IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: ____________

In the matter between:

BLACK ROCK MINING LTD	Applicant
and	
NKOSANA KENNETH MAKATE	First Respondent
STEMELA & LUBBE INCORPORATED	Second Respondent
VODACOM (PTY) LTD	Third Respondent

NOTICE OF MOTION

PART A

TAKE NOTICE THAT Black Rock Mining Ltd (hereinafter called **the applicant**) intends to make application to this Court on Thursday 13 November 2025 at 10:00 or as soon thereafter as counsel may be heard for an order in the following terms:

1. This application is enrolled as an urgent application in terms of the provisions of Uniform Rule of Court 6(12), and the applicant's non-compliance with forms,

service and time periods as provided for in the Uniform Rules of Court is condoned.

2. Pending final determination of Part B of this application:

2.1 The third respondent is interdicted and restrained from making payment in respect of any award/settlement concluded between the first respondent and the third respondent pursuant to the so-called "*Please Call Me*" litigation, into any bank account other than the trust bank account of the second respondent.

2.2 The second respondent shall hold 40% of the total proceeds received, or to be received, on behalf of the first respondent from the third respondent, in its trust account.

2.3 The second respondent is interdicted and restrained from paying out the 40% of the proceeds being held by it in trust.

2.4 The second respondent shall provide to the applicant a full and transparent disclosure of the settlement quantum, terms, conditions, payment timelines and the account to which payment is to be, alternatively was, made.

3. The costs of Part A of this application are reserved for determination at the hearing of Part B hereof.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **ERROL ELSDON** together with the annexures thereto will be used in support hereof.

TAKE NOTICE FURTHER THAT the applicant has appointed **SN MNGUNI ATTORNEYS INC** of Block A, Unit 8, Upper Grayston Office Park, 150 Linden Street, Simba, Sandton and email address sinen@mnguniinc.co.za at which it will accept notice and service of all process in these proceedings. Take notice that the applicant's preferred method of service is at the aforementioned email address.

TAKE NOTICE FURTHER THAT if any of the respondents intend opposing Part A of this application, such respondents are required: -

(a) to notify the applicant's attorneys in writing on or before 10:00 on Wednesday 12 November 2025 of their intention to do so; and

(b) to deliver their answering affidavits, if any, on or before 16:00 on Wednesday 12 November 2025, pursuant to which the applicant will deliver its replying affidavit by 08:00 on Thursday 13 November 2025; and

(c) to appoint in their notification of intention to oppose an address as referred to in Rule 6(5)(b) at which they will accept notice and service of all documents in these proceedings, which may include an email address.

KINDLY place the matter on the roll accordingly.

PART B

TAKE NOTICE THAT Black Rock Mining Ltd (hereinafter called **the applicant**) intends to make application to this Court on Thursday 2 December 2025 at 10:00 or as soon thereafter as counsel may be heard for an order in the following terms:

1. This application is enrolled as an urgent application in terms of the provisions of Uniform Rule of Court 6(12), and the applicant's non-compliance with forms, service and time periods as provided for in the Uniform Rules of Court is condoned.

2. Pending final determination of an action to be instituted by the applicant within 30 (thirty) days of date of this order:

   2.1. The third respondent is interdicted and restrained from making payment in respect of any award/settlement concluded between the first respondent and the third respondent pursuant to the so-called *"Please Call Me"* litigation, into any bank account other than the trust bank account of the second respondent.

   2.2. The second respondent shall hold 40% of the total proceeds received, or to be received, on behalf of the first respondent from the third respondent in its trust account pending final determination of the applicant's claim against the first respondent.

2.3. The second respondent is interdicted and restrained from paying out the 40% of the proceeds being held by it in trust.

2.4. The second respondent shall provide to the applicant a full and transparent disclosure of the settlement quantum, terms, conditions, payment timelines and the account to which payment is to be, alternatively was, made.

3. The costs of this application, including the costs of two counsel, shall be paid by those respondents that oppose the interim relief sought herein on Scale C.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **ERROL ELSDON** together with the annexures thereto will be used in support hereof.

TAKE NOTICE FURTHER THAT the applicant has appointed **SN MNGUNI ATTORNEYS INC** of Block A, Unit 8, Upper Grayston Office Park, 150 Linden Street, Simba, Sandton and email address sinen@mnguniinc.co.za at which it will accept notice and service of all process in these proceedings. Take notice that the applicant's preferred method of service is at the aforementioned email address.

TAKE NOTICE FURTHER THAT if any of the respondents intend opposing Part B of this application, such respondents are required: -

(a) to notify the applicant's attorneys in writing on or before 16:00 on Thursday 13 November 2025 of their intention to do so; and

(b) to deliver their answering affidavits, if any, on or before 16:00 on Friday 21 November 2025, pursuant to which the applicant will deliver its replying affidavit by 16:00 on Wednesday 26 November 2025, in order for the matter to be ripe for fnal enrolment by noon on Thursday 27 November 2025; and

(c) to appoint in their notification of intention to oppose an address as referred to in Rule 6(5)(b) at which they will accept notice and service of all documents in these proceedings, which may include an email address.

KINDLY place the matter on the roll accordingly.

DATED AT JOHANNESBURG ON THIS 11TH DAY OF NOVEMBER 2025.

SN MNGUNI ATTORNEYS INC
Block A, Unit 8
Upper Grayston Office Park
150 Linden Street
Simba, Sandton
Email address sinen@mnguniinc.co.za
Ref: Mr S Mnguni/SM/B0014/24

TO:

THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
JOHANNESBURG

AND TO:

NKOSANA KENNETH MAKATE
First Respondent
Garsfontein Road

Waterkloof
Pretoria
AND:
STEMELA & LUBBE INCORPORATED
On behalf of the First Respondent
Email: wilna@stemelalubbe.co.za
sonja@stemelalubbe.co.za

AND TO:

STEMELA & LUBBE INCORPORATED
Second Respondent
889 Justice Mahomed Street
Brooklyn
Pretoria
Email: wilna@stemelalubbe.co.za
sonja@stemelalubbe.co.za

AND TO:

VODACOM LTD
Third Respondent
Vodacom Corporate Park
082 Vodacom Boulevard
VodaValley
Midrand
AND:
LESLIE COHEN & ASSOCIATES
On behalf of the Third Respondent
Email: les&lhlaw.co.za

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: ______________

In the matter between:

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and	
NKOSANA KENNETH MAKATE	First Respondent
STEMELA & LUBBE INCORPORATED	Second Respondent
VODACOM (PTY) LTD	Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ERROL ELSDON

do hereby make oath and state that:

1. I am a major businessman, a former director of the applicant (**"Black Rock"**), *domiciled* at 1 Sterling Street, London SW7, United Kingdom.

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2. The content hereof is, save where otherwise stated or indicated to the contrary, within my personal knowledge and belief and is true and correct.

3. I am duly authorised on behalf of Black Rock to instruct attorneys, depose to affidavits, and generally to do all things necessary to prosecute this application to finalisation.

PARTIES

4. The applicant is **BLACK ROCK MINING LTD**, a company with limited liability duly registered in accordance with the laws of the British Virgin Islands ("**BVI**"), with its registered address and its registered agent, as required by the laws of the BVI, at Trident Trust Company (BVI) Ltd, Trident Chambers, PO Box 146, Road Town, Tortola, British Virgin Islands.

5. The first respondent is **NKOSANA KENNETH MAKATE**, a major male accountant with place of employment at the South African Local Government Association, Garsfontein Road, Waterkloof, Pretoria. The first respondent ("**Mr Makate**") has at all relevant times in the litigation referred to hereinafter, been represented by his attorneys, the second respondent ("**Stemela & Lubbe**"). A copy of this application will therefore also be electronically served on Mr Makate through his attorneys.

6. The second respondent is **STEMELA & LUBBE INCORPORATED**, a personal liability company registered and incorporated in terms of the company laws of

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the republic of South Africa, carrying on business as a firm of attorneys at 889 Justice Mahomed Street, Brooklyn, Pretoria.

7. The third respondent is **VODACOM (PTY) LTD**, a private company with limited liability registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at Vodacom Corporate Park, 082 Vodacom Boulevard, VodaValley, Midrand.

8. The third respondent (**"Vodacom"**) has, throughout the litigation proceedings that I elaborate upon below, been represented by Attorneys Leslie Cohen & Associates. A copy of this urgent application is therefore also electronically served on Leslie Cohen & Associates.

NATURE OF APPLICATION

9. This is an urgent application, brought in two parts, in which Black Rock applies for interim relief that would safeguard certain funds – part of the proceeds of litigation funded by Black Rock – pending final determination (by way of action) of Black Rock's entitlement to the funds in question.

10. In terms of Part A, brought as a matter of extreme urgency, Black Rock seeks nothing other than to preserve the status *quo* for a period of three weeks, until such time as a fuller ventilation of the issues and Black Rock's entitlement to interim relief can take place.

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11. Part B of the relief is also interim in nature, but is envisaged to have longer effect, since it will be in place to secure the funds pending final determination of action proceedings to be instituted by Black Rock within 30 days of an order granted in terms thereof.

12. Shortly stated, Black Rock is contractually entitled to payment of 40% of all proceeds (including any settlement amount) paid, or to be paid, by Vodacom to Mr Makate flowing from litigation instituted by Mr Makate against Vodacom in 2008.

13. It recently came to Black Rock's knowledge that Vodacom and Mr Makate had concluded a settlement in respect of the litigation, the quantum of which settlement possibly runs into hundreds of millions of Rands.

14. There is prima facie proof, dealt with below, that Black Rock's contractual entitlement will be frustrated and that it will be sidelined once the payment is made by Vodacom to Mr Makate.

15. Upon gaining knowledge of the settlement Black Rock therefore forthwith sought an undertaking:

    15.1. from Vodacom to the effect that Vodacom will not pay the award to any account other than the trust bank account of Stemela & Lubbe; and

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15.2. from Stemela & Lubbe, that it will hold in trust 40% of the total proceeds received, or to be received, on behalf of Mr Makate from Vodacom, and that it will continue to hold this amount in trust pending final determination of Black Rock's claim against Mr Makate.

16. Vodacom responded by indicating that it did not wish to become embroiled in litigation between Black Rock and Mr Makate, and that it will abide with any order issued by a competent court. This obviously implies that Black Rock has to obtain a court order along the terms prayed for herein in order to ensure that the settlement amount from Vodacom is not paid into any account other than Stemela & Lubbe's trust account.

17. Stemela & Lubbe bluntly refused the undertaking, and disputes Black Rock's contractual entitlement relied upon herein. Quite obviously, this is a dispute that has to be ventilated in action proceedings.

MATERIAL BACKGROUND FACTS

18. Mr Makate is a former employee of Vodacom.

19. During 2000 Mr Makate came up with an idea in terms of which a cell phone user who has no airtime would be able to send a request to another cell phone user who has airtime, to call the former. The idea was reduced to writing and Mr Makate consulted a superior at Vodacom for advice on how to sell the idea to any of the cell phone providers, including Vodacom. Mr Makate was advised

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to speak to Vodacom's then director of product development and management, a Mr Geissler.

20. Mr Makate and Mr Geissler negotiated and reached agreement that Vodacom would use Mr Makate's idea to develop a new product which would be put on trial for commercial viability. If the product was successful, Mr Makate would be paid a share in the revenue generated by it. Mr Makate and Vodacom deferred their negotiations on the amount to be paid to Mr Makate to a later date. However, they agreed that in the event of them failing to agree on the amount, Vodacom's Chief Executive Officer would determine the amount.

21. Based on Mr Makate's idea Vodacom developed a new product called *"Please Call Me"*. The product was instantly successful and generated a lot of revenue for Vodacom. Despite this, Vodacom did not negotiate compensation for the use of Mr Makate's idea.

22. Pursuant to having left Vodacom's employ, Mr Makate instituted an action in the High Court of South Africa, Gauteng Local Division, Johannesburg, seeking an order directing Vodacom to comply with its obligations in terms of the parties' oral agreement. Whilst upholding Mr Makate's version of the agreement concluded between himself and Mr Geissler acting for Vodacom, Mr Makate's claim was dismissed on 1 July 2014 given that the High Court found that Mr Makate had failed to prove that Mr Geissler had authority to

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conclude the agreement on Vodacom's behalf, and given that the High Court concluded that Mr Makate's claim had prescribed.

23. Mr Makate eventually successfully appealed the dismissal of his claim to the Constitutional Court. On 26 April 2016 the Constitutional Court granted judgment in Mr Makate's favour in the following terms:

> "1. Leave to appeal is granted.
>
> 2. The appeal is upheld.
>
> 3. The order of the Gauteng Local Division of the High Court, Johannesburg is set aside and replaced with the following order:
>
> '(a) *It is declared that Vodacom (Pty) Ltd is bound by the agreement concluded by Mr Kenneth Nkosana Makate and Mr Philip Geissler.*
>
> *(b) Vodacom is ordered to commence negotiations in good faith with Mr Kenneth Nkosana Makate for determining a reasonable compensation payable to him in terms of the agreement.*
>
> *(c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's chief executive officer for determination of the amount within a reasonable time.*
>
> *(d) Vodacom is ordered to pay the costs of the action, including the costs of two counsel if applicable, and the costs of the expert, Mr Zatkovich.'*
>
> 4. The negotiations mentioned in 3(b) must commence within 30 calendar days from the date of this order.
>
> 5. Vodacom is ordered to pay the applicant's costs of this court and the Supreme Court of Appeal, which include costs of two counsel, where applicable."

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24. Pursuant to the Constitutional Court order, Mr Makate and Vodacom commenced with negotiations, but could not reach consensus on the amount of compensation. Consequently, in terms of paragraph (c) of the Constitutional Court order quoted above, the CEO of Vodacom was tasked with determining the amount of compensation. The CEO awarded Mr Makate compensation in the amount of R47 million.

25. Mr Makate, dissatisfied with the amount of compensation, instituted review proceedings in the High Court against the amount decided upon by the CEO. The matter has been in and out of the Courts since, with various orders and directives being granted on how Mr Makate's compensation should be calculated. I am not going to burden the urgent court with and extensive renditions of the various orders granted, and appeals against orders, since April 2016.

26. The matter finally came before the Constitutional Court again in November 2024, culminating in a judgment granted on 31 July 2025 once more remitting the matter back to the Supreme Court of Appeal.

27. The litigation has however now been overtaken by a settlement between Mr Makate and Vodacom, as dealt with below.

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THE FUNDING AGREEMENT

28. My business interests include litigation funding, in which I have been involved in through various entities for many years.

29. Summarised, litigation funding amounts to a model in terms of which a third party provides financial support to a claimant or a legal entity to cover the costs of pursuing litigation. In return, the funder receives an agreed share of any proceeds recovered if the case is successful, but bears the risk of loss should the case fail. This arrangement enables parties who may not have the resources to pursue valid claims to pursue such claims, whilst allowing the funder to profit from the outcome.

30. During about November 2011 I was introduced to Mr Makate by the late Christiaan Schoeman, an erstwhile advocate of the High Court. Mr Schoeman had apparently either been struck off the roll, or had his name removed from the roll of advocates, as far back as 1998.

31. Mr Schoeman informed me that Mr Makate was in need of financial support for his litigation against Vodacom, which had been dragging since 2008. I informed Mr Schoeman that I would be interested to put together funding for the litigation.

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32. On 7 November 2011 and at Pretoria Mr Schoeman, acting for a company to be formed, and Mr Makate representing himself, concluded a written funding agreement ("**the funding agreement**").

33. A copy of the funding agreement is attached hereto marked **BRM1**. The content thereof will be relied upon in argument.

34. The relevant material express terms of the funding agreement were that:

34.1. It was recorded that Mr Makate had instituted action against Vodacom.

34.2. It was recorded that Mr Schoeman was concluding the agreement in his capacity as an authorised representative of a company yet to be nominated (referred to throughout the funding agreement as **the Company**).

34.3. The Company would fund all legal costs and expenses reasonably necessary to prosecute the claim instituted by Mr Makate against Vodacom.

34.4. The Company indemnified Mr Makate against all and any claims which could be instituted against him during the course of the litigation, including any adverse costs orders.

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34.5. The Company would deposit with the attorneys (the second respondent, Stemela & Lubbe) sufficient funds as reasonably required and requested from time to time to finance the litigation, within ten days of being requested to do so.

34.6. The Company undertook to pursue the litigation to the best of its abilities.

34.7. In consideration for funding the litigation and taking the associated risk, the Company would be entitled to control and direct the litigation, and to appoint its own legal team to present the action to court.

34.8. Where the matter is settled by negotiation and agreement, neither Mr Makate or the attorneys would be entitled to effect settlement without the written consent and approval of the Company, unless the amount payable in terms of such settlement agreement exceeded R650,000,000.00.

34.9. Upon conclusion of the matter, whatever award is made and recovered by Mr Makate from Vodacom, would be paid to Stemela & Lubbe's trust account.

34.10. Stemela & Lubbe would be instructed to divide the recovered amount in such a manner that Mr Makate would receive 60% thereof, and the Company would receive 40%.

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34.11. Any legal costs recovered from Vodacom due to favourable costs orders awarded to Mr Makate during the course of the litigation, would not form part of the award and would be retained by the legal team.

34.12. In the event of there being any dispute or difference between the parties arising out of the funding agreement, the said dispute or difference would on written demand by any party be submitted to informal arbitration in Pretoria, which arbitration needs to be finalised within one month on date of declaration of a dispute.

IMPLEMENTATION OF THE FUNDING AGREEMENT

35. After the conclusion of the funding agreement, and in terms of the provisions of the funding agreement, Stemela & Lubbe were appointed as Mr Makate's attorneys.

36. On the advice of Mr Schoeman, Mr Makate's claim in the litigation was substantially reformulated, and Ms Wilna Lubbe of Stemela & Lubbe provided an estimate of the litigation costs amounting to R750,000.00.

37. I raised an initial sum of R500,000.00 through investments made by myself, Mr Schoeman and Ms Tracy Roscher. This amount was paid to Ms Lubbe in respect of Mr Makate's fees.

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38. In July 2013 myself, Mr Schoeman and Ms Roscher travelled to the Isle of Wight to consult with Mr Makate's former manager, Mr Lazarus Muchenje (pertinently referenced in the judgments in the litigation between Mr Makate and Vodacom) and persuaded him to testify on Mr Makante's behalf. Without Mr Muchenje's evidence it is highly doubtful that Mr Makate's claim would ultimately have been successful.

39. In July 2013 Ms Lubbe advised me that further funding was required given that the initial amount of R500,000.00 had been exhausted. Utilising my existing contacts and networks it became clear that the funding would primarily be sourced funders in the United Kingdom through various offshore entities. Mr Schoeman and I determined that funding would be housed in an offshore entity.

40. I decided that I would utilise Black Rock, a company of which I was the sole shareholder and director for this purpose.

41. On or about 18 July 2013 Mr Schoeman therefor appointed Black Rock as the nominated company in terms of the funding agreement.

42. I raised £250,000.00 (approximately R3,750,000.00 at that point in time) from a London investor, the Global Distressed Alpha Fund III represented by its agent, Simba Capital VIII Sàrl. The written memorandum of agreement for

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these funds is attached marked **BRM2**. This confirms conclusively that Black Rock was indeed appointed as nominated company.

43. In total, an amount of R4,390,000.00 was raised and applied to fund the litigation. Of this, R2,400,000.00 was paid to Stemela & Lubbe in respect of fees disbursements, with the balance applied to counsel, expert witnesses and litigation expenses.

44. It is therefore undisputed that Black Rock became a party to the funding agreement, and acquired the rights and obligations as provided for in terms thereof. Had it not been for my efforts and the funding raised in terms of the funding agreement, Mr Makate's litigation against Vodacom would never have progressed and there would have been no settlement.

THE TEMPORARY DEREGISTRATION OF BLACK ROCK

45. On 30 April 2014 Black Rock was deregistered by the BVI registrar of companies, owing to an inadvertent administrative failure to pay annual registration fees, notwithstanding that Black Rock remained actively engaged in the litigation funding through myself, and continued to hold beneficial rights under the funding agreement.

46. Mr Makate was aware of an acquest in the continuation of the funding agreement through Black Rock, despite Black Rock's temporary deregistration, as is evidenced by:

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46.1. his continued acceptance of funding provided through the funding agreement; and

46.2. his continued participation in the litigation funded under the funding agreement.

47. On 14 December 2020 Black Rock was restored to the company's register, in terms of section 218 of the BVI Business Companies Act, which provides as follows:

> "218(3) Where a company has been restored to the Register under this section, the company is deemed never to have been dissolved or struck off the Register."

48. In the premises Black Rock's temporary deregistration did not, and does not, affect its rights in terms of the funding agreement.

THE ARBITRAL AWARD CONFIRMING A VALID NOMINATION OF BLACK ROCK IN TERMS OF THE FUNDING AGREEMENT

49. During April 2014 Mr Schoeman and Mr Makate purported to conclude a written addendum to the funding agreement. A copy of the purported addendum is attached marked **BRM3.**

50. The purported addendum professed:

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50.1. to amend the funding agreement by changing the proportioned shares in the litigation from 60% in favour of Mr Makate and 40% in favour of the company nominated, to 50% in favour of each Mr Makate and the nominated company;

50.2. to nominate a company known as Raining Men Trade (Pty) Ltd, of which I was also a director, as the nominated company in terms of the funding agreement.

51. On the advice of Mr Schoeman I accepted that this nomination was valid. I was however wrong, given the outcome of the arbitration proceedings referred to below.

52. Mr Makate challenged the validity of the addendum.

53. This led to arbitration proceedings, in terms of clause 11 of the funding agreement, in which Raining Men claimed to be the nominated company in terms of the funding agreement and in which Raining Men sought declaratory relief to this effect.

54. During these arbitration proceedings Mr Makate himself testified that Black Rock was in fact the validly nominated company in terms of the funding agreement.

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55. In this regard I attach an extract from the transcript of arbitration proceedings marked **BRM4** from which Mr Makate's evidence under oath is evident. The relevant exchange goes as follows:

> "<u>Mr J Crouse:</u> Was...who was the funder, at that stage, according to your knowledge?
>
> <u>Mr KN Makate:</u> Ja, I mean...according to my knowledge Chris had always obviously painted himself as a funder, but at that point I had known that a company called Black Rock was indeed nominated and funding my litigation."

56. The arbitrator, Mabena SC, found that:

56.1. the addendum dated 25 April 2014 purporting to nominate Raining men was fraudulent;

56.2. Raining Men obtained no rights under the funding agreement;

56.3. with regard to Black Rock:

> " 1. There was no valid nomination of Raining Men (Pty) Ltd and it obtained no rights and obligations in terms of the funding agreement or alleged nomination agreement. Raining Men has no locus standi for any claim against Mr Makate.
>
> 2. The only valid nomination which was made in terms of the funding agreement was the nomination of Black Rock Ltd, which company has been finally deregistered in the British Virgin Islands. Such nomination was never cancelled in writing or otherwise, nor was there any transfer of its rights that it obtained in terms of the nomination agreement.

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> 3. Mr Schoeman as First Claimant cannot have the rights devolved upon him as a Claimant or party to the funding agreement after the nomination of Black Rock Ltd and further to nominate any party such as Raining Men (Pty) Ltd as a party to the funding agreement."

57. A copy of Mabena SC's ruling and award, as well as his subsequently published reasons for his award are attached marked **BRM5**. The contents of these documents will be relied upon in argument.

58. The issue as to which company was appropriately nominated in terms of the funding agreement, has therefore been finally determined. It is Black Rock, and no other.

ATTEMPTS TO SIDELINE BLACK ROCK

59. There have, since 2015, been various attempts to sideline myself and Black Rock. These attempts will obviously form the subject matter of the action to be instituted as contemplated in Part B of the notice of motion in this application, suffice to say that there has never been an effective termination of the funding agreement addressed to Black Rock.

60. Mr Schoeman and Ms Lubbe from Stemela & Lubbe, who were at some stage during this saga involved in a romantic relationship, were the main protagonists behind these attempts.

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61. Mr Schoeman ultimately instructed a firm of attorneys, Hahn & Hahn, to ostensibly act on behalf of Mr Makate and to purportedly terminate the funding agreement.

62. The highwater mark of these attempts occurred on 12 January 2015 when Hahn & Hahn wrote correspondence to attorneys Wertheim Becker Incorporated (acting for Raining Men Trade) purporting to terminate the agreement. A barely legible copy of this letter is attached marked **BRM6**.

63. There was therefore never a valid termination addressed to Black Rock. It seems that the confusion in Mr Schoeman's mind as to whether the addendum to the funding agreement effectively substituted Raining Men for Black Rock, caused him to give instructions to these attorneys to purportedly terminate with the wrong entity.

64. Mr Schoeman was, ultimately, also effectively sidelined by Ms Lubbe. The details of all the skulduggery that occurred need not detain this urgent court. It will obviously be fully ventilated in due course. Mr Schoeman however, shortly before his death, confided in me that he was in fact the author of the letters despatched on the Hahn & Hahn letterhead, which were sent to himself. It was therefore a coordinated attempt to try and sideline me and the original funders from the litigation.

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65. As I have stated however, there was never a valid and effective termination addressed to Black Rock, and Black Rock remains the nominated company in terms of the funding agreement.

THE SETTLEMENT BETWEEN VODACOM AND MR MAKATE

66. Since about 5 November 2025 rumours started swirling that Vodacom and Mr Makate had reached a settlement.

67. Then, on 9 November 2025, the Sunday Times Newspaper carried two articles in which the news pertaining to the settlement between Vodacom and Mr Makate of the Please Call Me dispute, in an undisclosed amount, was publicised. Copies of these articles are attached as **BRM7**.

68. I forthwith, after having read the articles and receiving confirmation through these articles that the rumours of a settlement was indeed true, instructed Black Rock's attorneys to address letters of demand to Vodacom and to Stemela & Lubbe, placing on record that Black Rock intended enforcing its rights in terms of the funding agreement, and requiring an undertaking:

68.1. from Vodacom, that the proceeds of the settlement would not be paid to any account other than Stemela & Lubbe's trust account, as per the terms of the funding agreement; and

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68.2. to Stemela & Lubbe, to the effect that 40% of the amount paid to Mr Makate, be retained in trust pending the outcome of an action to be instituted by Black Rock in order to enforce its rights.

69. A copy of the letter of demand sent to Vodacom on 10 November 2025 is attached marked **BRM8**, and a copy of the letter of demand sent to Stemela & Lubbe on the same day is attached **BRM9**.

70. In the afternoon of 10 November 2025 Stemela & Lubbe responded to Black Rock's letter of demand. A copy is attached marked **BRM10**. As is evident, Stemela & Lubbe:

70.1. Avers that the settlement between Mr Makate and Vodacom is of no concern to Black Rock.

70.2. Stemela & Lubbe, erroneously, avers that Vodacom has nothing to do with the claim.

70.3. States that Mr Makate has purportedly terminated the funding agreement with Black Rock. This is disputed. There were numerous attempts to terminate the funding agreement, but only in respect of Raining Men. However, given the arbitration findings referred to above, and Mr Makate's evidence at the arbitration hearing, it is evident that Raining Men never held any rights in terms of the funding agreement, and as such any purported termination of the funding

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agreement vis-á-viz Raining Men was not only ineffective but irrelevant insofar as Black Rock was concerned.

70.4. States that Black Rock's claim has become prescribed. I am advised that this is a patently untenable statement, given that prescription only commences to run as soon as a debt becomes due. No debt could have become due until such time as an amount was awarded to Mr Makate, alternatively, a settlement amount was agreed. This only happened in November 2025. As such, prescription has only now started to run in respect of Black Rock's claim.

71. Clearly, however, Stemela & Lubbe intends dissipating the funds as soon as payment is received from Vodacom. Its response of 10 November 2025 therefore confirms that Black Rock is entitled to an urgent interim interdict as claimed.

72. Vodacom also responded later that same afternoon. A copy of Vodacom's response is attached marked **BRM11**.

73. As is evident, Vodacom indicates that it will abide by any order granted by a competent court. It however failed to provide any undertakings pertaining to payment of the funds into Stemela & Lubbe's trust account as per the funding agreement. Clearly, therefore, in the absence of a court order Vodacom will pay the settlement amount into any accounts as dictated by Stemela & Lubbe,

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and not necessarily into Stemela & Lubbe's trust account as per the funding agreement. This adds further impetus to Black Rock's right and entitlement to interim relief.

74. In a final attempt to prevent having to approach the court on an extremely urgent basis in terms of Part A, a final letter was written to Vodacom on 11 November 2025 requesting an indication as to when Vodacom intends making payment to or on behalf of Mr Makate. A copy is attached as **BRM12.** As at the time of the commissioning of this affidavit, Vodacom had not yet respondent and Black Rock was left with no option other than to approach the court on extremely abridged time periods for the relief as applied for in terms of Part A of the notice of motion.

MEETING THE REQUIREMENTS FOR AN INTERIM INTERDICT

75. I am advised that in order for Black Rock to obtain the interim interdict applied for herein, it has to demonstrate that:

75.1. it has a *prima facie* right to the ultimate relief it will seek;

75.2. it will suffer irreparable harm if the interim relief is not granted, but the ultimate relief is eventually granted;

75.3. that the balance of convenience favours the granting of the interim interdict;

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75.4. that there is no adequate alternative remedy available to it.

76. I deal with each of these requirements in turn.

Black Rock's *prima facie* right

77. Black Rock has established, *prima facie*, that it is the nominated company in terms of the funding agreement.

78. Mr Makate has confirmed as much under oath.

79. There was no valid termination of the funding agreement, and any such termination as may be claimed by Stemela & Lubbe, should be resolved in action proceedings to be instituted shortly.

80. In the premises Black Rock has established a *prima facie* entitlement to 40% of the proceeds, in terms of the provisions of the funding agreement.

Irreparable harm

81. From the numerous desperate attempts, since at least 2015, to sideline myself and Black Rock from the funding arrangement and the proceeds of the litigation, it is evident that Mr Makate under the guidance of Stemela & Lubbe does not intend to honour its obligations to Black Rock.

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82. It would seem that numerous other agreements have been concluded, and that others now purport to lay claim to the proceeds of the settlement.

83. As soon as these amounts are paid out, and given the magnitude of the amounts in question, it is highly unlikely that Black Rock will successfully recover any amounts even if it is successful in its action.

84. The settlement between Vodacom and Mr Makate has already been concluded, and clearly payment of the settlement funds is imminent. Vodacom could make payment at any moment.

85. Once the settlement proceeds are paid over, the funds will immediately fall under the control of Stemela & Lubbe and/or Mr Makate. Stemela & Lubbe has refused to give an undertaking as requested.

86. There exists a real and imminent risk (in the light of the history of the matter and the evident animosity from Stemela & Lubbe) that upon receipt of the settlement proceeds, Mr Makate or his attorneys will dissipate, transfer or distribute the funds to third parties thereby frustrating any subsequent recovery by Black Rock.

87. In that event, Black Rock's contractual right to 40% of the proceeds would be rendered nugatory.

88. Moreover, the harm extends beyond loss of money. Black Rock has invested considerable resources in funding Mr Makate's litigation. The dissipation of its contractual share would undermine its legal and commercial interests as a litigation funder.

Balance of convenience

89. By virtue of what I have explained above, Black Rock has demonstrated that the prejudice it stands to suffer if the interim relief is not granted, outweighs the prejudice that any of the respondents stand to suffer if the interim relief is granted. These negative consequences will be irreversible.

90. Insofar as Mr Makate is concerned, there is no negative consequences – he still stands to receive the remaining 60% of the settlement award. The balance of the 40%, he was never entitled to.

91. Insofar as Vodacom is concerned, there is clearly no prejudice. In any event, Vodacom has indicated that it will abide by any order granted by a competent court.

92. The letter from Stemela & Lubbe dated 10 November 2025 sets out no prejudice that the firm stands to suffer should the order be granted. Any prejudice subsequently raised in affidavits, will be an afterthought.

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No other satisfactory remedy

93. Black Rock was prudent and reasonable in its approach, and requested undertakings from Vodacom and Stemela & Lubbe.

94. Vodacom's response makes it clear that, even though it will not take part in litigation proceedings, it requires an order of court in order to give direction to how it deals with the funds.

95. Stemele & Lubbe has unequivocally indicated that no undertaking will be furnished. It, hollowly, invites Black Rock to sue its client, Mr Makate. This, I submit, is a strange thing to do for an attorney who purports to be acting in the best interests of its client. Be that as it may, and for the reasons highlighted above, the funds need to be preserved in order for any action proceedings to have a practical result.

URGENCY

96. The irreparable harm that Black Rock will suffer should the interim relief not be granted, to a large extent demonstrates why the matter is urgent and why it will not obtain substantial redress should the matter be heard in the ordinary course.

97. I submit that Black Rock has, as soon as it learnt of the settlement between Mr Makate and Vodacom, acted expediently and immediately demanded

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undertakings. When it became clear in the afternoon of 10 November 2025 that no undertakings would be given, Black Rock's attorneys forthwith instructed counsel to commence preparing an application.

98. Given that a payout is clearly imminent, Part A of this application is geared towards securing the status *quo* until such time as a fuller ventilation of Black Rock's entitlement to an interim interdict can take place. Part B of the application is anticipated to be set down on 2 December 2025. This is reasonable, given the need for the various parties to deliver affidavits in order to place their versions before the court.

99. Shortly stated, if an application is brought in the ordinary course, the payment would have taken place and the funds would have been dissipated long before the matter came to court.

100. In the premises Black Rock will not be afforded substantial redress if it was to approach the court in the ordinary course.

CONCLUSION

101. Black Rock has established, at least *prima facie*, that it is entitled to 40% of the proceeds of the settlement concluded between Vodacom and Mr Makate.

102. If Black Rock was to wait and approached the court in the ordinary course, the funds in question will be dissipated long before the matter is heard.

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103. In the premises Black Rock has made out a case for the relief applied for in terms of both Part A and Part B of its urgent application.

104. No costs are sought in terms of Part A of the application, and costs are sought in terms of Part B only against such respondents as are opposing the interim relief applied for.

105. A confirmatory affidavit from the Black Rock's attorney of record, Mr Mnguni, will be obtained and attached hereto.

DEPONENT

I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent does not have any objection to taking the oath, and that the deponent considers it to be binding on the deponent's conscience, and which was sworn to and signed before me at Johannesburg on this the 11th day of November 2025 and that the administering of the oath complied with the regulations contained in Government Gazette No R1258 of 21st July 1972, as amended.

COMMISSIONER OF OATHS

NEO MOKHOBO
COMMISSIONER OF OATHS
PRACTICING ATTORNEY
5TH FLOOR, THE RIDGE
1 DISCOVERY PLACE
SANDTON

BRM1

"A" "E"

MEMORANDUM OF AGREEMENT

Entered into and between:

NKOSANA KENNETH MAKATE
ID:
Address:
E-mail: kennethmakate@gmail.com
(hereinafter referred to as "Makate")

and

Christiaan Schoeman
ID: 481220 5005 089
Address: 77 Ambassador Crescent, Waterkloof Valley, 14 Squirrel Avenue, Waterkloof, Pretoria
E-mail: chris@litfin.co.za
In his capacity as authorized representative of a Company to be nominated
(hereinafter referred to as "The Company")

WHEREAS Makate issued Summons against Vodacom under Case Number 20980/2008 South Gauteng, High Court;

AND WHEREAS Makate needs funds to proceed with the litigation;

AND WHEREAS the Company will provide funding to pursue the claim;

NOW WHEREAFTER THE PARTIES AGREE AS FOLLOWS:

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1. **DEFINITIONS**

Claim: means Claim issued in Summons Case No 2011/01680 South Gauteng High Court and all interlocutory applications thereto in such litigation.

Attorneys: means Stemela & Lubbe Inc, 141 Charles Street, Brooklyn, Pretoria.

Effective Date: means date of signature of this Agreement by the party last signing.

Vodacom: means Vodacom (Pty) Ltd, Registration No: 1991/001471/07.

2. **FUNDING**

The Company shall fund all legal costs and expenses reasonably necessary to prosecute the claim instituted by Makate against Vodacom.

Subject to clause 7, the legal costs shall not include the legal costs already incurred before the effective date in connection with the issuing of Summons and the litigation proceedings thus far.

The company indemnify Makate against all and any claims which may be instituted against him during the cause of the litigation, including any adverse cost orders which may be granted during the litigation

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The Company shall deposit with the attorneys sufficient funds as reasonably required and requested by the attorneys from time to time to finance the litigation, within 10 days of being requested to do so.

3. **LITIGATION**

The Company undertakes to pursue the litigation to the best of its abilities.

In consideration for funding the litigation and taking the associated risk, the Company shall be entitled to control and direct the litigation, and to appoint its own legal team to present the action to Court. Where the matter is settled by negotiation and agreement, neither Makate or the attorneys shall be entitled to effect settlement without the written consent and approval of the Company, unless the amount payable in terms of such settlement agreement exceeds R650,000,000.00 (SIX HUNDRED AND FIFTY MILLION RAND).

4. **NO CESSION OR ASSIGNMENT**

The parties confirm that the claim is not ceded or assigned to the Company and this Agreement only relates to the sharing of any recovery made from Vodacom.

5. **REWARD**

In consideration for the funding the litigation, and taking the risk associated therewith, the Company shall be entitled to control and direct the litigation through Makate as Plaintiff, who shall act upon all of the companies reasonable and necessary instructions.

Upon conclusion of the matter, whatever award is made and recovered by Makate from Vodacom, shall be paid to Stemela & Lubbe Inc (Trust Account) who shall be instructed to divide such recovery in such a manner that Makate will receive 60% thereof and the company 40%

NM

Any legal costs recovered from Vodacom due to favourable costs orders awarded to Makate during the course of the litigation, will not form part of the reward and will be retained by the legal team.

Upon success of the merits of claim, the company will pay a minimum deductible advance of R4,000,000.00 (FOUR MILLION RAND) to Makate as up front distribution of rewards obtained.

6. LEGAL REPRESENTATION

The Company has the exclusive authority to appoint a legal team to represent Makate in the litigation.

The instructing attorneys will be Stemela & Lubbe Inc, 141 Charles Street, Brooklyn, Pretoria, who will appoint correspondents in Johannesburg for purposes of service and in compliance of the Uniform Rules of Court.

The attorneys will appoint the following Counsel:

Adv. CE Puckrin SC;

Adv. R Michau SC

A junior Counsel to be appointed by the legal team.

The amount of R50,000.00 (FIFTY THOUSAND RAND) will be set aside for the services of the junior Counsel refereed to in paragraph 6.3.3. The purpose would be to allow Makate to consult with such junior counsel to assist him in understanding the legal process and issues Makate will first address any questions to the attorneys, but if he wants to consult with junior counsel as well, he will be at liberty to do so subject to the limit of R50,000.00. All such consultations or telephonic conferences will be arranged by the Attorneys.

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7. ATTORNEYS R MASILO

It is recorded that Makate's present attorneys in the litigation is R Masilo Attorneys, 98 President Street, Old Mutual Building, Suite 11, First Floor, Germiston

Upon signature of the funding agreement, Stemela & Lubbe Inc will address a letter to Masilo Attorneys informing them of the funding agreement and that Makate has terminated their mandate.

R Masilo Attorneys will be requested to withdraw as Attorneys of record and Stemela & Lubbe will file a new Notice to be Attorneys of Record.

Stemela & Lubbe Inc will enter into negotiations with Masilo Attorneys to arrange for a fair and reasonable compensation to them for work done and services rendered prior to the effective date. Makate confirms that Masilo Attorneys agreed to work on a contingency basis and that they have assumed the risk of the litigation. Any agreed reasonable remuneration will be paid from Makate's 60% share if the litigation is successful. The provision of the Contingency Fees Act 66/1997 will be applied to any agreement reached.

The Company will indemnify Makate from any clams which may be instituted against him in consequence of Masilo Attorney's involvement in the litigation prior to the effective date.

8. PUBLICITY AND CONFIDENTIALITY

Each party undertakes to keep confidential and not to disclose to any third party, save as may be required in Law or by ruling of a Court, the nature, content or existence of this Agreement and any and all information given by a party to the other parties pursuant to this Agreement.

9 SUPPORT AND BONA FIDES

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The parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.

10. **BREACH**

In the event of any of the Parties ("Defaulting Party") committing a breach of any of the terms of this Agreement and failing to remedy such breach within a period of 21 days after receipt of a written notice from another Party ("Aggrieved Party") calling upon the Defaulting Party so to remedy, then the Aggrieved Party shall be entitled, at its sole discretion and without prejudice to any of its other rights in law, either to claim specific performance of the terms of this Agreement or to cancel this Agreement forthwith and without further notice, and in either case to claim and recover damages from the Defaulting Party.

The Parties agree that any costs awarded will be recoverable on an attorney- and own-client scale unless the Court specifically determines that such scale shall not apply, in which event the costs will be recoverable in accordance with the High Court tariff, determined on an attorney-and-client scale.

11. **DISPUTE RESOLUTION - INTERNAL ARBITRATION**

In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute or difference shall on written demand by any Party be submitted to informal arbitration in Pretoria, which needs to be finalised within one month of date of declaration of dispute.

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The parties shall decide on an Arbitrator, failing which the Chairman of the Pretoria Bar will appoint an Advocate with no less than 10 years standing as Arbitrator The decision shall be final and binding on all the parties to the dispute The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the parties to the dispute.

Any arbitration in terms of this clause 11 shall be conducted *in camera* and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.

This clause 11 will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.

12. NOTICES AND DOMICILIA

12.1 The Parties select as their respective *domicilia citandi et executandi* the following physical addresses, and for the purposes of giving or sending any notice provided for or required under this Agreement, the said physical addresses as well as the following telefax numbers –

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Name	Physical Address, Telefax and e-mail address
NK Makate:	48 Midland Estates , 8th Street , Noordwyk, Midrand. KennethMakate@gmail.com

Name	Physical Address, Telefax and e-mail address
C Schoeman:	77 Ambassador Crescent, Waterkloof Valley, 14 Squirrel Avenue, Waterkloof, Pretoria E-mail: chris@litfin.co.za, Fax: 012 346 6029

Name	Physical Address, Telefax and e-mail address
W Lubbe (Stemela & Lubbe Inc)	141 Charles Street, Brooklyn, Pretoria, Tel: 012 346 0136, Fax: 012 346 6029 E-mail: sonja@stemelalubbe.co.za

provided that a Party may change its *domicilium* or its address for the purposes of notices to any other physical address or telefax number by written notice to the other Parties to that effect. Such change of address will be effective 5 (five) business days after receipt of the notice of the change.

12.1 All notices to be given in terms of this Agreement will be given in writing and will -

12.1.1 be delivered by hand or sent by telefax,

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12.1.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a business day will be presumed to have been received on the following business day; and

12.1.3 if sent by telefax during business hours, be presumed to have been received on the date of successful transmission of the telefax. Any telefax sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

12.2 Notwithstanding the above, any notice given in writing, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause .

13 APPLICABLE LAW AND JURISDICTION

13.1 This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa

14 DEPENDENT ADVICE

Each of the Parties to this Agreement hereby acknowledges and agrees that –

14.1 it has been free to secure independent legal and other professional advice (including financial and taxation advice) as to the nature and effect of all of the provisions of this Agreement and that it has either taken such independent advice or has dispensed with the necessity of doing so; and

14.2 all of the provisions of this Agreement and the restrictions herein

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contained are fair and reasonable in all the circumstances and are in accordance with the Party's intentions.

15 GENERAL

15.1 Whole Agreement

15.1.1 This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on any of the Parties.

15.1.2 This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

15.2 Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

15.3 NO ASSIGNMENT

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by any Party without the prior written consent of the other Parties, save as otherwise provided in clause 15 herein.

16 COSTS

Except as otherwise specifically provided herein, the Company will bear and pay all legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this

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Agreement

17 SIGNATURE

17.1 This Agreement is signed by the Parties on the dates and at the places indicated below.

17.2 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

17.3 The persons signing this Agreement in a representative capacity warrant their authority to do so.

17.4 The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

SIGNED at Pretoria on 7th November 2011

Signed by: NK MAKATE

Signature

NM
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SIGNED at Pretoria on 7 November 2018

For and on behalf of

Signature

C SCHOEMAN

As witness:

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MEMORANDUM OF AGREEMENT

Memorandum of agreement made and entered into by and between

SIMBA CAPITAL VIII SÀRL a company duly organised and legally existing under the laws of Luxembourg (Company Registration No. B175040) having its registered office in L – 8308 Marner/Capellen 75 Parc d'Activités, care of 1 Fullerton Road, #02-01One Fullerton. Singapore 049213 or its assigns or nominee

(hereinafter referred to as "the financier")

and

BLACK ROCK MINING LTD a company with limited liability duly registered and incorporated in the British Virgin Islands

(hereinafter referred to as "Black Rock")

and

ERROL ELSDON an adult male residing at Silkwood Linden Road, Sandton South Africa

(hereinafter referred to as "Elsdon")

and

CHRISTIAAN SCHOEMAN an adult male residing at 174 Smith Street. Muckleneuk. Pretoria

(hereinafter referred to as "Schoeman)

and

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WILNA LUBBE an adult female of Stemela & Lubbe Inc of 889 Justice Mahomed, Brookly, Pretoria

(hereinafter referred to as the "Attorney")

PREAMBLE

WHEREAS A	Black Rock has entered into an agreement ("the agreement") with Nkosana Kenneth Makate ("Makate") to finance his on-going litigation with Vodacom ("the litigation"). and
WHEREAS B	Black Rock is entitled in terms of the agreement to receive 50% of the gross income from the proceeds of the litigation, and
WHEREAS C	the financier has agreed to supply additional funding to Black Rock.
WHEREAS D	Stemela and Lubbe Inc have been appointed Attorneys in this matter ("the Attorneys).

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Upon signature hereto, the financier will pay to solicitors Hamilton, Downing, Quin LLP, of 40/41 Museum Street, London WC1A 1LT ("the solicitors") an amount of £100 000.00 (One Hundred Thousand Pounds Sterling). The funds are to held by the solicitors;

    1.1 To the order of the Attorneys and

    1.2 Will be dealt with on the instructions of Ms Wilna Lubbe a director of the Attorneys.

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2. Upon signature hereto the financier will pay to Black Rock, on the instruction of its director Errol Elsdon, an amount of £150 000.00 (One Hundred and Fifty Thousand Pounds Sterling) to an account and beneficiary nominated by him.

3. All the proceeds of the litigation will be paid to the Attorneys and they will account to all parties, for such proceeds.

4. Upon receipt of such proceeds and providing the financier has complied with its obligations set forth herein, the Attorneys are hereby irrevocably directed to pay to the financier and the Attorney hereby accepts such instructions;

   [a] an amount of £250 000.00 (Two Hundred and Fifty Thousand Pounds Sterling) plus 5% (five per cent) of the gross proceeds from the litigation.

   [b] for the purposes of this Agreement gross proceeds from the litigation shall mean all monies paid by the Defendants in the litigation referred to in recital A and paid to either the Plaintiff or the Attorneys in full and final settlement of the litigation inclusive of any payments with regard to damages, interest, costs and the like without deduction.

SURETYSHIP AND INSTRUMENT OF DEBT

The amount payable in terms of this instrument, by the financier, is regarded as a loan to Black Rock and the loan will only be regarded as redeemed, when payment is made in terms of paragraph 4 hereof.

In the event of Makate's claim being dismissed or in the event that the amount payable to the financiers pursuant to clause 4[a] above amounts to less than £250,000 within one year from the date hereof, Schoeman and Elsdon, bind themselves, jointly and severally, the one paying, the other to be absolved as sureties and co-principal debtors in favour of the financier for the debt owing by Black Rock in terms of this instrument to the financier, for payment of an amount up to £250 000.00 (Two Hundred and Fifty Thousand Pounds Sterling).

THUS DONE AND SIGNED AT Pretoria ON THE 1st DAY OF JULY 2013

NM

C. SCHOEMAN

E. ELSDON

AS SURETIES AND CO-PRINCPAL DEBTORS

E. ELSDON

IN HIS CAPACITY AS A DIRECTOR OF BLACK ROCK AND BEING DULY AUTHORISED THERETO

THE FINANCIER

W. LUBBE

[illegible]
[illegible]
[illegible] Commissioner of Oaths
[illegible] Practising Attorney RSA
[illegible]
[illegible] STREET
[illegible]
[illegible]

NM
[illegible]

"E"

BRM3

MEMORANDUM OF AGREEMENT

Entered into and between:

NKOSANA KENNETH MAKATE
ID:
Address:
E-mail: kennethmakate@gmail.com
(hereinafter referred to as "Makate")

and

Christiaan Schoeman
ID: 481220 5005 089
Address: 77 Ambassador Crescent, Waterkloof Valley, 14 Squirrel Avenue, Waterkloof, Pretoria
E-mail: chris@litfin.co.za
In his capacity as authorized representative of a Company to be nominated
(hereinafter referred to as "The Company")

WHEREAS Makate issued Summons against Vodacom under Case Number 20980/2008 South Gauteng, High Court;

AND WHEREAS Makate needs funds to proceed with the litigation;

AND WHEREAS the Company will provide funding to pursue the claim;

NOW WHEREAFTER THE PARTIES AGREE AS FOLLOWS:

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1. **DEFINITIONS**

Claim: means Claim issued in Summons Case No 2011/01680 South Gauteng High Court and all interlocutory applications thereto in such litigation.

Attorneys: means Stemela & Lubbe Inc, 141 Charles Street, Brooklyn, Pretoria.

Effective Date: means date of signature of this Agreement by the party last signing.

Vodacom: means Vodacom (Pty) Ltd, Registration No: 1991/001471/07.

2. **FUNDING**

The Company shall fund all legal costs and expenses reasonably necessary to prosecute the claim instituted by Makate against Vodacom.

Subject to clause 7, the legal costs shall not include the legal costs already incurred before the effective date in connection with the issuing of Summons and the litigation proceedings thus far.

The company indemnify Makate against all and any claims which may be instituted against him during the cause of the litigation, including any adverse cost orders which may be granted during the litigation.

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The Company shall deposit with the attorneys sufficient funds as reasonably required and requested by the attorneys from time to time to finance the litigation, within 10 days of being requested to do so.

3. LITIGATION

The Company undertakes to pursue the litigation to the best of its abilities.

In consideration for funding the litigation and taking the associated risk, the Company shall be entitled to control and direct the litigation, and to appoint its own legal team to present the action to Court. Where the matter is settled by negotiation and agreement, neither Makate or the attorneys shall be entitled to effect settlement without the written consent and approval of the Company, unless the amount payable in terms of such settlement agreement exceeds R650,000,000.00 (SIX HUNDRED AND FIFTY MILLION RAND).

4. NO CESSION OR ASSIGNMENT

The parties confirm that the claim is not ceded or assigned to the Company and this Agreement only relates to the sharing of any recovery made from Vodacom.

5. REWARD

In consideration for the funding the litigation, and taking the risk associated therewith, the Company shall be entitled to control and direct the litigation through Makate as Plaintiff, who shall act upon all of the companies reasonable and necessary instructions.

Upon conclusion of the matter, whatever award is made and recovered by Makate from Vodacom, shall be paid to Stemela & Lubbe Inc (Trust Account) who shall be instructed to divide such recovery in such a manner that Makate will receive 60% thereof and the company 40%.

NM

Any legal costs recovered from Vodacom due to favourable costs orders awarded to Makate during the course of the litigation, will not form part of the reward and will be retained by the legal team.

Upon success of the merits of claim, the company will pay a minimum deductible advance of R4,000,000.00 (FOUR MILLION RAND) to Makate as up front distribution of rewards obtained.

6. <u>LEGAL REPRESENTATION</u>

The Company has the exclusive authority to appoint a legal team to represent Makate in the litigation.

The instructing attorneys will be Stemela & Lubbe Inc, 141 Charles Street, Brooklyn, Pretoria, who will appoint correspondents in Johannesburg for purposes of service and in compliance of the Uniform Rules of Court.

The attorneys will appoint the following Counsel:

Adv. CE Puckrin SC;

Adv. R Michau SC

A junior Counsel to be appointed by the legal team.

The amount of R50,000.00 (FIFTY THOUSAND RAND) will be set aside for the services of the junior Counsel refereed to in paragraph 6.3.3. The purpose would be to allow Makate to consult with such junior counsel to assist him in understanding the legal process and issues. Makate will first address any questions to the attorneys, but if he wants to consult with junior counsel as well, he will be at liberty to do so, subject to the limit of R50,000.00. All such consultations or telephonic conferences will be arranged by the Attorneys.

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7. ATTORNEYS R MASILO

It is recorded that Makate's present attorneys in the litigation is R Masilo Attorneys, 98 President Street, Old Mutual Building, Suite 11, First Floor, Germiston.

Upon signature of the funding agreement, Stemela & Lubbe Inc will address a letter to Masilo Attorneys informing them of the funding agreement and that Makate has terminated their mandate.

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9. SUPPORT AND BONA FIDES

NM

The parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.

10. BREACH

In the event of any of the Parties ("Defaulting Party") committing a breach of any of the terms of this Agreement and failing to remedy such breach within a period of 21 days after receipt of a written notice from another Party ("Aggrieved Party") calling upon the Defaulting Party so to remedy, then the Aggrieved Party shall be entitled, at its sole discretion and without prejudice to any of its other rights in law, either to claim specific performance of the terms of this Agreement or to cancel this Agreement forthwith and without further notice, and in either case to claim and recover damages from the Defaulting Party.

The Parties agree that any costs awarded will be recoverable on an attorney- and-own-client scale unless the Court specifically determines that such scale shall not apply, in which event the costs will be recoverable in accordance with the High Court tariff, determined on an attorney-and-client scale.

11. DISPUTE RESOLUTION – INTERNAL ARBITRATION

In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute or difference shall on written demand by any Party be submitted to informal arbitration in Pretoria, which needs to be finalised within one month of date of declaration of dispute.

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The parties shall decide on an Arbitrator, failing which the Chairman of the Pretoria Bar will appoint an Advocate with no less than 10 years standing as Arbitrator. The decision shall be final and binding on all the parties to the dispute. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the parties to the dispute.

Any arbitration in terms of this clause 11 shall be conducted *in camera* and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.

This clause 11 will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.

12. NOTICES AND DOMICILIA

12.1 The Parties select as their respective *domicilia citandi et executandi* the following physical addresses, and for the purposes of giving or sending any notice provided for or required under this Agreement, the said physical addresses as well as the following telefax numbers –

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Name	Physical Address, Telefax and e-mail address
NK Makate:	48 Midland Estates , 8th Street , Noordwyk, Midrand. KennethMakate@gmail.com

Name	Physical Address, Telefax and e-mail address
C Schoeman:	77 Ambassador Crescent, Waterkloof Valley, 14 Squirrel Avenue, Waterkloof, Pretoria E-mail: chris@litfin.co.za, Fax: 012 346 6029

Name	Physical Address, Telefax and e-mail address
W Lubbe (Stemela & Lubbe Inc)	141 Charles Street, Brooklyn, Pretoria, Tel: 012 346 0136, Fax: 012 346 6029 E-mail: sonja@stemelalubbe.co.za

provided that a Party may change its *domicilium* or its address for the purposes of notices to any other physical address or telefax number by written notice to the other Parties to that effect. Such change of address will be effective 5 (five) business days after receipt of the notice of the change.

12.1 All notices to be given in terms of this Agreement will be given in writing and will -

12.1.1 be delivered by hand or sent by telefax;

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12.1.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a business day will be presumed to have been received on the following business day; and

12.1.3 if sent by telefax during business hours, be presumed to have been received on the date of successful transmission of the telefax. Any telefax sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

12.2 Notwithstanding the above, any notice given in writing, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause .

13 APPLICABLE LAW AND JURISDICTION

13.1 This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa.

14 DEPENDENT ADVICE

Each of the Parties to this Agreement hereby acknowledges and agrees that –

14.1 it has been free to secure independent legal and other professional advice (including financial and taxation advice) as to the nature and effect of all of the provisions of this Agreement and that it has either taken such independent advice or has dispensed with the necessity of doing so; and

14.2 all of the provisions of this Agreement and the restrictions herein

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contained are fair and reasonable in all the circumstances and are in accordance with the Party's intentions.

15 GENERAL

15.1 Whole Agreement

15.1.1 This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on any of the Parties.

15.1.2 This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

15.2 Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

15.3 NO ASSIGNMENT

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by any Party without the prior written consent of the other Parties, save as otherwise provided in clause 15 herein.

16 COSTS

Except as otherwise specifically provided herein, the Company will bear and pay all legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this

Agreement.

17 SIGNATURE

17.1 This Agreement is signed by the Parties on the dates and at the places indicated below.

17.2 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

17.3 The persons signing this Agreement in a representative capacity warrant their authority to do so.

17.4 The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

SIGNED at Pretoria on 7th November 2011

Signed by: NK MAKATE

Signature

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SIGNED at Pretoria on 7 November 2018

For and on behalf of

____

Signature

C SCHOEMAN

____

As witness:

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Mr KN Makate: No, I didn't ask him to investigate that, no.

Mr J Crouse: Okay, so that wasn't part ...

Mr KN Makate: It was not part of his mandate.

Mr J Crouse: Thank you. Now we have been through the timeline and we know that during the beginning of 2015 when you became aware of Raining Men, you have requested Mr Bester to investigate that signatures?

Mr KN Makate: Yes. Ja, in 2015, yes, ja.

Mr J Crouse: When was the first time that you became aware of the name, Raining Men, in relation to your funding or proposed funding?

Mr KN Makate: It was when I think I got either an email or a call from Wilna that actually asked me about Raining Men and whether did I nominate Raining Men, ja.

Mr J Crouse: And when was that?

Mr KN Makate: It was in December, I think, 2014.

Mr J Crouse: December 2015?

Mr KN Makate: 2014.

Mr J Crouse: December 2014?

Mr KN Makate: Uhm.

Mr J Crouse: Prior to that, if I understand you correctly, you have had no word of Raining Men?

Mr KN Makate: Absolutely no word. I didn't know Raining Men.

Mr J Crouse: Was ... who was the funder at that stage, according to your knowledge?

Mr KN Makate: Ja, I mean ... according to my knowledge Chris had always obviously painted himself as a funder, but at that point I had

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known that a company called Black Rock was indeed nominated and funding my litigation.

Mr J Crouse: And you were aware of that nomination agreement (indistinct - talking simultaneously)?

Mr KN Makate: I was aware, I mean I signed at Craw Daddy's.

Mr J Crouse: Were you ever informed ...

Adv R Willis: Sorry, Mister Arbitrator, may we just have some time to ... thank you, Mister Arbitrator.

Arbitrator: Mister Makate?

Mr J Crouse: Were you ever informed that the Black Rock agreement was not in existence anymore, substituted with someone or some entity else?

Mr KN Makate: No, I was never informed.

Mr J Crouse: Were you ever aware that Mr Schoeman apparently cancelled the nomination agreement of Black Rock?

Mr KN Makate: I was never informed of that.

Mr J Crouse: Or that ...

Arbitrator: Sorry, what was your ...

Mr J Crouse: That Mr Schoeman informed Mr Makate that the Black Rock agreement was cancelled.

Arbitrator: Okay. Thank you.

Mr J Crouse: And you were never informed, or were you ever informed that the alleged rights to cede and to nominate, reverted back to Mr Schoeman?

Mr KN Makate: No, I was never informed about that.

Mr J Crouse: Never? In terms of the Black Rock agreement, were you

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satisfied that they are able to fund the litigation?

Mr KN Makate: I mean I was satisfied at the time. Remember, Chris had told me already in July 2013 that he was going to raise £1.5 million through Black Rock, so ... our Craw Daddy's meeting was merely a confirmation of a company that he had already spoken to me about.

Mr J Crouse: Now ...

Arbitrator: Just a minute. Ja?

Mr J Crouse: Now, Mr Schoeman was arranging these ... or the funds and he was in control, according to you, and you believed what he said?

Mr KN Makate: No, I believed what he said, I had no really a reason to question what he was saying, no. I trusted him.

Mr J Crouse: Now during 2013, and more specifically the 13th of August 2013, an article was published and it is in Bundle "G", if I remember correctly.

Mr KN Makate: Where in Bundle "G"?

Mr J Crouse: Page 18.

Mr KN Makate: Yes.

Mr J Crouse: Do you recognise that article?

Mr KN Makate: Yes, I recognise the article.

Mr J Crouse: Can you turn to page 19 for me and read paragraph 4, into the record for me?

Mr KN Makate:

> *"Sterling Rand is a partnership between Errol, Tracy Roscher and attorney, Chris Schoeman. The firm operates through a network of prominent international*

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IN THE ARBITRATION BETWEEN

CHRISTIAAN SCHOEMAN	First Claimant
(Withdrawn)	
RAINING MEN (PTY) LTD	Second Claimant
(In Business rescue)	
and	
NKOSANA KENNETH MAKATE	Respondent

ARBITRATOR'S RULING AND AWARD

The Arbitrator makes the following ruling and award. The reasons for the ruling and award will be provided in due course:

1. There was no valid nomination of Raining Men (Pty) Ltd and it obtained no rights and obligations in terms of the funding agreement or alleged nomination agreement. Raining Men has no locus standi for any claim against Mr Makate.

2. The only valid nomination which was made in terms of the funding agreement was the nomination of Black Rock Ltd, which company has since been finally deregistered in the British Virgin Islands. Such

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nomination was never cancelled in writing or otherwise, nor was there any transfer of its rights that it obtained in terms of the nomination agreement.

3. Mr Schoeman as First Claimant cannot have the rights devolved upon him as a Claimant or party to the funding agreement after the nomination of Black Rock Ltd and further to nominate any other party such as Raining Men (Pty) Ltd as a party to the funding agreement.

4. Mr Schoeman withdrew his claim in the arbitration on 15 November 2018.

5. Mr Schoeman and Raining Men, jointly and severally, the one to pay the other to be absolved, must pay the costs of Mr Makate in the arbitration on an attorney and own client scale as provided for in the funding agreement and the arbitration agreement, save that the order against Mr Schoeman should be calculated until the date when Mr Schoeman withdrew his claim.

6. Due to the extensive reliance for the claim *inter alia* upon a copy of a document which authenticity and originality could not be proved by the claimants, and taken into account the evidence of Mr Jannie Bester, a handwriting expert, I find that the contested signatures on the document is not that of Mr. Makate and that the nomination agreement of Raining Men (Pty) Ltd is fraudulent.

7. Due to the reliance of the Claimants (the directors of Raining Men (Pty) Ltd and Mr Schoeman) and further taking into account their disregard for ethical and responsible litigation, which was perpetuated by Mr Thomas Hendrik Samons, the BRP of Raining Men (Pty) Ltd, a punitive cost order is made in this matter.

8. Raining Men (Pty) Ltd shall pay the costs of Mr Makate incurred from 15 November 2018 until 28 January 2019 on an attorney and own client scale.

9 Raining Men (Pty) Ltd and its BRP Mr Thomas Hendrik Samons shall pay the costs of Mr Makate incurred in the arbitration from 30 January 2019 until date of this ruling *de bonis propriis*.

10. All the costs awards are directed to be jointly and severally amongst the relevant parties, except where specifically provided otherwise.

11. The costs shall include the qualifying, preparation and attendance fees of the expert, Mr Jannie Bester which greatly assisted the arbitration in this matter.

12. The costs will also include the costs of the arbitration venue, recordings and transcript, cost of one senior counsel, two attorneys and the costs of the Arbitrator.

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13. The taxation of the costs will be dealt with as provided for in paragraph 11.3 of the arbitration agreement and the Arbitrator will appoint a cost consultant to assist with the taxation of the accounts. The costs of such consultant will form part of the costs of the arbitration.

ADV M.H MABENA SC
(ARBITRATOR)

10/03/2020
DATE

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BRM5.2

ADV M.H MABENA SC

407 New Court Chambers
115 Paul Kruger Street
PRETORIA, 0002

P.O. Box 1255
PRETORIA
0001

Tel: (012) 334-4113

Fax: (012) 334 4114

Cell: 063 130 8354

Date:23 July 2020

RE: TH SAMONS N.O / RAINING MEN (PTY) LTD (IN BUSINESS RESCUE) / / MH MABENA SC / KN MAKATE

TO: caroline@cdvlaw.co.za
hans@cdvlaw.co.za
wilna@stimelalubbe.co.za
johan@crouseinc.co.za

Dear all

The reasons will be filed with the Registrar of the High Court, in terms of Rule 53 of the uniform rules of Court on Monday 27 July 2020.

However, the parties must make an unequivocal undertaking to settle the Arbitrator's outstanding fee in terms of Clause 2.6 of the Arbitrator's Ruling of 20 October 2015.

Kind Regards

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Tshego Mathabathe

PA - M.H Mabena SC

Arbitrator

(Electronic and thus unsigned)

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 22065/2020

In the review application between:

THOMAS HENDRICK SAMONS *N.O.*	**First Applicant**
RAINING MEN TRADE (PTY) LTD	**Second Applicant**
THOMAS HENDRICK SAMONS	**Third Applicant**
CHRISTIAAN SCHOEMAN	**Fourth Applicant**

And

M.H (ANDREW) MABENA SC	**First Respondent**
KENNETH NKOSANA MAKATE	**Second Respondent**

Reasons for the ruling and award in terms of Rule 53(1)(b)

1.

Appointment as Arbitrator

1.1 On 20 October 2015 I was appointed by the then Chairperson of the Pretoria Society of Advocates to act as arbitrator in an arbitration between Mr Christiaan Schoeman as First Claimant ('Mr Schoeman'), Raining Men (Pty) Ltd as Second Claimant ('Raining Men') and Mr Nkosana Kenneth Makate ('Mr Makate') as Respondent.

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1.2 The arbitration ensued due to the provisions for arbitration as dispute resolution procedure contained in a written agreement concluded between Mr Schoeman and Mr Makate on 7 November 2011. Mr Schoeman concluded the agreement, acting on behalf of a company to be nominated. The parties referred to this agreement as the 'Funding Agreement' in the pleadings.

1.3 Clause 11 of the Funding Agreement provides as follows:

"In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute of difference shall on written demand by any Party be submitted to informal arbitration in Pretoria, which needs to be finalised within one month of date of declaration of dispute.

The parties shall decide on an Arbitrator, failing which the Chairman of the Pretoria Bar will appoint an Advocate with no less than 10 years standing as Arbitrator, The decision shall be final and binding on all the parties to the dispute. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator hose decision shall be final and binding on the parties to the dispute.

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Any arbitration in terms of this clause 11 shall be conducted in camera and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration. This clause 11 shall be binding on the Parties notwithstanding any termination or cancellation of the Agreement."

1.4 As this provision constituted the arbitration agreement between the parties, I had to decide on procedural issues whenever the parties could not agree on the procedures to be followed to conduct the arbitration.

2.

Parties:

2.1 Initially both Mr Schoeman and Raining Men were claimants and Mr Makate was the Respondent, but on 15 November 2018 Mr Schoeman withdrew his claim in the arbitration which left Raining Men as the only claimant in the arbitration.

2.2 On 21 January 2019 Mr Samons ('the BRP') was appointed as Business Rescue Practitioner of Raining Men, being placed under business rescue on 18 January 2019.

3.

Pleadings by the Claimants

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3.1 On 3 December 2015 the Claimants filed a Statement of Claim, which was amended on 19 July 2016 and 15 July 2019 during the arbitration.[1]

3.2 The Claimants sought the following relief:

3.2.1 A declaratory order that Raining Men is a party to the Funding Agreement through its nomination by Mr Schoeman and therefore acquired the rights and obligations vis-à-vis Mr Makate;

3.2.2 That the Funding agreement is binding on Raining Men and Mr Makate and is extant;

3.2.3 That Raining Men is a party with Mr Makate to the Addendum concluded on 24 April 2014 and acquired the rights and obligations vis a vis Mr Makate through its nomination;

3.2.4 That the Addendum is binding on Raining Men and Mr Makate and is extant;

3.2.5 Punitive costs.

4.

Pleadings by the Respondent

[1] The pleadings are contained in Exhibit A of the record. Statement of Claim p1 – 46.

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4.1 On 17 December 2015 the Respondent, Mr Makate filed a Statement of Defense.[2]

4.2 The Respondent sought the following relief:

4.2.1 A declaratory order that the Funding Agreement was duly cancelled;

4.2.2 That the purported nomination agreement is invalid;

4.2.3 That Raining Men have no claim based on either the Funding Agreement or the nomination agreement against Mr Makate;

4.2.4 In the alternative should the Arbitrator find that the Funding Agreement was not properly cancelled or that the nomination agreement is valid:

4.2.4.1 That the outstanding balance of legal fees and disbursements be taxed by a cost consultant appointed by the arbitrator;

4.2.4.2 That the Arbitrator will make a final ruling on the amount due and payable by Mr Schoeman, alternatively Raining Men to comply with its obligations in terms of the Funding Agreement or Nomination Agreement or both;

4.2.4.3 That the Arbitrator will rule on a date for such amount to be settled by Mr Schoeman alternatively Raining Men to attorneys Stemela & Lubbe Inc;

[2] Exhibit A p47-56.

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4.2.4.4 Punitive costs

5.

The sequence of the arbitration and the separation of issues

5.1 The arbitration was instituted in October 2015 by Mr Schoeman as first claimant and Raining Men as second claimant. The parties filed their respective pleadings and the Constitutional Court ruled in favour of Mr Makate on 26 April 2016.

5.2 Before the arbitration could commence, Both Mr Schoeman and Raining Men lodged an urgent application in the High Court to have the arbitration set aside. However, on 14 June 2016, an order was made by the Honourable Judge Tuchten, by consent, amongst the parties that the arbitration would proceed (Tuchten 1). The arbitration was scheduled to start on 25 July 2016.

5.3 On 20 July 2016 Mr Schoeman lodged a further application in the High Court to prevent the arbitration from proceeding. Raining Men supported this application as the Fourth Respondent.

5.4. On 31 August 2018 the Honourable Judge Tuchten dismissed this application with costs (Tuchten 2).

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5.5 The arbitration was scheduled to resume from 3 - 5 December 2018, but on 15 November 2018 Mr Schoeman as First Claimant withdrew his claim in the arbitration. Raining Men appointed a new attorney (Mr FJ Cohen) and requested that the arbitration be postponed until early 2019 to allow it to brief counsel.

5.6 On 12 December 2018 I ruled that the arbitration would proceed on 5 February 2019.

5.7 No further correspondence was received until 30 January 2019 when Mr Samons informed the parties that he had been appointed as Business Rescue Practitioner (the BRP) on 21 January 2019 already and he needed more time to prepare.

5.8 I requested dates from the parties to decide on a date for the arbitration but Raining Men's representatives would not make any commitment or simply failed to answer my requests. On 15 March 2019 I informed all the parties that the arbitration would proceed on 10-12 April 2019 as a final date. I informed the parties that as arbitrator, I had a duty to make sure that the arbitration proceedings get finalised. During all these postponements, Mr Makate and his team were ready to proceed and validly complained about the delays.

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5.9 On 20 March 2019 I informed the parties about a final pre -arbitration meeting scheduled for 25 March 2019. The purpose was to discuss all procedural preliminary matters to enable the arbitration to proceed on 10 April without further delay. Raining Men's attorney replied that he was not available for the entire week without mentioning availability of counsel or another representative of his firm.

5.10 On 26 March 2019 Mr Makate filed a notice with an application to have the issues to be adjudicated upon, separated. As Mr Schoeman had withdrawn as party, Mr Makate stated in his notice that:

"Be pleased to take notice that the Respondent in the above matter hereby gives notice of his intention to apply, under the Uniform Rule of Court 33(4), alternatively in terms of the Arbitrator's inherent jurisdiction to regulate procedure before him, that the issue of whether there was a valid nomination of Raining Men Trade (Pty) Ltd be separated from the remainder of the issues in the arbitration and be heard separately and before other such issues are heard.

Be pleased to take notice that the application will be brought at the pre-arbitration hearing at 14h00 on Friday the 29th of March 2019.'

The notice was served on Mr Samons as BRP and on the attorneys acting for Raining Men in the arbitration.

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5.11 To accommodate Mr Cohen, the pre-arbitration meeting was postponed to Friday 29 March 2019. On Thursday 28 March Mr Cohen again said that he was not available. In terms of my powers as arbitrator to decide on time, date and place of hearings, I repeated that the pre -arbitration meeting scheduled for 29 March would proceed. Mr Makate's application for a separation of issues had to be decided upon on an urgent basis, as it had an impact on the preparation for the arbitration. Mr Cohen was invited to join the meeting telephonically or send any representative, such as the BRP, or counsel. It was clear that Raining Men's legal team was deliberately trying to prevent the pre- arbitration meeting to proceed. Eventually Raining Men's legal team failed to turn up and failed to take any telephone call on the specified time. The application for separation was moved and considered by me.

5.12 Mr Makate applied that the issue to be initially decided upon was if Raining Men had been validly and property nominated. The nomination was alleged in paragraphs 7-13 of the Claimant's Statement of Case. In his Statement of Defence, Mr Makate denied the nomination of Raining Men based on the alleged addendum attached as POC 2 to Raining Men's Statement of Claim, denied that he was advised of such nomination and denied that Raining Men became a party to the Funding Agreement.[3] In view of the fact that Mr Schoeman had withdrawn his claim in the arbitration, only Raining Men remained as party. If Raining Men had not been properly and validly nominated, it would have no locus standi in the arbitration and the other

[3] Paragraphs 3-5, 10.2 and 13 of the Statement of Defence, p48 of the pleadings Exhibit A.

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disputes on the pleadings such as the cancellation of the agreement would not be relevant any longer. It therefore gave rise to an issue of fact raised in the pleadings.

5.13 The procedure of separation of issues is aimed at facilitating the convenient and expeditious disposal of litigation.[4] In **Tshwane City v Blair Atholl Homeowners Association**[5] the SCA ruled that the word 'convenient' conveys not only ease or expedience, but also appropriateness and fairness. It is the convenience of all concerned which must be taken into consideration.[6] My function was to ascertain to the best of my abilities, the nature and extent of the advantages which would flow from the granting of the separation. If the advantages outweigh the disadvantages, the separation should be granted. according to the SCA in **S v Malinde.**[7]

5.14 In this instance the separated issue would have shorten the duration of the arbitration and possibly facilitated the final determination of the disputes in the arbitration, which had been pending since 2015. It would confine the evidence to one dispute. Mr Puckrin argued that the balance of convenience required that the crisp issue of a valid nomination should conveniently be decided on its own, as it would only require evidence regarding the nomination itself. If Raining Men could not prove its valid nomination, it would not have locus standi in the arbitration and the remaining issues would fall away. I accepted

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[4] *Denel (Edms) Bpk v Vorster* 2004 (4)SA 481 (SCA) at 485 A-E.
[5] *Tshwane City v Blair Atholl Homeowners Association* 2019(3) SA 398 SCA at 414 F-G.
[6] *NK v KM* 2019(3) SA 57 1(GJ) at 574 B-577 G.
[7] *S v Malinde* 1990(1) SA 57 (A) at 68C- E.

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his argument as I had been ultimately satisfied that it was convenient and proper to try the issue of nomination separately.[8]

5.15 On 3 April 2019 Raining Men lodged a further urgent application to have my appointment set aside, alternatively to set aside the ruling to separate the issues. The urgent application was dismissed with costs by the Honourable Judge Davis.

5.16 On 10 April 2019 the arbitration commenced and again Raining Men applied for a postponement of the arbitration to lodge an application due to the fact that I did not have the jurisdiction to rule on the separation of issues. This contention was repeated in the Heads of Argument filed by Raining Men.

5.17 The arbitration agreement originated from paragraph 11 of the Funding Agreement which provided inter alia as follows:

In the event of there being any dispute or difference between the parties arising out of this agreement, the said dispute or difference shall on written demand by any Party be submitted to informal arbitration………… The Parties shall decide on an arbitrator, failing which the Chairman of the Pretoria Bar will appoint an Advocate with no less than 10 years standing as Arbitrator (sic). The decision shall be final and binding on all the parties to the dispute. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the parties to the dispute failing to agree on <u>any matter relating to</u> <u>the administration of the arbitration</u>, (my

[8] *Osman Tyres and Spares CC v ADT Security (Pty) Ltd* (unreported) SCA case 1174/2018 dated 3 April 2020) at paragraphs 45-46.

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underlining) such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the parties to the dispute.

5.18 The parties could not agree on the application to separate issues, which aspect was clearly a matter relating to the administration of the arbitration which fell within my powers as arbitrator to rule upon, guided by fairness as a criteria.[9] The contention by Mr Willis that such ruling fell outside the scope of my powers as arbitrator, is simply untenable in law.

5.19 The issue of Raining Men's nomination formed an integral part of the pleadings.I specifically referred to paragraphs 7-9D of the Claimants Statement of Case and the denial thereof in paragraphs 3-5 ,10.2 and 13.1 of the Respondent's Statement of Defence. After the Claimant moved an amendment to include paragraphs 9B-D to its Statement of claim, the Respondent's pleadings still denied such allegations in paragraph 3 thereof. On a proper reading of the pleadings, paragraphs 10.1 and 10.2 also refers to a denial of the nomination.

6.

The Evidence led by Raining Men

6.1 Mr Schoeman

[9] Lufuno Mphaphuli and Associates (Pty)Ltd v Andrews 2009(4)SA 529 CC;. Telcordia Technologies Inc v Telkom SA Ltd 2007(3) SA 266 SCA.

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6.1.1 Mr Schoeman, a businessman involved in litigation funding, had practised as an attorney and later as advocate at the Durban Bar until he was struck from the roll there. He therefore has an extensive legal background. During his opening remarks he stated that he deliberately withdrew his claim in the arbitration as he does not want to be part of anything in the Vodacom/ Makate matter. He stated that he has no interest in the outcome and "I am finished with it and that is it" [10]. Although the only relevant issue before me was the nomination of Raining Men, he insisted on giving extensive evidence on all issues which he deemed relevant, notwithstanding his counsel, Mr Willis's attempts to steer clear of irrelevant aspects.

6.1.2 He was introduced to Mr Makate by a Mr Jenkins. Mr Makate provided him with a copy of pleadings in his claim against Vodacom with the intention that he should obtain funding to further pursue the claim. After an international funding company GDAF declined to get involved, he decided that he will fund the claim himself. After various meetings with Mr Makate and Stemela & Lubbe Inc Attorneys, he concluded the agreement referred to as the Funding Agreement on 7 November 2011 with Mr Makate. In terms of the agreement he acted "in his capacity as authorized representative of a Company to be nominated". Clause 2 of the Funding Agreement provides:

2. FUNDING

The Company shall fund all legal costs and expenses reasonably necessary to prosecute the claim instituted by Makate against Vodacom.

[10] Transcript volume 3 p54.

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And

The company indemnify Makate against all and any claims which may be instituted against him during the cause of the litigation, including adverse cost orders which may be granted during the litigation.

The company shall deposit with the attorneys sufficient funds as reasonably required and requested by the attorneys from time to time to finance the litigation, within 10 days of being requested to do so.

6.1.3 In return for the funding the funding agreement provided in clause 5 as follows:

5. REWARD

........Upon conclusion of the matter ; whatever award is made and recovered by Makate from Vodacom, shall be paid to Stemela& Lubbe Inc (Trust Account) who shall be instructed to divide such recovery in such a manner that Makate will receive 60 % thereof and the company 40%.

6.1.4 Initially investments of R750 000 was obtained from friends and family members such as Mr Jenkins, his ex-wife Mrs Wilma Schoeman, Mr Elsdon and a Mrs Roscher in their personal capacities. When more funding was needed, Mr Elsdon obtained funding from a Mr Eddlestone and Mr Shone in London. However, after a visit to the UK to meet with a witness Mr Muchenje, he realised that he had to formalise the nomination of a company in terms of the funding agreement.

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6.1.5 On 15 April 2014 Mr Elsdon phoned him and stated that " I have got a company that we are going to use as the company in my place, and this is the company, Raining Men Trade (Pty) Ltd." [11] An Attorney Mr Kika thereafter drafted the agreement referred to as the Addendum to the Payment Rights Agreement ("the Addendum or Nomination agreement") which is attached as a POC2 to the pleadings.[12]

6.1.6 The addendum <u>amended</u> the percentages so that Mr Makate would receive 50% and the company 50 % of any proceeds. In clause 4 it states:

4. <u>NOMINATION OF COMPANY IN TERMS OF THE MAIN AGREEMENT</u>

4.1 Schoeman hereby nominates Raining Men Trade (Pty) Ltd with Registration number 2011/147785/07. a company duly registered and incorporated with limited liability in terms of the company laws of the Republic of South Africa, the Company to be nominated in terms of the Main Agreement.

And

4.2 The remaining terms of the Main Agreement hall continue to be in full force and effect.

6.1.7 The date was inserted as 24 April 2014 and signatures appear of Schoeman and Makate.

[11] Transcript Volume 5 p14.

[12] Paginated pages 28-31 of the pleadings.

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6.1.8 Mr Schoeman testified that he arranged a meeting with Mr Makate at Crawdaddy's restaurant to discuss the change in percentage and that Mr Makate was very unhappy, but both of the signed the addendum. The signatures of witnesses appearing on the addendum are those of Mr Van der Merwe Snr and Mr van der Merwe Jnr who happened to sit at another table. He then scanned the document and sent it to Mr Elsdon, Mrs Roscher and the Attorney Kika. No copy of such mail was ever discovered in the arbitration.

6.1.9 Mr Schoeman testified that the nomination of Raining Men as the company who would be the party to contract with Mr Makate in terms of the Funding Agreement occurred firstly orally during the telephonic discussion with Mr Elsdon on 15 April 2014, thereafter being recorded in the addendum signed on 24 April 2014. The nomination was again recorded in a resolution which was passed by the directors of Raining Men on 14 November 2014 by way of a ratification, attached as POC 4 to the Statement of Claim. [13] He stated that the nomination of Raining Men had already been communicated to Mr Makate in clause 4.1 of the Addendum.

6.1.10 Notwithstanding the fact that the eventual cancellation of the Funding Agreement was irrelevant for purposes of the determination of the separated issue, Mr Schoeman eagerly wanted to testify about an alleged conspiracy with Mr Makate's legal team whereby he deceived Raining Men's directors.

[13] Paginated p 35 of the pleadings.

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6.1.11 Before his cross examination could ensue, Mr Schoeman himself applied from the bar that Mr Puckrin SC, acting for Mr Makate should be prohibited from cross examining him due to the fact that Mr Puckrin was, according to him, not independent. As there was no merit whatsoever in this application, I refused it.

6.1.12 Mr Schoeman was confronted why he had not once during his extensive evidence mentioned a company called Black Rock. He tried to explain that some months after nomination of Raining Men in April 2014, it was suggested by attorneys in the UK that the funding should be done in an offshore entity, which was a company which Mr Elsdon had, called Black Rock Ltd, registered in the British Virgin Islands. However, they did not proceed with the idea, but still used the company as nominated entity in an agreement signed with Mr Eddlestone and Shone for funding. Mr Schoeman was referred to a written document dated 18 July 2013.[14], clearly preceding the date of the addendum of 24 April 2014. He conceded that the agreement contained the signatures of himself, Mr Elsdon, Mr Eddlestone (the London financier) and Mrs Lubbe of Stemela and Lubbe Inc.

6.1.13 The contents of the document was read to Mr Schoeman as follows:

PREAMBLE

[14] Exhibit G p42-45.

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WHEREAS A Black Rock has entered into an agreement ('the agreement') with Nkosana Kenneth Makate ('Makate') to finance his ongoing litigation with Vodacom ('the litigation'), and

WHEREAS B Black Rock is entitled in terms of the agreement to receive 50 % of the gross income from the proceeds of the litigation, and

WHEREAS C the financier has agreed to supply additional funding to Black Rock

And in paragraph 3

3. All the proceeds of the litigation will be paid to the Attorneys and they will account to all parties, for such proceeds

And in paragraph 4(b)

4............

4(a).............;

4(b) for the purposes of this Agreement gross proceeds from the litigation shall mean all monies paid by the Defendants in the litigation referred to in recital A and paid to either the Plaintiff or the Attorneys in full and final settlement of the litigation inclusive of any payments with regard to damages, interest, costs and the like without deduction.

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6.1.14 When it was put to Mr Schoeman that if Mr Makate was not a party to the agreement, the only way he could have in any way become involved as a party to the funding agreement would be for you to have nominated Black Rock as your nominated company, Mr Schoeman conceded that. He also conceded that the 50 % was at variance with the funding agreement .He further conceded that in terms of this agreement, Black Rock would receive its funding from an offshore company, Simba and that the attorneys would be Stemela and Lubbe Inc.

6.1.15 Mr Schoeman also agreed that GBP 100 000 was designated for Stemela & Lubbe Inc for funding of the case and the other GBP150 000 went to a Cyprus account of Mr Elsdon, whereafter it was shared amongst himself, Mr Elsdon and Mrs Roscher.[15]

6.1.16 Mr Schoeman conceded that Simba, Mr Elsdon, Mrs Roscher and himself regarded Black Rock as the nominee, but tried to get away from this nomination by stating that it was for a very short period of time, that it wasn't accepted by Black Rock (notwithstanding Mr Elsdon's written acceptance in the agreement in his capacity as director of Black Rock being duly authorised thereto) or it was cancelled and "it is gone"[16]. He answered that the nomination of Black Rock was cancelled at a maximum of a month after the nomination of Black Rock. He and Mr Elsdon scrapped it without informing Mr Makate, because Mr Makate did not even know about it. [17]

[15] Transcript vol 5 p116.
[16] Transcript Vol 5 p117.
[17] Transcript Vol 6 p37.

N.M.
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6.1.17 Mr Schoeman was referred to his own email correspondence to Mr Elsdon and Mrs Roscher wherein he confirmed the nomination of Black Rock as follows:

- 9 August 2013: Makate has an income sharing deal with Black Rock. Their fundraising efforts were disappointing and the trio were desperately short of cash. I quote
  "*We have a written distribution agreement in Black Rock—it was Black Rock's obligation to provide funding. Black Rock was failing in its pursuit of funding*"[18]

- 11 August 2013: Mr Elsdon confirmed in a mail to Mr Schoeman that it was Black Rock's obligation to provide funding, but asked
  "*Where does the obligation to provide unlimited funding arise from?*"[19] (Clearly negating the fact that they have shared the proceeds derived from funding amongst themselves)
- 4 September 2013: Mr Schoeman wrote to Mr Elsdon and Mrs Roscher that
  "*We have agreed some time ago that we should use Black Rock Mining as the vehicle*"[20]

- 15 April 2014: Mr Elsdon bought Raining Men as a shelf company

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[18] Exhibit J p7.
[19] Exhibit J p13.
[20] Exhibit J p21.

NM
[illegible]

- 30 April 2014: Black Rock was finally deregistered in BVI;
- 13 November 2014 Mr Elsdon and Mrs Roscher were appointed as directors of Raining Men;
- 14 November 2014: Resolution accepting and ratifying the Nomination Agreement by Raining Men;
- 3 December 2014: Mr Elsdon stated in an e mail to Ms Lubbe that Raining Men controls the litigation

6.1.18 Mr Schoeman agreed to all of these dates and it is common cause that Black Rock was nominated as the company in terms of the funding agreement. However, he could provide no evidence that the nomination of Black Rock was cancelled. When asked about the purported nomination of Raining Men, Mr Schoeman stated that each and every e mail he wrote after 13 October 2013 should be disregarded as it were all lies and part of a "conspiracy" amongst him and Ms Lubbe and members of Mr Makate's legal team to get rid of Raining Men. He was referred to a mail written by him on 15 December 2014 to Mr Elsdon and Mrs Roscher ,stating insurmountable problems relating to Raining Men as follows:

"*Raining Men is totally insolvent;*

No shares have been issued in Raining Men

Raining Men has no money

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[initials]

Makate did not accept the nomination of Raining Men I believe his refusal to accept the nomination is perfectly reasonable… we are giving him an empty indemnity that is not worth the paper it written on.
I don't think Black Rock even exists anymore"[21]

He only answered that some of the paragraphs were lies and some were true.

6.1.19 Mr Schoeman stated that he did not know where the original of the addendum was and could not produce the requested original or even the mail which he sent to Mr Kika attaching the agreement which he alleged Mr Makate signed in front of him on 24 April 2014. He also could not remember if he indeed took the original to Mr Kika as undertaken by him in a mail.[22] But it should have been in the file handed to Mr Cohen, the attorney acting for Raining Men. When it was put to him that Mr Makate would testify that the addendum which he had signed was for a nomination of Black Rock, he disagreed, but he stated he did not have an independent recollection of Mr Makate's initialling the document. He could not explain why Mr Makate's purported initials were made in the middle and over the typed parts of the addendum and not below where ample space exists. He just stated that he certainly didn't initial on Mr Makate's behalf.

6.1.20 I have observed Mr Schoeman closely during his testimony and cross examination. He was duplicitous in the extreme, tailored his evidence and answers to suit him. When he was confronted with documents which did not

[21] Exhibit G p115-117.
[22] Transcript Vol 6 p 66.

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support his current version, he used the veil of his self-confessed dishonesty, blaming it on a conspiracy. Mr Schoeman can only be described as a totally uncredible witness, a liar and a fraudster (even by his own admission). His insistence that Mr Makate signed the addendum in his presence, thereby nominating Raining Men, carries no evidentiary value. His attempt in evidence in chief to avoid the nomination of Black Rock was a clear indication that he could not deal with that nomination, which he signed in July 2013 already, several months before the name of Raining Men was mentioned.

6.2 Mr van der Merwe Jnr

6.2.1 Mr van der Merwe testified that he and his father attended a meeting with Mr Schoeman at Crawdaddy's restaurant in Menlyn on an unknown date. On arrival, Mr Schoeman was sitting with an unknown person which Mr Schoeman later introduced as Mr Makate. He saw documents on the table. After Mr Makate left, Mr Schoeman came to their table and asked them to sign as witnesses for a document which Mr Makate and Mr Schoeman had signed according to Mr Schoeman. He never saw them signing and did not look at the contents of the document. He could not identify the Addendum as the document which they had initialled or confirm the signatures of either Mr Makate or Mr Schoeman. His evidence did not assist in any way to establish if the addendum relied upon by Raining Men in the arbitration was in fact the same document which he and his father initialled.

6.3 Mr Elsdon

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6.3.1 Mr Elsdon testified that he is a businessman, domiciled in London and the director and a shareholder of Raining Men together with Mrs Roscher as Chief Financial Officer. Due to his previous exposure in litigation finance, Mr Schoeman approached him to replicate such funding in litigation in South Africa. He met Mr Makate in 2011 for the first time together with Mr Jenkins and Mr Schoeman. He later established that Mr Schoeman had concluded an agreement with Mr Makate to fund his litigation. Mr Elsdon was also the director of Black Rock Ltd, a company registered in the BVI. Black rock was used as the special purpose vehicle through which financing from another international company, Simba would be obtained for the funding of Mr Makate's matter against Vodacom. He stated that the nomination of Black Rock was tacitly accepted, and Black Rock was thereafter included in the July 2013 agreement as the nominated company.[23]

6.3.2 He testified that the nomination of Black Rock was cancelled" informally "[24] , but he didn't know when and how. He confirmed that Black Rock was finally deregistered in the BVI on 30 April 2014 and that the company as entity had ceased to exist as from date of such deregistration. During April 2014 he and Mrs Roscher realised that they needed to formalise a nomination agreement with Mr Schoeman and obtained Raining Men as shelf company on 15 April 2014. He accepted the nomination during a telephone call with Mr Schoeman. He received any copy of the addendum via e mail from Mr Schoeman on 24

[23] Transcript Volume 7 p33.
[24] .Transcript volume 7 p60.

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April 2014.[25] It was sent as four separate pages which were signed and initialled. Mr Schoeman would bring the original document to Johannesburg the following day. He insisted that the addendum which was signed was the same document which he sent to Mr Schoeman to obtain Mr Makate's signature.

6.3.3 He only forwarded the signed addendum to Mrs Lubbe, the attorney acting for Mr Makate on 3 December 2014 after being alerted by Mr Schoeman of a letter of breach from Mr Victor Williams from Hahn & Hahn Attorneys, acting for Mr Makate in the cancellation of the agreement. They were only appointed as directors at CIPC on 13 November 2014 and thereafter signed a resolution that they ratified the nomination of Raining Men by Mr Schoeman.

6.3.4 During cross examination Mr Elsdon confirmed that Black Rock was nominated in terms of the funding agreement.[26] He also conceded that the Back Rock agreement did not provide for a raising fee for himself, Mrs Roscher and Mr Schoeman, but he believed that the litigation against Vodacom only needed GPB 100 000 and that they were entitled to the remainder of GBP 150 000.

6.3.5 Mr Elsdon tried to avoid answering the question if the Black Rock agreement was ever cancelled. At first, he said that it was not cancelled, but 'settled 'with Simba. Thereafter he changed it to an oral cancellation.[27] Another version

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[25] Exhibit F p1-4 .
[26] Transcript Volume 8 p16-17.
[27] Transcript volume 8 p28.

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was that the Black Rock agreement was later cancelled by Simba as he had done a business favour for Mr Shone, but he could not remember the date.[28] A fourth version was that Mr Schoeman cancelled it '*because people in the group were not happy*'.[29] They (Mr Schoeman and himself) did not think it was necessary to inform Mr Makate that they had cancelled it as they assumed that Mr Makate was not aware of the Black Rock agreement.[30] Mr Elsdon confirmed that the 'loose partnership' consisting of himself, Mr Schoeman and Mrs Roscher put the funding money into the case and the special purpose vehicle used was Black Rock.[31]

6.3.6 When confronted with newspaper articles where he and Mrs Roscher stated that another company Sterling Rand (Pty) Ltd ('Sterling Rand') was funding the case, he said that they were "showboating" to promote Sterling Rand and that Sterling Rand would not receive 50 % of proceeds.[32]

6.3.7 Mr Elsdon was asked to compare two versions of the addendum with each other. The two sets are included in the record as Exhibit K and Exhibit J.[33] He was asked why the last pages of the document in Exhibit J differed from the last page of the document as exhibit K, but which purported to be the same document. Mr Elsdon's only explanation was that printing of the pages from different computers may have caused the change.[34] Mr Elsdon vehemently

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[28] Transcript volume 8 p32.
[29] Transcript Volume 8 p78-79.
[30] Transcript Volume 8 p35.
[31] Transcript Volume 8 p45.
[32] Transcript Volume 8 p68.
[33] Exhibit J p33-35.
[34] Transcript Volume 8 p99.

NM

denied the proposition to him that the addendum was altered, that the spacings obviously differed and that the document was forged.

6.3.8 Mr Elsdon was also at a loss to explain why the change of directors of Raining Men was only lodged at CIPC on 13 November 2014, being a week after Hahn and Hahn required proof of the company documents and directorships. He couldn't answer the preposition that he couldn't provide the company documents as they were only registered as directors of Raining Men in the records of CIPC on 12 December 2014.

6.3.9 Mr Elsdon lied about an irrevocable direction which he had signed until the signed document was provided to him.[35]

6.3.10 When Mr Elsdon was asked during cross examination in which capacity they (Mr Schoeman, Mrs Roscher and himself) attended a meeting with Mrs Lubbe on 13 October 2014 at her office, he said that they attended as directors and shareholders of Raining Men, knowing full well that they only lodged the documents to become directors of Raining Men a month later on 13 November 2014 at CIPC.[36] When he was confronted with the fact that evidence will be led that he stated at the meeting that he attended it as director of Sterling Rand and that no mention was made of Raining Men, he replied that Raining Men was a *'special purpose vehicle under the Sterling*

[35] Transcript Volume 8 p155-156 and Exhibit L.
[36] Transcript volume 9 p46.

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perusing the document, he noticed the name of Black Rock in the document. He also noticed that the percentage split was correctly amended to 53/47 as previously agreed between him and Mr Schoeman, thereby amending the initial 60/40 split. The last page of the document had no clauses typed in, but only made provision for signature of the parties.

7.1.7 Due to the pages being unnumbered and not bound, he opted to go with his full signature on each page instead of using his usual way of only initialling. As auditor he wanted to make sure that each page could stand at its own.[40] After he and Mr Schoeman signed the addendum, Mr Schoeman took the document to two other people who were sitting at a table nearby to sign as witnesses. On Mr Schoeman's return he asked for a copy of the signed addendum, but Mr Schoeman told him that he as on his way to Johannesburg and that he would scan and mail a copy to him on his return. Notwithstanding many requests, Mr Schoeman never sent him a copy.[41]

7.1.8 In December 2014 he was provided with the Addendum which is attached as POC 2 to the Statement of Claim. In early January 2015 he closely scrutinised the document and realized that certain terms and conditions in the addendum did not reflect the terms and conditions which he had agreed to at the meeting at Crawdaddy's.[42] He also noticed that the initials on pages 1, 2 and 3 of the addendum were not his own.[43] He said that he would never have signed over the typed words while there was ample space below for initials and he

[40] Transcript Volume 10 p40-41.
[41] Transcript Volume 10 p43.
[42] Transcript Volume 10 p44.
[43] Transcript Volume 10 p45.

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certainly did not sign an addendum which had nominated Raining Men. He also never consented to a 50/50 split in proceeds. The document which he signed nominated Black Rock, a BVI company. The first time when he had heard of an entity called Raining Men , was in early December 2014 when he was asked by Mrs Lubbe, his attorney if he had nominated Raining Men.[44] Until such time he was convinced that the funder was Black Rock. He was never informed that the Black Rock nomination was not in existence anymore, nor was he informed of any cancellation of that nomination.[45] He only signed one nomination addendum, being the Black Rock nomination. He never agreed to any other amendment of the funding agreement, neither orally nor in writing.

7.1.9 He then obtained the services of a handwriting expert, Mr J Viljoen Bester. At his request, he provided him with samples of his initials, signatures as well as examples of contracts which he had signed at his work on 24 April 2014 or close to such date.[46] Mr Bester examined the various examples and prepared an expert report. His key conclusions (which he confirmed in evidence later) were read into the record by Mr Makate as follows:

7.1.9.1 "*During the examination of the* ***questioned*** *initials on page 1 to 3 of the ADDENDUM TO THE PAYMENT RIGHTS AGREEMENT mentioned at 1 the Payments Rights Agreement document,* *__no__* (my underlining) *corresponding handwriting characteristics were identified*

[44] Transcript Volume 12 p114.
[45] Transcript Volume 12 p115.
[46] Transcript Volume 12 p108.

NM

between the questioned initials and the collected specimen initials....and Fundamental handwriting differences were identified between the questioned initials and the collected specimen initials.

7.1.9.2 *It is further Mr Bester's opinion based on a balance of probabilities that the writer of the Kenneth Nkosana Makate collected specimen initials is* *__not__* (my underlining) *the writer of the Kenneth Nkosana Makate questioned initials on the ADDENDUM TO THE PAYMENT RIGHTS AGREEMENT document mentioned at 1"*[47]

7.1.10 During cross examination Mr Makate not once changed his version, answered the questions without contradicting himself and I had no reason whatsoever to question his credibility.

7.2 <u>Mr Smit</u>

7.2.1 Mr Smit is a practising attorney and director of the firm Fourie, Smit & Associates. Mr Smit completed his articles at Stemela & Lubbe. As Professional Assistant, he assisted Mrs Lubbe during the preparations for the trial of Mr Makate against Vodacom. He met Mr Elsdon and Mrs Roscher sometime prior to the commencement of the trial in July 2013. He received various telephone calls from them requesting copies of the pleadings. He was hesitant to provide it as he did not know what their involvement was.

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[47] Exhibit N, p5-6.

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7.2.2 He attended a meeting in October 2014. His recollection was that Mrs Lubbe, Mr Schoeman, Mrs Roscher, Mr Elsdon and himself was present. The purpose of the meeting was to discuss the funding which was required to continue with an appeal and to establish in which capacity Mr Elsdon and Mrs Roscher were involved in the matter. [48] He recalled that Mrs Lubbe asked why the legal team had to share documentation and client information with Mr Elsdon and Mrs Roscher and in which capacity they were attending. Mrs Roscher replied that they were present in their capacity as directors of Sterling Rand, while Mr Schoeman confirmed that he was there as a representative for a company to be nominated. Neither Mr Schoeman, Mrs Roscher nor Mr Elsdon mentioned the name of a company Raining Men. He heard the reference to Raining Men for the first time before the offices closed in December 2014.

7.2.3 Mr Smit is totally independent and is not involved in the litigation of Mr Makate. He answered all questions with a forthright attitude and in spite of repetitious cross examination by Mr Willis, he stuck to the facts as testified in chief. Mr Smit made a good impression and his evidence is credible.

7.3 Mr Jannie Bester, a handwriting expert

[48] Transcript Vol12 p31

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7.3.1 Mr Bester received training at the Forensic Science Laboratory at the South African Police service for 3 years. He completed the Advance Certificate in Fraud Examination. After 3 years in the SA Police service he practised in the private sector for the past 20 years.

7.3.2 He is a professionally recognised forensic document examiner of the Chartered Society Forensic Sciences in the UK and a court qualified examiner in South Africa. He is currently the deputy chairman of ACFE (Association of Certified Forensic Examiners). He was the previous chairman of the SA Council of Natural Science Profession's professional committee dealing with forensic science. Since 1993 he has completed 1400 disputed document cases and has provided expert evidence in more than 70 court cases and more than 60 arbitration and disciplinary hearings worldwide. He has published numerous articles in his field and attended numerous conferences on forensic science and participated as a panel speaker on the topic of conclusions, signature and handwriting terminology and skills at the 7th Annual Meeting of the American Society of Question Document Examiners.

7.3.3 Mr Bester's expertise, training and qualifications are such that I was satisfied that he is a qualified expert in the field of handwriting analysis and that he was more than qualified to present evidence in that regard in this arbitration and declared as such. [49]

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[49] Transcript Volume 14 p71-72.

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7.3.4 Mr Bester explained that the procedure when investigating handwriting or, as in this instance, signature or initials, is to first examine it by searching for distinguishing features by which you can individualise each pen stroke. Then he would compare similarities, writing differences and writing variations.[50] He handed in his expert report which was marked as Exhibit N. He explained the various features for consideration such as *inter alia* alignment, disguise, freedom of execution line quality, overall pressure, hesitations of the writing instrument and drawn quality of the lines of various forms.

7.3.5 He would then request original signatures and handwriting from the person who disputes the validity of the signature as well as contemporaneous handwriting specimens. He then considers and compares the different sets, keeping in mind that in this instance only a photocopy of the questioned signature and initials were available, and not the original.

7.3.6 He confirmed that his mandate was to compare the 3 Initials which appear on the Addendum to the Payment Rights Agreement document and the signature of Mr Makate on page 4 of the document to the collected specimen signatures and initials from Mr Makate.

7.3.7 Mr Bester used enlarged photographs of the disputed initials and the specimens received from Mr Makate[51] to explain handwriting characteristics which were identified.[52] The examples from the contracts signed by and

[50] Exhibit N p4
[51] Exhibit P.
[52] Transcript volume 14 p144.

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received from Mr Makate spanned over a period of two and a half years from 8 April 2013 to 26 May 2015 in order to observe the natural handwriting variation. As expert should ascertain the handwriting similarities as well as discriminating elements which indicate handwriting differences. He explained that if you want to forge another person's signature, one has to identify all the discriminating elements in that person's handwriting first. Thereafter you have to adopt those features , which means that you have to develop parallel neuro muscular control processes which are identical to that of the other person.[53] Thereafter you have to identify your own neuro-muscular processes and then ignore all of those to produce the parallel neuro-muscular process of the other person. In Mr Makate's signature on page 4 it would be highly unlikely to do that successfully.

7.3.8 After studying all the material to his disposal, he concluded that he could not exclude the possibility that the signature on page 4 of the Addendum, was that of Mr Makate. [54]

7.3.9 Mr Bester then testified about his examination of the questioned initials on pages 1, 2 and 3 of the Addendum. He examined both types of initials from the specimen's received from Mr Makate. The difference between the collected specimens and the questioned initials were "glaring obvious". He said:

[53] Transcript Volume 15 p27.
[54] Transcript Volume 15 p22.

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"If you look at the questioned initials, there is **no[55] corresponding similarities between that and that and that of the writer of the collected specimen initials** (being Mr Makate's)".[56]

7.3.10 Mr Bester's expert opinion was that the writer of the collected specimens (Mr Makate) was not the writer of the questioned initials on pages 1, 2 and 3 of the addendum to the Payment Rights Agreement.

7.3.11 Mr Bester 's expertise and independence as a forensic document examiner and conclusion derived upon stand uncontested. His evidence and expert opinion have to be accepted. It leads to the inevitable conclusion that the document relied upon by Raining Men as being the written document which constituted its nomination, was forged on pages 1, 2 and 3 thereof.

8.

Conclusion on the facts provided

8.1 Which entity was nominated?

8.1.1 It stands uncontroverted that at latest 18 July 2013 Mr Schoeman had nominated Black Rock Mining, a company registered in the British Virgin Islands as the entity which would finance the ongoing litigation of Mr Makate with Vodacom. This is clear from the written agreement which was entered into between Simba Capital, a Luxemburg company, Black Rock Mining

[55] Transcript Volume 15 p43.
[56] Transcript Volume 15 p48.

Limited (with Mr Elsdon signing on its behalf in his capacity as director), Mr Elsdon himself in his personal capacity, Mr Schoeman and Mrs Lubbe, acting on Mr Makate's behalf as his attorney in the litigation against Vodacom.[57] The preamble of the document explicitly states that:

> *"Black Rock has entered into an agreement ("the agreement") with Nkosana Kenneth Makate .... To finance his ongoing litigation with Vodacom"*
>
> and
>
> *'Whereas (b) Black Rock is entitled in terms of the agreement to receive 50 % of the gross income from the proceeds of the litigation".*

8.1.2 Between 8 August 2013 and September 2013 (being more than a year before Mr Schoeman on his own version started with his alleged false correspondence) both Mr Schoeman and Mr Elsdon confirmed in e-mails to one another that Black Rock had the obligation to provide the funding in the litigation.

8.1.3 Mr Makate distinctly remembered that he signed an addendum which nominated Black Rock, an international company and that he accepted the assurance of Mr Schoeman that the company had sufficient funds to fund the litigation and to indemnify him. His testimony that both he and his attorney

[57] Exnibit G p42-45.

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were under the impression that Black Rock was the nominated entity until November / December 2014 when the name of Raining Men was mentioned for the first time by Mr Elsdon, is accepted.

8.1.4 Mr Schoeman and Mr Elsdon tried to persuade me that the nomination of Black Rock was cancelled but contradicted each other regarding about how and when such cancellation occurred. Neither of them could show any document in writing confirming such cancellation. Mr Schoeman testified that Mr Makate was never informed of the cancellation, but Mr Makate added that he was never even aware thereof and he never consented to it.

8.1.5 From Mr Schoeman's e mails dated 13 August 2013 and 4 September 2013 and Mr Elsdon's reply thereto[58] it is clear that they realised that they were bound to the nomination of Black Rock. It is not clear when they realised that Black Rock was deregistered in the BVI, but it left them with a dilemma: the entity which had been entitled to a share in the proceeds of the litigation, had dissolved and no longer existed. They did not tell Mr Makate and were clearly not concerned about his exposure, having divided the proceeds of funding obtained from third parties amongst themselves. But they had to find another entity. But their insurmountable problem was that Mr Makate had to sign the Black Rock agreement and in view of the friction which ensued due to lack of funding, they could not disclose it to Mr Makate and his attorney.

[58] Exhibit J p7,13, ,21.

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8.1.6 According to Mr Smit, whose evidence I accept, they were asked in October 2014 during the meeting at Stemela and Lubbe in which capacity they were attending. The answer was that they were there as directors of Sterling Rand, which had no agreement with Mr Makate whatsoever. If Raining Men had really been nominated by Mr Schoeman (with Mr Makate's consent) on 24 April 2014 as the Addendum would reflect, they would surely have referred to the agreement reached and signed by Mr Makate in April 2014 already? The only logical deduction which I can make is that it still hasn't existed at that stage, but was created soon afterwards.

8.1.7 Having the original signed Black Rock agreement in their exclusive possession, the solution to Mr Williams's letters of demand was to produce a signed nomination of Raining Men on 3 December 2014. The only way to have achieved it, was to rely on a document which had Mr Makate's signature on the last page and to change the first three pages to allow for Raining Men's nomination and to provide for a different percentage split. However, Mr Makate's initials were needed on pages 1, 2 and 3. Mr Makate testified that he had neither seen that document, nor had he initialled those pages. I have no reason not to believe him. His denial is corroborated by the independent expert and damning evidence of Mr Jannie Bester who concluded that there were no corresponding similarities and that the differences between Mr Makates's own initials and the ones appearing on the Addendum, were glaring obvious. Even the untrained eye can see that the initials were peculiarly made over the type written parts. How exactly the forged initials were made and by whom, is a matter which the National

Prosecuting Authority should investigate. Suffice to say that Mr Elsdon and Mrs Roscher's refusal to provide the handwriting expert with specimen signatures is perturbing.

8.1.8 I therefore conclude that the addendum, which purports to be a nomination of Raining Men, is a fraudulent document on which no reliance can be placed. The entire nomination of Raining Men is a fraud and the consistent reliance on the fraud by Mr Schoeman, Mr Elsdon as director of Raining Men and Mr Samons, as its BRP, is shocking.

8.1.9 In addition, Raining Men tried to rely on an oral nomination.[59] As will be discussed below, the fact that Mr Schoeman advised Mr Makate and Mr Williams on 11 November 2014 of a nomination of Raining Men, could not have rectified the position in any way. In the first instance the existing nomination of Black Rock was still extant and binding, secondly an oral nomination was not competent in view of the provisions of the Funding Agreement, (which requires any amendment or addendum to be in writing and signed by the parties) and thirdly any oral nomination of Raining Men was part and parcel of the fraud committed. To suggest that the law should allow for the oral nomination where the preceding act of nomination was obtained by a written forgery, is simply untenable.

8.1.10 Raining Men had therefore obtained no rights and obligations in terms of the funding agreement or was never validly nominated by the alleged addendum

[59] Amended Statement of Claim paragraph 9A.

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which falsely purported to contain its nomination. It follows that it has no locus standi to claim any part of Mr Makate's proceeds in the litigation against Vodacom, should he receive same.

9.

Legal conclusions

9.1 The legal teams of both parties agreed in their Heads of Argument that the Funding Agreement which contains the provision that Mr Schoeman acted on behalf of a company to be nominated, can be classified as a contract for the benefit of a third party or *stipulation alteri.* As stated in **McCullough v Fernwood Estate Ltd** [60]

> *... the object of the agreement is to secure some advantage for the third person. It may happen that the benefit carries with it a corresponding obligation.......The third person having once notified his acceptance and thus established a vinculum iuris between himself and the promissor would be liable to be sued, as well as entitle to sue.* [61]

A contract may be concluded between two parties for the benefit of a company not yet identified or in existence.[62] When such company is identified and nominated, it may accept the benefit.

[60] *McCullough v Fernwood Estate Ltd* 1920 AD 204.
[61] *McCullough v Fernwood Estate Ltd* 1920 AD 205-206.
[62] *Bagradi v Cavendish Transport Co* (Pty) Ltd 1957 (1) SA 663.

NM

9.2 In **Total South Africa (Pty) Ltd v Bekker NO**[63] the then Appeal Court stated *"The mere conferring of a benefit is therefore not enough: what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract."*[64] Once the third party for whose benefit the contract was concluded has accepted the benefit and has conveyed such acceptance to the other parties, such third party receives all the rights and obligations which formed part of the original contract between the first two parties. [65]

9.3 If applied to the facts in this arbitration as found in paragraph 8 above, Mr Schoeman as *promitens* concluded an agreement with Mr Makate as *stipulator* to nominate a company as third party to provide funding to Mr Makate. The company also had to indemnify him against adverse costs orders. In return it would share in a percentage of the proceeds of the litigation against Vodacom, if successful. Mr Schoeman nominated Black Rock on or about 18 July 2013. Mr Elsdon, as director, accepted the nomination and the benefit. Mr Makate also accepted the nomination of Black Rock as funder when Mr Schoeman provided him with the written agreement containing a nomination.

---

[63] *Total South Africa (Pty) Ltd v Bekker NO* 1992(1) SA 617 A.

[64] *Total South Africa (Pty) Ltd v Bekker NO* 1992(1) SA 617 (A) at 625.

[65] *DF v LF and LF NO and iProtect Trustees (Pty) Ltd NO* SAflii case 12469/2016 dated 29 June 2017 ZAGP JHC (2017) 129.

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9.4 Mr Makate and Black Rock became the parties to the funding agreement (POC 1) and therefore had to comply with the provisions of the agreement. Clause 15.2 provided for a non-variation as follows:

"15.2 Variation to be in writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the parties."

It is trite law that such non variation clause has to be adhered to by the parties. If not in writing, any variation will be invalid. [66]

9.5 Mr Schoeman and/or Mr Elsdon in his capacity as director of Black Rock could only have amended or cancelled the nomination of Black Rock with the consensus of Mr Makate and Black Rock in a written document. Raining Men could not prove that such amendment or cancellation ever occurred. Black Rock therefore endured as the nominee until it was deregistered, thereby ceasing to own the claim.

9.6 Instead of concluding a valid cancellation of the contract with Black Rock, Raining Men relied on a fraudulent addendum which amended the terms of the funding agreement and presented forged initials on pages 1, 2 and 3 containing the contents of the purported agreement. The addendum, containing the nomination, is invalid and Raining Men cannot keep any

[66] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shiffren* 1964(4) SA 760; *Brisley v Drotsky* 2002(4) SA 1 SCA; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266.

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advantage which it has obtained by fraud.[67] As fraud vitiates all, no subsequent oral nomination , ratification or communication of the nomination could rectify its fraud.

10.

Conduct of Raining Men, the BRP and its legal team in the arbitration and reasons for the punitive cost orders

10.1 Raining Men:

10.1.1 Raining Men together with Mr Schoeman knowingly relied on a forged agreement with Mr Makate and persisted with the arbitration and various other litigation as referred to above for the past 5 years to the extreme detriment of Mr Makate.

10.1.2 Throughout the cross-examination of Mr Elsdon it became quite evident to me that Raining Men would persist with any version of a story in order to obtain a share in the proceeds Mr Makate could possibly receive from his claim against Vodacom without offering any financial assistance. Mr Elsdon referred to Mr Makate with contempt as crazy and greedy.[68]

10.2 Business Rescue Practitioner:

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[67] *Esorfrankl Pipelines (Pty) Ltd v Mopani District Municipality and Other* 2014(2) All SA 493 SCA.
[68] Exhibit J p13.

NM

10.2.1 In terms of Section 28(b)(i)[69] an appointed BRP has the duty to manage the affairs of the company under business rescue. When Mr Samons was appointed as the BRP of Raining Men he stepped into the shoes of the directors of Raining Men. As BRP Mr Samons not only managed the financial affairs of the company but also was the driving head of any and litigation instituted by and against Raining Men prior to being placed under business rescue.

10.2.2 In terms of the arbitration agreement [70] each party in the arbitration was responsible in equal shares for the payment of my fee. As Mr Samons was in control of the financial management of Raining Men, he had a duty not only to assess if the company under business rescue can afford litigation, but to adhere to his own undertakings to contribute the share as claimant. Mr Samons showed no such ethical tendency. He attended the arbitration at certain occasions, promising to revert regarding contributions and then disappeared.

11.

Ruling and Award

11.1 The reasons above constitute my reasons for the award which I issued on 10 March 2020 for purposes of the review in terms of Rule 53. It is not the

[69] The Companies Act 71 of 2008.
[70] Exhibit B, page 22 & 28 (marked in red)

NM

reasons or judgment in the arbitration, as Raining Men has not provided the necessary funds for me to issue those reasons and judgment.

11.2 I noticed that paragraph 7 of my ruling and award contains a typographical error, having omitted the words "upon a fraudulent document", I repeat the ruling made in paragraph 7, while the others remain the same.

11.3 Paragraph 7 should read:

7. Due to the reliance of the Claimants (the directors of Raining Men Trade (Pty) Ltd and Mr Schoeman) upon a fraudulent document and further taking into account their disregard for ethical and responsible litigation, which was perpetuated by Mr Thomas Hendrik Samons, the BRP of Raining Men Trade (Pty) Ltd , a punitive cost order is made in this matter.

11.4 Apart from the above, I stand by the award and ruling made.

Signed on **28 July 2020** at **PRETORIA**

Adv M H Mabena SC

First Respondent in Review

(Electronic and thus unsigned)

NM

ADV M.H MABENA SC

407 New Court Chambers
115 Paul Kruger Street
PRETORIA, 0002

P.O. Box 1255
PRETORIA
0001

Tel: (012) 334-4113

Fax: (012) 334 4114

Cell: 063 130 8354

Date:28 July 2020

RE: TH SAMONS N.O / RAINING MEN (PTY) LTD (IN BUSINESS RESCUE) / / MH MABENA SC / KN MAKATE

TO: caroline@cdvlaw.co.za
hans@cdvlaw.co.za
wilna@stimelalubbe.co.za
johan@crouseinc.co.za

Dear all

Hereto attached please find reasons for the ruling and the award in terms of Rule 53(1)(b).

Kind Regards
Tshego
PA - M.H Mabena SC
Arbitrator
(Electronic and thus unsigned)

NM

BRM6

"PDG 8"

44

hahn&hahn
attorneys

Wertheim Becker Inc
Johannesburg

ATTENTION MR AMISH KIKA

Date	Monday, 12 January 2015
Your ref	
Our ref	
Tel	(+27 12) 431 2480
Direct fax	(012) 430 2103
E-mail	victor@hahn.co.za

Per email

CONFIDENTIALITY CAUTION
This document is intended only for the use of the individual or entity to which it is addressed and contains information that is privileged and confidential. If the reader of this document is not the intended recipient, or the employee or agent responsible for delivering the document to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this document is strictly prohibited. If you have received this document in error, please notify us immediately by telephone and return the original document to us at the above address at our cost

RE: NK MAKATE / RAINING MEN

We are in receipt of your letter dated the 9th instant, attached to your email of even date.

At the outset we point out that it is our client's view that your client's nomination as "the nominated company" in terms of the funding agreement, our client had earlier concluded, is void *ab initio*. The onus of demonstrating that your client was properly and lawfully nominated clearly rests on your client. In the circumstances we refrain from setting out any reasons why our client contends as he does. Our client's rights are fully reserved.

In so far as you seek the reasons for the cancellation, we again stress that the cancellation was only done defensively, in the event that it is eventually held that your client was indeed properly nominated (all of which is denied).

In our earlier letter of demand, (the receipt of which you have acknowledged on behalf of your client) we set out the basis of why your client is, in any event, in default of the funding agreement (if he it was ever a party). We do not intend repeating the grounds for default again and our client's rights are reserved.

Yours faithfully

HAHN & HAHN ATTORNEYS
Per:

262/270 Stanza Bopape Street (previously Church Street), cnr Stanza Bopape & Hamilton Streets, Arcadia Park, Pretoria,
P.O.Box 55675, Arcadia, 0007, Republic of South Africa
Docex 47 · Sunnyside Web. www.hahnlaw.co.za

NM

EB

"POC 9"

45

-----Original Message-----
From: Chris Schoeman [mailto:chris@litfin.co.za]
Sent: 12 January 2015 09:16 AM
To: "Victor Williams '; Wilna Lubbe
Subject: RE: PETITION VODACOM

Dear Sir,

In my capacity as being "duly authorised by a company to be nominated" in respect of the Funding Agreement earlier concluded with your client I hereby confirm as follows;

1. I acknowledge receipt of the letter of demand.

2. I accept that despite the demand I remained in default of the Funding Agreement.

3. I confirm that I accept your client's cancellation of the Funding Agreement.

Regards,

Chris Schoeman

-----Original Message-----
From: Victor Williams [mailto:victor@hahn.co.za]
Sent: 12 January 2015 08:22 AM
To: Chris Schoeman
Subject: RE: PETITION VODACOM

Dear Mr Schoeman,

Further to my email of the 7th January 2015, it goes without saying that the cancellation of the Agreement by my client also included the cancellation of the funding

Kind regards

Victor Williams

No virus found in this message.
Checked by AVG - www.avg.com
Version: 2015.0.5645 / Virus Database: 4257/8913 - Release Date: 01/12/15

No virus found in this message.
Checked by AVG - www.avg.com
Version: 2015.0.5645 / Virus Database: 4257/8913 - Release Date: 01/12/15

NM

at 493,053 — or 15.7% more than the 426,093 at the same stage last year.

be the partner of choice to the country's growers, retailers and exporters," said Paul Gibbons, CEO

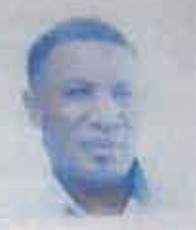
boosted turnover.

GLOBAL CEOs are

directing strategic investment ... development ... security. BusinessLIVE

BRM7.1

Makate settlement opens a new chapter for innovation



Opinion

GUGU LOURIE

After a 25-year legal battle, Nkosana Kenneth Makate has not only lived up to his name but has engraved a new, indelible chapter into our national heritage.

Makate's first name, "Nkosana", holds power. In isiZulu, Nkosana means "prince" or "young chief". His out-of-court settlement with Vodacom for his "Please Call Me" (PCM) invention was more than a personal victory. It reshapes the landscape for innovators and corporates alike.

All along, I thought this young chief, Makate, was immune to stress, but his recent comments to the Sunday Times revealed he had been carrying an immense burden. "There's no price to be relieved of the stress, to have a normal life without litigation hanging over your head," he said.

For a quarter of a century, the PCM litigation was his shadow and burden of stress. Yet, Makate never lost his cool. He mounted a relentless court battle to be justly and fairly compensated by Vodacom for his invention.

During the many court battles, Makate rejected Vodacom's R47m settlement offer that many urged him to take. He stood his ground until the very end. The courts may not have delivered a final "winning verdict", but imminent victory pressured Vodacom to settle.

No African on the continent, or in the diaspora, has ever taken on a European giant like Vodafone, with a market value of £20bn (R455bn), in a more than two-decade-long legal battle, and prevailed.

Young innovators and those yet unborn must know that this young chief paved the way for them.

The PCM historic settlement should inspire dreamers — even in KwaMashu, Soweto, Lidec, KwaMasemola and remote villages — that an innovative idea can be of immense value.

The case champions "intrapreneurship". It ensures that if employees, like an accountant inventing an AI solution, come up with valuable ideas outside their job description, they have a right to share in its success.

The settlement sets a transnational precedent. Its principles of good faith and protection against exploitative power dynamics are now a powerful reference for lawyers in Africa and the Commonwealth.

Vodacom's parent company, Vodafone, deployed PCM in 18 countries, from Europe to India, and as recently as 2023 in Ethiopia.

The legal significance of this journey cannot be overstated. The 2016 Constitutional Court judgment in the PCM matter was transformational. It reshaped the relationship between contract law and our constitutional rights to equality, ubuntu and fair labour practices. The court held that a verbal agreement, based on reasonable expectation, can be binding.

It held that Vodacom's product development head, Philip Geissler, had the ostensible authority to bind the company, and Vodacom could not later deny this.

The court also made crucial rulings on prescription, finding that the debt was only discoverable once revenue was realised, and it constitutionalised the employer-employee relationship, infusing it with ubuntu and good faith into our commercial contracts, something that can be included in studies at law school.

It confirmed Makate as the inventor, protecting his business concept under contract law, independent of patents and the patenting process.

On the other side, Vodacom's CEO, Shameel Joosub, displayed remarkable leadership. After the R47m offer was rejected, he did not endlessly appeal; he let the process run its course until a resolution was found.

In the end, the PCM settlement was a strategic liberation for Vodacom. It removes a massive litigation overhang, enabling the company to pursue new opportunities with certainty.

Vodacom's partners, like Remgro, with its new fibre venture Maziv, can now proceed with more confidence, potentially paving the way for an initial public offering on the JSE to raise capital for a national fibre rollout.

Vodacom can built up its firing-on-all-cylinders fintech business and possibly list it on a Kenyan or South African stock exchange.

The clean slate may even make Vodacom a more attractive target for a suitor such as the Middle Eastern telecomms e&.

It also allows Joosub's future successor to start without the historic burden of litigation.

The settlement means, finally, that Makate can enjoy his well-deserved dues for his PCM invention.

More than monetary compensation, it remains remarkable that an ordinary man challenged a corporate Goliath and secured a victory that echoes far beyond himself.

I salute him with Michelle F Goodrich's words: "Courage to me is doing something daring, no matter how afraid ... So you're afraid? Be afraid. Be scared silly. Until you're trembling and nauseous but do it anyway!"

Makate did it anyway. And in so doing, this young chief has secured a legacy of justice for generations of innovators to come.

* Lourie is the founder and editor of Tech Financials

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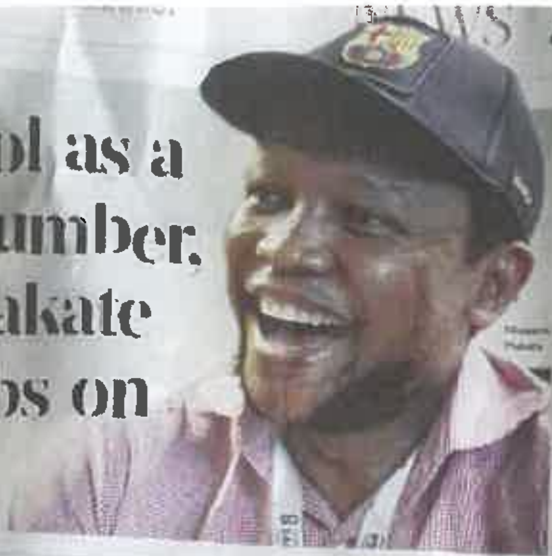
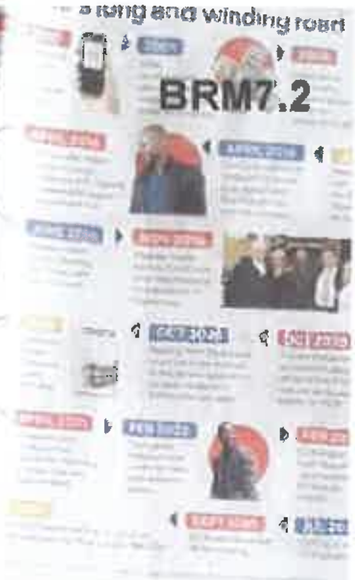
BRM7.2

Cool as a cucumber, Makate jobs on



'Please Call Me' inventor says he won't make major life changes after big payout



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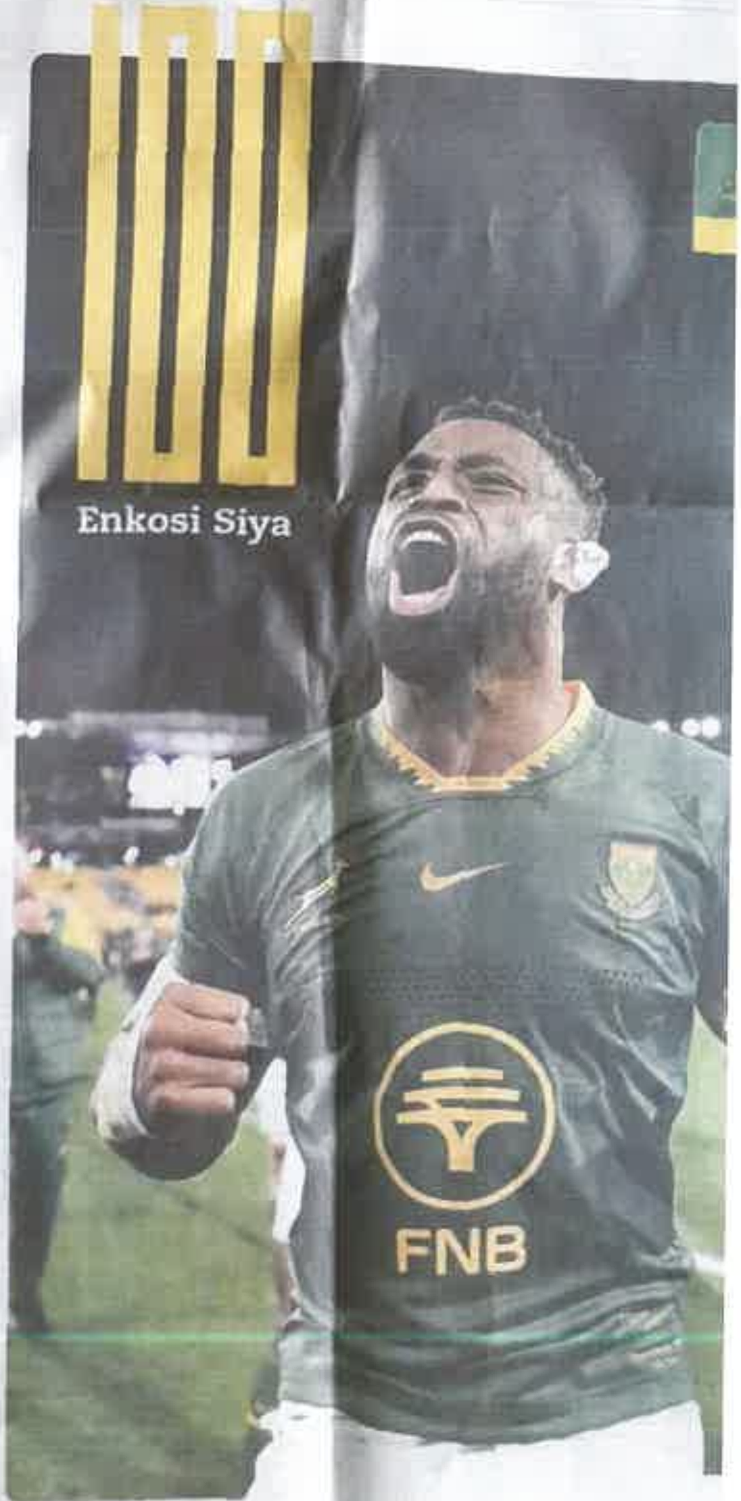

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BRM8

info@mnguninc.co.za
(010) 449 9705
Block A, Unit 8
Upper Grayston Office Park
150 Linden Street
Simba
Sandton
2031

Our Ref : Mr S. Mnguni/sm/B0014/24
Your Ref :
Date : 10 November 2025

To : **Vodacom Ltd**
C/o Leslie Cohen & Associates
Attention : Leslie Cohen
E-mail : les@lhlaw.co.za

Dear Sirs

URGENT: BLACK ROCK RE: MR N.K. MAKATE / VODACOM LTD

1. We address this letter to you in your capacity as the attorneys acting on behalf of Vodacom Ltd in the "Please Call me" litigation.

2. We act on behalf of Black Rock Mining (Pty) Ltd ("Black Rock"), the nominated company in terms of a funding agreement ("funding agreement") concluded between Nkosana Kenneth Makate ("Makate") and Christiaan Schoeman as authorised representative of a company to be nominated as per a copy of the agreement attached hereto marked "**A**".

3. In terms of the funding agreement, the following was, *inter alia,* agreed:

   3.1 the funder would provide funding for the litigation between Makate and Vodacom known as the 'Please Call Me' ("litigation");

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3.2. the funder is entitled to 40% of whatever is to be paid by Vodacom to Makate in respect of such litigation ("the award"); and

3.3. the award is to be paid by Vodacom to attorneys Stemela and Lubbe Incorporated trust account who are to divide and distribute such award as to 60% to Makate and 40% to our client.

4. We have reason to believe that Stemela and Lubbe will not pay to our client, the funder, its 40% entitlement of the award.

5. Kindly advise urgently as to whether you have been instructed to pay the award to Stemela and Lubbe's trust account as is provided for in the aforesaid funding agreement.

6. Our client intends to institute action against Makate for payment of 40% of the award to be paid to him.

7. Insofar as you have instructions to pay the award to any other party other than Stemela and Lubbe's trust account, we seek your unequivocal undertaking **by close of business today** that you will not pay the award to any other account other than Stemela and Lubbe's trust account. Failing such undertaking, our client intends to urgently apply to the High Court to interdict you from paying the award to any other account other than Stemela and Lubbe Incorporated.

8. We will simultaneously with this letter be seeking an unequivocal undertaking from Stemela and Lubbe Incorporated that they will retain in their trust account 40% of the award paid by Vodacom to Makate pending the outcome of an action to be instituted by our client against Makate and citing any other interested parties for payment of 40% of the award. Such action will be instituted within 30 days from today.

9. We await your urgent undertaking as set out in paragraph 7 and all our client's rights remain strictly reserved.

Yours faithfully,

Sinenhlanhla Mnguni
Direct E-mail: sinen@mnguniinc.co.za

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BRM9

info@mnguniinc.co.za
(010) 449 9705
Block A, Unit 8
Upper Grayston Office Park
150 Linden Street
Simba
Sandton
2031

Our Ref	:	Mr S. Mnguni/sm/B0014/24
Your Ref	:	W Lubbe/SS/61/1550/0
Date	:	10 November 2025

To	:	**STEMELA & LUBBE**
Attention	:	Wilna Lubbe
E-mail	:	wilna@stemelalubbe.co.za sonja@stemelalubbe.co.za,

Dear Madam,

URGENT: BLACK ROCK RE: MR N.K. MAKATE / VODACOM LTD

1. We act for Black Rock Mining Ltd ("Black Rock").

2. We refer you to the written funding agreement concluded between your client, Mr N.K Makate ("Makate") and Black Rock on 7 November 2011. Black Rock is the nominated company in terms of the funding agreement entitled to a 40% share of any recovery made by Mr Makate from Vodacom, including any settlement sum.

3. It has come to our client's attention that a settlement agreement has recently been concluded between your client and Vodacom, finally resolving the protracted litigation and entitling your client to a substantial payment.

4. In terms of clause 5 of the funding agreement, Black Rock is contractually entitled to 40% of all proceeds (including any settlement amount) paid, or to be paid, by Vodacom to Stemela and Lubbe of which 60% is to be paid to Makate in respect of the "Please Call Me" litigation.

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5. We hereby damand from you and your client that you will make payment to our client of our client's 40% entitlement to the proceeds to be paid or to be paid to you on behalf of Makate by Vodacom in terms of the settlement agreement, the terms and conditions of which you are invited to disclose.

6. Should you or your client dispute this entitlement and/or fail to provide written confirmation of the aforesaid, our client hereby formally calls upon you, **by close of business today**, to furnish an unequivocal written undertaking that:

   6.1. You will hold 40% of the total proceeds received or to be received on behalf of your client from Vodacom and that you will hold this amount in your trust account pending final determination of our client's claim against Makate which will be instituted in the High Court within 30 days from today.

   6.2. We reiterate that you must provide forthwith a full and transparent disclosure of the settlement *quantum*, terms, conditions, payment timelines and the account to which payment is to be made since you are fully aware that in terms of the funding agreement as aforesaid, such payment from Vodacom is to be paid to your trust account.

7. Kindly be advised that, should you fail to furnish the aforesaid written undertaking by close of business today, our client intends, without further notice, to launch urgent proceedings in the appropriate High Court for an order interdicting and restraining you from paying out, transferring, or in any way dealing with any portion of our client's share of the settlement proceeds paid by Vodacom in terms of the settlement agreement concluded with your client and to apply for any appropriate alternative and/ or ancillary relief.

8. All of our clients' rights remain strictly reserved.

Yours faithfully,

Sinenhlanhla Mnguni
Direct E-mail: [illegible]

NM

BRM10

STEMELA & LUBBE
Attorneys

Stemela Lubbe Incorporated / Reg. No.: 2010/002828/21
VAT No.: 4880 2550 56

110 Nicolson Street
Brooklyn, Pretoria
PO Box 69
Groenkloof, 0027

Tel: 012 346 0136

sonja@stemelalubbe.co.za

U verw: / Your ref:
Ons verw: / Our ref: W LUBBE/SS/61/1550/0

Datum / Date: 10 November 2025

SN MNGUNI ATTORNEYS
SANDTON
BY E-MAIL: jaden@mnguniinc.co.za, lena@nmguniinc.co.za, tasneem@mnguniinc.co.za, sinen@mnguniinc.co.za, stella@mnguniinc.co.za

and to

ATTENTION: MR. L COHEN
LESLIE COHEN & ASSOCIATES
BY E-MAIL: les@lhclaw.co.za / elaine@lhclaw.co.za

Dear Sir / Madam,

RE: BLACK ROCK MINING LTD / NK MAKATE

1. This letter is in response to your letter of 10 November 2025 and a letter addressed to Vodacom through its attorney, Mr Cohen.

2. There is no basis for your letter for a number of reasons.

3. The settlement between our client and Vodacom is of no concern to your client and neither are the details into which account that money is to be paid.

4. Your allegations are in respect of a debt which your client believes is due to it against Mr Makate. Vodacom has nothing to do with that and it is highly improper for you to contact them and involve them in this dispute. Insofar as Vodacom is concerned, it is *res inter alios acta*.

5. You are welcome to sue Mr Makate for that which your client believes is due to it. It is purely a monetary claim and there is nothing urgent about it.

6. In any event. If your client had a claim, it has prescribed for the reasons which follow.

7. On 11 February 2021 your client brought an application seeking a declaration that it is the nominated company in terms of the funding agreement. Our client addressed a letter to your client on 5 March 2021 via its then attorneys, Fairbridges Wertheim Becker, advising it that the agreement had been terminated. Your client's current claim is based on the validity of that agreement. As such, at the very latest, your client became aware of its purported debt on 5 March 2021.

8. We are not going through the history of that application, but you are aware of the fact that your client had to provide security for costs and, eventually, on 6 March 2024, your client withdrew its application. As such, apart from the issue of prescription, your client has waived its rights to claim anything under the terminated agreement.

9. Kindly refrain from involving Vodacom in the dispute between our respective clients.

10. Your demands will not be met.

Yours faithfully
STEMELA & LUBBE

Lubbe

W Lubbe

NM

BRM11

Leslie Howard Cohen
Assisted by:
Dirk Venter (Conveyancer)
Elaine Mitchell (Professional Assistant)
Gillian Moss (Office Manager)
B-BBEE Rating: Level 4

Leslie Cohen & Associates
ATTORNEYS AT LAW

2nd Floor, Morningside Hub
313 Rivonia Road
Morningside
Email: les@lhclaw.co.za;
Tel: (010) 448 - 5170

Our Ref: Leslie Cohen/V642
Your Ref: Mr S Mnguni/sm/B0014/24

10 November 2025

SN MGUNI ATTORNEYS
ATTENTION: MR S MNGUNI
PER EMAIL: sinen@mnguniinc.co.za; stella@mnguniinc.co.za

Dear Sir/Madam,

RE: VODACOM (PTY) LTD // BLACK ROCK // MR N.K. MAKATE

We acknowledge receipt of your letter dated the 10th *instant* the contents whereof have been noted. We have communicated with our client on whose instructions this letter is addressed. We confirm as follows:

1. On 2 November 2025 our client and Mr Makate settled the litigation in terms of a confidential settlement agreement in which our client agreed to pay Mr. Makate a settlement amount ***("the settlement amount")***.

2. Our client will abide with any order issued by a competent court as it has no desire to become embroiled in a dispute between your client and Mr. Makate.

3. Kindly be guided accordingly.

Yours faithfully,

LESLIE COHEN
LESLIE COHEN & ASSOCIATES
(Electronically Transmitted With No Signature)

NM

BRM12

info@mnguniinc.co.za
(010) 449 9705
Block A, Unit 8
Upper Grayston Office Park
150 Linden Street
Simba
Sandton
2031

Our Ref : Mr S. Mnguni/sm/B0014/24
Your Ref : Leslie Cohen/V642
Date : 10 November 2025

To : **Leslie Cohen & Associates**
Attention : Leslie Cohen
E-mail : les@lnclaw.co.za

Dear Sirs

RE: BLACK ROCK MINING LTD / NK MAKATE

1. We thank you for your letter of 10 November 2025 and note your client's position.

2. We note that you did not state whether the settlement amount would be paid by your client to Stemela *& Lubbe in terms of the funding agreement*.

3. Our client intends applying to court by way of urgency for the necessary interdictory relief in order to protect its claim to 40% of the proceeds being paid to Mr Makate. We kindly request your client to advise when payment will be made to Mr Makate or to any other parties on his behalf or instruction. You will appreciate that the date for payment impacts directly on the extent of the urgency of the application our client will be launching.

4. We must request your immediate response to this letter.

NM

Yours faithfully,

Sinenhlanhla Mnguni

Direct E-mail: [illegible].co.za

NM

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: ____________

In the matter between:

BLACK ROCK MINING LTD	Applicant
and	
NKOSANA KENNETH MAKATE	First Respondent
STEMELA & LUBBE INCORPORATED	Second Respondent
VODACOM (PTY) LTD	Third Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

SINENHLANHLA MNGUNI

do hereby make oath and state that:

1. I am a male attorney practicing under the name and style of SN Mnguni Attorneys Inc of Block A, Unit 8, Upper Grayston Office Park, 150 Linden Street, Simba, Sandton.

K.C.M

SN

2. The content hereof is, save where otherwise stated or indicated to the contrary, within my personal knowledge and belief and is true and correct.

3. I have read the answering affidavit deposed to by **ERROL ELSDON**, and confirm the content thereof is correct insofar as same pertains to me.

DEPONENT

I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent does not have any objection to taking the oath, and that the deponent considers it to be binding on the deponent's conscience, and which was sworn to and signed before me at Johannesburg on this the 11TH day of NOVEMBER 2025 and that the administering of the oath complied with the regulations contained in Government Gazette No R1258 of 21st July 1972, as amended.

COMMISSIONER OF OATHS

KEORAPETSE LLOLO MOTEANE MATLALA
COMMISSIONER OF OATHS
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