IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 09/52967

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

1 March 2010 .....
SIGNATURE

In the matter between

ANISH ANIL MAHARAJ **APPLICANT**

and

DINESH CHOUDREE **FIRST RESPONDENT**

STANDARD BANK OF SOUTH AFRICA LIMITED **SECOND RESPONDENT**

NEDBANK LIMITED **THIRD RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for the confirmation of a rule *nisi*, issued by this court (Blieden J) in terms of which the attachment of the first respondent's funds held in three of his bank accounts held with the second and third respondents was authorised *ad fundandam vel confirmandam jurisdictionem*. Only the first respondent (henceforth referred to as "the respondent") opposes the confirmation of the rule.

[2] The respondent's opposition is based on four grounds. On the view I take of this matter it is only necessary to determine one of those grounds, which is that the applicant has failed to show a *prima facie* cause of action against the respondent, in the action he, at the time of launching this application, proposed to institute against the respondent. The action I should mention was instituted the day after the rule *nisi* was granted.

[3] It has become well entrenched that an applicant seeking an order for attachment to found jurisdiction must show a *prima facie* cause of action against the defendant. The requirement is satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action. In *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA), Hefer ADCJ held as follows (para [7]):

> *'However, accepting the statements at face value, it is plain that an applicant must at the very least make all the allegations in his founding affidavit that will sustain a cause of action*.'

(See also *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) at para [7]). In *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA), Scott JA, having referred to the above general requirement, added thereto (para [12]):

> *'..it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused.'*

The remedy moreover should be applied with care and caution as it is (in the words of Scott JA) "of an exceptional nature and may have far-reaching consequences for the owner of the property attached". As rightly pointed out by counsel for the respondent, this is even more apposite in our post constitutional dispensation where the protection of property is constitutionally (s 15(1) of the Constitution) enshrined.

[4] In deciding whether the applicant has made out a *prima facie* case, I propose to adopt a two-legged approach, firstly, to consider the allegations concerning the applicant's cause of action as set out in the founding papers and secondly, (in line with the approach proposed in *Dabelstein and Others v Lane and Fey NNO*, supra) to also have regard to what has been said in the

respondent's answering affidavit, or to put it differently, to look at all the evidence before me in order to decide whether a *prima facie* cause of action has been established. For present purposes regard need only be had to the fact that the applicant's cause of action is based on an agreement concluded between him and the respondent which was "partly oral and partly in writing" (the agreement).

[5] Applying the principles to which I have referred above, the minimum threshold the applicant in my view must pass to discharge the onus of establishing a *prima facie* cause of action is that the allegations made by him in the founding affidavit (the founding affidavit has been deposed to by an attorney duly authorised to do so on behalf of the applicant), on the acceptance thereof, will show that an agreement was concluded, on the terms alleged, which would entitle the applicant to payment of the sums claimed.

[6] This brings me to the terms of the agreement which are set out as follows in the founding affidavit:

> '13. The Applicant has a claim against the First Respondent for the sum of US$1 507 033.00 as well as the further sum of US$1 695 033.00 together with such interest as may be claimed in law.
> 14. The claim arises out of, and is based on, an agreement concluded between them in 2005.
> 15. The Applicant and First Respondent were involved in a business in the online gaming industry and were both shareholders of a local company called Brandbox Media (Pty) Limited ("Brandbox").
> 16. On 13 July 2005, in Johannesburg, the Applicant and First Respondent concluded an agreement which was partly oral and partly in writing, in terms of which the Applicant sold to the First Respondent his interest in the business, as well as his shareholding in Brandbox.
> 17. I attach copies of the documents which constitute the written part of the agreement as "VJM1" to "VJM8".
> 18. In terms of the aforesaid agreement, the purchase price payable by the First Respondent to the Applicant in consideration for the Applicants interest and shareholding was the sum of US$4 839 099.00. The purchase price was payable as follows:
> 18.1 the sum of US$1 637 033.00 by 15 January 2006;
> 18.2 the sum of US$1 507 033.00 by 15 January 2007;
> 18.3 the sum of US$1 695 033.00 by 15 January 2008.

19. The first respondent paid to the Applicant, or caused to be paid, the sum of US$1 637 033.00 during January 2006, but failed to pay the remaining two instalments.
20. The First Respondent is accordingly indebted to the Applicant in the sum of US$1 507 033.00 and the further sum of US$1 695 033.00 together with such interest as may be claimable in law on each of the aforesaid amounts.'

(the agreement)

[7] I turn now to the written part of the agreement. It consists of eight pages. The first page (Annexure "VJM1") bears the heading "Memorandum of Understanding – 5 July 2005". Below the heading there appears altogether nineteen paragraphs, numbered 1.1 – 1.9 and 2 – 2.9, each consisting of not more than two lines. In addition thereto, four further paragraphs have been inserted in manuscript, numbered 3.0 – 3.3. Below the numbered paragraphs the signature of the respondent (who is throughout referred to as "DC") with the date 13/07/05 appears and below this, the signature of the applicant (referred to as "AM") also with the date 13/07/05 next to it. Before dealing any further with the remaining pages of the annexure, it is convenient at this stage to consider the nature and impact of the Memorandum of Understanding.

[8] The Memorandum of Understanding is anything but a model of clarity. It is certainly no easy task to decipher the true meaning of its "terms". On my reading thereof it in essence regulates the separation of the applicant and the respondent in regard to "BBM", which I assume (and accept for present purposes) is a reference to Brandbox Media (Pty) Ltd, in which it is alleged the applicant and the respondent were shareholders. But what is glaringly absent from this document is any reference to any of the terms of the agreement.

[9] The next part of the written part of the agreement consists of four pages (Annexure "VJM 2-5"), and bears the heading "Transfer Notice". All pages, in the bottom corner thereof, it is common cause between the parties, bear the signatures of the applicant and the respondent. *Ex facie* the Transfer Notice:

- It is recorded that an Economic Benefits Agreement exists between "Praxis Investment Trust, a discretionary trust established in terms

of the banks and trust companies of the British Virgin Islands and bearing registration number (11111) (hereinafter referred to as "Praxis") and Maricass International Holdings Incorporated, a company incorporated in [insert details] and bearing registration number [11111] (hereinafter referred to "Maricass")".

- It is issued by Praxis (as transferor) to Maricass "in terms of clause 9.1 of the [Economic Benefits] agreement", which constitutes an offer by Praxis to sell its entire "economic benefit" in Maricass, to Maricass.
- Certain "conditions" are attached to the offer, one thereof being the purchase price payable in the sum of US$ 4 839 099.00 (which corresponds with the purchase price referred to in the applicant's founding affidavit) and that the amount is payable by way of three instalments, which all accord with the dates and amounts stated in paragraph 18 of the founding affidavit.
- It has not been signed in the spaces provided for signatures by either Praxis or Maricass (on the last page with the heading "Acceptance Notice").

[10] It is immediately apparent that neither relevance nor nexus between the Transfer Notice and the agreement exists nor has such been alleged or shown. No mention of any one of the entities (accepting them to be entities), Praxis and Maricass, are to be found in the terms of the agreement set out in the founding affidavit. The Transfer Notice cannot in any way be reconciled with the terms of the agreement. If anything it is destructive of the terms of the agreement. To summarise: nothing has been set out to show respondent's (as opposed to Maricass) personal liability to the applicant (as opposed to Praxis) for the payments in respect of the sale of the entire economic benefit of Praxis in Maricass, to Maricass where, according to the applicant he, in terms of the agreement he now relies upon, personally had sold to the respondent his interest "in the business" (without disclosing the name of such business) as well as his shareholding in Brandbox, a company that simply does not feature at all in the Transfer Notice.

[11] But it does not end there: the Transfer Notice containing, as I have already referred to, an offer by Praxis which was open for acceptance by Maricass, was *ex facie* the documents not accepted. In the replying affidavit (deposed to by the applicant personally) it is stated that the Transfer Notice at the time of concluding the agreement had not been signed (*ie* by either Praxis or Maricass), but that it was "later signed".

[12] I proceed to deal with the final pages of the written part of the agreement (Annexure "A6-8") bearing the heading "Notes: Agreed Adjustments". On the last page thereof one finds a payment schedule where the instalments (as stated in paragraph 18 of the founding affidavit) again appear. Again, there is no nexus between this document and the Transfer Notice on the one hand, or for that matter, the agreement, on the other.

[13] I turn now to the second leg of the enquiry. In the answering affidavit the respondent in addition to the uncertainties and inconsistencies I have already referred to, convincingly shows that the applicant has proffered different versions concerning the agreement in other proceedings between the parties in this court concerning the self-same alleged cause of action. Those proceedings are a previous identical action instituted by the applicant against the respondent, which is still pending; the applicant's application for the sequestration of the respondent's estate also based on the alleged indebtedness arising from the agreement, which was dismissed with costs, and the respondent's application for the furnishing by the applicant of security for costs, which is still pending before this court. The respondent, with painstaking accuracy, has referred to the inconsistencies revealed when a comparison is made between the allegations concerning the agreement and the annexures relied upon as the written part of the agreement, in all of these cases. I do not consider it necessary for purposes of this judgment to traverse all those inconsistencies. Merely two thereof will serve to illustrate the point: firstly, in the sequestration application (brought in June 2008) the applicant stated that the Memorandum of Understanding – 5 July 2005 constituted the

written part of the agreement and that it had to be read "in conjunction with" a further agreement (*ie* the Transfer Notice), which at the time was "in the process of being concluded between Praxis and Maricass". He further stated that the respondent, in terms of the Memorandum of Understanding, personally guaranteed to make to the applicant the payments referred to in the Transfer Notice and that the first payment of US$1 507 033, which the respondent had guaranteed, had in fact been made in January 2006 by Maricass on the respondent's behalf, to Praxis, on the applicant's behalf. These allegations in the meanwhile seem to have fallen along the wayside as they are not repeated in the present application, but, in my view more importantly, they can in any event in no way be reconciled with the wording of the Memorandum of Understanding.

[14] Secondly, and in my view decisive of the unsustainability of the applicant's cause of action, is the turn the applicant's cause of action has taken in the Intendit which was issued the day after the order (in terms of which the applicant was also granted leave to sue the respondent in the action by way of edictal citation) was granted. For the first time the following is now alleged:

> '*6. The transfer notice and acceptance notice (annex(sic)"B2" to "B5") reflect a simulated agreement between Maricass International Holdings Incorporated and the Praxis Investment Trust, which was designed by the defendant to conceal the fact that he was purchasing the plaintiff's said interest and shareholding. The purchase price and method of payment as agreed between the plaintiff and the defendant are however correctly reflected in the transfer notice.*'

The applicant both under oath (in the sequestration proceedings) and in the first action (which is still pending) has never made any mention of a simulated agreement. But it goes further: the contents of the newly introduced paragraph 6 are at odds with the terms of the agreement. The allegation that the "defendant concealed that he was purchasing the plaintiff's said interest and shareholding" flies in the face of the fact that the applicant was a co-signatory to those very documents and further that those documents are the very documents the applicant relies upon as constituting the agreement.

[15] Finally, a further disturbing feature deserves comment. The respondent in his answering affidavit pertinently raised the impropriety of the applicant relying on an agreement between Maricass and Praxis as entities who are not parties to these proceedings. The applicant apart from relying for the first time on a simulated agreement, does not deal with this apparent anomaly at all. His failure to do so is unjustifiable on any rational basis. It merely needs to be stated that it is certainly not for this court to venture into speculation as to what the applicant's cause of action against the respondent is. He bore the onus of showing a *prima facie* cause of action which he, for the reasons stated, has failed to discharge.

[16] To sum up then I conclude that there are no prospects of the applicant succeeding on the cause of action he has set out in this application resulting in a failure to discharge the onus of showing a *prima facie* cause of action. The rule *nisi* accordingly falls to be discharged.

[17] In the result, I make the following order:

1. The rule *nisi* dated 22 December 2009 is discharged.
2. The applicant is ordered to pay the first respondent's costs of the application, such costs to include the costs consequent upon the employment of two counsel where two counsel were employed.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	**ADV J A PLOOS VAN AMSTEL SC** **ADV J J BITTER**
APPLICANT'S ATTORNEYS	**GARLICKE & BOUSFIELD INC**

COUNSEL FOR THE FIRST RESPONDENT	**ADV V SONI SC** **ADV SK DAYAL**
FIRST RESPONDENT'S ATTORNEYS	**VOS ATTORNEYS**
DATE OF HEARING	**19 FEBRUARY 2010**
DATE OF JUDGMENT	**1 MARCH 2010**