CIV\APN\335\92

IN THE HIGH COURT OF LESOTHO

In the Application of :

FEEDEM CATERING SERVICES PTY Applicant

v

FEEDEM CATERING SERVICES LESOTHO Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 22nd day of November, 1994

On 25th September, 1992 Mr. Harley for the above applicant sought and obtained a provisional order of liquidation of the respondent in terms of Section 172(c) read with Section 173(e)(f) and (g) of the Companies Act of 1967. The provisional order was returnable on 16-11-92.

In terms of this order Mr H.J.F. Steyn a practicing attorney in Lesotho but resident in South Africa was appointed a provisional liquidator with powers set out in praragraph 6 of the order placed before Court.

Section 172(c) provides that a company shall be deemed to be unable to pay its debts

"if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contigent and prospective liabilities of the company".

Section 173 provides that a company may be wound up by court (in subsection) (e)

"if seventy-five per cent of the paid up share capital of the company has been lost, or has become useless for the business of the company".

(f) "if the company is unable to pay its debts"

(g) "if the court is of opinion that it is just and equitable that the company should be wound up".

In terms of the applicant's Notice of Motion it was urged -

(1) that the respondent be placed under provisional compulsory liquidation in the hands of the Master of the High Court of Lesotho;

(2) that a Rule Nisi be granted calling upon the respondent and all other interested parties to show cause on the return date why a final order of Compulsory Liquidation should not be granted;

(3) that the order be published once in the "Lesotho Weekly";

(4) that this Order be served at either its registered head office, or alternatively, at its principal place of business at 3rd Floor, Carlton Centre, Maseru;

(5) that the costs of this application be paid out of the assets of the respondent as costs in the Estate;

(6) that Hendrik Jacobus Frederik Steyn be and is hereby appointed the Provisional Liquidator of

the respondent in Provisional Liquidation, to take immediate control of the Company's assets and granting to him the powers provided for in Section 188(1)(a) and (c) and Section 188(2)(a) (b) (c) (e) (f) (g) and (h) of the Companies Act of 1967.

In Section 188 it is provided under (1) that

"The liquidator in a winding up by the court shall have the following powers :-

(a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;

(b) .....

(c) to draw, accept, make and endorse any bill of exchange or promisory note in the name and on behalf of the company, but so as not, except with the leave of the court or the authority mentioned in sub-section (4) of this section or for the purpose of carrying on the business of the company in terms of paragraph (e) of sub-section (2) of this section, to impose any additional liability upon the company".

Under subsection (2) of this section it is provided that

"He shall have power, with the leave of the court or with the authority mentioned in subsection (4) of this section -

(a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature, and subject to the provisions of any law relating to criminal procedure any criminal proceeding: Provided that immediately upon the appointment of a liquidator or a provisional liquidator, the Master may authorise upon such terms as he thinks fit legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent;

(b) to agree to any offer of composition made to the company by any debtor or contributory, and take any reasonable part of the debt in

discharge of the whole or give reasonable time, regard being had to the provisions of section two hundred and forty-six.

(c) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(d) .....

(e) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding up thereof: Provided that if necessary the liquidator may carry on or discontinue the same before he has obtained the leave of the court or the authority aforesaid, but it shall not then be competent for him as between himself and the creditors or contributories to charge the winding up with the cost of any goods purchased by him unless the same have been necessary for the immediate purpose of carrying on the business and there are funds available for payment of the same after providing for the cost of winding up or unless the court otherwise orders;

(f) in the case of a company unable to pay its debts, to elect to adopt or to abandon any contract entered into by the Company before the commencement of the winding up to buy or receive in exchange any immovable property, transfer of which has not been effected in favour of the company: Provided that -

(i) if the liquidator does not make his election within six weeks after being required in writing to do so, the person entitled under the contract may apply by motion to the court for cancellation of the contract and delivery of possession of the immovable property and the court may make such order as it thinks fit;

(ii) nothing in this paragraph contained shall affect any concurrent claim against the company for damages for non-fulfilment of the contract;

(g) to determine any lease entered into by the company as lessee by notice in writing to the

lessor, subject however to the following terms and conditions:-

(i) nothing in this paragraph contained shall affect any claim by the lessor against the company for damages he may have sustained by reason of the non-performance of the terms of the lease;

(ii) if the liquidator does not within three months of his appointment notify the lessor that he is prepared to continue the lease on behalf of the company, he shall be deemed to have terminated the lease at the end of such three months;

(iii) the rent due under any lease so determined from the date of the commencement of the winding up to the termination of the lease by the liquidator shall be included in the costs of administration;

(iv) the fact that a lease has been terminated by the liquidator shall deprive him of any right to compensation for improvements made during the period of the lease;

(g) to sell, by public auction or otherwise, deliver or transfer the movable and immovable property of the company.

(Sic) (3). He shall have power, with the leave of the court, to raise money on the security of the assets of the company or to do any other thing which the court may consider necessary for winding up the affairs of the company and distributing its assets.

(4) He may, with the authority of a resolution of creditors and contributories, duly passed at a joint meeting thereof, do any act or exercise any power for which he is not by this Act expressly required to obtain the leave of the court".

The applicant relies on a lengthy affidavit of Jeremy Webb who avers that applicant is a company with limited liability, duly registered as such in terms of the Company Laws of the Republic of South Africa, carrying on business principally at the corner of Evans and Vander Bijl streets, Alrode South, 1450 Alrode, Johannesburg. This company trades as caterers and suppliers of food. The deponent is authorised to make this petition in terms of a resolution reflected in Anpexture "A".

The respondent is a company with limited liability, duly registered as such in terms of the Company Laws of the Kingdom of Lesotho, carrying on business principally at 3rd Floor, Carlton Centre, Kingsway, Maseru, Lesotho.

The petitioner (Applicant) is a shareholder in the Respondent Company to the extent of 49% of its issued capital. The deponent Jeremy Webb is also a director of the Respondent Company. To this extent he holds himself competent to depose to facts relating to this petition as they fall within his personal knowledge or alternatively are gleaned from documentation directly under his control.

In paragraph 3 of the petition the deponent avers that the Respondent Company is indebted to the petitioner in the sum of M292,331-23.

It is averred that the above sum is made up as follows :

(a) Monies lent and advanced to the Respondent Company on Loan Account. The Court is referred to a computer ledger print-out dated 22nd September 1992 a true copy of which is marked "B", together with;

(b) the sum of M74 000-00 arising from and being in respect of certain dishonoured cheque No. 518403, dated 30th June, 1992, issued by the respondent in favour of the petitioner, a true copy of which is marked "C".

(c) The sum of M22 547-64 arising from and being in respect of certain dishonoured cheque No. 518401 and dated 30th June, 1992, issued by the respondent to the petitioner, a true copy of which is marked "D".

The deponent J. Webb avers that these funds were loaned and disbursed to the respondent on Loan Account to provide working capital from time to time to the Respondent Company, and that these amounts are repayable on demand.

By way of providing background to the circumstances surrounding this petition the deponent indicates that he (J. Webb) was approached by a certain Mrs. Florina 'Mamothe Ntlhasinye in 1988, for purposes of entering into an arrangement, in terms of which the Peititioner would register a company of which Ntlhasinye would be a shareholder. In consequence of some deliberation that was embarked upon, the Respondent Company was registered on or about 18th October, 1888.

The deponent avers also that the Petitioner carries on

business as purveyors and dispensers of a wide variety of food stuffs to a very broad market of consumers through subsidiary companies in Namibia, Kenya and Dubai and employs around 2300 people.

He further states that it was agreed between the shareholders that at all times the Respondent's affairs would be run on a completely open basis, with full access to all company records, documents, bank accounts, ledgers, bank statements and customer details and so on.

The deponent asserts that the arrangement between the Petitioner and the Respondent was that the Petitioner would support the Respondent Company from time to time with expertise of which it has great abundance; financial support, provision of trained staff in managerial positions etc. He is emphatic that it was a specific term of the parties' agreement that the loans would be payable on demand.

However according to the Petitioner, it has become apparent to it that over recent months, the Respondent Company has been run by Ntlhasinye in the most reckless and unbusinesslike fashion.

The deponent for the Petitioner goes further to indicate that the Respondent Company has a bank account at Barclays Bank, PLC, Maseru Branch. As agreed between the parties, so says J. Webb, the

signing powers would devolve on four individuals, any two of which could sign. The Court has accordingly been referred to Annexture "E" dated 20th December, 1989, setting out the arrangement referred to in this paragraph. This letter or annexture "E" is signed by M.D. Maree who is said to be a director of the Petitioner. Annexture "E" bears the names and specimen signatures of Ntlhasinye (who was Chairman at the time) M.D. Maree (Managing director) and other directors J. Webb and W. Bolton.

The deponent indicates tht the Respondent's affairs were basically managed by the Petitioner through personnel seconded to it from time to time, in key positions. He says that Ntlhasinye after being chairman for a while has recently become the Respondent Company's Managing Director.

J. Webb informs the Court that through discussions held between him and Ntlhasinye from time to time and in more particular, very recently, it has become evident to the Petitioner regarding the affairs of the Respondent Company, that :-

(a) the respondent is trading under insolvent circumstances;

(b) the respondent is unable to meet its day to day running expenses and is commercially insolvent;

(c) certain affairs of the Respondent Company have been conducted on its behalf by Ntlhasinye in a fraudulent manner.

The deponent attempts to illustrate the above set of unsavoury

circumstances by pointing out that on 21st September, 1992 the Petitioner received through Mr. M.D. Maree a letter telefaxed from Barclays Bank PLC marked here as "F" containing the following information :

> "We refer to the Special Resolution voted at the meeting of the Board of Directors of Feedem Catering services (Lesotho)(Pty)Ltd., held in Maseru on the 15th September, 1992.
>
> This Special Resolution authorises present Managing Director Mrs. F.M. Ntlhasinye to operate and sign the account in our books as sole signature.
>
> Please confirm to us that you will no longer sign on the account which is to be operated by the one and only signature of Mrs. F.M. Ntlhasinye.
>
> (signed) R.H. Fenech - Senior Manager".

J. Webb says that he, together with M.D. Maree and A.D. Constandakis who are all coincidentally directors of the Respondent Company, were absolutely shattered to receive the above letter telefaxed to the Petitioner by Barclays Bank and explains why receipt of that telefax had the said effect on those other directors.

He explains that :-

(a) the Petitioner has been placed in possession of a copy of a letter addressed to Barclays Bank, by the Respondent's Ntlhasinye, dated 17th September 1992, enclosing a copy of the so-called "Special Resolution" dated the 15th day of September 1992.

The letter and "Special Resolution" are referred to respectively as "G1" and "G2".

(b) the Petitioner, as a 49% shareholder in the Respondent Company, was not a party to the passing of this so-called Special Resolution

(c) This document, according to the Petitioner, constitutes nothing less than fraud, as against the Petitioner shareholder.

(d) A Special Resolution may only be passed, in terms of the Lesotho Companies Act, after the fulfilment of conditions laid down in Section 106(1) of the Act; reading :-

> "A resolution shall be a special resolution when it has been passed by a majority of not less than three fourths of such members entitled to vote in person or by proxy, at a general meeting of which not less than 21 days' notice has been given, specifying the intention to propose the resolution, as a special resolution and the terms of the resolution, and at which members holding in the aggregate, not less than one fourth of the total votes of the company are present in person or by proxy"

J. Webb accordingly brings to the court's attention that the Petitioner was neither -

(i) placed on notice by the other shareholder as to its intention of passing the resolution,

nor (ii) given notice of 21 days specifying the intention to propose the resolution, nor any details of the resolution,

nor(iii) given an agenda notice of any description nor a venue at which such meeting would take place.

The Petitioner accordingly directs the Court's attention to the reality that the document "G2" bearing Ntlhasinye's signature

was apparently presented to the Law Office on 16th September, 1992 for registration as a "Special Resolution". The Petitioner further indicates that in so doing Ntlhasinye did not only pass a fraudulent resolution, but has in fact uttered it to the Registrar of Companies as a genuine document and genuine Special Resolution. The Court was referred to the provisions of Section 298 of the Companies Act of 1967, read with Sections 299 and 300 dealing with the consequences of directors and others raising false statements and documents. The Petitioner therefore is of the view that prima facie there is a case of breach of at least Sections 298 and 300 of the Lesotho Companies Act of 1967.

Section 298 provides that :

"(1) Every officer of a company or external company or any other person employed generally or engaged for some special work or service by the company or external company who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or account in relation to any property or affair of the company or external company which is false in any material particular, shall, subject to the provision of sub-section (2) of this section, be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(2) In any prosecution under this section it shall be a defence if it is proved that the person charged had, after reasonable investigation, reasonable ground to believe and did believe that the statement, report or account was true, and that there was no omission to state any material fact necessary to make the statement as set out not misleading".

Section 299 provides in part that :-

"Where (a) a person is convicted .....
or

(b) in the course of the winding up or judicial management of a company it appears that a person -

(i) has been guilty of any offence for which he is liable (whether he has been convicted or not) under Section 275; or

(ii) has otherwise been guilty while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company; the court may make an order that, that court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company or any external company, for such period as may be specified in the order...."

Section 300 provides that -

Any person who conceals, destroys, mutilates, falsifies or makes or is privy to the making of any false entry in, or with intent to defraud or deceive, makes or is privy to the making of any erasure in any register book (including any minute book), security, account or document of any company or external company, shall, unless he satisfies the court in each case that he had no intention to defraud or deceive, be guilty of an offence and shall be liable on conviction to a fine not exceeding R1000-00 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment".

The Petitioner's deponent basing himself on the above-quoted sections taken along with the documents referred to above urges the

Court to the view that it would prima facie appear that criminality may be involved with consequences affecting Ntlhasinye who signed the letter of 17th November, 1992 addressed to Barclays Bank PLC; and whose signature also appears upon the so-called "Special Resolution" dated 15th September, 1992. See "G2".

In this posture of events the Petitioner addressed Annexture "H" to the Senior Manager of Barclays Bank PLC drawing to the Senior Manager's attention the fact that all cheques require two signatures in terms of the Articles of Association and Resolutions both lodged with the latter's bank. The Petitioner further informed the Senior Manager that because the other directors were not informed of the board meeting held on 15th September 1992 they were no party to the Resolution, thus the arrangement requiring two signatures should perforce remain.

The Petitioner through J. Webb has alerted the Court though, to the fact that it has happened on occasion that the Petitioner has allowed cheques to be issued by the Respondent Company, against the single signature of Ntlhasinye only in circumstances where the Petitioner has given prior written authorisation to Barclays Bank PLC to deal with such cheques. The Petitioner says that circumstances requiring this departure from the norm were not only special but were very few indeed. Circumstances leading to this departure are said to have arisen as a result of practical impossibility to sign cheques from Johannesburg in emergencies.

J. Webb accordingly stated that the mandate given by the Respondent to Barclays Bank PLC, has never been disturbed by the signatories of the Respondent Company except on occasions referred to above. These are occasions specifically agreed to by J. Webb on behalf of the Petitioner who is a shareholder and creditor of the Respondent Company.

The Court has been informed that under normal circumstances the Respondent's cheque book is sent to the Petitioner's office in Johannesburg for a second signature.

The Petitioner bemoams the fact that the Maseru Butchery and Cold Storage (Pty)Ltd, a consistent supplier and one of the Respondent's major creditors has called up the funds due, owing and payable to it in the sum of M269 166-52. In this regard the Petitioner refers the Court to Annexture "I" the Affidavit by J.D. Meiring.

In paragraph 3 at page 49 of the record Meiring says :

> "The Respondent has enjoyed credit facilities from my company on the basis that all deliveries are paid for within 30 days of date of delivery. The Respondent Company has exceed (sic) its credit terms with my Company, and regrettably, is now indebted to my Company in the sum referred to above - (M269 166-52)"
>
> "I have demanded repayment of the above mentioned funds from the Respondent Company, whose officers and employees have informed me, that it is unable to pay the said amount".

The Petitioner has also attached "J" a copy of a telefax from I & J Ltd one of the suppliers who informed the Petitioner that I & J Ltd has had to withdraw its support to the Respondent and would no longer supply it with foods because of the Respondent's inability to pay I & J Ltd an amount of M287 452-00 due, owing and payable as at 21st September, 1992.

The Petitioner, accordingly wishes to persuade the Court to the view that prima facie, the Respondent is in grave financial difficulties and ex facie the dishonoured cheques, has no funds in its account to meet its day to day running expense, saying nothing about its ability to redeem the amounts owing to only three of its creditors consisting of

(a) the Petitioner in the sum of M292 331-22

(b) The Maseru Butchery and Cold Storage Pty Ltd in the sum of M269 166-52 and I & J Ltd in the sum of M287 452-00 all footing up to M848 949-75 due and payable yet all remain unpaid by the Respondent.

The Petitioner also brought to the Court's attention that sums of money owed to the Respondent Company by debtors remain unpaid. In particular a vast sum of M450 000-00 remains unpaid by the Royal Lesotho Defence Force to the Respondent.

The Petitioner feels great anxiety in that :-

(a) as the amount remains unpaid the Respondent Company's position becomes untenable, as this particular customer is a major customer of the

Respondent Company in Lesotho;

(b) even if this particular debtor pays the Respondent Company these funds immediately, which is very unlikely, such funds would fall under the direct control of Ntlhasinye, if the Order prayed is not granted.

(c) in the light of the apparent conduct of Ntlhasinye, she is, according to the Petitioner's submission, a totally inappropriate person to have the sole signing powers of a bank account of the Respondent Company wherein the Petitioner and other creditors have a very real financial interest.

(d) the Petitioner maintains that there is no immediate remedy available to it to cure the situation where for no apparent reason Ntlhasinye's conduct has been rendered questionable as it even smacks of fraud. Thus the only option the Petitioner settled for was by way of bringing these proceedings on urgent basis with the hope that the administration of the Respondent Company would be placed in the hands of the Liquidator, under the overall jurisdiction of the Master of the High Court of Lesotho.

J. Webb avers that certain cheques have been returned by the bank on 22nd September, 1992, and that he is in a position to advise that the only reason there are in fact funds standing to the credit of the account, at this stage, although meagre, is that other cheques have been dishonoooured by the bank very recently.

Indeed perusal of the Current Account Ledger for the period 25th August to 8th September, 1992 shows that certain other cheques have been returned, such as for instance one for M4,203-60 on 26th August, 1992; and one for M2,328-68 on 28th August, 1992.

The Petitioner has referred to vast sums of money owing by the Respondent Company arising from dishonoured cheques ranging from M171 138-22 through no less than five occasions to M4 250-00 between 7th August, 1992 and 10th August, 1992. As at 15th August, 1992, the Respondent Company's Account was in debit to the extent of M307 508-80.

The Petitioner gleaned from the Barclays Bank PLC the information that this bank has been compelled to dishonour other cheques drawn on the Respondent bank account for lack of funds. This factor would have the effect of making creditors favoured with such cheques to discontinue credit arrangements with the Respondent, thus placing further pressure on the already untenable financial position of the Respondent Company.

The Petitioner accordingly submits that the Respondent Company is unable to pay its debts in terms of Section 172(c) read with Section 173(f) of the Companies Act of 1967.

Section 172(c) says :

> "A company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company".

Section 173(f) says :

"A company may be wound up by court if the the company

is unable to pay its debts"

The Petitioner goes on to show that it is a member and shareholder of the Respondent company and thus has become intimately acquainted with the operations of the Respondent through the years and therefore is well placed to advise the court of the severe deterioration in the Respondent Company's general activities over recent months.

Apart from reference to pressing claims against the Respondent by several creditors the Petitioner takes particular exception to Ntlhasinye passing a fraudulent "Special Resolution" to prevent access to the bank account by the Petitioner, and regards this as fraud, misconduct and oppression on the part of Ntlhasinye.

The Petitioner therefore feels that it has lost confidence in the conduct and management of the Respondent Company's affairs and urges that on this ground alone the Respondent company should be wound up in terms of Section 173(g) of the Companies Act of 1967 saying :-

> A company may be wound up by court if the court is of opinion that it is just and equitable that the company should be would up"

The Petitioner maintains that there is no reasonable hope for possible co-operation in the future due to Ntlhasinye's misconduct which in turn has generated loss of confidence in her integrity,

business ability, sense of responsibility and capacity to discharge duties incumbent upon a Director of a Company in terms of the Lesotho Companies Act,.

The Petitioner further complains of the fact that vital information is deliberately kept away from it by Ntlhasinye who, it is averred, has instructed Messrs Colin Ross, P. Mokhethi and Mrs. N. Nalane, not to pass information to the Petitioner or its representatives as indicated by Annexture "L" a copy of an internal circular (undated though reference to a date in its body indicates when) but signed Ntlhasinye.

Annexture "L" says :

> "Please note that effective from today, 24 August, 1992 you are prohibited from giving any information regarding this company to anybody except with my authority.
>
> Breach of this directive will warrant a summary dismissal"
>
> (signed F.M. Ntlhasinye).

The Petitioner indicates that "L" came to its possession.

The Petitioner has also attached a copy of a fax from Lugogo Sun, dated 23rd September, 1992 marked "M" reading :

> "You are hereby instructed not to allow any member of F C S to have access to any records or information whatsoever. If you encounter any problems enforcing this, please call me immediately. They are not allowed to enter any of our units"

Regarding the above the Petitioner observes as follows :-

(these annextures) -

(i) constitute a breach of our verbal shareholders' agreement.

(ii) they constitute a direct breach of the provisions of Section 121 of the Articles of Association of the Respondent Company, which read as follows :

> '112 the books of account shall be kept at the registered office of the company, or, subject to Section 112 of the Act, at such other place or places, as the Directors think fit, and shall always be open to the inspection of the directors'".

The Petitioner's charges against the Respondent Company's delingquent conduct and misdeeds is long indeed. Through its deponent at page 24 of the record it sets out that :

> "I further submit that the motive for this recent development is mala fide and amongst other things, is designed to place the entire business of the Respondent under her (Ntlhasinye's) direct personal control, which she now treats as her private estate".

J. Webb goes further to surmise that there is a direct link between these unlawful actions and contents of Annexture "N" a "Pay Advice Form" issued by Royal Lesotho Defence Force (RLDF), in favour of the Respondent Company in the sum of M481 115-31. The deponent avers that he is advised that Annexture "N" is the voucher supporting the cheque for the above amount which was uplifted by a certain "Joyce" an employee of the Respondent Company, on 9th September, 1992. The Petitioner's attempt to inquire from Barclays

Bank PLC and perusal of the latest bank statements leave the Petitioner in no doubt that this cheque has not been paid to the credit of the only Company bank account authorised by the company directors.

In this posture of events the Petitioner is of the view that these funds have either been stolen or most certainly been diverted from the company's only legitimate bank account, to another, to the detriment of the creditors. Further that Ntlhasinye's misdeeds constitute a crippling blow to the financial circumstances of the Respondent Company.

The Petitioner accordingly submits that it is just and equitable that the respondent company be wound up, in terms of Section 173(g) of the Companies Act, as it has no money or reserves, with which to pay its debts, or meet its day-to-day running commercial expenses. The Petitioner feels sorely prejudiced by this state of affairs as a shareholder in the Respondent company and invites the Court to take into account the possible prejudice that members of the public and other Creditors of the Respondent Company as well are subjected to by the Respondent.

The Petitioner avers that it has no security for the payment of its claim and therefore approaches this Court at best as a member of the Respondent to the extent of 49% of its shares as well

as in its capacity as a concurrent creditor.

The Petitioner has pointed out that in the arrangement it entered into with the Respondent for purposes of smooth running of the Respondent Company, it seconded to the respondent certain staff with special skills recruited from the Petitioner's group of companies. An understanding essential to this arrangement was that the Petitioner would continue to enjoy full disclosure of all relevant activities of the Respondent Company.

Thus the Petitioner instructed Mr. Sam Baidoo of the firm Baidoo, Asiedu & Co, Auditors of Maseru, to produce financial statements on a monthly basis. This arrangement was observed until the end of July 1992 when the Petitioner was informed that Baidoo had been instructed by Ntlhasinye to discontinue the flow of information and financial statements to the Petitioner. It is the Petitioner's view that this stoppage of the flow referred to above constitutes a direct breach of the agreement and the understanding between the shareholders. The Petitioner has attached annexture "O" in support of the instant averment above. Annexture "O" is a letter signed by Ntlhasinye and addressed to the Petitioner with specific direction to J. Webb's attention, dated 24 August 1992.

It is headed "Shareholders working Relationships and Board Procedures" and reads :-

"I wish to express my grave dissatisfaction on :

1. Your insulting attitude towards me as a person during your last visit here by storming into my home and making a scene to upset my family.

2. Your ignoring the official cancellation of the Board meeting and, without my knowledge and the Board's approval held a meeting and reached conclusions with the Bank. Also to continue working on all the records in my office with Sam without my knowledge.

   If this company has to continue there may be respect between the shareholders.

   I have no objection to shareholders getting all the information they require, but that must be done through the official channels i.e. Through me and the Board. And this must be practised immediately.

3. You have deliberately withheld all banking tansactions by refusing to sign surity papers sent to you six (6) weeks ago. The present situation is that creditors' cheques are not paid by the bank and supplies have as from today been stopped by some of them.

   Unless I receive those documents by DHL tomorrow morning, I will have to take measures to remedy the situation.

Sincerely

F.M. NTLHASINYE
for FEEDEM CATERING SERVICES LESOTHO (PTY) LTD"

The Petitioner's reaction to this letter where Ntlhasinye says "I have no objection ....." is that it is an attempt by Ntlhasinye to become the sole source of any information to the Petitioner notwithstanding that the Petitioner is a shareholder in the Respondent Company. Thus the Respondent through this attitude espoused by Ntlhasinye constitutes a breach of the long standing agreement between the shareholders.

The Petitioner senses also that Ntlhasinye objects to the Petitioner's legitimate agent i.e. J. Webb who is also a director of the Respondent, working with the Auditor on records in the Respondent's office.

J. Webb also accepts as correct the allegation that the Petitioner had refused to sign surety papers. He advances as the reason for this refusal, the fact that the Respondent Company has completely unsecured banking arrangements with Barclays Bank PLC, as neither the Petitionr has furnished security, nor has it signed guarantees of any sort for Barclays Bank PLC. More by token, Ntlhasinye also has furnished none, nor has she signed the conceivable guarantees for that Bank in question. The Petitioner surmises that Barclays Bank PLC extends favourable treatment to the Respondent by reason of the Petitioner's association with the Respondent because the Petitioner is regarded in the Republic of South Africa as "a blue chip banking risk". Thus it is probable that because of the above-mentioned association this Bank has allowed the account from time to time to run into debit.

The Petitioner avers that it never intended nor does it now intend, to provide sureties to the Respondent's bankers under the present circumstances. It goes further to concede that it has declined to sign certain cheques for fear that the bank account would be driven into a debit situation with the result that cheques

would be dishonoured and possible fraud committed against innocent third parties who are creditors and payees under those instruments.

The Petitioner observes as correct the admission by Ntlhasinye that certain suppliers have withdrawn support and stopped supplying the Respondent Company with business commodties.

The Court has learnt from the Petitioner that Barclays Bank PLC has stopped processing transactions in the Respondent's account and is dishonouring all cheques due to the apparent conflict on the signing powers of the account. The Petitioner maintains that overdraft facilities are not called for in respect of the Respondent's business hence the Petitioner's disinclination to put up any guarantees to the Bank.

The Petitioner has placed before Court an unsigned copy of what it terms true and the most recent Financial Statements of the Respondent Company, dated 29th February, 1992, marked "P" as prepared by auditors of Baidoo Asiedu and Co. Maseru. These statements as at 29th February, 1992 show the Respondent's assets exceeded its liabilities by M10 060-00 with liabilities totalling M2 034 214-00 as against current assets of M1 971 710-00 and fixed assets of M72 564-00. The Respondent Company also had a negative nett current asset position of M62 504-00 and was therefore completely illiquid at the time; and that from what is reflected in the balance sheet the Respondent Company was evidently unable

to meet its day-to-day running expenses or indeed redeem its liabilities on demand. Indeed on page 68 of the record opposite NETT CURRENT ASSETS is reflected M62 504-00 in brackets showing that this sum represents the extent of liabilities.

Thus the Respondent urges the Court to the view that for these additional reasons the Respondent Company is hopelessly insolvent and is unable to pay its debts within the meaning of Section 172(c) read with Section 173(f) of the Companies Act. Provisions of these sections have earlier been cited in extenso elsewhere in this Judgment.

The Petitioner buttresses its submission for the liquidation of the Respondent Company by resort to further reasons advanced in its deponent's averments that it would be to the advantage of creditors in that:

> "(a) The respondents general body of creditors as a whole will benefit by the immediate liquidation of the Respondent Company in order to ensure the largest possible dividend, and to ensure that the proceeds are distributed equitably amongst the Respondent's Creditors, so that no one single reditor is preferred as above another. This latter reality is a very real danger at the moment when it is considered that The Maseru Butchery and Cold Storage(Pty)Ltd have already instructed its (sic) Attorney to proceed against the Respondent Company, as per its Affidavit attached, hereto;
>
> (b) it would be to the eminent advantage of companies and persons who have contracted with the Respondent, to deal with the Liquidator who could make a commercial decision, based on the interests and instructions of creditors, as to whether to continue to trade in liquidation, to continue to execute and supply to existing customers, which the Respondent Company does have and to give

directions as to the collection of the debtors' ledger, which, if handled by a Liquidator, would ensure an equitable pay-out of funds to the Respondent's creditors;

(c) the Liquidator would be in a position to trade in liquidation, with the consent of this Honourable Court, and the creditors, of course, if circumstances warranted".

Accordingly the Petitioner requests the Court to grant the above relief in the event that this Petition is successful.

The Petitioner by way of summing up its prayers asks the Court to make suitable Orders in terms of Section 172(c) of the Companies Act as the Respondent is unable to pay its debts, and points out that the Respondent is in breach of Section 173(f) of that Act in any event. The Petitioner reiterates that it would be just and equitable if the Respondent were wound up in terms of Section 173(g) of the above Act. The Petitioner further relies on its assessment of the Respondent's financial obligations in an attempt to show that the picture emerging from this assessment is a very grim one. Moreso because the Respondent Company does not have immovable property and has in any event lost 75% of the paid-up share capital, or even rendered it useless for the business of the Company, the Respondent Company it is urged, should be found to be in breach of the provisions of Section 173(e) of the Companies Act. Annexture "Q" was referred to in an attempt to show that the Respondent has minimal assets as reflected in the Balance Sheet. I should think Annexture "Q" in this regard was wrongly referred to in the deponent's affidavit in paragraph 17 page 32 of the

record because that annexture refers to what is termed "Consent to Act As Provisional Liquidator" filed by Hendrik Jacobus Frederik Steyn at page 78 of the record. Proper reference should have been Annexture "P" which relates, inter alia, to the Balance Sheet at page 68 of the bound record.

The Petitioner prayed that it be granted relief without prior service of its papers on the Respondent because should the Respondent Company get wind of the relief sought there is fear that it might cause further funds to be diverted and placed under the control of persons other than the company, in which case the Petitioner, the general body of creditors and innocent third parties including approximately seventy employees stand to lose irretrievably.

The Petitioner urged that H.J.F.Steyn be appointed a Provisional Liquidator by virtue of his experience in that regard and for the reason that his appointment as such would ensure general protection of creditors in the Estate. His Consent appears at page 78 marked "Q" though erroneously referred to by the deponent at page 33 as marked "P".

The Respondent filed its notice of intention to oppose dated 8th October, 1992 represented by a firm of attorneys styled G.G. NTHETHE & CO. A Notice of Anticipation was however filed by Messrs Du Preez Liebetrau & Co, also a firm of attorneys who also

filed the Respondent Company's Opposing Affidavit sworn by Ntlhasinye.

Responding to the foregoing onslaught Ntlhasinye avers that she opposes this application by the Petitioner and asks for the discharge of the Provisional Liquidation Order. She points out that because all other directors are employed by the Petitioner and have associated themselves with the application, there is no one but her who can oppose this matter on behalf of the Respondent. She also avers that she is a creditor and a majority shareholder, and as such she strongly opposes the liquidation of the company. She is assisted, as far as need be, in this matter by her husband one David Ntlhasinye.

This deponent for the Respondent pleads that because of brevity of time she has not been able to obtain verifying affidavits and has annexed a variety of annextures in support of her averments. She pleads also that her preparation in response to the Petitioner's allegations has been hampered by the fact that the records of the (Respondent) Company are with the Petitioner's Attorneys and or the Provisional Liquidator. Otherwise she swears that the facts she avers to are within her knowledge, thus to that extent she says they are true and correct.

She indicated at the outset that her Counsel would argue certain aspects of the case in limine and boldly stated that she

would willingly testify orally regarding all aspects of the case and submit herself to cross-examination. By way of throwing down the gaunlet she says "I invite the Petitioner's deponents, its attorneys and the provisional liquidator to do the same".

In her introductory remarks Ntlhasinye indicates that the Respondent has an excellent business, and is rapidly expanding into Africa. She charges that this is the reason why the Petitioner wants this business for itself. From this averment the Court should infer that the deponent wishes to convey to it that the prime motive that has prompted the Petitioner to move this application is greed.

Ntlhasinye dubs the liquidation application malicious abuse of process intended to give vent to the ulterior motive to snatch away from her the company's business; and in the result stifle effective competition and enrich the petitioner and the provisional Liquidator at the expense of the Respondent, its creditors and the deponent herself.

Having indicated that the Petitioner runs a business, in South Africa, similar to the Respondent, Ntlhasinye goes further to state that before the "New South Africa" the Petitioner had no access to other markets in Africa and was only too happy to obtain access to Africa through her and the Respondent Company. She asserts therefore that now that trade between South Africa and the rest of

Africa is opening up more and more freely, the Petitioner wants to dump her so as to grab all the business and keep it for itself.

She emphatically charges that the Petitioner has abused Court process herein in the most serious manner, with the assistance and connivance of its attorney and the Provisional Liquidator who has in effect handed the company's business to the Petitioner on a plate, without regard to lawfulness or any accepted procedures. She charges that there is no substance nor are there any bona fides in this application.

Having drawn attention to the fact that barring her the other directors of the Respondent are also directors of the Petitioner, she accuses them of having colluded with Steyn in authorising and launching this Petition. The brunt of this charge is directed with utmost vigour at Webb who is not only the deponent upon which the Petition is based but is also a director of the Respondent Company. The other directors are not spared the blanket charge that as the Petitioner's men they have seriously failed in their duty of good faith to the Respondent Company, and thus have acted deliberately to prejudice the Respondent.

In what she terms "Background History" Ntlhasinye has outlined that she has been involved in the wholesale meat industry and in lodge and retail business in Lesotho for many years while the Petitioner has been involved in catering industry in South Africa

for many years.

It was thanks to the Papal visit in Lesotho in 1988 that Ntlhasinye and Webb met and both expressed an interest in launching a catering business to coincide with that visit which hopefully would result in sizeable business benefits and returns for both.

Thus it was agreed between the two to form the Respondent Company and work together.

In pursuance of this enterprise the share capital was to be a tiny nominal sum of M4000-00. As Ntlhasinye would be the controlling shareholder she would contribute 51% converting into the sum of M2040-00 and the Petitioner 49% converting into M1960-00.

An aggregate of normal business activities such as trade credit and bank facilities would constitute further capital requirements for the running of the Respondent company. Where necessary, shareholding would serve as a sheet-anchor or longstop.

As success in this type of service industry depends on skill in marketing and management administration the respective major contributions would consist in provision of important expertise, service and contacts to ensure the survival and prosperity of the Respondent Company.

Thus the Petitioner would provide mainly the technical knowhow with which it was no doubt greatly endowed and competent staff. Indeed Ntlhasinye has indicated that catering was something new to her and thus regarded the Petitioner's expertise in this area as very important.

Ntlhasinye went further to state that the Petitioner was to provide administration services including analysis of weekly business returns, monitoring and advising on the operations of the Respondent Company. She on the other hand would provide business infrastructure, her own services, influence and expertise in such areas as marketing and day to day operations. She states that further nature of her contribution took the form of the use of her car, petrol, office equipment and staff to establish the Respondent Company.

She bemoams the fact that contrary to the agreement, the Petitioner introduced a number of junior staff members for employment by the company; and that these persons were incompetent, thus the Petitioner failed in this regard to provide the assistance spelt out in the agreement.

Because of the handicap posed by the incompetence of staff recommended by the Petitioner it was decided that all administration should be done by the Petitioner from South Africa.

But this proved unsuccessful with the result that the decision was reversed and administration was restored to Lesotho and placed under the Lesotho management, with the assistance of the auditor Sam Baidoo who was responsible for preparing month to month financial statements and payment of all invoices on a monthly basis or in such terms as agreed on between the Respondent and suppliers.

Ntlhasinye says she initially sent all business returns and record books to the Petitioner in Johannesburg as agreed. But because of the Petitioner's failure to fulfil its obligations relating thereto, she was compelled to do the necessary work in Lesotho. She points out that certain important company's papers are still in the Petitioner's possession.

She is in no doubt about her achievement of a great deal of success attributable to her effort in areas such as marketing, and winning more and more contracts for the company. The upshot of her self-application was the substantial future growth in business and profits, so she says.

From page 105 to 107 Ntlhasinye has outlined factors which she wishes to be taken into account as a measure of her success and achievements in the running of the Respondent Company. In this light she has indicated that she won all major Lesotho contracts consisting of, inter alia, the Army (RLDF), the State and Private Hospitals, LHPC Mafeteng, the Agricultural Colleges and the Lesotho

Highlands Water Venture including the contract for Clarence H M C.

She says she made great progress in expanding the Respondent Company operations into other countries in the region with the result that her Company is about to be awarded large contracts by the University in Maputo Mozambique as well as by the Ministry of Works engaged in factory catering in that Country. She has good reason to believe that her proposals on behalf of the Respondent for expansion of the business in respect of all hospitals in Zimbabwe will be crowned with success. She is hopeful that more by token her tenders for three substantial hospitals in Swaziland will come through if the provisional order is uplifted.

More importantly she has pointed out that the monthly turnover for the Respondent Company has grown to about M800 000-00 and that the business is conducted on a profitable basis.

I may add in passing that the Provisional Liquidator Mr. Steyn buttresses this view in his affidavit at page 259 of volume IB paragraph 12 Ad Para 13.5 that

> "It was my impression that the business was good but it was apparently not run in a stable manner, but on a fraudulent basis which in fact brought about the total collapse of the respondent"

The support by Steyn of the view I have referred to above is confined to the words underlined by me.

Ntlhasinye rounds off her series of successes by laying a charge against the Petitioner at page 107:8.8 by saying

> "The Petitioner is extremely jealous of these important successes in the rest of Africa, and would prefer to have the full and exclusive benefit of these lucrative contracts for which I have worked so hard, which are the property of the Company".

She proceeds under reference to what she terms "Friction Between Shareholders" to lay the blame at the Petitioner's door for problems which have bedevilled the performance of the Respondent Company. She calls the Petitioner's conduct in question and charges that its failure to contribute meaningfully to administration and management, and its recent sabotage of the Company for ulterior motives caused the Respondent Company to flounder in real quagmire. She suspects that it was the Petitioner's deliberate intention to hinder the Respondent Company's progress because the serious competition it was giving to the Petitioner posed a real threat to the latter's interests in the rest of Africa. She thinks the Petitioner felt humiliated to be out-classed in business by a Mosotho citizen in business. She maintains that by sending junior and inexperienced staff instead of the proper one as promised, the Petitioner meant to achieve its ulterior motive towards and improper designs on the Respondent Company. She stresses that the Petitioner's conduct aroused, in her, untold resentment. She deplores the poor commitment by the Petitioner in its role as a shareholder.

She proceeds to refer the Court to factors which she treats in her averments under the heading "Disloyal Conduct by the Petitioner".

She attributes this conduct to a possible motive that the Petitioner loathed sharing with her what certainly appeared to be potential profit. In Ntlhasinye's view - the Petitioner's motive to "hog" the profits to her entire exclusion. She says that she rejected the Petitioner's persistent proposal to have 60% of the shares. She says she took umbrage at the Petitioner's suggestion that unless she agreed to the Petitioner's 60% proposal of shares, then the respondent should not use the "FEEDEM" name in Africa. She regarded this attempt at making the Respondent forego use of the name "FEEDEM" as grossly unreasonable because there was no provision in the agreement restricting the Respondent's activities to Lesotho. In any event, she maintains, the Respondent is entitled to use its own name.

It is Ntlhasinye's evidence that finding itself in this quandary the Petitioner which had till then been trying to checkmate the Respondent Company by simply withholding its cooperation and assistance, nailed its colours to mast and started actively to squeeze the Respondent Company to death.

The strategy used by the Petitioner is set out in paragraphs 10.5 through 10.4 starting at page 112.

The trick employed by the Petitioner was to simply cut off its cash flow by blocking arrangements to obtain bank finance. This would have the effect of delaying payment to creditors with the usual and imaginable problems following in the trail of such delays. Furthermore the Petitioner thwarted Ntlhasinye's attempt to cede the debtors to the bank where she hoped to obtain facilities to help her obviate problems caused by kinks in the cash flow. The Petitioner used its majority strength on the Board to foil Ntlhasinye's good intentions. She thus complains that "the refusal is totally unjustified and unreasonable; and in direct conflict with their duties" to observe keep (and not break their) utmost good faith with the company.

Ntlhasinye says that she received assurance from the bank that it would accept suretyship of the Petitioner. Her frustrations deepened when the Petitioner refused to sign the necessary documents requested by the bank in that regard, notwithstanding Ntlhasinye's repeated requests that it do so. She points out that by any reasonable standards her company has done well and has shown great success in a short time, regard being had to the fact that because of the Petitioner's unreasonable attitude, this company does not have any bank overdraft facility which is otherwise required.

She also is aggrieved that the Petitioner's directors

developed a tendency to secretly meddle in the affairs of the Respondent Company and to extract information from the staff members behind her back. She maintains she as managing director has a duty to protect the company from unlawful conduct by others. She says she wrote to Webb demurring at this practice and insisting that proper channels should be followed and used. Webb appeared to accept the prudence on which Ntlhasinye's remarks were based but to her dismay the practice went on unabated.

Ntlhasinye complains that the other directors who are employed by the Petitioner started refusing to sign cheques. The nett result of this deliberate attempt to deny the company access to finance and to bring payments to a standstill was creation of creditor pressure - a nightmare - calculated to serve as a pretext for bringing the instant proceedings so that in the end Ntlhasinye would be elbowed out of business competition whereupon the Petitioner would be able to snatch these very important contracts for itself without payment and without regard for the interests of creditors; so she maintains.

Ntlhasinye has attached to her opposing affidavit annextures 1 to 16 in support of her frustration at the Petitioner's unreasonable conduct. These annextures constitute documents and correspodence between her and the Petitioner. They also include correspondence and documents relating to the bank. She has attached these documents to serve as proof, inter alia, that she

as major shareholder kept her part of the bargain and gave her necessary support by signing the suretyship while the Petitioner, like a skittish horse, baulked of doing so. She demurs at the fact that the Petitioner refused to sign the Deed of Cession or the security required by the bank. She denounces the Petitioner's allegation of commitment to the company and charges that any such notion is refuted by the Petitioner's own conduct. She gives no quarter in pointing out that Webb admits in the letter dated 26th August, 1992, that information should be channelled through her, but this, she says, is a material fact which was withheld in the Petition where Webb chose to accuse her of withholding information. To me the letter appears to bear the date 25-08-92. See page 159 of the record.

In another letter dated 18-9-92 it is further suggested by Webb that, because of an obstacle consisting of Webb and Ntlhasinye not being able to see eye to eye, a mediator be appointed "in order to resolve the situation as soon as possible in the interests of all parties".

Camping on Webb's trail regarding the substance of this letter Ntlhasinye says at page 114 -

> "It is also interesting that the Petitioner, who in the petition says there is no other remedy, suggested we get a mediator. In principle I agreed but refused to accept that an RSA director of the Petitioner act as mediator"

Because of the soured relations between Webb and Ntlhasinye it seems that even simple things such as fixing an appointment to have their differences ironed out or go to the bank together to put matters right would be to no avail. This culminated in Webb suggesting that Ntlhasinye should give up her rights on consideration of M15 000-00 per month. As was to be expected Ntlhasinye rejected this offer especially mindful of the Petitioner's previous indication that it would consider opting out of being part of the Respondent Company. Indeed it is somewhat fascinating to consider what could have prompted this change of heart on the part of the Petitioner if such change of heart does not also give credence to Ntlhasinye's view that prospects of healthy life for the future of the Respondent company were good. Meaning there was viability in the company - a factor which is hardly consistent with insolvency; or to view it from another angle - a factor which cannot lightly be discarded when considering the drastic and extreme step of finally liquidating a company on grounds of alleged insolvency. Conversly unless there was viability in the Respondent Company - barring mismanagement - there couldn't have been anything to tempt the Petitioner to itch so much for its exclusive control of the Respondent Company.

Ntlhasinye was thus driven to the zenith of despair when Webb instead of resolving the bank situation chose to go to Maseru to set things in motion for the liquidation of the company in a scarcely veiled bid to gain exclusive control of the Respondent

Company on behalf of the Petitioner.

In what I find a fruitful digression during the course of her averments Ntlhasinye aptly explained for the benefit of this Court what she termed the need for financing facilities in a business such as the Respondent Company.

She explains that most of the clients of the Respondent Company are large institutions, either state or semi-state.

In her experience, which is fairly vast, she has noticed that institutions of this nature are slow payers, but that they certainly honour their obligations to pay. It would seem that Ntlhasinye would live quite blissfully and comfortably in business with these institutions regardless of the caution embodied in the maxim that "he pays too little who pays slowly". Be that as it may. No wonder then that she takes up the cudgels for the Lesotho Military against the Petitioner's charge that the Military are "a bad debtor", and says such a charge "is unfair, to say the least. They are a large and important client. Due to (sic) the nature of Government administration payment is not very prompt, but payment is always made, and their business is very (sic) sought after".

She indicates that the average period for payment to the company by its debtors is sixty days when all incidents and causes of delay have been taken into account. She stoically if

stoutheartdly makes light of this apparent handicap and regards it as "simply inherent in the nature of the company's business". She nonetheless states frankly that on the other hand the company must buy and pay for goods, and pay running expenses including salaries either immediately on within 30 days. Because the company must effectively finance the purchases and expenses for about two months before receiving payment, this is where the question of the need for a large overdraft facility comes in. Ntlhasinye explains that such facility is the life-blood and nerve centre of large companies and institutions that one sees around. Therefore there is nothing strange about it.

Without waiting to be asked the obvious question "how the shortfall would be met" she is quick to explain that "the amount of the shortfall which must be financed by the bank is comfortably covered by debtors". In this way even if the business stops at any given time, the debts owing continue to be collected with the result that the overdraft is wiped out and the balance so collected becomes available to the remaining creditors and shareholders. She gives a reassurance that this is quite normal for healthy companies.

On the other hand and failing the bank facility, the company has to finance the cash flow shortage by shareholder loans or by delaying payment to creditors. Ntlhasinye highlighted the direct correlation between business growth and the requirement for growth

in cash flow and indicated that the need for financing grows in direct proportion to the growth in cash flow. She accordingly avers that because she won more and more contracts with the result that the business growth reached an excellent peak, the company's cash flow requirements likewise grew. She estimates that owing to the present turnover of M800 000-00 per month the cash flow financing requirement would be in the region of around M1 Million. She points out that this amount represents less than the average amount of debtors owing to the company, and is thus of the view that the bank cannot hesitate to give the facility against cession of the book debts or, in the alternative, suretyship by the shareholders.

With regard to what she terms "My Defensive Steps" Ntlhasinye states that it was her duty to protect the Company against what she perceived as unlawful and malicious attack. She moans that because the South African directors had refused to sign cheques, the Respondent Company could not make any payments. She feels she was obliged to take steps to avert a real and impending crisis, which, it seemed to her, the Petitioner had tried to create and was hoping for. Thus she justified her passing the resolution for her signature alone. She says she did so in order to enable the account to be used, otherwise salaries would not have been paid and other company commitments met.

She acknowledges and confesses her error in passing what

purports to be a resolution by directors of the Respondent Company empowering her to be the sole signatory in the operation of the Company's account at Barclays Bank PLC Maseru. Her attempt, which in my view does not carry any conviction, to explain her error is to the effect that proper procedures (in passing the purported Special Resolution) were not followed and that she mistakenly described that error in a letter as a special resolution. I don't think the advice that she says she now got and is reconciling herself (from what I can deduce) with whose terms does much to improve on what to me appears to have been a deliberate act to undermine the terms of a pre-existing arrangement wherein there had to be no less than two directors whose signatures would be required by the bank for transation of the business. "G1" and "G2" sought to replace such arrangement without knowledge and authority of other shareholders or directors.

Ntlhasinye makes a merit of the fact that "G1 is in effect not a Special Resolution much as she has styled it one at the heading of this letter addressed to the Manager of Barclays Bank PLC. She lays about the Petitioner for its criticism of her conduct and the use of most severe and unjustified accusations. However she acknowledges her own shortcomings and says that while indeed she is skilled in marketing, she never claimed that administration is one of her strong points. She pleads that she took these steps in desperation and in self-defence, all in good faith. It is amazing though that she does not describe these steps as unlawful or

wrongful much as they obviously are and much as one surmises she wishes her confession to count.

Ntlhasinye avers that because the Petitioner made it impossible for the Respondent Company to make any payments, she opened a new account in the name of the Company at the Agric Bank and deposited the Army payment into the account, to enable her to pay salaries and other necessary expenses.

She describes as ridiculous the suggestion that she has stolen the above money. Much as she is entitled to feel that this suggestion derogates from her, it would save time if she simply said she denies that she has stolen this money if indeed she has not stolen it, instead of giving the suggestion a description that is not of much help to the Court. However, she challenges this suggestion by asserting that the Petitioner knows all about this account and says further that Mr. Steyn has frozen it. She reiterated her objection to the Petitioner's directors spying on the Respondent Company behind her back and asserted her stand in her capacity as the Respondent's director against any such practice. She felt it her duty to inform her staff that they were answerable to her and that they should not disclose information to anybody without her knowledge. Otherwise she says her attitude has always been that normal channels of communication are best utilised where courtesy prevails; and that she is amenable to a practice where these channels are observed.

She proceeded to attack "The Mala Fides in the Application" and pointed at "Abuse of Ex-Parte Procedure" as a case in point. She demurred at the fact that neither she nor the Respondent Company was served with Notice of the Application; and that the application was instead moved ex-parte.

She relied on the advice furnished to her about the Appeal Court's disapproval of the use of ex-parte procedure to snatch orders unless the recognised grounds pertinent thereto are genuinely present. She maintains that no such grounds obtained in this application. Thus there was no cause to fear that prior notice to her of the application would have precipitated the alleged harm in the shape or form of theft of company money. As the procedure adopted is so prejudicial to her she would have preferred if the petition had been moved in terms of Rule 8(2) addressed to the Respondent Company and served on it (before being moved). She maintains therefore that as the basis on which justification for moving the application ex-parte and on grounds of urgency, is artificial and contrived this Petition stands to be rejected outright.

In her summary of the Petitioner's case against her Ntlhasinye indicates that it resolves itself into a three-pronged structure consisting of the allegations that -

(a) She has been stealing company money

(b) The petitioner had no other remedy except liquidation

(c) that if there was prior service, she would have stolen even more.

With regard to the allegation of theft she relies on her previous statement that it is a far fetched and malicious untruth and therefore ought to be rejected as such by this Court. She suggests that even if the Petitioner had good grounds to suspect her of theft, it should have called a valid meeting of directors to pass the necessary resolutions to restrict her powers, or applied for an interdict preventing her from alienating any company assets or misappropriating funds, or even directing that all cheques from debtors should be paid into a special account;or given her short notice, to at least enable the company to be heard even without affidavits if only to secure the most suitable interim relief with minimum prejudice to the company.

Ntlhasinye is adamant that the real reason for snatching the order ex parte and for asking for liquidation without resort to other and more appropriate remedies was usurpation of the Respondent Company's business - an objective best secured if Ntlhasinye has been got rid of as a competitor in Africa. She further says that the Petitioner obviously knew very well that the company would oppose what she calls "'this malicious application', and that there was no prospect of the application being granted in such event". What is more obvious to me is that the application

would be strenuously opposed judging from annextures reflecting a staggering build-up of very strained relations that prevailed between the parties immediately before the Petition was launched. She charges that the ploy used by the Petitioner in snatching the order behind her back was with the connivance of its lawyers for the ill motive of stripping the company of its assets and handing them quickly over to the Petitioner. She pleads that the Court as it is wont to do in such cases, should show its displeasure by discharging the order on this ground alone and imposing punitive costs order.

She denies that there was any urgency in this matter and charges that the Petitioner simply created an atmosphere by exaggerating the significance of her resolution, while at the same time withholding material facts and using emotive and unjustified language. She prays that the Court should not be influenced by what she calls "this transparent stratagem of the Petitioner".

This deponent proceeds to a heading styled "Non Disclosure of Material Facts" where she points out that she received advice that once the Petitioner adopted the approach to Court ex-parte, it was strictly obliged in law to make a full and frank disclosure of all facts which might affect the decision of the Court on hearing the matter. She submits that the Petitioner has dismally failed to meet this requirement of full disclosure. She charges that the Petitioner chose instead to present a false and distorted picture

laden with atmosphere and unjustified negative allegations about her.

By way of example she indicates by reference to court records in CIV\APN\323\88 and CIV\APN\325\88 that despite being regarded by the Petitioner as "eminently suitable" person to be appointed liquidator, Mr. Steyn has already been found by this Court to have acted irresponsibly in an estate matter. Thus she submits that she is deeply concerned at the strange conduct of Mr. Steyn in this matter and prays that he be ordered to pay costs de bonis propriis.

She charges that the Petitioner has deliberately withheld from the Court information pertaining to

(a) the impressive growth record of the Company

(b) the Petitioner's sabotage of the company manifested in various occasions referred to by this deponent previously

(c) the petitioner's refusal to allow cession of debtors to the bank

(d) the petitioner's real objective in bringing these proceedings.

Ntlhasinye alludes to the advice she received to the effect that non-disclosure of material facts in an ex-parte application is such a serious matter that the Courts invariably show their displeasure by discharging provisional order with costs, often on the attorney and client scale, even if the non-disclosure is due to mere negligence as opposed to bad intent. She accordingly

submits that the non-disclosure in the instant matter is in fact deliberate in all instances that she referred the Court to. Thus she prays for the discharge of the order on grounds of non-disclosure on attorney and client scale.

As to "Ulterior Motive" manifested by the Petitioner according to Ntlhasinye's averments, the Court is asked to find that it exists in this case in the form of an attempt to thwart legitimate competition and consequently snatch the business for the Petitioner to the prejudice of creditors and Ntlhasinye herself.

She submits on advice taken, no doubt from her attorneys, that use of liquidation proceedings for an ulterior motive is seriously reprobated by Courts and invariably leads to failure of such applications with costs on a punitive scale. She thus prays for not only the discharge of the provisional order but that the matter be referred to the Director of Public Prosecutions and the respective Law Societies of Lesotho and the Orange Free State as the facts in this matter are so serious as to warrant no less an action than the one she suggests above. She also prays that a rule nisi be issued calling upon the Petitioner's Attorney and its Provisional Liquidator to show cause why they shouldn't be ordered to pay costs herein de bonis propriis on attorney and client scale.

She proceeded to what is headed "Mala Fides In Administration of the Estate by Mr. Steyn", and expressed her regret coupled with

a sense of outrage that she is obliged to inform the Court of the serious conduct (misconduct) of the Privisional Liquidator Mr. Steyn who is an officer of this Court. She avers that the only reasonable inference from his conduct of the affairs of the Respondent Company in provisional liquidation is that Mr. Steyn has been actuated by improper motive geared at assisting the Petitioner to snatch the business by dishonest means.

She demurs at the fact that within the short time of his appointment as Provisional Liquidator Mr. Steyn has ceased to run the business of the company even though he had the power and was under the duty to do so, and in stead has given the company's most valuable assets i.e. its supply contracts to the Petitioner and dismissed most of the staff to enable the Petitioner to employ them.

In support of this allegation Ntlhasinye relies on T. Mohaleroe's affidavit i.e. Annexture 17 confirming the content of a telephonic discussion between him and Mr. Steyn held on Thursday 22nd October, 1992 where Mr. Steyn is alleged to have stated -

"(1) that the final order would be opposed,

(2) that he tried to conduct business, but that he has now given the contracts to a Company called Caterserve,

(3) that Caterserve is run by the Petitioner;

(4) that he has not collected anything except the money in the Agric Bank that is blocked;

(5) that he has dismissed 90% of the staff;

(6) that the business has been good, and in his opinion the business is viable if run on a stable basis;

(7) that he has given up the premises rented by the company;

(8) when asked what about the current supply contracts, he responds 'Well Feedem, Caterserve, they've taken it over';

(9) that the vehicles are being stored, save for a four-wheel drive vehicle in my possession;

(10) that Steyn has not yet sold anything".

Ntlhasinye makes reference to an observation by her with regard to (8) above that it is clear that even Mr. Steyn got confused between Caterserve and the Petitioner Feedem. She deems it clear that although the name Caterserve is used, the business has been handed over to the Petitioner. It would be important to refer to TM1 from 173 to 175 for the full text of the conversation between Mr. Steyn and Mr. T. Mohaleroe.

Ntlhasinye relies on annexures 18 to 19 to show that the Respondent's staff had their service terminated and got re-employed by the Petitioner under the name Caterserve operating from Mr. Harley's office. She refers to Annexure 20 being a supplier's affidavit showing that the name of the business has changed from the Respondent's to Caterserve further that only difference is of names and that of Mrs Ntlhasinye is not there.

Ntlhasinye points out with disbelief that since his appointment Mr. Steyn has made not the slightest effort to contact her despite her being an easy person to contact. To illustrate the ease with which Mr. Steyn could find her if he was so disposed she indicates that the Company Manager Mr. Colin Ross who assisted the Petitioner against the Respondent company and now is employed by Caterserve, knows where Ntlhasinye lives.

Ntlhasinye avers that it was imperative on the Provisional Liquidator to have urgently contacted her as Managing director to discuss about the interim management of the Respondent Company's affairs.

The failure by Mr. Steyn to contact her betokens her firm belief that Mr. Steyn knew and feared that Ntlhasinye would strongly oppose the closure of the Respondent Company and the gratuitous disposal by him of its assets as he has done and further that Steyn was apprehensive that if Ntlhasinye was alerted to his designs on the company and its assets she would have taken steps to prevent Steyn virtually getting away with it.

Having stated her objection to Mr. Steyn's cessation of the company's business Ntlhasinye asserts that the Respondent Caompany is very viable and draws satisfaction from Mr. Steyn's admission to that effect. She invites the Court to the view that with his experience Mr. Steyn is behoved to observe the highest standards

of responsibility and honesty once appointed as provisional liquidator. That and no less is what all interested parties are fully entitled to expect of him. She assets that Mr. Steyn is required to carry on the business of the company on a caretaker basis, preserve the value of the business as a going concern for the benefit of creditors and members. She charges that Mr. Harley as the Petitioner's attorney knows as much for indeed as appears from paragraphs 16(a) and (b) of the petition drafted by him, it is borne out that mere lip service has been paid to the benefits of the provisional liquidator continuing the business of the company.

She camps on the trail of Mr. Harley's contemplation that the decision to continue trading should be based on "the interests and instructions of creditors" and challenges Mr. Steyn to indicate what instructions he obtained from the creditors (besides the Petitioner) to abandon the business and donate the contracts to the Petitioner's new business and in what regard all this is in accordance with the interests and instructions of creditors.

She demurs at the fact that Mr. Steyn's action has effectively thwarted any hope of reviving the company by useful application of the wholesome offer of compromise. By his deed Mr. Steyn has dashed any hope of the company being sold as a going concern She is indignant to observe that the Provisional Liquidator has ingnored the important aspect known to all in this field that far

better prices are usually fetched in respect of businesses bearing the qualification that they are a going concern.

Ntlhasinye indicates that in a service industry the main assets are the business's contracts and trained staff even though no money value can be placed on them. The important thing is that they are essential for the continuation and future profits of the business, and "cannot simply be replaced like a vehicle or other hard asset". She is therefore dismayed that "it is these most important assets that the Petitioner has now hi-jacked with the positive help of Mr. Harley and Mr. Steyn. The staff were dismissed by Mr. Steyn and immediately employed by Caterserve, and the contracts were simply given to Caterserve.

She accordingly prays that for this serious and unlawful conduct Mr. Steyn should be permanently disqualified from being appointed as a liquidator in Lesotho.

In her "Responses to Specific Allegations" Ntlhasinye manifests her understanding of the Petitioner's case to be:

1. that the Petitioner is a creditor in the sum of M229 331 payable on demand, and also for cheques for roughly M96 000 for loans.

2. That the petitioner managed the company; and that the

Petitioner's complaints are :-

(a) that Ntlhasinye gave instructions to the bank concerning signing powers, and the resolution in that regard.

(b) that the company is insolvent and unable to pay its debts on the basis of :

(i) the unsigned financial statement;

(ii) the attitude of Maseru Butchery and I & J;

(iii) the dishonoured cheques;

(iv) the Army's failure to pay its accounts;

(v) the Petitioner's withdrawal of financial support;

(vi) fraudulent conducting of the business by Ntlhasinye;

(vii) her withholding of information as evidenced by the instruction to staff and to Legoqo Sun, including instruction to the auditor to stop giving information to the Petitioner without Ntlhasinye's knowledge;

(viii) her theft of money paid by the Army;

(ix) 75% loss of capital;

(x) absence of any other remedy;

(xi) dispensation with service on the company for fear that Ntlhasinye would thereby be actuated to steal more money.

She responds to the Petitioner's claim by denying that the Respondent Company owes the Petitioner the amount stated. She denies that the Petitioner loaned any moneys to the Respondent in respect of working capital from time to time. She reiterates that the only amount put by the Petitioner into the Respondent Company is its contribution of M4 900-00. She says that all that the

Petitioner did from time to time was to allow the Respondent to use the Petitioner's leasing account in respect of vehicles. Debts resulting therefrom were invoiced on a monthly basis and repaid promptly through the Auditor. She is adamant that there isn't any agreement on the basis of which the Respondent borrowed money from the Petitioner or on whose basis the alleged amount would be repaid on demand. She lays stress on her contention that in any event, a shareholder loan account is not repayable on demand because it is not intended as capitalisation for the company and is not to be paid before other creditors are paid, unless the company can easily pay the amount out of readily available resources. She points out that the two cheques referred to earlier were not for loans. She explains that the larger one was for dividends being a share of profits, while the other was for normal transactions invoiced. That they were dishonoured was due to a temporary shortage of cash flow attributable to the Petitioner's own conduct. Hence her challenge to Webb to submit documentation relied on and to submit to cross-examination.

Ntlhasinye denies that the Petitioner managed the Respondent Company and is emphatic that she is the one who did so in her capacity as managing director while the Petitioner, contrary to the agreement that it would provide important assistance failed to comply with terms of that agreement.

Concerning the complaint about her sole signing powers

Ntlhasinye rests her case on what she stated previously in that regard, and adds a rider that she denies that the Petitioner's vicious comments are called for.

Regarding insolvency and inability to pay on the part of the Respondent Company she states that the Petitioner in a bid to snuff out the cash flow precipitated this calamity and should therefore not be allowed now to rely on a situation created by itself. She reiterates that despite deliberate subjection to crisis and frustration the Respondent Company is perfectly solvent and would remain so provided it is protected from the malice of the petitioner and the present crisis created by it. She thinks the company will continue to become a very successful and thriving concern.

Ntlhasinye in connection with specifics raised by the Petitioner says with regard to "financial statements" that the document relied on by the Petitioner is not signed nor is it approved by the directors; furthermore that it does not correctly set out the true position. She says that in any event as this document is out of date it fails to indicate that the position has much improved since the preparation and submission of that document. In any event the document itself shows that "the company is solvent as its assets clearly exceed its liabilities so comfortably that more than M150 000-00 could be distributed as dividends". She thus denounces as not correct the allegation that

those statements show an insolvent position.

With regard to "Attitudes of Maseru Butchery and I & J" Ntlhasinye denies that any amount is overdue to Maseru Butchery and challenges the deponents alleging that to produce documents they rely on. She challenges them to a duel waged by means of oral testimony. She asserts vehemently that "payments were made in the ordinary course. Any amounts outstanding are not due and payable" She denies that I & J accounts are owing since April, and insists on seeing the supporting documents.

While insisting that payments were made in due course she slightly shifts her ground by accepting that payments may well be slightly in arrear due to the cash flow crisis deliberately precipitated by the Petitioner. She however, stoutheartedly asserts that the company is in a position to meet its obligations because of the availability of substantial cash and substantial amounts shortly to be paid by debtors.

Concerning the dishonoured cheques she lays the blame at the Petitioner's door, but relies on the readily available amount of substantial cash to meet the amounts of those cheques notwithstanding the Petitioner's ill-motive to foul the Respondent Company's pitch for selfish gain.

With regard to the "Army not paying accounts" Ntlhasinye

reiterates that the Army and the Company's other debtors are mostly substantial institutions who are good for payment of their debts. She makes the point that despite the Petitioner's nasty comments about the Army, it is very keen to have this important business for itself.

Regarding the "Petitioner's withdrawal of support" Ntlhasinye says that because the Petitioner acted in bad faith in its withdrawal of the financial support, it should not be allowed to rely on such withdrawal by pretending to be doing so in good faith.

Ntlhasinye believes that given an opportunity the Respondent can obtain sufficient bank facilities against cession of the book debts to pay all overdue creditors and meet its day to day obligations. Furthermore she appears to have sallied forth to make inquiries about obtaining further funds and has received positive response and assurances that funds would be available if needed. She thus strenuously denies as false the allegations that, the Respondent Company with its healthy and growing business, is insolvent.

She denies that she has acted fraudulently, recklessly or dishonestly and maintains that she has done a good job under the most trying circumstances.

She justifies her "withholding of information" by pointing at

pardonable sense of virtue she concludes that "it defies comprehension how Mr. Webb can state that 75% of the capital has been lost. It simply is not so".

She denounces the assertion that there was

> "no other remedy and submits that the Petitioner does not explain why it did not consider the more usual remedies of passing effective resolutions, or asking for ordinary protective interdict without resorting to the drastic step of winding up such a successful and promising young company."

Indeed the court on various occasions has reprobated resort to the extraordinary while the ordinary still avails.

Ntlhasinye submits that the ex-parte procedure was not justified in this case. She reiterates that the Petitioner snatched the order with no bona fide justification. She submits that the contrived explanation for doing so is unconvincing. She asserts that her contention is given greater force by the Petitioner's subsequent conduct, ably assisted by Mr. Harley and Steyn. Thus she denies the allegations made by and relied on by the Petitioner.

Ntlhasinye rounded off by appealing to the Court to set aside the provisional order urgently and by setting out grounds for doing so. Prominent among such grounds is that she wanted to anticipate the return day to discharge the order in order to counter-act the negative publicity gaining ground against the

Ntlhasinye submits that the ex-parte procedure was not justified in this case. She reiterates that the Petitioner snatched the order with no bona fide justification. She submits that the contrived explanation for doing so is unconvincing. She asserts that her contention is given greater force by the Petitioner's subsequent conduct, ably assisted by Mr. Harley and Steyn. Thus she denies the allegations made by and relied on by the Petitioner.

Ntlhasinye rounded off by appealing to the Court to set aside the provisional order urgently and by setting out grounds for doing so. Prominent among such grounds is that she wanted to anticipate the return day to discharge the order in order to counter-act the negative publicity gaining ground against the company as evidenced by the article in "The Mirror' She feels it is urgently necessary to free the company from the hands of the Petitioner and its lawyers, so as to enable it to resume business and pay all its creditors in full. She explained the difficulties she encountered while trying to secure services of attorneys possessed of "the specialised commercial experience to effectively deal with this conspiracy against the Company by very experienced foreign lawyers and directors".

She finally proposed steps to be followed in order to safeguard creditors and the Respondent Company by way of Judicial

Management. She has also in a separate application launched interdict proceedings against Mr Steyn, Caterserve, Mr. Harley and the Petitioner; while in another set of proceedings she has prayed for provisional order of Judicial Management. All these applications are supported by affidavits sworn to by Ntlhasinye.

Because she accepts that the parties she has launched the interdict proceedings against are entitled to a hearing before the order prayed has been made final, she asks that a rule nisi be issued, calling upon the Petitioner, its attorney of record and the Provisional Liquidator to show cause on a date determined by Court, why they should not be ordered to pay costs on the basis referred to earlier.

In his replying affidavit Webb indicates that it was never envisaged that the Respondent would trade outside Lesotho and supplies fresh information that the Petitioner has trading links with Kenya, the United States (Houston) Namibia and Dubai in the Middle-East. He denies that the Respondent company, contrary to the impression it created, was either delegated or authorised to attempt to break into other African Markets. It is however my lasting impression that the Respondent did not expressly or implicitly say that in attempting to open new markets in various states in Africa it was operating under colour of authority delegated or granted to it by the Petitioner.

I may just indicate that in response to the application for an order of Judicial Management FEEDEM CATERING LESOTHO (PTY) LTD, the Respondent in the application brought by Mamothe Florina Ntlhasinye the 1st Petitioner and M L R Food Company(Pty)Ltd filed "Notice of Withdrawal of Opposition In Respect of FEEDEM CATERING SERVICES(LESOTHO)(PTY)LIMITED" on 9th November, 1992 and the notice bears proof of service on the other side on 6th November, 1992.

The withdrawal reads :-

> "Feedem Catering Services(Lesotho(Pty)Ltd hereby withdraws its opposition to the Judicial Management Application.
>
> The Notice of Intention to Intervene or to join these proceedings on behalf of Feedem Catering Service(Pty)Ltd remains undisturbed".

In this posture of events it would seem to be time saving to grant the application for an order of Judicial Management with costs to the 1st Petitioner and as set out in the Notice of Motion. Mr. S.C. Buys of the firm Du Preez Liebetrau & Co. is appointed Judicial Manager.

The three applications before Court are in effect interralated. Thus even though opposition to the Judicial Management application has been withdrawn the Court is at large to have regard to the affidavits filed therein where the same are relevant to the remaining appliqations.

In that regard the Court has taken a very serious view of allegations appearing at page 572 and indeed calls in question the fact that Webb did not explain why he didn't report to the police the massive theft and fraud he repeatedly casts at the door of Ntlhasinye. It is indeed very significant that today no charges concerning the alleged theft and fraud have been laid against her yet this criminal activity is said to have come to Webb's attention in September, 1992. Ntlhasinye indicated that the amount paid by the Army was transferred and placed by her into an account at Lesotho Agricultural Development Bank (LADB) and that this account was discovered by Mr. Steyn who froze the assets. She explained why she took this action. Any serious charge of theft or attempt to steal this money seems to me to be sapped of any serious vigour by the fact that Ntlhasinye opened the account at LADB in the name of the Respondent Company. This would have taken a different complexion if the new account was in her name or that of some spurious company. Webb's attitude as well as Steyn's would thus tend to give credence to Ntlhasinye's contention that the resultant crisis was not and could not have been triggered by Webb's discovery of the funds at LADB. To that extent the discovery could not have been the reason for moving the Petiton ex-parte but merely the excuse.

It is significant that Ntlhasinye admits her use of some of the money for herself but explains the circumstances she used it. She indicates that the account in the LADB should be in the region

of M542 000-00 which is not far different from that attested to by Likhetho Matlanyane who says in Annexture D that the amount as of 30th September was M541 679-31. Though unable to confirm this as the exact amount Ntlhasinve on reasonable and probable grounds admits it could be in that region.

The allegation that she diverted the M411 683-60 from the cash resources of the Respondent with the intention to steal it or remove it secretly from the Respondent's cash flow is negatived by the fact that it was banked in the Respondent's name and necessary entries on the debtors' ledgers were made.

The court is at sea concerning the substance of the Liquidator's and the Petitioner's allegations about the theft because of no attempt made by them to attach relevant documents to the affidavits they submitted before Court. Thus Ntlhasinve has to that extent been deprived of the opportunity to explain any of the withdrawals. These could easily have been requested and obtained from the Bank. Thus the Court faced with these circumstances would not be wrong in accepting Ntlhasinve's attempt to explain how from her recollection she spent the money as shown at page 574 onwards.

It is also significant that while the Petitioner says on the one hand Maseru Butchery is owed vast sums of money, Ntlhasinve on the other hand denies this allegation and substantiates her stand

in that regard by showing that Maseru Butchery's account was paid by her an amount of M25 000-00 drawn on the LADB. This is one among many disputes of fact that the Petitioner should have thought seriously about before moving an application ex-parte. I say so because the denials by Ntlhasinye are not what one could dispose of as artificial or just denials for the sake of denials only.

She has indicated that she used M29 000-00 in cash to pay staff salaries at the end of September, 1992. One only quails with trepidation to imagine what could have happened if she failed to pay the staff who were expecting payment from her. Wrong as what she did may seem, it appears that justification would always favour an action embarked on to choose a lesser evil of the two facing one.

The Petitioner's case is riddled with non-disclosures. Ntlhasinye refers the Court, for support of huge sums of moneys she drew, to affidavits of her husband and one Pinki Mokhethi marked "B" and "A" respectively. But despite his knowledge of this fact Colin Ross did not make any such disclosure to the Court. The Court has been given reasons for which it is inescapable to conclude that Colin Ross must have known about the money in question.

For her use of the company's moneys for her private purposes Ntlhasinye relies on the practice she and another or others used

to indulge in with Webb's knowledge, either as a loan from the company, or as an advance on future dividends. But one is struck by silence on the part of the Petitioner's deponents about this practice.

In his heads of arguments filed primarily for the Petitioner Mr. Wessels submitted that the provisions of the Act and the test to be applied are to be found in Section 173 of the Companies Act of 1967 in order to determine whether a Company may be wound up. These are

> (1) that the Company is unable to pay its debts. See sections 173(f) (read with) and 172(c).
>
> (2) that the Court is of the opinion that it is just and equitable. See section 173(g).

He further submitted that a company is deemed to be unable to pay its debts if it is so proved to the satisfaction of the Court. I agree with this submission.

It is indeed profitable in determining whether a company is unable to pay its debts, to take into account the contingent and prospective liabilities of the company.

Thus Mr. Wessels submitted that evidence that a company has failed on demand to pay a debt which is due, is prima facie proof of its inability to pay its debts. He stated that when the Court was approached the Respondent was in fact insolvent and proof of

this was its inability to pay its debts and that on a balance of probabilities it is clear that it cannot meet its debts. See **Rosenbach & Company Pty Ltd vs Sing's Bazaars (Pty)Ltd** 1962(4) 4 SA p.593 D at p.597.

Mr. Wessels submitted on the authorities of **Moosa vs Matjee Bhawan Pty Ltd** 1967(1) SA 131 at 137-138; and **Henochsberg on the Company Act** 4th Ed. Vol 2 p 588 that a court will be of the opinion that it is just and equitable to wind up a company if, in the case of a "Domestic Company" i.e. a company with a small membership the "deadlock" principle can be applied. This principle is

> "founded on the analogy of partnership and is strictly confined to those small Domestic Companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the Company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly co-operation in running the Company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way, if they are partners, they could claim dissolution of the partnership".

He accordingly pointed out that as between Ntlhasinye and the South African director Webb the trust is at an end. Thus even if Ntlhasinye's hands are clean the trust and confidence are inexistent.

Henochsberg at pages 596 and 598 is authority for the view that the test to be applied in an application for a winding-up order is whether the applicant's affidavit contains allegations which show prima facie that the grounds for winding-up exist.

Mr Wessels contended that the allegations have been substantiated and the case made out on behalf of the Petitioner These he said consist in the fact that the Respondent is unable to pay its debts and that a 51% shareholder is running the company in a fraudulent, reckless, unreasonable, dishonest and unbusiness - like fashion.

Regarding the Respondent's inability to pay its debts, the Petitioner alleges that it is owed M292 331-23 as reflected at pp 6-7 of the Record.

He underscores the significance of the fact that the sum owed includes a total of M96 547-64 consisting of two dishonoured cheques drawn by the Respondent Company in favour of the Petitioner. See pages 7, 41 and 42 of the Record.

He indicated that Maseru Butchery and Cold Storage is owed M269 166-52 while I & J is owed M287 452-00.

He submitted that the bank statement dated 22nd September,

1992 reflects a credit balance of no more tha M39 143-74.

The learned Counsel referring to Ntlhasinye's fraudulent and unbusinesslike style of running the Respondent Company, drew the Court's attention to the existence of an agreement between Ntlhasinye and the Petitioner regarding how Ntlhasinye was to run the Respondent Company, namely, on an open basis with full access to all company records; and that a bank account was to be held at Barclays Bank PLC in Maseru, further that two signatures were required on any cheque drawn by the Respondent company. Notwithstanding all these terms, Ntlhasinye breached the agreement encompassing them, by passing a fraudulent resolution to secure signing powers on cheques for herself alone; and by failing to run the Respondent Company on an open basis; and by causing the Respondent Company's cheques to be dishonoured; and by failing to pay into the Respondent Company's bank account at Barclays Bank PLC in Maseru, a payment made by a major client and debtor of the Respondent Company. The payment is said in fact to have been received by Ntlhasinye.

She is said to have also breached the agreement by misappropriating monies belonging to the Respondent Company and failing to pay creditors and thereby creating a situation where creditors have refused to supply the Respondent Company.

Praying that the Rule Nisi should be confirmed Mr. Wessels

indicated that section 175 of the Companies Act of 1967 gives the Court a discretion as to whether or not to confirm a winding-up order and urged that this discretion should be judicially exercised and reposed his trust in the fact that the Court would follow directions furnished by provisions of sections 172 and 173.

He urged further that because the granting of the final winding up order is opposed the Court must be satisfied on a balance of probabilities that the rule should be confirmed. In this regard I was referred to **Wackrill vs Sandton International Removals (Pty)Ltd** 1984( ) SA 282 at pp 285-6.

The learned Counsel submitted that the onus rests on the party alleging that Mr. Steyn and Mr. Harley should have thought of some other remedy; and accordingly pointed out that Ntlhasinye failed to show another remedy that would have been better. I however recall distinctly that she did. Whether her brand of remedy is relevant or desirable is another matter.

Justifying the approach opted for by the Petitioner Mr. Wessels submitted that oral evidence on an issue of fact would rather be called for where it is relevant and might disturb the balance of probabilities. Otherwise no.

I agree with Mr. Edeling Counsel for the Respondent that papers are lengthy and the facts complex in this matter.

On the one hand Mr. Wessels for the Petitioner contends in favour of winding up the Respondent company on the grounds that the Petitioner has satisfied the requirements for a final interdict consisting of

(1) a clear right

(2) an injury actually committed or reasonably apprehended.

(3) absence of similar protection by any other remedy.

Mr. Edeling in opposing this interdict on behalf of the Respondent submits that Ntlhasinye as a shareholder has a clear right to protect her interests, to insist on proper administration and the preservation of the assets of the company, and to ask for the setting aside of unlawful disposal of the company's assets. She has a clear right to ask for protection, which should be granted if the other requirements are met.

He contends that the requirement concerning Ntlhasinye's apprehension of injury committed or threatened has been satisfied in that Steyn did hand over the assets of the Respondent Company to Caterserve a foreign company without payment, and did not perform his duties properly. To that extent he contends that the conduct complained of is established. I agree with this contention.

He further contends that no suitable alternative remedy has been suggested by Steyn and others. Therefore the relief asked for by the Respondent is appropriate to the problem. So much then for the interdict against mismanagement.

With regard to judicial management matter I need only indicate that Mr Wessels' contention would have been irrelevant in so far as it tended not to have regard to the requirement in the Lesotho law that it need inter alia satisfy the question "is it desirable" which is not the case in the Law of South Africa. The difference between subsections (1) and (2) of Section 265 is significant in that subsection (1) requires probability that a company will be restored to success whereas subsection (2) requires only that judicial management must be desirable. Thus the judicial management petition has expressly been brought in terms of subsection (2) on grounds that judicial management is desirable. The Republic of South African Act has no equivalent of subsection (2) thus the authority relied on by Feedem SA would not have been applicable even if opposition to the Respondent's application in that regard had not been withdrawn.

Mr. Edeling neatly summarised the facts as follows :

1. Feedem Lesotho (the company) is owned by Feedem SA 49% and Mrs Ntlhasinye (51%). The company provides catering services. Mrs. Ntlhasinye as managing director was in control.

2. On 25th September, 1992 Feedem SA applied on an urgent ex-parte basis for the provisional winding up of Feedem

Lesotho. An order was granted. The principal allegations were -

(a) that Feedem SA was a creditor of Feedem Lesotho for M292 331 plus a further M96 000 all payable on demand.

(b) that Feedem Lesotho is insolvent and unable to pay its debts. It relied, inter alia, on unsigned balance sheets, and various cheques which were not met by the bank.

(c) that Mrs Ntlhasinye had mismanaged the affairs of the company, and had inter alia withheld information, amended the signing instructions at the bank, and misappropriated moneys paid to the company by its debtors.

(d) that the matter was urgent because Mrs Ntlhasinye might divert further funds.

He contended that without this allegations relating to fear for further diversion of funds the court would not have granted the order ex-parte. I agree with this observation.

He summarised the Respondent company's case as follows inter alia :

(a) that it opposes the application and denies the alleged indebtedness to Feedem SA

(b) that it denies that the company is insolvent

(c) that it contends that the short term inability to pay debts is due to the conduct of Feedem SA in refusing to sign documents at the bank and in refusing to counter-sign cheques.

(d) that it denies the alleged mismanagement explains the attitude about information going through proper channels and explains the need to give the new instructions to the bank and to deposit moneys in a second bank account.

(e) that it contends that Feedem SA abused the process of court by

(1) withholding important background facts, correspondence, and negative findings made against Mr Steyn in this Court

(2) abusing the ex-parte procedure

(3) alleging urgency in order to succeed in snatching the business of the company on an unopposed basis, and

(4) launching the proceedings with an ulterior motive of getting rid of a competitor and snatching the business free of consideration.

(f) that it contends that Mr. Steyn has acted improperly in his administration of the estate.

The allegations are essentially that :

(1) Mr Steyn knew that the return day would probably be opposed as indeed indicated in the conversation he had over the phone with Mr. Mohaleroe. Regard should be had to the fact that the prime function of a Liquidator is in a care-taker capacity; the question of disposal of the assets being a different matter altogether

(2) He did not preserve the business of the company although it is common cause that the business of the company is profitable and viable if properly managed.

(3) He "gave away" the main assets of the company, namely the contracts and the staff, to a puppet company of Feedem SA which was put in place by Mr. Harley.

(4) He made no contact with Mrs. Ntlhasinye in order to obtain her assistance in the interim management of the company.

(g) that the respondent asks for oral evidence and cross-examination of Mr. Webb, Mr. Steyn and others.

Two further applications were launched. The first is referred to as the interdict matter and the second is for judicial management. This second one has been disposed of earlier in the body of this judgment.

In the interdict matter, Mrs. Ntlhasinye relies on the facts set out in the opposing affidavit and asks for

(a) removal of Mr. Steyn as liquidator, and an order disqualifying him from holding that office again.

(b) interdicts against disposing of the company's assets or interfering with its business, and against defamation.

(c) a declaration that the handing over of the company's contracts to Caterserve(Pty)Ltd is invalid

(d) an urgent interim relief.

In the Judicial management application Mrs Ntlhasinye and MLR Food Company(Pty)Ltd contend that judicial management is desirable

(i) because the company has been severely

prejudiced by the malicious ex-parte winding up and disposal of assets by Mr. Steyn to Caterserve and

(ii) pray that the disposal of assets must be set aside, and the company needs a period of protection to recover from set backs caused by the winding up and related conduct of Feedem SA and its attorneys and Mr. Steyn.

In argument advanced on her behalf Mrs Ntlhasinye makes so bold as to say that if it is alleged that she took the company money she must be ordered to return it so that the company can be in a strong position again.

After the matters had been postponed on 29th October 1992 to 16th November, 1992 to enable further affidavits to be filed a further set of affidavits by Feedem SA, Mr. Steyn and others were filed. In them it was contended that Mrs Ntlhasinye is a liar, and a thief, that she stole almost M1 Million, and that it is just as well the company was closed down in time. The further allegations against her are, inter alia, that she diverted company funds to the account since as long ago as September 1991, in a total amount just less than M1 Million and this money was to be used, inter alia, to pay for Mrs Ntlhasinye's house in Swaziland for almost M400 000-00. The auditor says he was never told about these funds or this bank account and the money was not used for company purposes. It is also alleged that she purchased goods on the company's accounts with suppliers, for herself and her other businesses. It is also alleged that she forged a signature on a Santam financial

questionnaire.

It is contended that the company would have managed if she had not removed about M1 Million.

It was also alleged that she transferred funds to her children's accounts.

The Petitioner contends that Mr. Steyn tried to trade but could not succeed, mainly because at Katse, there was a risk of further losses and damages claims by clients if supplies are interrupted, and that is why he let Caterserve take over the contracts and staff.

In her replies to these allegations Mrs Ntlhasinye says

> "Regarding the withdrawal of funds to be placed in the names of my children, I state that I was not aware of this my husband did this on the advice of attorneys we used in Maseru immediately after provisional liquidation".

She further contends that the deposits into the Agric Bank account were not unlawful, and she denies strenuously that there was any theft. She points out that the deposits were in the name of the Respondent company and that the receipts from the debtors were entered on the debtors ledger. She cannot understand why the auditor did not pick this up from the ordinary books. She contends that much of the money was used for normal company expenses such

as salaries and payments to suppliers. Although she did use some of the money for herself, the internal arrangements between the shareholders were flexible and she was entitled to do this. On the basis that it would all be reflected in the books of account and would be sorted out later. She denies that any moneys would be used to pay for a house. She points out that an amount of M40 000-00 which Webb complains about was in fact drawn with the knowledge of Webb who signed for the withdrawal. She denies any wrongful purchases on the company's accounts.

She contends that Webb's conduct in liquidating the Company was in bad faith. Further that there is no excuse for Steyn's failure to properly manage the business of the company and she severely criticises his interim management of the company and the transfer to Caterserve. She charges that the auditor did not do his job properly. She asserts that the terms of the handover of the contracts by Steyn are not acceptable.

She charges that Webb knew of the Swaziland company, and is untruthful when he pretends it was done behind his back, and that Webb made improper suggestions to her in respect of meat business in Lesotho.

She denies any forgery.

Mr. Wessels contends that all the creditors want a final

liquidation order. He submits that they all support the appointment of Mr. Steyn as Liquidator and are opposed to the appointment of Mr. Buys in any capacity whatsoever.

He referred to the animosity between parties in a small or domestic company and urged that the creditors' attitute should be considered when issuing a final order either because it is just and equitable or because the company can't meet its liabilities

He pointed out that Ntlhasinye has taken steps contrary to the majority decision of the Board of Directors, by opening an alternative bank account and seeking sole signing powers. He submitted that there is complete lack of trust and confidence between Ntlhasinye and the Petitioner as shown by the correspondence between them.

He correctly pointed out that the parties have made serious allegations regarding theft, fraud, dishonesty, lies, jealousy, racial prejudice and abuse of the court process about and regarding each other.

He emphasised that these two "partners" cannot work together on account of animosity between Ntlhasinye and the only other shareholder.

But Mr Edeling counters by pointing out that the mismanagement

by Mrs Ntlhasinye is denied and explained; and that in any event, this is not a ground for winding up, although it cannot be ignored and must be considered in relation to the most suitable order under all the circumstances. He suggests that in a further order he would propose that Mrs Ntlhasinye shouldn't have signitory rights.

Mr. Wessels contends that there would be no point in discharging the provisional liquidation order because Feedem Lesotho no longer exists, that there is no indication that former employees will go back, that in any case the Respondent Company has no employees with which to carry out any of its contracts.

He indicated that there are binding contracts between previous customers and clients of the Respondent Company and a company named Caterserve(Pty)Ltd.

Mr Edeling questions the locus standi of Feedem SA as a creditor and says that this is hotly disputed. He submitted that Feedem Lesotho's alleged insolvency and inability to pay are disputed and reasons have been furnished for any impression gained that these factors do in fact obtain. He raised objection to abuse of process by the petitioner and submitted that this would be sufficient ground for refusing a final order and discharging the provisional order. Should this be done then the court would however consider what further orders must be made to protect

creditors and be in the interests of the Company. He submitted that Petitioner and its attorneys including the Provisional Liquidator had ulterior motive.

He referred to material non-disclosures including the facts that Webb knew that the money was paid into the Agric Bank account in the name of the company. He contended that this non-disclosure was discovered when Webb's further affidavit was filed. He charged that Webb did not initially disclose the fact that he knew that the moneys had been banked in an account in the name of the company I agree that a material non-disclosure of this nature is very serious indeed.

In **S. Lieta vs S. Lieta** C. of A. (CIV) 5 of 1987 (unreported) Trengove J.A. said at p.8 :

> "It is necessary to draw attention to an aspect of this case which appears to have been overlooked in the Court a quo, namely that in his application the Respondent breached the uberrima fides rule, whereby it is the duty of a litigant who approaches the court ex-parte to disclose to the court every circumstance which might influence the Court in deciding to grant or to withhold the relief. (See e.g. **Schlesinger vs Schlesinger** 1979(4) SA 342(W) at 349 and **Cometal-Momental Sary vs Corlana Enterprises (Pty)Ltd** 1982(2) SA 412(W) at 414). The Respondent manifestly failed to make a full and honest disclosure in his application. Thus, on being apprised of the true facts, the Judge a quo had a discretion to dismiss the application on account of the non-disclosure, or to preserve it. There is no indication in the judgment that the learned judge applied his mind to this aspect of the case. Had this discretion rested in me, I have little doubt that I would have discharged the rule on account of the Respondent's breach of the uberrima fides rule".

Mr. Edeling referred, with disapproval, to the Petitioner's failure to use other possible remedy such as the decisions by the directors, action in terms of section 165, or interdict against mismanagement.

It appears that under the heading "Minorities" section 165 is very important being designed for the sort of situation this court is faced with. It gives the court widest powers to curtail abuses by opporessive majority. I agree with the contention that this could have been resorted to as one of the possible procedures to follow instead of running for liquidation.

He contended that Feedem SA caused the situation now relied on by it and that it would be wrong for it to rely on the situation that Ntlhasinye clearly showed she complained about; namely, that Feedem SA deliberately stopped signing cheques and precipitated cash flow crisis.

Feedem Lesotho has made submissions against winding up Petition. In those submissions it has pointed out that Feedem SA strenuously opposes the request that oral evidence be heard so as to air material disputes of fact (but Webb says no ways). See page 98 of the record.

It is also a matter of some curiosity that Webb is adverse to any suggestion that this proceeding be referred to oral evidence yet there is authority in **Wackrill vs Sandton Internation Removals** 1984(1) SA 277 WLD, for the view that

> "The standard of proof of the relevant facts required for the confirmation of a provisional winding-up order should not be anything less than that required in civil cases, that is proof on a clear balance of probabilities, with the admission of viva voce evidence where necessary to resolve material disputes on the affidavits".

It is submitted by Mr. Edeling that in these circumstances the court can only decide the matter on the basis of the petitioner's allegations which the Respondent admits together with the Respondent's allegations. I accept that this represents trite law as indeed succintly put in **Stellenbosch Farmer's Winery Ltd vs Stellenbosch Winery (Pty) Ltd** 1957(4) SA 234(C) at 235 E-G. C\f **Plascon Evans Paints vs Van Riebeeck Paints** 1984(3) SA 623 (AD) at 634E - 635C. Thus the Court is at large to go along with the Petitioner's allegations which are confirmed by the Respondent.

Mr. Edeling says that on this basis it cannot be found that the petitioner has sufficient locus standi or that the company is unable to pay its debts. Furthermore, so the argument goes, it will be found that the ex-parte procedure was not justified, that the petitioner was actuated by an improper motive, and that it caused or contributed to the situation complained of by it.

On this basis Mr Edeling submitted that Feedem SA could quite clearly have applied for minorities relief in terms of section 165 which gives the court extensive powers to assist minorities in the case of oppression by the majority. He contended that it would indeed appear that in terms of section 175(2) no winding up order should be given since it appears that some other remedy was available and the petitioner acted unreasonably seeking to wind up the company on an urgent ex-parte basis without justification and without full disclosure in circumstances where it failed to consider other remedies to present before Court for relief. He stressed that such unreasonable conduct was persisted in even after the provisional order was given by failing to preserve the business of the company pending the return day. He urged that on this basis, a final order must as contemplated in the relevant interpretive statute, be refused.

He submitted that indeed the petitioner might have had a valid complaint that money was not being deposited into the account; but raised the question whether there was no other relief. In other words were the facts such that if the court could not give any other solution the only solution would be winding up? He contended that if the share holding were 50\50 there would have been a deadlock and the court would have been unable to give minority protection since there would have been none.

The learned Counsel went on to submit that a further ground

which gives the court extensive powers to assist minorities in the case of oppression by the majority. He contended that it would indeed appear that in terms of section 175(2) no winding up order should be given since it appears that some other remedy was available and the petitioner acted unreasonably seeking to wind up the company on an urgent ex-parte basis without justification and without full disclosure in circumstances where it failed to consider other remedies to present before Court for relief. He stressed that such unreasonable conduct was persisted in even after the provisional order was given by failing to preserve the business of the company pending the return day. He urged that on this basis, a final order must as contemplated in the relevant interpretive statute, be refused

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The learned Counsel went on to submit that a further ground for discharging the provisional order is the serious non-disclosure of material facts and set about this contention by pointing out

that the non-disclosures include the fact that serious findings had previously been made against Mr. Steyn in his capacity as a provisional trustee in Lesotho. This was not disclosed, and it was stated under oath that Mr. Steyn is an "eminently suitable" person to be appointed, with the very extensive powers that were asked for and granted.

It is indeed necessary for the court to be placed in a proper position to determine whether the person proposed is proper to have those wide powers.

Thus Mr Edeling submitted that if the previous facts had been disclosed, the court might well have appointed someone else either alone or with Mr Steyn.

Another aspect of non-disclosure pointed out by counsel related to the fact that the withholding of information by Mrs Ntlhasinye was something that had been addressed in correspondence, and that Webb had apologised to her and agreed with her views that information should be given through the proper channels. (See Annexure 7 attached to her papers) But strangely enough the court was misled into thinking that this aspect was far more serious. Webb had been complaining previously that Ntlhasinye was withholding secrets from him. But he didn't tell the court that this was resolved as reflected in Ntlhasinye's Annexure 7. Had Webb referred to this letter in his averments the sting would have

been taken out of some of the charges he was levelling at her

Learned Counsel also submitted that there was no disclosure by Feedem SA of the fact that the background was a series of disputes between the shareholders, as set out in very important correspondence.

Indeed the most important non-disclosure relates to the cheque for M481 000-00 from the RLDF. In the Founding Affidavit deposed to by Webb on behalf of the Petitioner at page 20 of the ex-parte matter Webb says :

> "(a) the army has paid a cheque which was uplifted by one "Joyce" on 9th September 1992.
>
> (b) the cheque has not been paid into the Barclays bank account
>
> (c) the funds may have been stolen or diverted";

and he leaves the court with the clear impression that he knows nothing further about the money and conjectures, with all the genuine anxiety of an unknowing man, that it was probably stolen.

Grounds for urgency were said to be fear of further similar thefts.

Ntlhasinye in her affidavit points out that the money was deposited in an account at Agrip Bank in the name of the company

and she explains that she had to do so because Webb had stopped signing cheques at the Barclays account and she needed to pay salaries and so forth. In reply Webb states that he knew three or four days before the petition was launched that the cheque in question had been deposited at the Agric Bank.

The significance sought to be placed on this aspect of the matter is erroneous because Webb before brining the petition knew where this money had gone.

Thus Mr. Edeling having demurred at the fact that Webb does not deny the fact that the acoupt was even in the name of the company submitted that it is clear, on Webb's own evidence, that he knew about the Agric Bank facts before he signed the Petition. Nevertheless, he withheld these important facts. He further says the importance of these facts is two-fold. First, it puts a completely different complexion on the allegation that Mrs Ntlhasinye stole the money. A thief would hardly keep the money in a bank account of the company whose funds she stole. Equally important, these facts prove that the company had about half a million Maluti available in cash, which could easily be used to meet the pressing demands of creditors. This makes the allegations of inability to pay debts far less convincing. Thus learned Counsel accordingly submitted that if the court had known on 25th September, 1992 that the company had this money in a bank account, and if the petition had been served, it would have been a simple

matter to make a suitable alternative order without the drastic step of winding up. This is, he said, particularly so in that it is common cause that the business of the company is viable and profitable, which counts against winding up.

Indeed a simple order would have been that those moneys should be drawn against two signatures instead of winding up the company. I have no hesitation in accepting that Webb created very false impression in the court's mind.

I may say also that Ntlhasinye's readiness even to disclose matters which tend to put her severely in dim light with the exception of the agony she seemed to be labouring under in trying to explain away the propriety of seeking to pass off as a sole signatory to the bank accounts, contrasts sharply with what appears to be a concerted effort by the Petitioner's deponents not to be candid with the court in respect of things they are exposed to have been privy to but were not ready to confide in the court.

I therefore agree entirely with Mr Edeling's submission that the abuse of launching ex-parte proceedings without making full disclosures merits the strongest censure of this court. Indeed the learned Counsel referred the court to the Lesotho Court of Appeal's strong expression in **P. Ntsolo vs M. Moahloli** C. of A(CIV) 8 of 1987 where Aaron JA said

"It is well established that a party who comes to Court

seeking ex-parte relief must take great care in drawing his affidavits, and that

(a) all material facts must be disclosed which might influence the Court in coming to a decision;

(b) where material facts are not disclosed, the Court has a discretion to set aside the relief granted ex-parte, on the ground merely of the non-disclosure;

(c) this is so whether the non-disclosure was wilful and mala fide, or merely negligent. See for example **Schlesinger vs Schlesinger** (supra). In most cases, that discretion is exercised against the appellant.

The reason for this is obvious. It is an extraordinary procedure for a Court to grant relief against a party without that party having had an opportunity to reply to the case made out by the applicant. Safeguards are necessary to try to minimise the risks of prejudicing the party against whom the order is sought. The insistence on full disclosure of all material facts - not only those facts which the applicant considers relevant, but all facts which may possibly influence the court's decision - is one of those safeguards.

Affidavits are generally drawn by, or with the assistance of, legal pratitioners. As officers of the court, they should be particularly astute to ensure that their lay clients, who cannot be expected to know the procedural rules, do make full and accurate disclosure"

I have no doubt that Webb's non-disclosure of material facts is deliberate and mala fide.

1. There are several grounds on the basis of which the provisional order stands to be discharged, but in exercise of my discretion propose to discharge it on the basis of non-disclosure of material facts by some of

the Petitioner's deponents, with costs on attorney and client scale.

1.(a) Serious allegations have been made about Mr. Harley based mainly on the censure he previously received from the High Court concerning his conduct in matters relating to liquidation four years before this application. I have not been persuaded that in the instant proceedings there is enough evidence to link him with any wrongdoing to warrant any censure or negative pronouncement concerning his conduct. He is accordingly discharged from any liability to the respondent in his personal or professional capacity including any form of inquiry or investigation envisaged under any provions of sections falling under the 1967 Companies Act. The situation is different with regard to Mr Steyn. Some of the Respondents' serious averments against him have gained the court's favour. The haste with which he divested the Respondent of its most important assets and gave them to a foreign company without consideration, coupled with the telephonic conversation he had with Mohaleroe, from which conversation it is clear he appeciated that the whole exercise by him and the Petitioner would be opposed gave further impetus to the Respondent's view that a conspiracy appeared to have been entered into to get rid of Ntlhasinye and squeeze the Respondent out of business in consequence thereof. Thus it seems inescapable to attribute ill-motive to Mr. Steyn. I say this with all the constraint bearing in mind his untarnished career for a long time as an officer of this Court, an attorney who assisted this Court as a Trustee or Liquidator on many occasions.

2. The Respondent company is placed under judicial management under the control of the Master of the High Court and subject to the further provisions set out below.

(a) Subject to the supervision of this Court, Feedem Catering Services (Lesotho)(Pty)Ltd is placed under the management of a judicial manager appointed in terms of Section 186, but subject to the provisions of subsections (2)

and (3) of section 185, and any person or persons vested with the management of the company's affairs is or are from the date of the making of this order divested thereof.

(b) Upon the date of this order, and upon completion of a bond of security in accordance with the provisions of Section 241 of the companies Act, the judicial manager shall proceed forthwith to take over the management of the company, and shall as soon as practicable and unless with the consent of the Master not later than one month and in any case not later than three months after the date of his assumption of management, and at intervals of three months thereafter, submit to a meeting of the company, to a meeting of the creditors of the company and to the Master, a report showing the assets and liabilities of the company, its debts and obligations, and all such other information as may be necessary to enable the Master, the members and the creditors to become fully acquainted with the company's position.

The court also issues an order

(c) directing that the judicial manager will be remunerated at a rate as determined by the Master,

(d) directing that the judicial manager shall have full power to deal with the management of the company and its affairs, including all powers previously held by the board of directors, and the power to conduct the business of the company including the powers to sell and or otherwise dispose of any of the assets of the company and including powers incidental to the aforesaid including the power to raise money on debentures or otherwise without the authority of members, but subject to the rights of creditors.

It is further ordered that

(e) While the judicial management order is in force, all legal proceedings, actions and the execution of all writs, summonses, and other processes against the company be stayed and be not proceeded with without leave of this Court first being obtained, after due and sufficient

service on the Judicial Manager

(f) The Judicial Manager shall have the duties as set out in Section 268 of the Companies Act.

(g) Mr. S.C. Buys of the firm Du Preez Liebetrau & Co. is appointed as Judicial Manager.

(h) This Court may at any time and in any manner vary the terms of this order on good cause shown.

(i) Sections 234, 235 and 262 of the Companies Act shall apply in the judicial management.

(j) The costs of the application for judicial management and of the judicial management and the enquiry referred to below may be paid from the assets of the company, without prejudice to the right of the company to recover such costs and\or damages from any person.

3. This order shall be published once in the Government Gazette and once in a newspaper circulating in Maseru.

4. The judicial manager shall cause an Enquiry to be made in terms of sections 204 and 272 read with section 264 of the Companies Act, into the various matters raised in the papers filed of record.

In this regard:

(a) Dr W.M. Tsotsi (or failing him Mr. M.T. Matsau) is appointed commissioner in terms of Section 262 of the Companies Act.

(b) The Judicial Manager shall give the commissioner every assistance in regard to the inquiry.

(c) The commissioner shall have all such powers as are contemplated in the Companies Act, including the power to sign and issue subpoenae and to regulate the procedure at the enquiry.

(d) Any subpoena addressed to any person employed or appointed by Feedem Catering Services(Pty)Ltd may be served in South Africa by an attorney admitted in South Africa. If any such person fails to attend at the enquiry or to comply with any instruction given by the Commission, such fact will be taken into

account by this Court in any future proceedings in this matter.

(e) The enquiry is to be held behind closed doors, and no person may be present thereat without the consent of the Commissioner.

(f) The evidence shall be recorded and transcribed.

(g) The Commissioner shall at the conclusion thereof submit a report to this Court containing his findings and recommendations.

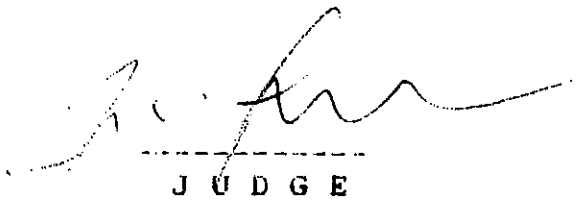
5. Pending any further order which may be made after receipt and consideration of the commissioner's report, Caterserve (Pty)Ltd is interdicted from allowing any transfer, issue or allotment of its shares; and from disposing of or alienating the business presently conducted by it, and is ordered to take all reasonable steps to continue and preserve the said business and to keep full and proper records of all transactions, as may be required by the judicial manager. In cases of doubt, the directions of the judicial manager must be sought, failing which application must be made to this Court for directions. It is further ordered that Feedem Catering Service (Pty)Ltd and its direction Mr Webb shall ensure compliance with the orders in this paragraph.

6. The interdict matter (being the application for the removal of Mr. Steyn and for the setting aside of the transfer of contracts to Cater Serve (Pty)Ltd and for related relief) is postponed sine die, and may be enrolled after the Commissioner has filed his report.

7. Any interested party may, after receipt of the Commissioner's report, give notice to any other part of any further or alternative relief which may be sought at the resumed hearing of the interdict matter.

8. The allegations against Mrs 'Mamothe Florina Ntlhasiuye should be investigated by the Commissioner.

9. Costs in the interdict matter are reserved.



J U D G E
22nd November, 1994

For Applicant :
For Respondent: