

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

ISOBELLE ANNE CASSEL and
JOAN BENEDICK NNO

FIRST APPELLANTS

ISOBELLE ANNE CASSEL

SECOND APPELLANT

and

DAVID HERMANUS RHEEDER and
LESLIE COHEN NNO

FIRST RESPONDENTS

ASSOCIATED BRUSH MANUFACTURERS
(PTY) LTD

SECOND RESPONDENT

Coram: CORBETT CJ, E.M GROSSKOPF, SMALBERGER, STEYN JJA,
PREISS AJA

Date heard: Monday 4 March 1991

Date delivered: Tuesday 26 March 1991

J U D G M E N T

PREISS AJA:

Rand Broom and Brush (Pty) Ltd (the company) manufactured brooms and brushes at its factory in Industria West, Johannesburg. Associated Brush Manufacturers (Pty) Ltd was its holding company. The late Dennis Joseph Cassel (Cassel) was a director of the subsidiary company from 3 November 1949 until his death on 3 March 1984. A fellow director was Mr A. B. Treisman (Treisman).

During December 1985, almost two years after Cassel's death, an action was commenced in the Witwatersrand Local Division.

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It consisted of a number of claims arising out of the alleged conduct of Cassel during his administration of the company's affairs. The first plaintiff was the company itself and the holding company was the second. The executors in Cassel's deceased estate were cited as the first defendants and Cassel's widow (who was, incidentally, one of the joint executors) was cited as the second defendant.

During July / August 1986 the company was placed into liquidation; its two liquidators, Messrs Rheeder and Cohen, were substituted for the first plaintiff. In what follows it is convenient to describe the four parties to the action as the company, the second plaintiff, the first defendants and the second defendant, respectively, as they were in the court a quo.

The action was heard by Levy A.J. He was faced with a series of claims. Some of them were at the suit of the company and some at the suit of the second plaintiff. Relief was claimed in some instances against the first defendants, in some against the second defendant, and in some against the first defendants, alternatively, the second defendant. Fortunately, for the purposes of this appeal it is unnecessary to differentiate between them. Only one single claim falls to be considered, namely, claim E. There are two reasons for this limitation. First, a number of claims were settled between the parties before the trial commenced. Secondly, all the remaining claims, save for claim E, were dismissed. The first and second defendants sought, and obtained, leave to appeal against claim E. The second plaintiff has confined its cross-appeal to claim E only, contending that a larger amount should have been awarded, although both plaintiffs initially obtained

leave to appeal in respect of all the claims with which the trial court was concerned.

Claim E is a claim at the instance of the second plaintiff against the first defendants in terms of which an order was sought, declaring the first defendants to be responsible for the debts of the company to its creditors as at 3 March 1984 (the date of Cassel's death) pursuant to the provisions of s 424(1) of the Companies Act 61 of 1973, which states:

"When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent

purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

In the summons the plaintiffs alleged that during the period 1973 to 1984 the business of the company was carried on fraudulently and / or recklessly and that Cassel was knowingly a party to the carrying on of business in this manner. Particulars of the alleged fraudulent or reckless conduct were furnished. The trial court found that three classes

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of fraudulent conduct were proved. They are described in the summons as follows:

(a) "During or about the period 1981 to 2 March 1984, Cassel improperly misappropriated monies in the sum of R 59 684.64 belonging to the First Plaintiff, alternatively, due to the First Plaintiff, in respect of the sale of wire by the First Plaintiff to Pretoria Betonmuur Fabrikante (Edms) Bpk." (para 29.10).

[This claim will be dealt with under the heading, "Sale of Scrap Wire".]

(b) "During or about the period 1981 to 2 March 1984, Cassel, alternatively, Cassel and Treisman jointly, improperly misappropriated monies in the sum of approximately R 40 000.00 belonging to, alternatively,

due to, the First Plaintiff in respect of the Saturday sales of brushware and steel wool through the First Plaintiff's cash sales store" (para 29.11). [This claim will be dealt with under the heading "Cash Sales Store"].

(c) "During or about the period 1979 and 1980, Cassel improperly misappropriated monies in the sum of approximately R 20 000.00 belonging to, alternatively, due to, the First Plaintiff in respect of the sale of reject products arising in the course of the First Plaintiff's manufacturing operations" (para 29.13). [This claim will be dealt with under the heading "Reject Brushes"].

As a result of the alleged misappropriations, the second plaintiff sought an order in terms of s 424(1) declaring that

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Cassel and, in consequence, the first defendants were responsible for the debts of the first plaintiff to its creditors as at 3 March 1984, being the sum of not less than R 3,75 million.

The learned Judge heard evidence and argument extending over nine days. In the result the second plaintiff succeeded on claim E. It was held that misappropriations had been duly proved under all three heads and that the company's loss need not be confined to such amounts as Cassel had retained for himself but should, in terms of s 424(1), include additional amounts that accrued to Treisman, Cassel's fellow director, and to Mr R.F Pascoe, the then general manager of the company. The award totalled R 99 551.50. It was made up of a loss to the company from the sale of scrap wire in the sum of R 48 551.50; a loss from the cash sale store in the sum of

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R 36 000.00; and a loss from the sale of reject brushes in the sum of R 15 000.00.

Section 424(1) empowers a court to "declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible... for all or any of the debts or other liabilities of the company...". The learned judge did not limit his order to a mere declaration; he went on to order the first defendants to pay the sum of R 99 551.50 to the first plaintiff.

The form of the order was presumably in accordance with the provisions of s 424(2)(a) of the Companies Act, which states:

"Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose

of giving effect to the declaration..."

While they have no bearing upon the issue in the present appeal, two features of the trial court's order should be mentioned.

The first is that, although the relief in claim E was specifically sought at the instance of the second plaintiff, the order of payment was made in favour of the company, i e the first plaintiff. The reason probably lies in the fact that it was the company itself which sustained the loss.

The second observation is that the plaintiffs were awarded the costs of a six day hearing and had to pay the costs of the remaining three days.

For a proper evaluation of the evidence tendered in the court a quo in support of claim E, it must be borne in mind that many of the witnesses had already testified in prior proceedings.

During June and July 1986 an enquiry was held before inspectors appointed under s 258 of the Companies Act. After the winding-up of the company, a further enquiry was held under s 417 of the Act. Transcripts of the proceedings at both enquiries were made available. One of the terms of the pre-trial conference was that such transcripts constituted an accurate record of the proceedings, and relevant extracts were used during the cross-examination of the plaintiffs' witnesses.

I proceed now to an analysis of the evidence upon each of the three categories of Cassel's alleged misappropriations.

(a) SALE OF SCRAP WIRE.

The plaintiffs alleged that Cassel had misappropriated cash which was earned by the company from the sale of scrap steelwool

wire. Mr Labuschagne, an artisan in the employ of the company, was in charge of the manufacture of steelwool. The manufacture resulted in a by-product, scrap steelwool wire. Labuschagne nowhere involved Cassel in the sale of this by-product. He said that it was Pascoe who instructed him to telephone prospective purchasers and to insist on payment in cash.

It was Pascoe who was given the cash or blank cheques and it was Pascoe who completed the blank cheques received from customers. Pascoe told him that he must not let the company auditors know about the existence of certain Croxley books which recorded these cash sales.

It is only Pascoe who says that the monies were handed to Cassel. I shall have occasion to deal with Pascoe's deficiencies as a witness in due course. It suffices for the present to say that counsel for the defendants described him as a self-

confessed liar and thief. The description is not unmerited.

In so far as this series of transactions is concerned there are a number of disquieting features in Pascoe's account.

In his evidence-in-chief he told the court that he used to take the cheques to Nedbank, Industria, across the road from the company's premises. Mrs Thompson, a teller at the bank, required him to sign each cheque at the back and to fill in the company's account number. It was only in cross-examination that he disclosed that the account number was not the company's, but his own. It is strongly suggestive of a naive attempt to distance himself from an irregular course of dealings and to foist some degree of direct participation upon Cassel.

There are a number of other features of his evidence which cause concern. He said that Cassel on most occasions gave Treisman his share of the cash proceeds. Treisman (whose

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reliability as a witness is discussed at a later stage) denied that Cassel had ever handed him money; it had always been given to him by Pascoe.

The learned Judge in the court a quo found that Cassel had been responsible for the alleged misappropriations solely on the ground that Pascoe's evidence (which he was unwilling to accept without corroboration) was corroborated by Treisman's evidence that Cassel had suggested to him that cash should be set aside for building purposes, for staff bonuses and for "perks" for himself and Treisman. Apart from Treisman's general deficiencies as an acceptable witness, the learned Judge in my view lost sight of the fact that Treisman under cross-examination receded from his original account. He admitted that it was Pascoe who told him that the money was in the form of a "perk". He said that he could not even remember

whether the arrangement had been discussed with Cassel.

It follows that the so-called corroboration of Pascoe by Treisman is no corroboration at all. It would involve a finding that Pascoe is corroborated by a conversation which Treisman cannot recall. I am of the view that the evidence in regard to this transaction falls far short of what is required, not only for the reasons given, but because Pascoe and Treisman, as I shall indicate, were unworthy of credence and because it is necessary to apply the cautionary rule regarding evidence against a deceased person. The rule is stated in Borcherds v Estate Naidoo 1955 (3) SA 78 (A) at 79 A - B by Fagan JA in the following terms:

"If the facts in issue are particularly within the knowledge of only one of the parties to a suit, that is a circumstance

which the Court must take into consideration in weighing the probative effect of the evidence adduced. Here the one party to the alleged transaction of repayment is dead. The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party."

Though there is no rule which requires evidence against a deceased estate to be corroborated, corroboration may assist in satisfying the cautionary rule. On the other hand, as Fagan JA went on to point out in the Borcherds case, supra (at 79 F):

"The mere fact that, as in the case before us, three witnesses corroborate each other by giving similar evidence on the one side cannot make the three or any one of them

escape the cautious scrutiny which should be applied to evidence which the other party to the suit is not in a position to answer."

See also:

Da Mata v Otto NO 1972 (3) SA 858 (A) at 869 B - E.

Randaree and Others NNO v W H Dixon and Associates and

Another 1983 (2) SA 1 (A) at 6 A.

The learned judge in the court a quo referred to the cautionary rule but failed in my view to appreciate that Pascoe's testimony was insufficiently cogent to overcome the caution, and that there was no corroboration of such testimony.

(b) CASH SALES STORE.

The evidence of this alleged misappropriation and that of the sale of scrap wire is similar in nature and quality.

The court a quo found that Cassel misappropriated cash monies derived from a cash sales store which was operated on Saturdays by Labuschagne. Labuschagne's evidence, as in the case of scrap wire sales, does not involve Cassel at all. It was Pascoe who instructed him to use Croxley books, as distinct from the company's regular books, for the Saturday sales.

It was Pascoe who controlled the operation of the store and told the company's employees what to do. The cash was locked up in the safe over weekends; on Monday mornings the cash and the Croxley books were handed to Pascoe. The only evidence linking Cassel with the Saturday store is Pascoe's. He told the court that he handed over the proceeds to Cassel and that

he had been present on occasions when Cassel had handed a share of the money to Treisman. He stated that in the majority of cases Cassel himself handed the money to Treisman and in the minority of cases he was asked by Cassel to give Treisman the money. At the s 258 enquiry he said it was the other way round. This, in itself, is not a serious discrepancy. What is more disquieting is Treisman's denial that he had ever received money directly from Cassel.

In relation to this transaction Pascoe displayed uncommendable zeal in implicating Cassel. At the s 258 enquiry he retracted his former evidence (which in itself, raises a serious doubt about his veracity) and stated that the cash proceeds from the Saturday store and the scrap wire sales had been discussed between Cassel and Karlin, the company's auditor. This discussion had taken place at the Houghton Club in 1982.

The inspectors then asked Pascoe the obvious question, namely, whether he had himself been present at the discussion. He said that he had not. His information derived solely from what Cassel had told him.

At the s 417 proceedings Pascoe repeated this version. When the issue was pursued before the commissioner he stated expressly that he had no personal knowledge of the discussion; his source of information was Cassel's disclosure to him.

At the trial, however, Pascoe's evidence underwent a startling transformation. He claimed for the first time that he had been present at the luncheon at the Houghton Club and this evidence was proffered almost immediately after he had said the following:

"Mr Cassel told me that he had discussed the matter with Mr Karlin, who was the senior auditor, and that they had agreed that they could retain certain of the cash sales".

Accordingly, his claim to have been present at the luncheon ran completely counter to what he had asserted on several previous occasions, including the stage immediately prior to this change of front. Pascoe's attempts to repair this damaging feature were clumsy and disingenuous. On this aspect alone Pascoe was shown to be completely unreliable . It should further be noted that Karlin had also died before the trial took place. The cautionary rule, the complete unreliability of Pascoe's evidence and the failure by Treisman to provide any sort of corroboration lead in my opinion to one conclusion only - that the evidence of this alleged misappropriation

falls far short of what is required.

(c) REJECT BRUSHES.

This alleged misappropriation requires special scrutiny since it involves the evidence, not only of Pascoe and Treisman, but also of Mrs Pretorius, who worked for the company over two separate periods totalling nearly 20 years. Her duties varied from time to time. She began as a wage clerk, and then worked as a general office employee and later as head of the despatch section.

The essence of her evidence was that the sale by the company of the reject brushes was a clandestine operation, devised by Cassel, and of which only the two of them were to know. She stressed that Cassel impressed upon her that it was just

between the two of them. This element of secrecy was not borne out by her subsequent testimony. She admitted that instructions to sell rejects had come from Pascoe and from Treisman as well as Cassel. She repeated that "the directors" had asked her to arrange the reject sales. She was then asked by her own counsel which of the directors had given her instructions, whereupon she reverted to Cassel. In that context, her identification of Cassel is suspect. The question as well as her answer do not flow convincingly from her general reference to "the directors". In further evidence she stated that the proceeds were to be handed either to Cassel or to Pascoe. Thereupon she added that she had been told to hand the proceeds to Treisman if Pascoe was absent.

Her elaborate attempt to prove a confidential, and therefore suspect, operation to which only she and Cassel were privy

collapsed upon further analysis. She described how, in order to protect herself, she took away a number of Croxley books relating to the reject sales. Her idea was to have proof that it was Cassel who dealt with the proceeds in case she should herself be accused of misappropriation. Yet it was not Cassel who asked her to return the incriminating books but Mrs Liebenberg, the company's bookkeeper. Mrs Pretorius alleged that Cassel "glo vir hulle daar by die werk gesê [het] hy sal my wys, ek het geen bewys van daardie geld nie". "Hulle" suggests that the scheme was by no means a secret one, confined to Cassel and herself. At the s 258 enquiry she said that this information was given to her by a coloured employee of the company, named Baker. She was confronted with her evidence at the enquiry in the court a quo, whereupon she named another employee, Koos Slafa, as having come to her with news that the cash sales books had been destroyed. (Incidentally, the

destruction of these books was never established).

Thus, on the evidence of Mrs Pretorius alone, this so-called private arrangement was known not only to Cassel and herself, but also to Pascoe, Treisman, Mrs Liebenberg, Baker, Koos Slafa and "hulle daar by die werk". It certainly suggests a deliberate initial attempt to stigmatise the transaction as part of a secret scheme devised by Cassel. This in itself makes her evidence and her motive suspect.

This particular feature is not in my opinion as serious as her description of the duration of the irregular sales. In her evidence-in-chief, she told the court a quo that reject sales had continued for "n jaar, of twee of drie". Then she specified the particular years, namely, 1978, 1979 and 1980. This evidence stands in direct contrast with what she told

the s 258 inspectors. When she was asked how long she was involved with the reject sales she said "Ek sal sê omtrent drie, vier, miskien vyf maande, ek kan nie die presiese tydperk gee nie maar dit was n paar maande voordat ek weg is." When one of the inspectors at the enquiry, seizing upon the longest period of her estimate, said, "Nou, u het met die reject verkope vir ongeveer vyf maande gewerk het u vir ons gesê", she replied, "Ek sal sê plus / minus vier, vyf maande, ek kan nie vir u die regte tydperk gee nie". The inspector, still apparently engaged in extending the period, put the following to her, "Met ander woorde, die vyf maande, die vyf of ses maande wat u betrokke was by die verkoop van die rejects was seker daar van November / Desember se kant van die vorige jaar?" Her reply was, "Ja, dit kan so wees".

It is clear that at the enquiry, in a series of questions

directed to establish the duration of her involvement with reject sales, she furnished replies which indicated a period of several months. One can make due allowance for her uncertainty as to the precise duration, but the difference between several months to which she testified at the enquiry, and a period of years to which she adhered in the court a quo is so marked upon so central an issue that she must be regarded as unreliable. I would hesitate to describe her as dishonest, but little faith can be placed upon her uncorroborated account.

The criticism of Mrs Pretorius does not end there. She gave a confused account about when she decided to report the irregularities to the company's auditor. Initially, she said that she made that decision before she left the company's employ and that was why she took a number of Croxley books

with her. Later in her evidence, she was equally adamant that it was after she had left. As for her reasons for leaving the company, she was equally unsatisfactory. She told the court a quo that it was because she had had an argument with an Indian woman in the company; to the s 258 inspectors she spoke generally in the following terms, "Omdat ek nie gelukkig was daar nie, daar was dinge wat my gegrief het en dinge, ek dink die 'pressure' op my was ook te veel, die drukking was te veel vir 'n vroumens alleen om die hele 'despatch' te hanteer." When her conflicting reasons for leaving the company were put to her, she launched forth against Cassel for not backing her up in her quarrel with the Indian woman and stated that she and Cassel had been involved in a dispute over it. True, these are not major discrepancies but they point to a state of confusion, which, largely for the reasons which are already recorded, makes it inadvisable to treat her testimony

as sufficiently cogent to overcome the cautionary rule. The learned judge in the court a quo considered that she was merely confused and that her evidence could safely be accepted. In the light of the present analysis I cannot share that view.

Part of the evidence linking Cassel with the reject sales is the evidence of an alleged meeting between Cassel, Pascoe, Treisman and the auditor, Mr Prissman. Mrs Pretorius stated that she took the Croxley books to Prissman and disclosed the irregular dealings to him. If Cassel was shown to have attended this meeting it would have provided some proof of his complicity, because it was alleged that Prissman had confirmed that the money would have to be returned to the company and that Cassel had undertaken to do so. Prissman did not testify at all. Pascoe gave this evidence. For reasons which I have already stated, Pascoe is unworthy of credence;

it will be recalled that upon another occasion he tried to place himself at a meeting, the luncheon at the Houghton Club, in order to implicate Cassel. It is significant that when he gave evidence before the s 258 inspectors all he said was that Prissman had brought the matter to Treisman's attention. Not a word was said about the alleged meeting. Treisman was himself asked a leading question by his counsel. It was, "Do you remember a meeting after she had left, between you and Mr Cassel and the auditor, Mr Prissman, and Mr Pascoe?" Treisman replied, "I have a recollection of that". Under cross-examination it became clear that Treisman could not recall it. He began by saying, "I take it that Dennis and Pascoe were there too". Then the following questions and answers are recorded:

"Yes, but you don't remember Mr Cassel being present?"

-- I can't say so.

No, he might or he might not? --- He might or he might not. As I say, it was so many years ago."

Apart from his inability to place Cassel at that meeting, Treisman did not commend himself as a reliable or an objective witness. It was not established that Cassel was told by Prissman that the proceeds of the reject sales would have to be refunded to the company. That being so, there was no cogent evidence linking Cassel to the reject sales and the unlawful appropriation of cash monies. In my view this complaint was also unproved.

(d) THE QUALITY OF THE EVIDENCE GENERALLY.

From the above analysis it will be apparent that I do not subscribe to the finding by the court a quo that three categories

of misappropriation were duly established. I have already indicated that in my view Mrs Pretorius was not merely a confused witness but also an unreliable one. I have set out reasons for rejecting the evidence of both Pascoe and Treisman. These reasons were based upon what they stated in regard to those three specific categories of misappropriation. It is necessary to deal with other unsatisfactory features in their evidence, features which serve to fortify the conclusion that they cannot be believed.

Pascoe was at pains to protect Treisman. He first denied all knowledge of irregular dealings when he testified before the s 258 enquiry. He claimed that the cash sale store was open on week-days only and that there had been Saturday sales for no more than "a couple of weeks" on a trial basis. The Saturday takings were negligible, amounting to about R200

or R250 each time. The money was handed to him by Labuschagne on Mondays and was then deposited in the company's account.

Dealing with the sale of scrap wire, Pascoe told the s 258 inspectors that the proceeds were deposited in the company's account. When challenged with this testimony under cross-examination in the court a quo, Pascoe admitted that he had lied. He said that he had written a letter to one of the commissioners, admitting that he had not told the truth.

When taxed about the reason for his duplicity he said that he had acted out of sympathy for Treisman and in an effort to shield him. He had given his word to Treisman that he would not divulge anything about his thefts from the company. To put it bluntly, he breached his oath before the enquiry in order to honour his promise given to Treisman. This issue must obviously reflect adversely upon Pascoe's credibility, but it also touches upon Treisman's and lends added emphasis

to the probability of Treisman's own misappropriations.

Both Pascoe and Treisman had strong reasons for giving evidence favourable to the plaintiffs. Both of them admitted to thefts of money from the company and neither of them had been asked to repay it. Treisman had paid back no less than R 50 000.00 to the company. This refund only covered amounts disbursed for private air tickets, petrol for private motoring and telephone expenses. It did not cover his misappropriations. As for Pascoe, there was the admitted receipt of "bonuses" from the proceeds of cash transactions as also an amount of R 9612.50 that he received from an arrangement between himself and Mr Bachan, an agent in the employ of the company.

This arrangement is completely indefensible. Commission agents at the same level as Mr Bachan were paid a 5% commission on

orders. Pascoe arranged with Bachan that he would be paid 10%, on the understanding that 5% would be remitted to Pascoe personally. There can be no excuse for such an arrangement; it amounts to what is popularly known as a "kick-back".. It is clearly a theft from the company. Nobody in the business was made aware of this arrangement. Pascoe's attempt to justify his conduct is as pathetic as it is disingenuous. The following passage in the record of his cross-examination speaks for itself:

"You simply took that money which belonged to the company, didn't you? --- I believe it belonged to Mr Bachan.

But Mr Bachan, you said, was prepared to work for 5%? --- He was prepared to set up a marketing organisation and, due to the insecurity of Rand

Broom and Brush at that particular stage, he would look around for other products, and other products would be amalgamated into his business.

Well, I don't see any connection with you. What service did you provide for the half of the commission?

--- What service did I provide? After hours service.

Going through the 'Yellow Pages'. 'Phoning Mr Bachan.

Giving him leads with regard to wholesalers that we had not approached. Leads to hardware stores that he had not approached, and basically guiding him along the right lines.

But wasn't this part of your job as the managing director - the general manager of Rand Broom and Brush? --- It was part of my job.

So why did you have to be paid extra for that? -

-- Because at that particular stage the future of

the company was very very insecure, and after the twelve years that I had put into the company I realised that it was a possibility that maybe time was running out, and the thing is I should set up a marketing organisation and hopefully, have something to fall back on.

So you were trying to set this up for yourself?

--- Trying to set it up, and at the same time, trying to keep Rand Broom and Brush hopefully trading profitably."

Treisman was an unimpressive witness, apart from the fact that he had received cash monies which had not been accounted for. Often, when driven into a corner, he sought refuge in a lapse of memory. I have already cited one typical instance. Counsel for the company, Mr Cohen, was driven to admit that

he was untruthful but attempted to salvage this witness by contending that he had deliberately tailored his evidence to protect a guilty Cassel. In my opinion, this contention carries the seed of its own destruction. When once it was conceded that this witness was untruthful it would be idle and even dangerous to speculate about his motives. In any event it is more probable that Treisman's departures from the truth were prompted by a desire to deflect attention from his own speculation rather than by a desire to protect Cassel, with whom he had not been on speaking terms for years.

Having advanced a great number of separate claims in their action in the court a quo, the plaintiff attempted to paint a picture of misappropriations on a massive scale. It is not without significance that the company, the alleged victim of such misappropriations, remained solvent and viable right

up until Cassel's death. It was only a series of ill-advised foreign exchange transactions and business decisions after Cassel's death that brought about the company's demise. In the founding affidavit in support of an order of winding-up, Pascoe stated the following under oath:

"9.1 since March 1984 the Applicant has suffered severe exchange rate and control losses. These losses at present exceed R 1 000 000. The cause of this is that, since March 1984, the Applicant borrowed money and purchased goods from overseas and, as a result of the exchange control curbs which have occurred and the value of the rand against foreign currencies, has suffered the said losses;

9.2 during 1984, 1985 and 1986 the Applicant has suffered severe trading losses. This, I believe, can be ascribed to two reasons, firstly the need to finance what is set out in 9.1 above and, secondly, the costs of expansion to the Applicant's factory and plant situated at 15 Maraisburg Road, Industria West."

In view of the uncertainty created by this welter of evidence, the finding by the learned judge in the court a quo that claim E had been established and a misappropriation by Cassel totalling R 99 551.50 proved, was, with respect, unfounded. It follows that the appeal must succeed and the cross-appeal must fail.

This conclusion renders it unnecessary to consider an interesting further argument as to the nature and applicability of the

relief under s 424(1) of the Companies Act. The question is whether an action for such relief is passively transmissible as against the executors in Cassel's deceased estate. I express no view upon this issue.

(e) COSTS.

It goes without saying that the defendants, the successful appellants, are entitled to the costs of the appeal and cross-appeal. An argument was raised by Mr Doctor, their counsel, in support of an award of such costs on the attorney and client scale. His argument, briefly summarised, was that the plaintiffs, duly forewarned by the unacceptable evidence by key witnesses given before the two enquiries, nevertheless pursued an action based upon such evidence. The argument is not without force; but despite the deficiencies of Pascoe

and Treisman especially, there was evidence from many witnesses which pointed to a series of suspicious dealings. Mrs Pretorius does not fall into the same category of disrepute as do Pascoe and Treisman. It is fair to say that there was evidence that money was being lost to the company by a series of cash transactions; it is the link between these transactions and Cassel himself which fell short of proof at the trial. In these circumstances, despite the uncommon zeal with which the plaintiffs brought a multiplicity of claims against Cassel's successors, I am of the view that the action was not shown to have been instituted frivolously or dishonestly, and the claim for attorney and client costs must be rejected.

One further issue on the question of costs must be considered.

It concerns the qualifying fees of Mrs Claire Herbst, an accountant, who was consulted by the defendants in their

preparation of the case. More particularly, she was consulted for the purpose of cross-examining Mr Wood, an accountant in the employ of Price Waterhouse, who had carried out an extensive investigation of the company's books and records. At one stage the plaintiffs invited her to consult with Wood in order to prepare a statement of agreed facts. Discussions were thereafter held. After Wood had been cross-examined (and in the presence of Mrs Herbst who was allowed to remain in court) it was no longer necessary to call her.

Mr Doctor argued that in these circumstances the defendants were entitled to ask for her qualifying fees as a witness even though she was not called. Mr Cohen, for the plaintiffs, neither disputed these facts nor raised any counter argument.

This issue was discussed in the case of Stauffer Chemical

Co. and Another v Safsan Marketing and Distribution Co. (Pty)

Ltd and Others 1987 (2) SA 331 (A) at 355 E - H, where Corbett

JA stated the following:

"The true position, it seems to me, is that the fact that the person concerned was not called as a witness is merely a factor to be considered, in the context of all other relevant circumstances, in determining whether the payment of his qualifying fees by the party applying for the order was reasonably necessary. In the absence of any explanation, the failure to call the person as a witness would generally lead to the inference that the payment of the fees was not reasonably necessary. Where, however, as in the present case, it appears that the party in question originally intended to call the person

as a witness and that, in the light of the issues then subsisting the person's evidence would have been relevant, but that subsequently the issues were narrowed down, or eliminated by reason of the attitude adopted by the other party to the case in such a way as to render the calling of the person as a witness unnecessary, then, in my view, the non-appearance by such person in the witness stand would not itself lead to such an inference. Indeed in such a case, depending on all the circumstances, the Court might well come to the conclusion that the payment of the qualifying fees was reasonably necessary."

Mrs Herbst was to be called as a witness in the light of the issues then subsisting. Those issues were then eliminated

or narrowed down in such a way as to render her calling unnecessary. In these circumstances the payment of her qualifying fees was reasonably necessary, in the light of the test enunciated in the above decision.

The following orders are made:

1. The appeal is allowed with costs, and the cross-appeal is dismissed with costs. Such costs are to be paid by the respondents jointly and severally, the one paying the other to be absolved.
2. Paragraphs 4 and 5 of the order made by the court a quo, are set aside, and paragraph 4 is replaced by the following:

"On claim E, absolution from the instance with costs;

such costs to include the qualifying fees of Mrs
Claire Herbst. The costs are to be paid by the
plaintiffs jointly and severally, the one paying
the other to be absolved."



H.J PREISS AJA

CORBETT CJ)
E.M GROSSKOPF JA)
SMALBERGER JA) CONCUR
STEYN JA)