THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 661/2024

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	**FIRST APPLICANT**
AFRICAN DEVELOPMENT BANK	**SECOND APPLICANT**
and	
KALAGADI MANGANESE (PTY) LTD	**FIRST RESPONDENT**
KALAHARI RESOURCES (PTY) LTD	**SECOND RESPONDENT**
KGALAGADI ALLOYS (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Industrial Development Corporation of South Africa Limited and Another v Kalagadi Manganese (Pty) Ltd* (661/2024) [2025] ZASCA 70 (30 May 2025)

Coram: MEYER, MATOJANE, KATHREE-SETILOANE and UNTERHALTER JJA and VALLY AJA

Heard: 3 March 2025

Delivered: 30 May 2025

Summary: Law of Contract – international arbitration agreement – disputes arising out of or in connection with the agreement – must be resolved through arbitration in the United Kingdom - International Arbitration Act 15 of 2017 applies – high court – no jurisdiction to determine disputes.

Diplomatic Privileges and Immunities Act 37 of 2001 – African Development Bank – immune from court's jurisdiction – immunity recognised and enforced through the Diplomatic Privileges and Immunities Act 37 of 2001.

ORDER

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

1 The application for leave to appeal is granted with costs including those of two counsel where so employed.
2 The appeal is upheld with costs including those of two counsel where so employed.
3 The order of the high court is set aside and replaced with the following order:
'1. The application is stayed as against Kalagadi Manganese (Pty) Ltd (Kalagadi Manganese), pending the final determination of the arbitration proceedings in terms of clause 40.2.1 of the Common Terms Agreement.
2. Kalagadi Manganese is ordered to pay the costs of the application including those of two counsel.'

JUDGMENT

Kathree-Setiloane JA (Meyer, Matojane and Unterhalter JJA and Vally AJA concurring):

[1] This is an application for leave to appeal in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) against paragraph 3 of the order of the Gauteng Division of the High Court, Johannesburg, Spilg J sitting as the court of first instance (the high court), dated 6 September 2023. The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.

[2] On 29 April 2020, the first applicant, the Industrial Development Corporation (the IDC) brought an application to place the first respondent, Kalagadi Manganese (Pty) Ltd (Kalagadi) under business rescue in terms of s 131(1) of the Companies Act 71 of 2008, under case number 10228/2020 (the business rescue application). In response, Kalagadi, together with the second and third respondents respectively, Kalahari Resources (Pty) Ltd (Kalahari Resources) and Kalagadi Alloys (Pty) Ltd (Kalagadi Alloys),[1] brought an application in the high court to, *inter alia*, compel the IDC and the second applicant, the African Development Bank (the AfDB),[2] to accept a restructuring arrangement of the debt between Kalagadi and the applicants (the Kalagadi application). The relationship between Kalagadi and the applicants is governed by various contracts; the principal one being the Common Terms Agreement which was concluded on 4 September 2017.

[3] In their answering affidavit, in the Kalagadi application, the applicants raised the following preliminary objections:

'(a) The court is required to stay the exercise of its jurisdiction to determine the merits of the Kalagadi application. Clause 40.2.1 of the Common Terms Agreement provides that any disputes arising out of or in connection with the agreement must be resolved through arbitration in London, United Kingdom, under the International Chamber of Commerce rules [(the ICC Rules)]. The substantive law of the Common Terms Agreement is also English law. Kalagadi's attempt to bypass this arbitration clause and bring the matter before a domestic court contravenes the agreed-upon dispute resolution process.

(b) Kalagadi has failed to follow further formal dispute resolution processes prescribed in the Common Terms Agreement. Clause 15 of the Common Terms Agreement requires that disputes regarding revisions to the Financial Model or Technical and Economic Assumptions must first be negotiated in good faith and, if unresolved, referred to an expert for determination in terms of

[1] Kalagadi, Kalahari Resources and Kalagadi Alloys are collectively referred to as 'the respondents' in the judgment.
[2] IDC and AfDB are collectively referred as 'the applicants' in the judgment.

clause 38 of the Common Terms Agreement. Kalagadi's failure to engage in this expert determination process, opting instead to initiate court proceedings, is a direct violation of the contractually prescribed mechanisms for resolving such disputes.

(c) AfDB, a respondent (and a necessary party) in the Kalagadi application, is immune from the Court's jurisdiction. Under article 52(1) of the AfDB Parent Agreement (given effect to, and recognised, *inter alia*, by article 4 of the AfDB Host Country Agreement), the AfDB is immune from every form of legal process except in cases arising out of its borrowing powers. This immunity has been recognised and enforced through South African law, specifically the Diplomatic Privileges and Immunities Act 37 of 2001 [(the Immunities Act)], pursuant to the Host Country Agreement concluded with the Minister of International Relations and Cooperation of the Government of the Republic of South Africa [(the Minister)].

(d) Since the AfDB is a necessary party to the application and cannot be subject to the jurisdiction of the South African courts, the Court is divested of jurisdiction and the entire application is rendered defective as relief cannot be granted against the AfDB and it cannot otherwise be joined to the proceedings.'

The preliminary objections will be referred to as the arbitral, expert determination and immunity challenges, respectively.

[4] Kalagadi operates a manganese mine in the Northern Cape. It obtained various loan facilities from the applicants for its operation. These facilities were made available to Kalagadi pursuant to the Common Terms Agreement. The total amount owing by Kalagadi is currently in excess of R6 billion.

[5] The IDC is not only a major creditor of Kalagadi, but is also a minority shareholder in Kalagadi, with a 20% shareholding. The major shareholders of Kalagadi are Kalahari Resources and Kgalagadi Alloys. They are not parties to the Common Terms Agreement, but are parties to two separate Guarantee, Pledge and Cession Agreements which were concluded on 14 September 2017 with, *inter alia*, IDC and AfDB, respectively. Pursuant to these agreements, Kalahari Resources and

Kgalagadi Alloys provided security to the applicants, which they could call up in the event of Kalagadi breaching its debt repayment obligations to them, under clause 5 of the Common Terms Agreement. Clause 5[3] regulates Kalagadi's repayment obligations to the applicants.

[6] Kalagadi did not satisfy its obligations under clause 5 of the Common Terms Agreement. The applicants, acting in terms of their powers under clause 24.30,[4] issued separate notices of default to Kalagadi accelerating the entirety of the debt. Kalagadi was obliged to repay the whole debt immediately.

[7] On 29 April 2020, the IDC instituted the business rescue application. At the time, Kalagadi was indebted to the IDC in an aggregate amount of R3,010,341,967.01. This application was struck from the roll on 29 May 2020, for want of urgency. The respondents subsequently brought the Kalagadi application. In addition to an order directing the applicants to restructure their loans to Kalagadi, the respondents also sought an order directing the applicants to consent to the termination of a mining contract concluded with Murray & Roberts Cementation

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[3] Clause 5 of the Common Terms Agreement reads:
'[Kalagadi] shall repay all Utilisations made to it under a Facility Agreement in full, in the amounts and on the dates specified in that Facility Agreement, in accordance with the Priority of Payments and otherwise in accordance with the terms of the Facility Agreement, this Agreement and the Account Bank Agreement.'

[4] Clause 24.30.1 provides (in relevant part) that the Lenders are entitled to take the following action as a result of an event of default:
'. . . .
(*c*) demand repayment of all or part of its share of the Total Outstandings regardless of whether or not the individual amounts of the Total Outstandings are due, all of which amounts shall immediately become due and payable upon such claim; and/or
(*d*) declare that all or part of any Loans is repayable, and any other amounts accrued or outstanding under the Finance Documents are immediately due and payable, whereupon they shall become immediately due and payable; and/or
. . . .
(*g*) take any steps to exercise enforce any rights, remedies, powers or discretions of the Finance Parties under the Security Documents, subject to the Intercreditor Deed; and/or
(*h*) instruct the Borrower to, or enforce, all or any of the Borrower's rights under the Project Documents for which purpose the Borrower irrevocably appoints the Facility Agent as its agents to perform all acts and to sign all documents and all Project Authorisations on its behalf necessary to enforce such rights.'

(Pty) Ltd, which Kalagadi blamed for the business rescue application. They also sought to interdict the applicants from exercising their security rights in terms of clause 1.1.248 of the Common Terms Agreement, consequent upon their default.

[8] On 30 October 2020, Kalagadi launched a further application in which it, *inter alia,* sought a joint hearing of the business rescue and the Kalagadi applications. The high court heard that application on 30 January 2021. On 22 July 2021, it ordered a joint hearing of the two applications on the basis that 'the substantive adjudication of the one [application] involves a consideration of the factors raised in the other, and it may be more convenient not to require their regurgitation simply for the sake of form'. The high court did not order a consolidation of the two applications.

[9] However, on 3 December 2021, the high court heard only the preliminary objections raised in the Kalagadi application and the business rescue application.[5] It did not deal with the merits of these applications. On 6 September 2023, it dismissed the preliminary objections in the Kalagadi application in paragraph 3 of its order. The applicants applied to the high court for leave to appeal this order. It was refused. They subsequently applied to this Court for leave to appeal. The respondents oppose the application.

The Arbitral Challenge

[10] The applicants contend that the high court erred in dismissing this preliminary objection, as the peremptory dispute resolution mechanism in clause 40.2.1 of the Common Terms Agreement is peremptory. Clause 40.2.1 reads:

'Subject to Clause 40.2.10, any dispute arising out of or in connection with [the Common Terms Agreement], including any question regarding its existence, validity or termination, shall be

[5] The business rescue application has been postponed *sine die* (without a date).

referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the ICC) in force at that time (the ICC Rules), which ICC Rules are deemed by reference into this clause 40.2 . . .'

[11] The test for interpreting documents is well established. It is a unitary exercise that involves considering the text, context and purpose of the provision in question.[6] Clause 40.2.1 is unambiguous. It expressly provides that 'any dispute arising out of or in connection with [the Common Terms Agreement]' shall be referred to arbitration and finally resolved by arbitration. The use of the word 'shall' signifies that clause 40.2.1 is peremptory. It provides no scope for the exercise of a discretion. It also imposes no internal substantive limitation on the class of disputes that must be referred to arbitration. This is consistent with the purpose of the clause which is to establish a neutral, efficient, and enforceable dispute resolution mechanism for the resolution of disputes arising from the agreement. Thus, any disputes arising out of or in connection with the Common Terms Agreement must be referred to arbitration for resolution.

[12] The only exception to this rule is in clause 40.2.10 of the Common Terms Agreement.[7] This term of the agreement gives the finance parties (in this case the IDC and AfDB) an election, regardless of whether the borrower has commenced arbitration, to elect by notice in writing to the borrower (Kalagadi) that the dispute shall be resolved by litigation rather than arbitration. Neither of the applicants has made this election. The Kalagadi application concerns alleged breaches, by the

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[6] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).

[7] Clause 40.2.10 of the Common Terms Agreement reads:
'The Borrower agrees for the benefit of the Finance Parties that, at the sole option of the Finance Parties and regardless of whether the Borrower has commenced arbitration proceedings under Clause 40.2.1, the Finance Parties may elect by notice in writing to the Borrower . . . that the Dispute shall be resolved by litigation rather than arbitration. . .'

applicants, of the Common Terms Agreement. These are, manifestly, 'disputes arising out of or in connection with the [Common Terms Agreement]'. Courts of law, therefore, have no jurisdiction to determine these disputes.

[13] In spite of the peremptory dispute mechanism in clause 40.2.1 of the Common Terms Agreement, the high court found that:

(a) the Kalagadi application is responsive to the business rescue application, and, given that the dispute resolution clause is not applicable to the business rescue application, the court has sole jurisdiction in both applications;

(b) the AfDB actively supported the business rescue application and thus cannot now cavil at the respondents raising defences to the business rescue (in the form of the Kalagadi application), even if such issues would otherwise fall to be arbitrated in terms of the Common Terms Agreement;

(c) the respondent parties have a right of access to court under the Constitution, which right may only be limited where it is reasonable to do so; and

(d) the issues, which are the subject matter of the court proceedings, overlap with what may be referred to arbitration and thus the former subsumes the latter, and it does not make sense to refer the issues to arbitration.

[14] The high court erred in arriving at this conclusion, as it failed to consider the parties' clear intention to include an extensive dispute resolution mechanism in the Common Terms Agreement. It, furthermore, simply overlooked that the agreement is an 'international arbitration agreement' which is governed by the International Arbitration Act 15 of 2017 (the IAA). Prior to 20 December 2017, all arbitrations and arbitration agreements, whether domestic or international in character, were governed by the Arbitration Act 42 of 1965 (the Arbitration Act). Since that date, however, international arbitrations are governed by the IAA. Article 1(3) of Schedule

1 to the IAA, states that an arbitration is international if, *inter alia*, the parties to an arbitration agreement have at the time of the conclusion of that agreement, their places of business in different States; or the place of arbitration is different to the State where the parties have their places of business.

[15] The Common Terms Agreement is an international arbitration agreement as the AfDB has its offices in Abidjan and Côte d'Ivoire, whereas Kalagadi, ABSA[8] and the IDC have their places of business in South Africa. Additionally, the agreed place of arbitration in the agreement is London. The IAA clearly applies in this matter. Counsel for the respondents conceded as much during oral argument in this Court.

[16] In terms of article 8(1) of Schedule 1 to the IAA, '[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. The IAA heightens the stringent standard that a party wishing to escape an arbitration agreement must meet, before a court would entertain the matter. This is in step with the modern approach to arbitration clauses which is 'to respect the parties' autonomy in concluding the arbitration agreement, and to minimise the extent of judicial interference in the process'.[9]

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[8] ABSA is a lender under the Common Terms Agreement but is not cited as a respondent in the Kalagadi application.
[9] *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd,* 2011 (3) SA 631 (KZD); [2011] 3 All SA 204 (KZD) para 13 citing *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Mphaphuli*) para 219.

[17] The high court, however, failed to apply the test prescribed in the IAA. Mistakenly, it referenced the Arbitration Act in its judgment and applied an 'interests of justice' test to conclude that it has a wide discretion in this matter. Yet even under that Act, the test is stringent.[10]

[18] There was some debate on whether the applicants relied on article 8(1) of Schedule 1 to the IAA in argument before the high court. The respondents were adamant that the applicants had not, hence we should not assail the high court for failing to apply this provision. This submission is misplaced. The high court was confronted with a preliminary objection to its jurisdiction to determine the dispute between the parties. In terms of clause 40.2.1 of the Common Terms Agreement, the high court was required to determine whether the arbitration clause was of appreciation. The applicants' omission to deal with the IAA pertinently, during argument in the high court, did not absolve the court from doing so. A court has a duty to determine its own jurisdiction, quite apart from the parties' submissions to the Court.

[19] The high court erred for the further reason that it considered the Kalagadi and the business rescue applications as having overlapping issues. The Kalagadi application is distinct from the business rescue application. It is brought under a separate case number from the business rescue application and is not a counter application to the latter. This is, perhaps, why the high court did not make an order consolidating the two applications. Besides the relief sought in the Kalagadi

[10] In terms of s 3 of the Arbitration Act, a Court could overlook an arbitration agreement on 'good cause' being established. This open-ended standard was interpreted restrictively in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) paras 36-7, where the Constitutional Court held that 'the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out . . . [a]bsent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists'.

application is not dependent on the outcome of the business rescue application. The relief sought, and issues raised, in the Kalagadi application are founded on purported breaches of the Common Terms Agreement.

[20] Even if there are overlaps between the two applications, this does not render the dispute resolution mechanisms in the Common Terms Agreement inapplicable to disputes arising therefrom. The relief sought in the business rescue application and the Kalagadi application are dissimilar. Each of these proceedings may take its own course without requiring the high court to assume jurisdiction over the arbitration proceedings. The business rescue proceedings are clearly not a basis for disregarding or bypassing the arbitration agreement.

[21] The business rescue application would bring about an entirely different statutory regime in respect of Kalagadi. Importantly, in this regard, it will place Kalagadi under independent oversight and temporarily halt certain enforcement action against it, without absolving it from any breach. By comparison, the relief which Kalagadi seeks in the Kalagadi application is effectively an injunction against the exercise of the applicants' contractual rights. This relief must be sought in the correct forum - the contractually agreed arbitration process.

[22] The high court also erred in placing emphasis on Kalagadi's lack of legal remedies. It has remedies in terms of the contractually agreed dispute resolution clause in the Common Terms Agreement. Kalagadi expressly agreed, in that agreement, not to exercise its right to access to court in terms of s 34 of the Constitution. As held by the Constitutional Court in *Mphaphuli*[11] 'the decision to

[11] Ibid at paras 216-217.

refer a dispute to arbitration, as long as it is voluntarily made, should be respected by the courts.[12]

[23] The high court found that AfDB supported the business rescue application and is therefore precluded through its conduct from invoking its immunity or the arbitration agreement under the Common Terms Agreement. The high court erred in this respect, as there is no factual basis for this finding on the papers. Equally, it erred in concluding that the IDC cannot simultaneously invoke the business rescue application and raise the preliminary objections. Nothing stopped the IDC from doing so. It raised the preliminary objections as a defence in the Kalagadi application, whereas it seeks a different remedy in the business rescue application.

[24] The Kalagadi parties seek to escape the peremptory dispute resolution clause by contending that the Guarantee, Pledge and Cession Agreements are implicated in this matter. They argue that these agreements would expose Kalahari Resources and Kalagadi Alloys (the Kalagadi majority shareholders) to liability, should the applicants not be interdicted from enforcing their security rights in the high court. As mentioned, these shareholders are not party to the Common Terms Agreement but rather to two different Guarantee, Pledge and Cession Agreements. Although they do not allege that the applicants have breached these agreements, they, nonetheless, believed, rightly or wrongly, that as Kalagadi was not in a position to pay the debt to the applicants, they would likely call up their guarantees.

[25] In my view, Kalahari Resources and Kgalagadi Alloys were not required to wait for the applicants to call up the guarantees before seeking interdictory relief,

[12] Ibid at para 219.

which they could only seek from the high court, under the Guarantee, Pledge and Cession Agreements. A referral to arbitration of the interdictory relief they seek in the Kalagadi application will, therefore, deny them the right to seek relief, in the high court, to interdict the applicants from enforcing their security rights in terms of those agreements. It must be emphasised, however, that the security arrangement under these agreements have no bearing on the enforceability of the peremptory arbitration clause as between Kalagadi and the applicants.

[26] Kalagadi contends that the IDC's constitutional and statutory obligations preclude it from entering into an arbitration agreement. This contention is unsustainable. The IDC's primary mission is to promote economic growth and industrial development in South Africa. Lending money is a key tool for achieving this objective.[13] There are no legal barriers that preclude the IDC from agreeing to the arbitration process to resolve disputes, when concluding loan agreements. Public bodies, routinely, enter into such agreements and participate in arbitrations in South Africa. Section 5 of the IAA expressly recognises the binding nature of arbitration agreements on public bodies, such as the IDC, in international commercial arbitrations.[14]

The Immunity Challenge

[27] In relation to this ground of appeal, the applicants contend that AfDB enjoys immunity from legal process and the high court erred in concluding that it has

[13] Sections 4(*b)* and *(c)* of the Industrial Development Corporation Act 22 of 1940 specifically give the IDC the authority to lend money to companies and acquire shares in those companies.

[14] Section 5 of the IAA provides: '[the IAA] binds public bodies and applies to any international commercial arbitration in terms of an arbitration agreement to which a public body is a party'. A 'public body' is defined in the IAA to include provincial and national departments, municipalities and 'any other functionary or institution when exercising a public power or performing a public function in terms of . . . any legislation'.

jurisdiction over it.[15] The applicants found this challenge on the AfDB Parent Agreement and the AfDB Host Country Agreement. The AfDB was established in terms of the AfDB Parent Agreement that was signed in Khartoum on 4 August 1963. South Africa became a member of the AfDB on 13 December 1995.

[28] In terms of article 52(1) of the AfDB Parent Agreement, the AfDB is immune 'from every form of legal process except in cases arising out of the exercise of its borrowing powers'. The AfDB Host Country Agreement was agreed to by the Republic of South Africa and published in Government Notice 916, *Government Gazette* 32579 of 18 September 2009. It conferred the relevant immunities on the AfDB.[16] Article 4 of the Host Country Agreement provides that 'the [AfDB] shall be immune from every form of legal process and may only be sued in accordance with paragraph 1 of article 52 of [the AfDB Parent Agreement]'.

[29] The AfDB's privileges and immunities are recognised by the Minister under s 5(3) and 7(1) of the Immunities Act. The high court held, to the contrary, that the AfDB was not immune in the Kalagadi application, as such immunity had not been incorporated into South African law as required under s 231(2) of the Constitution. This section provides that '[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National

[15] Should the applicants succeed in this challenge, AfDB's immunity would not only preclude it from being party to the Kalagadi application. Since it is a necessary party to the proceedings, not only can no relief be granted against it, but the entire application would be stillborn. In *Absa Bank Limited v Naude NO and Others*[15], this Court held that 'if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined before the court can proceed to adjudicate the dispute'. If the court has no jurisdiction over a necessary party, then it cannot adjudicate the matter.

[16] This was recognised by the republication of the Host Country Agreement (with a protocol) by the Minister in the Government Gazette on 10 November 2017 (GN 1233; GG 41237). The official Department of International Relations and Co-operation's treaty register confirms the amended Host Country Agreement, which amended and reincorporated the original Host Country Agreement of 2009, subject to amendments that are not relevant to this matter. It came into force in South Africa on 18 August 2017.

Council of Provinces, unless it is an agreement referred to in section 3'. This section is not applicable, as immunity from legal process is sourced not from s 231 of the Constitution, but rather in the Immunities Act, and its consequent recognition by the Minister. Sections 5(3) and 7(1) of the Immunities Act provide:

'5(3) any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).

. . . .

7(1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*.'

[30] These provisions give the Minister the power to recognise organisations for the purposes of conferring immunities. The Minister may then enter into an agreement with the recognised organisations which confer those immunities or, in the absence of agreement, simply confer them unilaterally in terms of s 7(2) of the Immunities Act.[17] Parliament has specifically assigned these powers and duties to the Minister.

[31] Since the immunities and privileges are incorporated into domestic law through the Immunities Act, there is no need for additional ratification by Parliament. In addition, the Immunities Act has been invoked on several occasions and remains on our statute books. Its constitutionality has not been successfully challenged. Nor has the Minister's power to confer immunity in terms of s 7(2) of

[17] Section 7(2) of the Immunities Act provides:
'The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*.'

the Immunities Act. The Immunities Act is, therefore, enforceable in its terms.[18] Consequently, s 231(2) of the Constitution is inapplicable.

[32] As indicated above, in terms of article 52 of the AfDB Parent Agreement, the AfDB is immune from every form of legal process, except in cases arising out of the exercise of its borrowing powers. Since, this case involves the exercise AfDB's lending powers and not its borrowing powers, legal immunity applies to AfDB. The applicants, however, argue that under the Common Terms Agreement, the AfDB only consented to being sued by way of the arbitral procedure in clause 40.2.1 or the expert procedure in clause 38. These clauses, so they contend, are significant because although the AfDB has immunity, they still provide Kalagadi with legal recourse should they breach the Common Terms Agreement.

[33] However, as correctly pointed out by the respondents, what the applicants fail to address is clause 40.2.9 of the Common Terms Agreement which nullifies clauses 40.2.1 and clause 38, to the extent that they apply to the AfDB. Clause 40.2.9 precludes the respondents from ever proceeding against AfDB. It reads:

'The parties hereby acknowledge and agree that nothing contained in this Agreement, or any other Finance Document shall be construed *as a waiver, renunciation or other modification of any privileges, immunities and exemptions accorded to AfDB under the AfDB Charter, international law or any other law applicable or applicable international treaties or customs, including without limitation . . . the immunity of AfDB from all forms of legal processes . . . .'* (My emphasis.)

[34] Although this issue was raised by the respondents in their answering affidavit, the applicants failed to deal with it in reply or in their heads of argument. However,

[18] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC); *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24.

at the hearing in this Court, counsel for the applicants waived reliance on clause 40.2.9 in so far as it applies to its immunity in the arbitral process in terms of clause 40.2.1 of the Common Terms Agreement. The effect of this waiver is that Kalagadi may proceed against AfDB in arbitration proceedings envisaged in clause 40.2.1 of the agreement but may not do so in a court of law. In other words, AfDB will not raise immunity in the arbitration proceedings. Consequently, the issue of non-joinder will not arise.[19]

[35] In the circumstances, there is no obstacle to staying the Kalagadi application for purposes of referral of the dispute to arbitration in terms of clause 40.2.1 of the Common Terms Agreement. The stay of the Kalagadi application will not non-suit Kalahari Resources and Kgalagadi Alloys. They have their remedies in terms of the Guarantee, Pledge and Cession Agreements which they may enforce in the high court. In view of the conclusion that I have arrived at; I will not consider the remaining preliminary objection concerning clause 38 of the Common Terms Agreement.

[36] For all these reasons, the high court has no jurisdiction to determine the Kalagadi application. In the circumstances, the application for leave to appeal must be granted and the appeal upheld.

[37] In the result, it is ordered that:

1 The application for leave to appeal is granted with costs, including those of two counsel where so employed.

2 The appeal is upheld with costs including those of two counsel where so employed.

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[19] See fn 17.

3 The order of the high court is set aside and replaced with the following order:

'1. The application is stayed as against Kalagadi Manganese (Pty) Ltd (Kalagadi Manganese), pending the final determination of the arbitration proceedings in terms of clause 40.2.1 of the Common Terms Agreement.

2. Kalagadi Manganese is ordered to pay the costs of the application, including those of two counsel.'

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F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances

For the appellants:	A E Franklin SC and M Mbikiwa
Instructed by:	Webber Wentzel, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondents:	A Gautschi SC, N Luthuli, O Motlhasedi and M Salukazana
Instructed by:	Harris Nupen Molebatsi Inc, Johannesburg
	Mayet & Associates, Bloemfontein.