

SOUTH AFRICA / JUDGMENT

Hushon S A (Proprietary) Limited v Pictech (Proprietary) Limited and Others (Pty) [1997] ZASCA 37; [1997] 2 All SA 672 (A) (9 May 1997)

[1997] ZASCA 37

COURT

Supreme Court of Appeal

BEFORE

Nienaber, Schutz, Hefer, Zulman, Streicher

CASE / FILE NUMBER

418/95

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SCHUTZ JA

I agree with the judgment of my brother Nienaber save in respect of the weight to be attached to two of the contingencies he has taken into account. I would attach less weight to them and, as they are both adverse to Hushon, I would award a larger amount as damages.

The first is the impact on Hushon's sales of C A C's lawful competition in the market for Century equipment. Notwithstanding that C A C was entitled to approach the company Century to obtain the sole

or an additional distributorship, it is open to serious doubt whether it would have done so, or having done so, would have succeeded, without employing unlawful means. Pictech considered following the lawful path. Having heard the price demanded by Varvarigos it discarded the lawful way. We have insight into the thinking of the Pictech high command through the recorded statements of purpose and intent that later fell into Hushon's hands: an insight not ameliorated by any evidence given on the defendants' behalf. The intention was not to persuade Century by lawful persuasion, not even using the good offices of Taiyo Busan. This speaks volumes for what Pictech thought the lawful method would not yield. What the intention was, was to employ sabotage, to destroy Hushon's creditworthiness in the eyes of Century, to suborn

Danneý, the man who had had contact with Century, while he was still in Hushon's employ, and to create chaos in the sales department. This being the overall strategy, it is no good to reason that Danney could have given notice and that he could have taken up employment with C A C.

That is not what he did. The probable reason is that he, like the other conspirators, realized that such a course would not benefit him or them. His presence, and that of Woodman, in Hushon was needed in order to hole the ship before he abandoned it.

What actually happened was that the plan only half succeeded. Had the letter of credit not been paid that may well have led to the immediate end of Hushon's distributorship. But, at least, the contact man had come over after doing his work, and Woodman remained. Pictech was therefore left with the choice either to abandon its plan or to fight it out with an already maimed opponent. It chose the latter option. That The point is, in my view, that it is unlikely that C AC would ever have become a lawful alternative distributor of Century equipment. What Pictech might have done to counter the price advantage of that equipment is a matter for speculation. But given its record it is not to be assumed that it would in all things have behaved lawfully.

The second adverse contingency on which I differ as to its degree or weight, is Hushon's ability to have raised funds. I agree that the positions of Hushon and Varvarigos were parlous. However, that does not mean that Hushon would not have succeeded, at least for some years, if it had not been drawn down by the unlawful conduct of Pictech.

After

all, it had the prospect of being the distributor of a product with a marked price advantage. There seems to be little point in stressing the actual history of Hushon and its relationship with Repfin, when one of the very causes of that history was Pictech's unlawful actions. If the Century equipment had proved a success I have little doubt that finance would have been found, however that would have been done.

Accordingly I would attach much less weight to the two contingencies discussed. My informed guess as to the damage suffered is R250 000,00.

1. Condonation is granted for the late filing of the record, the appellant being liable for any extra costs occasioned thereby.

"Judgment is granted in favour of the first plaintiff against the following defendants, Pictech (Pty) Ltd (first defendant), Clint Husemeyer (second defendant), K I C Ltd (third defendant), Brian Danney (seventh defendant), Dave Woodman (eighth defendant) and C A C (Pty) Ltd (ninth defendant), jointly and severally in the sum of R250 000, 00 with costs, such costs to include the costs of two counsel."

W P SCHUTZ

JUDGE OF APPEAL

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2.

The appeal succeeds with costs including the costs of two

counsel.

3.

The order of the Court a quo is altered to read:

"Judgment is granted in favour of the first plaintiff against the following defendants, Pictech (Pty) Ltd (first defendant), Clint Huysemeyer (second defendant), K I C Ltd (third defendant), Brian Danney (seventh defendant), Dave Woodman (eighth defendant) and C A C (Pty) Ltd (ninth defendant), jointly and severally in the sum of R250 000, 00 with costs, such costs to include the costs of two counsel."

W P SCHUTZ JUDGE OF APPEAL

HEFER JA)

) CONCUR STREICHER AJA)

IN THE SUPREME COURT OF APPEAL

SOUTH AFRICA

Case No 418/95

In the matter between:

HUSHON S A (PROPRIETARY) LIMITED

Appellant

and

PICTECH (PROPRIETARY) LIMITED

1st Respondent

CLINT HUYSEMEYER

2nd Respondent

K I C LIMITED

3rd Respondent

BRIAN DANNEY

4th Respondent

DAVE WOODMAN

5th Respondent

C A C (PROPRIETARY) LIMITED

6th Respondent

CORAM: HEFER, NIENABER, SCHUTZ, ZULMAN JJA

et STREICHER AJA

HEARD: 7 MARCH 1997

DELIVERED: 9 MAY 1997

JUDGMENT

/NIENABER JA 2 NIENABER JA:

The respondents are now prepared to concede what they had unsuccessfully contested in the court below - that they had contrived to employ improper and unfair means in competing with the appellant, a trade rival. The only issue remaining is whether the appellant succeeded in proving a loss and the extent thereof. The court a quo (Levy AJ sitting in the Witwatersrand Local Division) found against the appellant and ordered absolution from the instance with costs. This is an appeal, with leave of the court a quo, against that order.

I propose to refer to the appellant as "the plaintiff" or "Hushon". Originally there were nine defendants but the plaintiff has conceded that it had no claim against three of them. I shall refer to the remaining six respondents collectively as "the defendants" and to particular respondents by an abbreviation of their names.

History:

During 1986 Hushon commenced trading as an importer and distributor in South Africa of air-conditioning equipment. The moving force behind Hushon was one Varvarigos. Varvarigos was described by Irvine, one of the plaintiffs witnesses, as an excellent trader, with lots of experience and impressive communication skills. Through the

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initiative of Hushon's sales manager, later a director but now the fourth respondent, Danney, Hushon had entered into an agreement with a Korean company, Kyung Won Machinery Company, to import and distribute in South Africa air-conditioning equipment manufactured by that company under the name "Century". I shall refer to it as it was referred to in the court below as "Century". Century was represented in its dealings with its South African distributors at first by one Park and later by one Chen.

During more or less the same period the first respondent ("Pictech") was also engaged in the importation and distribution of air- conditioning equipment in South Africa . This equipment was manufactured in Japan under the name and style of " Hitachi ". Pictech obtained its supplies through the agency of a Japanese company, Taiyo Busan Company. At some point in the past there had been some or other licensing arrangement between the Japanese and the Korean manufacturing companies in consequence of which the Century equipment so closely resembled the Hitachi equipment that the former was referred to in the trial as "a clone" of the latter. Indeed, because it retailed at about 25-35% less in South Africa than Hitachi and was slightly outmoded, it was even described as a "cheap clone".

Hushon placed its first order for Century equipment to the value of US\$ 30 082 in February 1986 and followed it up with further orders from March to December. Cheh promised Hushon that Century would grant Hushon the exclusive right to import Century equipment into South Africa if the orders placed by Hushon reached a value of US \$200 000 within a given period. It is common cause that Hushon failed by a moderate margin to achieve that goal.

Pictech belonged to the Piccan group of companies. One of

Pictech's associated companies was the third respondent ("KIC"). The second respondent ("Huysemeyer") was its managing director. On 20 August 1986 Huysemeyer wrote to KIC as follows. I quote the letter in full since it outlines the defendants' strategy:

Century equipment manufactured in South Korea is a

The local distributor, Hushon (Pty) Ltd is promoting Century as a " Hitachi made in South Korea ". It is impossible for us to prevent Hushon from doing this because, although Century does not equal Hitachi quality and technology, Hitachi assisted them in the past with technical co-operation. The appearance, model numbers and technical literature of Century is remarkably similar to Hitachi , it is quite natural therefore, for

Normally we would be able to compete with better service and a better product, but as you can see from the attached F.O.B. price list (in U.S. \$) it is impossible to quote within approximately 30% of the Century prices.

Fortunately Hushon is a badly run company and the staff is unhappy with the tough management style of the owners - this is slowing them down for the moment. If the Century distributorship ever got into the hands of a large group, such as Dorbyl or Murray and Roberts, Pictech would be destroyed.

We therefore propose that the following steps be taken to protect both Pictech and Hitachi . 1.

Pictech will take the Century distributorship away from Hushon. 2.

Pictech will take the two key sales staff of Hushon to expand the Johannesburg office. 3.

No Century equipment will be sold outside the P.W.V. area - J Venter does not want Century to disturb the market in Durban . 6. Century will not be quoted for large projects - only small jobs to compete with National etc. In any event no Century will be quoted without my permission.

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ii) Century will no longer drive price levels in this market down, iii) A dangerous competitor of Hitachi will come under our control. iv) We will be able to establish Hitachi as the market leader more easily because we can persuade customers to pay more for superior quality Hitachi. v) We will control both ends of the market and increase our growth and market share, particularly at the high end of the market. vi) Pictech will be able to control the volume of Century that is distributed in this market.

Our long term interest lies with Hitachi because this company is a household name and produces products of superior quality. In addition Hitachi has the most advanced technology and the widest product range. Our strategy in controlling Century distribution is to prevent Century from eroding Hitachi's market share and driving the price down. We will put Hushon out of business and gain two good sales engineers to expand our Johannesburg branch. Natal and the Cape will be sheltered from Century competition."

The "two key sales staff of Hushon" were Danney and one Woodman who succeeded Danney as sales manager of Hushon, and is now the fifth respondent.

In line with the strategy outlined in the letter overtures must have been made to Danney for on 22 August 1986 Danney, in a telex

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to Century, warned it that Pictech would approach it to secure a distributorship for Century equipment in South Africa. On 23 August 1986 Cheh replied that Century had indeed received enquiries from Hushon's competitors "with a view to shifting sources of supply" but he reassured Danney that he had not responded and that "Century moved slowly and carefully although always giving priority to first contact if they proved to be good partners".

In the meantime CAC (Pty) Ltd ("CAC"), the sixth respondent in this appeal, and a wholly owned subsidiary of Pictech, was incorporated and singled out to conduct the group's trade in the Century equipment.

It must have been during this period that Danney and Woodman were enticed to shift their allegiance from Hushon to Pictech for on 22 September 1986 Danney, while still in Hushon's employ, sent a telex to Century stating that Hushon was in financial difficulties, that sales of Century equipment were being hampered thereby, that he had made contact with a large and powerful group of companies and that, together with Woodman, CAC was formed "which has enough financial backing to ensure that Century products will eventually become market leaders in our country". CAC, he stated, was prepared

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to guarantee that all orders placed on Century by Hushon would be shipped and paid for by CAC, which was prepared to raise the necessary letters of credit to cover both Hushon's outstanding and CACs initial orders. The telex ended with an appeal to Cheh "to keep the contents of this telex confidential and to use our new telex number 424971 for any further correspondence". That number happened to be KICs telex number.

The impression that Danney and Woodman had to all intents and purposes joined the ranks of the opposition was confirmed by a further telex dated 7 October 1986 in which Cheh asked Danney for advice as to how Century should conduct itself "against Hushon SA [in respect of] after service for our products already supplied and installed by Hushon SA."

Huysemeyer had in the meantime devised a strategy that Century should call for letters of credit from Hushon within 48 hours, in the belief that Hushon would be unable to respond in time, thereby enabling Century to cancel Hushon's orders which CAC would then take over. Danney, while still in Hushon's employ, intercepted a request from Century for Hushon to furnish it with letters of credit within 48 hours. Danney deliberately kept the request from

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Varvarigos who fortuitously came to hear of it and was able to raise the required letters of credit in time.

Danney was discharged by Hushon on 31 October 1986 when Varvarigos discovered his treachery. Woodman became sales manager in his stead until 30 November 1986 when he too was dismissed. One Goudemond replaced him.

On 31 October 1986 Varvarigos sent Cheh a telex the contents of which I quote in full:

"It has been brought to my attention as at yesterday's date that certain misrepresentations have been made by Mr Brian Danney on behalf of the company known as Hushon South Africa (Pty) Limited, Mr Danney has conspired with our opposition company who are linked directly as an agent on behalf of Hitachi for the sale of its products in Southern Africa. I have been unaware of these developments and have confronted Mr Danney with these accusations and he has admitted that he has been party to a plot to severely damage the integrity of our company so that the utilisation of the Century products can be taken advantage of by another company which is related to a large corporation in South Africa. I, as chairman and managing director of Airama group which incorporates Hushon South Africa, give you my assurance that we will continue to support your company as we have done in the past, we have been informed by our receptionist at Hushon that certain damaging

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telexes regarding our company's financial position have been transmitted to you. We believe that deliberate delays were caused by members within our own organisation to discredit our company and undermine our good standing with your company and our clients.

On behalf of my companies I apologise for any inconvenience caused by the actions of my ex-employees. I reiterate that our group will continue to support Century and that we fear overtures and approaches will be made by Mr Danney representing other interests not associated and in opposition to my group. It is possible that Mr Danney or a designate will have already approached you and will, in fact, still try to obtain access to Century products for South Africa. Mr Woodman will continue in the employment of Hushon South Africa and will be joined by Mr John Goudemond as from today to take up his new responsibilities. Thanking you for your kind attention as assuring you of our continued support in the future."

There is no direct evidence that Pictech was aware of Danney's dishonest activities but inasmuch as neither Danney, Woodman nor Huysemeyer was called by the defendants to testify, it is a fair inference that Pictech must have been aware of Danney's subversion and condoned it as being in line with the strategy devised by Pictech and KIC.

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On being dismissed Danney immediately joined CAC and on 10 November 1986 Huysemeyer telexed Chen to inform him that Danney would be CAC's general manager. Danney thereupon used the visa and air bookings previously arranged for him by Hushon to visit Century in Korea on which occasion he secured Century's agreement to supply CAC with Century air conditioning equipment.

During November 1986 it was discovered, according to Goudemond, that Hushon's customers were dissatisfied and that Danney and Woodman had tampered with and removed documents which left Hushon's records in a state of chaos.

On 20 November 1986 Cheh, in response to a telex from Hushon, replied:

"We have actually driven our company policy to the direction of supporting your company only while we have refused any business proposal from some companies in South Africa. Of course, Pictech was one of above companies, in this regard, we have never repented of above policy because you have showed us your continuous marketing efforts which were enough to deserve our utmost attention. However, it is true that confusion of business at your end

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affected our company policy, which made us to consider your market situation again. As you know, most of correspondence have been made by Mr B Danney and due to this reason and his powerful marketing activity we have thought he has enough knowledge on our products and he is proper person for initial stage of handling unknown products in South Africa. However, due to unexpected problems at your end we have faced an awkward situation and the time during which we have tried to find out the best way to solve this problem, Mr B Danney of CAC (Pty) Ltd visited us for the facing problems and through deep business discussion we have received some order from CAC (Pty) Ltd regretfully. Therefore, we would like to watch closely your market for some period apart from sole distributorship but please put the complete confidence that we will continuously support you as well as before. Finally, we feel sorry not to give 100 percent satisfactory answer ..." (Some minor if imaginative editing was necessary). On the same day Varvarigos replied in a tone which was

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surprisingly conciliatory:

"We were very disappointed to learn of your company accepting an order from Mr B Danney of CAC (Pty) Ltd. We believe that our ex-employee has brought dishonour to himself by his actions by being treacherous and deceitful. He set up his visit on the pretence of representing our company whilst he was conspiring with our competitors to deceive our company, his visa was also obtained on our company's behalf together with airline confirmations and arrangements. We respectfully wish to point out that we believe that any agreement arising out of such a devious conspiracy should be treated with contempt. I am more than willing to visit your company and discuss the matter further, however, as it takes 12 weeks for a visa to be obtained, I await your further comments, our company has been successful in receiving more orders for Century equipment

and since starting to promote your product exceeded our target of 200 000,00 dollars in first half of season. We do not wish to demand anything from your company but we respectfully appeal to your sense of fair play and point out that if any person or persons conspire to act in an unethical and dishonest manner then we believe we should not support such activities. C A C (Pty) Ltd are funded by Pictech and if you wish to support your opposition companies then that is a decision you are entitled to make at your discretion. We will continue to support you as in the past and hope that at the end of the game honesty and fair play will succeed over our competitors."

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Varvarigos testified that whereas the relationship with Century was excellent in the past when Hushon enjoyed quick responses from it, matters thereafter deteriorated rapidly: Century became unresponsive and uncooperative and made it difficult for Hushon to get confirmation of orders in order to enable it to submit quotations to potential purchasers. Even a trip to Century in Korea by Varvarigos and Goudemond to smooth matters over proved fruitless. Hushon lost credibility in the market place and found it increasingly difficult to do business in Century equipment.

The plaintiffs complaint:

Hushon never achieved the sole distributorship it sought. Century was accordingly not precluded from dealing with CAC. As it happened Cheh, although leaning in favour of Hushon, was not unreceptive to advances from the defendants, especially after Danney joined their ranks. Chen's attitude was that Century would trade with both South African distributors for a period of 18 months by which time it would decide to which of them to grant the monopoly. In the meantime Century did not refuse orders from either side. Hushon's complaint was that CAC was nonetheless not competing with it on equal terms. KIC and Pictech's stated aim was to eliminate Hushon

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as a competitor in Century equipment. They sought to do so by improper means by soliciting Hushon's key personnel to subvert Hushon's business from within; by encouraging Danney in particular to feed disinformation to Chen about Hushon's capabilities for dealing adequately in Century's products, all in an attempt to undermine Cheh's confidence in Hushon in order to secure an advantage for CAC. Such conduct, a conspiracy to disrupt Hushon's business .by unfair means, so it was found by the court a quo and conceded by the defendants, was actionable.

The scheme was conceived by Huysemeyer, the second respondent and managing director of Pictech, the first respondent, who conspired with KIC, the third respondent, to deploy Danney and Woodman, the third and fourth respondents respectively, to act, while in the employ of Hushon, as fifth columnists. Both of them eventually joined CAC, the sixth respondent, which was the vehicle commissioned to drive the scheme. All the respondents were accordingly directly involved in the plot to assassinate Hushon commercially. All are accordingly jointly and severally liable for any loss suffered by Hushon which is attributable to that conspiracy.

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The claim:

Hushon's claim was for payment of damages in the sum of R1 181 034. In the further particulars to its particulars of claim the claim was originally framed as a projection, based on Hushon's own "annual turnover in relation to its annual nett income, its annual expenses, and its annual nett profit/loss during the years 1983, 1984, 1985 and 1986" and the profits Hushon would have achieved for the period 1987 through to 1991, "but for the unlawful conduct of the defendants". At the trial no attempt was, however, made to substantiate this basis for a claim. A completely new formulation was presented by its accounting witness, Wainer. It became a claim in two parts: the first part, in the amount of R798 000, represented the profit Hushon contends it would have earned up to June 1990. It is computed on the basis of CAC's turnover of sales in Century equipment over the period 1987 to June 1990, when sales apparently ceased, totalling R6 834 754. This figure was extracted by Wainer from KICs management accounts in which CAC's sales were recorded, to which Wainer applied an average gross margin of 28.7% which he calculated (on the strength of an assurance that trade was increasing) to be slightly in excess of Hushon's average gross margin

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for the financial years 1984 to 1986.

The second part of the claim, in the amount of R382 000, represented the profit Hushon contends it would have earned during the period June 1990 to May 1992, computed as a projection of profits, again based on CACs turnover of sales.

Both computations are therefore premised on the assumption that but for the intervention of the defendants all CACs sales would have been achieved by Hushon.

The findings of the court a quo:

It was principally the non-acceptance of that proposition, which is central to Hushon's case in respect of both causation and quantum, which prompted the court a quo to grant absolution from the instance.

On the aspect of causation the court a quo observed that Hushon, having failed to achieve "a sole agency" from Century, would not have been the only competitor for the importation of Century's goods into South Africa; in addition the court was doubtful of Hushon's administrative and financial capabilities of itself managing the additional volume of CACs trade with Century. On the aspect of quantification the court a quo also held that Hushon had failed to adduce the best evidence available to it to prove its loss, viz evidence

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of the profits it would have made on transactions which, due to the improper methods employed by the defendants, it lost to CAC.

I share some of the scepticism of the court a quo in both respects but I differ from it, with respect, on whether absolution from the instance should necessarily follow.

The approach to the problem:

The pivotal issue is whether Hushon, but for CAC's intrusion in the market and the defendants' impermissible methods, would have sold all the units of Century equipment which CAC, because of such intrusion, was able to sell. That question must be approached not as a matter of law but as a matter of probability. It was not the plaintiffs case that the defendants, like disloyal agents, were in law obliged to account for and disgorge all the profits derived from their admitted wrongdoing. Nor was it contended that all the CAC sales, being tainted, should as a matter of course be allotted or attributed to Hushon. And finally it does not follow as a matter of inference that Hushon was entitled to appropriate the CAC's sales as the measure for calculating its claim. *Omega Africa Plastics(Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) was also an action for damages. It originated from the sale by the defendant of goods

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which infringed on the plaintiffs registered design. According to s 15(1) of the Designs Act 57 of 1967 the registered proprietor of the design was entitled to the exclusive right in the Republic to make, use, or vend the goods embodying the design. The trial court had held that in law a *prima facie* inference operated in favour of the plaintiff that he would himself have effected all the infringing sales but for the defendant's infringement. Trollip JA, however, stated at 472D-E:

"With respect I think that that approach was erroneous, for in our law no such rule is applicable in the present situation. At the end of the day when, as happened here, both parties have adduced all their evidence and have closed their respective cases on the plaintiffs claim for the loss of his profits, there is ordinarily no room for any such *prima facie* inference. The true and only enquiry then is, has the plaintiff, on whom the onus of proving such loss rests, discharged that onus on a balance of probabilities?"

In line with that approach the enquiry in this matter must likewise be narrowed to an assessment of the probabilities.

Hushon's case is that if the defendants had not conspired to subvert its working relationship with Century it would have been the only importer of Century equipment in South Africa and, that being so, that it would have effected all the sales in South Africa that CAC

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effected; and finally that it would have had the means and the financial resources to accommodate the extra volume of trade. Consequently, so it was contended, Hushon is entitled to the profits it would have made on such sales, calculated in accordance with its own cost and profit structure.

The first question, then, is whether, in the absence of the defendants' wrongful conduct, Hushon would probably have been the only marketer in the field - with the corollary that if it were, the entire volume of trade in Century equipment in South Africa would have been its trade.

The answer to that question according to Hushon is yes and according to the defendants is no. I deal first with the defendants' contention.

The defendants' contention:

On the defendants' approach Hushon would not have been in command of this part of the market at all. It is common cause that Hushon never achieved the level of sales that would have entitled it to a sole distributorship. Nor were Danney and Woodman restrained by restraint clauses in their contracts of employment with Hushon from joining the defendants' organisation after due notice.

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Wrongfulness of the defendants' conduct, so it was contended, was accordingly restricted to the period while the two of them remained in Hushon's employ. Thereafter they were free to join and on the probabilities would have joined the defendants' stable when, with Danney's expertise and experience, the likelihood was that CAC would have captured the major portion of the market in any event.

I disagree. Danney abused his position by advancing the interests of the opposition while still in the employ of Hushon. The extent to which he succeeded in ingratiating himself with Chen and in furthering the interests of the defendants is aptly demonstrated by the telex dated 7 October 1986, referred to earlier, which was sent by Chen to Danney at KIC's telex address and in which he asked for Danney's advice on how Century should conduct itself against Hushon in respect of the service of goods already supplied by Century to Hushon. Indeed, in his telex of 20 November 1986 to Varvarigos Cheh admits in so many words that Danney's influence was a pervading one. The contention that the perverse effect of Danney's defection can be confined to the period of his employment with Hushon, simply because he was not impeded by a restraint clause from joining the ranks of the Pictech organisation, is quite untenable.

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This is one of the major difficulties facing Hushon in computing its loss with any degree of precision: the virtual impossibility of assessing the continuing detrimental impact of Danney's treachery while in Hushon's employ, on Hushon's trade with Century after he left it. I accordingly reject the defendants' suggestion that Hushon's loss must be restricted to the period of Danney and Woodman's employment with Hushon; and that the field of competition for the Century equipment was accordingly open to be occupied by CAC as a competitor on fair and equal terms.

The plaintiffs contention:

Hushon, on the other hand, reasoned as follows: prior to CACs intrusion into the market Hushon was the only concern which had established a working relationship with Century; that relationship was a profitable and equable one; had it not been for the defendants' intervention it would have continued as such. Pictech's first attempt was to enter the market properly by buying out Hushon. When that strategy failed Pictech, with the active co-operation of all the other defendants, resorted to the improper *modus operandi* of suborning Hushon's personnel to further Pictech's interests at the expense of those of their employer, with the ultimate aim of destroying Hushon's

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business and of eliminating Hushon as a competitor in respect of both the Century and Hitachi products. In the absence of any evidence from any of the conspirators of a change of heart, it must be inferred that their wrongful conduct would have remained the norm. That being so, it cannot be assumed that CAC would thereafter have competed legitimately. To make that assumption in their favour would amount to the recognition of a right to compete unfairly; in effect the defendants would then be rewarded for their own wrongdoing. Moreover, inasmuch as the object of the exercise in estimating the extent of loss resulting from wrongful conduct is to "think away" the wrongful conduct, such wrongful conduct cannot remain as part of the equation. Notionally, at any rate, it must be discounted. Since there was no evidence of any third party who showed any interest in this particular corner of the market the position must be assessed not as if CAC was a legitimate contender in competition with Hushon, but as if Hushon was the only contender, that is to say, as if Hushon had achieved its sought-after monopoly.

This approach, while neat, can likewise not be endorsed. For two reasons: it does not accord with the pleadings and it is contrary to the probabilities.

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The pleadings:

As far as the pleadings are concerned Hushon's case as initially pleaded was that it was the *de facto* sole distributor of Century equipment in South Africa. In its further particulars it is stated:

"(i) It was a further express alternatively implied tacit term of the agreement that the First Plaintiff would be granted from the Korean supplier the sole agency for this equipment in respect of South Africa and would accordingly become the sole distributor of this equipment in South Africa if the First Plaintiff purchased goods from the Korean supplier for amounts totalling US\$150 580,00 prior to the end of 1986. (ii) Pursuant to this term of the agreement the First Plaintiff purchased equipment from the Korean supplier for a total purchase price of US\$170 300,00 and paid the purchase price in respect thereof, prior to the end of 1986."

When it became apparent to Hushon's advisers, as a result of further consultations, that the stipulated target was in excess of the amount pleaded and had in fact not been reached, Hushon sought an amendment in the following terms: "15.24 As a further result of the action of the Defendants the Korean supplier:

15.24.1 Began providing the First Plaintiff with false

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information; 15.24.2 Lost enthusiasm in regard to its dealings with the First Plaintiff; 15.24.3 Began supplying CAC with Century equipment.

All of which had the effect of denying the First Plaintiff any reasonable prospect of securing a binding sole distributorship agreement which but for their conduct it would have secured."

The aim of the proposed amendment was to permit the plaintiff to reap the benefits of a monopoly, not as a sole distributor, but as a prospective sole distributor who was deprived of the opportunity of achieving sole distributorship by the wrongful conduct of the defendants.

The application, which was opposed, was made after Cheh had completed his evidence before a commission de bene esse held in Hong Kong. Cheh was not prepared to attend another such enquiry. The application was refused by Myburgh J mainly on the ground that the defendants would be prejudiced thereby: not having been an issue on the pre-amendment state of the pleadings Cheh was not led on it and to the extent that he may have made factual concessions under cross-examination, he was not re-examined on them. That position in

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my opinion still obtains. It does not appear to me to be fair to allow the plaintiff to establish, for the purpose of the quantification of its claim, and by means of what would essentially be a fiction, a position which it was not permitted to occupy on the pleadings.

The probabilities:

Turning to the probabilities both Reinhardt (a witness for Hushon) and Mingo (a witness for the defendants) testified about the numerous meetings at which Pictech's entry into the Century market was debated. Reinhardt was a director of Pictech who resigned early in 1987 when he obtained the exclusive right from Hushon to market Century equipment at a 10% discount in Natal. It was Reinhardt who primed Varvarigos with the copies of Pictech and KIC's internal letters and telexes on which Hushon's particulars of claim were largely modelled. Mingo was then a group accountant with the KIC group. Both of them were directly involved in the discussions leading to the deployment of CAC and its ensuing trade with Century. At none of these meetings, according to their evidence, was it ever discussed that dirty tricks would be used to displace or destroy Hushon. In a letter dated 25 September 1986 to another company in the group, Piccan Ltd, in which Huysemeyer outlined the various options open to the

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group, he stated:

"We have taken legal advice and there appears to be no possibility of legal action because there is no formal agreement between Century and Hushon."

That paragraph does suggest that Huysemeyer, without disclosing the extent to which he was corrupting Hushon's employees, was alive to the legalities of the situation. Reinhardt's disillusionment stemmed from what he perceived to have been a shift in policy on the part of Huysemeyer: a determination to demote the Century line of goods in order to protect and promote Hitachi. Reinhardt and Mingo understood both lines to be complementary rather than competitive. Whatever the policy considerations it was clear that the Pictech alliance was resolute on doing as much business with Century as would enable it to enter and corner the market at Hushon's expense. Even on Huysemeyer's partisan approach it would have been necessary for it to do sufficient business with Century to defeat Hushon. As it turned out Huysemeyer's strategy of capturing the entire market failed. Cheh decided to supply both Hushon and CAC and to make a decision on which one was to be given preference only after 18 months' trading - a decision which obliged CAC to remain active and competitive in

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the Geld, as indeed it was, to the extent of a turnover in sales in excess of R6 million over the next few years. From whichever direction the matter is approached CAC would have remained a real and formidable competitor of Hushon. It simply does not follow that if CAC had not competed unfairly it would not have competed at all.

On the probabilities Hushon would have faced a challenge from CAC; and if it did it is unlikely that it would have managed to monopolize the market. In my view it is therefore improbable that Hushon, in addition to its own sales, would have imported and sold every unit of Century equipment which CAC imported until 1988 and sold until 1990. The plaintiffs approach, which is squarely based on that proposition, must accordingly be rejected, just as, earlier, the defendants' contrary approach in this regard was rejected.

Four methods of computation:

Once Wainer's basic assumption is discredited it follows that both components of the plaintiffs claim as formulated by Wainer (the first method) must fail. The second part of the claim, based on a projection of CAC's sales for the foreseeable future, even after CAC itself had ceased to deal in Century equipment, is open to the additional criticism that it ignores the unchallenged evidence about the

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problems experienced with the quality of the Century product after Korea was beset by floods in 1987 and riots in 1988.

Hushon made no attempt to prove its claim in the form in which it was initially pleaded (the second method) i.e. as the negative difference between its actual sales and a projection based on its own sales prior to 1986. Its reluctance to do so is understandable since the defendants' intervention occurred at such an early stage of Hushon's own involvement in the importation of Century equipment that its relative trickle of trade in Century products, which preceded the inroads CAC made into Hushon's market, could not provide a broad enough data base to render any projection or extrapolation reliable.

A third method for computing the claim was the one suggested by the court a quo. It reads:

"Hushon's best evidence of its losses, if only in 1987 and 1988,

while it was fully operative would have been the evidence of particular contracts lost whether through Century's uncooperativeness or Danney's or Woodman's sabotage until they were discharged. Nor was any proof offered of the unavailability of such evidence to justify a resort to less cogent evidence as proof of Hushon's loss of profits."

I can appreciate the force of that line of thought. It is a matter for

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adverse comment that Hushon had not adduced evidence of even a single instance where it competed for but lost a sale to CAC, let alone evidence of a sufficient number of transactions to identify and plot a trend. Having said that, I am not convinced that it could reasonably have been expected of Hushon to have presented its entire case on that footing. Such evidence would have had to include not only evidence of its own activity in the market but also of the activity of its opponent, to which the plaintiff was not privy. Even in a market which was a fairly close-knit one, evidence of that nature would not necessarily or at any rate not readily have been available to it.

Whichever way the plaintiff could have turned to prove the exact extent of its loss, it would have faced grave difficulties, partly because of the problem of determining the adverse repercussions which the defendants' unlawful methods had on the volume of its trade and partly because of the quandary of devising an appropriate method of quantification. Yet there can be no doubt that Hushon did suffer a loss as a result of the defendants' wrongful conduct. In those circumstances a court has no option but to resort to the rough and ready method of the proverbial educated guess (the fourth method) and to do the best it can on such material as is placed before it (cf Caxton

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Ltd and Other v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) at 573G-J).

A point of departure:

I have already expressed the view that Hushon was not entitled to appropriate the CAC sales statistics as if these sales were its own. But these statistics are not without significance. At the very least they serve as an indication, the high-water mark, of the potential of trade during the relevant period, notwithstanding the many quality problems which both Hushon and CAC

experienced with the Century product. This figure can therefore be used not as a measuring stick, as the plaintiff sought to do, but as the point of departure in an attempt to quantify the plaintiffs loss as best one can on the available material.

Contingencies:

On that approach a number of downward adjustments must be made on the basis of contingencies which, if the defendants' wrongful conduct is left out of account, would probably have affected the level of Hushon's trade and hence its estimated profit. The question then is: what are the contingencies and what allowance should ultimately be made for them?

Viewed from the Korean side supply exceeded demand.

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Century accepted all orders, both from Hushon and from CAC, although there were complaints about the pace at which some of the orders were executed. Any limitation or constraint in the overall volume of trade accordingly originated on the South African and not on the Korean side - be it because the South African market was unable to absorb any further increases in such trade or because Hushon or CAC, as the case may be, was unable to cope with it.

On the South African side CAC was part of a large conglomerate of companies which had taken a policy decision to penetrate the market for Century equipment. CAC had the financial resources at its disposal and the will, at least on the short and medium term, to do business on a substantial scale, as is demonstrated by the magnitude of its trade over a relatively short period.

Hushon was likewise anxious to expand its trade with Century. It was argued on behalf of the defendants that Hushon's failure to reach the level of sales which would have entitled it to a sole distributorship in terms of its arrangement with Century was an indication of its inability to improve its trade with Century in Korea. But this was during the very period when the plaintiff, according to Goudemond who succeeded Danney as general manager of Hushon,

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was experiencing the after-effects of Danney's sabotage. It was also the period when Cheh was proving to be less than co-operative in responding to Hushon's queries. Too much should therefore not be made of Hushon's failure to reach its prime target.

According to Goudemond the plaintiff succeeded in gradually increasing its trade. But two factors in particular would have inhibited it in doing so to a significant degree. The first was CAC's competitive edge. CAC operated on a vastly different scale from Hushon. It warehoused a huge stock of Century equipment. Compared to the group to which CAC belonged, a large organisation with a known reputation and considerable resources, Hushon was a small private company with a modest staff, a restricted infrastructure and virtually no stock. The second inhibiting factor was Hushon's precarious financial position. This was due to heavy forex losses which Hushon suffered in 1985 and from which it never fully recovered; indeed, Hushon's counsel did not seriously dispute that Hushon was trading in insolvent circumstances throughout the period

which is relevant to the computation of its claim. In addition Hushon was committed to the hilt in cross-guaranteeing the liabilities of another of Varvarigos's companies which was later liquidated, Airama (Pty) Ltd.

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Hushon could not look to Varvarigos for financial assistance since he had taken some heavy losses with business ventures of his own. Consequently Hushon was largely dependent on Repfin Acceptances (Pty) Ltd ("Repfin") for the funding, by means of letters of credit, of its importation of Century stock. But during 1987, for reasons unrelated to Century, Hushon's relationship with Repfin deteriorated rapidly and by 1988 the two companies were locked in litigation. Repfin was itself placed in liquidation towards the end of 1988. There was no evidence that any other financial institution was prepared to fund Hushon. Hushon was accordingly, on the probabilities, without outside financial support. It was suggested by Varvarigos that Hushon could have financed the importation of goods on a so-called "back to back" basis, using the order for one transaction to obtain credit for the next. That method of financing is of course also dependent on the disposition of some outside agency to provide credit. Moreover, the quality of the product became a real problem. Orders were cancelled and numerous instances were recorded where Hushon and CAC were required to replace defective equipment. CAC was in fact driven to dump R1.7 million's worth of Century equipment in Zambia in 1989 to recover import duties paid by it in respect thereof. That being so

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it is unlikely that Hushon would have been able in the long run to finance all its dealings on a back to back basis.

On the evidence it is not possible to make a definite finding as to how far Hushon's resources would have stretched but it is fair to say, I think, that serious doubts must be entertained as to its ability to significantly increase the volume of its trade in Century equipment beyond its own sales. According to Hushon's financial statements for the financial year ending in June 1985, before Hushon commenced trading in Century equipment, its turnover amounted to R1 228 631 producing a net operating loss of R27 430. During the next year ending June 1986, its turnover dropped to R887 826 with a net loss of R35 801. By June 1987 its turnover was a mere R571 946 while its loss grew to R193 323. The turnover but also the loss increased in the year ending June 1988 to R1 297 653 and R288 760 respectively. The corresponding figures for June 1989 were R558 908 with a profit of R18 951. Hushon and CAC both stopped importing Century equipment from about the end of 1988. Hushon's last order for Century equipment was placed during February 1988 and from mid-1988 Hushon was no longer actively doing business. One does not know what percentage of Hushon's overall turnover was

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represented by sales of Century equipment. According to Hushon's further particulars for trial it sold only "117 sets of air conditioning units as well as certain accessories" during the period 1986 to 1988. Nor can it be determined, as stated earlier, precisely what effect the defendants' wrongdoing would have had on the extent of Hushon's trade. But even making a generous allowance in Hushon's favour in both respects it is difficult to see how Hushon would have been able, with the resources at its disposal, to more than double its capacity in order to handle the additional burden of CAC's trade of R6 834 754.

Having regard to these factors one cannot safely accept Varvarigos's bold but bald assertion that Hushon would comfortably have been able to handle the full extent of CAC's trade.

There is a further factor to be taken into account. According to figures extracted by Wainer from the KIC management accounts CAC marketed Century products in Natal to the value of R2 219 262. Hushon also marketed Century products in Natal. It did so by supplying Reinhardt at a discount of 10%. Reinhardt held the exclusive right from Hushon to sell the product in Natal. One would have expected Reinhardt who gave evidence for Hushon to have testified that his organisation would have been able to cope with an

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extra R2 million's worth of sales. Yet Reinhardt was not asked to what extent he faced competition from CAC, whether he lost any sales to CAC, whether the demand generally speaking exceeded supply and whether he would have been able to manage the additional volume of sales. Such evidence could and should have been led and the plaintiffs failure to do so leads to the inference that Reinhardt would not have testified to that, effect. In the circumstances Hushon cannot complain if Warner's assumption that Hushon would have done business to the extent of the entire extra R6 million should in any event be scaled down, if not proportionately, then at least to a marked degree.

Conclusion:

All these factors must be considered as contingencies tending to deflate the plaintiffs claim: the uncertainty about the Natal sales, about Hushon's own sales and about sales actually lost to CAC; CACs competitive presence in the field; CACs scale of operations as compared to that of Hushon; and finally Hushon's financial troubles. Taking all these factors into account it will not, f believe, be unfair to Hushon to estimate that it would have had additional trade, but for the defendants' wrongful conduct, of no more than an additional R1,5

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million. Applying to that figure the plaintiffs own ratio of profit to sales (R798 446 on sales of R6 834 754), a loss of profit is realised in the order of R175 000. That is the figure which in my view must be awarded to the plaintiff.

Some procedural matters:

The plaintiff sought condonation for the late filing of the record. The record initially furnished to the defendants was incomplete in a number of respects pointed out to the plaintiff by the defendants. The record was eventually supplemented, albeit with some imperfections, but in, doing so the plaintiff, at the ireresistance of the defendants, overcompensated by including in it documents which did not even form part of the record before the trial court, such as an application for security. This is a development which could have led to a special order for costs. But since both parties were at fault, the plaintiff for being late with an incomplete record, the defendants for insisting on the inclusion of unnecessary matter, I propose to make no special order for costs in favour of either party.

The application for condonation was opposed solely on the ground that the appeal lacked merit. Since the appeal is to succeed condonation must follow.

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One of the respondents, a company which has since apparently been taken over by a foreign concern with no links to the dispute between the parties, has not filed a power of attorney to oppose the appeal. Since that respondent has not conceded the appeal it remains liable jointly and severally with the other respondents.

The order: The following order is made:

1. Condonation is granted for the late filing of the record, the appellant being liable for any extra costs occasioned thereby.
2. ' The appeal succeeds with costs including the costs of two counsel.
3. The order of the court a quo, in respect of the respondents in this appeal, is altered to read:

"Judgment is granted in favour of the plaintiff against Pictech (Pty) Ltd, Clint Huysemeyer, KIC Ltd, Brian Danney, Dave Woodman and CAC (Pty) Ltd, jointly and severally, in the sum of R175 000,00 with costs, such costs to include the costs of two counsel."

P M Nienaber Judge of Appeal Zulman JA concurs

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