C OF A (CIV) NO. 32 OF 1996

IN THE LESOTHO COURT OF APPEAL

In the matter between:

LESOTHO BANK **Appellant**

and

LESOTHO HOTELS INTERNATIONAL (PROPRIETARY LIMITED (In judicial management) **1st Respondent**

THE MASTER OF THE HIGH COURT **2nd Respondent**

S C BUYS N O **3rd Respondent**

GUISEPPE ANTONIO MARIE FLORO **4th Respondent**

HELD AT MASERU

Coram:

STEYN	**P**
BROWDE	**JA**
VAN DEN HEEVER	**JA**

J U D G M E N T

BROWDE JA:

The Appellant ("The Bank") sought an order in the High Court discharging the First Respondent from Judicial Management and granting an order provisionally winding - up the First Respondent.

The Judicial Management Order was issued in November 1988

and contained a clause which is unnecessary but common in orders of that nature namely

> "While the Judicial Management orders are in force, all actions and the execution of all writs, summonses and other processes against the companies be stayed and be not proceeded with without leave of the above Honourable Court".

This provision is in identical terms with the provisions of Section 266 (1) (d) of the Companies Act No.25 of 1967.

After hearing argument on the whole application Kheola CJ found that because the Appellant instituted the application without obtaining leave of the Court to do so the Application should be dismissed with costs.

In its notice of Appeal the Appellant contests the need for leave and also alleges that the Court **a quo** erred in law and in fact in not granting the order winding-up the Respondent. In their heads of argument dated 21 November 1996 Counsel for the Appellant inter alia attack the finding of the learned Judge **a quo**. It submitted that a clear case was made out for a winding-up order and asks this Court to grant an order provisionally winding-up the respondent.

In his heads of argument which were apparently served on the Appellant's attorneys on 13 January 1997 counsel for the Respondents Mr. S. Alkema stated the following

> "12. In the papers before the Curt **a quo**, the First , Third and Fourth Respondents accepted that there was no longer any need for a Judicial Management Order. (Vol. III, pages 321, 342, and 343). In argument before the Court **a quo**, First, Third and Fourth Respondents' counsel conceded that First Respondent should be discharged from judicial management, but persisted with the opposition to the order placing First Respondent under provisional liquidation.
>
> 13 When the Court **a quo** dismissed Appellant's application on 30 September 1996, but failed to discharge First Respondent from judicial management, the First Respondent **mero motu** and at its own costs, applied to the Court **a quo** for the discharge of the Judicial Management Order, which order was granted on 11 December 1996. For the sake of completion and easy reference, the order discharging First Respondent from judicial management is annexed hereto, marked "A"."

The copy of the Order of Court shows that the order discharging the Respondent from Judicial Management was granted by Kheola CJ on 9 December 1996.

The respondents now adopt the stance that there is no longer a need for this appeal since the Judicial Management has been ended and that the only court which can grant a provisional winding- up order is the High Court. When the question of this court's jurisdiction to grant the winding- up order sought by the appellant was raised with Mr. Penzhorn who appeared for the Appellant he conceded that we had no such power and suggested that the matter be sent back to the court a quo for a decision on the winding-up application.

The position therefore is this. Both parties agree that the matter should be remitted to the High Court and that the only

questions left for this court to decide are

(1) What is the proper Order as to costs which this court should make in respect of the appeal proceedings before us?

(ii) What should be the order in regard to the costs in the court a quo?

It is clear that this court has no jurisdiction to issue an order winding up the Respondent (this appears to be accepted by counsel on both sides) and that should the appellant wish to pursue that application it will have to be heard in the High Court. It is obvious that the papers will have to be supplemented to bring the information before the court up to date. I would therefore remit the matter to the High Court with leave to the Appellant and the Respondent to supplement the papers as they think the application requires.

In order to enable this court to arrive at a fair decision in regard to the costs in this court and in the court below, counsel have handed in certain correspondence which passed between the parties' attorneys after the Bank received the Respondent's heads of argument. On 17 January 1997 the Bank's attorneys in their letter expressed surprise that they learned of the discharge of the Judicial Management Order only when they received the Heads of Argument. After expressing the view that the matter of leave being now academic the application for liquidation could be heard either by this Court or the High Court, they suggested that the application be sent back to the High Court and that Respondents pay the costs of appeal to the

date of the filing of the Respondents' Heads of Argument. They called for comment on that suggestion. The Respondents' Attorneys replied on 21 January 1997 stating that they did not agree that the aspect of the necessity for an Application for leave before seeking discharge from judicial management had become academic and asserted that the appeal had to be heard not only on that point but also because the application for the winding up order had been dismissed by the High Court.

Consequently the letter ended

> "In the circumstances we are also not prepared to accept your proposal regarding the aspect of wasted costs and the appeal will therefore proceed"

This elicited the Bank's response that as the parties had failed to agree on the question of costs the appeal would be proceeded with.

Before turning to consider the effect of the letter I think it is necessary to deal with the issue as to whether or not leave was required to bring the application to discharge the Judicial Management Order. The object of a Judicial Management order is to grant a moratorium to a company suffering a temporary set back, due primarily to mismanagement or other unusual circumstance, to enable it once more to become a successful enterprise. Creditors cannot sue for the debts owed to them during the subsistence of the order without leave of the court. That is what is meant, in my opinion, by the clause staying "actions, writs, summonses and other processes against the

company." An application to discharge the Judicial Management is not such a process against the company. If, for example, the Judicial Manager himself wished to bring the application either because the exercise was successfully completed, or perhaps had become patently hopeless, it would not make sense to require of him that he should approach the court for leave to do so. His application would not fall into any of the categories referred to as "actions, writs, summonses and other processes against the company." If I am right in that then the learned Chief Justice was, with respect, wrong in holding that he could not hear such application (to enable a further application to be brought for a winding-up order). There is no logical reasoning for distinguishing between the Judicial Manager himself and any creditor who wishes to put an end to the moratorium by application to court to have the order of judicial management discharged.

I have read the judgments referred to by counsel for the Respondent, namely Samuel Osborn (S.A.) v. United Stone Crushing Co. (Pty) had 1938 WLD 229 and Millman v. Swartland Huis Meubileerders 1972 (1) S.A. 741 (C) but do not find them helpful. Indeed they do not deal with the effect of the clause referred to on an application to discharge the Judicial Management order. The learned Chief Justice appears to have relied on a passage from Henochsberg on the Companies Act 4th Ed. Vol. 2 p.781 in which the learned authors express the view that if cancellation of the Judicial Management order is sought by a creditor and is opposed by the Judicial Manager leave must first be obtained to

bring the application. It follows from what I have said above that I do not agree with this view. However it appears to be irrelevant to this case since, as appears from the heads of argument set out above, the Respondents including the Judicial Manager himself conceded before the court a quo that the company should be discharged from Judicial Management; though the latter did not concede it should occur in those proceedings and at that stage.

The judgment of the court a quo made no reference whatsoever to the merits of the application for a winding-up order. Consequently I am of the opinion that the Respondent was wrong in stating in its letter of 21 January that the application for the winding-up order had been dismissed. It seems to me that once the Respondent adopted the attitude that it was not prepared to pay any of the costs of this appeal, the appellant had no option but to prosecute the appeal in order to have the costs order made by the court a quo altered. Had the costs of appeal been tendered by the Respondents to the date of the filing of their Heads of Argument, (as was suggested by their counsel Mr. Alkema, in a memorandum to them which was handed in to us by consent) further costs may well have been avoided by the Respondent. However as this was not done, and as I think Kheola C.J. should not have ordered the Appellant to pay the costs in the court **a quo** it is in my view proper to uphold the appeal with costs.

As far as the costs in the court a quo are concerned we have

been informed and it is obvious from the record that most of the time, and practically all the documents, related to the question of liquidation. Because it is far from clear that the appellant was entitled to an order provisionally winding up the company - there are disputes of fact on the papers concerning fundamental issues - I think justice would be done were the costs of those proceedings be reserved for the Court which hears the application.

It will be for the appellant to set the matter down should it wish to continue to seek a liquidation order. For that reason I think the proper order for this court to make (in case the Appellant has second thoughts about what course it should follow) is that if the appellant does not within 6 weeks of this order i.e. on or before 16th March 1997 set down the application for hearing on a date to be fixed by the High Court then the costs of the application in the Court a quo must be paid by the Appellant.

To sum up therefore

(i) The appeal is upheld with costs.

(ii) The application for a winding-up order in respect of the 1st Respondent is remitted to the High Court with leave to the parties to amplify their papers as they deem fit.

(iii) The costs of the original application in the Court **a quo** are reserved for decision by the court hearing the application with this proviso - if the Appellant does not set the application down on or before the 16th March 1997 for hearing on a date to be fixed by the High Court then the costs of the application in the court **a quo** must be paid by the Appellant.

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J BROWDE
JUDGE OF APPEAL

I agree .....
J.H. STEYN
JUDGE OF APPEAL

I agree .....
VAN DEN HEEVER
JUDGE OF APPEAL

Delivered at Maseru on the 5th day of February, 1997.