AGRIPROCOM P/L
versus
THE TRUSTEES (for the time being)
OF THE EDULIS TRUST

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 23 June and 21 July 2004

Mr *T Biti*, for the applicant
Advocate *H Zhou*, for the respondents

GOWORA J: The applicant herein seeks firstly an order that service of summons issued against the respondent be served upon their legal practitioner of record Mrs *Mtetwa* of *Kantor and Immerman*. That point having been conceded by the respondent, it is no longer an issue. In fact I am informed by Mr *Biti* from the bar that service of the summons has in the interim been effected upon Mrs *Mtetwa*.

The second part of the order is for the attachment of share certificates evidencing the shareholding of the respondents in Edulis Trust Zimbabwe (Pvt) to found or confirm the jurisdiction of this court to determine the dispute between the parties.

In heads of argument filed on their behalf, the respondents have contended that, the applicant must first establish that it has a cause of action before the order can be granted. The respondents contend that the agreement relied upon by the applicants provides for the sale of the shares either upon failure by the respondent to extend the initial two year period, or not exercising the option to extend the agreement at the expiry of the initial two year period. As the agreement was terminated by the applicant prior to the expiry of the initial two year period, then the applicant cannot seek to rely on the provisions of an agreement it breached.

In the application before me the applicant does not seek an order to enforce the terms and conditions of the contract whether or not the contract was terminated by the effluxion of time or as a result of a breach of its terms by the applicant, is not in so far as the present application is concerned relevant or genuine. The court in this application is concerned with whether or not it is necessary to attach the property of the respondents which is situate in the country in order to confirm or found jurisdiction. The merits or otherwise of

the applicant's claim are not the issue. The respondents have not referred the court to an authority which supports their contention that if the applicant has not established a cause of action, on the main issue, then the property sought to be attached cannot be attached. I am not persuaded by that argument. In my view the issue of whether or not a cause of action is disclosed, is an issue which is pertinent to the main action between the parties. It is not the issue before me and I do not have sufficient information to come to a determination.

The respondents have also contended that the applicant has failed to follow the provisions of the agreement in the purported agreement in that it failed to call upon the respondents to remedy any perceived breaches.

Again in my view, as the agreement is not before me for interpretation, this is not material to the dispute which I have to determine.

The respondents have contended further that the applicant has provided no value for the shares and aver that for this court to grant the order sought the value of the shares must be determinable so that the number of shares is known especially in view of the fact that the agreement provided for the determination of the value of the shares by the auditors of Collica Investments P/L. The respondents have not referred me to any authority for this submission. However, the agreement itself has provided the value on which the shares should be transferred between the parties, and the contention that the value of the shares has not been established therefore does not hold water.

In *Thermo Radiant Oven Sales (Pty) Ltd v Nelsprint Bakeries (Pty) Ltd* 1969(2) SA 295(309E-F) it was stated that the property to be attached must have some saleable value. According to clause 85 of the agreement it is agreed between the parties that the value of 25% of the shares is not less than US$170 000.00, which would put the value of all the shares at an amount beyond that.

It has not been contended that the shares have no saleable value but that their exact value has not been established.

I am persuaded that the shares have a saleable value and are capable of attachment to found or confirm jurisdiction.

The attachment of the property of a peregrims is necessary to found jurisdiction. In this case none of the respondents are resident within the jurisdiction. The contract between the parties was concluded in South Africa even though it was to be performed in this country. It is necessary therefore in order that this court have jurisdiction that the property of the respondents be attached.

At page 93 of their book The Civil Practice of the Supreme Court of South Africa 4 ed, the learned authors Van Winsen, Cilliers and Loots state as follows:

> "Where an *incola* wishes to sue a *peregrinus* to enforce a claim sounding in money or relating to property and none of the usual grounds upon which the court might have jurisdiction is present, attachment is a condition precedent to the action, for it is upon the attachment that the court's jurisdiction is founded.
>
> Even if the court has jurisdiction upon one or other of the common-law grounds, it is still necessary for an *incola* or *peregrine* plaintiff to attach the property or person of a peregrine defendant to confirm or strengthen the jurisdiction already possessed by the court. In *Einwald v German West Africa Co* DE VILLIERS CJ, dealing with the grounds upon which the court's jurisdiction can be exercised, remarked as follows: 'The grounds are threefold: *viz* by virtue of the defendant's *domicile* being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter in an action in *rem* being situated in this colony. If the defendant is *domiciled* here, the process of attachment is wholly unnecessary, but in the absence of such domicile, the invariable practice of this court has been to attach the person or property of the defendant for the purpose of founding jurisdiction even where either of the two latter requisites is present".

In *casu*, the applicant contends that not only is the attachment necessary to found jurisdiction but also to afford security. In *ex parte Moi-tal Construction Co (Pvt) Ltd* 1962 R & N 248 BEADLE CJ stated at 249F-G

> "But the courts have been careful not to detail all the circumstances in which an order for an attachment would be made. Examples of the type of cases in which orders for attachment have been made are cases where property which is sought be attached is property which is the subject matter of every dispute in question, or cases where it is quite clear that the only property which the respondent has within the jurisdiction is the property which is sought to be attached and there is danger that, if it is not attached he will make away with the property and the court's judgment would possibly be a "*brutum fulmen*".

The 75% shareholding in Collica are indisputably the only property that the respondents have in this jurisdiction. In the case of a judgment in favour of the applicant they would be the only attachable asset. This is an appropriate situation for attachment of the shares. The applicant therefore succeeds and I will issue an order in the following terms:-

IT IS ORDERED AS FOLLOWS:

1. That the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorised and directed to attach and hold the share certificates evidencing the shareholding of the Edulis Trust in Edulis Zimbabwe (Pvt) Ltd to found or confirm jurisdiction, and this order shall be his warrant to do so.
2. The costs of this application shall be costs in the cause of the main action.

Honey & Blanckenberg, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners