**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**

**REPORTABLE**

**CASE NO: 16527/19**

In the matter between:

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| **C AND C RESTAURANT GROUP (PTY) LTD** | First Applicant |
| **STUART JONATHAN BAILEY** | Second Applicant |
| and | |
| **MICHAEL RUSSELL TOWNSEND** | Respondent |

In re:

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| **MICHAEL RUSSELL TOWNSEND** | Applicant |
| and | |
| **C AND C RESTAURANT GROUP (PTY) LTD** | Respondent |

Coram: P.A.L. Gamble, J
Date of Hearing: 24 October 2019
Date of Judgment: 29 October 2019

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## JUDGMENT DELIVERED ON TUESDAY 29 OCTOBER 2019

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**GAMBLE, J:**

INTRODUCTION

[1] This matter was heard in the Fast Track of the Motion Court on Thursday, 24 October 2019. It involves the provisional liquidation of a company and is therefore by its nature urgent. Having come to a firm conclusion on the outcome of the application before me I intend making the order set out at the end of this judgment. In light of the urgency of the matter my reasons are relatively concise and I reserve the right to amplify them later should the need arise. I shall refer to the parties by name so as to avoid confusion.

[2] On 17 September 2019, and under case number 16527/2019, Michael Russell Townsend ("Townsend") lodged an application for the liquidation of a company known as C and C Restaurant Group (Pty) Ltd ("the Company") on the basis that it was unable to pay its debts. His *locus standi* to bring the application is not in dispute: it is common cause that he is a creditor of the company in the amount of R6,5m. The application was served on the company at its registered office which is located at the offices of Gillan and Veldhuizen Attorneys in Westlake, Cape Town. These are the attorneys who represent Townsend in these proceedings and were responsible for the launching of the application to wind up the Company.

[3] The sole shareholder and director of the Company is Stuart Jonathan Bailey ("Bailey"), a Cape Town businessman with offices in Gardens. Bailey and Townsend have a long history of personal and business association. Bailey was aware of the application to liquidate his company and had been consulted by

Townsend in the run-up to the lodging of the application. However, given the events to which I shall refer hereunder, it would be fair to say that there is now no love lost between Bailey and Townsend and that their business association has most likely come to an untimely end.

[4] The application to wind up the Company served before Steyn J in the Motion Court on Thursday, 10 October 2019 having been brought on the customary abridged time limits. Her Ladyship was obviously satisfied that a *prima facie case* had been made out because she duly granted a provisional order for winding up with the usual terms as to service, the order being returnable on Wednesday, 20 November 2019.

[5] Despite his earlier acquiescence in the granting of the order, Bailey has had a change of heart and seeks to invoke the provisions of Rule 6 (12)(c), asking this court to reconsider the matter, to set aside the rule *nisi* and to grant him an opportunity (on behalf of his Company) to formally oppose the application for liquidation. He set this matter down on a fairly tight timetable and after the customary flurry of paper the application served before this court in the Fast Lane as aforesaid. At the hearing Bailey was represented by Adv G. Elliott SC and Townsend by Advs. G. Woodland SC and C. Cutler.

THE FACTUAL BASIS FOR THE APPLICATION FOR RE-CONSIDERATION

[6] Townsend and Bailey both have extensive experience in the restaurant trade in Cape Town, including the conceptualization, establishment and running of such establishments. Townsend’s affidavit in this application suggests that he has

been more successful than Bailey, who has been the regular beneficiary of his benevolence, and Bailey is portrayed herein as a man of straw who has had judgments taken against him. Townsend says, *en passant,* that Bailey was notoriously short of cash and that he had come to his assistance on more than one occasion in the past. In any event, the two men are social friends with Bailey being god-father to Townsend's young son.

[7] Townsend was previously the driving force behind the Harbour House Group of companies ("*HHG*") which runs a number of restaurants in the Peninsula under a variety of brands. Bailey held a management position with HHG at the time Townsend was still there. When he disposed of his interest in HHG Townsend agreed to a restraint of trade which limited his involvement to a maximum of 3 restaurants for the duration of the restraint – 5 years. The restraint is in favour of an entity called Chezbiz (Pty) Ltd. Townsend says that he assiduously observed the conditions of the restraint and that from time to time he re-negotiated the terms thereof with Chezbiz.

[8] Since leaving HHG Townsend has been involved with a chain of restaurants under the guise of a company known as Cowboys and Crooks (Pty) Ltd. In 2018 he and Bailey (then running his own company called Cowboys and Cooks (Pty) Ltd) entered into an agreement in terms whereof the latter provided management services to the former under a so-called "*service level agreement"* (*"SLA"*). Evidently Bailey's company later changed its name to "*C and C Restaurant Group (Pty)*" Ltd to avoid confusion in the market place as to who might be crooks and who might be just cooks.

[9] Be that as it may, also in 2018, the Company entered into negotiations with one Reeder (the guiding mind of Equicap Finance (Pty) Ltd) for the purchase of a share in another restaurant chain called the Slug and Lettuce Group. The agreed price was R13m and Bailey looked to Townsend for funding. Townsend says now that it was agreed in August 2018 that he would lend the Company R6,5m towards that acquisition and that the balance of the purchase price would be paid by the Company out of its revenue. Bailey, on the other hand, says that Townsend agreed to fund the full amount in 2 tranches of R6,5m. That dispute cannot be resolved on the papers, nor need it be. But, what is common cause is that Townsend lent the Company R6,5m in August 2018 on unspecified repayment terms and that he is accordingly its creditor.

[10] Townsend was concerned that this loan might amount to a breach of his restraint and negotiations accordingly ensued in that regard with Chezbiz. The parties termed this the "*Slug and Lettuce Relaxation*", the common understanding being that if Townsend was unable to persuade Chezbiz to grant him the relaxation sought, he would be required to withdraw his funding from the Company. Contemporaneous notes of these discussions reflect that all parties were aware of what was happening and that Townsend's "*funding and support will be withdrawn and taken over by… another acceptable investor to ensure that [Townsend] is not in breach of his agreements.*" The note also records that Bailey was aware of Townsend's restraint and that he "*will agree to bind [himself and the Company] to the arrangements contemplated herein."*

[11] It later turned out that Townsend became concerned that Reeder had overvalued the Slug and Lettuce and that the amount he had advanced in reality

reflected more than 50% of the equity in the Slug and Lettuce. Whatever Townsend's obligation in relation to the balance of the purchase price might be, no further amount was forthcoming from him in August 2019, which is when Bailey says the second tranche was due.

[12] Townsend says that he was unable to resolve the issues around his restraint of trade with Chezbiz and accordingly was obliged to formally call up (he used the phrase "*withdraw*") the loan to the Company, which he did in mid-2019. In July/August 2019 it came to Townsend's notice that the Company was struggling to pay its trade creditors which were then in excess of R2,2m. It also owed Reeder R6,5m and Townsend the same amount. He accordingly took the decision (in consultation with his lawyers) to move for the winding up of the Company.

[13] Townsend says that Bailey was overseas in August 2019 and that they discussed the position telephonically. He says that he advised Bailey to accept the reality of the situation – that the Company could not pay its creditors – and further cautioned him to be careful of being held personally liable for the debts of the Company through being a party to reckless trading. It appears that Bailey then accepted the inevitable and on 16 September 2019 he sent Townsend an email - the customary "*Dear Mike"* letter associated with friendly sequestrations and liquidations - acknowledging the Company's liability for R6,5m and confirming its inability to pay. This correspondence was used by Townsend in the winding up application to demonstrate to the Court the Company's acknowledgement of its inability to pay its debts.

[14] When Bailey returned to Cape Town on 23 September 2019 he received email confirmation from an attorney at Gillan and Veldhuizen that the winding up application had been served and a copy of the papers was enclosed with that email for his convenience He says that he noted that the application was set down for hearing on 10 October 2019. As a matter of fact, then, both Bailey and the Company knew more than a fortnight in advance of the pending liquidation application but they did not take any immediate steps to oppose it.

[15] On 7 October 2019 Bailey consulted a Mr. Slabbert of his present attorneys of record, Slabbert, Venter Yanoutsos Inc., and was given advice suggesting that there might be a basis for opposing the winding up application. The substance of that advice is not material to this application. Mr. Slabbert then drafted a detailed letter addressed to Gillan and Veldhuizen setting out the grounds of opposition but was instructed by Bailey to hold over its dispatch: he indicated that he wished to meet with Townsend early the next morning, as he now puts it, "*in an attempt to alleviate my fears and concerns that Townsend was not acting in the [Company's] best interests and that he might be utilising the liquidation application for his own personal gain to the prejudice of [the Company] and me.*"

[16] When they met, says Bailey, "*Townsend alleviated my concerns by assuring me that I should trust him and stand by the process, which I understood to be the liquidation application and its part in Townsend's strategy for the [Company], Townsend and I to benefit therefrom. Townsend stated that the fight was not with me*

*but with Reeder and that Reeder would* 'get the klap[1] he deserves'". Just what this strategy was is not properly explained in the papers but it seems that the parties had discussed using the interrogation provisions of s417 of the old Companies Act of 1973 to expose Reeder's duplicity in inflating the value of the Slug and Lettuce. Conceivably the effect of this would be to drive down the value of Reeder's claim against the Company, reduce the extent of its liabilities and make it more attractive for a buyer (or funder) in the winding up process. Whatever the position, Mr. Slabbert was told after the meeting not to send the letter and the application for winding up went through without more ado.

[17] On Friday 11 October 2019 Townsend sent out a letter to a number of his business associates and suppliers to his company. In that letter he explained that a winding up order had been granted the previous day, that the effect thereof was to terminate the SLA the Company had with Cowboys and Crooks and confirmed that his companies were financially sound and would continue to trade as before. The letter concluded with the following remark –

> "*We would like you to note that we distance ourselves from the financial conduct of Mr. Bailey and the C & C Restaurant Group and we anticipate that liquidators will be appointed shortly to manage the further affairs of this group."*

[18] In this application for reconsideration Bailey says that he was taken aback at the defamatory nature of the communication, that the letter confirmed to him

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[1] The vernacular for "*a smack*".

that Townsend was pursuing his own interests and agenda and implies that Townsend had not abided by the agreed basis for the liquidation of the Company. He implies that if he had known what Townsend was really about he would not have acquiesced in the winding up but most certainly would have opposed the application before Steyn J.

[19] In urging the court to reconsider the order of Steyn J, Mr. Elliott SC stressed that it was important to "*reverse the company out of liquidation"* so as to "*level the playing fields*" and afford the Company and Bailey an opportunity to oppose the granting of a provisional order of liquidation afresh. Mr. Elliott SC was unable to produce any authority in which such steps had previously been sanctioned by a Court and counsel readily conceded that the application was a novel one. He urged the court, nevertheless, to exercise the wide discretion which it enjoyed in considering an application under Rule 6(12)(c) to come to the assistance of his client, a reference which was said to be to both Bailey and the Company.

THE APPROACH TO RECONSIDERATION UNDER RULE 6(12)(c)

[20] Rule 6(12) is the rule generally applicable to urgent applications. Sub-rule (a) thereof permits the court a wide discretion to dispense with the rules relating to form and service in urgent applications, while sub-rule (b) requires an applicant to make out a case for urgency in its founding affidavit. Sub-rule (c) is to the following effect.

"*A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order*."

[21] When a court embarks upon such reconsideration it takes into account all matter then before it in the affidavits for reconsideration including that which might conceivably portray a different set of circumstances to that before the court earlier[2]. In argument Mr. Woodland SC focused on 2 aspects of the sub-rule. Firstly, he said the sub-rule contemplated that the person affected by the original order was the entity given *locus standi* to apply for reconsideration. In this case that is the Company, which is now in provisional liquidation and in the hands of the Master, given that no provisional liquidators have yet been appointed by the Master. In the result, it was contended that the erstwhile director has no *locus standi* to apply for reconsideration. There is, in my view, merit in this argument but I need not decide that point now in light of the second issue raised by Mr. Woodland SC.

[22] With reference to the decision of Koen J in ***Lanarco***[3] Mr. Woodland SC argued that reconsideration under sub-rule (c) was not permissible in circumstances where the party asking therefor knew of the original application and decided not to oppose it.

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[2] ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 1996 (4) SA 484 (W) at 486H-487C; The Reclamation Group (Pty) Ltd v Smit and others 2004 (1) SA 205 (SE) at 218D-F; South African Airways SOC v BDFM Publishers (Pty) Ltd 2016 (2) SA 561 (GJ) at 565I.

[3] Lanarco Home Owners Association v Prospect SA Investments 42 (Pty) Ltd (In Business Rescue) [2014] ZAKZDHC 44 (29 October 2014) at [12]

> "*[12] The interim interdict was granted with the full knowledge of the first respondent, in circumstances where it was given an opportunity to oppose it, and where it had indicated that it did not intend opposing the relief but would consider its position after the granting of the order. The application was accordingly not granted ex parte, but more correctly, by default. That in my view is the end of the enquiry and the application for reconsideration."*

[23] I concur with the approach adopted by Koen J. In the present matter, the application before Steyn J did not proceed *ex parte.* All the interested parties were properly served and in compliance with Western Cape Practice Direction 27(3), Townsend's attorneys filed an affidavit of service highlighting this. But not only were both the Company and Bailey served, the latter also consulted fully with his attorney seeking advice on the protection of both his and the interests of the Company (which he managed and effectively owned).

[24] The letter to Townsend which was drafted but not sent was placed before this Court in the application to reconsider and it is clear therefrom that opposition to the winding up was being seriously contemplated just a couple of days before the hearing in the Motion Court. It concludes as follows.

> "*[37] In the circumstances, our client requires time to prepare and file* a *proper, comprehensive answering affidavit in the liquidation application.*

*[38] Accordingly, this matter cannot go ahead on 10 October 2019 and must be postponed to a date on the semi-urgent roll, for hearing in due course.*

*[39] We suggest that the legal representatives of the parties, including their counsel, agree a timetable for the filing of papers and the hearing of the application.*

*[40] Please confirm therefore that this matter will be postponed on Thursday and that agreement will be reached in respect of a timetable relating to the further conduct of the matter and that same will be made an order of court.*

*[41] Should we not hear from you in this regard by close of business on Tuesday, 8 October 2019, we shall brief counsel to appear on Thursday and to hand up a copy of this letter to the presiding judge.*"

[25] But these intentions came to naught when Bailey instructed Mr. Slabbert not to proceed with the envisaged opposition. In the result, the matter was heard by Steyn J in default of appearance to oppose and not *ex parte.* Bailey is accordingly not permitted to have a second bite at the cherry and ask for the proceedings to commence *de novo.* He must accept the *status quo* and consider his position on the return day of the rule *nisi.*

GROUNDS TO INTERFERE?

[26] My finding on the absence of an entitlement to reconsideration is the end of this matter. But in the event that I am wrong on that score, I shall deal briefly with the merits of the application for a provisional winding up order on the facts now known. Firstly, the fact that no precise terms were fixed for the repayment of Townsend's loan is neither here nor there. It is trite that in such circumstances, the sum of R6,5m was repayable on demand.[4] The loan is not disputed and in the circumstances Townsend had the requisite *locus standi* to apply for the winding up. Indeed, I did not understand Mr. Elliott SC to argue otherwise.

[27] Then, the inability of the company to meet its debts in the ordinary course of business is not in issue either: Bailey did not seek to recant on the contents of the "*Dear Mike*" email of 16 September 2019. And, that state of affairs is borne out by the evidence contained in the affidavit by the Company's financial manager, Merinda Meintjes, which forms part of the answering affidavits in these papers.

> "*[8] The Company is in dire financial distress and is unable to pay its creditors. I have been receiving demands for payment by the Company's creditors for some time and attended several meetings with creditors to discuss various accounts due for payment."*

Ms. Meintjes, who herself has a loan claim in excess of R1m against the company, attaches to her affidavit 2 demands from trade creditors of the company issued under s345 of the old Companies Act of 1973. The aggregate of these debts is in excess of

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[4] G.B.Bradfield Christie's Law of Contract in South Africa, 7th ed. at 595-6

R85 000. If these demands are not met, the creditors in question would be entitled to move for winding up orders without more.

[28] Turning to the Company's obligations to SARS, Ms. Meintjes says that there are VAT payments totaling nearly R875 000 which remain unpaid by the Company. She further attaches the latest set of management accounts which reflect a loss for the period March 2018 to August 2019 of more than R2,4m and stresses that–

> "*[13]… It is glaringly obvious that the Company's financial position is deteriorating on a monthly basis and that it is commercially insolvent as it is unable to pay its creditors."*

[29] Lastly, the Company's assets, apart from some items of furniture, office equipment and the like of negligible value, are said to consist of goodwill in excess of R18,25m which is regarded as grossly overstated by Ms. Meintjes.

> "*[16]… The total assets have been recorded as approximately R19, 000,000.00. These are not tangible assets and worthless. The Company does not have significant liquid or readily realisable assets which could be utilised by creditors."*

CONCLUSIONS

[30] In the result, I am satisfied that the commercial insolvency of the Company has been established on the papers as they now stand and that the order of provisional winding up is fully justified. No amount judicial benevolence in the form of

the exercising of a wide discretion will warrant the transfer of this company out of the ward for terminally ill corporates.

[31] On the issue of costs, Mr. Woodland SC noted that serious allegations were made in the papers against Attorney Veldhuizen of Gillan and Veldhuizen for breaching his duties of confidentiality towards the Company and Bailey, for permitting an untenable conflict of interest to arise and, hence, obliging Mr. Veldhuizen to file an extensive affidavit to rebut the suggestions of impropriety. Mr. Elliott SC very properly did not seek to advance this case in argument. Clearly, Bailey was acting on legal advice when he deposed to the founding affidavit herein and is not to be blamed for misunderstanding the correct legal position.

[32] Arguing further that a hopeless case was advanced by Bailey and that other parties were put to unnecessary expense resulting in the proceedings being regarded as vexatious, Mr. Woodland SC sought succor in the old Cape Provincial Division touchstone – *in re* Alluvial Creek Ltd 1929 CPD 532 and asked for costs on the attorney and client scale. I have given serious consideration to that request but, considering that Bailey acted on legal advice and not off his own bat, I am not persuaded that this application warrants a punitive costs order

**ORDER OF COURT**

**Accordingly it is ordered that the application for reconsideration of the provisional order under Rule 6(12) (c) is dismissed with costs.**

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**GAMBLE, J**