**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2020/12468**

(1) REPORTABLE: **YES**
**(2)** OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

**(Signed)**

**22 July 2021** .....

SIGNATURE

In the matter between:

| | |
|---|---|
| **KALAGADI MANGANESE (PTY) LTD** | First Applicant |
| **KALAHARI RESOURCES (PTY) LTD** | Second Applicant |
| **KGALAGADI ALLOYS (PTY) LTD** | Third Applicant |
| and | |
| **INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD** | First Respondent |
| **ABSA BANK LTD** | Second Respondent |
| **AFRICAN DEVELOPMENT BANK** | Third Respondent |

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**JUDGMENT- 22 JULY 2021**

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**SPILG, J**

**INTRODUCTION**

1. The Industrial Development Corporation ("*the IDC*") brought an urgent application to place Kalagadi Manganese (Pty) Ltd ("*Kalagadi"*) under business rescue (under case number 10228/2020). Although the application was struck from the roll as not urgent by Mia J in May 2020 the IDC continued to pursue it in the ordinary course.

   This will be referred to as the "*BR Application*"

2. The IDC is both a lender and, pursuant to the loan, holds a minority shareholder stake in Kalagadi.

   The other main shareholders are Kalahari Resources (Pty) Ltd and Kgalagadi Alloys (Pty) Ltd which together make up the majority shareholding

3. Subsequent to the BR Application, Kalagadi brought its own application (under case no 12468/2020) to compel the IDC and other lenders to accept a restructuring arrangement which it contended would avert the need for business rescue ("BR"). A significant aspect of the proposal was to terminate a mining contract concluded with Murray & Roberts Construction ("*MRC")*, who Kalagadi blamed in part for its situation. This could only be done with the lenders' consent. Kalagadi also wanted to conduct the mining operations on its own.

   Allied relief was sought which included interdicting the lenders from exercising their security until the Kalagadi application was determined.

   This will be referred to as the "*Kalagadi Application*"

4. The other lenders cited in Kalagadi's application are ABSA Bank Ltd and the African Development Bank, each of whom oppose the application, as does MRC which is an interested party.

5. The IDC then suggested mediation in an attempt to find a commercially and financially viable solution. This was accepted and the parties elected to formalise the mediation process under the provisions of the then newly implemented Rule 41A of the Uniform Rules.

This is significant because Kalagadi relies *inter alia* on an alleged non-compliance by the IDC with the termination requirements of R 41A. It should be added that the parties considered it unnecessary to involve the other lenders and it appears that they too were agreeable to this.

6. In the event, on 18 September 2020 a mediation agreement was concluded between the IDC and Kalagadi.

7. Two highly skilled and respected mediators were appointed; former Deputy Chief Justice Moseneke and former Judge and senior advocate John Myburgh.

8. On 15 November 2020 the IDC purported to terminate the mediation process. This led to a new application being brought against it by Kalagadi and its two other shareholders who contended that the termination was not in accordance with the provisions of their mediation agreement. Absa and ADB were also cited as respondents. However, on 4 December and without admission the IDC then again terminated the mandate after complying, in form at least, with the termination provisions of the agreement

   The purpose of the application was to achieve two objectives; firstly, to stay the Kalagadi Application pending the conclusion of the mediation process; the other was to direct that the BR application and the Kalagadi Application be heard together and by the same Judge.

   It is evident that a short term consequence of granting the latter would be to neutralise the BR application until the mediation process was concluded.

   This application will be referred to as the "*Stay Application*".

9. By this stage the following applications were at least filed before the court;[1]

   a. the main Business Rescue Application brought by the IDC in respect of Kalagadi. This application is challenged not only on its own merits but by a substantive separate application for the adoption of a business plan proposed by Kalagadi and its other two shareholders which I have referred to as the Kalagadi Application;

[1] At this stage Kalagadi were still contending that the mediation had not been properly terminated and that BR application remained stayed under R 41A

b. the more recent application brought by Kalagadi in order to stay the court determination of both earlier proceedings pending the outcome of a R 41A mediated resolution and to consolidate the hearing of both the BR application and the compulsory adoption of the business plan proposed by Kalagadi and its majority shareholders.

10. Since the case appeared to be bogged down and because of its complexities the matter was referred to the Commercial Court for adjudication.

11. The first order of business was therefore to determine the Stay Application (i.e. to stay all other proceedings between the parties pending the outcome of mediation) and to decide whether the BR Application should be determined together with the Kalagadi Application.

12. During the course of case managing the hearing of the two applications a further twist in the saga occurred when the IDC purported to terminate the court sanctioned R 41A mediation.

    Kalagadi and its two other shareholders then brought a substantive application to declare that the termination of the mediation process was in bad faith. The application was not academic because, if the court finds that the IDC mediated in bad faith, then this may bolster Kalagadi's position with regard to one of its substantive defences to the BR application.

13. However that issue could not be determined before another dispute was resolved. Kalagadi contended that it was entitled to rely, in support of its contention that the mediation process was held or was terminated in bad faith, on certain correspondence and other documents which arose during the mediation process. The IDC resisted the introduction of such evidence on the grounds of confidentiality, not only by reference to the nature of mediation but also because the parties had expressly agreed that these documents were not capable of disclosure save for proving the existence of any agreement that may have eventuated.

14. The confidentiality issue was dealt with in a judgment delivered on 8 February 2021. The order reads:

    1. *The following documents in unredacted form will also form part of the evidential material before the court when it hears the parties on whether the applicants have a*

*cause of action or defence in law or in fact based on the allegations that the IDC mediated in bad faith;*

a. *The "Record of Discussion" document of 22 September 2020*
b. *Items 9, 10, 19 and 21 on the Index. They comprise correspondence by the legal representatives, respectively dated 15 October 2020 from Werksmans Attorneys to ENSafrica, a reply on the same date from ENS to Werksmans, an email from Cliffe Dekker Hofmeyr to ENS of4 December 2020 and a letter dated 10 December 2020 from ENS to the joint mediators.*
c. *The Board Minutes of 13 November 2020 and 21 January 2021.*

2. *Publication of each of the documents identified in the previous paragraph ("the affected documents") or any reference to their contents shall be embargoed pending the outcome of the decision as to whether in law or in fact the applicants have a sustainable cause of action or defence based on the allegation that the IDC mediated in bad faith*

3. *None of the parties or their legal representatives shall cause to be published or disseminated any of the affected documents or their contents save by uploading them onto CaseLines and by circulation to the other parties to the litigation and to the judge via his registrar.*

4. *It shall be the responsibility of the parties and the senior attorney engaged in the litigation on behalf of the respective parties to take adequate steps to ensure that the contents of paras 2 and 3 of this order are complied with and adequate measures are put in place to prevent publication.*

5. *The orders in paras 2 to 4 shall be subject to reconsideration once the court has determined the issues identified in para 2.*

6. *The IDC shall pay the wasted costs of the hearing on 15 November 2020 but the scale on which such costs are to be paid are reserved*

7. *The costs of the hearing of 30 January 2021 will be determined together with the decision on the issue identified in para 2*

15. Subsequently, and after the relevant documents were produced in unredacted form the court heard argument on;

    a. whether Kalagadi had a sustainable cause of action or defence either in law or in fact based on the allegation that the IDC mediated in bad faith;

    b. whether the BR application and the Kalagadi Application (which it will be recalled is to compel the BR to accept Kalagadi's business plan) be heard together and before the same judge.

**MEDIATING IN BAD FAITH**

16. Two fundamental considerations arise when considering the duties, if any, imposed on parties to a mediation. Each stems from the voluntary nature of the process.

17. The first is that parties may come into a mediation with preconceived ideas which may never be shaken. That, it seems to me, cannot be equated with bad faith: If each party believes that the other cannot be trusted and the mediators cannot overcome that stumbling block then no amount of reassurance or the provision of alternate forms of security for guaranteeing performance is going to change that, whereas appreciating the downside of not finding an alternate solution may. But again, it is difficult to envisage how running the risk of adverse consequences where there exists a deep-rooted mistrust of any deal that might be brokered can amount to bad faith.

18. It appears evident that the concept of bad faith bargaining in labour relations matters cannot be simply transplanted into the mediation framework. The question then is whether there is a legally enforceable obligation to be receptive to a proposal put, to at least consider it in good faith, and if so, whether there are any legal consequence if a party does not.

    This will inevitably be reduced to whether there can be such a thing as a reasonable proposal that cannot be rejected without a reasonable explanation and, borrowing from administrative law, whether the explanation is rational; if so, then why in a purely business relationship not legislated for is it not enough to say that I cannot trust the other party to keep its word?

19. All the parties made submissions which did not go much beyond positional statements as to whether there was a juridical concept of bad faith mediation attracting consequences in one form or another and if so what the test might be. This is readily understandable considering the embryonic stage of our Rule 41A mediation process and the paucity of case law or literature on the specific topic.

    The difficulty faced by the court is that, precisely because of the novelty of the points raised, any decision would require a far deeper understanding of the impact that holding a party to a standard of good faith mediation may have and the criteria which needs to be satisfied if a cause of action or defence can be founded on bad faith mediation (which I will refer to broadly as sanctionable bad faith mediation).

20. It was therefore necessary to undertake research before feeling comfortable in giving this decision which covers not only the concept of bad faith mediation but also the confidentiality of documents originating during the course of the mediation.

21. I suggest that the type of issues which surface and would require determination reveal the chasm between legal proceedings and negotiations which must be conducted under law between employer and employee on the one hand and mediation on the other. Mediation accepts that parties may come with intractable positions which may be rooted in something quite unrelated to the legal or factual issues they have chosen to define, or which have arisen, in the actual litigation between them.

    The mediation process seeks to help the parties find each other and move away from the cause of the litigation. The process may take quite imaginative forms, may still involve one party outmaneuvering the other or using its superior bargaining position which in turn results in the other submitting to a poor settlement, albeit preferable to a possible adverse court outcome. The mediator is not there to determine what is fair. The mediator seeks to facilitate a resolution to the dispute between the parties in a non-adversarial and non-judgmental way. A mediation process is not about negotiating the legal position of the parties as set out in court papers. It is about finding a way out of the deadlock by exploring possible solutions which may have no bearing on the actual issues before the court but will bring about their resolution in a non-adversarial way.

***Mediation – some relevant concepts***

22. Rule 41A (1) provides the following working definition of mediation:

> "*a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute."*

23. Rule 41A (6) identifies a further attribute built into the process:

> *(6) Except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence.*

24. The four pillars of mediation identified by Rule 41A are;

    a. A voluntary non-binding non-prescriptive dispute resolution process;

    b. The terms of the process to be adopted are those agreed upon by the parties;

    c. The mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them;

    d. The process is confidential.

25. The foundation to these principles is that, unlike dispute resolutions by court or arbitration which takes the process and resolution out of the hands of the parties, mediation empowers the parties in that they are in control of the process.

    Intrinsic to empowering them and enabling the mediator to fulfill his or her function, the parties must be able to speak frankly and possibly expose weaknesses while the mediator

must be able to secure the parties' trust and confidence, particularly where it may be desirable to caucus separately. Only through this openness can options be explored and ways suggested of dealing with underlying motivations, embedded conceptions or otherwise recognising obstacles and their underlying cause in order to assist the parties in getting past no (because of seemingly intractable positions or open mistrust).

26. Mediation has been said by an author who is experienced in this field to be "*premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved."*[2]

27. Consolidating the learnings of two leading authors in the field, a practicing mediator wrote:

> *Traditionally, mediation is recognized as a facilitative device appropriate for resolving disputes between parties wishing to preserve an existing relationship. The mediation process itself attempts to facilitate communication between parties through a structured, confidential process conducted by a neutral third party (mediator) wherein parties can clarify the disputed issues, identify underlying interests and explore possible resolutions. Since the parties ultimately craft the solution and terms (self-determination), mediation provides a more flexible process where by the parties can reach mutual satisfaction from creative remedies that may not be available through traditional litigation, or that would not have the ability to preserve the existing relationship. Perhaps the most notable distinction between mediation and litigated resolution is that mediation attempts to structure and preserve the resolution around the relationships between the parties, something that litigated resolution lacks in any consideration*.[3]

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[2] Prof Maureen A. Weston in her article "*Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality",* 76 IND. L.J. 591, 592 (2001).

[3] http://www.riflemanlaw.com/practice-areas/mediation/mediation-confidentiality-bad-faith-enforceability Jeff D Rifleman "*Mediation as a Modern Alternative Dispute Resolution Device – Issues and Discussion on Confidentiality, Participation Requirements and Enforcement of Agreements"* (2008) citing Kimberlee K. Kovach, *Mediation: Principles and Practice* (3d ed. 2004) at 14 and 15, and Kent L. Brown, *Comment, Confidentiality in Mediation: Status and Implications*, 1991 J. Disp. Resol. 307, 309.

***Rule 41A***

28. Superimposed over ordinary voluntary mediation where a party can withdraw at any stage without potentially attracting any adverse consequence, is a judicially sanctioned R41A procedure which is directed at requiring parties to consider a non-adversarial resolution to a dispute which is already before the courts. Whether they must do so in a constructive manner or whether the consequence of non-constructive engagement simply leads to adverse cost consequences is in general terms to be gathered from an understanding of R 41A read as a whole, its underlying purpose and the nature of mediation.

29. It therefore appears advisable to set out the provisions of R41A in full, highlighting some of the more significant passages for the present exercise:

> *41A. Mediation as a dispute resolution mechanism.*
>
> *(1) In this rule-*
>
> *"dispute" means the subject matter of litigation between parties, or an aspect thereof.*
>
> *"mediation" means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.*
>
> *(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.*
>
> *(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.*

*(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.*

*(d) Subject to the provisions of subrule (9) (b) the notices referred to in this subrule shall be of a without prejudice and shall not be filed with the registrar.*

*(3) (a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.*

*(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.*

*(4) Where a dispute is referred to mediation-*

*(a) the parties shall deliver a joint signed minute recording their election to refer the dispute to mediation;*

*(b) the parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate;*

*(c) the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the minute referred to in paragraph (a) to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits; and*

*(d) the process of mediation shall be concluded within 30 days from the date of signature of the minute referred to in paragraph (a): Provided that a Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session.*

*(5) (a) In proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.*

*(b) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party from the date of signature of the minute referred to in subrule (4) (a) to the time of conclusion of mediation by the parties who have elected to mediate: Provided that any party to the proceedings who considers that such suspension of time limits is being abused, may apply to the court for the upliftment of such suspension.*

*(c) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.*

*(d) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.*

*(6) Except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence.*

*(7) (a) Upon conclusion of mediation the parties who engaged in mediation shall inform the registrar and all other parties by notice that mediation has been completed.*

*(b) Notwithstanding the failure of parties who have engaged in mediation to deliver the notice referred to in paragraph (a), the suspension of the time limits referred to in subrule (4) (c) shall lapse unless a Judge or a court has extended the time limit and notice thereof has been given to all parties to the proceedings within 5 days of such order.*

*(8) (a) Mediation shall be deemed to be completed within 30 days from the date of signature of the joint minute referred to in subrule (4) (a), from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step referred to in subrule (4) (c)*

*shall lapse: Provided that where mediation is completed before the aforesaid period of 30 days, the parties who engaged in mediation shall deliver a notice contemplated in subrule (7) indicating that mediation has been completed.*

*(b) The parties who engaged in mediation and the mediator who conducted the mediation shall within five days of the conclusion of mediation, issue a joint minute indicating-*

*(i) whether full or partial settlement was reached or whether mediation was not successful; and*

*(ii) the issues upon which agreement was reached and which do not require hearing by the court.*

*(c) It shall be the joint responsibility of the parties who engaged in mediation to file with the registrar, the minute referred to in paragraph (b).*

*(d) No offer or tender made without prejudice in terms of this subrule shall be disclosed to the court at any time before judgment has been given.*

*(e) Where the parties have reached settlement at mediation proceedings the provisions of rule 41 shall apply mutatis mutandis.*

*(9) (a) Unless the parties agree otherwise, liability for the fees of a mediator shall be borne equally by the parties participating in mediation.*

*(b) When an order for costs of the action or application is considered, the court may have regard to the notices referred to in subrule (2) or any offer or tender referred to in subrule (8) (d) and any party shall be entitled to bring such notices or offer or tender to the attention of the court.*

30. The provisions of R 41A accord with the understood purpose of mediation and its general nature and functioning. At the expense of a degree of repetition;

a. Mediation is encouraged as a form of alternative dispute resolution. The only sanction for a failed mediation is the possibility of an adverse costs order;

b. Mediation is entirely voluntary and if the parties, or only two of them, are so minded they are at liberty to agree on such terms of mediation as they wish;

c. An unwilling party cannot be compelled to mediate. The furthest a court can go is to direct a litigant "*to consider*" mediation;

d. Even if some of the parties agree to mediate other parties in the same litigation are not obliged to fall in line. They must simply wait out the period while litigation is stayed;

e. Thirty days is a reasonable time to expect a mediated result failing which the parties must go back to litigation, unless the court extends the time on "*good cause"* - which is likely to occur where the parties, or court, believe that given more time mediation may prove successful;

f. Save in limited circumstances which may be provided under law, a court cannot be informed of any of the mediation proceedings prior to the final outcome of litigation. Even if settlement has been reached it is unnecessary for the court to be informed of the terms (although exceptions are conceivable). It is only if a part of the case is unresolved through mediation that the court is to be informed of the issues which have been resolved- but this is really a matter of case management or housekeeping so that the court will proceed to determine only the outstanding issues.

I believe that on their own the highlighted portions of the Rule reveal as much.

31. If a party is not obliged to mediate then it is difficult to appreciate how under the rule a party who submits to mediation is obliged to undertake mediation in a particular way. The only sanction in terms of Rule 41A is if the party has abused mediation in order to delay the litigation.

***Sanctionable bad faith mediation***

32. Is there such a thing as bad faith mediation? A number of decisions in the Unites States courts confirm that there is. By way of illustration:

In *Outar v. Greno Industries Inc* (2005 WL 2387840 (N.D.N.Y. Sep. 27, 2005)) at 3 the District Court on appeal said: "*The Court can be forgiving about a lot of things but not to the extent of allowing a litigant to refuse to follow the established procedures of the Court and the Federal Rules."*[4]

In *Del Fuoco v. Wells* [5] the court sanctioned the plaintiff and his attorney for bad faith as a result of attempting to use the mediation process to extort a settlement. The following extract, given on appeal, provides a useful insight into the court's reasoning:

> *"The use of this case as a vehicle for the bad faith demand clearly constitutes a litigation abuse defiling the judicial process"*[6]

By contrast in *Graham v. Baker*[7], although the court on review found that there was a requirement of good faith mediation, on the facts of the case this did not go beyond a requirement that the parties participate in the mediation session.

33. As court assisted mediation became more structured and institutionalised within the court's procedural framework due to its effectiveness in dispute resolution[8], the need arose to marry the objectives of mediation with procedural criteria considered necessary in cases where they were undertaken at the court's insistence.

34. Accordingly, while the decisions of the United States courts are instructive, it is necessary to recognise the distinction between voluntary and coercive mediation.

    In this context it is evident that Rule 41A is constructed on the premise of voluntary mediation with the parties remaining in control of the process and outcome.

35. Nonetheless it must also be recognised that under R 41A a court is expected to enquire into the conduct of the parties during the mediation process when determining an appropriate order for costs and it appears inevitable that issues of bad faith mediation will be raised and

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[4] Id
[5] 2005 WL 2291720, at 1 (M.D.Fla. Sept. 20, 2005)
[6] Id at 10
[7] 447 N.W.2d 397 (Iowa 1989) at 400-401
[8] This was identified by Chief Justice Burger of the United States Supreme Court in an address delivered at the 1976 Roscoe Pound Conference.

have to be considered alongside those mentioned in subrule (9)(b) (which is limited to comparing the outcome of the case with offers or tenders which may have been made during the mediation process).

36. The Unites States cases do however provide an understanding that bad faith mediation may be divided into conduct by a party which does not take into account a state of mind but only the external acts (culpability based on conduct alone - the *actus reus* if one will). As the cases considered earlier demonstrate this *may* manifest itself in a failure to attend the mediation, a failure to appoint a person who has sufficient authority to engage in or conclude a successful mediation, or even a failure to prepare at all for a mediation session.

    There is also the possibility that the subjective intent of a party may result in that person being found to have mediated in bad faith. Under R 41A it is clear that abusing the mediation process for purposes of delay will result in it being aborted on an application to court (and presumably also extortion or improperly utilising the mediation process to obtain discovery of otherwise confidential or privileged communications).

    These situations would fall neatly into a sub-set of bad faith mediation identified in *Outer* as a refusal to follow established court procedures and rules. Possibly unprofessional conduct sanctionable by a professional body or the litigant's association, ombud or under a governing statute may similarly constitute bad faith mediation and be subject to appropriate sanctioning.

37. The cases also indicate that there cannot be a hard and fast rule unless, and this appears significant, there is a clear requirement when the parties enter into mediation that the ground rules required certain conduct or behavior.[9]

[9] See Samara Zimmerman's article; Judges *Gone Wild: Why breaking the mediation confidentiality privilege for acting in "bad faith" should be reevaluated in court-ordered mandatory mediation.* Cardoza Journal of Conflict Resolution [Vol. 11:353] at pp 384:

> *"While mediation and its promise of confidentiality should not shelter a party whose behavior distorts the essence of the process, the subjective interpretation of "good faith" leaves a party with lack of notice of expected conduct and exposed to potential liability without forewarning. If there is going to be a mediation exception to confidentiality for acting in bad faith, such an exception needs to be formalized objectively and procedures instituted to preserve the integrity and principles of the mediation process."*

38. It therefore appears that barring certain overarching and clearly understood governing rules or legislation it is essential that the parties and their legal representatives have first submitted to a clearly defined minimum participation requirement on their part, before they can be subject to sanction.[10]

39. The type of considerations were identified by Kovach, a summary of which appears in *Mediation as a Modern Alternative Dispute Resolution Device* by Jeff D. Rifleman[11]

> *Kovach offers criteria for good faith definition by discussing generally what good faith is not and then offering a list of suggested factors to include in statutes to aid in the determination of good faith participation. She asserts that good faith mediation does not necessitate reaching an agreement, or that they will be more likely, as mediation can be just as beneficial and valuable to the parties even if there is not agreement.*
>
> *Additionally, good faith does not require the parties to have a sincere desire to resolve the dispute. Nor does it require full disclosure to the other party or mediator or that the party conform to any set behavior, although the parties should attempt to show behavior showing an attempt to participate in a meaningful way.*
>
> *Kovach suggests the following factors as considerations in constructing a good faith definition be included in statutes as a way to present some sort of objective standard that courts, mediators, lawyers and parties in dispute can follow to assess good faith participation:*
>
> - *arriving at the mediation prepared with knowledge of the case both in terms of the facts and possible solutions;*
> - *taking into account the interests of the other parties;*
> - *having all necessary decision-makers present at the mediation;*
> - *engaging in open and frank discussions about the case or matter in a way that allows mutual understanding;*
> - *not lying when asked specific or direct questions;*

[10] Id

[11] See earlier footnote; *Mediation as a Modern Alternative Dispute Resolution Device – Issues and Discussion on Confidentiality, Participation Requirements and Enforcement of Agreements* (2008) at pp19-20.

- *not misleading the other side;*
- *demonstrating a willingness to listen to all parties;*
- *being prepared to discuss you interests openly;*
- *having a willingness to explain specific proposals and refusals.""*

40. Rifleman however cautions[12]:

> *While Kovach's suggestions have their merit, the one fact that these cannot address is a party's mental unwillingness to participate or the ability for the decision maker to determine the degree to which the party believes they have attempted to participate or their willingness to forego mediation in favor of a potentially more costly and risky litigation process. No matter whether lawmakers address mandatory participation determination by a 'meaningful participation' standard, or 'good faith' standard, or some other criteria to define and to demonstrate compliance with mandatory mediation, it is obvious that some definition and review standard has not yet reached universal acceptance."*

The author adds;

> *"In addition, concerns that address bad faith participants who act in their own interest to disrupt or avoid the benefits of mandatory mediation, and the sanctions imposed on well-meaning parties who attempt to minimally participate or choose not to participate in favor of traditional litigation are areas for further consideration when law makers attempt to construct mandatory mediation requirements"*

41. It is evident that R 41A encourages mediation through a mild-mannered approach, with only a cost sanction at the end of litigation and an aborting of the process if there is abuse.

The Rule does not provide a basis for coercion nor lays down any clearly prescribed requirements. Indeed, at best a court at this stage can only encourage the parties to mediate by requiring a reluctant party to "*consider"* mediation.

[12] Id at 20-21

***Confidentiality***

42. Inextricably tied up with the question of bad faith mediation is the confidentiality of the documents which came into existence during the mediation process. A finding on that must inform the way the court deals with the arguments raised in the judgment.

43. There is obviously a tension between the right of a fair hearing where all relevant evidence must be placed before the court and a party's agreement to abide by the confidentiality provisions of an agreement.

44. Rule 41A itself acknowledges that there may be instances where the law recognises an exception to a confidentiality provision. Such law includes the common law, which clearly has had insufficient time to develop in relation to the field of mediation and has yet to fully flesh out the practical considerations which may adversely impact on the proper functioning of mediation, the inhibiting effect it may have on the way mediators conduct themselves, caucus and the like.

45. While it is evident that the question of whether the parties did reach a settlement and its terms is an obvious illustration of when the events which occurred and the documents demonstrating consensus are relevant, it does not necessarily touch on the methodology applied by the mediator or any of the processes following, barring the ultimate alleged final set of proposals which either constitute a consummated settlement or not.

46. There is however a *via media* in relation to allegations of bad faith mediation. A court can have regard to the documents through what is termed a judicial peek and afford the parties an opportunity to argue on them, but for the purpose of the issue at hand only. In that way the fair trial principle is respected while confidentiality is maintained since only the court would be added to the circle of those privy to the documentation.

47. A number of cases in the United States have considered the confidentiality provisions in mediation agreements or applicable legislation. Generally there is a reluctance to open up the process to the dissemination of the documents. The starting point is that it is destructive of the mediation process and inhibits the functioning of the mediator and the frankness of engagement by the parties if they have to look over their shoulder every time they make a proposal or engage in seeking a way forward. In this regard there are a number of

instructive cases. In the present case the parties provided for detailed confidentiality and non-disclosure provisions.

In considering the issue, sight should not be lost of the fact that confidentiality provisions are also there for the benefit of the mediators.

***Application of the facts***

48. I am satisfied on the papers before me that the issues on which the parties engaged in the mediation centered around respective concerns about corporate governance and the impact any change or failure to change the corporate structuring may have on three critical considerations which weighed with both parties ; namely the initiative and philosophy which drives Kalagadi, the financial viability of Kalagadi and the exposure of IDC and any other lender consequent upon the way in which Kalagadi is governed; both parties taking a position with regard to the import and relevance of King IV on issues of corporate governance.[13]

49. I am also satisfied, with respect, that there were enough opportunities which the mediators utilised to engage the respective parties and explore avenues around the impasse. The very fact that the IDC initiated the mediation and that two highly skilled mediators were agreed upon *prima facie* reflects the intention with which they approached the mediation.

50. Kalagadi contends that the manner in which the IDC terminated the mediation is more pertinent and reflects that it mediated in bad faith. I am satisfied that the proposals and counter-proposals as well as an objective report that was compiled by Snowden reflect that an intractable impasse had been reached which required the assistance of the mediators to unlock if they could. The simple matter of it is that they were unable to and that is the reality. Moreover the efforts of the joint mediators and their own conclusion of the mediation process must be respected.

51. I am unable to find that there was bad faith mediation on the part of the IDC that can either in fact or in law be construed as culpable.

[13] King IV Report on Corporate Governance for South Africa 2016 (1 November 2016)

***The confidential documents***

52. Because of the disposal of Kalagadi's attack based on bad faith mediation I believe it would offend the confidential nature of mediation and the provisions of the mediation agreement if the court was to now embark on an examination of the documents or to allow them into the public domain. The considerations of confidentiality were dependent in the present case on a favourable outcome for Kalagadi of the bad faith mediation issue. That has not eventuated.

53. My previous order provided for an embargo on the confidential documents including a redacted version of two other documents. In view of my finding the purpose of presenting those documents has been served and they remain confidential, are privileged from disclosure under Rule 41A and there is no reason not to respect the terms of the parties' agreement.

54. Finally on this score, the IDC brought an application to strike out the Referral of Dispute document. The document was relevant to the contentions advanced by Kalagadi regarding IDC mediating in bad faith. In view of my findings its purpose has been served and its contents fall within the confidentiality provisions of the mediation agreement.

***Section 131 of the Companies Act***

55. There is another matter I should address. The IDC in bringing its application for business rescue under s 131 of the Companies Act 71 of 2008 relies on each of the three grounds which entitles a court to place a company under BR, one of which is that it is just and equitable to do so for financial reasons. [14]

[14] Section 131(4)(a) provides that;

> "(4) After considering an application in terms of subsection (1), the court may—
>
> (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—
>
> (i) the company is financially distressed;

56. Kalagadi took issue with that, and in its answering affidavit contended that the IDC is precluded from relying on this ground because it has conducted its relationship with Kalagadi in bad faith. It contends that it is and will continue to operate profitably as a going concern and that the IDC is abusing its position as shareholder and lender. In its argument Kalagadi reminded the IDC that, as a developmental finance institution, it is mandated to promote government's development agenda "*by supporting pathfinding Broad-based Black Economic Empowerment … ventures*." [15]

57. Kalagadi details the basis for its contention of bad faith on the part of the IDC in attempting to usurp Kalagadi for reasons which it must explain by;

    a. meeting directly with MRC when requested by Kalagadi to consent to terminating the mining contract and belatedly giving only conditional consent to Kalagadi's request to such termination;

    b. compelling Kalagadi to change its executive management by requiring its executive chairperson to become a non-executive chair and within two months have the Board jointly appoint a new or confirm the existing Chief Executive Officer of the company in consultation with the IDC;[16]

    c. betraying its mandate as a development finance institution.[17]

58. The finding that the IDC was not mediating in bad faith cannot therefore impact on the question of whether outside the mediation it had done so as Kalagadi contends in its papers.

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(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

[15] Answering affidavit, para 170 et sec
[16] Id para 232 et sec
[17] Id para 249 et sec

**DIRECTING JOINT HEARING OF THE BR AND KALAGADI APPLICATIONS**

59. The lenders oppose the joint hearing of the BR Application and the Kalagadi Application.

60. I accept that there is no application to consolidate the two but rather an application that they both be heard by the same judge at a joint hearing. Neither the IDC nor the other lenders or MRC have indicated the prejudice that may be suffered if this was done or if a formal consolidation was not ordered. It is not uncommon where it is expedient to hear two cases which may not involve the same direct parties nor precisely the same relief that they be placed before the same judge for hearing, if only because the substantive adjudication of the one involves a consideration of the factors raised in the other and it may be more convenient not to require their regurgitation simply for the sake of form.

61. The issue between the IDC and any affected parties (as defined in Chapter 6 of the Companies Act) on the one hand and Kalagadi and its shareholders on the other revolves around the appropriate business plan, which of necessity would include a restructuring proposal in one form or another, and what should be put up. No one has suggested that the Kalagadi Application can be knocked out as a technicality. Accordingly, a court is in the best position to determine what business plan or restructuring proposal if any, should be put forward, how that can be competently achieved both in conformity with the Companies Act and in a manner that will achieve the ultimate objectives of Chapter 6. The possible outcomes are many but if only one application is considered to the exclusion of the other then the possibility of staggered appeals loom with consequent delays

**COSTS**

62. The issues are self-contained and do not require the outcome of the hearing in the main application before they can be determined.

63. A special order for costs is not justified as many of the issues were *res nova*

**ORDER**

64. It is therefore ordered that:

1. *The IDC application to strike out the Record of Discussion is dismissed;*

2. *The application to declare that the IDC acted in bad faith in regard to the mediation process is dismissed;*

3. *The business rescue application under case number 10228/2020 and the Kalagadi application under case number 12468/2020 are to be heard jointly before the same judge;*

4. *Subject to para 5 Kalagadi is to pay to the IDC and the other parties who opposed these applications two thirds of the costs on a party and party scale, such costs to include the costs of two counsel where applicable;*

5. *Excluded from the reckoning of costs in para 4, are;*

    a. *the costs of the abortive hearings of 15 November 2020;*

    b. *The costs of the hearing of 30 January 2020*

    *which are to be borne by the IDC on the party and party scale, such costs to include the costs of two counsel*

6. *The hearing of the business rescue application and the Kalagadi application will take place before Judge Spilg on any suitable date or dates during the week of 27 September 2021 unless any party makes representations for alternate arrangements regarding the hearing.*

**(Signed)**

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**SPILG, J**

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|---|---|
| DATE OF JUDGMENT: | 22 July 2021 |
| FOR 1st APPLICANT: | Adv. IV Maleka SC |
| | Adv. M Salijkazana |
| | Harris Nupen Molebatsi Inc. |
| FOR 2nd and 3rd APPLICANTS: | Adv. A Gautschi SC |
| | Adv. N Luthuli |
| | Adv. O Motlhasedi |
| | Harris Nupen Molebatsi Inc |
| FOR 1st RESPONDENT: | Adv. M van der Nest SC |
| | Cliffe Dekker Hofmeyr |
| FOR 2nd and 3rd RESPONDENTS: | Adv. A Franklin SC |
| | Webber Wentzel |
| FOR 5th RESPONDENT: | Adv. L van Tonder SC |
| | Tiefenthaler Attorneys Inc. |