IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2025-216564

In the matter between:

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

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

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"*Vodacom has launched a new product called 'Call Me', thanks to Kenneth Makate from our finance department. Kenneth suggested the service to the product development team, which immediately took up the idea. 'Call Me' is a world first and allows Vodago prepaid users to send a free text message to other Vodacom customers requesting that they call them back…*"

-per Vodacom's announcement, 2000

INTRODUCTION

1. This application is the most egregious abuse of the provisions of rule 6(12), deserving the censure of the court with a suitable costs order.

2. As Lord Steyn famously remarked, "*In law, context is everything*".[1]

3. The Applicant (**"Black Rock"**) purports to present a simple case. After learning of First Respondent's (**"Makate"**) settlement with the Third Respondent (**"Vodacom"**), it promptly sought undertakings from Makate to "freeze" 40% of the funds received from Vodacom pending litigation, which were refused. Now it seeks purported "ordinary" interim interdictory relief to preserve the funds in Lubbe's trust account while enforcing its alleged contractual rights.

4. However, Black Rock offers a factual matrix, selectively arranged to obscure damaging facts and their complete context as they have evolved since 2013.

5. The dispute between the First Respondent (**"Makate"**) and the Applicant's deponent, Errol Elsdon (**"Elsdon"**), as to whether Black Rock or any of Elsdon's business cohorts including their shelf companies (Black Rock and

[1] In *R v Secretary for the Home Department, ex parte Daly* [2001] UKHL 26; [2001] 3 All ER 433 (HL) at 447. This was approved in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1.

Raining Men Trade (Pty) Ltd (**"Raining Men"**) would receive any money pursuant to the Funding Agreement with Makate has been raging for more than a decade. They have been under no illusions that Makate will not pay anything. For a decade now, they have done nothing to resolve this.

6. Yet now Black Rock seeks to enforce the provisions of the purported Funding Agreement, which was concluded between Makate and the late Mr Chris Schoeman (**"Schoeman"**) in 2011, and for which Schoeman nominated Black Rock for between 2 and 4 weeks only, with Elsdon as a shareholder and only director, in 2013 when it was provisionally deregistered. Black Rock was finally deregistered in April 2014 but clandestinely restored in December 2020, in an opportunistic attempt to take advantage of an arbitration ruling in which it was not even a claimant.

7. Since 2015, when the Funding Agreement was first cancelled with Schoeman and Raining Men, Elsdon (of course, Black Rock was then a non-existing entity, having been deregistered) knew that Makate would not be sharing any court judgment or settlement amount from the Vodacom with any person, juristic or natural, who had purported to fund him.

8. December 2015 saw Raining Men instituting arbitration proceedings against Makate before Mabena SC as arbitrator, seeking declaratory relief to assert Raining Men as a party to the Funding Agreement through Schoeman's purported nomination. Mabena SC's Award of 10 March 2024 went against Raining Men, who was ordered to pay Mr Makate's costs on a scale between

attorney and own client.[2] Mabena SC's findings concerning Elsdon are most notable. He remarked that:

> *"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…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…*"[3].

9. We respectfully submit that when the evidence of Elsdon is considered, the Honourable Court would not err by taking into account Elsdon's tendency to present a version that best serves his and his related entities', including Black Rock's interests, and by viewing his evidence with caution.

10. Elsdon, and the revived Black Rock, must have known that again when the agreement with Schoeman and Black Rock was, in any event, cancelled on 5 March 2021 on the basis that it had been induced by fraud, or terminated due to Makate's acceptance of Black Rock's continued repudiation. They again did nothing to obtain clarity on the dispute. In fact, the court application which they instituted in February 2021 for declaratory relief was unconditionally withdrawn on 6 March 2024. Had that case run its course, none of this would have been necessary.

11. However, neither Black Rock nor Elsdon nor Schoeman ever challenged the cancellation of the agreements. Having sat idly by for years, watching the

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[2] 003-84 to 003-85, paragraphs 5, and 8 of the Award.
[3] 003-129, paragraph 10.1.2 of the Arbitrator's Reasons,

litigation play out, they now seek the court's assistance, not only at the expense of Makate but also at the expense of other deserving litigants who have genuine urgent matters to resolve. This conduct should not be countenanced.

12. Black Rock's application is, in any event, fatally flawed in many aspects on the merits.

13. For example, in seeking specific performance of an agreement, it has failed to prove performance of its obligations under the Funding Agreement, or to tender such performance. It has even failed to allege that it has paid the amount of R4 million to Makate, as detailed in the last paragraph of paragraph 5 of the Funding Agreement, or made a tender of such payment. This failure is destructive of any possible *prima facie* right that may have existed and, in any event, destructive of any alleged urgency.

14. Black Rock, since its nomination in 2013, has not, itself, contributed one cent towards the litigation costs of Makate.[4] This is confirmed by Elsdon's evidence in the 2021 application, "…*[T]he funding received and applied by Makate towards the costs of his litigation ceased during or about October 2014 when a dispute arose between the parties*".[5] In addition, in arbitration proceedings more than five years ago, both Elsdon and Schoeman testified that the agreement with Black Rock had been cancelled.[6] Black Rock now

[4] 003-13 paragraph 26 of the answering affidavit.
[5] Elsdon's founding affidavit in Black Rock's Application under Case Number 7089/2021, attached as **M8** to the answering affidavit, particularly at 003-57, paragraph 22.
[6] See paragraph 103 below.

reprobates by seeking to enforce its purported rights under the Funding Agreement, which Elsdon himself says was cancelled.

15. Additionally, during Black Rock's deregistration from 2014 to 2020, it lacked the legal capacity to perform its obligations under the alleged funding agreement by indemnifying Makate. How could it ever have performed its contractual obligations during that period? It has not demonstrated that it has.

16. It is astonishing that, in February 2021, Black Rock instituted an application for declaratory relief (to assert Black Rock's position as the purported nominated "Company" under the Funding Agreement) and then unconditionally withdrew it in April 2024. Had it pursued that declaratory relief, its position vis-à-vis Makate under the Funding Agreement would have been resolved a long time ago in the ordinary motion court. Now it wants interim relief, for fundamentally similar relief, through the urgent court, and on severely curtailed timelines. That is an abuse.

17. In the 2021 Court application, Elsdon in fact testified on 9 February 2021 that when the CEO determined the amount of R47 million,[7] Black Rock had a "*vested and tangible interest in the matter…*"[8]. But it did nothing to protect what it testified was a vested interest. It did not contribute money to the review, the SCA appearance, or the CC appearance. Now it wishes to protect its alleged "*vested and tangible interest*" urgently.

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[7] More than five years ago.
[8] Elsdon's founding affidavit, deposed to on 9 February 2021, under Case number 7089/2021 (part of **M8** to the answering affidavit**)**, particularly paragraph 56.3 at 003-66 to 003-67.

18. For Black Rock, Elsdon, and the legal practitioners of Black Rock to contend that this matter must now be dealt with in such ridiculously truncated time periods is a gross abuse of the provisions of rule 6(12).

19. Black Rock relies on numerous broad and unsubstantiated statements in the founding affidavit concerning the imminent risk of dissipation,[9] or that funds will/would be dissipated,[10] which would frustrate Black Rock's contractual entitlement for subsequent recovery,[11] and which would render its contractual rights nugatory.[12] All of this is the classic wording and hallmarks of a *Mareva injunction*, despite the Applicant trying to shy away from this in its replying affidavit and heads of argument. However, there is no shred of factual substantiation in the founding affidavit- a basic requirement that Black Rock has not met.

20. On 12 November 2025, Makate and the Second Respondent (**"Lubbe"**) demanded proof of authority of Black Rock's attorney under Rule 7(1),[13] and they demanded security in the amount of R500,000.00 under Rule 47.[14] The purported proof of authority that Black Rock offered is not supported by any affidavit (as it should have been) and is therefore worthless. Despite undertaking to provide security, none has been offered to date. That is unsurprising as Black Rock is an indigent *peregrinus*. In the 2021 application,

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[9] See, for example, 001-30, paragraph 71 of the founding affidavit, and 001-33, paragraph 86 thereof.
[10] 001-30, paragraph 71; 001-33, paragraph 86; and 001-36, paragraphs 99 and 102 of the founding affidavit.
[11] 001-33, paragraph 86 of the founding affidavit.
[12] 001-33, paragraph 87 of the founding affidavit.
[13] 002-8 to 002-10.
[14] 002-4 to 002-7

Black Rock could not provide security either; another company in Cape Town, Rozendal, came to Black Rock's rescue and provided security.[15] Black Rock cannot be permitted to proceed with its purported urgent application without compliance with Makate's Notices in terms of Rules 7(1) and 47.

21. Furthermore, not a single warning of the practice directives of Justice Sutherland has been followed.

22. The matter should summarily be struck for want of urgency with a suitable punishing costs order of 3 counsel, *de bonis propriis* against Elsdon.

CONTEXT

23. On a more general basis, following Makate's invention[16] in 2000, his endeavours to negotiate reasonable compensation came to naught, resulting in the institution of an action in 2008 to compel Vodacom to negotiate such compensation in good faith. Makate succeeded only in 2016 in the Constitutional Court.[17]

24. After negotiations had failed, Vodacom's CEO's subsequent determination of R47 million as reasonable compensation led to further expensive litigation, successful in the court *a quo* and the SCA. 25 Years after the invention, the Constitutional Court referred the determination of the *quantum* back to the

[15] 006-12, paragraph 17 of the supplementary answering affidavit.
[16] "*Call Me*" was renamed early on as "*Please Call Me.*"
[17] *Makate v Vodacom (Pty) Ltd [2016] ZACC 1*.

Supreme Court of Appeal ("SCA"),[18] which would have heard the matter on 18 November 2025.

25. On or about 5 November 2025, *ad foras curiae*, Makate and Vodacom reached a confidential settlement agreement for Vodacom to pay an undisclosed amount to Makate.

26. Now enters Black Rock like an ever-absent father who has never paid any maintenance, arriving just in time for his daughter's wedding, demanding to walk her down the aisle. Black Rock is a foreign company registered in the British Virgin Islands, deregistered from 30 April 2014 to 14 December 2020, and has never been registered in South Africa. Despite this, it's deponent, Elsdon, falsely claims that it is his funding that he raised[19] (*not Black Rock*) that led to the eventual settlement.[20]

27. But the allegations of Black Rock funding the litigation are just false. For example, his statement that "*Black Rock has invested considerable resources in funding Mr Makate's litigation..."*[21] is entirely inconsistent with his statement under oath in the 2021 litigation that the *"funding did not come from the applicant directly but may be ascribed to the applicant...."*[22]

28. This is but one example of the false testimony of Elsdon.

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[18] *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13.
[19] At 001-22, paragraph 44 of the founding affidavit, Elsdon claims that "…*[H]ad 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*…"
[20] 001-22, paragraph 44 of the founding affidavit.
[21] 001-34 paragraph 88 of the founding affidavit.
[22] 003-58 paragraph 27 Elsdon's founding affidavit in Case Number 7089/2021.

29. For Black Rock's alleged performance in terms of the Funding Agreement, it claims to be contractually entitled to 40% of the total proceeds paid by Vodacom to Makate (**"the funds"**).

30. Makate and Lubbe were not able to provide a proper answering affidavit and, without any prejudice to their rights, consented to the order that, until the week of 2 December 2025, the funds (i.e., 40% of any money paid) will be kept in the trust account of Lubbe. That is the *status quo*.

31. However, as per the court order, should the application be struck for want of urgency, as it should be, or dismissed, the funds need not be kept in the trust account of Lubbe. Then Black Rock should do what it should have done a long time ago, and now, which is to institute proceedings in the normal manner.

32. Thus, at the heart of **Part B** of Black Rock's application lies a *Mareva injunction*: to freeze the funds in Lubbe's trust account, pending the finalisation of arbitration proceedings[23] for specific performance in the form of payment of the alleged agreed remuneration.

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[23] 001-5, prayers 2, 2.2, and 2.3 of the Notice of Motion read as follows:

> "2. *Pending final determination of an arbitration and/or action to be instituted by the applicant within 5 (five) days from date of this order:*
>
> *2.1 …*
>
> *2.2 The second respondent shall hold 40% of the total proceeds received, ought 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 in trust…*"

33. Makate opposes the application on various grounds, including the lack of urgency, that the purported Funding Agreement has been cancelled in 2015, or more recently, on or about 5 March 2021, alternatively, that it had been induced by fraud, alternatively, that Black Rock has never performed in terms of the purported Funding Agreement, alternatively, that any conceivable claim that Black Rock may have had, was extinguished through prescription by no later than 4 March 2024. Black Rock has also waived its rights when its only director at the time, Elsdon, was part of a fraudulent scam to nominate Raining Men.

34. The challenge to the Funding Agreement based on fraudulent misrepresentation will be launched in an action to be instituted following applications to found jurisdiction and for edictal citation. It is apparent that Makate's quest for remuneration for his invention has now changed direction. What lies ahead is a further chapter of protracted litigation to freeze 40% of the money he has received from Vodacom.

35. The effect of a *Mareva injunction* would be dramatic, as it would prevent Makate from freely dealing with a large portion of his hard-fought reasonable compensation until the end of the protracted litigation.

36. Lastly, Black Rock seeks ancillary relief to compel Makate and Lubbe to make a full and transparent disclosure of the settlement quantum, terms,

conditions, payment timelines, and the account to which payment has been made.[24]

37. Despite the disclosure-relief not being urgent and being final in effect, Black Rock has not demonstrated any factual or legal basis justifying its granting.

THE ISSUES

38. The issues *in limine* are:

38.1. Black Rock's non-compliance with Notice in terms of Rule 7(1).

38.2. Black Rock's non-compliance with the Notice in terms of Rule 47.

38.3. Urgency.

39. The main issues on the merits are:

39.1. There is no allegation of performance or a tender of performance.

39.2. Cancellation of the Funding Agreement, either in 2015 or 2021.

39.3. Any conceivable claims of Black Rock have become extinguished through prescription by no later than 5 March 2024.

39.4. Waiver.

39.5. Black Rock's arbitration proceedings are moot.

39.6. Whether Black Rock has satisfied the requirements for a *Mareva injunction*.

39.7. The requirements for granting the relief sought under **Part B**.

40. Makate and Lubbe dispute each issue.

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[24] 001-6, prayer 2.4 of the Notice of Motion.

BACKGROUND FACTS

41. As stated above, Makate's litigation against Vodacom commenced in 2008.

42. On 7 November 2011, Makate and Schoeman (in his capacity as authorised representative of a company to be nominated) concluded the Funding Agreement.[25]

43. On or about 18 July 2013, Schoeman nominated Black Rock as the "Company" for purposes of the Funding Agreement.[26] At the time, Elsdon accepted the nomination on behalf of Black Rock.[27]

44. On or about 24 April 2014, conveniently, a week before Black Rock's deregistration,[28] Schoeman purportedly nominated Raining Men in writing, a purported written agreement, as the funding "Company".[29] But Elsdon and Rocher only became directors of Raining Men some 8 months later, in December 2014. On 10 March 2020, after some five years of arbitration litigation, the arbitrator found the purported agreement with Raining Men was void due to fraud- Makate's signature had been forged.[30] Elsdon and Rocher purportedly accepted this fraudulent nomination on 14 November 2014.[31]

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[25] 001-18, paragraph 32 of the founding affidavit, read with "BRM 1" to the founding affidavit at 001-38 to 001-49.
[26] 001-21, paragraph 38 of the founding affidavit; 003-6, paragraph 7 of the answering affidavit.
[27] 003-7, paragraph 9 of the answering affidavit.
[28] 001-22, paragraph 45 of the founding affidavit.
[29] 005-111 to 005-114, "ADDENDUM TO THE PAYMENT RIGHTS AGREEMENT", **M29** to the supplementary answering affidavit, particularly clause 4 at 005-113 to 114.
[30] 003-14, paragraph 28 of the answering affidavit.
[31] 006-98, i.e., the "RESOLUTION" dated 14 November 2014, marked **M22** to the supplementary answering affidavit.

45. To this day, the identity of the forger remains a mystery, but, of course, the probabilities are that it could only have been at the instance of either Schoeman, Elsdon, or Rocher (Elsdon's co-director of Raining Men at the time). None of them has come forth with a version.

46. On 30 April 2014, Black Rock was deregistered by the British Virgin Islands (**"BVI"**) Registrar of Companies,[32] and it remained deregistered until its status was clandestinely restored on 14 December 2020 pursuant to a court order.[33]

47. On 5 December 2014, Schoeman paid the paltry amount of R7,853.00 towards Makate's legal costs.[34] As stated, this was at a time when Black Rock was deregistered.[35] That is the last payment ever made towards Makate's litigation costs.

48. On 12 December 2014, Elsdon and Rocher were registered as directors of Raining Men,[36] effective as of 13 November 2014.[37]

49. On 7 January 2015, attorney Williams of Hahn & Hahn Attorneys, representing Makate, cancelled the agreement with Raining Men (as nominee) and the Funding Agreement with Schoeman[38]. Cancellation with Black Rock at the time was not legally possible, as it did not exist. But both

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[32] 001-22, paragraph 45 of the founding affidavit.
[33] 001-23, paragraph 47 of the founding affidavit.
[34] His contribution to the costs of bringing a special application for leave to appeal to the SCA.
[35] 003-7, paragraph 10 of the answering affidavit.
[36] 006-101, i.e., Black Rock Windeed Search Report.
[37] 006-100, i.e., Black Rock Windeed Search Report.
[38] 003-13, paragraph 27 of the answering affidavit, read with **Annexures M6** at 003-39 and **M7** at 003-40.

Schoeman and Elsdon, at the time, were relying on the fraudulent nomination of Raining Men. The only person with whom Makate could legally cancel in 2015 was Schoeman, which he did. Schoeman did nothing about the cancellation, nor did Black Rock. In fact, Schoeman accepted the cancellation in writing. Elsdon was aware of all this. He too did nothing. Even as late as December 2020, when Black Rock was clandestinely revived, it would have known of the 2015 cancellation. It too did nothing.

50. On 12 January 2015, Williams informed Schoeman that the cancellation (of 7 January 2015) included the cancellation of the Funding Agreement. Schoeman (being "duly authorised by a company to be nominated") accepted the cancellation.[39]

51. During or about December 2015 and following the Constitutional Court hearing on 1 September 2015 of Makate's appeal to the Constitutional Court, Raining Men declared a dispute to enforce its purported rights under the funding agreement for which Schoeman had nominated it, albeit fraudulently, as the "Company". The dispute was referred to Mabena SC as arbitrator[40]. In terms of Mabena SC's award dated 10 March 2020, the nomination of Raining Men was declared invalid (due to fraud).[41]

52. Makate's success in the Constitutional Court in 2016 revived the interest of Elsdon and Raining Men, of which Elsdon is a director. Obviously, "smelling

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[39] 003-9, paragraph 16 of the answering affidavit. A legible copy of the cancellation letter is attached as **M17A** at 005-59.
[40] 003-57, paragraph 23 of Elsdon's founding affidavit under Case Number 7089/2021.
[41] 003-83 to 003-86, i.e., the award by Mabena SC dated 10 March 2020.

money", to use a colloquial phrase, Raining Men, quite bizarrely, with respect, brought an urgent application seeking a declarator that only it and Schoeman were entitled to negotiate with Vodacom. True to form, Elsdon supported the urgent application, thereby asserting that Black Rock had no rights under the funding agreement.[42] This must constitute a waiver of Black Rock's rights, even if it was defunct at the time. The application was dismissed, as stated in paragraph 2 of the court order.[43]

53. On 10 March 2020, Mabena SC made the award mentioned above, declaring Schoeman's nomination of Raining Men invalid,[44] due to the forgery of Makate's signature.[45] The reasons for the award were given on or about 28 July 2020.[46]

54. On or about 21 April 2020, and under Case Number 22065/20, Raining Men instituted an application for the review of Mabena SC's Award.[47]

55. On 20 January 2021, Black Rock was reinstated by the BVI Registrar of Corporate Affairs,[48] following an order made by the Eastern Cape Caribbean Supreme Court on 14 December 2020.[49]

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[42] 003-8, paragraph 13 of the answering affidavit.
[43] 003-7/8, paragraph 12 of the answering affidavit, read with **M1** thereto at 003-26, and read with High Court of South Africa, Gauteng Division, Pretoria, Case Number 42533/2016. See the consent order by Tuchten J dated 14 June 2016, M20 at 006-92/6..
[44] 003-83 to 003-86, i.e., the Award by Mabena SC dated 10 March 2020.
[45] 003-7, paragraph 11 of the answering affidavit.
[46] 003-87 to 003-131, i.e., the Reasons for the Award by Mabena SC dated 28 July 2020, issued under cover letter dated 23 July 2020.
[47] 003-62.
[48] 003-141, i.e., the Certificate of Good Standing.
[49] 003-132 to 003-134, i.e., the court order dated 14 December 2020.

56. On 21 January 2021, Raining Men withdrew the Review Application[50], obviously a carefully hatched plan in reaction to the successful reinstatement of Black Rock and in an attempt to take advantage of the ruling.

57. On 11 February 2021, Black Rock initiated an application under Case Number 7089/2021 in the High Court of South Africa (**"Case Number 7089/2021"**) seeking to have the arbitration award handed down by Mabena SC on 10 March 2020 made an order of court, alternatively, that the award be rectified to have "Black Rock Mining Ltd" substituted for all references to "Raining Men (Pty) Ltd". As will appear below, Black Rock withdrew this application on 6 March 2024.[51]

58. On 5 March 2021, and in the wake of Black Rock's application under Case Number 7089/2021, Makate, represented by Lubbe, addressed a letter of cancellation to Black Rock's attorneys of record.[52] This was a cancellation due to fraud and repudiation on the part of Black Rock. Whether, for current purposes, that cancellation was a valid one is not the point. Makate cancelled it. Black Rock and Elsdon have done nothing to challenge the cancellation, not even by way of correspondence.

59. The claim has not only been extinguished through prescription, but for more than 4 years, Elsdon and Black Rock did nothing. It is destructive of any claim of urgency. Any urgency, of which there is none, is self-created.

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[50] 003-23, paragraph 56 of the answering affidavit.
[51] 003-151 to 003-153, i.e., Black Rock's Notice of Withdrawal, marked **M11**.
[52] 003-17, paragraph 37 of the answering affidavit, read with **M9** thereto at 003-145 to 146. A legible copy of the cancellation letter is attached as **M17A** at 005-60.

60. In the application under Case Number 7089/2021 for a declaratory order that it was the nominated funder, Black Rock, failed to discover under Rule 35(3), causing Makate to move for the dismissal of the application.[53]

61. On 6 March 2024, i.e., the morning of the ensuing case management meeting regarding the application to dismiss the case for noncompliance with court rules, Black Rock unconditionally withdrew its application.[54]

IN LIMINE: RULE 7(1) AUTHORITY

62. It is not uncommon that a litigating party's persistence with the enforcement of the provisions of Rule 7 is viewed as a technical or even obstructive manoeuvre to gain an advantage. We shall indicate below that the instant matter is clearly not such an instance.

63. As will be shown below, Black Rock's failure to comply with Makate's demand for proof of authority of its alleged attorney of record engages various substantive issues, in many instances going to the root of this case. We shall elaborate in this regard below.

64. Uniform Rule 7 provides, *inter alia*, as follows:

> "*(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer*

[53] 003-147 to 003-148 i.e., **M10** to the answering affidavit.
[54] 003-18, paragraph 40 of the answering affidavit, read with **M5** at 003-35 to 37, **M10** at 003-147 to 149, and **M11** at 003-151.

act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

…

(4) Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that where a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power."

65. On 12 November 2025, Makate delivered a notice in terms of Rule 7(1) disputing the authority of SM Mnguni Attorneys to act on behalf of Black Rock. Unless it satisfies the Court of its attorney's authority, it may no longer act on behalf of Black Rock.[55]

66. On or about 13 November 2025, Black Rock delivered a document styled "RESOLUTION OF BLACK ROCK MINING LTD". This document was not uploaded onto Caselines. We take the liberty of attaching it as **"HOA 1"**.

67. It purports to be a resolution passed at a meeting held on 11 November 2025, purportedly attended by "*Marinos Daniel (Sole Director)*", who seemingly signed the document. We highlight the following:

67.1. In paragraph 2.1, it purports to authorise the launching of the urgent application proceedings (followed by a description that accords with that of the instant matter);

[55] 002-8 to 002-10, being the Notice in terms of Rule 7(1).

67.2. In paragraph 2.3, it seemingly authorises Black Rock's attorneys to represent it in the instant matter;

67.3. In paragraph 2.4, it purports to authorise Errol Elsdon "…to sign all affidavits and documents and do all things that may be necessary in order to bring the above-mentioned application…".

68. In the supplementary answering affidavit, Makate denies the authority of SM MNGUNI ATTORNEYS INC. to have instituted the instant application and to represent Black Rock therein.[56]

69. In the supplementary replying affidavit, Elsdon states that Black Rock provided a resolution dated 11 November 2025 demonstrating authority, and then, remarkably, states that "*…[T]he resolution is signed by myself as director of Black Rock and is a valid corporate authorisation.*"[57]

70. *First*, Black Rock chose not to produce any evidence on oath as to the identity of Mr Daniel and his alleged office as its sole Director or Chairman, or the veracity of the purported resolution. This document is not worth the paper it is printed on.

71. *Second*, the purported resolution dated 11 November 2025 refers to Marinos Daniel (Sole Director). On the second page, a signature resembling "MDaniel" appears. This is the signature that Elsdon states on oath as his signature. However, if compared to Elsdon's signature as it appears in his

[56] 006-49 to 006-50, paragraph 112 of the supplementary answering affidavit.
[57] 004-75, paragraph 149 of the supplementary replying affidavit.

affidavits, it is apparent to the naked eye that Elsdon did not sign the purported resolution of 11 November 2025.

72. *Third*, in paragraph 1 of his founding affidavit, he describes himself as *"a former director".*

73. This is yet another instance in which Elsdon demonstrates that his evidence on oath is not to be believed as correct—two false statements in one sentence.

74. Elsdon further relies on possibly two contentions in support of the alleged authority of his attorney, i.e., **i)** he purportedly confirmed his authority to instruct attorneys on behalf of Black Rock to prosecute the application, as stated in paragraph 3 of the founding affidavit,[58] and (possibly) **ii)** the confirmatory affidavits of the purported attorney.[59]

75. Starting with the latter, no confirmatory affidavit by the attorney has been attached to Elsdon's supplementary replying affidavit. By reason of what is stated below, even if there were a confirmatory affidavit from the attorney, it would have been valueless for demonstrating his authority.

76. Paragraph 3 of the founding affidavit reads as follows: "I am duly authorised on behalf of Black Rock to instruct attorneys, depose to affidavits, and generally do all things necessary to prosecute this application to finalisation."

[58] 004-76, paragraph 151 of the supplementary replying affidavit.
[59] 004-78, paragraph 153 of the supplementary replying affidavit.

77. In **Eriksson**,[60] a matter dealing with Rule 7(1), Strydom J accepted the following proposition: “The question arises whether the signatories to this mandate were authorized to bind their principals. To ascertain this, so it was argued, a further requirement needed to be met, i.e., the resolutions authorising the persons who signed the mandates from which it could be deducted that these representatives were properly authorised by the principal.”[61]

78. In turn, Strydom J grounded his approval by quoting the following passage from **Glofinco**:[62]

> “*[13] A representation, it was emphasised in both the NBS cases, supra, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (NBS Limited v Cape Produce Company (Pty) Ltd, supra at 411H-I). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment.*”

79. Strydom J further stated that:

> “I am in agreement with the finding in ANC Umvoti Council Caucus and Others v Umvoti Municipality [2010 (3) SA 31 (KZP) par 28] that the resolution type cases should also be dealt with in terms of rule 7(1) for the simple reason that a mandate given by unauthorized representatives should not stand scrutiny, unless there are other

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[60] *Eriksson v Hollard Insurance Company Limited and Others* (2021/45339) [2023] ZAGPJHC 39 (24 January 2023).
[61] Ibid at [31].
[62] *Glofinco v Absa Bank Ltd. t/a United Bank* (135/2001) [2002] ZASCA 91; 2002 (6) SA 470 (SCA) (30 August 2002).

compelling reasons why the mandate satisfies a court that authority does exist. In this regard, a court will look at the evidence before it and consider probabilities holistically to come to its conclusion."

80. Black Rock seemingly reasons and expects that this Honourable Court must, on face value, accept and be satisfied with Elsdon's version regarding his authority to appoint attorneys and, by implication, that he instructed SN MNGUNI ATTORNEYS INC.

81. Black Rock's reasoning is fallacious for many reasons, the least of which is not Elsdon's patently false and contradictory evidence that he signed the purported resolution of 11 November 2025.

82. We submit that Black Rock was required to provide a resolution by the board of directors of Black Rock, supported by evidence of its veracity. The purported evidence of Elsdon does not pass muster.

83. However, more fundamentally, Black Rock's failure to provide proof of authority engages the following substantive issues:

83.1. As a peregrinus, there is nothing on the papers suggesting that Black Rock holds any assets (other than its interest in its purported claim) in South Africa. In fact, Black Rock has not shown that it owns a single asset anywhere in the world. It has not provided the requested balance sheets or bank statements. The obvious conclusion is that they are non-existent.

83.2. Makate claims that the only asset Black Rock may own is the interest in the purported claim for 40% of the proceeds received from

Vodacom.[63] As might have been expected, Black Rock did not address this allegation or present any facts showing that it owns assets other than its purported claim.[64]

83.3. Black Rock disputes[65] that it is a shelf company with no assets,[66] but it does not take the court into its confidence by disclosing its assets, if it owns any. But, once again, the assertion that it is not a shelf company is difficult to believe. It is contrary to Elsdon's evidence under oath in the arbitration, as detailed below.

83.4. Black Rock's impecuniosity has marked its conduct since Schoeman nominated it in 2013. We highlight the following:

83.4.1. Under the heading "**No Allegations of and Facts Supporting Performance, and no Tender**", we demonstrate with reference to incontrovertible facts that Black Rock, since its nomination in 2013, has not contributed one cent towards the litigation costs of Makate. Despite numerous challenges to produce evidence in this regard, not a shred has been forthcoming. This seems to be common cause if the affidavit of Elsdon is to be believed in the 2021 litigation to which we have already referred.

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[63] 005-12, paragraph 17 of the supplementary answering affidavit.
[64] Black Rock deals with paragraphs 13 to 31 (including paragraph 17) of the supplementary answering affidavit in paragraphs 101 to 112 of the supplementary replying affidavit and with paragraphs 13 to 22 (including paragraph 16) of the supplementary answering affidavit in paragraphs 101 to 105 and 120 of the supplementary replying affidavit.
[65] 004-70, paragraph 127 of the supplementary replying affidavit.
[66] 004-70, paragraph 126 of the supplementary replying affidavit.

83.4.2. Black Rock was deregistered from April 2014 to December 2020. However, Black Rock expects this Honourable Court to believe Elsdon's version, where he states that:

> "*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:*
>
> *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.*"[67]

83.4.3. During or about 2016, its only asset was "certain rights to a proposed listing in London, which was to have taken place a few years before that, but other than that, none…". It was a shelf company with a zero balance sheet.[68]

83.4.4. In Black Rock's withdrawn application, it relied on an entity called Rozendal to pay money into Lubbe's trust account as security for the withdrawn application,[69] which has not been denied.[70]

83.5. Black Rock is a *peregrinus* that does not own any assets, not only in South Africa, but elsewhere in the world.

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[67] 00-22 to 001-23, paragraphs 46, 46.1 and 46.2 of the founding affidavit.
[68] 003-177 line 24 to 003-178 line 10, i.e., **M15** to the answering affidavit: transcript of the evidence of Elsdon.
[69] 005-12, paragraph 17 of the supplementary answering affidavit.
[70] See footnote 64.

84. Considering the above, it is apparent that the applicant has every reason not to take this Honourable Court into its confidence by producing proof of its alleged attorney's authority

85. Accordingly, there is no evidence before the Honourable Court "to look at… and consider probabilities holistically to come to its conclusion."

86. SN MNGUNI ATTORNEYS INC. and counsel appointed by it should not be permitted to act on its behalf, and costs are to be awarded against Elsdon in his personal capacity.

87. The application should be dismissed on this basis, and Black Rock, should it wish, can relaunch proceedings once it has proven that a proper resolution has been passed.

IN LIMINE: RULE 47 SECURITY

88. Rule 47 provides, *inter alia*, as follows:

> "*(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.*
>
> *…*
>
> *(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.*"

89. On 12 November 2025, Makate demanded security of R500,000.00 because Black Rock is a *peregrinus* and it has been ordered to provide security in Case Number 7089/2021.[71]

90. Despite Black Rock's undertaking to provide (reasonable) security[72], nothing has been forthcoming, despite the expiry of 10 days from delivery of the notice. Not even an engagement as to what would be acceptable to Makate. Currently, Black Rock and Elsdon are litigating risk-free.

91. In *Mystic*,[73] the SCA confirmed that security for costs engages a balancing exercise as had been referred to in *Shepstone & Wylie*,[74] as a court should not fetter its own discretion, particularly not by adopting an approach that brooks no departure except in special circumstances. It must decide each case upon consideration of all the circumstances without adopting a predisposition either in favour or against granting security. The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial, the plaintiff's claim fails, and the defendant is unable to recover the costs incurred in defence of the claim.

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[71] 002-4 to 002-7 being the Notice in terms of Rule 47.
[72] 004-9, paragraph 24 of the replying affidavit.
[73] Mystic River Investments 45 (Pty) Ltd & Another v Zayeed Paruk Incorporated & Others (Case no 432/2022) [2023] ZASCA 54 (19 April 2023) at par [8].
[74] Shepstone & Wylie & Others v Geyser NO [1998] 3 All SA 349 (A); 1998 (3) SA 1036 (SCA) at 1045I-1045C.

92. We incorporate here, as if specifically stated, and highlight the contents of paragraph 83 above.

92.1. Without security for costs, Makate has no chance of recovering any costs awarded to him, not in South Africa, let alone the rest of the world.

93. Having regard to the balancing exercise referred to in **Shepstone** above, there is nothing in Black Rock's basket, with everything in favour of the granting of security weighing heavily in Makate's favour.

94. This Honourable Court has a broad discretion under Rule 47(4) to grant any appropriate relief where security has not been given within a reasonable period of time.

95. In these premises, we submit that Black Rock's application is to be dismissed with appropriate costs.

LACK OF URGENCY

Introduction

96. Rule 6(12)(b) of the Uniform Rules of Court provides as follows:

> "*(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, an applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course.*"

97. This is a commercial matter in which Black Rock seeks specific performance and a full disclosure of information about the settlement between the First and Vodacom.

98. The purported grounds for urgency are essentially founded on Black Rock's aspersions, albeit wholly unfounded inferences, that Makate and Lubbe will dissipate the funds, which will allegedly cause prejudice to Black Rock.

Self-created urgency

99. It stands incontrovertibly that Black Rock's alleged entitlement to 40% of the proceeds received from Vodacom has been a dispute for many years.[75] At least a decade. The following facts fortify this conclusion.

100. To the knowledge of Elsdon[76], the funding agreement was cancelled on 7 January 2015 by Williams of Hahn & Hahn, representing Makate.[77] Black Rock concedes that the correspondence from Williams on 7 and 12 January 2015 was addressed to Schoeman personally and to Raining Men, of which he was a director.[78] Black Rock does not seriously dispute that the cancellations on these dates included the cancellation of the 2011 Funding Agreement between Makate and Schoeman, and that it was by consent.[79] Despite its knowledge of the cancellation of the 2011 Funding Agreement with Schoeman, Black Rock did nothing to protect its alleged rights.

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[75] 003-12, paragraph 24 of the answering affidavit.
[76] 005-9, paragraph 12 of the supplementary answering affidavit (on the next page, 005-10).
[77] 003-13, paragraph 27 of the answering affidavit.
[78] 004-38, paragraph 22 of the supplementary replying affidavit.
[79] **M7** to the answering affidavit at 003-40.

101. The 2015 cancellation of the 2011 Funding Agreement between Makate and Schoeman must be viewed against the backdrop of Black Rock's deregistration at the time, which had been in effect since April 2014. Makate would not have known Black Rock's status would be restored, or if it would ever be restored. Self-evidently, cancelling with Raining Men was no legal option given its fraudulent appointment. However, the cancellation with Schoeman included a Raining Men cancellation because, at the time, the fraud against Makate was unknown.

102. Thus, Schoeman was the only conceivable person whom Makate could give notice of cancellation, or, as matters turned out, with whom a consensual cancellation could be reached. There was no protest from Elsdon at the time, demanding that Black Rock be engaged in the cancellation.

103. It comes as no surprise that in the arbitration proceedings, both Schoeman[80] and Elsdon[81] testified that Black Rock's nomination agreement had been cancelled about a month after its conclusion.[82] Makate knew of Black Rock and the cancellation. He testified as early as 6 June 2016, as shown in his affidavit in the Tuchten J urgent application, that he cancelled the 2011

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[80] **M15** to the answering affidavit (i.e. the evidence of Schoeman) at pages 003-174 to 003-180; particularly 003-175, lines 5 to 10; 003-176, lines 1 to 3 and 11 to 12; and **M18** to the supplementary answering affidavit (i.e. the evidence of Schoeman) at 005-83, line 20 to 005-84, line 5; 005-89, lines 12 to 20.

[81] **M15** to the answering affidavit (i.e. the evidence of Elsdon) at pages 003-179, line 2 to 003-180, line 18.

[82] **M15** to the answering affidavit (i.e. the evidence of Schoeman) at page 003-176, lines 1 to 3 and 11 to 12

Funding Agreement with Schoeman during January 2015, which Schoeman admitted.[83]

104. Makate's affidavit in the Tuchten J matter further makes a crucial point. It states that in the founding affidavit, the applicant (Raining Men, of which Elsdon is a director) falsely claimed that the cancellation of the funding agreement was a "*sham*" that formed part of an elaborate conspiracy.[84]

105. Thus, armed with this knowledge, since that all role players (Elsdon, Schoeman, and Makate) had accepted the cancellation of the nomination agreement with Black Rock in 2015, and after having attested to this fact on oath in 2019, and after Elsdon, in 2016, had described the cancellation of the 2011 Funding Agreement as a "sham", Black Rock now launches this urgent application aimed at enforcing that very same Funding Agreement to which it was initially nominated, purporting that Elsdon and Black Rock never had any cause to believe that its alleged rights have been compromised.

106. As an aside, the fact that (1) Elsdon supported and ratified the Raining Men nomination, fraudulent as it may be, and (2) did nothing to enforce the Black Rock nomination, demonstrates in the clearest form of an unequivocal waiver by conduct of any right that Black Rock may have had in its nomination. There is no other conclusion on these undisputed facts.

Redress in the ordinary course

[83] **M21** to the supplementary answering affidavit at 005-94 to 005-95, para 14, 14.1, 14.2, 14.3, and 15, and 005-96, par 16 of Makate's affidavit.
[84] **M21** to the supplementary answering affidavit at 005-96, par 19.2.

107. For purposes of the enquiry into the issue of redress in the ordinary course, we shall assume that Black Rock has demonstrated circumstances that render the matter urgent (*which is expressly denied*).

108. In **East Rock Trading**, it was held as follows:[85]

> "*[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, an applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of the absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.*"

109. **De Wit**, in his article discussing **East Rock Trading**, concerning the harm the applicant may suffer where the matter is not dealt with on an urgent basis, wrote as follows:[86]

> "*[H]arm does not found urgency. Rather, harm is a mere precondition to urgency. Where no harm has, is, or will be suffered, no application may be brought, since there would be no reason for a court to hear the matter. However, where harm is present, an application to address the harm will not necessarily be urgent. It will only be urgent if the applicant cannot obtain redress for that harm in due course. Thus: harm is an antecedent for urgency, but urgency is not a consequence of harm.*"

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[85] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
[86] V de Wit '*The correct approach to determining urgency*' (2021) 21(2) Without Prejudice 12 at 13.

110. **De Wit**'s approach was approved in various divisions of the High Court.[87]

111. It is apparent from **East Rock Trading** and **De Wit** that the consideration of redress in the ordinary course is separate and distinct from the circumstances that may render the matter urgent.

112. As **De Wit** correctly pointed out, harm or the risk of harm may render the matter urgent, but that urgency (in the sense that the applicant cannot obtain substantial relief in the ordinary course) is not a consequence of harm.

113. Applying the above rule to urgency in the instant case, we submit that it is required of the applicant to advance facts why, if the *Mareva injunction* is not granted, the funds will have been dissipated with intent, and that recovering the funds will be frustrated.

114. In short, the Applicant's case is that, if 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 in the ordinary course."[88] Given the magnitude of the amounts in question, it is "highly unlikely" that Black Rock will succeed in recovering the money, even if successful.[89] But, in truth, the likelihood is probably the opposite.

115. Without providing any supporting facts, Black Rock speculates that the First and Second Respondents will dissipate the funds with the intent to frustrate their recovery. These inferences are drawn from bald allegations that Black

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[87] See for example: in *MM v NM and Others* (15133/23P) [2023] ZAKZPHC 117 (18 October 2023) at [8], and *P.D and Another v A.R and Another* (D779/2023) [2024] ZAKZDHC 27 (17 May 2024) at [12].
[88] 001-36/99.
[89] 001-33/83.

Rock has been "*sidelined*" for 15 years (another factor, *en passant*, which affects urgency), that Makate has no intention of performing his purported contractual obligations, Lubbe's alleged "animosity", her refusal to give an undertaking as demanded by Black Rock, and other alleged funders now claim their share.

116. None of the above alleged circumstances remotely supports the contention that, absent a *Mareva injunction*, Makate and Lubbe will have dissipated the funds, and that redress in the ordinary course (in the sense that Black Rock will be frustrated when it seeks to enforce an award or order in its favour) will not be attained.

117. More fundamentally, Black Rock provides no facts supporting the speculation that Makate's settling of his relevant obligations would in any manner compromise his ability to perform his alleged contractual obligations to Black Rock, even if it were to succeed.

118. Elsdon and Black Rock's false testimony and speculation of sidelining and dissipation must be weighed against the uncontested facts as they relate to the profiles of Makate and Lubbe:

    118.1. Makate has no plans to leave South Africa. His wife is in medical practice, and his children are at school. SALGA permanently employs him in a senior position and plans to invest a large portion of the Vodacom payment in his family's benefit.[90]

[90] 006-7 to 006-8, paragraph 8 of the supplementary answering affidavit.

118.2. Without repeating the uncontested contents of Lubbe's affidavit,[91] her qualifications (she holds two Master's degrees) and professional career make it plain that she will not dissipate the funds with the intention to defeat any success that Black Rock may attain in litigation. It is a remarkable allegation against a very senior practitioner.

118.3. We submit that Black Rock has failed to demonstrate that it would not achieve free dressing in the ordinary course if the instant interim relief is not granted.

Urgency of Relief to Compel Discovery

119. The second leg of the relief sought under **Part B** is to compel Lubbe to make a full and transparent disclosure of the settlement quantum, terms, conditions, payment timeline, and the like.

120. Black Rock did not make out any case for urgency concerning this second leg, which, in any event, is impermissible, as it is essentially for discovery in motion proceedings, without a Rule 35(13) application to make discovery procedures applicable. It seems to seek further particulars which cannot be sought in motion proceedings.

Conclusion

91

121. There is no urgency in Black Rock's application. Any conceivable urgency is self-created.[92] Not recently, but over many years.

122. We respectfully submit that Black Rock has also failed to provide any reasons why Black Rock would not obtain redress in the ordinary course.

123. As such, the matter is not urgent, and it ought to be struck from the roll with punitive costs against Black Rock.

BLACK ROCK'S CLAIM FOR SPECIFIC PERFORMANCE

Legal Principles

124. Before discussing Black Rock's alleged rights to claim specific performance, it would be apt to discuss briefly relevant legal principles on, *first*, the function of the founding affidavit in a claim of this nature, and *second*, a claim for specific performance of reciprocal contractual obligations.

The Founding Affidavit in Motion Proceedings

125. It is required by Rule 6(1) of the Uniform Rules of Court that "…every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

126. It is submitted that the following provides a summary of the legal principles pertaining to this sub-rule and to motion proceedings in general:

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[92] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] 4 All SA 67 (GP) at [64].

126.1. It is incumbent upon an applicant to make out his/her/its case in the founding affidavit.[93] An applicant must stand or fall by his/her founding affidavit.[94]

126.2. The founding affidavit, being the equivalent of a plaintiff's pleadings and evidence on trial, must in itself contain sufficient facts upon which a court may find in an applicant's favour,[95] and must provide *prima facie* evidence upon which an applicant relies.[96] Put differently, in motion proceedings, the affidavits constitute both the pleadings

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[93] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A), where the following was stated at pages 635F to 636B:

> "*…When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:*
>
> > *"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".*
>
> *Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit" (per VAN WINSEN J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953 (3) SA 256 (C) at 260.) It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar.*"

[94] *Mistry* (supra) 1979 (1) SA 626 (AD) at 635H – 636D.

[95] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323G; In *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at page 611, paragraph [93], the Constitutional Court referred with approval to the below statement made in *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 739 (W) at 742C:

> "*In application proceedings the affidavits constitute not only the evidence but also the pleadings and therefore these documents should contain, in the evidence they set out, all that would have been necessary in a trial.*"

[96] *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* [2011] 4 All SA 113 (SCA) at par [23]; *Louw and Others v Nel* [2011] 2 All SA 495 (SCA) at par [17].

and the evidence, and the issues and averments in support of the parties' cases should appear clearly therefrom;[97]

126.3. What might be sufficient in a declaration to foil an exception would not necessarily, in a founding affidavit, be sufficient to resist an objection that a case has not been adequately made out;[98] and,

126.4. The distinction between primary and secondary facts has been explained as follows in **Die Dros**[99]:

> "*The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action.*"

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[97] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.

[98] *In Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793D-E, the former Appellate Division referred with approval to the remarks of Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C - E where it was stressed that:

> "…where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

See also *Democratic Alliance v Kouga Municipality and Others* [2014] 1 All SA 281 (SCA)

[99] *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at page 217, paragraph [28]

Reciprocal Contractual Obligations

127. *First*, it needs to be determined whether the principle of reciprocity of performance applies to a contract. This is basically a question of interpretation, assisted by a presumption that in any bilateral contract, i.e., one in which each party undertakes obligations towards the other, a common intention is that neither party should be entitled to enforce the contract unless that party has performed or is ready to perform its own obligations.[100]

128. *Second*, concerning claims for specific performance, the following is trite:

128.1. Where a contract imposes reciprocal obligations upon the parties, performance and counter-performance should generally take place at the same time.[101]

128.2. Certain types of contracts form an exception to this rule in that a party claiming remuneration must first perform their side of the contract.[102]

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[100] *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* (1212/2016) [2017] ZASCA 185; 2018 (3) SA 65 (SCA) at [20], where the following was stated: "*The principle of reciprocity (exceptio non adimpleti contractus) recognises the fact that in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances. Whether there is such an intention must often be determined by an interpretation of the contract (See Van der Merwe et al Contract: General Principles 5th ed (2015) at 335; and the references therein). In fact, there is a presumption that interdependent promises are reciprocal unless there is evidence to the contrary (Contract General Principles, supra). The common intention is that neither should be entitled to enforce the contract unless he/she has performed or is ready to perform his/her own obligations. (See RH Christie and G Bradfield Christie's Law of Contract in South Africa 6th ed (2011) at 437; Hauman v Nortje 1914 AD 293 at 300; Wolpert v Steenkamp 1917 AD 493 at 499; Nesci v Meyer 1982 (3) SA 498 (A) at 513F).*"

[101] *Nulliah v Harper* 1930 AD 141 152–153; *Koenig v Johnson & Co Ltd* 1935 AD 262 276; *Millman v Goosen* 1975 3 SA 141 (O) 142; *RM Van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 1 SA 250 (C) at 252H.

[102] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at paragraph 418B; *Man Truck and Bus (SA) (Pty) Ltd v Dorbyl Limited t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) at paragraph 12.

128.3. A plaintiff claiming specific performance must ordinarily allege that (i) it has made performance, or (ii) that it is excused from performance by reason of, e.g., impossibility or because the promises of performance are not dependent on each other, or that it must tender performance.[103]

129. Because a plaintiff's performance or tender of performance is part of its cause of action, it must plead it specifically, and its failure to do so will make the declaration excipiable.[104]

Did the parties to the Funding Agreement intend reciprocal contractual obligations?

130. The first enquiry concerns whether the Funding Agreement engages reciprocal contractual obligations.

131. In **Mkhize**[105], the court stated that, in interpreting a constitution in accordance with the rules applicable to the interpretation of a contract, it requires giving effect to the plain language of the document, objectively ascertained within its context. In the course of interpretation, preference should be given to a sensible meaning over one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.[106]

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[103] *Ghinste* (supra) at 253B-C.
[104] *Chrispette and Candy Company Ltd v Oscar Michaelis NO and Another* 1947 (4) SA 521 (A) at 537; See also: BRADFIELD GB, *Christie's Law of Contract in South Africa*, Eighth Edition at page 512.
[105] *National African Federated Chamber of Commerce and Industry and others v Mkhize* and others [2015] 1 All SA 393 (SCA) at paragraph [21].
[106] See also: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18].

132. The Funding Agreement reveals that Black Rock (as the "Company") had the following contractual obligations:

132.1. The Company must fund all legal costs and expenses reasonably necessary to prosecute the claim instituted by Makate against Vodacom.[107]

132.2. It must fund legal costs envisaged by clause 7, i.e., costs incurred in respect of R Mashilo Attorneys before the effective date, or indemnify Makate against claims by R Mashilo Attorneys.[108]

132.3. To indemnify Makate against all and any claims which may be instituted against him during the course of the litigation, including any adverse cost orders which may be granted during the litigation.[109]

132.4. It must deposit with Stemela & Lubbe Inc. sufficient funds, as reasonably required and requested from time to time, to finance the litigation, within 10 days of being requested to do so.[110]

132.5. It must pursue the litigation to the best of its abilities.[111]

132.6. Upon the success of the merits of the claim, Black Rock must pay a minimum deductible advance of R 4 million to Makate as an upfront distribution of rewards obtained.[112]

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[107] 001-39, clause 2, the first unnumbered subclause.
[108] 001-39, clause 2, the second unnumbered subclause read with 001-42, clause 7, the fourth and fifth subclauses.
[109] 001-39, clause 2, the third unnumbered subclause.
[110] 001-40, clause 2, fourth unnumbered subclause.
[111] 001-40, clause 3, first unnumbered subclause.
[112] 001-41, clause 5, second unnumbered subclause.

[*We pause to point out that the merits of the claim were, of course, decided in the 2016 Constitutional Court judgment. Since then, it has only been litigation in respect of quantum.*]

133. Concerning Black Rock's entitlement to remuneration, the wording of clause 5 ("**REWARD**") is germane:

> "*…Upon conclusion of this 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%.*"

134. Reading the reward in conjunction with the Company's contractual obligations, the Company would become entitled to its reward if the performance of its contractual obligations results (in whole or in part) in Makate succeeding in litigation and receiving money from Vodacom.

135. We submit that on a plain reading of the Funding Agreement, the parties' performance was reciprocal.

136. Fairly construed, Black Rock's right to receive its "REWARD" is conditional upon it having performed its obligations set out under paragraph 132 above.

Black Rock's Purported Cause of Action

137. Black Rock seeks the relief set out under **Part B** pending final determination of arbitration and/or action proceedings to be instituted by Black Rock within

five days from the order.[113] On 18 November 2025, Black Rock initiated arbitration proceedings against Makate.

138. In the Founding Affidavit, Black Rock pleaded, *inter alia*, the following:

138.1. On 7 November 2011, Schoeman (on behalf of a Company to be nominated) and Makate concluded the funding agreement.[114] On 18 July 2013, Schoeman appointed Black Rock as the nominated company.[115]

138.2. In terms of the funding agreement, the Company would fund all legal costs and expenses reasonably necessary to prosecute Makate's claim against Vodacom,[116] and it would indemnify Makate against all and any claims which could be instituted against him in the course of the litigation, including any adverse cost orders.[117]

138.3. Upon conclusion of the matter, whatever award is made and recovered by Makate from Vodacom would be paid to Lubbe's trust account,[118] which Lubbe would divide so that Makate would receive 60%, and the Company 40%.[119]

138.4. Black Rock raised funding for Makate's litigation, of which R2.4 million was paid to Lubbe.[120]

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[113] 001-5, prayer 2 of Part B of the Notice of Motion.
[114] 001-18, paragraph 32, together with "BRM1" to the founding affidavit.
[115] 001-21, paragraph 41 of the founding affidavit.
[116] 001-18, paragraph 34.3 of the founding affidavit.
[117] 001-18, paragraph 34.4 of the founding affidavit.
[118] 001-19, paragraph 34.10 of the founding affidavit.
[119] 001-19, paragraph 34.10 of the founding affidavit.
[120] 001-22, paragraph 43 of the founding affidavit.

138.5. Had it not been for Elsdon's efforts and the funding raised in terms of the funding agreement, Makate's litigation against Vodacom would never have progressed, and there would have been no settlement.[121]

138.6. During Black Rock's deregistration (30 April 2014 to 14 December 2020[122]), Black Rock remained actively engaged in the litigation funding through Elsdon.[123]

138.7. On or about 5 November 2025, Vodacom concluded a settlement agreement with Makate for payment of an undisclosed amount.[124]

138.8. Black Rock is entitled to 40% of the proceeds under the funding agreement.[125]

139. In Black Rock's attorney's letter of demand dated 10 November 2025 to Makate, Black Rock states that:

> "*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 & Lubbe, of which 60% is to be paid to Makate…*
> *5. We hereby demand 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 to you on behalf of Makate by Vodacom in terms of the settlement agreement…*".[126]

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[121] 001-22, paragraph 44 of the founding affidavit.
[122] 001-22 to 001-23, paragraphs 45 and 47 of the founding affidavit.
[123] 001-22, paragraph 45 of the founding affidavit.
[124] 001-28, paragraphs 66 and 67 of the founding affidavit.
[125] 001-32, paragraph 80 of the founding affidavit, read with 001-36, paragraph 101 of the founding affidavit.
[126] 001-127 to 001-128, paragraphs 4 and 5 of Annexure "BRM 9" to the founding affidavit.

140. It follows that Black Rock's intended claim against Makate is for specific performance by Makate of his alleged contractual obligation to pay 40% of the proceeds received from Vodacom to Black Rock, who asserts that it is entitled to such payment *ex contractu*.

No Allegations of and Facts Supporting Performance, and no Tender

141. As stated above, in accordance with the legal principles applying to reciprocal obligations, a plaintiff who claims specific performance must have performed or tender to perform his own reciprocal obligations.

142. We have further explained above that in motion proceedings, it is required of a party to make the necessary allegations to sustain its cause of action in its founding affidavit, and to advance evidence to sustain the same, at least, *prima facie*.

143. Since 2011, Black Rock has not contributed one cent to Makate's litigation costs; the last payment received was from Schoeman, amounting to less than R8,000.00 in December 2014, and Makate has been dependent on the generosity of his legal representatives ever since.[127] Despite Makate's multiple explicit challenges[128] in the answering affidavits for Black Rock to produce a shred of evidence to support its claims of relentless support and funding, nothing has been forthcoming- not even in the supplementary replying affidavit.

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[127] 003-13 paragraph 26 of the answering affidavit.
[128] E.g., 003-13, paragraph 26 of the answering affidavit; 005-20, paragraph 41.2 (over onto page 005-21) of the supplementary answering affidavit.

144. Thus, in the context of this matter, it was required of Black Rock, in its founding affidavit, to allege performance, or a tender of performance, as essential allegations to its cause of action. Additionally, Black Rock was required to provide facts demonstrating its alleged performance.

145. Black Rock purportedly deals with performance as stated in paragraphs 138.4, 138.5, and 138.6 above.

146. Black Rock failed to plead that it has performed the obligations set out under paragraph 132 above, or that it was excused from such performance. Further, no tender has been made to perform.

147. We emphasise Black Rock's obligation, upon success of the merits of the claim, to pay a minimum deductible advance of R 4 million to Makate as an upfront distribution of rewards obtained.[129] This obligation was pertinently referred to in the supplementary answering affidavit.[130]

148. The attention of the Honourable Court is directed to BlackRock's response regarding payment of the R4 million, as it appears in the supplementary replying affidavit. In response, Black Rock delves into historical funding and the alleged funding arrangements in 2012. Quite deliberately, Elsdon endeavours to draw the Honourable Court's attention away from its failure to have alleged payment of R 4 million or a tender to do so.[131]

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[129] 001-41, clause 5, second unnumbered subclause.
[130] 006-14, paragraph 23 of the supplementary answering affidavit and 006-14 to 006-15, paragraph 24.2 thereof.
[131] 004-68 to 004-69, paragraphs 121 to 125 of the supplementary replying affidavit.

149. Considering these *lacunae*, Black Rock has failed to make out a case against Makate, not even *prima facie*.

CANCELLATION AND PRESCRIPTION

150. Makate and Lubbe argue that any conceivable claim that Black Rock may have had has been extinguished through prescription.

151. Concerning Makate's cancellation in 2015 of Raining Men's nomination (albeit fraudulently obtained) and of the Funding Agreement concluded with Schoeman, we incorporate here the contents of paragraphs 48, 50, and 100 to 103 above, as if specifically stated.

152. On 5 March 2021, Makate, through his attorney, addressed a letter of cancellation to Black Rock's attorney of record. In this regard, we incorporate here the contents of paragraphs 8 and 57 above. Now, almost 5 years later, Black Rock purports to attack the validity of the cancellation by saying the letter was "*sent deep into the litigation against Vodacom…*"[132] that Makate did not have the right to cancel the contract unilaterally (instead, so the fallacious contention goes, Makate ought to have instituted arbitration proceedings under clause 11),[133] and that the letter makes bald assertions of non-performance.[134] In these regards, we submit the following:

[132] 004-40, paragraph 31 of the supplementary replying affidavit.
[133] 004-40, paragraph 32.1 of the supplementary replying affidavit.
[134] 004-41, paragraph 32.3 of the supplementary replying affidavit.

152.1. These purported grounds for attacking the validity of the 2021 cancellation are baseless.

152.2. Unless an agreement provides otherwise, the passage of time does not preclude a party from exercising a right of cancellation. Makate exercised his right to cancel the Funding Agreement with Black Rock shortly after its reinstatement in December 2020, following its deregistration in 2014.

152.3. Notably, Makate cancelled the said agreement because it was induced by fraudulent misrepresentation and, alternatively, Black Rock's repudiation, which Makate accepted. The contention that, under those circumstances, Makate lacked the right to terminate the agreement unilaterally is incorrect.

152.4. Strangely, Black Rock contends that the issue of cancellation is to be adjudicated in the arbitration proceedings.[135] This contention is misplaced, to say the least. We refer to the discussion below under the heading "ARBITRATION PROCEEDINGS ARE MOOT" to the effect that:

152.4.1. By instituting the application for a declarator some years ago, the disputant has waived his right to arbitration (which had to be disputed within 30 days) and is deemed to have waived his rights.

[135] 004-41, paragraph 34 of the supplementary replying affidavit.

152.4.2. We further repeat that Black Rock (and Elsdon) knew of the cancellation in terms of Makate's attorney's letter dated 5 March 2021. Despite this knowledge, it failed to exercise its alleged rights to declare a dispute concerning the cancellation within 30 days and to refer the matter for arbitration. Instead, it continued with its 2021 application for another 3 years until it was unconditionally withdrawn.

152.4.3. Moreover, arbitration proceedings are inappropriate given Makate's cancellation of the Funding Agreement based on fraud.

152.5. Black Rock's suggestion that the contents of the cancellation letter of 5 March 2021 were somehow inadequate is wrong.

153. In *Rademeyer*, the majority judgment of the Constitutional Court stated the following:

> "*[59] …In our law, breach of contract is remediable through two mutually exclusive options — a claim for specific performance that seeks, notwithstanding the breach, to keep the contract alive; or cancellation of the contract and a claim for damages.*
>
> *[60] When an election is made to sue for specific performance, axiomatically that lawsuit cannot possibly be a basis for the judicial interruption of the running of prescription in respect of cancellation and a damages claim in respect of the same debt arising from breach of the contract…*
>
> *[68] It is necessary to restate some well-established legal principles. First, it bears emphasis that a debt is the correlative of a right of action; when one is extinguished, so, too, is the other.* It is important to draw a clear distinction between the contractual remedies of specific performance and cancellation and concomitant damages. In the case of the former, the claim is based on the contract itself and breach of the contract is not a prerequisite for the claim. * It is the primary remedy for breach*

*of contract and simply seeks to ensure that the other contracting party performs as she undertook to do.**

*[69] Prescription in respect of a damages claim for breach of contract commences to run at the earliest from the time of breach of contract** A claim for specific performance can prescribe separately from a claim for damages. This is so, since upon breach with resultant damages, a new separate personal right arises so that the innocent party is restored to the status quo ante, that is, the position she would have been in had the breach not occurred. On the other hand, a right to claim specific performance originates upon conclusion of the contract, and prescription of the debt would commence running as soon as it is due — that is not the case in respect of a damages claim where prescription would only start running when the breach occurs. If a debtor is non-compliant with a court order to make specific performance, it constitutes a further breach of the contract and a judgment creditor may seek an order from the court cancelling the agreement and for an award of damages.[136] The so-called "double-barrelled" approach permits a plaintiff to claim specific performance and, in the alternative, an order cancelling the agreement in the event that the debtor fails to comply with the order for performance within the period stipulated by the court order. That is what happened here.*

[*** -References to footnotes excluded*]

154. When Black Rock received Makate's cancellation letter on 5 March 2021, assuming it to have constituted a breach by Makate, it became entitled either to claim specific performance or to cancel the agreement and claim damages.

[136] *Shembe* above n 14 at 469EE.

155. Applying the principles of **Rademeyer**, the running of prescription in respect of Black Rock's claim for specific performance would have commenced on 5 March 2021, and the three-year period would have expired on 4 March 2024.

156. Accordingly, on the common cause facts, Makate's alleged debt and Black Rock's concomitant purported right to claim specific performance was extinguished through prescription on 4 March 2024. The recent delivery of Black Rock's statement of claim (even if competent) seeking specific performance occurred after prescription of the claim.

157. There is no reason why the parties should be compelled to embark on the process of costly and time-consuming litigation when nothing precludes the court from finding, at this early junction, that, because of the cancellation and prescription, Black Rock no longer has a (presumed) *prima facie* right.

WAIVER

158. Referring to the facts already stated above, we respectfully submit that Black Rock's conduct over more than a decade indisputably constitutes a waiver of the right that it now seeks to enforce.

159. We highlight the following:

159.1. Black Rock abandoning its rights as nominee in favour of the fraudulently appointed Raining Main.

159.2. Elsdon, as the directing mind of both Black Rock and Raining Men, accepts Black Rock's purported abandonment of its rights and accepts Raining Men's purported nomination.[137]

159.3. Causing or allowing Black Rock to be deregistered in April 2014 and allowing its loss of corporate identity to prevail until December 2020.

159.4. Supporting Raining Men's flawed quest to enforce the fraudulent nomination in the arbitration proceedings.[138]

159.5. Testifying that the Black Rock agreement with Schoeman has been cancelled.[139]

159.6. In the arbitrator's findings, reasons, and award are laced with scathing remarks regarding Elsdon and Schoeman's dishonest testimony. Despite this, Raining Men instituted a review application against the arbitrator's decision under Case number 22056/2020, which was withdrawn on 21 January 2021.[140]

159.7. Elsdon testified that the award aggrieved him, and it was he who instructed the review to be instituted.[141]

159.8. Black Rock's withdrawal on 6 March 2024 of its 2021 application for declaratory relief to assert its position as the "Company" under the Funding Agreement.

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[137] 003-21/2, paragraph 52 of the answering affidavit.
[138] 003-22, paragraph 54 of the answering affidavit.
[139] 003-23, paragraph 55 of the answering affidavit.
[140] 003-23, paragraph 56 of the answering affidavit.
[141] Elsdon's founding affidavit in Black Rock's Application under Case Number 7089/2021, attached as **M8** to the answering affidavit, particularly at 003-62, paragraph 45 thereof.

160. No conduct can be clearer and unequivocal of a waiver of rights.

ARBITRATION PROCEEDINGS ARE MOOT

161. As stated above, on 11 February 2021, Black Rock initiated an application under Case Number 7089/2021 in the High Court of South Africa, Pretoria, for an order declaring that Black Rock (Black Rock Mining) is the nominated company in terms of the funding agreement entered into in November 2011 (purportedly) as per the arbitrator's award.[142]

162. Although the onus of showing good cause to avoid an arbitration is not easily discharged, instances in which it has been exercised include allegations of fraud.[143] Fraud has been squarely raised in Makate's letter of 5 March 2021.

163. Where an arbitration clause accords a disputant an option to have a dispute referred to arbitration, and the disputant to whom the option was accorded does not exercise it, he cannot at a later stage demand arbitration.[144]

164. By instituting the application for a declarator some years ago, the disputant has waived his right to arbitration (which had to be disputed within 30 days) and is deemed to have waived his rights.

165. We further repeat that Black Rock (and Elsdon) knew of the cancellation in terms of Makate's attorney's letter dated 5 March 2021. Despite this

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[142] 003-16, paragraphs 34 and 35 of the answering affidavit, read with **M8** at 003-45 and further.

[143] **Russell v Russell** [1880] 14 ChD 471; **Universiteit van Stellenbosch v J A Louw** 1983 (4) SA 321 (A) at 333.

[144] *Southern Life Association v Bannink's Executor* 1920 AD 34.

knowledge, it failed to exercise its alleged rights to declare a dispute concerning the cancellation within 30 days and to refer the matter for arbitration. We submit that Black Rock's conduct, and in certain instances, rather the lack thereof, constitutes a waiver of the right to arbitration.

166. Where a party contends that an impending arbitration proceeding will be invalid, it may be unrealistic and inconvenient to expect such a party to take part in the proceedings under protest or otherwise to await the conclusion and then, if the result is against it, to oppose the award being made an order of court.[145]

167. We further repeat what has been stated above regarding the cancellation correspondence of 7 and 12 January 2015 between attorney Williams of Hahn & Hahn Attorneys and Schoeman.[146] Upon Schoeman's acceptance, the Funding Agreement was cancelled by mutual agreement between the parties.

168. Where a contract is dissolved by mutual consent, the arbitration clause must also be deemed dissolved.[147]

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[145] *Intercontinental Finance and Leasing Corporation (Proprietary) Ltd v Stands 56 and 57 Industria Limited* 1979 (3) SA 740 (W) 754.

[146]

[147] *Turkstra and another v Massyn* 1958 (1) SA 623 (T) 625. Williamson J commented: *"The question as to whether a new contract was made which entirely dissolved the old contract and all it contain is not arbitrable under a submission which depends for its existence upon the continued operation of the original contract."*

MAREVA INJUNCTION AND ANTI-DISSIPATORY RELIEF TYPE RELIEF

Purpose of and requirements for granting a Mareva Injunction

169. The purpose of and requirements for this kind of interdict have been described in several cases.

170. The Supreme Court of Appeal in **Knox D'Arcy Limited** held as follows:

> "The question which arises…is whether an applicant needs to show a particular state of mind on the part of the respondent, ie, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this kind of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said the effect of the interdict is to prevent the respondent from freely dealing with its own property to which the applicant lays claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of an applicant's claim. *However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency.*"[148] [Emphasis added]
>
> "*The interdict with which we are dealing is* sui generis*. It is either available or it is not. No other remedy can really take its place….The question here is purely whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intent to render the applicant's claim nugatory.*"[149]
>
> *"As I have stated above, there may be exceptional circumstances in which a* bona fide *disposition of assets may be interdicted, but in my view this is not that sort of case. First, this was not the petitioners' case*

[148] *Knox D'Arcy Ltd and Others v Jameson and Others* 1996 (4) SA 348 (A) at 372F-H.
[149] *Ibid* at 373D-E.

on the papers. There they pin the colours to the mast of the intentional secreting of assets."[150]

171. According to **Gracies Consolidated Index and Noter-up**, these principles relevant to anti-dissipation relief have been referred to by other courts in tens of instances. In only one instance has a court distinguished the legal principles applicable to the matter before it from those enunciated in **Knox D'Arcy Limited**.[151] Where the SCA considered those principles, they were considered, or considered and applied, without criticism. Undoubtedly, **Knox D'Arcy Limited** is good law and should be applied *in casu*.

172. The Supreme Court of Appeal (SCA) in **Bassani[152]** approved **Knox** and recognised that the description of the remedy as an "*anti-dissipation interdict*" is now common usage[153]. In upholding the High Court decision, the SCA approved the finding by the court *a quo* that there was no real risk that the respondent would dissipate its assets, which diminished the likelihood of dissipation of assets to avoid the efficacy of a Court order and to leave the applicant with a hollow judgment, should the applicant succeed.[154]

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[150] *Ibid* at 377B.
[151] In *Krog v Botes* 2014 (2) SA 596 (GJ) Weiner J dealt with anti-dissipation interdict. At para [28] the learned judge stated:
"*In my view the applicant does not need to go that far. What he essentially seeks is an interim interdict to secure the proceeds of the sale pending the determination of the action, which directly involves the asset in question. It is not an interdict as envisaged in the Knox D'Arcy case*…"
[152] *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd & others* 835/2020) [2021] ZASCA 126.
[153] *Ibid* at [1].
[154] *Ibid* at [11].

173. In **KSL**, the requirements for granting an anti-dissipation order were articulated as follows[155]:

> "*The requirements for an interim interdict are: (a) a prima facie right, even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy [Setlogelo v Setlogelo 1914 AD 221 at 227; Webster v Mitchell 1948 (1) SA 1186 (W) at 1187]. In Knox D'Arcy … this Court went further and held that an anti-dissipation interdict provides a remedy where an Black Rock has shown on the established basis of an interim interdict; (a) a claim against a respondent and (b) that the respondent is [intentionally] secreting or dissipating assets, or is likely to do so with the intention of defeating an applicant's claim. These jurisdictional facts to justify the granting of an anti-dissipatory relief were re-affirmed by this Court recently in Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others.*"

Does Black Rock satisfy the requirements for the granting of a *Mareva injunction*?

174. It is submitted that the current application demonstrates no exceptional circumstances that warrant a deviation from the test espoused in **Knox D'Arcy**, and it is incumbent upon Black Rock to show that Makate and Lubbe have a particular state of mind that warrants the relief sought.

175. Black Rock relies on numerous broad and unsubstantiated statements in the founding affidavit concerning the imminent risk of dissipation,[156] or funds will/would be dissipated,[157] which would frustrate Black Rock's contractual

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[155] *KSL v AL* (356/2023) [2024] ZASCA 96; 2024 (6) SA 410 (SCA) (13 June 2024) at [16].
[156] See, for example, 001-30, paragraph 71 of the founding affidavit, and 001-33, paragraph 86 thereof.
[157] 001-30, paragraph 71; 001-33, paragraph 86; and 001-36, paragraphs 99 and 102 of the founding affidavit.

entitlement for subsequent recovery,[158] and which would render its contractual rights nugatory.[159] However, they are inferences, which are not based on any primary facts.

176. Makate emphasises the following facts:

176.1. Black Rock was deregistered from 2014 to 2020.[160]

176.2. Crucially, despite Schoeman and Elsdon's knowledge of the alleged "sidelining" and cancellations, despite Black Rock's restoration of registration in December 2020, they remained docile and took no steps to protect their purported rights relevant to the alleged "sidelining" and cancellations complained of.

176.3. Black Rock's reliance on Schoeman's alleged "deathbed" confession (to cast aspersions that Makate and Lubbe sidelined Black Rock and Elsdon, and will dissipate the funds, *even if true, which is denied*), weighs against Black Rock. Schoeman passed away on 6 March 2022.[161] Therefore, before Schoeman's passing, Black Rock and Elsdon knew that Schoeman would allegedly have prepared Hahn & Hahn's communications regarding the cancellation. Despite this alleged knowledge, Black Rock and Elston remained supine.

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[158] 001-33, paragraph 86 of the founding affidavit.
[159] 001-33, paragraph 87 of the founding affidavit.
[160] 001-22, paragraph 45 of the founding affidavit and 001-23, paragraph 47.
[161] 005-34, paragraph 66.3 of the supplementary answering affidavit.

176.4. Elsdon's subjective perception that the "animosity"[162] between him (and Black Rock) and Lubbe indicates that its claim will be rendered nugatory[163] is meaningless. Indeed, Lubbe has represented Makate since about 2008 and has crossed swords with Elsdon and his front companies on many occasions. The fact that Elsdon and cohorts have not had any success in litigation may be experienced by him, misconstrued as it may be, as animosity. But the fact remains that Elsdon's perception of Lubbe can never provide a basis for the inference that Lubbe will dissipate monies to defeat Black Rock's claim, even if successful.

176.5. Equally, the "*magnitude*"[164] of the amounts in question are meaningless.

176.6. Black Rock does not provide any facts to support its contention that "*its legal and commercial interests*"[165] will be harmed by the imaginary dissipation and should be disregarded. The fact of the matter is that Black Rock is an empty shell- it has no such interests, in any event, not of any substance that would justify protection by way of the drastic proposed remedy.

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[162] 001-33, paragraph 86 of the founding affidavit.
[163] 001-33, paragraph 87 of the founding affidavit.
[164] 001-33, paragraph 83 of the founding affidavit.
[165] 001-34, paragraph 88 of the founding affidavit.

177. The attention of the Honourable Court is respectfully drawn to the contents of Lubbe's affidavit,[166] in which she disputes Elsdon's personal attacks and questioning of her professionalism and integrity,[167] and she provides a resume of her qualifications and professional experience.[168] She disputes (with reasons) that she would dissipate funds to frustrate or render Black Rock's contractual rights nugatory. She explains that Makate's refusal to give an undertaking was not sinister but was informed by advice from his legal team.[169] She provides a detailed explanation for disputing the allegations that the funds were paid into her personal bank account in the UK.[170]

178. Notably, the Applicant neither responded to nor denied any of the allegations in Lubbe's affidavit. Accordingly, these facts must stand uncontested.

179. None of Black Rock's unsubstantiated inferences demonstrates any risk of dissipation, let alone dissipation with the intention to render Black Rock's alleged claim hollow.

180. Black Rock claims that the interim interdict sought is a standard remedy to preserve the status quo pending final adjudication of disputed rights. We respectfully disagree and contend that the above requirements applicable to a *Mareva injunction* must be satisfied.

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[166] 006-51 to 006-58, **M16** to the supplementary answering affidavit.
[167] 006-52 to 006-53, **M16** to the supplementary answering affidavit, paragraphs 4 (including subordinates) and 5.
[168] 006-53 to 006-54, **M16** to the supplementary answering affidavit, paragraph 6 (including subordinates).
[169] 006-55, **M16** to the supplementary answering affidavit, paragraph 8.
[170] 006-55 to 006-56, **M16** to the supplementary answering affidavit, paragraph 9 (including subordinates).

181. If the Court finds that Black Rock need not satisfy the requirements for the granting of a *Mareva injunction*, then we submit that Black Rock's application should fail because it did not meet the requirements for the granting of interim interdictory relief, which we shall deal with below.

REQUIREMENTS FOR INTERIM RELIEF

182. In **Setlogelo**, the following was stated:

> "*It is trite that an applicant seeking interim relief must show that:*
> *(a) The right that forms the subject matter of the main action and that the applicant seeks to protect is prima facie established, even though open to some doubt;*
> *(b) There is a well-grounded apprehension of harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
> *(c) The balance of convenience favours the granting of interim relief but falls away when the applicants can show a clear right;*
> *(d) The applicant has no other satisfactory remedy.*"[171]

183. Holmes JA said in **Olympic Passenger Services**[172]:

> *"Upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant. The weaker the prospects of*

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[171] *Setlogelo v Setlogelo* 1914 AD 221 at 222.
[172] *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383.

success, the greater the need for the balance of convenience to favour it."

***Prima facie* right**

184. Black Rock suggests that the consideration of a prima facie right should take account only of its version. It relies squarely on the signed Funding Agreement, the arbitrator's Award, and Makate's testimony, but out of context.[173] Further, it appears to propose that the court should ignore Makate's version (particularly the defences of cancellation, prescription, fraud, waiver, and estoppel).[174]

185. We respectfully point out that the test for demonstrating a prima facie right goes far beyond the mere version of an applicant. It is trite that the mere acceptance of an applicant's allegations is insufficient.

186. The proper approach for considering a *prima facie* right in the context of an interim interdict is:[175]

> "…*to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant [should] on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to*

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[173] See e.g., 004-77, paragraph 152.3.1 of the supplementary replying affidavit.
[174] See e.g., 004-76, paragraph 152.1 of the supplementary replying affidavit.
[175] *Webster v Mitchell* 1948 1 SA 1186 (W) at 1189 (words in square brackets inserted by *Gool v Minister of Justice* 1955 2 SA 682 (C) at 688).

trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

187. Concerning a *prima facie* right, an applicant, including Black Rock, is required to make out its case in the founding affidavit, by which it must stand and fall. The founding affidavit, being the equivalent of its pleadings and evidence on trial, must in itself contain sufficient facts upon which a court may find in an applicant's favour.

Performance

188. In terms of the Funding Agreement, Black Rock was obliged to pay an amount of R4 million (at least) to Makate "upon success of the merits of the claim".[176] On a plain reading of the Funding Agreement, this is a reciprocal contractual obligation on the part of Black Rock, performance of which it had to allege or tender as essential to its cause of action. In its founding affidavit, Black Rock failed to allege performance of this obligation (supported by facts) or to tender such performance.

189. It gets worse for Black Rock. Makate explicitly challenged Black Rock to address this *lacuna*, but it failed to do so.

190. Absent performance or a tender of performance, Black Rock has no *prima facie* right. The question as to the element of doubt concerning a *prima facie* right does not even arise.

[176] 001-41, clause 5, second unnumbered subclause.

191. On the case as pleaded, thus absent performance or a tender, concerning the inherent probabilities and the ultimate onus, Black Rock has no prospects of success to obtain final relief in due course. The question of whether it could or should succeed is not even open for debate.

192. Black Rock seemingly deals with performance by alleging that:

192.1. It has raised funding for Makate's litigation, of which R2.5 million was paid to Lubbe (paragraph 138.4 above);

192.2. Had it not been for Elsdon's efforts and funding, Makate would not have settled with Vodacom (paragraph 138.5 above); and,

192.3. During Black Rock's deregistration, it remained actively engaged in litigation funding through Elsdon (138.6 above).

193. Black Rock was obliged, but failed to plead, that it had performed the following obligations, supported by facts:

193.1. It has funded all relevant litigation costs and expenses;[177]

193.2. It has funded the legal costs of R Mashilo Attorneys as envisaged by clause 7;[178]

193.3. It indemnified Makate against all and any litigation-related claims;[179]

193.4. It has deposited with Stemela & Lubbe Inc. sufficient funds, as reasonably required and requested to finance the litigation;[180] and,

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[177] 001-39, clause 2, the first unnumbered subclause.
[178] 001-39, clause 2, the second unnumbered subclause read with 001-42, clause 7, the fourth and fifth subclauses.
[179] 001-39, clause 2, the third unnumbered subclause.
[180] 001-40, clause 2, fourth unnumbered subclause.

193.5. It has pursued litigation to the best of its abilities.[181]

194. The failure to have alleged performance of the remaining obligations referred to above is not accidental. In fact, the common cause facts demonstrate that BlackRock was legally incapable of performing these obligations.

195. We repeat that these lacunae are fatal to the instant application, for the same reasons advanced about the obligation to pay R 4 million.

Other factors

196. It is trite that a court, when considering granting an interim interdict, will be loath to delve into probabilities. However, considering the test set out in **Webster**, a court may take facts into account that cast a shadow over an applicant's case.

197. We respectfully submit that Makate advances numerous facts that would be appropriate to take into consideration for determining the inherent weakness of Black Rock's case. These will be briefly discussed below, against the backdrop of the details advanced hereinbefore.

198. Schoeman nominated Black Rock on 18 July 2013. Some nine months later, on 30 April 2014, Black Rock was deregistered, a status that prevailed until January 2021.

199. It stands to reason that during this period of loss of Black Rock's corporate identity, it had no legal capacity to perform under the Funding Agreement,

[181] 001-40, clause 3, first unnumbered subclause.

particularly to make payments towards Makate's litigation costs or to provide the indemnity envisaged by the Funding Agreement.

200. While it may theoretically be possible for a third party to have funded Makate's litigation during Black Rock's deregistration, its failure to have proffered such supporting facts in Elsdon's founding affidavit is telling.

201. More critical is the "Company's" obligations to indemnify Makate against any liabilities relevant to the litigation. There is no suggestion in the papers that anyone, on behalf of the non-existent Black Rock, indemnified Makate against litigation-related liabilities. Once again, it was Black Rock's duty to advance facts in this regard, which it failed to do.

202. This explains Black Rock, leading to meaningless and patently flawed allegations, as more fully referred to above, including that it "raised funding"; had it not been for Elsdon's efforts and funding, Makate would not have settled with and received money from Vodacom; and, during Black Rock's deregistration, it remained actively engaged in litigation funding through Elsdon. These allegations do not even resemble the "Company's" performance of its obligations as envisaged by the Funding Agreement.

203. We repeat what has been stated above regarding the 2015 cancellation of the Funding Agreement by Makate (represented by Hahn & Hahn), which Schoeman accepted. Further, in the arbitration proceedings, both

Schoeman[182] and Elsdon[183] testified that Black Rock's nomination agreement had been cancelled about a month after its conclusion.[184]

204. Shortly after Black Rock's status was restored in January 2021, Makate notified Black Rock in writing on 5 March 2021 of its cancellation of the Funding Agreement as a result of fraud, alternatively, its acceptance of Black Rock's continued repudiation.

205. We repeat what has been stated in paragraphs 158 to 160 above regarding waiver, which we submit provides a further factor to take into account against the granting of the interim relief sought.

206. Notably, the cancellation of the agreements in 2015 and 2021 triggered the running of prescription as we have discussed under paragraphs 150 to 157 above, all of which are incorporated here.

Conclusion

207. We respectfully argue that the above claims regarding the absence of allegations of performance or a tender are fatal to any potential *prima facie* right. Furthermore, we contend that the other factors mentioned above, whether considered individually or together, cast more than a significant

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[182] **M15** to the answering affidavit (i.e. the evidence of Schoeman) at pages 003-174 to 003-180; particularly 003-175, lines 5 to 10; 003-176, lines 1 to 3 and 11 to 12; and **M18** to the supplementary answering affidavit (i.e. the evidence of Schoeman) at 005-83, line 20 to 005-84, line 5; 005-89, lines 12 to 20.

[183] **M15** to the answering affidavit (i.e. the evidence of Elsdon) at pages 003-179, line 2 to 003-180, line 18.

[184] **M15** to the answering affidavit (i.e. the evidence of Schoeman) at page 003-176, lines 1 to 3 and 11 to 12

doubt on Black Rock's claimed *prima facie* right, to the extent that denying the interim relief requested would be appropriate.

Injury actually committed or reasonably apprehended

208. Black Rock's attempts to establish an apprehension of injury are mounted on generalisations and Elsdon's personal views regarding Makate and Lubbe, unsubstantiated by any facts.

209. Black Rock has failed to establish any reasonably plausible basis for concluding that there is a reasonable or real risk that Makate, with the assistance of Lubbe, will have squandered the proceeds derived from Vodacom.

210. The personal and professional profiles of both Makate and Lubbe do not provide any cause to believe that Makate will plunder his estate to sabotage Black Rock's alleged claim, even if successful.

Balance of convenience

211. The stage is set for Black Rock and Makate to engage in litigation for many years, possibly longer than a decade. During this period, if interim relief is granted, Makate will not enjoy the fruits of his hard-fought remuneration for an invention he developed 25 years ago.

212. The contribution of R2.45 million by the funders must, even to the untrained eye, be a proverbial drop in the ocean. This is indicated, amongst others, by

the bill of costs amounting to some R 12 million in respect of the proceedings that ended in the Constitutional Court in July 2025.[185]

213. Makate stands to lose the potential benefits that may be derived from investing his money, free from any encumbrances.

214. There is no reasonable or real risk that the proceeds received from Vodacom will be dissipated, as argued above, and for Black Rock to be ultimately unsuccessful in recovering its alleged claim.

215. On balance, he will undoubtedly suffer the most.

216. At the other end of the scale, Black Rock will gain no benefit if the funds remain in trust.

217. The answering and supplementary answering affidavits explain that Makate stands to suffer severe losses if the funds remain in Lubbe's trust account pending the finalisation of litigation that is likely to continue for many years. These losses include reduced interest income and the loss of income he could have earned through investment.

218. In **Cronshaw**, Shultz JA stated the following:[186]

> "*A court granting an interim interdict is entitled, in the exercise of its discretion, to impose reasonable conditions, one of them being that it be a condition of the grant that the applicant undertakes to be liable in such damages as the respondent may prove he has suffered as a result of the interdict, if at the trial it emerges that the interdict should not have been granted: Hillman Bros (West Rand) (Pty) Ltd v Van den Heuvel*

[185] 006-46, paragraph 103 of the supplementary answering affidavit.
[186] Cronshaw and Another v Coin Security Group (Pty) Ltd 1996 (3) SA 686 (A) at 690 to 691.

1937 WLD 41 at 46. In many instances justice dictates that the Judge should require the giving of such an undertaking before there can be any question of the court granting an interim interdict is entitled, in the exercise of its discretion, to impose reasonable conditions, one of them being that it be a condition of the grant that the applicant undertakes to be liable in such damages as the respondent may prove he has suffered as a result of the interdict, if at the trial it emerges that the interdict should not have been granted: Hillman Bros (West Rand) (Pty) Ltd v Van den Heuvel 1937 WLD 41 at 46. In many instances justice dictates that the Judge should require the giving of such an undertaking before there can be any question of the grant of an interim order. Of course, even where this is done, it may be small solace to a respondent having difficulty in proving or recovering damages. But it is a remedy sometimes of worth. And the prospect of the imposition of such a condition may act as a deterrent to an applicant ready to deal out but not take hurt."

219. In **Shoprite**, the following was stated:[187]

"*I am, however, disposed to grant the interdict conditionally so as to make provision for the potential financial prejudice to the respondents should they eventually prove successful in resisting applicant's claims in the action to be brought. This object can be achieved in the present case by requiring applicant to provide the respondents with an undertaking to pay them any damages which respondents are able to prove resulted from the grant of the interdict and their having to re-open the New Mall, should applicant fail in the action to be instituted by it against them. That the Court has the power to impose reasonable conditions when exercising its discretion to grant an interim interdict on motion appears from cases such as Hillman Bros West Rand (Pty) Ltd v Van den Heuvel 1937 WLD 41 at 46. In that case the Court came to the conclusion that the applicant was entitled to have its position safeguarded pending the decision of the action to be instituted, subject to such conditions as the Court considered necessary for the protection of the respondent. The Court, per Greenberg J (as he then was), granted the interdict subject to the condition inter alia that, if in the action applicant failed to prove its allegations, it agreed to be liable to respondent for any damages suffered by him through the fact that the interdict was granted. In an appropriate case the applicant can be*

[187] Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others 1994 (2) SA 172 (C) at 184-185.

required, as a condition of the grant of his application, to give security for such damages as the respondent may have sustained as a consequence of the interim interdict, should the action fail. See Ndauti v Kgami and Others 1948 (3) SA 27 (W) at 37; Chopra v Sparks Cinemas (Pty) Ltd and Another 1973 (4) SA 372 (D) B at 379D-H. In the present case consider that an undertaking by the applicant will suffice, there being no reason to doubt its ability to meet the respondents' claim for damages should the need arise."

220. In **Hix Networking**,[188] the Appellate Division stated the following:

"*…This is the fact that Hix refused, in express terms in the reply, to tender an undertaking to cover the respondents' losses should it transpire that the interim relief it sought should not have been granted. In cases of this nature this is a very common rider added to the Court's order when an interdict is granted. It is designed to protect the person against whom the interdict is granted from suffering loss as a result of the interdict being granted. This is because the interdict is a judicial act. The party interdicted would not (in the absence of malice) be able to recover damages. See Hillman Bros (West Rand) (Pty) Ltd v Van den Heuvel 1937 WLD 41 at 46; Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd 1996 (3) SA 686 (A) at 690H-691B. In the present case the appellant's refusal to offer an undertaking would, in my view, have ensured that the balance of convenience favoured the respondents.*

221. We highlight that Black Rock is a peregrinus, an empty shell (as it has always been), reinstated in January 2021 solely to serve as a vehicle for the purpose of the alleged claim.

222. Without i) such an undertaking by Black Rock that it would be liable for all losses suffered by Makate in the event of it not succeeding with its claim, and

[188] Hix Networking Technologies V System Publishers (Pty) Ltd and Another, 1997 (1) SA 391 (A) at page 403 E-F

ii) providing security, there is simply no basis on which interim relief can be granted.

No alternative remedy

223. Black Rock has already instituted arbitration proceedings, albeit fatally flawed and meritless. Further, because the instant application is stillborn, the question of alternative relief does not arise.

CONCLUDING REMARKS

224. Makate and Lubbe submit that the matter should be struck from the roll, with costs, for lack of urgency.

225. *In the alternative*, if the matter is not struck from the roll, the application be dismissed with costs, and it be declared that Black Rock's purported claim concerning the funds has become extinguished through prescription.

C. PUCKRIN SC
R. MICHAU SC
C.A.C. KORF
CHAMBERS, TSHWANE
30 NOVEMBER 2025