REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28106/2016

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

12/9/18
DATE

SIGNATURE

In the matter between:

POWER HORSE ENERGY DRINKS GmbH Applicant

and

TRIBEONE FESTIVALS (PTY) LIMITED Respondent

J U D G M E N T

VAN DER LINDE, J:

[1] This is an application for the winding-up of the respondent company in terms of Chapter 14 of the Companies Act 61 of 1973 ("the old Act"), which, by virtue of schedule 5, item 9(1) of the Companies Act 71 of 2008, is still applicable. The case against the respondent is that it

cannot pay its debts and, more particularly, that it is deemed not to be able to pay its debts, because it did not do so despite receipt of a letter duly dispatched in terms of section 345 of the old Act, and the passage of three weeks after receipt.

[2] The respondent's defence to the application is that the debt which the applicant claims is owing to it, is a disputed debt, on *bona fide* and reasonable grounds; and so this application for the winding-up of the respondent is an abuse of process because the applicant was well aware, as in fact its own section 345 letter presages, that the debt was disputed.

[3] This is a defence that relies on the so-called Badenhorst-rule, derived from the judgment by Hiemstra, AJ in Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) who applied the following principle articulated in Buckley on Companies:

> *'A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order.'*

[4] This application introduces an interesting dimension because the applicant has disclosed correspondence between the parties which, at least *prima facie*, was engaged upon in order to settle the dispute and

would thus be protected against disclosure by legal professional privilege in the form of litigation privilege.

[5] It is regarded by some as contentious as to whether this is a proper nomenclature at all for the rule, but certainly courts enforce the principle that *"Statements made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute may not be disclosed in evidence without the consent of both parties;"* see The South African Law of Evidence, 2nd Edition, DT Zeffertt, AP Paizes, p 700.

[6] The applicant relies on the correspondence thus disclosed, particularly a letter of 22 February 2016 by the respondent, for its contention that the respondent has admitted being indebted to the applicant in an amount of €21 044.75.

[7] The aggregate amount of the applicant's claim is €170 000 in respect of which – on the applicant's argument – the letter by the respondent of 22 February 2016 admits an indebtedness in respect of €21 044.75. The applicant accepts that ordinarily such correspondence would not be admissible by virtue of the principle referred to above.

[8] However in this case the applicant argues that in the letter of 22 February 2016 the respondent not only admitted indebtedness to the applicant in the amount of €21 044.75, but in fact also committed an act of insolvency. Relying on the judgment of *Absa Bank Limited v Hammerle Group (Pty Ltd, [2016] JOL 33570 (SCA)*, the applicant contends that the letter and its contents are admissible against the respondent.

[9] Making matters more interesting is the fact that in an interlocutory application the respondent had applied to this Court for an order compelling the applicant to put up security for the costs of the winding-up application, because the applicant is a *peregrinus* not only of the court but also of the country. In that application the applicant also disclosed the same contentious without prejudice correspondence, including the letter of 22 February 2016, in its answering affidavit. The respondent objected to the disclosure of the correspondence on the basis of litigation privilege, applying to have it struck out.

[10] The respondent's application to compel the applicant to furnish security succeeded before my colleague Nyathi, AJ but his Lordship refused the application for striking out. His Lordship did not provide reasons for his order. The applicant now argues that inevitably the only reasoning that could have motivated his Lordship to have come to that conclusion was that the judgment in *Absa Bank Limited v Hammerle* was followed.

[11] His Lordship must have reasoned, submitted the applicant, that the letter became admissible on the basis, not that it contained an admission by the respondent that it was insolvent and could not pay its debts as and when they fell due for payment, but rather simply on the basis that the letter constituted an attempt by a debtor to compromise its debts; and that constituted an act of insolvency under the Insolvency Act, 24 of 1936.

[12] In other words, the applicant argues that the ratio of *Absa v Hammerle* is not simply that an admission of an act of insolvency in the course of correspondence otherwise protected by privilege, is admissible in an

application for the sequestration of the estate of a debtor; but it is also admissible in an application for the winding-up of a company debtor. This submission was not unnerved by the applicant's acceptance that a company cannot be wound up on the basis of it having committed an act of insolvency under the Insolvency Act, as opposed to it being unable to pay its debts for purposes of the old Act.

[13] There is yet a further facet to this argument, and it is this. The applicant argues that the order of Nyathi, AJ is *res judicata* and that issue estoppel applies, meaning that the issue as to the admissibility or otherwise of the correspondence has been decided in a manner that is binding on the parties, and therefore the correspondence must be admitted.

[14] In a sense these issues, interesting as they are, do not really determine the substance of the matter because, as was submitted by Mr Bhana, SC who appeared with Mr Rowan for the respondent, even if the correspondence were admitted, the debt of the applicant, meaning the entire debt, is disputed on a *bona fide* and reasonable ground and therefore the application for the winding-up of the respondent must inevitably fail.

[15] However, the issues as to the admissibility of evidence raised by the applicant are important and they need to be addressed. As concerns the respondent's submission that the entire debt contended for by the applicant is in any event disputed on a *bona fide* and reasonable ground, it will assist if something is first said by way of introduction to that topic.

[16] What had happened is that some time ago in 2012 the applicant and the respondent concluded a written agreement in terms of which the applicant would pay the respondent €200 000 for the respondent to advertise the applicant's power drink both before and during a music festival which the respondent would organise.

[17] The applicant proceeded to pay to the respondent the total amount of €170 000 (not the full amount of €200 000) and in turn the respondent went ahead and provided advertising space and exposure to the applicant before the music event. The contract did not allocate the amount of €200 000 to exposure before the music festival and exposure during the music festival; and indeed the contract appeared to leave it up to the respondent a discretion as to how to allocate advertising exposure in respect of the applicant's product in the run-up to the music festival and at the music festival itself.

[18] What then happened is that the City of Tshwane rendered the facility at which the music festival would be held unavailable and accordingly, according to the respondent, *force majeure* rendered performance by the respondent of advertising exposure at the music festival impossible, not *ex tunc*, but *pro nunc*. In other words, according to the respondent at least, the contract became impossible of performance not *ab initio*, but from that point onwards into the future.

[19] The applicant on the other hand regarded the respondent's inability to continue with the arrangement of the music festival as a breach of contract on the respondent's part, and the applicant purported to cancel the agreement. Pursuant to that cancellation, the applicant

claimed from the respondent repayment of the €170 000 which the applicant had part-paid to the respondent in part-performance of the applicant's obligations in terms of their agreement.

[20] The applicant says that its claim is not for damages but simply a claim for repayment of its performance. This is important from the applicant's perspective, because the respondent relies on clause 12 of the agreement between the parties in terms of which, in the event of the respondent's performance being rendered impossible through *force majeure*, no breach will have been committed by the respondent. Since there would not have been a breach, there is no entitlement on the part of the applicant to cancel the agreement, nor to claim anything, be it damages or repayment of performance.

[21] Important however for purposes of this part of the application is the respondent's contention that from the get-go of the dispute between the parties, the applicant appreciated that it could not justifiably claim repayment of every Euro that it had paid to the respondent, because admittedly the respondent had provided advertising exposure to the applicant.

[22] That gave rise to the ground of dispute between the applicant and the respondent which in turn led to the negotiations between them, without prejudice, in an attempt to settle the value to which the applicant would be entitled in respect of the advertising exposure which the respondent had in fact afforded to the applicant. If there was a margin favourable to the applicant, the parties would have to agree the extent of that margin, and how that margin would be settled.

[23] It is that debate between the parties that gave rise to the letter by the respondent of 22 February 2016 in which the respondent suggested to the applicant that an appropriate margin in favour of the applicant was €21 044.75. The respondent proposed in the letter that that margin be settled by tripling it up to €54 095.75 and then settling this by providing, as it were, performance in kind by arranging advertising exposure to the applicant in the future at other future music festivals to be managed by the respondent.

[24] It is this proposal which the applicant submits was an admission of liability in the amount of €21 044.75, thereby establishing not only the applicant's *locus standi* in the winding-up proceedings but also the inability of the respondent to pay its debts.

[25] It seems to me, for reasons on which I will elaborate more fully below, that the correct approach to this matter is as follows. First, a merely interlocutory order of my brother Nyathi, AJ would ordinarily bind neither him nor me. It did not purport to deal with the merits of the dispute between the parties and since that is so, *res judicata* or issue estoppel does not apply. See generally, *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, fifth ed, Cilliers, Loots and Nel, Vol 1, p928 in fin.*

[26] Next, the ratio in *Absa v Hammerle* does not apply, because all that that judgment decided was that a communication by a debtor company – meaning a juristic person - that it is insolvent and unable to pay its debts is not protected by the privilege which normally protects

settlement negotiations, in the public interest. This is what Mbha, JA said (emphasis supplied):

"[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 admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency 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 dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained by the words of Van Schalkwyk J in Absa Bank Ltd v Chopdat, when he said:
"[A]s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations.
A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis."
In the final analysis, the learned Judge said at 1094F:
"In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion."

[27] However, in the present matter, I do not believe that the letter by the respondent of 22 February 2016 can be described as an admission by the respondent of an inability on its part to pay its debts as and when

they fall due for payment, or an admission on the part of the respondent that it is insolvent; in other words, I do not believe that the letter can be said to contain admission that the respondent is unable to pay its debts for purposes of s.344(f) read with s.345(1)(c) of the Old Act. That being so, the letter of 22 February 2016 would ordinarily be inadmissible and the respondent's striking out application in this court ought to have succeeded, were it not for the next consideration.

[28] The order of Nyathi, AJ – whether correct or incorrect, and whether interlocutory or not – was not a nullity and it had legal effect until it was later set aside by an appropriate court. This did not occur. The order therefore had the legal effect of removing from the contentious letter the shield of protection against disclosure that the respondent was otherwise entitled to hold up. The letter became part of the official record in the interlocutory application, open to the public.

[29] That being so, the protection afforded by the privilege fell away and cannot be revived; compare *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others, 2016 (2) SA 561 (GJ)*, per Sutherland, J (emphasis supplied):

> *[43] Building upon that proposition it was further argued on behalf of SAA that once a person has exercised the human right to claim privilege over given information, the right of privilege in respect thereof can be invoked as against the world to protect and preserve the confidentiality of the information which is subject to a claim of privilege. Accordingly, so runs the argument, even when that confidentiality has been breached, the right to protection is not extinguished, but continues in perpetuity. Thus, the confirmation of the order is appropriate, because a clear right has been established in the right to privilege so described, further publication will perpetuate the harm, and*

no other suitable remedy can achieve the suppression of further dissemination of the information.
[4] ...
[48] By invoking such legal advice privilege, no less than litigation privilege, the client invokes a 'negative' right, ie the right entitles a client to refuse disclosure by holding up the shield of privilege. What the right to refuse to disclose legal advice in proceedings cannot be is a 'positive right', ie a right to protection from the world learning of the advice if the advice is revealed to the world without authorisation. The client may indeed restrain a legal advisor on the grounds of their relationship, and may also restrain a thief who takes a document evidencing confidential information on delictual grounds.
[49] But if the confidentiality is lost and the world comes to know of the information, there is no remedy in law to restrain publication by strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached. A client must take steps to secure the confidentiality and, if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject-matter of communications with a legal advisor, received in confidence. This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached. A client must take steps to secure the confidentiality and, if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject-matter of communications with a legal advisor, received in confidence. This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and is made flows from the nature of the right itself. The proposition about the consequences of loss of confidentiality is endorsed by the authorities."

[30] It does not seem to me that the disclosure issue is fact-driven; once as a matter of law the privilege was lost through court order, it was lost, absent an appeal against or rescission of the order, no matter whether

one or more persons actually saw the letter. I was not asked to rescind that order and the letter thus became part of a public record and admissible in the proceedings before this court.

[31] That leaves the question whether the defence which the respondent has put up is a *bona fide* defence and one which is raised on reasonable grounds. In turn, this involves the question whether the respondent's contention in its answering affidavit that the applicant received more advertising value than the €170 000 which it paid to the respondent pursuant to the agreement, can be dismissed as not being *bona fide* and not being raised on reasonable grounds.

[32] In my view that conclusion cannot be drawn. The respondent's exposition of the value which it attributes to the advertising exposure which it afforded to the applicant may be contentious, but even the applicant has to accept that some value is attributable to the exposure which the respondent afforded to it. Despite applicant's counsel describing the language used by the respondent as gobbledygook, this court cannot dismiss out of hand that in the business of advertising exposure, rand value is probably capable of being accorded to what the respondent calls the "*eye-ball*" exposure to the applicant's product.

[33] There is a further dimension to this letter. The applicant argued that the difference between the allegedly admitted advertising value in the contentious letter and that subsequently contended for by the respondent in its answering affidavit, shows that the defence is not *bona fide*. But the applicant in fact never accepted the lesser rand value which the respondent ascribed in its contentious letter to such

advertising exposure as in the event the applicant received. That means the offer that the respondent made to the applicant in the contentious letter lapsed through non-acceptance.

[34] The applicant thus cannot submit that there is an undisputed indebtedness in the amount of €21 044.75 owed to it by the respondent. At best, its submission can go no further than to say that it contends the respondent owes it €170 000, whereas the respondent has offered to settle that indebtedness by paying it only €21 044.75; but that the applicant has obviously declined that offer.

[35] Specifically, the applicant cannot sue the respondent for €21 044.75, for two reasons. First, it has not accepted the offer, so there is no compromise that can serve to found a cause of action. And second, it has not adopted the truth of the respondent's analysis, not even in the alternative, and thus it cannot found a cause of action on the basis of an enrichment action. Compare *Sager Motors (Pvt) Ltd v Patel, 1968 (4) SA 98 (RA)*, the headnote of which correctly summarises the ratio: *"Practice - Trial - Plaintiff failing to establish version of the contract relied on - Plaintiff seeking judgment in the alternative based on defendant's version of the contract - Trial Court ordering absolution from the instance - Plaintiff unsuccessfully appealing."*

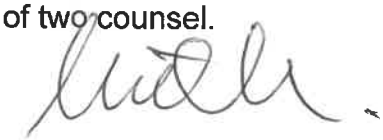
[36] So there is no scope for the applicant to argue that *"Even on the respondent's version, it owes me more than R100."* There is no such thing as a plaintiff/applicant asking a court to award it an amount of money because the amount is owing on the defendant's/respondent's

own version unless, as I have pointed out, the applicant/plaintiff adopts that version as its own, even if only in the alternative.

[37] Where does that leave the applicant? It must show that the respondent's belief that it is not obliged to repay the €170 000 is not reasonable and *bona fide*. And as I have said earlier, I cannot reject – and it would appear that even the applicant accepts – the notion that such advertisement as the applicant received has some value, difficult though it may be to quantify it.

[38] It follows that the application for the winding-up of the respondent must be dismissed. I do not believe that a special costs order is warranted. In the result I make the following order:

(a) The application for the winding-up of the respondent is dismissed with costs, including the costs of two counsel.



WHG van der Linde
Judge, High Court
Johannesburg

For the applicant: Adv A Kemack, SC
Adv JM Hoffman

Instructed by: WerthSchröder Inc
Applicant's attorneys
1st Floor, Kiepersol House
Stonemill Office Park 300
Acacia Road
Darrenwood
Tel: (011) 476 1776
Fax: (011) 476 1813
Email: kschroder@wertschroeder.com
Ref: RAKSchröder\SP\KSP00014

For the respondent:	Adv AR Bhana, SC Adv A W T Rowan
Instructed by:	Mervyn Taback Inc Respondent's attorneys 13 Eton Road, Parktown Johannesburg Tel: (011) 358 7700 Email: nm3@tabacks.com Ref: Ms N Mather