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# DISPUTE RESOLUTION ALERT

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### Mediate in bad faith? A look at Rule 41A of the Uniform Rules of Court

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## Mediate in bad faith? A look at Rule 41A of the Uniform Rules of Court

The fact that an impasse cannot be overcome between parties does not immediately mean that a party that then withdraws from mediation acts in bad faith.

Mediation is an alternative method of dispute resolution that requires parties to interact directly with one another with the aim of settling any disputes amongst themselves before an independent third party.

Rule 41A of the Uniform Rules of Court makes it a mandatory requirement as a pre-action for litigants to consider mediation when instituting any new action or application proceedings. To give effect to this, Rule 41A requires the aforesaid proceedings to be accompanied by a notice stating whether each party is amenable to resolving the matter by way of mediation or not, along with reasons. The purpose of Rule 41A is two fold - to alleviate the caseload on the courts and to ensure that matters are capable of being resolved without recourse to the judicial system.

### Perceptions of bad faith in mediation

But what happens when parties agree to mediate and an allegation is made that one party acted in bad faith during the mediation process? This question was considered in the case of *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* Case No.12468/2020.

In this case, Kalagadi Manganese (Pty) Ltd (Kalagadi) instituted an application against the Industrial Development Corporation of South Africa Ltd (IDC) compelling the IDC (and other lenders) to accept a restructuring arrangement – which stemmed from a previous urgent application by the IDC to place Kalagadi under business rescue. Following the application, the parties agreed to mediate the dispute.

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## Mediate in bad faith? A look at Rule 41A of the Uniform Rules of Court ...continued

The court found that a mediator does not decide on the outcome of the dispute – instead, they help parties break down, understand and focus on the important issues that need to be resolved.

In the midst of the mediation process, the IDC terminated the mediation and Kalagadi contended that the IDC acted in bad faith by doing so. Thereafter, Kalagadi instituted proceedings to declare that the IDC had acted in bad faith.

The court first had regard to the purpose of mediation, along with its general nature and functioning, and considered the four pillars of mediation identified by Rule 41A:

- a. *[mediation is] 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; [and]*
- d. *the process is confidential."*

The court found that a mediator does not decide on the outcome of the dispute – instead, he/her helps parties break down, understand and focus on the important issues that need to be resolved. The mediator further attempts to unlock the impasses between parties where it is possible to do so. The fact that an impasse cannot be overcome between parties does not immediately mean that a party that then withdraws from mediation acts in bad faith. Accordingly, the application to declare that the IDC acted in bad faith in regard to the mediation process was dismissed by the court.

Although litigants can have noble intentions in engaging with Rule 41A, they must be careful to understand the true purpose and functioning of mediation proceedings which, among other things, dictate a **voluntary and non-prescriptive** attempt to resolve disputes between parties.

*Corné Lewis, Neha Dhana and Lawrence-John Maralack*



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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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