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Our Reference:

M.S. Omar/um

Your Reference:

5 August 2008

Attention: Ziyaad Muhammad**Islamic Finance Institute of Southern Africa**

Dear Brother Ziyaad

RE: VODACOM BROAD-BASED BEE TRANSACTION

1. I refer to your request for a Shariah opinion in respect of the abovementioned. I summarize below by using the example of a participant who subscribes for 100 shares only.

2. **Structure of BEE Transaction**

2.1 The participant subscribes for 100 shares at R25 per share totalling R2500.00 in the issued share capital of Yebo Yethu. ("the shares");

2.2 The current fair market value of the shares is R15 625.00, which is allocated as follows:

2.2.1	Cash paid	-	2 500.00
2.2.2	Discount	-	1 563.00
2.2.3	Vendor finance ("notional loan")-		11 562.00
			15 625.00
	Value of shares ("fair value investment")		15 625.00

- 2.3 Yebo Yethu in turn will use the cash proceeds being R2500.00 plus the notional loan plus the discount, to subscribe for 50 ordinary shares ("ordinary shares") and 575 A shares ("A shares") in the issued share capital of Vodacom SA.
- 2.4 In substance therefore the participant owns (indirectly via Yebo Yethu) 50 ordinary shares and 575 A shares in the issued share capital of Vodacom SA. In other words, the participant owns 625 shares at R25 per share constituting the fair value investment.
- 2.5 The participant is, as stated above (see 2.2.3) indebted (via Yebo Yethu) to Vodacom SA for the notional loan for the sum of R11 562.00. The notional loan attached to each A Share is R20.1087. The total notional loan of R11 562.00 is accordingly computed as follows : 575 A Shares x 20.1087.
- 2.6 The participant receives dividends from Vodacom SA (via Yebo Yethu) on his or her 50 ordinary shares from implementation date and thereafter.
- 2.7 The "A" shares do not pay any actual dividends for the facilitation period, that is, for a period of seven years from the date of issue of the shares ("facilitation period"). Thereafter, the "A" shares would generate dividends on the same basis as the ordinary shares.
- 2.8 The dividend that would have been payable on the "A" shares during the facilitation period ("notional dividend") is effectively used to reduce the notional loan.
- 2.9 In simple terms, the profits that the participant would have earned on the "A" shares during the facilitation period is used to reduce the notional loan during the facilitation period.

- 2.10 The notional loan will increase at 10% per annum compounded semi-annually in arrears. Similarly, the notional dividends on the "A" shares will be increased and compounded at 10% per annum.
- 2.11 Upon the expiry of the seven-year facilitation period, the outstanding notional loan (if any), is discharged as set out in paragraph 2.12 below.
- 2.12 Vodacom SA will discharge the notional loan outstandings (if any) by repurchasing at par value, in terms of a formula so many "A" shares of fair market value equal to the notional loan outstandings. For example, the fair market value per share at the relevant time (seventh anniversary of date of issue) is R100.00 per share, and the notional loan outstandings per share at the time is R50.00, Vodacom SA will have the right to repurchase from the participant (via Yebo Yethu) at par value, 287 A shares, calculated as follows:

$$\frac{50}{100} \times 575 = 287 \text{ A shares}$$

- 2.13 The shares if so repurchased by Vodacom SA, will be cancelled as issued shares in terms of section 85 of the Companies Act, 1973.
- 2.14 In the result, the issued share capital of Vodacom SA will decrease. with the consequence that the actual shareholding of Vodacom Group (Pty) Ltd (post the BEE transaction) will increase proportionately.
- 2.15 Furthermore, a material term of the offer is that the participant is precluded from selling his or her shares for the first period of five years. For the second five-year period, the participant may only sell his or her shares to a member of the Black Public (as defined). ("restrictive conditions")

3. Critical Shariah Issues

- 3.1 Does the notional loan arrangement give rise to a genuine debtor-creditor relationship ? If so, does the creditor receive a contractually stipulated benefit over and above the capital, represented by the notional loan of R11 562.00 ? (“the first question”)
- 3.2 Are the restrictive conditions in the context of the broad-based BEE transaction permissible in the Shariah ? (“the second question”)

4. Shariah Analysis

- 4.1 In relation to the first question, the contention is that the notional loan arrangement referred to above does not give rise to a true and genuine debtor-creditor relationship, because :
- 4.1.1 There is no physical exchange of funds in the sense that this notional transaction is represented by accounting entries giving rise to a notional set-off (bearing in mind that a company cannot render financial assistance in respect of Section 38 of the Companies Act, 1973)¹
- 4.1.2 There are no enforceable obligations in that the creditor cannot sue the debtor for the recovery of notional outstandings.
- 4.1.3 Vodacom SA, in its capacity as creditor, is not enriched by the notional loan arrangement.
- 4.2 On the available information, we are not satisfied that the notional loan arrangement does not give rise to a genuine debtor-creditor relationship. The reasons for this are as follows :

¹ S 38 : “No company shall give, whether directly or indirectly, or whether by means of a loan . . . any financial assistance for the purpose of . . . a purchase or subscription made . . . by any person of or for any shares of the company . . .”

- 4.2.1 In view of the fact that the notional loan increases at 10% per annum, compounded semi-annually in arrears, the interest component of the debt is reflected in the notional loan outstandings at any point during the facilitation period.
- 4.2.2 It appears to us that whilst Vodacom SA may not directly benefit in the event of a repurchase, referred to in paragraph 2.12 above, Vodacom Group (Pty) Ltd, as the majority member, owning 93.75% shareholding (post the BEE transaction) in Vodacom SA, may benefit from the repurchase. The reason for this is that although the shares so repurchased are cancelled as issued shares in terms of Section 85(8) of the Companies Act, 1973², with a resultant proportionate decrease in the issued share capital of Vodacom SA, the net effect would be that the shareholding of Vodacom Group (Pty) Ltd would increase.
- 4.3 On this basis, our provisional prima facie view is that the notional loan arrangement includes an element of interest, with the result that it is impermissible according to the Shariah.
- 4.4 With respect to the second question, the Shariah analysis must be considered with reference to the rules governing shirkah (partnerships). It is a settled principle that a condition with a rational benefit, which is not contrary to the essence of a partnership arrangement, is valid. The restrictive conditions are consistent with Broad-Based Black Economic Empowerment objectives as set forth in Section 2 of the Broad-Based Black Economic Empowerment Act, 2003, read with the codes of good practice gazetted under this act from time to time, and accordingly are rationally based without affecting the essence of the partnership. (see for example, *Badai al Sanai* by Imam Khassani, in the chapter dealing with *Mudarabah*, and *Al Mabsut* of Imam Saraksi, and *Al Mughni*, Rule 3708).

² S 85 : “Shares issued by company and acquired under this section shall be cancelled as issued shares and restored to the status of authorised shares forthwith.”

5. In arriving at the foregoing, we have relied on :

5.1 the registered prospectus;

5.2 the BBBEE offer as advertised in 'Business Day', July 30th, 2008.

6. We reserve the right to amend the opinion contained herein, based on any further information or clarifications received.

Yours faithfully,

M S Omar