




**GAUTENG DIVISION, JOHANNESBURG  
COMMERCIAL COURT**

**CASE NOS 2020/10228  
2020/12468**

(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>YES</b>
(3)	REVISED.
<b>20 May 2024</b>	
	SIGNATURE

**CASE NO: 2020/10228**

In the matters between:

**INDUSTRIAL DEVELOPMENT CORPORATION  
OF SOUTH AFRICA LTD**

Applicant

And

**KALAGADI MANGANESE (PTY) LTD**

First Respondent

**KALAHARI RESOURCES (PTY) LTD**

First Intervening Party

**KGALAGADI ALLOYS (PTY) LTD**

Second Intervening Party

And

**CASE NO:2020/12468**

In the matters between:

**KALAGADI MANGANESE (PTY) LTD**

First Applicant

**KALAHARI RESOURCES (PTY) LTD**

Second Applicant

**KGALAGADI ALLOYS (PTY) LTD**

Third Applicant

and

**INDUSTRIAL DEVELOPMENT CORPORATION**

First Respondent

**OF SOUTH AFRICA LTD**

**ABSA BANK LTD**

Second Respondent

**AFRICAN DEVELOPMENT BANK**

Third Respondent

**BOWWOOD AND MAIN NO. 51 (PTY) LTD**

Fourth Respondent

**MURRAY & ROBERTS CEMENTATION (PTY) LTD**

Fifth Respondent

## **JUDGMENT**

### **LEAVE TO APPEAL**

**(re: Several *in limine* issues)**

**SPILG, J**

**20 May 2024**

### **INTRODUCTION**

1. It is necessary to remind the parties that the two matters before the court include an application (under case number 10228/2020) by the Industrial Development Corporation (“*the IDC*”) to place Kalagadi Manganese (Pty) Ltd (“*Kalagadi*”) under business rescue (“*the BR Application*”).

The other case, and which I previously directed be heard together with the BR Application, is the application (under case no 12468/2020) that Kalagadi subsequently brought to compel the IDC and other lenders to accept a restructuring arrangement which it contended would avert the need for business rescue. Kalagadi also sought allied relief which included interdicting the lenders from exercising their security until its own application was first determined. This is the “*Kalagadi Application*”.

2. Although the BR Application, which had been brought as a matter of urgency, was struck from the roll as not urgent by Mia J in May 2020, the IDC continued to pursue it in the ordinary course.

The IDC is the most significant lender to Kalagadi. Pursuant to the loan, it also holds a minority shareholding in that company.

3. The main shareholders in Kalagadi are Kalahari Resources (Pty) Ltd and Kgalagadi Alloys (Pty) Ltd ("*Kalahari*" and "*Kg Alloys*"), which together make up the majority shareholding. They are also cited as co-applicants in the Kalagadi application.

Naturally, the Kalagadi Application cited the IDC as one of the respondents. Kalagadi's other lenders were also cited as respondents; namely, Absa Bank Ltd ("*Absa*") and the African Development Bank ("*AfDB*"). They all opposed the application.<sup>1</sup>

### THE MATTERS SOUGHT TO BE APPEALED AGAINST

4. On 6 September 2023 this court delivered a judgment which dealt with four preliminary issues. The parties had agreed between themselves to deal with these issues separately. These issues were over and above the question of whether the termination of the mediation process was in accordance with the provisions of their agreement; an issue that the parties had also required be dealt with separately, as they were in two earlier judgments.
5. One of the four preliminary issues was raised by Kalagadi and its shareholders ("*the Kalagadi Parties*"). It concerns whether the IDC Board had authorised either the launching of BR proceedings or its opposition to Kalagadi's Application for debt restructuring. The issue spilled over to a challenge of the authority of one of the deponents to affidavits filed on behalf of the IDC. This issue implicates both applications.
6. The remaining three issues were raised by the lenders and concerned, in one form or another, the ousting of this court's jurisdiction.

The first relied on AfDB's immunity from legal process. The other issue relied on the terms of a compulsory arbitration and peremptory dispute resolution provision found in the Common Terms Agreement ("*the CTA*") concluded between Kalagadi and its

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<sup>1</sup> Murray & Roberts Construction ("*MRC*") was also cited as a respondent in the Kalagadi application. This is because a significant aspect of Kalagadi's proposal was to terminate a mining contract concluded with MRC, who Kalagadi blamed in part for its situation. Kalagadi also wished to conduct the mining operations on its own. However such a termination can only be effected with the lenders' consent.

MRC has fallen out of the current litigation. Although the court was not provided with the details, none of the lenders contend that MRC's exit has affected any of the submissions made by them in regard to the present issues for determination.



lenders (which included IDC, AfDB and Absa Bank Ltd). The final point argued by the lenders was that the restructuring order sought by Kalagadi amounts to changing the financial model and business plan under which the lenders agreed to loan the funds, an issue which they argue by reference to the agreement, can only be decided upon by a technical expert or a banker (depending on the nature of the issue which is subject to final resolution by the expert).<sup>2</sup>

The issues raised by the lenders dealt only with the Kalagadi Application, but in view of my initial directions must also have an effect on the BR Application. This is because I was unwilling to hear the BR Application without having regard to the considerations raised by the Kalagadi Parties. I was unwilling to do so because I did not believe it to be in the interests of justice if they were not taken into account. I still maintain that position as the presiding judge seized with both matters.

7. The court's judgment of 6 September 2023 dismissed each of the points raised by the respective parties.
8. The Kalagadi parties apply for leave to appeal the decision not to uphold their point *in limine* in respect of both applications. The IDC and AfDB do so in respect of the decisions on the three points they raised in the Kalagadi Application.

#### **THE APPLICATIONS FOR LEAVE TO APPEAL**

9. I have reconsidered the judgment of 6 September 2023 in light of the contentions advanced by all the parties and am satisfied that their respective appeals would not have a reasonable prospect of success and that at least in one instance would be premature.<sup>3</sup>
10. There is however another aspect I wish to raise regarding these applications. It concerns the undesirability of dealing piecemeal with a matter which involves business rescue proceedings.

The court accepts that having regard to the state of the matter at the time, the earlier *points in limine* relating to the mediation process required separate adjudication.

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<sup>2</sup> Initially there was another point raised by AfDB and supported by the IDC. It concerned the law which applied to the CTA. However the parties agreed that English law applies.

<sup>3</sup> See paras 51 and 52 of the judgment

However, in retrospect it was incorrect for the court to have acceded to the parties' request to separate the issues to which its judgment of 6 September 2023 relates.

11. A court of first instance has a natural reluctance to second guess well represented parties who have agreed on a way to proceed with their case. A judge comes into a matter cold, whereas by the time it comes to court the respective legal representatives are steeped in the matter. The presiding judge may therefore not be fully alive to the broader dynamics of the case.
12. Nonetheless, by their nature business rescue proceedings should be dealt with expeditiously so as to avoid all affected parties being left "*in a state of flux for an indefinite period*".<sup>4</sup>

In *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) at para 10 Binns-Ward J said:

*"It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings – however dubious might be their prospects of success in a given case materially affects the rights of third parties to enforce their rights against the subject company".<sup>5</sup>*

This passage was expressly approved by Swain JA in *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others* 2019 (3) SA 97 (SCA) at para 25

Regard may also be had to:

- s 128 (1) (b) which provides that

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<sup>4</sup> *Henochsberg on the Companies Act*; s 128 (b) definition of business rescue

<sup>5</sup> See also *South African Bank of Athens Ltd v Zennies Fresh Fruit CC and a related matter* 2018 (3) SA 278 (WCC) at paras 38 and 43.



*“business rescue” means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—*

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;*
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;*

- s 132 (3) which in addition provides that

*If a company’s business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must—*

- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and*
- (b) deliver the report and each update in the prescribed manner to each affected person, and to the—*
  - (i) court, if the proceedings have been the subject of a court order; or*
  - (ii) Commission, in any other case.*

(Emphasis added)

13. I was remiss in not being guided rather by the need for expedition in business rescue matters. I believe that given possibly an extra two or three days at the outside, the entire matter could have been argued and determined.

It is likely that even with the parties up-dating their papers, the applications can be finalised by this court in their entirety before any appeal on the present points would be heard by an appeal court. The unsuccessful party can then seek to take all issues where a decision was given against it on appeal. To do so now does not achieve the objective of business rescue. The IDC must appreciate that it is *dominis litis* in the business rescue proceedings and AfDB cannot disassociate itself from the actions taken by IDC to bring and pursue those proceedings or the consequences of doing so, which include this court considering the contentions advanced in the Kalagadi Application.

14. For this reason too, aside from being satisfied that their respective appeals would not have a reasonable prospect of success, there is no other compelling reason that an appeal should be heard; in fact quite the contrary.

## **COSTS**

15. Both parties have been unsuccessful. They should each bear their own costs

## **ORDER**

16. I accordingly order that:

- 1. The application for leave to appeal brought by Kalagadi Manganese (Pty) Ltd, Kalahari Resources (Pty) Ltd and Kgalagadi Alloys (Pty) Ltd is dismissed*
- 2. The application for leave to appeal brought by the Industrial Development Corporation of South Africa Ltd and the African Development Bank is dismissed*
- 3. Each party is to pay its own costs*

  
SPILG, J

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DATE OF JUDGMENT:

20 May 2024

FOR THE PARTIES:

IDC in case no 10228/2020:

Mr V Movshovich

Webber Wentzel

IDC in case no 12468/2020:

Adv M du P van der Nest SC

Adv Mokale

Cliffe Dekker Hofmeyr

Kalagadi Parties

Adv A Gautschi SC

Adv N Luthuli

Adv O Motlhasedi

Harris Nupen Molebatsi Inc