> "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." (My underlining)

I have underlined the words appearing in the above quotation because it was an indication by the learned Justice of Appeal that there were disputes of fact on the papers on fundamental issues and that such disputes could not be resolved on affidavits without resorting to oral evidence. The learned Justice of Appeal did not indicate what those disputes of fact were. However these can be established by reference to the affidavits.

Following the remarks by the Court of Appeal that there are disputes of fact on the papers concerning fundamental issues, an attempt was made by the applicant's attorney to set down this matter for hearing of oral evidence. That notice of set down was eventually withdrawn and the matter was set down for argument. I have now heard the submissions by both counsel and whatever disputes of fact were there still remain. It is clear that the applicant is of the view that there are no genuine disputes of fact and that the matter can be decided on the papers as they stand.

According to the respondents' affidavits the debt in the amount of M159.901-97 owed by the first respondent to the applicant is admitted by the first respondent in no uncertain terms. At page 144 para. 91 of the record Stefan Carl Buys who is the third respondent and the Judicial Manager of the first respondent avers as follows:

> "The 1st respondent admits that a claim of R159 909-97 still exists but claims that the applicant is indebted to the 1st respondent in amount of more than R12,000,000-00. It is therefore in fact the applicant that is indebted to the 1st respondent and not **vice versa.** The applicant knows that it is liable towards the 1st respondent for the maintenance and upkeep of its buildings. The applicant has always failed to comply with this term of the Agreement and, in fact, agreed in writing that the 1st respondent should do the repairs and perform maintenance and that it would compensate the 1st respondent. To date it has not done so. It is also indebted to the 1st respondent for water and electricity it paid on behalf of the applicant and which was consumed by the applicant's tenants in the complex."

The deponent avers that the applicant has been informed that the 1st respondent preferred to apply set-off, which is a lawful attitude for the 1st respondent to adopt, and that the applicant cannot claim that the first respondent is, as a result of this, not able to pay its debts.

The deponent denies that the 1st respondent is indebted to the applicant in the amount of M745,341-88 for rates and taxes. He alleges that the applicant has always applied the wrong formula in the calculation of rates and taxes. He denies that the amount of M745,341-88 is the correct amount and that it is due and payable.

In its replying affidavit the applicant alleges that -

> "As pointed out in my founding affidavit, the applicant has, for the purposes of these proceedings, accepted the formula advanced by the first respondent.
>
> I annex hereto as Annexure "NM4", the third report by Joint Judicial Managers in the Judicial Management of Lesotho Hotels International (Proprietary) Limited (in judicial management) (trading as Victoria Hotels) page 12, paragraph 1, clearly shows that the third respondent admitted the applicant's claim for assessment rates and further that the only dispute was the manner of calculations of the rates. It is for this reason that I, in my founding affidavit, accepted the calculations of the third respondent. Applying the third respondent's calculation, the first respondent is indebted to the applicant in a sum of M745,341-88," (See paragraph 36 of the applicant's replying affidavit).

CIV/APN/121/96

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO BANK	**APPLICANT**
and	
LESOTHO HOTELS INTERNATIONAL (PROPRIETARY) LIMITED	**1ST RESPONDENT**
THE MASTER OF THE HIGH COURT OF LESOTHO	**2ND RESPONDENT**
S.C.BUYS N.O.	**3rd RESPONDENT**
QUISEPPE ANTONIO MARIO FLORIO	**4th RESPONDENT**

JUDGMENT

Delivered by the Honourable Chief Justice, Mr Justice J.L. Kheola on the 18th day of February, 1998

In C. of A (CIV) No.32 of 1996 (unreported) the Court of Appeal made the following order:

"(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."

At pages 7 - 8 Browde, J.A. said:

In his opposing affidavit the third respondent alleges that the applicant has always used the wrong formula in the calculation of rates and taxes. He does not allege that no amount is due to the applicant as assessment for rates and taxes. However, so he alleges, the amount of M745,341-88 is the wrong amount and it is therefore not due and payable. It is true that he does not say what amount is due and payable. It seems to me that it was the duty of the third respondent to say what amount is due and payable and what formula he had used to arrive at that figure. What is clear is that the third respondent still claims that the formula used by the applicant is not the correct one.

The bone of contention between the parties is whether first respondent is entitled to apply set-off. **Mr. Penzhorn. S.C.**, argued on behalf of the applicant that set-off does not apply in the particular circumstances of this case. On the other hand the third respondent claims in his answering affidavit that the applicant is indebted to the first respondent in an amount of more than M12,000,00.00, and accordingly set-off applies. **Mr. Penzhorn** submitted that for set-off to operate, the first respondent and judicial managers must be in a position to say "the plaintiff owes me a debt," rather than "I have a claim against him." That is to say the debt must be liquidated in the sense described by Innes, C.J. in the leading case of **Treasurer - General vs Van Vuren** 1905 T.S. 582 at page 589:

> "The law requires that a debt which it is desired to oppose by way of set-off must be of a liquidated nature. It need not be liquid in the sense in which that word is now used in our practice. According to Vinnius (Select Juris Quaest, 1, c.50), if not admitted by the other side it must be capable of easy and speedy proof. Pothier (obligations, 3,c,4, sec.2) says a debt is liquidated when it is evident that it is due, and to what amount. Cum certum est an et quantum debeatur; he adds that a disputed debt cannot be opposed in compensation unless the person who opposes it has

> proof at hand, and is in a position to justify his claim promptly and summarily. (See also code, 4,31,14, par. 1; Burton's Ins. Law, p.96; Burge, vol. 3, p.809; Kruger v. van Vuuren's Executor, 5 S.C. 162). According to the above tests the defendant's claim is a liquidated one; though not formally admitted it is not disputed, and it is by its nature capable of prompt and speedy proof. It is therefore a matter which would ordinarily be available as a set-off. The question, however, remains whether under the circumstances of the present case it can be held to have extinguished any portion of the capital or interest claimed b the plaintiff.
>
> The rule is elementary that a debt which it is sought to oppose to another by way of compensation must be fully due. In theory of law the two debtors pay one another not by cash, but by a reciprocal cancellation of their respective claims; and, in order that such an operation may take place, the debt preferred in satisfaction of the other must be absolutely due at the moment. In ordinary cases no question arises as to the debt against which compensation is opposed. The plaintiff comes into court to enforce his claim; the defendant, while assuming that it is due, brings forward a liquidated claim of his own and contends that the two are mutually destructive. And so they are if he establishes his facts."

In **Becket v. Foster,** 1913 C.P.D. 962 at page 970 Kotz'e, J., as he then was, stated:

> "What has to be determined is whether the counterclaim is sufficiently liquidated as to be capable of a set off. This depends not upon whether the counterclaim is admitted, but whether it is clear and easily ascertainable or calculable, and can be established summarily or without difficulty."

In **Hardy, N.O. & Mostert v. Harsant,** 1913 T.P.D. 433 at page 447, Mason J. said:

> "As the code phrases it, the debt should not be one demanding for its establishment a prolonged investigation or delay or involved in difficulties and Judges are not to be too ready to admit compensation."

In **Adjust Investments (PTY) LTD v Wiid,** 1968 (3) S.A. 29 at page 33 Erasmus, J. said:

> "Applying these principles I do not think that it can be said that the respondent's counterclaim, relying on fraud, is capable of prompt ascertainment, or that it will not involve a long and intricate investigation or that it can be established summarily or without difficulty or that it is a debt which is so certain that it can be "at once proved" (Arie Kgosi v. Kgosi Moshette and others, 1921 T.P.D. 524 at p.526)."

In the present case no details whatsoever are furnished in support of the alleged claims put up by the first respondent and the third respondent. In this regard the first respondent and the third respondent bear the burden of proof. The third respondent alleges that the amount of more than M12,000.00 in regard to which he claims set off is for maintenance and upkeep of the applicant's buildings. He alleges that the applicant has always failed to comply with this term of the Agreement and, in fact, agreed in writing that the first respondent should do the repairs and perform maintenance and that it would compensate the first respondent. To date it has not done so. It is also indebted to the first respondent for water and electricity it paid on behalf of applicant and which was consumed by applicant's tenants in the complex. (See paragraph 91 of the third respondents answering affidavit).

In its replying affidavit and in answer to paragraph 91 above, the applicant says that the first respondent has no claim against the applicant whatsoever and even if this court were to accept, purely for purpose of argument, that the first respondent had a claim such would not be an answer to this claim. The applicant has not categorically denied that it is indebted to the first

respondent in an unspecified amount of money for maintenance and upkeep of its buildings. It has not denied that it has always failed to comply with this term of the Agreement. Nor has it denied that it has agreed in writing that the first respondent should do the repairs and perform maintenance and that it would compensate the first respondent. I shall assume for the purpose of the decision of this case that the applicant accepts the above allegations. It is not enough for the applicant to merely say that the first respondent has no claim against the applicant whatsoever. It had to specifically deny the allegations made by the third respondent.

Be that as it may, the debt is said to be liquidated when it is evident that it is due, and to what amount. In the present case the first respondent has failed to prove what amount is owed by the applicant to it. To say an amount of more than M12,000,000.00 is not good enough. In the case of **Kruger v. van Vuuren's Executrix,** 5 S.C. 162 De Villiers, C.J cited Pothier and stated at page 166:

> "By our law, set-off .... extinguishes the debt pro tanto, against which it is opposed."

At page 168 of the judgment, he added;

> "Where the defendant does not rely upon a liquid document the liquidity of his claim must be decided by the court, which according to Vinnius, Sel. Jur. Qu. 1, 5, has some degree of discretion vested in it ..... But until every element of uncertainty has been removed as to the amount opposed in compensation set-off is not allowed."

As indicated earlier no details whatsoever are furnished in support of the alleged claims put up by the first respondent and the third respondent. The Court is unable to exercise its

discretion in favour of the first respondent in order to establish the debt because no particulars have been given. Set-off cannot be allowed when this uncertainty remains. If any repairs and maintenance of the applicant's buildings took place at all, then the first respondent ought to have proper records or receipts showing payments to the contractors who did the job. It would have been very easy for the first respondent to attach such records and receipts to its answering affidavit.

Mr. Alkema, S.C. counsel for the respondents submitted that it is clear from the application papers that both the pre-judicial management debts, as well as the post-judicial management debts are **bona fide** disputed by the first respondent. The first respondent does not distinguish between pre and post-judicial management debts, but claims that those debts have, or will be, extinguished by set-off by virtue of applicant's indebtedness to it.

The crucial question in these proceedings is whether or not the first respondent is insolvent in the sense that it is unable to pay its debts. It will be clearly seen from the financial statements of the first respondent that the debt in the amount of M159,901.97 is reflected as a debt to the applicant. It is significant that throughout the hearing of this application before it went on appeal, everybody accepted that the first respondent owed the applicant the above amount. I was most surprised when the fourth respondent in his supplementary affidavit after the matter was referred back to this Court by the Court of Appeal, now alleges that the above amount was a personal debt owed by him to the applicant. I am unable to accept this allegation and regard it as an afterthought.

There is a very serious dispute concerning the financial statements of the first respondent

prepared by one Bernard Greenberg whose supporting affidavit is on page 222 of the record. The financial statements starts on 217 to 221. In his supporting affidavit Mr. Greenberg alleges that he is a qualified Chartered Accountant. He has been the auditor of the first respondent for several years and has prepared financial statements for those several years. He alleges that the first respondent has never traded in insolvent circumstances and its assets have always exceeded its liabilities. He considers this company to be solvent and able to meet its trade creditors. That the company is trading successfully, on a cash basis, and without assistance of overdraft or bank facilities, which is a very rare position for a company to be in.

I do not know what the deponent means when he says that the first respondent is trading without assistance of an overdraft or bank facilities. The fact of the matter is that the financial statement shows an overdraft at the applicant of M116,027.00 (see page 218 of the record). That overdraft has now grown to M159,909.97 which has not been paid and against which a set-off is claimed. It is, therefore, not correct to say the first respondent is trading without an overdraft.

In answer to Mr. Greenberg's affidavit the applicant has filed an affidavit by Mr. James Edgar Jarvis who alleges that he is a Chartered Accountant holding the qualification of C.A. (S.A.). He criticizes the balance sheet prepared by Mt. Greenberg on a number of grounds running from page 282 to page 287. He concludes by saying that the balance sheet has not been prepared on generally accepted accounting principles or practice.

I agree with Browde, J.A. that there are disputes of fact on fundamental issues which cannot be resolved without hearing oral evidence.

I had earlier said that there is no evidence whatsoever regarding the amount paid for building and electrical repairs; I have now discovered that an amount of M381,307.00 appears in the balance sheet at page 358 of the record. That means that the amount was paid from the cash takings of the first respondent and it is a debt by the applicant to the first respondent in terms of the agreement that the first respondent should pay for the maintenance of the buildings and later claim reimbursement. However I am still alive to the fact that the accuracy of the balance sheet is disputed. Mr. Jarvis for the applicant is of the opinion that it is wrong. On the other hand Mr. Greenberg says that the balance sheet reflects the true financial position of the first respondent. That position is that it is not insolvent and should not be provisionally liquidated.

Mr. Alkema submitted that winding up proceedings ought not to be resorted to in order, by means thereof, to enforce payment of a debt, the existence of which is **bona fide** disputed by the company: the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt. In these cases the remedy available to an applicant is to institute an action for the recovery of the debt and not to institute winding-up proceedings (see Henochsberg on Companies Act, 4th edition page 583).

> "Where **prima facie** the indebtedness exists the onus is on the company to show that it is **bona fide** disputed on reasonable grounds." (**Meyer v Bree Holdings (PTY) LTD.** 1972 (3) S.A. 353(T) at pp. 354-355).

I have come to the conclusion that there are disputes of fact concerning the fact whether the first respondent is insolvent or not. That issue cannot be decided on affidavits. The applicant was aware of these disputes long before it instituted the present application.

In the result the application for the provisional liquidation of the first respondent is dismissed with costs.

The costs of the original application must be paid by the applicant.

J.L. KHEOLA
CHIEF JUSTICE

18th February, 1998

For the Applicant -

For the Respondents -