The present appeal arises from the institution, in April 1996, of proceedings on Notice of Motion by the appellant for the winding-up of the Company. An objection to the procedural regularity of these proceedings was taken by the respondents and was upheld by the High Court. The bar to the institution of the proceedings was the alleged need to obtain the leave of the Court which had placed first respondent under judicial management, before launching the application. This contention was erroneously upheld by the High Court but its decision was overturned by this Court. The matter was remitted to the High Court to hear the matter on the merits of the application "with leave to the parties to amplify their papers as they deem fit".

The parties duly - and voluminously - amplified their papers and they presented a record of more than 600 pages. The High Court, Kheola C.J. presiding, heard the application and dismissed it with costs. The Court came "to the conclusion that there are disputes of fact concerning the fact whether the respondent is insolvent or not" - and - "that the issues cannot be decided on affidavit". It did not refer the matter for oral evidence despite such an application being made in the alternative. It is against both the decision to dismiss the application and (alternatively) the failure to refer it for oral evidence that the appellant has noted this appeal. In essence, its appeal is directed against the finding by the

learned Chief Justice that disputes of fact existed that could not be decided on the papers before it. Alternatively that even in this event, the Court erred in exercising its discretion against referring the matter for oral evidence.

Many of the issues raised in the papers before us may well come before the Courts of the Kingdom in the months or years ahead. At present at least 10 (ten) Court proceedings have been launched by the parties against one another. It would therefore be wise to confine such comments as we make to matters which are necessary for the determination of the principal issues; i.e. whether the Court *a quo* was right in concluding as it did that the winding up order should be refused and in deciding not to refer the matter for oral evidence.

The present dispute has its genesis in a lease agreement with commencement date 1st April, 1982 between the fourth respondent and the appellant. The latter had, in terms of the agreement, acquired the businesses - *inter alia* - conducted at the Victoria Hotel from the first respondent's predecessor in title, Lesotho Hotels (Pty) Ltd. (in liquidation). The lease was for a period of 20 (twenty) years and had at the date of the hearing only some 3 years still to run. The first respondent, which became the lessee, was registered

on the 5th of June 1986 with the fourth respondent as the principal shareholder.

It is clear from the papers that the appellant, as long ago as 28th December, 1987, had come to realise that it had "entered into a very bad lease agreement". Whilst the contract had not been particularly profitable for the appellant *ab initio*, by the end of 1987, it had become truly burdensome. In a letter of the above date, the appellant's general manager writes as follows:

> "(a) Since we signed the lease agreement in 1982, the Lesotho Government has introduced rates on property which we have been paying for the last two years without passing them on to the tenant. These amount to M103,143-00 per annum on the property.
>
> (b) The insurance premiums for the hotel part have shot up from M40,000-00 in 1982 to 129,939-00 in 1987. These have not been passed on to the tenant as well.
>
> (c) In the meantime, the rentals have only increased to M126,000- per annum which leaves a clear loss of M107082-00 per annum without even including renovations and repairs that have been done to the exterior part of the lift tower.
>
> It is our intention not to continue with this situation anymore as the increase should indeed have been passed on to the client."

The solution suggested by the writer is the following:

> "Be that as it may, the facts of the matter are that it has become impossible to continue this lease agreement under its present terms, and we seek the concurrence of the tenant to alter the terms of the agreement in such a manner that the Bank will not be losing on the lease of the property. If the hotel cannot meet the required rentals to solve the problem, we are prepared to scrap the hotel and turn the establishment into offices for rental in order not to lose on the deal."

It is the contention of the respondents that a concerted effort was launched by the appellant in order to rid itself of the cumbersome lease and that this included the "possibibility of restrictions being placed on the residence permit of Mr. Florio" (the fourth respondent). The quotation is from a letter from the appellant's attorney to the general manager aforementioned dated 8th October, 1988. During the years that followed, a war of litigious attrition ensued, culminating in the institution of the present proceedings for the winding-up of the company.

The appellant's cause of action was founded upon an indebtedness in respect of two sums of money. The first is a claim for payment of M159,501-97 in respect of an overdrawn account. There is an allegation

that this amount had increased to more than M600,500. However, this is strenuously denied by the respondents. They point to the fact that the account had not been operated on since 1988 and that there could be no basis for such a substantial increase. In view of this dispute and for present purposes, the former rather than the latter figure must in the absence of documentary proof to the contrary be assumed as the extent of the company's indebtedness under this head. The second indebtedness is an amount of M745,341-88 being arrear rates and taxes payable over the period 1988 - 1995. Whilst the allegation is that this amount had increased to more than M1million in 1997, the former rather than the latter figure had to be seen as the claim to be considered for the purposes of determining the first respondent's liability. This is so because of the fact that the solvency or insolvency of the first respondent must be determined as at the date of the initiation of these proceedings, i.e. the 9th of April, 1966.

It is clear from the papers that liability for both these amounts is disputed by the first respondent. Whereas in the papers originally filed - and prior to supplementation subsequent to this Court referring the matter back in February 1977 - the first respondent had conceded that it was liable for the amount due on the overdraft, it was somewhat belatedly contended that the debtor was in fact the fourth respondent. The Court

*a quo* has, however, rejected this contention, and without making any finding on this issue, we will assume for present purposes that it was correct in doing so. However, the respondents have raised as a defence to this claim, certain counterclaims which they contend would more than extinguish liability under this head. I will deal with this aspect of the matter below.

As is *inter alia* apparent from the contents of the letter from the appellant's general manager referred to above, the issue of the liability and the computation of the extent of the liability of the tenant under the lease for the payment of rates and taxes is a matter of considerable dispute. The respondent's contention in this regard is that it is far from clear that the first respondent is at all liable for rates and taxes under the provisions of the lease. Their approach in this regard is that the relevant clause (14) of schedule A to the lease relates to existing rates and taxes already calculated as part of the rental. The provision referred to reads as follows:

> "In the event of the rates and taxes payable by the Lessor in respect of the property and buildings on and in which the premises are contained for the quarter or other usual period immediately preceding that in which this agreement is signed, the Lessor shall be entitled, as often as this occurs and from time to time, to divide the said increase amongst all the tenements of the said buildings proportionately to the rent ordinarily charged by the Lessor for each tenement at

> the time of the increase and the Lessor shall be entitled from time to time to add the Lessee's pro rata share of the said increase ascertained as aforesaid to the rental herein stipulated with effect from the date from which the increased rates and taxes are payable. Notwithstanding the date from which the increased rental becomes owing this increased rental shall not, however, be paid or accepted until any authority which may be required from the Rent Board or similar public body in terms of any law has been obtained and if such authority is required, the Lessee shall support an application therefor. Either party shall have the right to require this lease to be amended in writing from time to time to provide for such increased rental."

It is apparent that the wording is confusing and it would appear that certainly at least the method of the computation of the liability for any increase is open to debate. I will revert to this aspect of the matter below.

Insofar as the claim for M159,000 on the overdraft is concerned, the dispute is:

1. Has first respondent a valid claim in respect of moneys due and payable for improvements, maintenance and repairs; and
2. Is such a claim capable of being raised as a set off against the admitted liability i.r.o. of the overdraft.

As will appear in greater detail later in this judgment, it cannot be

seriously disputed that the respondents have effected repairs and other improvements to the leased buildings and that the amount proved to have been expended could well be recoverable from the appellant in terms of the provisions of the lease; See paras 2 and 3 of the schedule to the lease. The appellant's contention in this regard is however that no details as to how the amount claimed under this head - some M2.9 million - have ever been furnished, neither has the alleged indebtedness been properly documented. Such documentary proof as has been furnished, does not establish - so it was contended - a "liquidated claim or a claim capable of easy and speedy proof".

As indicated above, and after analysing the evidence, the learned Chief Justice came to the conclusion that there were *bona fide* disputes of fact - *inter alia* concerning the claims for maintenance - and that these disputes could not be resolved on the papers. Of particular significance in this regard are the following considerations:

1. As long ago as the 10th of August, 1993, the fourth respondent - pursuant to a cession from the Company - issued summons and filed a declaration in which he claimed M1.2 million from the appellant "in respect of water and electricity bills of defendant's (appellant's) other tenants and

maintenance for which defendant is liable in terms of the sub-lease".

2. On the 25th of June, 1995, the respondents' attorneys wrote in the following terms to the appellant's general manager:

"Dear Sir

AGREEMENT OF SUBLEASE: YOURSELVES
LESOTHO HOTELS INTERNATIONAL (PROPRIETARY) LIMITED
(IN JUDICIAL MANAGEMENT)

We address this letter to you in our capacity as the duly appointed Judicial Managers of the aforesaid company.

In terms of the existing Agreement of Sublease between yourselves and the company you are responsible for the maintenance of the exterior of the buildings, the surrounding grounds, fencing and roads together with other facilities.

You have previously been informed, in writing, that the thatched roof over the restaurant is in such a bad state that water was leaking into the restaurant.

You took no action whatsoever to rectify the situation and we proceeded to have the thatch roof redone.

You were also informed that the exterior paint condition of the hotel needed attention but you have taken no action in this regard.

Some of the maintenance and renovation work was necessary as a matter of urgency in order to stop and prevent further deterioration of the complex and also extensive damage to the structure of the building.

Since it was clear that the Bank was not prepared to, or failed to, carry out the renovation work we proceeded to do this.

> We hereby inform that we have spent an amount of R706,98340 in regard to the renovations and maintenance work on the victoria Hotel complex.
>
> We hereby demand from you immediate payment of the aforesaid amount within seven days from date hereof.
>
> As the documentation verifying this amount is extremely bulky and cannot be attached to this letter, we hereby inform that all the documents are available at your request for inspection and verification purposes.
>
> Please take notice that this amount is in addition to the previous claim which has been instituted against the Bank, and if payment is not made within the time limit stated above immediate Summons will be issued.
>
> Yours faithfully,
>
> DU PREEZ LIEBETRAU & CO."

It is clear from these two pieces of evidence that, whilst it is true that there was a great deal of delay and even evasiveness in respect of the provision of details concerning the first respondent's counter-claim, both it and the fourth respondent had not only sued in respect of such claim but had also quantified the claim, offering detailed documentary evidence in support of the demand for payment of the sum of R706,000. If these claims were established, they would extinguish any liability the first respondent may have had under this head.

Whilst therefore legitimate criticism can be levelled at the failure of the respondents timeously to plead their cause with sufficient detail, in

the same way criticism can be levelled against the appellant for not pursuing the offer to make documentation available for inspection. Had the appellant taken up this offer, it may well have been able to determine the validity of these claims and their extent.

It is at least clear on the evidence that the first respondent has spent resources on maintenance and repairs and has brought about some improvements to the leased premises. It therefore is puzzling, if indeed the appellant was frustrated in respect of its claim, why it did not, especially after the judicial management order was set aside - sue the first respondent, thus compelling it to furnish details of its compensatory claims.

There is a very real evidential basis for the first respondent's contention that it was entitled to defer payment of the claim based on the overdraft, and that, although the amount may have been due, it would, in an action in which payment was demanded, challenge by way of the *exceptio non adimpleti contractus,* the appellant's right to sue and/or raise the extinguishing impact of its counterclaim for payment of amounts due to it for expenses defrayed in respect of maintenance and improvements. The validity and extent of this liability cannot be determined on these papers. In my view, the learned Chief Justice was

clearly correct in not attempting to do so.

The evidential material on which the first respondent relies in this respect is *inter alia* the following:

1. Documentary material and correspondence indicate that parts of the building were or became deteriorated as a result of fair wear and tear. The defects which required maintenance included electrical equipment, structural alterations and roof repairs. In addition, as was to be expected, on-going repairs were required in respect of the conventional upkeep of the buildings.

2. As pointed out above, the appellant was in terms of the lease obliged to maintain the exterior of the building and keep it in good condition.

3. Some of the structural work appears to have been undertaken with the approval of the appellant.

4. The allegation is made that the appellant had failed to comply with the obligation to see to the proper maintenance of the

building. The appellant appears to have challenged the validity of this contention. It does not dispute the fact that the first Respondent had indeed undertaken considerable work in this regard. Its denial of liability to maintain is stated in bold terms. It says:

"The first respondent is obliged to maintain the building...."

It goes on to state "It is the first and the third respondents who have sought permission from the Applicant to effect certain repairs to the building in question" (This of course they were obliged to do in terms of par 2 of Schedule "A" to the lease in order to ensure that undisputed liability vests in the appellant). *Prima facie* therefore the appellant's bare denial cannot in these circumstances be regarded as acceptable.

The appellant's contention that these claims by the respondents lacked particularity are unsubstantiated and lack of *bona fide* substance can accordingly not be upheld.

I come next to deal with the claim for rates and taxes. As was stated above, the clause in the lease governing the liability of the parties

is neither clear nor appropriate to the situation obtaining in Lesotho at the time the lease was negotiated. How the liability of the first respondent under this head, if any, has to be computed is a matter of very real dispute. Once again, and in view of the fact that the parties via their legal advisors appear to be determined to squander their resources on fruitless and inappropriate litigation and to continue to do so, I think it unwise to comment extensively on this aspect of the matter. It will be enough if I say:

1. That there are real disputes concerning the fact and extent of the liability of the first respondent under this head; and

2. That the respondents have presented evidential material indicating that the first respondent may have *bona fide* counterclaims which could at least significantly reduce any liability it may have to the appellant under this head.

In any event - and once again *prima facie* and for present purposes only - the evidence indicating the the appellant may well be in breach of its obligations under the lease either to maintain the premises or to compensate the first respondent for expenditure allegedly legitimately incurred, could preclude the appellant from seeking to enforce the

provisions of the lease in this respect. As indicated above in respect of the first claim, the Company could well raise the *exceptio non adimpleti contractus.*

The appellant has contended in respect of the respondents' reliance on these counterclaims that they cannot be raised by way of set-off as they are not "readily ascertainable". In my view, it is in the light of the aforegoing unnecessary to enter into the debate concerning whether set off can be said to operate in the circumstances set out above. See in this regard, however, the lucid and rigorously researched exposition on this issue by Van den Heever J. (as he then was) in *Faatz v Maiwald* (1933 - S.W.A. - p 73. At p 90 the learned Judge articulates an approach which I would endorse; i.e. : "Whether a claim "(for purposes of being capable of set-off) "was to be regarded as liquid was largely a matter of judicial discretion exercised on a consideration of procedural expedience". He goes on to say: "We are faced with the anomaly that substantive rights have been dependant on judicial discretion. The system, however, is not logical; there are in it obvious inconsistencies due to its historical background and the conflict of considerations of equity in substantive law on the one hand, and the fear of abuse of legal process on the other". As to the capacity of claims of the nature raised by first the respondent being capable of speedy and easy proof, see: *Lester Investments (Pty) Ltd v.*

*Narshi* 1951(2) SA 464(C) and *Snyman v. Theron* 1952(2) SA 353 (T).

There are three further matters to which I should refer in order to dispose finally of the present appeal. The first is to record that in my view, quite apart from the disputes of fact incapable of resolution on affidavit, the appellant has also failed to establish with the requisite degree of proof that the first respondent is in fact unable to pay its debts and is commercially insolvent. As to the degree of proof required, see *Kalil v Decotex (Pty) Ltd* 1988(1) SA 943 at pp.978-979(A). Two chartered accountants have submitted affidavits. One Jarvis, whose evidence was tendered on behalf of the appellant, after considering the balance sheet of the first respondent, criticized this document alleging that it had not been prepared "on generally accepted accounting principles and practices". On the basis that the claim by the Company against the appellant is in dispute and that such claim "does not represent a genuine asset" he contended that in such event, the total assets could be reduced by this amount and give rise to "a deficit on shareholders interest of M472,603.00". However, he concludes as follows:

> "In my opinion, it is impossible from the format in which the balance sheet and notes have been presented, to determine what further liabilities, if any, the company has incurred

subsequent to the date of granting of the order of judicial management and whether such liabilities are covered by the value of current assets realisable in the course of the normal trading activities of the company."

One Greenberg on the other hand, says that the Company is in a healthy trading position and pays its own way if the appellant's disputed claims are discounted. Indeed, on the facts placed before the Court *a quo* it would appear that on the evidence of the 1996 balance sheet the company shows a M7 million excess of assets over liabilities.

The second issue concerns the propriety of the institution of winding-up proceedings in the circumstances which surround these disputed claims. Henochsberg on the *Companies Act*, Fifth Ed. Vol.2 at p.693-694 summarises the legal position thus:

> "In addition to its statutory discretion, the Court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* bringing about of the company's liquidation for its own sake, eg the attempt to enforce payment of a debt *bona fide* disputed...
>
> 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 on reasonable grounds; the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt."

See in this regard *Badenhorst v Northern Construction Enterprises Ltd* 1956(2) SA 346(T). In the latter judgment, the Court cites the following passage from Buckley on *Companies*, 11th ed. at 357 where the author says:

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

See also *Hülse- Reuter and Another v. HEC Consulting Enterprises (Pty) Ltd* 1998(2) SA 208 (C) and *Re a Company (NO 0012209 of 1991)* 1992(2) All E.R. 797 where Hoffmann J says the following at p 800:

> "It does seem to me that a tendency has developed, possibly since the decision in *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26, [1986] W1.R 114, to present petitions against solvent companies as a way of putting pressure upon them to make payments of money which is bona fide disputed rather than to invoke the procedures which the rules provide for summary judgment. I do not for a moment wish to detract from anything which was said in

/.....

> the *Cornhill Insurance* case, which indeed followed earlier authority, to the effect that a refusal to pay an indisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay. It was, however, a somewhat unusual case in which it was quite clear that the company in question had no grounds at all for its refusal. Equally it seems to me that if the court comes to the conclusion that a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, then the court would not be inclined to restrain presentation of the petition. But, if, as in this case, it appears that the defence has a prospect of success and the company is solvent, then I think that the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the RSC:Ord 14 procedure."

These comments seem to me to have relevance in the present matter. I say this because as indicated earlier in this judgment, there is some evidence that the appellants had found the lease unfortunate and that it was looking for some way or someone to rid it of this troublesome and burdensome contract. The failure to persist with its action for ejectment, to sue for payment of either claim and some of its other conduct, are all indications that either their primary motive, or at least a significant element in its motivation in seeking to wind up the Company, was to seek to bring the lease to an end. This the Court will of course not countenance, especially where, *prima facie*, some evidence is tendered that a respondent has a *bona fide* defence of some real merit to the claims of its creditor.

Finally, the issue as to whether the Court *a quo* was right not to refer the matter for oral evidence has to be adjudicated upon. It will be sufficient if I say that I could hardly think of a case less appropriate than the matter which served before the Chief Justice to make such an order. As counsel for the Company pointed out to us in argument, resorting to such a course of action would only result in a multiplicity of actions - in that any finding in the first respondent's favour would not constitute a final and enforceable judgment. Moreover, the practical consequences of granting the present liquidation order in respect of a trading company which backdates more than 2 years, would clearly not be desirable. If the parties are resolute in their determination not to seek a mediated resolution of their disputes, the only acceptable procedural remedy would, in my view, appear to be the institution of conventional civil proceedings. This matter was in any event entirely within the discretion of the Court *a quo* and no good grounds have been shown why this Court should interfere with its decision.

Both parties have only been benefitting the legal profession by their ready resort to litigation to solve their problems. Very substantial costs have been incurred that have brought them no nearer to an equitable resolution of their problems. They would be well-advised either to seek a mediated resolution or to go to Court as expeditiously as possible on properly defined, genuine disputes and pursue such litigation to its

conslusion.

For the above reasons, I would dismiss the appeal with costs including the costs of two Counsel.

J. H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree:

L. VAN DEN HEEVER
JUDGE OF APPEAL

I agree:

R.N. LEON
JUDGE OF APPEAL

Delivered at Maseru this 31st day of July 1998.

For Appellant :
For Respondents :