

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D6149/2024

**MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD
T/A MERCHANT FACTORS
Registration number: 2014/075671/07**

APPLICANT

and

**KAIROS COMMUNICATIONS (PTY) LTD
Registration number: 2013/007788/07**

RESPONDENT

ORDER

The following order is granted:

1. The application is referred for the hearing of oral evidence on a date to be fixed by the registrar, on the following issues:
 - (a) Was the ink supplied by Nano Inks defective?
 - (b) Did the respondent return any of the defective ink to Nano Inks?
 - (c) If so, in returning the defective ink, did the respondent discharge its liability to the Applicant?
 - (d) Did the respondent send the correspondence in which it confirmed that it had opportunity of examining the ink received and were satisfied that it conformed to the quality / workmanship that was expected upon purchase / requesting the inks, and if so, when?

2. The evidence shall be that of any witnesses whom the parties, or any of them, may elect to call, subject however to what is provided in paragraph 3 below.

3. Save in the case of the applicant and respondent, whose evidence is set out in their respective affidavits filed of record, neither party shall be entitled to call any witness unless:

(a) it has served on the other party, at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the respondent), a statement wherein the evidence to be given in chief by such a witness is set out; or

(b) the court, at the hearing, permits such a person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

4. The parties may subpoena any person to give evidence at the hearing, whether such a person has consented to furnish a statement or not.

5. The fact that a party has served a statement in terms of paragraph 3 above, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6. The provisions of Uniform rules 35, 36, 37 and 37A shall apply to the hearing of oral evidence.

7. The costs of this application are reserved for determination by the court hearing the oral evidence.

JUDGMENT

Magwaza AJ

Introduction

[1] This is an application for the provisional winding-up of the respondent brought by the applicant in terms of s 346(1)(b) of the Companies Act 61 of 1973 (“the Act”), arising from the respondent’s failure to pay its debt due to the applicant. The applicant relies on an undisputed irrevocable undertaking provided to the applicant by the respondent to pay the applicant an amount of R9 944 672.45 within 60 days of delivery of the goods. The respondent failed to pay the applicant this amount within 60 days and the applicant delivered a demand notice in terms of s 345 of the Act calling on the respondent to settle its liability within 21 days, failing which the applicant would proceed with the liquidation of the respondent.

[2] Despite the demand the respondent failed to pay its debt to the applicant and as a result the applicant instituted these proceedings. In further support of this application the applicant submits that over and above the respondent’s failure to comply with the demand notice the respondent committed an act of insolvency when it made a without prejudice proposal to settle its debt in instalments, which it subsequently failed to do.

[3] In opposition, although admitting that it signed the irrevocable undertaking to pay the applicant the amount of R9 944 672.45 the respondent has disputed its liability to the applicant and submits that it has a *bona fide* defence to the applicant’s claim as the goods which it had acknowledged liability for, were defective. The respondent further disputes that the applicant could place reliance on the without prejudice offer of settlement as an act of insolvency as this was privileged communication which should not be admissible in these proceedings.

[4] This court is therefore called upon to determine firstly whether the applicant is entitled to the liquidation of the respondent due to the respondent’s failure to comply with the s 345 notice and the respondent’s act of insolvency contained in its without prejudice proposal to settle its debt to the applicant. Secondly, whether the respondent disputes that indebtedness on *bona fide* and reasonable grounds.¹

¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T); *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) (‘*Decotex*’); *Gap Merchant*

Background

[5] On 23 March 2023, Nano Inks (Pty) Ltd (“Nano Inks”) agreed to sell and supply its ink products to the respondent on credit. During the period of 28 September 2023 to 13 November 2023 Nano Inks sold, supplied and delivered ink products to the respondent and issued four invoices for the total value of R9 944 672.45. Each of the four invoices were payable within 60 days of presentation.

[6] The respondent has not disputed concluding the credit facility agreement with Nano Inks nor having received the ink products and invoices from Nano Inks. It is also not disputed that the first invoice recorded that it was payable on 30 November 2025 with the last invoice being payable on 31 January 2025.

[7] On 30 October 2023 the applicant entered into a factoring agreement with Nano Inks, in terms of which Nano Inks sold its present and future accounts receivable (“invoices”) to the applicant, pursuant to which sale all the right, title and interest enjoyed by Nano Inks in respect of the invoices would be ceded to the applicant as and when they came into existence. The ceded rights included the right to payment, demand the return of the invoiced goods. In return, the applicant would advance to Nano Inks 70 percent of the value of each invoice issued by Nano Inks, with the balance of 30 percent of the value of the invoice being retained to cover the cost of financing and the various charges pursuant to the factoring agreement. For the purpose of this judgment the financial terms of the factoring agreement were not disputed between the parties.

[8] On 30 October 2023 Nano Inks sent a letter to the respondent, in which it informed the respondent of the conclusion of the factoring agreement between itself and applicant. According to this letter the respondent was advised that the applicant will collect all present and future debt, including those payable by the respondent. The letter further informs the respondent of the new procedures that must be

followed in view of the factoring agreement. The letter records the following procedures to be adopted:

‘ ...

Please ensure that the following procedures are adopted

- (1) Orders and enquiries regarding your orders should, as before, be addressed to us.
- (2) Invoices will be issued by us. However, your future monthly statement will be issued by MERCHANT FACTORS and payment should be made directly to them. Please complete and return the remittance advice portion of the MERCHANT FACTORS statement when making payment.
- (3) Any notice of claims, complaints or disputes relating to your account should be directed to MERCHANT FACTORS – telephone number (021) 4[...].
- (4) Prior to the return of any goods for whatever reason, please contact Merchant Factors at (021) 4[...], who will advise you where the goods are to be returned to, as the goods are currently secured in favour of MERCHANT FACTORS in accordance with the provisions of this agreement.

As all present and future debts have been ceded to MERCHANT FACTORS, only payment direct to them at:

P.O.	Box	OR	4 th	Floor,	Merchant	OR	By EFT or deposit to:
7[...]			Place				Account Name: Merchant
Cape Town			5[...]	L[...]	Street		Commercial Finance 1
8000			Cape Town				(Pty) Ltd
			8001				Bank: Capitec Business
							Account No: 1[...]
							Branch: Mid Commercial
							Branch Code: 450105

(and **NOT** ourselves), will validly discharge your indebtedness. No set-off will be recognized.

This notification of cession remains of full force and effect until cancelled or varied in writing by MERCHANT FACTORS.

The procedure now coming into effect does not in any way change the structure and management of the company and, likewise, its policies remain the same. The trading terms which you have been granted continue as before. ...'

[9] The letter sought to create a new procedure under which the payment of invoices would now be handled through the applicant, and how the respondent ought to deal with the return of goods through the applicant. More importantly, this letter did not seek to exclude any other defence open to the respondent to raise against Nano Inks.

[10] The respondent does not dispute having been notified of the new procedure, it however disputed that the respondent was not entitled to withhold any payment or claim any set-off against debt owed. This argument is without merit. In the letter it is specifically recorded that no set-off will be recognized, and I will not make any further reference to this defence in this judgment.

[11] On 16 November 2023 the applicant sent a letter to the respondent requesting it to confirm by signature that the invoices recorded therein and the amounts were to be paid into the applicant's bank account in accordance with the payment terms of 60 days. The bottom of the letter contains the following undertaking by the respondent:

'By our signature below, we acknowledge and confirm that the balance owing by ourselves to yourselves are due as follows:

1 December 2023 (R3 418 892.50)

1 February 2024 (R3 080 562.50)

1 February 2024 (R1 927 217.45)

1 February 2024 (R1 518 000.00)

And we irrevocably and unconditionally confirm and undertake that payment thereof will be made, without (and free and clear of any deductions, set off or counter claim) directly to yourself, to the abovementioned account on or

before the due date for payment thereof, in accordance with the payment terms granted by the abovementioned supplier.

For: Kairos Communications (Pty) Ltd – reg number 2013/007788/07

Full Names and Surnames – Mohammed Zakhir Ally (written in manuscript)
designation Financial Manager,

Signature _____ (*signature appears*)
duly authorised thereto.'

[12] On 12 December 2023 Nano Inks sent an email to the applicant and copied the respondent informing the applicant that there was a problem with the adhesion of the ink on the substrate (which is the basic material the ink is applied to) and it was reworking the ink. In response the applicant enquired from Nano Inks what was required in reworking the ink and the time required to complete this exercise. It is important to note that this exchange was between Nano Inks and the applicant and not the respondent. No further evidence was provided by the applicant on when the issue with the adhesion of the ink was raised by the respondent and whether it was resolved at all. It is, I think significant that Nano Inks and the applicant first identified what is a serious defect to the ink sold to the respondent.

[13] The respondent alleges that it returned 28 tons of the defective ink to Nano Inks. As evidence of the alleged returns the respondent put up delivery notes issued by the respondent on the respondent's letterhead and addressed to Nano Inks. The first delivery note was dated 14 December 2023, two days after the email exchanges between the applicant and Nano Inks. The delivery note described the type of ink and the quantity. Below the description of the ink and above the signatures two lines were inserted with the words "defective inks returned" written between these lines. The respondent also put up five other delivery notes dated between 5 February and 13 February 2024, which also contained the description of the different inks, various quantities with the same inscription "defective inks returned" contained in each delivery note.

[14] In addition, the respondent submitted that Nano Inks had requested the respondent to pay one of its suppliers, Chemipol, directly for certain material and set-

off this amount against the applicant's claim. The applicant has disputed that the respondent was entitled to set-off any amounts owed by Nano Inks to the respondent, as in terms of the acknowledgment and undertaking, it was precluded from set-off. The applicant further disputed that the respondent returned any of the inks and dismissed the delivery notes as an attempt by the respondent at self-corroboration, which it submits was impermissible.

[15] Although the first delivery note was purportedly issued on 14 December 2023, nearly six weeks later on 31 January 2024 the respondent made a without prejudice settlement proposal to pay the outstanding amount by way of instalments, commencing on 29 February 2024. The settlement proposal recorded the following:

'Kindly be advised that we propose settlement of the amount as follows:

1. Payment of R500 000.00 for 3 months, commencing from 29th February 2024.
2. Thereafter R1 000 000,00 from the 1st May 2024 until settlement of this account.

Kindly consider same and revert to us.

Our rights are reserved.'

[16] Despite the settlement proposal, the respondent failed to honour the terms thereof. The applicant made no suggestion that this proposal was accepted, however the applicant argued that this proposal constituted an act of insolvency by the respondent which contained an admission by the respondent of its inability to pay its debts as and when they arose.

[17] The respondent submitted that evidence of the settlement proposal is inadmissible in these proceedings as it was sent on a without prejudice basis in contemplation of settlement of the matter and the matter was not settled. The applicant submits that it is entitled to rely on this proposal because in insolvency

proceedings any admissions contained in a settlement proposal are not privileged and therefore admissible.

[18] It was further argued by the applicant that the settlement proposal which was made almost six weeks after the purported return of the first batch of the defective ink was inconsistent with the respondent's defence that the ink was defective. In any event, any goods returned to Nano Inks would only have created a claim by the respondent against Nano Inks and would not necessarily have been a defence against the applicant's claim.

[19] On 17 April 2024, the applicant issued a demand in accordance with s 345 of the Act read with schedule 5 of the Companies Act 71 of 2008, in which it demanded settlement of the amount of R9 944 627.45 within 21 days. Despite this notice the respondent failed once again to pay the outstanding amount. As a result of the respondent's failure to pay the amount, the applicant alleged that the respondent is unable to pay its debts as and when they fall due as envisaged in terms of s 345(1)(c) and seeks the winding-up of the respondent.

[20] The respondent argued that the applicant was well aware that there was an issue with the ink delivered by Nano Inks as early as December 2023. It argues that this issue places the respondent's liability in issue and creates a dispute of fact which ought to be referred to oral evidence for resolution of the matter.

[21] The applicant strongly opposed the referral of the matter to oral evidence as it believed that there existed no material dispute of facts in the matter. More specifically, the applicant submitted that the respondent had not disputed that it had signed the acknowledgement of indebtedness and irrevocable and unconditional undertaking to pay the applicant, free from any set-off or deduction, which constituted the basis of the respondent's indebtedness to the applicant. The applicant further submitted that the respondent sought to rely on a dispute of fact that arose a month before it made its settlement proposal.

[22] The fact that the settlement proposal was made without prejudice is of no moment and did not render it privileged for the purposes of insolvency. In support of

this argument the applicant relied on the judgment of *ABSA Bank Ltd v Hammerle Group*.²

[23] The respondent was at pains to argue that *ABSA* was distinguishable to the facts of this case. In *ABSA*, the impugned act of insolvency contained in the settlement proposal recorded that:³

‘Notwithstanding the aforesaid, please note that our client has been struggling to turn the business around. However, our client believes that it may in due course turn the business around by making it profitable. At this stage, our client has not been able to make any meaningful profits in the business.’

[24] The respondent argued that it was clear from the above paragraph that its position and settlement proposal were different from that contemplated in *ABSA*. The letter in *ABSA* contained specific admissions on the part of the respondent that it was unable to meet its debts as and when they became due and payable, which was different from the settlement proposal made by the respondent in this case. In contrast, the settlement proposal made by the respondent herein, which was marked without prejudice, did not contain an act of insolvency, but merely a proposal to pay its debt in instalments. The proposal was therefore not admissible in these proceedings.

[25] At the hearing of the matter the respondent accepted the validity of the acknowledgement of indebtedness, and that it was binding upon it. It however argued that the enforceability of the undertaking was premised on a valid indebtedness in favour of the applicant and as such the issue that the court ought to determine is whether the respondent has a *bona fide* defence which ought to be referred to oral evidence for determination.

[26] The respondent subsequently filed a supplementary answering affidavit in which it sought to submit firstly, a list of its employees that would be affected by the

² *Absa Bank Ltd v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA) ('ABSA').

³ *Ibid* para 11.

liquidation of the respondent and secondly, put up its financials to demonstrate that it was factually solvent as it had considerable profits, in excess of R10 million. The respondent argued that it would not be just and equitable that a provisional liquidation order be granted against it given that it had raised a *bona fide* defence to the applicant's claim based on reasonable grounds and that on an application of the *Badenhorst* rule, the matter should not proceed. It was further submitted that the court has a wide discretion which should be applied in a broad sense in due regard to what the *boni mores* are.

[27] The applicant argued that the issue of the respondent's employees is not relevant, nor is its profit at this stage, as it has been demonstrated that it is unable to pay its debt and part of the reasons why it is profitable is because it has not settled the applicant's debt. More importantly, any consideration of justice and equity is not relevant in the winding-up of the respondent given that the applicant is not seeking the winding-up on the basis that it is just and equitable to do so.

Legal framework

[28] It has long been accepted in our law that in winding-up applications, for a provisional order and rule *nisi* to be issued all that the applicant is required to demonstrate is that the respondent is *prima facie* indebted to the applicant,⁴ and thereafter the onus would shift on the respondent to demonstrate that its indebtedness is disputed on *bona fides* and reasonable grounds.⁵ Whilst the court enjoys a discretion in determining whether to grant a provisional liquidation order, such discretion is a narrow one and must be exercised judiciously.⁶

[29] The applicant's *prima facie* case must be determined on a balance of probabilities based on all affidavits filed as to whether the evidence demonstrates the insolvency of the company or respondent without regard to any evidence which may be adduced in rebuttal. However, where real and substantial factual issues are

⁴ See *Decotex*.

⁵ *Meyer, NO v Bree Holdings (Pty) Ltd* 1972 (3) SA 353 (T).

⁶ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24; 2022 (1) SA 91 (SCA) para 12.

raised in rebuttal the court is required to enquire into the bona fide of such rebuttal evidence. The referral of the matter to the hearing of oral evidence during the provisional order stage must only be granted in exceptional circumstances. In *Kalil v Decotex* the court having considered the general approach to provisional liquidation laid out in *Provincial Building Society of South Africa v Du Bois*⁷ stated the following:⁸

‘This judgment would thus appear to lay down that in an opposed application for a provisional order of sequestration the necessary *prima facie* case is established only when the applicant can show that on a consideration of all the affidavits filed a case for sequestration has been established on a balance of probabilities; and that, where the applicant does show this, an application by the respondent for the matter to be referred to *viva voce* evidence (in order to endeavour to disturb this balance) will, save in exceptional circumstances, not be granted. The learned Judge would also seem to have expressed the view, obiter, that where on the affidavits the balance of probabilities is against the applicant or where there is no balance either way, no *prima facie* case is established and the Court should refuse to order *viva voce* evidence.’

[30] In *Decotex* the court went on to say:⁹

‘Where, on the other hand, the affidavits in an opposed application for a provisional order of winding-up do not reveal a balance of probabilities in favour of the applicant, then clearly no *prima facie* case is established and a provisional order cannot at that stage be granted. The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. The alternative, viz refusal of the provisional order of winding-up, represents a final decision against the applicant and, if such a decision is always made purely on the affidavits, injustice may be done to the applicant. (Cf the general reluctance of the Court

⁷ *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W).

⁸ *Decotex* at 978D-F.

⁹ *Ibid* at 979E-980A.

in motion proceedings to decide finally genuine and fundamental disputes of fact purely on the basis of probabilities disclosed in contradictory affidavits: see *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 294D-295A, 299H-300A.) Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent. The case of *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) represents an instance where the Court, unable to resolve the disputed issues arising on an application for a provisional order of winding-up, referred the matter for the hearing of oral evidence.'

[31] It is clear from *Decotex*, in seeking to expand the *Badenhorst* rule to avoid and injustice to the applicant; the right to refer the matter to oral evidence is enjoyed by the applicant who having been faced with a bona fide defence, where the scales on a balanced of probabilities are evenly balanced, may seek to refer the matter for oral evidence on a narrow dispute of facts. That is not the case in this matter. On the contrary, it is the respondent who has sought to refer the matter to oral evidence on the basis of the *Badenhorst* rule, which the applicant has strongly opposed. However, given what is stated below it is unnecessary for this court to resolve this issue.

[32] Given that the respondent has admitted signing the acknowledgement of indebtedness coupled with an irrevocable undertaking to pay the applicant the amount of R9 944 672.45 within 60 days, and this period having lapsed without any payment being made by the respondent, I am satisfied that the applicant has established that the respondent is *prima facie* indebted to the applicant.

[33] In its founding papers the applicant's case was largely premised on the respondent's inability to pay its debt as contemplated in s 345(1) of the Act which

provides that a company shall be deemed to be unable to pay its debts if upon a demand having been served on the company it fails or neglects to pay the sum despite a period of three weeks having lapsed from the date of demand. It is common cause that on 18 April 2024 the applicant served such demand via the sheriff at the respondent's registered address, and that three weeks have elapsed since the service of this demand.

[34] Whilst the respondent does not dispute the demand, nor receipt thereof, it does however dispute that the applicant is entitled to its liquidation as its liability to the applicant is disputed on *bona fide* and reasonable grounds. The respondent submits that under the *Badenhorst* rule the application for its liquidation should not be resorted to as a means to enforce the applicant's claim where it is properly disputed on *bona fide* and reasonable grounds.

[35] The onus rests on the respondent to demonstrate on a balance of probabilities that it claims that it had returned the defective goods to Nano Inks constituted a *bona fide* defence on reasonable grounds because it has a genuine defence. In *Gap Merchant Recycling Rogers J* set out the approach to be followed in determining the reasonableness of a *bona fide* defence:

'[20] The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds is part of the broader principle that the court's processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the '*Badenhorst* rule', after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C. A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and bona fide grounds; a court may reach this

conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G-I). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (*Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218D-219C).'

Settlement proposal by the respondent

[36] As stated above, the applicant places reliance on the provisions of s 345 of the Act on the basis of the liquidation of the respondent. Firstly, having proved the acknowledgment of debt and compliance with this provision at this stage of the enquiry, a provisional order for the winding-up should normally be granted.¹⁰

[37] Secondly, whilst in its founding papers the applicant did not expressly place reliance on the settlement proposal as a basis for the liquidation of the respondent, in its heads of argument and certainly during argument, the applicant submitted that the said proposal constituted an admissible act of insolvency as contemplated in *ABSA* and ought to be admitted in these proceedings. In *ABSA*, the Supreme Court of Appeal ("the SCA") stated:

'[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a "without prejudice" basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency as the respondent did in this case, public policy dictates that such admission of insolvency should not be precluded from sequestrating or winding-up proceedings, even if made on a privileged occasion. The reasons for the exception is that liquidation or insolvency

¹⁰ *Decotex* at 979B.

proceedings are a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealings with the person or company trading in insolvent circumstances. It follows that an admission of such insolvency whether made in confidence or otherwise cannot be considered privileged...'

[38] *ABSA* is authority for the principle that an act of insolvency contained in communications between parties is admissible in liquidation proceedings even though such act was contained in privileged communication. However, this does not mean that all privileged communications are admissible in liquidation proceedings, only those communications which contain acts of insolvency are admissible regardless of whether they were made during privileged discussions or documents. In determining whether the settlement proposal constituted an act of insolvency as contemplated in s 8 of the Insolvency Act 24 of 1936 ("the Insolvency Act"), proper and due regard must be had to the wording of the offer. Section 8(e) provides:

'8. A debtor commits an act of insolvency -

...

(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;'

[39] What is critical for such offer to constitute an act of insolvency is that the company must seek to be released in part or wholly from its debt. An offer on its own to pay the debt in instalments without the respondent being released in part or in whole from its liability does not constitute an act of insolvency.¹¹

[40] This brings me to question whether the settlement proposal by the respondent meant that it sought to be released from its debt in whole or in part, for the proposal to constitute an act of insolvency. For the proposal letter to constitute an act of insolvency it must stand or fall on its own terms. In determining whether such offers

¹¹ *Mackay v Cah* 192 (4) SA 193 (O)

should be accepted as an admission of liability the SCA in *O'Shea NO v Van Zyl and Others NNO* said the following:¹²

'[26] ...As I have said, the court a quo treated this letter as confirmation of the admissions made by Mr O'Shea. It sought and found further confirmation of his authority to represent the Trust in relation to the content of the letter in subsequent correspondence from Herold Gie, from statements in the affidavits and from other aspects of his evidence before the Commission. But this was beside the point. The letter was unambiguous and must stand or fall as an act of insolvency on its own terms. It cannot be subject to interpretation by reference to events which occurred or knowledge which was obtained subsequent to its writing. The proper approach to determining whether a letter contains a notice of inability to pay in terms of s 8(g) is to consider how it would be understood by a reasonable person in the position of the creditor at the time he receives it taking into account that creditor's knowledge of the debtor's circumstances: *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at paras 14 and 15.'

[41] Whilst O'Shea was concerned with an act of insolvency under s 8(g) I see no reason why the same approach should not be adopted by in respect s 8(e). The letter of proposal must stand and fall as an act of insolvency on its own terms. The respondents' letter is a proposal to settle its entire debt in instalments. No offer was made by the respondent for its release in part or in whole from its debt. I am therefore not convinced that the settlement proposal constituted an act of insolvency. It therefore follows that the proposal remains privileged and therefore not admissible in these proceedings.

[42] There is no evidence that the applicant ever accepted the settlement proposal to constitute a binding agreement between the parties, which would on its own constitute sufficient evidence of the respondent's indebtedness to the applicant and not be privileged. There is also no evidence that the proposal was ever rejected nor is there evidence that when they realised that the ink was defective the offer was

¹² *O'Shea NO v Van Zyl and Others NNO* [2011] ZASCA 156; 2012 (1) SA 90 (SCA).

withdrawn. All that the applicant said about the proposal was that the respondent had failed honour the proposal, however it was admissible as it constituted an act of insolvency by the respondent.

Bona fide defence

[43] The main agreement under which the respondent's liability to the applicant is pursuant to is the factoring agreement between the applicant and Nano Inks. In terms of this agreement the invoices of Nano Inks issued to the respondent in respect of the goods supplied were sold to the applicant, and all rights and obligations under these invoices enjoyed by Nano Inks were transferred by way of a cession to the applicant as a form of security enjoyed by the applicant against Nano Inks. This is the basis under which the applicant is entitled to receive payment from the respondent. It is the payment or debt that arose from this cession that the respondent acknowledged to be indebted to the applicant.

[44] The nature of the cession is such that it does not only transfer the rights and obligations from Nano Inks to the applicant, but these are transferred to the applicant, "warts and all." This effectively means that the right to receive payment from the respondent by the applicant is coupled with any defences that the respondent may be entitled to raise against any claim that Nano Inks may have against the respondent, unless these defences have been specifically excluded by agreement between the parties.

[45] The cession enjoyed by the applicant was further secured by the acknowledgement of debt and irrevocable undertaking by the respondent to pay the applicant the value of the four invoices. By all accounts, this is the basis of the respondent's indebtedness to the applicant. However, it is the events that follow the acknowledgement that are disputed between the parties.

[46] As already stated above, the cession under the factoring agreement meant that the applicant accepted responsibility for the sale of the goods to the respondent and any associated dispute that may arise from said sale. However, this also meant that any dispute that the respondent would have against the workmanship or the

quality of the goods delivered now lay with the applicant and not Nano Inks. The respondent has sought to dispute its liability to the applicant on the basis that the ink products were defective, and this was brought to the attention of the applicant or its representatives at the time by Nano Inks.

[47] In support of this argument, the respondent relies on two pieces of evidence. Firstly, it relies on an email of 12 December 2023 between a Mr Alvin Pather (“Alvin”) of Nano Inks and Mr Tony Little of the applicant. The respondent is copied in this email correspondence. The said email from Nano Inks records that there appeared to be an issue with the adhesion of the ink on the substrate. On the very same day the applicant responds to Nano Inks and enquires as to how long the re-working was anticipated to take. This email exchange suggests that as of 12 December 2023, Nano Inks was in possession of some of the defective ink previously delivered to the respondent hence they were making efforts to re-work it. However, this is inconsistent with the first delivery note issued by the respondent to Nano Inks as it suggests that Nano Inks was already reworking the inks two days before the first delivery of the inks to Nano Inks on 14 December 2023.

[48] The respondent purportedly returned more ink to Nano Inks in February 2024. The respondent submits that the returned ink was valued at R9 918 268.60 representing a substantial amount of the applicant’s claim. The applicant has disputed the delivery notes or that it ever received the delivery notes and inks and argues that its case against the respondent was based on an irrevocable, unconditional acknowledgement of debt and undertaking to pay, which on its own is a self-contained claim.

[49] The delivery notes are all addressed to Nano Inks for the specific attention of “Alvin”. The respondent declared over 28 tons of ink was defective. On each delivery note the person at Nano Inks to whom the delivery is directed appears to have written his name and signed each delivery note, and that on the face of it suggests strongly that the redeliveries were made. The respondent can go no further than to annex the delivery notes to its papers. It is for the applicant and Nano Inks to refute the content of the delivery notes by putting up an affidavit from Alvin claiming that he did not receive the goods said to have been delivered or denying that the signature

on the documents is his. It is only at this point that the claim can be said to be self-contained. Equally, it was open to the applicant to file an affidavit by Nano Inks disputing the receipt of such a large quantity of inks, which if it had been delivered back to it would not have gone unnoticed. The failure of the applicant to obtain an affidavit from Nano Inks refuting the content of the delivery notes gives credence to the respondent's allegation that the debt may be disputed on *bona fide* and reasonable grounds.

[50] On the applicant's version, despite there being an irrevocable undertaking on the part of the respondent to pay this amount within 60 days, the respondent failed to do so. Pursuant thereto and upon numerous demands on the part of the applicant, on 31 January 2024 the respondent sent to the applicant a settlement proposal, which I have found to be inadmissible. Curiously, annexed to the founding papers together with the proposal is an undated email from the respondent which recorded the postal address, telephone number, confirmation of the balance of the account as of 30 September 2023, payment terms and the email address for the account. It is unclear whether this email was part of the settlement proposal or when the respondent actually sent it. However, what is more important is what is contained at the bottom of the letter:

'...

We confirm as follows:

1. We have received and accepted the goods in respect of the abovementioned invoice.
2. The goods were received at the location as specified in the order, 1[...] L[...] Road, Crossmoor, Chatsworth.
3. The goods in respect of the attached invoice have been purchased by yourself as an outright sale and not on a consignment basis / suspensive sale.
4. We have had reasonable opportunity of examining the goods received and are satisfied that the goods conform to the quality / workmanship that was expected upon purchase / requesting the goods. (My emphasis.)

The above email was sent to the applicant by the respondents' Financial Manager.

[51] Unfortunately, neither the applicant nor the respondent provided any clarity as to whether this email forms part of the proposal or whether it was a separate document that must be considered on its own merits without regard to the proposal. If the email is part of the proposal, it may also be equally inadmissible which would mean that the only evidence left to determine the *bona fide* of the respondent's defence, would be the emails of 12 December 2023 between the applicant and Nano Inks where the issue of the defective ink was raised and the delivery notes, which if viewed collectively may be construed as a *bona fide* and reasonable defence by the respondent.

[52] However, if the email is admissible and is read in conjunction with the email of 12 December 2023 and the delivery notes, the respondent's defence is unreasonable. This is because the picture these documents paint is that subsequent to the issue of the defective ink having been raised between the applicant and Nano Inks the respondent accepted that it had satisfied itself that it had examined the ink and that it conforms with the requisite standard for its intended use. This confirmation and its' timing is important because it goes to the fitness of the ink for the purpose it was intended. If assuming the email was issued at the same as the proposal, the truthfulness of the delivery notes issued in February 2024 will therefore be called into question.

[53] If the undated email from the respondent to the applicant formed part of the proposal, it would be equally inadmissible. However, if it was a standalone document, it would be admissible evidence that the respondent was satisfied with the quality of the ink and that it was suitable for its intended purpose. Such a crucial document ought to have been properly explained in the applicant's affidavit for this court to place reliance on it. Unfortunately, I am unable to resolve the admissibility of this email. This court should not be expected to wade through the annexures to determine its status and where it fitted in the chronology of events. It is for the applicant to explain the nature of this email and its importance in the chronology of events.

[54] Given the uncertainty about the status of the email between the applicant and respondent which records that the ink was suitable for use and whether the email

accompanied the settlement proposal I am unable to determine on the papers whether the respondent returned the ink after the defect had been resolved or the defects were never resolved and as such the respondent was entitled to return the ink to the applicant as it purportedly did in February 2024. This issue can only be resolved by reference to oral evidence.

Order

I accordingly make the following order:

1. The application is referred for the hearing of oral evidence on a date to be fixed by the registrar, on the following issues:
 - (a) Was the ink supplied by Nano Inks defective?
 - (b) Did the respondent return any of the defective ink to Nano Inks?
 - (c) If so, in returning the defective ink, did the respondent discharge its liability to the applicant?
 - (d) Did the respondent send the correspondence in which it confirmed that it had opportunity of examining the goods received and were satisfied that the inks conformed to the quality / workmanship that was expected upon purchase / requesting the inks, and if so, when?
2. The evidence shall be that of any witnesses whom the parties, or any of them, may elect to call, subject however to what is provided in paragraph 3 below.
3. Save in the case of the applicant and respondent, whose evidence is set out in their respective affidavits filed of record, neither party shall be entitled to call any witness unless:
 - (a) it has served on the other party, at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the respondent), a statement wherein the evidence to be given in chief by such a witness is set out; or
 - (b) the court, at the hearing, permits such a person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

4. The parties may subpoena any person to give evidence at the hearing, whether such a person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of paragraph 3 above, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. The provisions of Uniform rules 35, 36, 37 and 37A shall apply to the hearing of oral evidence.
7. The costs of this application are reserved for determination by the court hearing the oral evidence.

MAGWAZA AJ

Case information

Date of hearing: 14 & 28 February 2025

Date of judgment: 24 October 2025

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