THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1019/2024

In the matter between:

KALAGADI MANGANESE (PTY) LIMITED	**FIRST APPLICANT**
KALAHARI RESOURCES (PTY) LIMITED	**SECOND APPLICANT**
KGALAGADI ALLOYS (PTY) LIMITED	**THIRD APPLICANT**
and	
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
ABSA BANK LIMITED (acting through its Corporate and Investment Banking Division)	**SECOND RESPONDENT**
AFRICAN DEVELOPMENT BANK	**THIRD RESPONDENT**
BOWWOOD AND MAIN NO. 51 (PTY) LTD	**FOURTH RESPONDENT**
MURRAY & ROBERTS CEMENTATION (PTY) LTD	**FIFTH RESPONDENT**

Neutral citation: *Kalagadi Manganese (Pty) Limited & Others v Industrial Development Corporation of SA Limited & Others* (1019/2024) [2026] ZASCA 111 (25 August 2026)

Coram: MOCUMIE, GOOSEN and SMITH JJA

Heard: 7 May 2026

Delivered: 25 August 2026

Summary: Refusal of leave to appeal – reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act – whether exceptional circumstances in the form of grave injustice or disrepute to the administration of justice established – powers of appellate court to interfere with discretion exercised by the High Court – whether authority to initiate business rescue proceedings established – no prejudice or exceptional circumstances established – court lacked jurisdiction to reconsider refusal of leave to appeal – finality of petition decision affirmed – matter struck from roll

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Spilg J sitting as court of first instance):

1 The matter is struck from the roll.

2 The applicants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the first respondent in opposing the application for reconsideration.

JUDGMENT

Smith JA (Goosen JA concurring):

Introduction

[1] On 26 May 2020, the first respondent, the Industrial Development Corporation of South Africa Limited (IDC), instituted proceedings in the Gauteng Division of the High Court, Pretoria (the High Court), to place the first applicant, Kalagadi Manganese (Pty) Ltd (Kalagadi), under business rescue. More than six years later, that application remains unresolved, largely because of a series of interlocutory disputes between the parties.

[2] The present matter concerns two orders made in those interlocutory proceedings. They arose from Kalagadi's challenges, under rule 7 of the Uniform Rules of Court, to the IDC's authority to institute the business rescue proceedings and to the authority of Ms Thifhulufhelwi Lucretia Khumalo (Ms Khumalo) to depose to affidavits in support of them. At the time, Ms Khumalo was the IDC's Divisional Executive: Subsidiaries and Post Investment.

[3] During those proceedings, the High Court, per Spilg J, granted the IDC leave on 11 April 2023 to adduce further evidence on its authority to institute the business rescue application. On 8 August 2023, the High Court dismissed Kalagadi's challenge to authority with costs. Kalagadi thereafter unsuccessfully sought leave to appeal both in the High Court and in this Court.

[4] Kalagadi then applied for reconsideration of the decision to refuse leave to appeal, in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). On 13 February 2025, the President of this Court (the President) referred the application to this Court.

[5] Kalagadi is a duly incorporated mining company. The second applicant, Kalahari Resources Proprietary Limited, and the third respondent, Kgalagadi Alloys Proprietary Limited, hold 35.5% and 44.5% of its shares respectively. Where the context requires, I refer to these entities collectively as the applicants.

[6] The IDC is a wholly state-owned corporation established under the Industrial Development Corporation Act 22 of 1940 (the IDC Act). It is both a minority shareholder – owning 20% of the shares – and a major creditor of Kalagadi. The second respondent, Absa Bank Limited, was also one of Kalagadi's funders until its loan was taken over by the IDC. The third to fifth respondents were cited only as interested parties and did not participate in the reconsideration application.

The governing principles under s 17(2)*(f)* of the Superior Courts Act

[7] Section 17(2)*(f)* of the Superior Courts Act provides:

'The decision of the majority of the judges considering the application [for leave to appeal], or where the decision is that of a single judge, the decision of that judge, whether or not an application for reconsideration has been made in terms of paragraph (d), shall be final: Provided that the President of the Supreme Court of Appeal may in circumstances where a grave failure of justice may otherwise result or the administration of justice may be brought into disrepute, whether of application or mero motu, refer the decision to the court for reconsideration and, if necessary, variation'.

[8] The jurisprudence of this Court on the approach to matters referred for reconsideration by the President in terms of s 17(2)*(f)* is well established. The enquiry under s 17(2)*(f)* is anterior and jurisdiction-related: before the merits of the appeal are revisited, the Court must first be satisfied that the statutory jurisdictional facts for intervention are present. The parties also advanced their arguments based on this understanding.[1]

[9] Section 17(2)*(f)* sets an exceptionally high threshold. This is so because the application does not come before the Court as an ordinary request for leave, nor even as a petition for special leave to appeal. By the time reconsideration under that provision is sought, leave to appeal has already been refused by the High Court and, thereafter, by two judges of this Court. The matter therefore reaches the President only after the ordinary appellate avenues have been exhausted and after more than one judicial determination has been made against the grant of leave.

[10] For that reason, the requirements for reconsideration under s 17(2)(*f*) are significantly more exacting than those applicable to special leave to appeal under s 16(1)*(b)* of the Superior Courts Act. The test for granting special leave is whether there are 'special circumstances' justifying a further appeal. Examples of such circumstances include a substantial point of law, factual issues of great importance, or strong prospects of success. By contrast, an applicant invoking s 17(2)*(f)* must first surmount a distinct jurisdictional hurdle: it must show exceptional circumstances of the kind identified in the proviso, namely that a grave failure of justice may otherwise result or that the administration of justice may be brought into disrepute. Those requirements are exceptionally stringent, and the inquiry is both anterior to, and more demanding than the assessment undertaken in applications for leave to appeal. It is therefore not enough for the applicants to show that another court may reasonably come to a different conclusion,

[1] *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA); *Bidvest Protea Coins Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) at para 17.

or even that the refusal of leave may have been wrong. What must be shown is something far more compelling: a truly exceptional basis for reopening the matter.

[11] The Constitutional Court, in *Liesching v S*,[2] emphasised that s 17(2)(*f*) is not intended to afford litigants a further attempt at procuring relief that has already been refused. It is instead 'intended to enable the President to deal with a situation where an injustice might otherwise result. It does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial cherry.'[3]

[12] It is against that exacting standard that the anterior question must be considered, namely whether exceptional circumstances exist within the meaning of s 17(2)*(f)* such that the refusal of leave to appeal would occasion a grave injustice to the applicants or bring the administration of justice into disrepute. I address that question against the backdrop of the following facts.

Background facts

[13] Founded in 2007, Kalagadi operates the largest sinter plant[4] in the world. In addition to its ore-preparation, sinter and smelter facilities, the farms over which it holds mining rights contain approximately 960 million tons of manganese ore deposits. Those figures underscore the scale of Kalagadi's mineral endowment and the commercial promise ordinarily associated with an enterprise of this nature. Yet that wealth resource has not translated into financial stability. On the contrary, despite having access to considerable mineral resources, Kalagadi has been floundering financially and, for at least the past six years, has not been able to service its debts. The contrast between the abundance of its underlying assets and its persistent inability to meet its debt obligations lies at the heart of the present dispute.

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[2] *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) (*Liesching II*).

[3] Ibid para 139.

[4] A sinter plant agglomerates fine ore into larger material suitable for smelting.

[14] That financial reality is reflected in the scale of Kalagadi's indebtedness. It is common cause that, when the business rescue proceedings were launched, Kalagadi owed the IDC more than R3 billion. Since then, the debt has increased to approximately R6 billion. In response to Kalagadi's continued default, the IDC and other creditors called up their debts. When Kalagadi failed to satisfy the IDC that it could repay what was due, the IDC concluded that Kalagadi was financially distressed and, on that basis, instituted the business rescue application.

[15] In its answering affidavit in the business rescue proceedings, Kalagadi disputed Ms Khumalo's authority to institute the application and called for production of the IDC's board resolution authorising her actions. It subsequently delivered two notices in terms of rule 7: the first challenged the authority of the IDC's attorneys, Cliffe Dekker Hofmeyr Inc, to act on its behalf, and the second required the IDC to produce the resolution authorising the institution of the business rescue proceedings.

[16] Kalagadi also launched a counterapplication against the IDC and its other creditors for an order compelling them to accept a restructuring arrangement, which it contended would avert the need for business rescue. When the IDC opposed that application, Kalagadi in turn challenged the IDC's authority to do so. Kalagadi's authority challenge in that application was also dismissed with costs and its subsequent attempts to appeal were unsuccessful. Although Kalagadi also applied for reconsideration under s 17(2)(*f*) in that matter, it later abandoned that application for reasons that need not be considered in the present matter.

[17] In response to the rule 7 notices, the IDC filed an affidavit deposed to by its Company Secretary and General Counsel, Mr Paulus Makwane (Mr Makwane). Attached to his affidavit were a power of attorney authorising the IDC's attorneys to institute the business rescue proceedings and a document purporting to be an extract from an IDC board meeting held on 23 April 2020.

[18] The hearing of the business rescue application was subsequently delayed after the matter was struck from the roll for want of urgency on 6 May 2020, and the parties were directed to engage in case-flow management. They also attempted mediation, but that process ended when the IDC terminated it after the parties reached an impasse.

[19] By agreement between the parties, the issue of authority was separated for determination before the hearing of the business rescue application. When the separated issue was argued before Spilg J on 3 December 2020, he indicated that he was not satisfied with the extract from the board minutes and postponed the matter to allow the IDC to produce the actual resolution.

[20] After the postponement, the IDC unsuccessfully attempted to locate the board resolution. Those efforts were hampered by the fact that Mr Makwane had by then passed away. The IDC eventually established that, although its directors had met on 23 April 2020, the meeting was informal and concerned a single agenda item, namely Kalagadi's default. The board received detailed submissions on how that default should be addressed, and two possible courses were identified, one of which was for the IDC to enforce its creditor right through a 'step-in'[5] the other to place Kalagadi under business rescue. The latter course was recommended and accepted as the IDC's best available option. However, it is common cause that the extract from that meeting was mistakenly characterised as emanating from a formal IDC board meeting. The IDC contended that the mistake was *bona fide* and not intended to mislead the court or to construct proof of authority where there was none.

[21] During its investigation, the IDC discovered further documents, which, according to it, provided compelling proof that its board had formally authorised the institution of the business rescue proceedings. It accordingly sought leave to place those documents before the Court by way of an affidavit from its Chief Executive Officer, Mr Tshokolo Petrus

[5] A step-in is when a lender or secured creditor takes control of, or intervenes directly in, the borrower's project, operations, or key contractual rights in order to protect its exposure and recover the debt.

Nchocho, who attended both the directors' meeting of 23 April 2020 and all the other relevant board meetings.

[22] The High Court subsequently made an order, on 11 April 2023, granting the IDC leave to introduce further evidence. Kalagadi was then afforded an opportunity to file opposing affidavits. Thereafter, the matter was set down for oral argument. On 8 August 2023, the High Court dismissed Kalagadi's authority challenge with costs.

The applicant's submissions

[23] The applicants submit that, unless leave to appeal is granted against the High Court's orders, a grave failure of justice will ensue and the administration of justice will be brought into disrepute, for the following reasons:

a) The High Court erred in allowing the IDC to introduce further evidence after it had become apparent that the institution of the business rescue proceedings had not been duly authorised. This approach is inconsistent with established legal principles. Where a company institutes legal proceedings, some evidence must be placed before the court to show, first, that it resolved to institute the proceedings and, second, that the person deposing to the founding affidavit was authorised to do so. It is in the interests of justice that this misdirection be corrected.

b) The business rescue application was instituted more than five years ago and has, for that reason, become stale. In those circumstances, it is unlikely that a court would exercise its discretion in favour of the IDC without a comprehensive supplementation of its papers. There is, in substance, no material difference between requiring the IDC to supplement its papers and requiring it to institute fresh proceedings. The IDC would suffer no prejudice if it were compelled to pursue either course. By contrast, the applicants would be prejudiced if the IDC, as an organ of state, were permitted to persist with the application notwithstanding its failure to adopt the board resolution required under the IDC Act.

c) At the time the business rescue application was instituted, Kalagadi was engaged in ongoing negotiations with the IDC concerning the restructuring of its loan facilities. Against that backdrop, the decision to launch business rescue proceedings was not a mere procedural step, but a significant escalation with far-reaching consequences for Kalagadi's control of its affairs, its commercial standing, and the position of its shareholders and creditors. If, as the applicants contend, that decision was taken and implemented without the board authority required under the IDC Act, the institution of the proceedings was unlawful from inception.

d) On that footing, the High Court's decision to permit the IDC to cure the defect retrospectively by introducing further evidence after having heard argument and the presiding judge indicated his unwillingness to uphold the applicant's challenge, did more than accommodate an evidential omission. It effectively sanctioned the continuation of proceedings that, on the applicants' case, should never have been instituted without prior lawful authority. That is the source of the prejudice of which the applicants complain: Kalagadi now faces the prospect of being placed in business rescue through a process that has been unlawful at its inception, even though the statutory decision-maker had not properly authorised that course when it mattered.

e) The administration of justice would be brought into disrepute if an organ of state were permitted to invoke coercive statutory proceedings without the authority required by its founding legislation, and thereafter to validate – purportedly by way of ratification – that decision only once the defect had been exposed. In those circumstances, the complaint is not merely technical. It concerns legality, procedural fairness and the integrity of judicial process.

f) The matter also raises a significant legal question: whether a corporation's authority to institute proceedings may be inferred from the surrounding circumstances where no board resolution expressly grants that authority. In any event, the further evidence did not prove the existence of a valid board resolution. At most, it showed ongoing uncertainty within the IDC's management and board as to which legal process should be pursued. The applicants, therefore, submit that the impugned orders warrant appellate scrutiny, because leaving them undisturbed may be understood as endorsing a process inconsistent with the rule of law and the standard of lawful decision-making expected of public bodies. This will result in grave injustice to the applicants and will bring the administration of justice into disrepute.

The IDC's submissions

[24] In response, the IDC advances the following submissions:

a) In granting leave to introduce further evidence, the High Court exercised a discretion in the strict sense. On that footing, it submitted that an appellate court would be slow to interfere in the absence of a material misdirection; a failure to exercise the discretion judicially; or a decision so unreasonable that it cannot be sustained.

b) The High Court's judgment demonstrates that it considered both the explanation for the missing resolution and the contents of the further material against the applicable legal principles. There is therefore no proper basis upon which an appellate court could interfere with the exercise of that discretion.

c) The High Court found, correctly, that the evidence established overwhelmingly that the IDC board, after considering the available legal options, had decided to pursue business rescue and had duly authorised the institution of the proceedings. The minutes placed before the High Court pursuant to the order granting leave to adduce further evidence showed that the board's decision was confirmed at several subsequent meetings. The board also adopted a resolution ratifying Ms Khumalo's actions, together with any other steps taken to implement the decision to commence business rescue proceedings, to the extent that such ratification was necessary.

d) In any event, the applicants have not shown that they will suffer prejudice, still less grave injustice, if leave to appeal is refused. The High Court did not grant any substantive relief against them. Its orders were purely procedural and did no more than require the applicants to advance their defence in the business rescue proceedings.

Analysis

The order admitting further evidence

[25] The admission of further evidence after a matter has been argued is governed by strict requirements. Courts have emphasised that this power must be exercised sparingly and only in exceptional cases. The requirements for admitting further evidence include: a reasonably sufficient explanation why the evidence was not presented during the trial; a *prima facie* likelihood of the truth of the evidence; and material relevance of the evidence to the outcome of the proceedings.[6]

[26] The High Court's reasoning shows that it considered all these factors. It first examined whether the IDC had adequately explained why the board minutes had not been placed before the court when the authority issue was initially raised. It accepted that Mr Makwane, in his capacity as Company Secretary and General Counsel, had provided the extract from the 23 April 2020 minutes as a record of the board's decision and was responsible for safeguarding the IDC's board records and governance documents. In those circumstances, the High Court was satisfied that the IDC's management and legal representatives were entitled to treat the extract as an authentic and reliable record of the board's resolution.

[27] The High Court also considered that Ms Khumalo and Mr Nchocho had no reason, when the extract was first produced, to doubt its accuracy. They later discovered that the document was not, in form, a resolution adopted at a formal board meeting. Mr Makwane's death complicated that discovery and hindered the IDC's ability to clarify

[6] *Koch NO and Another v Ad Hoc Central Authority, South Africa and Another* [2022] ZASCA 60; [2022] 3 All SA 17 (SCA); 2022 (6) SA 323 (SCA).

the document's provenance at an earlier stage. The High Court was therefore entitled to conclude that the omission resulted from a *bona fide* mistake, rather than an attempt to mislead the court or to reconstruct authority after the fact.

[28] Moreover, the High Court was satisfied, on a *prima facie* basis, of the truth of the proposed evidence. In coming to that conclusion, it had regard to the fact that Ms Khumalo had been closely involved in presenting the available options to the board, participated in the ensuing discussions, and implemented the resulting resolutions. Mr Nchocho, the IDC's CEO, confirmed this account and stated that the board had resolved to institute the business rescue proceedings and had later ratified that decision at subsequent meetings.

[29] It is well established that the scope of an appellate court's interference depends on the nature of the discretion exercised by the court of first instance. Our law distinguishes between a discretion in the strict or true sense and a discretion in the loose or wide sense. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,[7] the Constitutional Court reaffirmed that distinction and emphasised that, where a court exercised a true discretion, an appellate court may not interfere merely because it would have reached a different conclusion. Interference is justified only where the discretion was not exercised judicially, was influenced by a wrong appreciation of the facts, or was vitiated by a misdirection on the law. The same approach appears from *Knox D'Arcy Ltd v Jamieson and Others*,[8] where this Court held that procedural and case-management choices falling within a range of permissible outcomes are ordinarily insulated from appellate substitution unless the court below acted capriciously, upon a wrong principle, or without substantial reasons.

[30] A decision to admit further evidence after argument is, in substance, an exercise of the court's control over its own process. Like decisions on condonation, postponement and related procedural indulgences, it generally entails a value judgment in which the

[7] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).
[8] *Knox D'Arcy Ltd. and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (SCA); [1996] 3 All SA 669 (A).

court weighs fairness to the parties, the explanation for the omission, the materiality of the proposed evidence, the stage of the proceedings, prejudice, and the broader interests of justice. For that reason, such a decision is best understood as a discretion in the strict sense. It follows that an appellate court is not entitled to reconsider the issue afresh simply because it might have struck the balance differently. The question is whether the High Court misdirected itself in principle, failed to consider relevant factors, considered irrelevant factors, or reached a conclusion so untenable that it cannot stand. Unless one of those vitiating features is shown, the order permitting the IDC to place further material before the court is not susceptible to appellate interference.

[31] The applicants did not dispute the authenticity of the minutes but sought to argue that they do not present evidence of a board resolution to institute the business rescue proceedings. The High Court could therefore not be faulted for its conclusion regarding the *prima facie* truthfulness of those documents.

[32] That conclusion was important because it bore directly on both fairness and materiality. Once the High Court was satisfied that the earlier omission was innocent, adequately explained, and *prima facie* true, it was entitled to consider whether the additional material was capable of resolving the real dispute, namely whether the IDC board had in fact authorised the institution of the business rescue proceedings.

[33] On the High Court's reading of the minutes and related documents, the further evidence showed not only that the board had been apprised of Kalagadi's default and the available legal options, but that it had endorsed business rescue as the course to be pursued and subsequently confirmed that decision. The evidence was therefore central, not peripheral, to the separated authority issue. In those circumstances, the admission of the material advanced, rather than undermined, the interests of justice, because it enabled the Court to determine the issue on the true facts instead of on an incomplete record.

[34] For all those reasons, I am not persuaded that the High Court misdirected itself, acted on a wrong principle, took irrelevant considerations into account, or failed to consider matters that were plainly material to the exercise of its discretion. On the contrary, the judgment shows that the High Court identified the correct enquiry, namely whether the IDC had given an acceptable explanation for the earlier omission, whether the proposed evidence was *prima facie* reliable, whether it was material to the separated authority issue, and whether its admission would better serve the interests of justice than deciding that issue on an incomplete record. Each of those considerations was directly relevant to the procedural indulgence sought, and each was addressed in a reasoned manner.

[35] In sum, the applicants have not shown any cognisable prejudice beyond being required to meet the IDC's case on a complete factual record. They were given an opportunity to respond to the additional material, and the order did not finally determine the merits of the business rescue application. For the same reason, they have not established that refusing to reconsider the petition decision would result in grave injustice or bring the administration of justice into disrepute.

Does the further evidence establish the IDC's authority?

The High Court's findings

[36] The High Court, after reviewing the board minutes admitted pursuant to the order granting leave to adduce further evidence, concluded that, by 1 April 2020, the board had reached consensus on the legal options available to address Kalagadi's default. Those options were a step-in or business rescue. The minutes of the board meetings indicate that, before the proceedings were instituted, the board had elected to pursue business rescue. The High Court was therefore of the view that this was not a case of management acting unilaterally and without authority, only for the board to learn of the proceedings after they had already been launched.

[37] The High Court was also satisfied that the relevant decisions were taken unanimously after consideration of the available options and legal advice from two

separate firms of attorneys. Nothing in the IDC Act precluded the IDC from adopting resolutions in that manner. The High Court therefore concluded that there was overwhelming evidence that the IDC board had resolved to institute the business rescue proceedings, that the IDC's attorneys were duly authorised to act on its behalf, and that Ms Khumalo was properly authorised to depose to the founding affidavit.

The applicable legal principles

[38] As I have explained above, in reconsideration proceedings, the inquiry is not confined to whether the High Court was right or wrong in its assessment of the further evidence. Nor is it enough to show that another court might reasonably have reached a different conclusion on the facts. The anterior question is whether the decision sought to be reconsidered gives rise to the exceptional circumstances contemplated in s 17(2)*(f)*. That is so because the mere correctness of the High Court's findings is not decisive at this stage. What matters is whether the impugned decision discloses an error of such significance, either in principle or in consequence, that the interests of justice require the matter to be reopened notwithstanding the finality ordinarily attaching to refusals of leave to appeal. Against that backdrop, it is necessary to consider the legal principles governing the proof of authority, since the applicants' complaint ultimately turns on whether the IDC lawfully authorised the institution and prosecution of the business rescue proceedings.

[39] The starting point is the principle that a juristic person can act only through natural persons authorised to bind it in accordance with its constitutive instruments and internal governance arrangements. In motion proceedings, however, our courts distinguish between the authority to depose to an affidavit and the authority to institute and prosecute the proceedings themselves. A deponent need not be separately authorised merely to swear to the facts. What must be authorised is the decision to litigate and the appointment of those who act on the juristic person's behalf in bringing and pursuing the proceedings.

That distinction was emphasised by this Court in *Ganes and Another v Telecom Namibia Ltd* [9] and reaffirmed in *Unlawful Occupiers, School Site v City of Johannesburg*.[10]

[40] Where authority is placed in issue, the inquiry is a practical one, namely, has sufficient evidence been placed before the court to show that the litigation is indeed being conducted at the instance of the juristic person? The best evidence will ordinarily be a resolution of the board or other competent organ, coupled where necessary with an affidavit from an official able to explain the entity's governance structure and the source of the mandate. But our law does not treat any single form of proof as indispensable in every case and proof by *aliunde* evidence is permissible.[11] As was recognised in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*,[12] the court must decide whether the material before it satisfactorily establishes that the juristic person resolved to litigate and that the persons acting for it were authorised to do so.

[41] Ordinarily, a challenge to authority must be raised in accordance with rule 7(1) of the Uniform Rules of Court. That rule requires a litigant who disputes the authority of the attorney acting for another party to do so by notice, whereupon the authority must be established to the satisfaction of the court before the attorney may continue to act. The purpose of the rule is to provide a fair and orderly mechanism for testing whether the proceedings are truly brought at the instance of the litigant in whose name they are launched, and to prevent collateral or purely technical objections to authority from being advanced informally in affidavits. Properly understood, rule 7 is directed primarily at authority to institute and conduct the litigation, not at the mere authority of a deponent to swear to an affidavit. That is why the distinction drawn in *Ganes* remains important when a juristic person's authority is challenged.

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[9] *Ganes and Another v Telecom Namibia Ltd* [2003] ZASCA 123; [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA) (*Ganes*) para 19.
[10] *Unlawful Occupiers, School Site v City of Johannesburg* [2005] ZASCA 7; [2005] 2 All SA 108 (SCA); 2005 (4) SA 199 (SCA).
[11] *Tattersall and Another v Nedcor Bank* 1995 (3) SA 222 9 (A).
[12] *Mall (Cape) (Pty) Ltd v Merino Ko-operasie. Bpk* 1957 (2) SA 347 (C) at 351D.

[42] A defect in authority is not always fatal from the outset. Our law recognises that, in appropriate circumstances, a juristic person may ratify the unauthorised institution of proceedings with retrospective effect. Whether ratification is permissible depends on the nature of the defect and the source of the power in question. Where the defect is merely one of internal authority, and no statutory prohibition or prejudice stands in the way, later ratification may cure the irregularity. But ratification cannot be used to create jurisdiction, confer standing where the empowering statute withholds it, or validate proceedings where the defect goes beyond internal mandate and strikes at the legality of the proceedings themselves. The latter qualification explains why courts have been cautious in cases where the problem was not merely procedural but implicated substantive entitlement. Nevertheless, this Court, in *Smith v Kwanonqubela Town Council*,[13] endorsed the view that ratification can have retrospective effect, provided it does not cause prejudice to the opposing party.

[43] The governing principle, therefore, is one of substance rather than form. The court considers, first, whether the juristic person has, through the appropriate organ, decided to litigate; secondly, whether the persons who launched and conduct the proceedings were authorised to do so; and, thirdly, if there was an initial defect, whether it is of a kind capable of ratification without prejudice to the opposing party or inconsistency with the governing statute. Properly understood, the law does not insist on ritualistic formalism, but neither does it permit a juristic person – particularly a statutory body – to invoke judicial process without proof that the decision to litigate was lawfully taken by the body empowered to make it.

The interpretation of the board minutes

[44] The principles governing the interpretation of contracts and other documents are well settled. The inquiry begins with the language used, read according to ordinary

[13] *Smith v Kwanonqubela Town Council* [1999] ZASCA 58; [1999] 4 All SA 331 (A); 1999 (4) SA 947 (SCA).

grammar and syntax, but always in context and in light of the provision's purpose and the background to its drafting.[14]

[45] Considered in light of the aforementioned principles and read as a whole and in sequence, the IDC board minutes show a sustained and deliberate decision-making process culminating in authority to institute the business rescue proceedings. From January 2020 onwards, the board repeatedly considered Kalagadi's escalating default, evaluated the available legal and commercial options, and directed management to prepare for business rescue if Kalagadi could not demonstrate a credible means of restoring solvency. The significance of the minutes lies not in any single phrase taken in isolation, but in the continuity of the board's deliberations and the consistency with which business rescue emerged as the chosen course.

[46] The board minutes of 29 January 2020 record that the directors considered three options: enforcement through a step-in, business rescue, or acceptance of Kalagadi's proposed business review framework. The board then resolved that preparations for business rescue should commence immediately because delay would jeopardise the IDC's position vis-à-vis other creditors. That was followed, at the meeting of 6 February 2020, by a further resolution that Kalagadi be required to furnish credible written confirmation of funding, failing which it should be placed in business rescue. It is common cause that Kalagadi did not satisfy that condition. The minutes of the meeting of 1 April 2020, reflect that the board regarded Kalagadi's position as untenable, rejected the alternative proposal placed before it, and recorded that the preparatory work for business rescue had been completed.

[47] The minutes of subsequent board meetings reinforce that conclusion. At the information session attended by board members on 23 April 2020, management presented a comprehensive set of documents, including legal advice from two firms of

[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18. See also *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.

attorneys, comparing the step-in and business rescue options. Management's recommendation was that business rescue remained the most appropriate course, and the directors agreed that the application should proceed.

[48] Then, at the special board meeting of 23 May 2020, the board resolved in express terms that its previous resolution concerning the business rescue application remained in force and that management should continue with the application without delay. That resolution is significant because it confirms, in unambiguous language, that the board understood itself already to have authorised the business rescue route before the application was launched. Neither the IDC Act nor the 1973 Companies Act prescribes that decisions of a board of directors must be reduced to a formal resolution to be valid. Section 6(1) of the IDC Act provides only for the corporation to be managed and controlled by the board of directors who 'exercise all such powers of the corporation as are not by this Act or the regulations required to be exercised by shareholders […].'

[49] The later resolutions of 25 May 2020 and 21 February 2022 do not detract from that conclusion. On the contrary, they are consistent with it. The resolution of 25 May 2020 recorded that the board had already resolved to place Kalagadi under business rescue and, in implementation of that decision, authorised Cliffe Dekker Hofmeyr to represent the IDC in the application and Ms Khumalo to depose to affidavits on its behalf. The resolution of 21 February 2022, adopted *ex abundanti cautela* (out of abundant caution), ratified any steps already taken by the attorneys and Ms Khumalo in giving effect to the board's earlier decision. Properly understood, those later resolutions supplemented and confirmed the authority previously given; they did not create authority for the first time. The applicants' assertion that Ms Khumalo acted unlawfully and that her actions could not be ratified is therefore untenable.

[50] Importantly, though, it matters not that there may be reasonable prospects that another court may find that the applicants were correct in their assertion that the further evidence fell short of proving original authority in the strictest sense. On the facts of this case, any deficiency was, at most, a defect in internal authority capable of ratification, not

a defect going to the IDC's legal capacity or standing to bring the proceedings at all. The resolution adopted on 21 February 2022 is accordingly important not because it created authority for the first time, but because it confirmed, to the extent necessary, steps already taken in implementation of a decision that the board had substantively made earlier. That is a material distinction. Our law does not treat every imperfection in the proof of a juristic person's mandate as fatal *ab initio*. Where the evidence shows that the litigation was, in substance, being pursued at the instance of the entity itself, and where the later ratification is not inconsistent with statute or productive of unfair prejudice, the defect may be cured retrospectively.

[51] That conclusion follows from the documentary record as a whole. The board minutes do not depict management embarking upon litigation on a frolic of its own and only later seeking *ex post facto* approval for an unauthorised initiative. They show the opposite: a sequence of deliberations in which the board repeatedly confronted Kalagadi's default, considered the available legal responses, preferred business rescue as the appropriate mechanism, and directed management to take the necessary steps to give effect to that course. On that footing, the 21 February 2022 ratification served a confirmatory and remedial function. It regularised, out of caution, the implementation of a mandate that already existed in substance. This is therefore not a case in which ratification was used to manufacture authority where none had ever been contemplated, nor one in which a statutory body sought to evade the governance requirements imposed upon it by retroactively sanctioning conduct wholly divorced from prior board approval.

[52] The applicants have not shown sufficient prejudice to render the alleged defect incurable. In this context, prejudice means more than the ordinary burden of meeting a case on its merits. They had notice of the case, an opportunity to answer the further material, and were not exposed to substantive relief without a hearing. Their complaint is simply that the IDC should have been non-suited earlier for want of proof. That does not defeat ratification. To hold otherwise would elevate form over substance and turn a remediable defect in internal authority into a dispositive technicality, despite evidence that the proper decision-maker had already resolved to pursue business rescue. The absence

of procedural unfairness or substantive disadvantage therefore supports the conclusion that any defect was capable of retrospective ratification.

[53] Moreover, even if another court might conceivably have drawn different inferences from the minutes of the board meeting, the judgment neither departed from settled legal principles nor broke new ground in the law. Instead, it turned on factual findings as to what the minutes proved, viewed against the settled principles governing proof of authority and ratification. In those circumstances, a failure to revisit those findings cannot be said to occasion a grave injustice or to bring the administration of justice into disrepute. Section 17(2)(*f*) is not engaged merely because the applicants continue to contest the inferences drawn from the documents.

Did the IDC board impermissibly delegate its statutory powers to Ms Khumalo?

[54] The finding that the further evidence was sufficient proof of authority to institute the business rescue proceedings is also dispositive of the applicants' argument that the board impermissibly delegated its statutory powers to Ms Khumalo. That argument conflates two distinct legal acts: the board's decision, as the competent organ of the IDC, to invoke business rescue, and the subsequent implementation of that decision through identified officials and legal representatives. If, as the minutes show, the board itself considered the available options, selected business rescue, and directed that the application be brought, then the essential statutory power was exercised by the board and not by Ms Khumalo. What she was thereafter authorised to do was not to decide whether the IDC should pursue business rescue, but to give effect to a decision already taken by the lawful decision-maker by deposing to affidavits, instructing attorneys, and taking the procedural steps necessary to place the matter before court. That is not an impermissible delegation of the board's power; it is the ordinary administrative implementation of a valid board decision.

[55] Treating implementation as a delegation of the power itself would erase the distinction between deciding to litigate and giving effect to that decision, and would

unrealistically require the board to perform every procedural step itself. Nothing in the IDC Act demands that.

Is the business rescue application stale?

[56] The applicants' claim that the business rescue application has become 'stale' is without merit. Delay alone does not extinguish such an application or render it incompetent. Whether it remains fit for determination depends on the cause and effect of the delay, the parties' conduct, whether updated facts are needed, and whether allowing it to proceed would cause cognisable prejudice. First, the delay is largely self-induced. The history of the proceedings shows that the business rescue application was delayed by interlocutory challenges and procedural skirmishes initiated by the applicants, including repeated challenges to the IDC's authority and related applications for leave to appeal. A litigant who materially contributed to the delay cannot readily rely on it as a separate ground to non-suit its opponent. To allow that would turn the consequences of a litigant's own forensic choices into a substantive defence.

[57] Second, the applicants have not demonstrated concrete prejudice flowing from the effluxion of time itself. Their complaint is not that witnesses have become unavailable, that relevant records have been lost, or that they have been deprived of a fair opportunity to answer the case they are called upon to meet. Nor have they shown that the passage of time has cured Kalagadi's financial distress or altered the underlying commercial reality that gave rise to the proceedings. On the contrary, the material before this Court indicates that Kalagadi's indebtedness has deepened and that its longstanding default remains unaddressed. In those circumstances, the delay does not neutralise the controversy; if anything, it underscores the continuing need for a judicial determination of the business rescue application on properly updated papers.

[58] Third, to the extent that the lapse of time may require the parties to place updated financial or operational information before the High Court, that is a case-management consequence rather than a reason to treat the application as stale. Courts routinely permit the supplementation of papers where the interests of justice so require, particularly in

protracted commercial litigation where the factual position may evolve while interlocutory disputes are being resolved. There is no basis to assume that the High Court would refuse an appropriate application by either side to supplement the papers. The need for supplementation, if it arises, therefore does not support the institution of fresh proceedings; it simply reflects the practical reality that a pending matter of this duration may have to be determined on an updated factual footing.

[59] Finally, and in any event, the staleness complaint is misdirected in the present proceedings. The issue before this Court is not whether business rescue should ultimately be granted on the merits, but whether the interlocutory orders concerning authority and the admission of further evidence disclose the exceptional circumstances required by s 17(2)(*f*). Whether the current facts still justify business rescue is a question for the High Court when the substantive application is heard. It follows that the applicants' reliance on alleged staleness does not establish a grave injustice or a risk of disrepute to the administration of justice arising from the procedural orders now under challenge.

The relevance of the negotiations between the parties

[60] The applicants assert that when the business rescue application was instituted, discussions were still underway between Kalagadi and the IDC regarding a possible restructuring of the lenders' debt facilities. They contend that the existence of those discussions is inconsistent with a firm board decision to commence business rescue and instead suggest that management acted prematurely, or at least without a clear mandate, in launching the proceedings.

[61] That contention cannot be sustained when the negotiations are considered in their proper context and against the documentary record. The minutes do not show indecision on the part of the board. Rather, they show that the board, having discarded the option of adopting Kalagadi's debt restructuring proposal, had identified only two legally and commercially viable responses to Kalagadi's continuing default, namely a step-in or business rescue. Business rescue ultimately emerged as the preferred option. On that footing, the fact that exploratory restructuring discussions may have continued in parallel

does not negate the board's mandate. Commercial negotiations often continue even after a creditor has resolved to pursue formal remedies, both to preserve the possibility of settlement and to test whether a consensual solution remains feasible. Such engagement is not inconsistent with authority already having been granted to proceed with litigation if no viable alternative materialises.

[62] Moreover, there was nothing to prevent the applicants from continuing to advance proposals after the application had been instituted. The essential point is that ongoing negotiations, without more, do not diminish the significance of the board minutes or justify an inference that no decision had been made. If anything, the later history points the other way: despite the passage of nearly six years, Kalagadi has not shown that it can service the debt or put forward a concrete and workable restructuring proposal. In that context, the negotiations are best viewed as exploratory discussions conducted alongside, rather than in place of, the IDC's decision to protect and enforce its rights through business rescue.

[63] Nor does the applicants' reliance on fairness or irrationality assist them. In instituting business rescue proceedings, the IDC was not exercising public power in the administrative law sense but was acting as a creditor seeking to protect its financial and commercial interests in response to a substantial and continuing default. The source of the IDC's decision was therefore not a statutory power directed at the public at large, but the ordinary legal capacity of a lender and litigant to enforce its rights and to invoke a remedy provided by company law.

[64] The fact that the IDC is an organ of state does not alter that conclusion. Its decision to pursue business rescue was intended to protect its exposure and to invoke a mechanism designed to address corporate financial distress. The continuation of restructuring discussions did not deprive the IDC of that entitlement. A creditor does not forfeit its remedial options merely because it remains willing to consider settlement.

Conclusion.

[65] For these reasons, I conclude that the applicants have not met the threshold for reconsideration under s 17(2)(*f*) of the Superior Courts Act 10 of 2013. They have not shown that refusing leave to appeal would occasion a grave injustice or bring the administration of justice into disrepute. Accordingly, there is no basis for this Court to interfere with the decision on the petition, which must stand. The application for reconsideration must therefore fail, and there is no reason to depart from the usual costs order.

[66] In the result the following order is made:

1 The matter is struck from the roll.

2 The applicants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the first respondent in opposing the application for reconsideration.

J E SMITH
JUDGE OF APPEAL

Mocumie JA (dissenting)

[67] I have read the judgment of my colleague Smith JA with whom Goosen JA agrees. I agree with the summary of the facts. I agree that there are no exceptional circumstances which would result in a likelihood of a grave failure of justice or the administration of justice being brought into disrepute if the order dismissing leave to appeal is not reconsidered. However, I disagree with him in respect of the order proposed. Instead of striking the application off the roll as he proposes, I would have dismissed the application for the reconsideration of the order refusing leave to appeal. It is trite that a dismissal would bring finality to the ongoing saga and would not give an applicant any false hope that it can re-

enroll the application differently phrased, but on the same factual matrix.[15] Had I enjoyed the majority, I would have confirmed the order of this Court dismissing the application for leave to appeal with costs set out in para 2 of the first judgment above.

B C MOCUMIE
JUDGE OF APPEAL

[15] *See JM and Another v Masureik and Others [2026] ZASCA 1; [2026] 1 All SA 259 (SCA); 2026 (4) SA 367 (SCA) paras 34 to 37. See para 36, citing Motsoeneng* fnt 1 above and *Former Way Trade Invest (Pty) Ltd v Bright Idea Projects 66 (Pty)* ZASCA 118; 2020 JDR 2072 (SCA) confirmed on appeal by the Constitutional Court in *Former Way Trade Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd [2021] ZACC 33); 2021(12) BCLR 1388 (CC;* JDR 2021 2223 (CC) (2021) (12) BCLR 1388 para 21.

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