REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12/16192

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED:

24/06/2012

In the matter between:

KALAHARI RESOURCES (PTY) LIMITED	Applicant
and	
ARCELORMITTAL S.A.	First Respondent
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	Second Respondent
KGALAGADI MANGANESE (PTY) LIMITED	Third Respondent

J U D G M E N T

COPPIN, J:

[1] The applicant ("*Kalahari*"), the first respondent ("*AMIT*") and the second respondent ("*the IDC*") are shareholders in the third respondent ("*Kgalagadi*") and their relationship is governed by a shareholders' agreement that they entered into in about August 2008 ("*the shareholders' agreement*").

[2] This matter involves an urgent application brought by Kalahari, relying on, in particular, clause 24.1.3 of the shareholders' agreement. It claims in the terms of its amended notice of motion, and particularly against AMIT, in addition to orders that the rules regarding forms and service be dispensed with, the following relief:

> *"1.2 Declaring that the First Respondent is obliged to discharge its obligations under the provisions of clause 24.1.3 of the shareholders agreement (a copy of which is annexed to the founding affidavit herein marked 'DMN3'); (the 'shareholders' agreement') with immediate effect.*
>
> *1.3 **Final relief***
>
> *1.3.1 That, in terms of the provisions of clause 24.1.3 of the shareholders' agreement:-*
>
> *1.3.1.1 The First Respondent shall, within 5 days of the date of this order (or within such other period as this court may deem meet), pay to the applicant the sum of R285 024 005.50 in respect of the funding which was required by the company between 1 July 2011 and 31 January 2012 which the First Respondent was obliged to pay but which was paid in its stead by the Applicant;*
>
> *1.3.1.2 (Deleted)*
>
> *1.3.1.3 The First Respondent shall, within 5 days of the date of this order (or within such other period as this court may deem meet), pay to the Third Respondent a contribution in the sum of R241 325 471 in respect of the funding which is required by the company between 1 February 2012 and 31 May 2012;*
>
> *1.3.1.4 Indefinitely as from 1 June 2012, and on a monthly basis within 5 days of the receipt of the notification referred to further below, the First Respondent shall pay to the Third Respondent 50% of the funding requirements of the Third Respondent, if any, as duly determined and*

notified in writing by the Chief Financial Officer of the Third Respondent.

1.3.2 *That the Applicant be granted further or alternative relief.*

1.3.3 *That the costs of this application be paid by the First Respondent.*

1.4 ***Interim relief:*** *In the alternative to prayer 1.3 hereof and in the event that this court should decline to grant the final relief therein sought:- that, pending the determination of arbitration proceedings to be instituted by the First Respondent under the provisions of clause 39 of the shareholders' agreement within 30 days of the granting of this order:-*

1.4.1 *The First Respondent shall, within 5 days of the date of this order (or within such other period as this court may deem meet), pay to the Applicant the sum of R285 024 005.50 in respect of the funding which was required by the company between 1 July 2011 and 31 January 2012 which the First Respondent was obliged to pay but which was paid in its stead by the Applicant;*

1.4.2 *(Deleted)*

1.4.3 *The First Respondent shall, within 5 days of the date of this order (or within such other period as this court may deem meet), pay to the Third Respondent a contribution in the sum of R241 325 471 in respect of the funding which is required by the company between 1 February 2012 and 31 May 2012;*

1.4.4 *As from 1 June 2012, and on a monthly basis within 5 days of receipt of the notification referred to further below, the First Respondent shall pay to the Third Respondent 50% of the funding requirements of the Third Respondent, if any, as duly determined and notified in writing by the Chief Financial Officer of the Third Respondent;*

1.4.5 *It is noted that the Applicant's loan account against the First Respondent, quantified as at 30 April 2012 in the sum of R1 102 211 043 and less any Amount that is refunded to the Applicant by way of payment from the First Respondent under prayers 1.4.1 and 1.4.2 hereof, has been tendered by the Applicant as security to the First Respondent for any loss which it may ultimately suffer as a result of the granting of the aforegoing interim relief and if it is ultimately found in the aforegoing*

arbitration proceedings (when any other proceedings) that the Applicant was entitled to the relief herein sought;

1.4.6 The Applicant shall not sell, dispose of, encumber, cede when any other way deal in or with the secured portion of its loan account as at 30 April 2012 against the Third Respondent save:

1.4.6.1 To discharge its own obligations under the provisions of clause 24.1.3 of the shareholders' agreement vis-à-vis the funding requirements of the Third Respondent.

1.4.6.2 Or otherwise with the written consent of the First Respondent.

1.4.7 The Applicant be granted further or alternative relief.

1.4.8 The costs of this application be reserved for determination in the aforesaid arbitration proceedings, or, failing that, by this court upon the request of any of the parties hereto with reasonable notice to the other party;

1.5 That, failing the institution by the Third Respondent of the arbitration proceedings within the time period as provided for in the preAMITble to prayer 1.4 above:

1.5.1 The relief set out in prayers 1.4.1 to 1.4.4 hereof shall ipso facto become final;

1.5.2 The relief as set out in prayers 1.4.5 and 1.4.6 hereof shall ipso facto lapse and be of no force and effect;

1.5.3 The First Respondent shall pay the costs of this application including those covered by any earlier order of reserved costs."

[3] This application was opposed by AMIT and it has brought a counter-application on an urgent basis in terms of section 131 of the Companies Act 71 of 2008 ("*the New Companies Act*") to place Kgalagadi under supervision and to commence business rescue proceedings. The counter-application is opposed by Kalahari. No other affected parties have filed papers.

[4] The case of the applicant, briefly stated is the following. That all funding required by Kgalagadi is to come from three sources as provided for in clause 24 of the shareholders' agreement and more particularly in the following order: Firstly, from Kgalagadi's own cash resources. Secondly, if Kgalagadi's cash resources are insufficient for its requirements, and subject to clause 24.5 of the shareholders' agreement, from third party sources by way of debt funding on commercially reasonable terms. Thirdly, if Kgalagadi is unable to secure third party funding on terms acceptable to it, the funding is to come from its shareholders on loan account *pro rata* to their respective shareholdings. Kalahari contends that since the first two sources of funding were not available the third tier, or source, became applicable and shareholders were accordingly obliged to provide funding to Kgalagadi in accordance with its requirements on loan account and *pro rata* to their respective shareholdings.

[5] It is common cause that Kalahari holds 40% of the shares, the IDC 10% and AMIT holds 50% of the shares in Kgalagadi. Kalahari contends that it and the IDC have met their funding obligations to Kgalagadi, but that AMIT has, since January 2011 to date, refused to contribute its share to the required funding of Kgalagadi. Kalahari also contends that it has not only paid its share but has also paid the share that AMIT had to contribute. It is accordingly seeking to recover the excess payment from AMIT and for declaration that AMIT is obliged to provide Kgalagadi with funding with immediate effect in circumstances where the other tiers of funding are not available.

[6] The relief sought by the applicant is crafted in the form of final, alternatively, interim relief. The final relief it seeks is the declarator I referred to, as well as the order that AMIT repay to Kalahari the excess that Kalahari paid on its behalf to Kgalagadi. In respect of this latter claim, Kalahari relies on a tacit term that it wants the court to infer, namely, that in circumstances where one shareholder overpaid on its contribution and the other shareholder failed to pay its share to Kgalagadi, the shareholder that overpaid is entitled to a contribution from the defaulting shareholder for the excess paid in. As an alternative to seeking an outright payment from AMIT to it, Kalahari seeks, what it terms "*interim relief*", which is payment of the aforesaid amount against the tender by it of security in the form of its loan account in Kgalagadi.

[7] Kalahari submits that AMIT's obligation to provide funding to Kgalagadi in terms of clause 24.1.3 of the shareholders' agreement, is not subject to the performance by Kalahari of any obligations in terms of that agreement including the obligation to register the mining right, which was in its name, into the name of Kgalagadi and to comply with corporate governance recommendations set out in the King II Report, as provided for in the shareholders' agreement. The argument being that the performance of the latter obligations were not reciprocal to AMIT's obligation in terms of clause 24.1.3, so that even if the obligations relating to the registration of the mining right and corporate governance have not been performed – that did not constitute a bar to requiring and compelling AMIT to perform in terms of clause 24.1.3.

[8] AMIT raised various grounds in its opposition to the application. Briefly stated they are the following. The agreement contains an arbitration clause (clause 39) and the kind of dispute raised by the applicant in these proceedings is subject to arbitration. The submission was that even though clause 39 contains a proviso (clause 39.1.2) that allows the parties to the shareholders' agreement to obtain relief by way of motion proceedings on an urgent basis, or to obtain any interdict, in conjunction or any similar proceedings, in any court of competent jurisdiction in order to preserve the subject matter of the arbitration, as effective relief pending the decision in the arbitration, the present relief sought by Kalahari is not interim (i.e. pending the decision in an arbitration) but is final in effect. Further, that the relief sought is not to preserve the subject matter, or the *status quo*. AMIT contends, in effect, that courts will enforce the arbitration provision and will readily order a stay of the court proceedings, unless it is shown that the arbitration provision is not applicable to the dispute, or that there are exceptional circumstances for the court not to order a stay. AMIT contends that the applicant has not made out a case as to why the application should not be stayed pending the arbitration proceedings.

[9] AMIT further submits that the final relief sought cannot be granted because on Kalahari's version, insofar as it is not contested by AMIT, and AMIT's version, Kalahari has not made out a case for the relief sought. In this regard it is contended by AMIT, firstly, that Kalahari has not made out a case that the third tier of funding has been reached, i.e. that third party funding

could not be assessed on terms acceptable to Kgalagadi. It is contended in this regard that there is enough third party funding available (i.e. on AMIT's version) but it cannot be accessed because Kalahari breached its obligation to secure registration of the mining licence in the name Kgalagadi. All funders, so it is averred by AMIT, insist on the registration of the mining licence in Kgalagadi's name. AMIT also contends that the principle of reciprocity applies in that Kalahari's obligations to secure registration of the licence in Kgalagadi's name and compliance with acceptable corporate governance procedures, are due for performance before AMIT's obligation to provide loan funding to Kgalagadi as contemplated in clause 24.1.3 of the shareholders' agreement. It is further contended by AMIT that there is no room in the shareholders' agreement for inferring a term that a shareholder who has paid, on loan account, more to Kgalagadi than its *pro rata* share (i.e. based on its shareholding) and where another shareholder has not paid, that the former is entitled to contribution of the excess from the non-paying shareholder. AMIT contends that the agreement contains specific provisions regarding the repayment by Kgalagadi of loan accounts. Further, that there are provisions that regulate the consequence of paying an excessive amount to Kgalagadi and submits that Kgalagadi's claim that AMIT be ordered to pay it directly in the amount of R285 024 005,50, is ill-conceived and that the tacit term Kalahari contends for in that regard cannot be inferred, given the circumstances and the express wording of the shareholders' agreement.

[10] AMIT further contends, in essence, that insofar as Kalahari seeks an order that AMIT pay money to Kgalagadi, Kalahari has no *locus standi* to do

so. It is further contended that the relief, which Kalahari claims under the heading; "*interim relief*" and, more particularly, for an order that AMIT make further payments by certain dates on the request of the CFO of Kgalagadi, is also not competent, because, *inter alia* ,future funding may not necessarily be required from the third tier because funds from the other tiers is available.

[11] . Before I deal with these arguments I shall give some context to the dispute between the parties by briefly traversing the nature and importance of Kgalagadi to the shareholders and the broader public.

[12] It is common cause and not disputed that Kalahari, that held a mining right to mine for manganese, and the IDC, engaged AMIT, as a joint venture partner, in order to assist with development funding and management of a three-in-one project which would consist of a mine and a sinter in the Northern Cape Province and a smelter in the Eastern Cape Province. In terms of the shareholders' agreement AMIT agreed to assist Kalahari and the IDC as stated and they jointly agreed to conduct the project through Kgalagadi. In order to do so AMIT agreed to subscribe to 50% of the entire issued ordinary share capital of Kgalagadi. In terms of the shareholders' agreement Kalahari, the IDC, AMIT and Kgalagadi agreed, that the terms and conditions stipulated in that document would apply to their relationship. Certain conditions precedent were agreed to which are not particularly relevant to the issues to be decided here save that one of the conditions was that Kgalagadi would declare a dividend to Kalahari and the IDC in an amount equal to the then Rand equivalent of US $222 500 000,00 (Two Hundred and Twenty Two

Million Five Hundred Thousand United States Dollars) less applicable statutory deductions. Project commencement dates are stipulated and in the shareholders' agreement it is further agreed that a project budget and implementation plan was to be developed by Kgalagadi.

[13] It is not in issue or disputed that the mine and sinter is to be developed and then the smelter. It was also not in issue that this project was an important project and would provide much needed job opportunities for the populations, particularly, in the provinces where mine, sinter and smelter would be situated. The project and, in particular, Kgalagadi was also created as a vehicle for Broad Based Black Economic Empowerment; to give Black people and women much needed skills and opportunities.

[14] The shareholders' agreement, *inter alia*, provides that cancellation is not a remedy available to the parties under the shareholders' agreement, but that any party shall be entitled to bring an action for specific performance of the provisions of the shareholders' agreement (clause 38). It is further provided in that regard, that the parties waive their rights to claim, or raise as a defence, that an alternative adequate remedy exists in law.

ARBITRATION ISSUE

[15] Clause 39(1) of the shareholders' agreement provides that, save in respect of those provisions which provide for their own remedies and which would be incompatible with arbitration, a dispute which arises in regard to the

interpretation of, or carrying into effect, or relating to any parties' rights and obligations arising from the shareholders' agreement, or the termination, or purported termination of, or arising therefrom, or from the rectification, or proposed rectification of the shareholders' agreement, shall be submitted and decided by arbitration. However, in terms of a proviso in that clause, an interdict may be sought, or urgent relief may be obtained, from a court of competent jurisdiction.

[16] Clause 39(12) provides specifically as follows:

> "*This clause 39 shall not preclude any party from obtaining relief by way of motion proceedings on an urgent basis or from instituting any interdict, injunction or any similar proceedings in any court of competent jurisdiction in order to preserve the subject matter to the arbitration of the availability of effective relief pending decisions of the arbitrators.*"

It was common cause that clause 39(12) contains typographical errors and that corrected that clause should read:

> "*Shall not preclude any party from obtaining relief by way of motion proceedings on an urgent basis or from instituting any interdict, injunction or similar proceedings in any court of competent jurisdiction in order to preserve the subject matter of the arbitration or the availability of effective relief pending the decision of the arbitrators.*"

[17] It was submitted on behalf of AMIT that this clause only meant that a party could approach a court by way of motion proceedings for urgent relief in order to preserve the subject matter of the arbitration, pending a decision in

the arbitration, i.e., for urgent interim relief to preserve the *status quo*. It was submitted in support of this interpretation of the clause, that the word "*or*" appearing after the words "*on an urgent basis*" was not disjunctive and that the lack of a comma between the words "*effective relief*" and the word "*pending*" was of no significance. I do not agree. In my view there is merit in Kalahari's submission that the word "*or*" is disjunctive in this context and that it conveys that a court may be approached either where urgent relief is being sought or where an interdict or interim interdict is being sought to preserve the subject matter. Clause 39(1) uses the word "*or*" in the same way it provides that an interdict "*or*" urgent relief may be obtained from a court of competent jurisdiction.

[18] In my view it is enough if the relief that is being sought is urgent. It is common cause that the application is urgent and that the matter was also entertained by my predecessor on that basis. In my view clause 39(1) and 39(12) of the shareholders' agreement recognise that urgent relief may be required including urgent relief for specific performance of an obligation under the shareholders' agreement. That is, over and above relief of an interim, preservatory nature. Since the arbitration envisaged in the agreement is through the International Court of Arbitration, the parties must have appreciated that obtaining urgent relief, be it interim or final, may not be readily possible and that an exception ought to be made for such an eventuality.

[19] In any event, part of the relief sought by Kalahari can be considered to be for the preservation of Kgalagadi, even though it is not to maintain a *status quo*. In my view AMIT's reliance on the arbitration clause to stay, or resist the applicant's claims, is not well-founded.

FINAL OR INTERIM RELIEF?

[20] The declarator that Kalahari seeks, namely that AMIT is obliged to discharge its obligations under the provisions of clause 24.1.3 of the shareholders' agreement with immediate effect, is final relief. So is the claim that AMIT pay to Kalahari on the basis of a tacit term the amount of money claimed. Kalahari's alternative claim is one in which the latter claim for payment is made subject to its loan account in Kgalagadi serving as security. It is worded as interim relief, but in my view it is final in its effect. Similarly, its claim that AMIT make further payments to Kgalagadi is final in its effect.

[21] It is trite that where final relief is claimed on motion and there are factual disputes that cannot be resolved on the papers, the approach to be followed is as set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[1]. This approach is also commonly referred to as the application of the "*Plascon-Evans rule*".

THE DECLARATORY RELIEF

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[1] 1957 (4) SA 234 (C).

[22] As I mentioned above, Kalahari seeks a declarator that AMIT is obliged to make a funding contribution to Kgalagadi, as contemplated in clause 24.1.3 of the agreement, within immediate effect. There is a dispute as to whether AMIT is obliged, at this juncture to make such a contribution or payment.

[23] Clause 24(1) of the shareholders' agreement provides that all funding required by Kgalagadi shall come from the following sources and in that order, namely, from Kgalagadi itself and if it is unable to provide the funding, from outside sources ("*third parties*") by way of debt funding on reasonable terms, and only if such funding cannot be sourced by Kgalagadi on terms acceptable to it – shall the funding "*be provided on loan account by the shareholders pro rata to their respective shareholdings*".

[24] It was submitted on behalf of AMIT that the third tier funding source has not been reached as yet, because there are third parties willing to fund but are not able to do so because of material breaches by Kalahari of the shareholders' agreement, particularly in that Kalahari has failed to secure the registration of the mining licence in the name of Kgalagadi despite reasonable time having elapsed within which it could and ought to have done so. Secondly, that there were serious corporate governance issues that were not being attended to by Kgalagadi, or by the Executive Chairperson of Kgalagadi (who also happens to be the chairperson of Kalahari) and that this was a concern to funders, including the Standard Bank. In this regard reference was made, *inter alia*, to a document annexed to the papers and marked

"SM55",[2] prepared by the bank's attorneys setting out the bank's concerns. The main concern raised relates to the fact that Kgalagadi was not the holder of the mining right and that it could not lawfully conduct mining operations until it was the holder of such a right. Further that there had (i.e. at that stage and up to about 23 May 2012) not been a notarial cession of the mining right by Kalahari in favour of Kgalagadi followed by registration of the right in Kgalagadi's name. There is also an indication in that document that if the mining title was registered in Kgalagadi's name it would serve as security for any loan advanced to it and that security would take the form of a mortgage bond. (However, this document does not state that funding is being withheld, or that it is being withheld for the reasons stated in the document).

[25] Kalahari, in its founding papers, avers that AMIT has refused to agree to the raising of external (or third party) funding. It is also averred that an agency appointed by Kalahari to raise capital for Kgalagadi was successful in that it was able to secure in-principle-commitments from a number of funders led by Standard Bank of South Africa, but that AMIT has failed to support the appointment of the agency as a representative of Kgalagadi (headed by a certain Mr Motau) and that AMIT has not agreed to such funding. It is also averred in the founding affidavit, that the process of raising external funding has been "*a long and complicated one*". Ms Mashile-Nkosi, Executive Chairperson of Kgalagadi, who also deposes to the founding affidavit of Kalahari, states that Kalahari no longer has the cash resources to continue

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[2] This is an extract from a report prepared by Webber Wentzel Attorneys that was presented at a meeting attended by representatives of AM at the Offices of Edward Nathan and Sonnenberg on 27 March 2012 and it alleged to set out the position of the banks.

with the three-in-one project; that such funding had been exhausted because it had to pay more than its *pro rata* share to Kgalagadi in circumstances where AMIT failed to make a payment. With reference to third party funding, she states that Kgalagadi had, for over a year, been in negotiation with a number of potential funders, including but not limited to the Development Bank of South Africa and Standard Bank Ltd. Standard Bank has performed the role of lead fundraiser for Kgalagadi and the funders, whom it represents, and Standard Bank, are in a position to advance portions of the funding required by Kgalagadi provided certain conditions are met. She refers to a letter, "DMN6" dated 30 April 2012, from the Standard Bank which sets out the position of the lead funding negotiator with regard to funding which is available to Kgalagadi. Ms Mashile-Nkosi goes further to also refer to an Annexure "DMN7" which contains the terms and conditions which Standard Bank wanted Kgalagadi to comply with. In "DMN6" the Director: Mining and Metals Finance of Standard Bank, on 30 April 2012, advises the Chairperson of Kgalagadi, *inter alia*, that it has approached various banks and institutions for funding proposals and that those listed have obtained credit approvals through allocated participation in the funding. A total funding of the equivalent of R4 billion, was approved for the mine and sinter plant and the further equivalent of R2,5 billion was approved for the smelter. However, and more importantly, the chairperson is also advised that the allocations of funds (as set out in the letter) "*would be made available subject to finalisation of the various legal agreements as well as the completion of the technical and legal due diligences all these processes have been commenced, with an initial due diligence report having been received from the technical consultants and draft*

legal agreements having been reviewed by all parties". "DMN7" appears to be a document emanating from Kgalagadi.

[26] It is also important to note from letters written by individual funders that are listed on "DMN6", including Investec, and Rand Merchant Bank that the financing they were prepared to provide was subject to the completion of documentation and the fulfilment of certain conditions precedent. All these commitment letters are pre-December 2011.

[27] In its answer to the aforesaid averments AMIT denies that it did not support Mr Motau's appointment to Kgalagadi and says that he was not appointed because Ms Mashile-Nkosi was not prepared to pay him the salary which he demanded and it was at the insistence of Ms Maashile-Nkosi that the Board decided against employing Mr Motau. Further, *inter alia*, the deponent to AMIT's answering affidavit states the following in response to funding not being immediately available:

> "*The company requires funding. The reason why the leading fundraiser cannot immediately (and could not before now) advance the funding required by the company, is because the applicant made it impossible for the conditions for such funding to be met. What the funders understandably require is security over a mining right, which mining right must, of necessity be an* asset" (i.e. of Kgalagadi and not of Kalahari).

[28] It is common cause that a notarial cession of the mining right from Kalahari to Kgalagadi, at best for Kalahari, only occurred on or about 23 May 2012 and that the actual registration of the mining right into the name of Kgalagadi only occurred or not about 6 June 2012 when the matter was

already being argued before me. I take the latter fact into account because it appeared to be common cause and was not disputed.

[29] On the facts one can reasonably find that even if the terms and conditions of the banks were acceptable to Kgalagadi it could, not objectively, comply with the condition that the mining right, which was still in the name of Kalahari, serve as security for any funding. From the version of AMIT, the registration of the right in the name of Kgalagadi was crucial for third party funding. If Kgalagadi did not have any resources of its own and if it could not access third party funding, because of its inability to meet conditions stipulated by third party funders, then the third tier of funding clearly became applicable.

[30] So even on AMIT's version, namely, that third party funding was not forthcoming, because conditions stipulated by third party funders had not been met, made the third tier of funding applicable.

[31] The question that arises is whether AMIT is justified in refusing to provide funding to Kgalagadi in circumstances where there are outstanding corporate governance issues and the mining right was not registered in the name of Kgalagadi? It is noteworthy that it is not Kgalagadi seeking to compel AMIT to fund it, but it is Kalahari which is seeking an order that AMIT provide the requisite funding to Kgalagadi. It is common cause that the relief sought is an order for specific performance. In accordance with the general principles that apply to reciprocal obligations, a party that claims specific

performance must perform, or tender to perform its own reciprocal obligations. In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[3] the court reviewed the history, nature and scope of the principle of reciprocity and the *exceptio non adimpleti contractus*. AMIT is relying on the latter defence in this matter. The principle of reciprocity recognises that there must be an exchange of performances and that a party may raise the *exceptio* as a defence to a claim brought by a party who has not performed or tendered to perform its obligations.

[32] On behalf of Kalahari it was submitted that the principle of reciprocity does not apply in this instance. It is submitted that compliance with the corporate governance requirements and the registration of the mining licence in the name of Kgalagadi, are not obligations which are reciprocal to AMIT's obligation to provide funding to Kgalagadi as and when such funding is required by Kgalagadi. On the other hand, it is submitted on behalf of AMIT that those obligations are indeed reciprocal and unless they have been performed it is not obliged to fund Kgalagadi. It is further submitted that it would be unreasonable to expect AMIT to fund Kgalagadi before those obligations are met.

[33] In the circumstances it is necessary to determine whether the principle of reciprocity applies in this situation. This is mainly a question of interpretation. However, interpretation is assisted by a presumption that in every bilateral or synallagmatic contract – that is a contract where the parties

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[3] 1979 (1) SA 391 (A).

undertake obligations towards each other – the intention of the parties is that one party would not be entitled to enforce the contract, unless it has performed (or tenders to perform) its obligations[4].

[34] Reference was also made in argument to what Corbett J stated regarding reciprocity in *ESE Financial Services (Pty) Ltd v Cramer*[5]. There Corbett J gave examples where performance of obligations may be simultaneous or consecutive. What is important, however, is that it was pointed out there that reciprocity does not depend merely upon the time stipulated for performance of an obligation. Corbett JA also went on to state:

> *"For reciprocity to exist there must be such a relationship between the obligation by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other, in cases where the obligations are not consecutive, vice versa (see De Wet and Yates, Kontraktereg, p 138; Myburgh v Central Motor Works 1968 (4) SA 864 (T) at p 865; Anastasopoulos v Gelderblom 1970 (2) SA 631 (N) at p 636)."*

[35] While the obligation to fund as contemplated in clause 24.1.3, on the face of it, appears to be an obligation toward Kgalagadi, it is, in essence, also an obligation shareholders owe to each other. If the other sources of funding are not available and a shareholder does not provide funding as contemplated in clause 24.1.3 it could impact negatively, not only on Kgalagadi, but the other shareholders. They may either have to pay more than their *pro rata* share of the funding to Kgalagadi, or suffer the consequences that no, or

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4 See *Hamman v Nortje* 1914 AD 293 at 300; *Nesci v Meyer* 1982 (3) SA 498 (A) at 513F.

5 1973 (2) SA 805 (C) at 808-9.

insufficient funding, may bring about. It is for that reason, in my view, that Kalahari would have the requisite interest to compel compliance with clause 24.1.3 of the shareholders' agreement. Furthermore, in my view the obligations that are relevant are not only those to be performed by Kalahari and AMIT, but also those of Kgalagadi.

[36] In terms of clause 12.9 of the shareholders' agreement it is, *inter alia*, agreed that the Board of Kgalagadi shall "*insofar as reasonably and practically possible*" adopt and apply the recommendations of the King Commission on Corporate Governance (save those provisions that relate to the appointment of non-executive directors); a code of conduct dealing with all empowerment issues; as well as a progressive policy. No time is expressly stipulated for the adoption and application of the aforesaid, but it is clear from the context that it was to be adopted and applied as far as is reasonable and practically possible. The complaint of AMIT relates mainly to the adoption and application of the corporate governance recommendation.

[37] In terms of clause 35.2 of the shareholders' agreement, Kalahari warranted to AMIT and the IDC *inter alia*, that "*the mining right will be duly and properly issued*" to Kgalagadi "*on the basis of facts and representations which were, and remain, true and correct*". Clause 2.40 of the shareholders' agreement defines "*mining right*" as the mining right that was granted by the Minister to Kalahari on 5 December 2007 in terms of section 23 of the Minerals and Petroleum Resources Development Act 28 of 2002 ("*the MPRDA*").

[38] In terms of clause 35.5, Kalahari undertakes in favour of AMIT – to ensure that a lawfully appropriate rectification or amendment to the mining right – is affected notarially and registered at the Minerals and Petroleum Titles Registration Office in terms of section 5(1)(d) and section 15(2) of the Mining Titles Registration Act 16 of 1967, as amended, "*as soon as may be reasonably possible after the fulfilment of the condition in clause 3.1.4 above*". It is further specifically recorded that clause 35.5 is a material term of the shareholders' agreement.

[39] It is common cause that at the time when Kalahari launched this application (i.e. 1 June 2012), the mining right had not as yet been registered in the name of Kgalagadi and that Kalahari only averred in its replying affidavit that there was a consent to the cession of the right, from it to Kgalagadi.[6] In its founding affidavit, Kalahari merely mentions that due to a typographical error in the application for the mining title the title was registered in the name of Kalahari rather than that of Kgalagadi and that the problem was in the process of being attended to by the DMR. AMIT in turn contends that Kalahari's explanation was false and that it only became aware in December 2011 that Kalahari did not do the cession and transfer the mining title to Kgalagadi as warranted in the shareholders' agreement.

[40] As I mentioned above, on or about 7 June 2012 counsel for Kalahari tendered an affidavit and proof from the Bar that the mining right was

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[6] The DMR's consent to the cession was apparently granted on or about 3 April 2012.

registered on 6 June 2012 in favour of Kgalagadi. AMIT's counsel objected to the admission of this affidavit. I reserved my ruling in that regard. No prejudice can be suffered by AMIT if I take into account the fact that the mining right was indeed registered in the name of Kgalagadi on 6 July 2012. In my view, it is very necessary for the proper determination of the issues in this case.

[41] The shareholders' obligation to fund Kgalagadi, which is contained in clause 24.1.3, does not expressly state that the funding is subject to the prior or simultaneous performance by Kgalagadi, or any shareholder, of their respective obligations. *Ex facie* the clause, if Kgalagadi requires funding and funding from the other sources is not available, then the third tier, shareholder funding contemplated in clause 24.1.3, becomes operative. In terms of *ESE Financial Services (supra)*, the relationship between the obligations of the respective parties is important as it may indicate the sequence in which they ought to have been performed.

[42] That the mining right or title was ceded to and registered in the name of Kgalagadi was no doubt material. In the absence of such right any mining related operations performed by Kgalagadi would have been legally questionable. An objection to fund Kgalagadi in respect of the performance of mining related operations that require a mining title, or licence, would of necessity only be enforceable if Kgalagadi has such a mining title and could legally conduct such operations and incur costs in relation thereto. However, funding obligations that related to activities that Kgalagadi could have

performed legally i.e. prior to having the mining title, would not be reciprocal to it having the mining title. In any event, in terms of the shareholders' agreement, AMIT was, from the outset, aware that the mining title was registered in the name of Kalahari and that a cession and registration into the name of Kgalagadi was required; that this would entail a process and that pending such a process, costs would nevertheless be incurred by Kgalagadi in relation to its project(s). Notwithstanding such knowledge, the cession and registration of the mining title, even though recorded to be a material term, was not made a condition precedent and AMIT was willing to purchase a 50% shareholding in Kgalagadi. Since June 2011 until about January 2012 AMIT approved payments by Kgalagadi. In March 2012 AMIT made a payment of R86 million in respect of Kgalagadi's obligations. AMIT, on its own version, only got to know in December 2012 that the cession of the mining title had not occurred despite the term that this had to occur as soon as reasonably possibly after the fulfilment of the condition precedent in clause 3.1.4 of the shareholders' agreement. AMIT's refusal to fund Kgalagadi was not really on the basis that the mining title had not been ceded, or registered, but on the misconception that the third tier of funding had not become obligatory or applicable.

[43] The obligation of Kgalagadi's board to adopt and apply, insofar is as reasonably and practically possible, *inter alia*, the recommendations of the King Commission on Corporate Governance are, in my view, not reciprocal. What is reasonable and practical in any particular situation and at a particular point in time, may be a matter of differing opinion. If this obligation is

reciprocal to the obligation of shareholders to fund Kgalagadi when it requires funding, in circumstances where no other funding is available, the excuse that corporate governance principles were not adopted in a particular situation, could be used as a means of avoiding funding. That could not have been the intention. Whether or not the corporate governance recommendations ought to be applied in any particular situation, ought to be a matter of decision by Kgalagadi, failing which, would be a subject for arbitration. It could not have been the intention of the parties to the shareholders' agreement that their disagreement as to what was reasonable and practical regarding the adoption of corporate governance recommendations, could be used as a reason for not funding Kgalagadi.

[44] Accordingly, in my view, AMIT was to provide funding to Kgalagadi since Kgalagadi could not access the required funding either from its own sources or from third party sources. Having said that, I am not of the view that it can be said that AMIT is in the future necessarily obliged to fund Kgalagadi, particularly now as the mining licence has been registered in the name of Kgalagadi. Whether or not AMIT has such an obligation in future depends on whether or not Kgalagadi requires funding, either because it has no funds of its own, or it cannot access funds of third parties on terms acceptable to it.

Re: THE CLAIM THAT AMIT BE ORDERED TO PAY DIRECTLY TO KALAHARI WHAT AMIT OUGHT TO HAVE PAID TO KGALAGADI

[45] As I pointed out earlier, the agreement contains no express term that gives one shareholder a right to claim from another shareholder its *pro rata* share of the funding in circumstances where the former shareholder has paid more than its *pro rata* share and the latter has not paid its share or a portion thereof.

[46] Kalahari contends as follows:

> "*It is an obvious proposition that compliance by one of the shareholders with its payment obligation to the company according precisely to its pro rata shareholding inures for the benefit of all the shareholders vis-à-vis the company's fortunes and overall value; a fortiori, the payment by a shareholder in excess of its pro rata obligation not only benefits the other shareholders (and of course the defaulting shareholder) in the sense that it fulfils the same function preserving or enhancing the state of the company, but also in the sense that the defaulting shareholder obtains a positive advantage and savings for as long as the other shareholder continues to pay and the defaulting shareholder continues to default.*
>
> ...
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> *That being so, it follows that there is a tacit term contained in the agreement that, to the extent that one shareholder should discharge the obligation of another to the company in excess of the former's own liability and for the joint benefit of those shareholders, the over-paying shareholder has a right to recover from the defaulting shareholder such excess payment.*" [emphasis added]

[47] In *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO*[7] Brand JA summarises the position regarding tacit terms as follows:

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[7] 2006 (3) SA 488 (SCA) at paras [19]-[20].

"[19] A discussion of the legal principles regarding tacit terms is to be found in the judgment of Nienaber JA in Wilkins NO v Voges 1994 (3) SA 130 (A) at 136H-137D. These principles have since been applied by this Court, inter alia, in Botha v Coopers & Lybrand 2002 (5) SA 347 (SCA) at paras [22]-[25] and in Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (6) SA 1 (SCA) ([2004] 1 All SA 1) at paras [50]-[52]. As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so (see eg Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time (see eg Alfred McAlpine (supra) at 532H-533B and Consol Ltd t/a Consol Glass (supra) at para [50]). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

[20] In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term (see eg Wilkins NO v Voges (supra) at 143C-E; Botha v Coopers & Lybrand (supra) at para [25])."

[48] It was held *inter alia* in *Robin v Guarantee Life Assurance Co Ltd*[8] that where parties have in clear and unambiguous terms dealt with a subject

[8] 1984 (4) SA 558 (A) at 567B-F.

matter there may be no room for importing a tacit term dealing with such matter into the contract. Trengove JA there specifically stated:

> *"A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen JA in SA Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598 (A) at 615D:*
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> > *'A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454.'*
>
> *(See also Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (A) at 215D-H; Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A) at 175C; Cape Town Municipality v Silber 1971 (2) SA 537 (C) at 543A-D; Christie The Law of Contract in South Africa (1981) at 156-158.)"*[9]

[49] It was submitted on behalf of AMIT that there was no room in the agreement for importing the tacit term contended for by Kalahari, particularly in the light of the extensive provisions in clause 24.1.3, read with clause 24.3, which contains the terms and conditions that are applicable to loan accounts of the shareholders. Clause 24.3.1.1 provides that the loan accounts shall bear interest at the prime rate. Clause 24.3.1.2 provides that, subject to clauses 24.3.1.3 and 24.3.1.4 and subject to the availability of funds and the obtaining of the relevant regulatory approvals required for repayment, the loan account shall be repaid as may be agreed from time to time between Kgalagadi and the shareholders. Clause 24.3.1.3 provides that the loan

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[9] See also *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] JOL 27883 (SCA) especially paras [12] and [13].

account shall in any event be repaid upon the grant of a provisional or final order placing Kgalagadi under judicial management or in liquidation. Clause 24.3.1.4 provides that repayment by Kgalagadi to the shareholders shall be made *pro rata* to their respective loan accounts, but to the extent that any shareholders' loan accounts exceeds its *pro rata* share based on its shareholding in Kgalagadi such excess shall first be repaid. In clause 24.3.2 it is provided that for as long as funding required by Kgalagadi is not provided by shareholders *pro rata* to their respective shareholdings, interest shall accrue and be payable monthly in arrear on any amount by which the shareholders' account exceeds such shareholders' *pro rata* share of all loan accounts at the prime rate of 2% (percent).

[50] In its original notice of motion Kalahari, in essence, sought an order that AMIT be directed to pay over the money to Kgalagadi which Kalahari had overpaid i.e. on behalf of AMIT and that Kgalagadi, in turn, be ordered to immediately pay over that amount to Kalahari. In its answering affidavit, AMIT, *inter alia*, raised the argument that this was tantamount to Kalahari being repaid a portion of its loan account contrary to the express provisions of the shareholders' agreement, in particular, the provisions of clause 24.3. In response Kalahari amended its notice of motion and now it seeks an order that AMIT pay the amount directly to it.

[51] Over and above the fact that the shareholders' agreement seems to deal extensively and unambiguously with the issues of overpayment and underpayment and non-payment, the difficulty with the order sought by

Kalahari is that Kgalagadi is not obliged to recognise the payment which AMIT is required to make directly to Kalahari. Kgalagadi is not required to credit AMIT's loan account with such payment and to reduce Kalahari's loan account with such payment. In those circumstances, in my view, if one applies the bystander test, the inference is that the response by AMIT, or any other shareholder, would in all probability have been that it would like to discuss and consider the suggested term. In all probability the shareholder would have wanted answers to those questions in particular whether Kgalagadi is in those circumstances to credit its loan account with the payment and it would not have necessarily agreed with the proposed term had it been suggested to the shareholder at the time when the shareholders' agreement was entered into.

[52] In my view the applicant's reliance on *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd*[10] is misplaced. In any event the applicant relies on the proposed tacit term for its cause of action. Accordingly, in circumstances where the term proposed cannot be inferred, the applicant must fail in its claim that AMIT pay directly to it what it alleges it paid in excess of its *pro rata* share of the required funding.

COUNTER-APPLICATION FOR BUSINESS RESCUE

[53] AMIT in its counter-application seeks an order that Kgalagadi be submitted to business rescue as contemplated in section 131 of the New

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[10] 1970 (1) SA 674 (C) at 677F-678A.

Companies Act on the grounds that Kgalagadi is financially distressed and that it is otherwise just and equitable to do so. Kalahari is opposing the counter-application on several grounds. Before dealing with the merits of the counter-application at the hearing, I requested counsel for AMIT to address me on whether there had been compliance with Regulation 124 of the Regulations made under the new Companies Act and in particular whether the application as required by Regulation 124 was served on the creditors of Kgalagadi. Creditors are "*affected persons*" as defined in the new Companies Act. In terms of section 131(2)(b) each affected person must be notified of the application in the prescribed manner. Regulation 124 of the new Companies Act Regulations[11] ("*the Regulations*") provides that:

> "*An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to court, must deliver a copy of the court application, in accordance with Regulation 7 to each affected person known to the applicant.*" [emphasis added]

[54] Regulation 7 of the Regulations provides that a notice or document to be delivered for any purpose contemplated in the new Companies Act or the Regulations must be delivered in a manner contemplated in section 6(10) or (11) or set out in Table CR3 of that Act.

[55] Section 6(10) of the new Companies Act provides:

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[11] GNR 351 of 26 April 2011; Companies Regulations, 2011, Government Gazette No. 34 23(9).

"*If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.*"

[56] Section 6(11)(b), which is relevant in the circumstances, provides:

"*If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10), is required –*

(b) to be published, provided or delivered, it is sufficient if –

(i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication in a manner and form such that the document, record or statement can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or

(ii) a notice of the availability of that document, record or statement, summarising its content and satisfying an prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement."

[57] It was common cause that the counter-application, including the affidavits in support of it, was not delivered to creditors, but that notice was sent to creditors by electronic means (i.e. by email) in which creditors were *inter alia* informed that AMIT was launching application proceedings against Kgalagadi in which it was seeking an order placing Kgalagadi under supervision and subjecting it to business rescue as contemplated in section 131(1), read with section 131(4), of the new Companies Act. The notice stated

that it was a notice in compliance with section 131(2)(b) of the new Companies Act read with the provisions of Regulation 7 Annexure 3 Table CR3; Further that the notice of counter-application relating to these proceedings, was annexed to that notice, and that the affidavits and related documents relevant to the counter-application, being voluminous, were not annexed to the notice, and that any party requiring a copy of the founding affidavit in the counter-application was invited to inform AMIT's attorneys of that fact by email communication, at a given address.The notice also stated that any party requesting a copy of AMIT's founding affidavit will be forwarded a copy thereof by email. In the notice intended recipients are also informed that as affected parties they are entitled to take part in the hearing of the above application in terms of section 131(3) of the new Act; that a counter-application for business rescue is being brought as a matter of urgency and is enrolled for hearing on 22 May 2012 and that if they intend opposing the application they are required to notify AMIT's attorneys in writing on or before 17h00 on Friday 18 May 2012 and to file answering opposing affidavits on or before 14h00 on Monday 21 May 2012. The notice is dated 17 May 2012. According to the affidavit of service, the notice was transmitted to creditors.

[58] It was submitted on behalf of AMIT that the notice accompanied by a copy of the notice of motion in the counter-application, was substantial compliance with section 131(2)(b) read with Regulations 7 and 124. It was further submitted with reference to the decision in *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group*[12] that Regulation 124 went too far in providing that

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[12] 2001 (5) SA 600 (WCC) para [16] at 605B-E.

the affected person should also be served with a copy of the application. It was further submitted that, in any event, there has been substantial compliance as contemplated in section 6(11)(b) of the new Companies Act and section 6(10) of that Act.

[59] On behalf of Kalahari it was submitted that there has been no compliance with the service requirements of section 131(2)(b) read with Regulations 7 and 124.

[60] I am of the respectful view that the court in *Cape Point Vineyards* was probably justified in its criticism of Regulation 124, namely, that it went beyond what might lawfully be prescribed under section 131(2)(b) of the new Companies Act, insofar as it required service of the whole application and that such service in most instances would not be practically feasible. However, the requirements of Regulation 124 cannot just be ignored, or be regarded as *pro non scripto*. Until declared invalid and set aside the requirements of that regulation would have to be complied with. Fortunately section 6(11)(b) of the new Companies Act does provide a solution when it is not practically feasible to deliver the whole application because of its bulk. That section provides that it is sufficient delivery if a notice is delivered to each intended recipient making known the document that is to be delivered is available, contains a summary of the contents of the document, complies with any prescribed requirements and gives instructions to the intended recipients as to how to get access to the document.

[61] The question that arises is whether the notice, that was submitted in this instance on behalf of AMIT and referred to above, is a notice that complies with section 6(11)(b)? If it is, then there has been substantial compliance as envisaged in section 6(11)(b) of the new Companies Act.

[62] The notice that AMIT's attorneys transmitted to intended recipients (i.e. creditors) does not make mention that it is a notice as contemplated in section 6(11)(b), but it purports to be a notice as envisaged in that section. Although it may arguably comply with certain of the requirements in section 6(11)(b), it certainly does not comply with the requirement that the document intended to be delivered, i.e. the application, be summarised therein. While the notice of counter-application gives an indication of, *inter alia,* the relief sought and the dates and times for delivery of the notice of opposition and answering and opposing affidavits, it does not contain a summary of the application. The grounds upon which the relief is being sought are not discernible from either the notice, or the accompanying notice of counter-application. If the document which is required to be delivered by the new Companies Act as per the wording of section 6(11)(b), then there has been no compliance with that section. Section 6(11)(b) provides that the notice complying with the requirements stated in that section will be sufficient if "*in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10) is required*" [emphasis added]. In section 1 of the new Companies Act the phrase "*this Act*" is defined as including the schedules and regulations. The term "*regulation*" is defined as meaning "*a regulation made under this Act*". The Act is the new Companies Act and Regulation 124,

which requires that the application be delivered to affected persons, is a regulation made under the new Companies Act. For substantial compliance with Regulation 124 – which is regarded as part and parcel of the new Companies Act – as contemplated in section 6(11)(b), the notice has to contain a summary of the content of the application. If it does not comply with that requirement of section 6(11)(b,) then it cannot be said that there has been substantial compliance with the new Companies Act regarding the delivery of the application or counter-application. In my view, there has, accordingly, not been compliance with the delivery requirements stipulated in section 131(2)(b) read with Regulation 124 and Regulation 7 read with section 6(11)(b) of the new Companies Act.

[63] Insofar as counsel for AMIT also relied on sub-section 6(10) of the new Companies Act reliance is clearly not appropriate, because section 6(10) only pertains to a "notice".

[64] Counsel for AMIT however also relied to a limited extent on section 6(9) of the new Companies Act and submitted that in terms of the provisions of that section there is substantive compliance. The section provides:

> "*(9) If a manner of delivery of a document, record, statement or notice is prescribed in terms of this Act for any purpose –*
>
> *(a) it is sufficient if the person required to deliver such a document, record, statement or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and*
>
> *(b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that*

document, record, statement or notice, unless the deviation –

(i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or

(ii) is such as would reasonably mislead a person to whom the document, record, statement or notice is, or is to be, delivered."

[65] In my view section 6(9) of the new Companies Act is not applicable to the present situation. It deals with the manner of delivery as opposed to what has to be delivered. It provides that if a person is required to deliver a document, record or statement in respect of which the manner for delivery is prescribed in terms of the Act, it is sufficient if that document, etc, is delivered in "*a manner that satisfies all the substantive requirements as prescribed*". Section 6(9)(b) provides that any deviation from the prescribed manner does not invalidate the action taken by the person delivering the document, etc, unless the deviation reduces the probability of the intended recipient receiving it, or would reasonably mislead the person to whom the document, etc, is to be delivered.

[66] Accordingly, in my view, the counter-application is not properly before me as there has been no compliance with the service provisions. In those circumstances it cannot be granted in these proceedings.

[67] In any event and even if I am wrong in my conclusion that there has been no substantial compliance with the service requirements of the new

Companies Act I am of the view that the business rescue application cannot succeed.

[68] Section 131(4) of the new Companies Act provides that 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; (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 (b) dismiss the application, together with any further necessary and appropriate order, including an order placing the company under liquidation. In terms of section 131(5) the court that makes an order in terms of subsection (4)(a) may make a further order appointing as interim practitioner, a person who satisfies the requirements of section 38 and who has been nominated by the affected person who brought the application subject to ratification by the majority of the independent creditors voting interests at the first meeting of creditors, as contemplated in section 147 of the new Companies Act. In this matter AMIT has nominated a business rescue practitioner, Gerhard Holtzhauzen ("*Holtzhauzen*") for appointment.

[69] It was submitted on behalf of AMIT that because of a lack of funding Kgalagadi was financially distressed and that it was facing the prospect, expressly alluded to by Kalahari in its founding papers in the application, of

being liquidated by one or other of its creditors and that business rescue was the ideal via media which would enable Kgalagadi to be nursed back to financial health. It was furthermore submitted on behalf of AMIT that it was also just and equitable for financial reasons to subject Kgalagadi to business rescue. The submission in this regard was that with an impartial business rescue practitioner supervising the management of the business there was a very strong likelihood that the corporate governance issues would be resolved and that funds from third parties would also flow in. It was submitted that Kalahari's fears that this was merely a ploy by AMIT to achieve its own ends and change the very objectives that inspired the formation of Kgalagadi, were unfounded. AMIT submitted that if Kgalagadi was subjected to business rescue it was prepared to inject the sum of R100 million and a further R400 million, once the mining right had been "regularised" in the name of Kgalagadi, for the development of the mine and sinter. This tender by AMIT was on the basis that in the hands of a business rescue practitioner AMIT's concerns, which it alleges has caused Kgalagadi's financial distress, will be relieved.

[70] Kalahari submits that the remedy of business rescue is completely inappropriate and destructive of the best interests of Kgalagadi and that it is also not just and equitable to subject Kgalagadi to business rescue. Kalahari blames AMIT for the financial difficulties in which Kgalagadi was finding itself in. It contends that AMIT has refused to provide the necessary funding to Kgalagadi since July 2011 with the exception of an amount of about R86 million which was paid on 13 March 2012. Kalahari submits that AMIT

deliberately refused to enable third party funders to provide the required funding. Further that AMIT is not even prepared to commit itself beyond the R500 million, which it is tendering on the basis aforementioned, although no such limitation is stipulated in the shareholders' agreement. According to Kalahari, if the tender was *bona fide,* AMIT would have committed itself to continue contributing in accordance with the shareholders' agreement. Kalahari also objected to the appointment of Holtzhauzen on two bases, namely, firstly, that he was a male and, secondly, that he had no qualifications or experience of running a mining company. According to Kalahari, his appointment would unjustifiably increase Kgalagadi's costs burden and also undermine the very important objectives of establishing Kgalagadi, particularly the empowerment of women. Kalahari also referred to concerns raised by some of Kgalagadi's service providers and employees, if Kgalagadi should be placed under business rescue.

[71] While the latter issues raised by Kalahari are not significant and might be dismissed on the basis of a lack of understanding of the process of business rescue, the concern is AMIT's attitude. As I found with regard to the claim, AMIT had an obligation to fund Kgalagadi in terms of the shareholders' agreement if Kgalagadi did not have funds and could not have access to funds from third parties on terms that were acceptable to it. AMIT does not say that it could not fund Kgalagadi because it did not have the necessary means, instead it appears that AMIT deliberately withheld funding from Kgalagadi, because (so it avers) it had no obligation to fund Kgalagadi as third party funders were willing to fund, but for the fact that the mining licence had

not been registered in Kgalagadi's name and because of specific concerns regarding corporate governance issues. Beside the fact that the parties had entered into mediation, AMIT apparently did very little, if anything, to provide for the funding needs of Kgalagadi. It did not institute arbitration proceedings to obtain specific performance of the alleged breaches it was raising as a reason why funds were not being accessed by Kgalagadi. Instead it deliberately withheld funding, seemingly knowing that Kgalagadi would, as a result, experience financial distress which would render it vulnerable to attack by disgruntled creditors; That by balancing its fate, of either being liquidated, or "*rescued*", there would be an opting of the latter, which would enable AMIT to achieve possibly more than what it could have achieved by an order for specific performance. The consequence of business rescue is that the business rescue practitioner takes over the full management control of the company (section 140(1)(a)). While a director continues to exercise the functions of a director (section 137(2)(a)) he or she is subject to the authority and control of the practitioner (section 137(2)(a) and section 140).

[72] There is ample authority that an applicant who relies on the ground that it was just and equitable to liquidate a company, (i.e. under the previous Companies Act), must come to court with clean hands. In other words, it must not itself have been wrongfully responsible for, or have connived at bringing about the state of affairs, which it asserts results in it being just and equitable

to wind up the company.[13] There is no reason why the same principle cannot also apply in the case of business rescue proceedings.

[73] This is not a case where Kgalagadi was previously generating profits and has now fallen upon bad days financially. Kgalagadi's business is in a developmental phase. A mine and sinter is to be developed before it can be profitably exploited. A smelter is also to be developed before profitable exploitation can occur. This was all known to AMIT from the outset. Funding has always been required for this developmental phase. This is also apparent from the shareholders' agreement. The mining right has now been registered in Kgalagadi's name and that can no longer be a factor when it comes to third party or shareholder funding. AMIT is not deprived of its remedies in terms of the shareholders' agreement. It can obtain relief by way of an order for specific performance. If AMIT meets its funding obligations, as was agreed to in the shareholders' agreement, there is no reason why Kgalagadi should be under financial distress. The shareholders' agreement contains adequate remedies, if obligations, emanating from the shareholders' agreement, are not performed.

[74] The parties sought the costs of three counsel, where three counsel were employed. In the result I make the following order with regard to the application and the counter-application:

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[13] See example *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd* [2008] 4 All SA 1 (SCA) at 9. For other authorities see Henochsberg on the Companies Act by P M Meskin Volume 1 Commentary under section 344 where authorities are listed including *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 292, *Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W) at 1032-1033 and *Marshall v Marshall (Pty) Ltd* 1954 (3) SA 571 (N) at 579.

74.1 It is declared that the first respondent (Arcelormittal SA) is obliged to discharge its obligations as shareholder under the provisions of clause 24.1.3. of the shareholders' agreement (a copy of which is annexed to the applicant's founding affidavit marked "DMN3") in circumstances where the third respondent (Kgalagadi Manganese (Pty) Ltd) requires funding and does not have such funding and cannot obtain the necessary funding from a third party on terms acceptable to it.

74.2 The first respondent is ordered to pay the third respondent within 10 days of this order a contribution in the sum of R241 325 471,00 in respect of the funding which the third respondent required for the period 1 February 2012 to 31 May 2012.

74.3 The first respondent is directed to comply with its obligations in terms of clause 24.4 of the shareholders' agreement.

74.4 The first respondent is ordered to pay the costs of the application, including the costs previously reserved. Such costs to include the costs of three counsel, where three counsel were employed.

74.5 The counter-application, to place the third respondent under business rescue, is struck from the roll with costs, such costs to

include the costs of three counsel, where three counsel were employed.

P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT (HEADS OF ARGUMENT HAVING BEEN DRAWN BY IVY MALEKA SC, L MORISON SC AND B M SLON)	BOKABA SC AND L MORISON SC
INSTRUCTED BY	BRIAN KHAN INC ATTORNEYS
COUNSEL FOR THE FIRST RESPONDENT	F A SNYCKERS SC AND K SERAFINO-DOOLEY
(HEADS OF ARGUMENT HAVING BEEN DRAWN BY S F BURGER SC, F A SNYCKERS SC AND K SERAFINO-DOOLEY)	
INSTRUCTED BY	CLIFFE DEKKER HOFMEYR INC.