IN THE NORTH GAUTENG HIGH COURT

(HELD AT PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

21/7/2014 DATE SIGNATURE

24/7/14

In the matter between: **Case no.A193/2012**

STEPHEN MARK RICH N.O.	First Appellant
TOBIAS JOHN LOUW N.O.	Second Appellant
RUSSEL WOLPE N.O.	Third Appellant

and

M RICH PROPERTIES (PTY LTD)	First Respondent
SHARON JULIUS N.O.	Second Respondent
SELMA RIVA RICH N.O.	Third Respondent
TONY BRAD JULIUS N.O.	Fourth Respondent

JUDGMENT

PRELLER J:

The present case is an appeal in one of five opposed applications for winding-

up orders that served together before Sapire AJ in the court *a quo*. By agreement between the parties only the present case was argued and the other four applications would follow the same fate as the present one.

The applicants brought an application to present further evidence on appeal, which we granted with an indication that the reasons for our decision would be given in this judgment.

The only purpose of the further evidence was to inform the court of subsequent events, which are strictly irrelevant, the question before us being whether the court *a quo* erred in dismissing the application on the evidence before it. The relevance of the further evidence was accordingly the only ground upon which Mr. Mundell based his opposition.

The evidence sought to be included consisted mainly of particulars of further litigation between the parties. The appellants made use of the gap offered to them to adduce further evidence about the financial irregularities committed by the respondents in managing the affairs of the companies, in order to strengthen their case for a liquidation order.

The main thrust of the evidence produced by the respondents was to inform the court of an order made by agreement between the parties by Willis J in the South Gauteng High Court on 22 March 2012, some two months after the dismissal of the application by Sapire AJ. The effect of the order was that an independent auditor was to be appointed by his professional body as a co-director in the five companies together with the third respondent. Whatever the intention with the further evidence may have been, its effect seems to have

been no more than to show that a workable solution to the feud in the family was possible and in effect to say to the appellants "we told you so". Although it may be reassuring to know that there seems to be light at the end of the tunnel, that faint glimmer will be of no consequence in considering the correctness of the court's decision.

The real parties to this most unfortunate dispute are four members of the same family. The parents are Maurice (or Mickey) and Selma (or Zelma) Rich and their children are Sharon and Stephen. The protagonists were Stephen on the one side and the other three members of the family on the other. The applications were the culmination of a long feud between the parties which was described as "irreconcilable" by the court *a quo*. In my respectful view "unresolved" would perhaps be a more accurate description and I shall revert to this aspect later in this judgment.

The facts are set out fully in the judgment of the court *a quo* and I shall do so somewhat more briefly. Many years ago Maurice and Selma established two trusts in which their assets would be placed with a view to provide a safe haven for the estate that he and Selma were to build up while providing for their own livelihood and eventually benefiting the two children. Hence the names of the two trusts: the **Emzed Trust -Sharon** and the **Emzed Trust - Stephen**. I shall for the sake of convenience refer to the trusts as the "**Sharon trust**" and the "**Stephen trust**" respectively.

The two parents were the directors of three of the five companies concerned in these five applications and Selma the sole director of the other two. The two trusts hold 50% each of the shares in the five companies. The original

trustees of the two trusts were Maurice, Raymond Goldstein and Russel Wolpe. The latter two were described by the court *a quo* as the "close associates and professional advisors" of Maurice. The appellants are the present trustees of the Stephen trust. The court *a quo* stated in its judgment that the trusts do not seem to have ever been implemented and were merely the nominee shareholders of the shares in the companies and also remarked on the relaxed, if not lax, administration of the trusts and the companies. Maurice and Selma regarded the assets of the companies as their own, which is fully borne out by the contents of the voluminous papers before us. The system functioned well enough as long as Maurice was at the helm of the ship.

Maurice suffered from senile dementia and has passed away after institution of the application. Stephen has since succeeded in gaining control of the Stephen trust, with the assistance of the two attorneys who are now his co-trustees and on his side in the dispute. The three trustees were the original applicants in the five applications, but Wolpe has since resigned, probably due to the conflict of interests arising from his position as trustee in both trusts.

The court *a quo* assumed without deciding that the applicants had made out a case for the winding up of the companies on the basis of the irregularities and mismanagement by Selma in the administration of the companies but added that it may be nothing more than a continuation of the way in which the companies had been managed by Maurice in the past. Unfortunately and despite the encouragement of the court *a quo*, the parties have been unable to settle their differences and find some equitable solution to the problem. The

court held that it retained a discretion to refuse a liquidation order even though the applicant may make out a case that it would be just and equitable to do so.

The main and only ground of appeal of any substance raised in the appellants' notice of appeal, is that the court erred in failing to find that there is an *onus* on the respondents to establish on a balance of probabilities that the appellants had another remedy available to them and were unreasonable in seeking the liquidation of the company rather than pursuing that other remedy. This point was further elaborated upon by Mr Mundell SC for the appellants in his written heads and in oral argument before us.

Mr McDonald for the respondents pointed out that the application before the court was one in terms of section 344(h) of the Companies Act, 1973 and not one by an oppressed minority of shareholders in terms of section 252. In the latter case it makes good sense that the Act requires of the respondents to show on a balance of probabilities that the minority has a satisfactory alternative remedy, but that does not apply in the present application, which is one in terms of section 344(h).

The court *a quo*, in my respectful view quite correctly, approached the case squarely from the point of view of the intentions of the original trustee and the way in which he managed the financial affairs of his family. It expressed its view of the proper course for the parties to be followed after the dismissal of the application, in the following terms:

"The parties may then resuscitate the trusts, under trusteeship of

persons who would be independent yet sensitive to Maurice's original intentions in forming the trusts. The trustees should be persons, the same for both trusts, who would follow the same policy which prevailed until Stephen obtained control of the trust which bears his name. This may, in the absence of co-operation, necessitate a further application to court, but it is to be hoped that a more mature attitude on both sides can achieve a solution. As an alternative to this, steps may be taken to set the trust deeds aside and return the assets to the donors whence they came."

That approach is in accordance with the statement by Ponnan JA in **Apco Africa (Pty) Ltd an another v. Apco Worldwide Inc., 2008(5) SA 615 SCA**, that sub-section 344(h) of the Act postulates not fact, but only a broad conclusion of law, justice and equity as a ground for winding-up. The learned judge of appeal continued:

"It is well settled that the sub-section giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section. ..... Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that had to be borne in mind in considering whether a case comes within the phrase. ..... It must also be recognised that there is no necessary limit to the generality of the words 'just and equitable'."

In my view the approach and reasoning of the court *a quo* cannot be faulted. The court was acutely aware of the depth of the rift in the family but as

responsible adults they will just have to find a way to look past their personal resentments in order to manage the affairs of the companies to the best advantage of all concerned.

The appeal is also directed against the cost order made by the court *a quo*. The relevant part of the judgment reads as follows:

> "While I make no finding on the merits of the family dispute, these applications should not have been made. The applicants will therefore have to pay the heavy costs which have been incurred. They may not however use trust assets to do so.
>
> The attorney Bester being a trustee may not charge the trust for fees and disbursements for her professional services to the trust in these applications. There is no provision in the trust deed entitling her to do so."

The five applications were dismissed with costs, including the costs of two counsel.

Costs being a matter in the discretion of the trial court, a court of appeal will not lightly interfere with a cost order made by that court in the absence of some misdirection. In my view there was nothing wrong and Mr Mundell did not advance any reason why the cost order should be interfered with.

In my view the appeal should be dismissed with costs, and that is the order that I propose.

F G PRELLER
JUDGE OF THE HIGH COURT

I agree.

S POTTERILL
JUDGE OF THE HIGH COURT

I agree

N KOLLAPEN
JUDGE OF THE HIGH COURT

It is so ordered.