

Short notes on

HOW PARTIES SHOULD CONDUCT THEMSELVES DURING MEDIATION

Introduction

For a few years now, it has been compulsory to consider Mediation as a dispute resolution mechanism, even in litigation. If parties refuse without basis, there could be severe consequences.

But what if one party feels the other is acting in bad faith? What are the behavioural requirements during the process?

Facts of the Case

In *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021), a reportable case in that division, the Industrial Development Corporation ("IDC") brought an urgent application to place Kalagadi Manganese (Pty) Ltd ("Kalagadi") under business rescue. IDC is a state-owned lender and holds a minority shareholder stake in Kalagadi.

After the Business Rescue applicant, Kalagadi brought its application (the "Kalagadi application") to compel the IDC and another lender to accept a restructuring arrangement which it contended would avert the need for business rescue.

The IDC suggested that Mediation find a commercially and financially viable solution in terms of a rule 41A Mediation. Instead, IDC terminated the process, and Kalagadi alleged that this was done in bad faith.

Kalagadi launched a new application for two reasons:

1. To stay the Kalagadi application pending the conclusion of the mediation process and;
2. To direct that the Business Rescue application and Kalagadi application be heard together.

Considerations by the Court

Is there a legally enforceable obligation to be receptive to a proposal? And if so, if there are any legal consequences if a party does not?

The Court also raised that the concept of bad faith bargaining in labour relations matters cannot simply be translated into the mediation framework.

Rule 41A mediation has four pillars:

- The voluntary non-binding and non-prescriptive dispute resolution process
- Terms of the process to be adopted are those agreed upon by the parties
- Facilitated by a mediator
- Process is confidential

The Pillars founded on the principle that Mediation empowers parties to be in control of the process. Accordingly, the Court found that the provisions of R41A accord with the understood purpose of Mediation and its general nature and functioning, albeit judicially sanctioned.

Moreover, the Court found that no sanction was imposed on parties to mediate or conduct themselves in a particular way in the Mediation. However, in terms of R41A, a court is expected to inquire into the parties' conduct during the mediation process when determining an appropriate order for costs. Therefore, if bad faith issues are raised, they will have to be considered alongside those mentioned in sub-rule 9(b).

Conclusion

The Court was unable to find that there was bad faith mediation on the part of the IDC that can neither be, in fact, or law be construed as culpable.

This should, however, not discourage parties from attempting to mediate and cooperate in the interest of partial or complete resolution of the dispute. Even if only to avoid the result of an adverse cost order.

Moreover, because the parties are more in control of the process, it has, in my view, enabled the successful resolution of disputes or, at the very least, ensured that issues are limited. Either way, the result is two-fold on success (whether in partial or complete resolution):

1. Saving costs, including the cost of time spent in the adversarial environment
2. Safeguarding the relationship between the parties, which may otherwise have been destroyed.

