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Case no 455/82
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SOUTH AFRICAN IRON AND STEEL
INDUSTRIAL CORPORATION LIMITED

- and -

HARCHRIS HEAT TREATMENT (PTY) LTD.

JANSEN JA.

Case no 455/82

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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

SOUTH AFRICAN IRON AND STEEL
INDUSTRIAL CORPORATION LIMITED

Appellant
(Defendant in the
Court a quo)

- and -

HARCHRIS HEAT TREATMENT
(PROPRIETARY) LIMITED

Respondent
(Appellant in the
Court a quo)

CORAM: JANSSEN, VILJOEN, HOEXTER, BOTHA JJA et
ELOFF AJA.

HEARD: 5 March 1985

DELIVERED: 23 July 1987.

J U D G M E N T

JANSEN, JA:-

This is an appeal against an order of the Transvaal Provincial Division (per O'DONOVAN J) whereby the appellant (Iscor) was, at the instance of the respondent (Harchris), inter alia interdicted from using or otherwise dealing with a furnace (referred to as the " Z D") which it (Iscor) had constructed. The judgment of the Court a quo is fully reported at 1983(1) SA 548 (T)..

It appears that during the second half of 1979 Iscor found itself, owing to an unprecedented demand arising from projects such as e g Sasol III and Koeberg and the requirements of the armaments industry, unable to meet its commitments for the delivery of normalized steel plate. It ran the risk of incurring /

incurring substantial penalties and had to bear recrimination from Sasol for the assurance it had given that it would not be necessary to import normalized plate. The process of normalization entails the heating of the steel to approximately 900°C, holding that temperature for some time ("soaking") and then allowing it to cool in, ideally, still air. Theoretically any furnace with an enclosure physically able to take the load and able to supply the necessary heat (preferably, evenly) would do. Iscor itself was mainly using a bogie hearth furnace for normalization of its plate and had experience of occasionally using its top hat annealing furnaces for this purpose. The demand for normalized plate exceeded production by about 1 000 tons per month and Iscor expected this position to continue for some months. The obvious

solution /

solution of the problem was to sub-contract for the normalization of the plate which Iscor itself could not do. There were, however, disadvantages in following this course: large loads would have to be transported to the sub-contractors and regular visits by employees of Iscor would be required to monitor the process so as to enable Iscor to give the necessary warranties to its customers. An approach was nevertheless made to Vecor. This corporation was quite prepared to put its top hat furnaces at the disposal of Iscor when available, but it was not in a position to give any priority to Iscor's work and this was not acceptable to Iscor. At a meeting on 18 September 1979, however, an agreement was reached with Harchris that it would normalize 300 tons of steel plate for Iscor at R50 per ton.

It was /

It was minuted that "kapasiteit by Harchris is voorlopig 500 ton per maand maar kan waarskynlik hoër wees" and that "Yskor voel dat die prys van R50 per ton vir normalisering te hoog is en dat verdere samesprekings moet volg nadat 300 ton behandel is". It was also minuted that the plates to be treated would have a minimum thickness of 30 mm and a maximum length of 9000 and a maximum width of 3000 mm. It was also agreed that Iscor would supply a reject 30 mm plate for experimentation by Harchris. Obviously this was, as far as Iscor was concerned, a trial contract.

In terms of the contract Iscor delivered 150 tons of plate to Harchris, which set about normalizing them in its pit furnaces. Harchris, however, encountered serious difficulty:

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the plates, particularly the thinner ones, tended to become distorted (buckled). J MacDonald, a metallurgist and at the time technical manager of Harchris, believed that this was caused by excess heat rising from the base of the furnace during the cooling stage. In an attempt to obviate this, he experimented with a removable ceramic fibre blanket, placing it on the base of the furnace. It does not seem as if this experiment was very successful. He, however, had high hopes of a top hat furnace Harchris had started building at the beginning of the year and which was reaching completion. He believed that this furnace would allow greater evenness of cooling of the plates and that the use of a removable ceramic blanket on the base could improve this even further.

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From Iscor's point of view things were not proceeding satisfactorily. Reports by Iscor's quality control section of distortion occurring in a large percentage of the plates were not reassuring. Customers could not be supplied and had to be appeased. During the afternoon of 9 October 1979 Mr Riddell, the Chief Works Manager at Van der Bijl Park, called a meeting of the works management team to discuss the position. It was reported that there appeared to be grave doubts whether Harchris would be able to do the required normalization. Riddell felt that something drastic had to be done to save the situation. The meeting then constituted itself a "think tank" ("dinkskrum") and came up with the solution that Iscor should become self-sufficient by constructing /

structing an additional furnace, a batch type, either a top hat or a bogie hearth, as soon as possible. A C Fokker, (a BSc graduate in iron and steel and a qualified metallurgist) the manager of the Hot Mills Section, who attended the meeting, was then given a mandate to investigate the possibility of building one or the other within a month. (Fokker preferred the idea of a bogie hearth furnace, because of the experience by Iscor of using that type of furnace for normalizing. However, the proposal of a top hat cannot be considered incongruous at all. Iscor had occasionally used its top hats, designed for annealing, for normalization.) He was also instructed to assess the likelihood of Harchris being able to meet Iscor's requirements in the immediate future.

Fokker retired to his office and considered the situation. He decided to approach Dickenson & Sons Limited, a company which had done considerable work on furnaces for Iscor in the past. He telephoned Mr Neville Dickenson who referred

Fokker /

Fokker to A G van der Veen, the technical director. Dickenson

said that he would arrange for Van der Veen to call back.

Van der Veen telephoned at about 17h00 and Fokker asked him to

come over. Fokker also recalled members of his staff who had

already left for the day to be present at the meeting with Van

der Veen and he instructed J S Allison, Superintendent of the

Slab Handling and Treatment Division, to arrange a visit to

Harchris the next morning.

At the meeting Van der Veen was apprised of the

situation. He dismissed the idea of a bogie hearth furnace

out of hand because he was of the opinion that it could not be

built within a short time - the top hat was of far simpler con=

struction. It is unnecessary at this stage to go into detail

regarding what transpired at the meeting, or at Van der Veen's

home that evening or at Harchris the next day. Suffice it to say that Fokker came to the conclusion that Harchris could not solve Iscor's difficulties, and that with the assistance of Van der Veen Fokker was able to present the concept of a large top hat furnace, entailing an expenditure in the vicinity of R160 000, to Riddell on the 11th of October, and the green light to proceed was immediately obtained from head office in Pretoria. Fokker was relieved of his ordinary duties and appointed Project Leader. The project was completed in the remarkably short time of 18 days. Great prominence was given in the media to this feat and Iscor produced a brochure setting out the history and specifications of the furnace (hereinafter called the "ZD" furnace).

On reading the brochure, H B Preston (at the time managing director of Harchris and designer of the top hat

furnace /

furnace then under construction) came to the conclusion that Iscor had unlawfully copied his furnace - hence the proceedings instituted by Harchris in this case. In evidence on behalf of Iscor, Fokker and Van der Veen deny copying. Van der Veen particularly maintains that the ZD evolved independently and he explains how it came about.

The Court a quo came to the conclusion that Iscor did copy the Harchris furnace. It speaks of an "inference of copying based on similarities between the two furnaces, opportunity and motive" (553A) and expresses the view that the "differences (between the two furnaces) do nothing individually or cumulatively, to displace the clear inference to be drawn from the basic similarities between the two furnaces, which were constructed /

constructed in quick succession and are unlike any other known to exist" (553D). In the result the Court also disbelieved Fokker and Van der Veen when they said, in effect, that the Harchris furnace did not figure at all in the design and building of the ZD. The Court's assessment of these two witnesses was however not based on demeanour but inter alia on a finding that certain aspects of their evidence were against the probabilities. The Court's conclusion also amounted, in effect, to an acceptance of the opinion of the Harchris expert witnesses (Preston, Dr C Allen and M van Dorfy) that the ZD was derived from the Harchris, and a rejection of the opinion of F J Koinis, the expert called by Iscor, who held the contrary view. The Court considered Koinis to be not impartial and his opinion as "entirely inferential and based on the differences between /

between the two furnaces (which) differences are not inconsistent with the charge of copying, and therefore do not logically support the positive inference which Koinis seeks to draw" (554F). It may, however, fairly be said that the opinion evidence on behalf of Harchris is also entirely inferential and is based mainly on the similarities between the two furnaces, and that little appears on the record to show undue bias on the part of Koinis.

In regard to the similarities between the furnaces the Court a quo considered the 2D furnace to bear "a striking resemblance to the Harchris furnace" and found the former to incorporate (see p 552H) all the features" of the latter mentioned in the judgment (at p 550 C-F). This passage reads as follows :-

"Certain /

"Certain of the salient features of the Harchris furnace should be noted. It is a type of furnace which is commonly referred to as a 'top hat' furnace, and consists of a removable hood or cover and two bases, which can be used alternatively, and which are insulated to prevent loss of heat. The dimensions of the hood and each of the bases enable it to serve for the treatment of steel plates in sizes ranging up to three metres in width and nine metres in length. The cover is equipped with four high velocity gas burners situated below the roof and firing above the load. There are three exhaust outlets in each of the bases, the function of which is to allow exhaust gases to escape evenly from all parts of the furnace, and ensure the maximum uniformity of temperature throughout the furnace. The cover is lined on the inside with a ceramic fibre blanket, attached with stainless steel studs and clips. Over each burner there is a layer of ceramic hardboard designed to eliminate or reduce erosion of the fibre blanket. The temperature control system operates by means of a programmer which interprets signals recorded on a tape. Locating devices, consisting of two steel centering rods, are located at opposite ends of the top hat. Chromite sand, placed in a channel, is used as a sealant between the top hat and the base."

The differences between the two furnaces considered by the

Court a quo appear from the following passage (p 553 A-C) :-

"The defendant seeks in various ways to displace any inference of copying based on similarities between the two furnaces, opportunity and motive. First of all, emphasis is placed on a number of differences between the two furnaces, of which a schedule has been drawn up by Mr Frank J Koinis, an expert witness called by the defendant. Many of these are variations of details. The most important variation relates to the arrangement of burners in the hood and the exhaust flues in the base. The Harchris furnace has four burners in the hood operating in a continuous flow, while the three flues in the base are interconnected by a single channel running lengthwise along the base. The ZD furnace on the other hand has six burners inside the hood, arranged in three pairs in staggered opposition to each other, while each of the three flues in the base exhausts separately at the side of the base. This arrangement, it is claimed, permits three zones of temperature control to be maintained."

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It may also conveniently be mentioned at this stage that the 2D was very much longer than the Harchris (the inside measurement being 14,5m as apposed to 9,58m), and that the difference in the positioning of the burners resulted in quite a different pattern in the heat flow. The details of the seal and locating pins also differed.

It is contended on behalf of the appellant that the Court a quo erred not only in its reasoning but also in the assessment of the witnesses,

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of the probabilities of the case and of the opinions of the experts. For a proper evaluation of these matters it will be expedient to mention, initially, some aspects of the art or science of furnace design and construction and the materials and components available to the constructor, in the light of evidence that is either common cause or uncontested.

This is not an arcane field and suitable materials and components are well-known and available in South Africa. Basically a furnace is an enclosure lined with a refractory material. The design and construction of the enclosure is mainly an engineering problem. As a refractory material ceramic fibre has distinct advantages, foremost that it is a lighter material than e g brick. There are a number of firms, such as Dickenson

& Sons /

& Sons and Carborundum Universal, that specialize in supplying, and if required, installing the fibre. In order to promote sales these firms are only too keen to assist in every respect.

In the course of giving his evidence-in-chief H B Preston says the following:-

" a person must be very knowledgable in the art to make these calculations [i e in designing a furnace] accurately, not so? --- You have got a lot of assistance these days. You can receive assistance from the ceramic fibre suppliers who will give you heat charts showing heat losses through various thicknesses and densities of wool, you can find out similar information from the refractory suppliers who will give you the heat conductivity and losses through various thicknesses of different types of castable, that would, that helps tremendously in working our calculations and you have a handbook named North American Combustion Handbook which gives you all the formulas to work to in designing a heat enclosure. It is a matter of following the formulas if you wish to do it the long way."

Gas is a most suitable heat source in the case of a large furnace (electricity e g then proving too costly). There are firms specializing in the supply and installation of appropriate burners. Hotwork Africa (Pty) Ltd supplies H V (high velocity) burners and Passetti, Maxon burners (that function at lower pressure). These firms are also eager to supply specifications and give advice, and they distribute pamphlets in the proper quarters. Illustrative of this is that Harchris bought the burners for its top hat from Hotwork and they were installed in a configuration recommended by J B Forster, at the time Sales Director of that company. Preston concedes that Forster also did the necessary calculations for the flues and that he may have recommended that they should be placed in the base.

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There is, however, a conflict on one aspect in this regard. Forster (a witness for Iscor) says that the idea of running the flues through the base was adopted by Preston on his recommendation whereas Preston claims to have already decided upon this before speaking to Forster. But be that as it may, it is not disputed that Forster's standard recommendation to prospective clients is that the flue(s) should be located in that position, with the burners firing overhead. There are also firms specializing in the supply and installation of instrumentation and control gear.

It would therefore not be surprising that if two furnaces of the same type (such as a top hat) are newly designed and constructed that they should have common features without any copying being involved. Unless the similarity

of/.....

of detail is so great that coincidence is excluded or a feature of the one is so novel that a similar feature in the other is hardly to be explained except on the basis of copying, such an inference cannot legitimately be drawn. The mere fact that they both in certain respects differ from all other existing furnaces of that type cannot be conclusive; the availability of new materials and components may lead to independent but similar adaptation. This is clearly to be gleaned from the evidence given by M van Dorfy (an expert called by Harchris) under cross-examination. His evidence in effect amounts to a concession that if called upon to design and construct a top hat furnace such as that required by Iscor, bearing in mind the new materials and components available, one would

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by a logical progression of steps arrive at a furnace very similar to the ZD.

It is against this background that the evidence of Fokker and Van der Veen must be evaluated. They both say that at the meeting on the 9th Iscor's problem was posed without reference to the top hat under construction at Harchris. This, it is contended, was improbable. However, the explanation given by Fokker that when he calls in an expert to solve a problem he does not volunteer suggestions until he has heard what the expert proposes to do, seems eminently reasonable. Furthermore, there appears to be little reason for Iscor to have considered the Harchris furnace as a prototype. Preston was not known as a professional designer and he did not profess to be one; no specifications or details

of/.....

of the capabilities of that furnace were ever available to Iscor; it was as yet unfinished and untried; Van der Veen gave the impression of being fully capable of doing what was required and exuded confidence. Although not a professional designer of furnaces he in fact had extensive experience in replacing refractories in existing furnaces with ceramic fibre and in making all the necessary calculations. He had also recently collaborated with Forster in the redesign of the VPC furnace at Vecor for conversion from electric heating to gas firing. According to Preston (at p 669), who had viewed the plans, "the VPC furnace was going to be changed to high velocity".

Fokker and Van der Veen say that the latter went home after the meeting and that night did the necessary preliminary calculations. Van der Veen produced those calcu-

lations /

lations, as also subsequent alterations and additions which portray the evolution of the ZD from a furnace with one heating cycle for normalization to one with additional cycles suitable for tempering. That these were in fact the calculations that led to the building of the ZD was never contested. In this regard the comments of C Allen (also an expert called by Harchris) are instructive :-

"Now, has, were the calculation of Mr van der Veen which have been in the plaintiff's possession and

which /

which have been handed up in the bundle, shown to you? --- Yes I have seen them.

Do they make sense to you? --- Yes.

Good sense? --- Yes.

Do they look like genuine calculations? ---

They do indeed.

With a view to designing the Iscor furnace? ---

Yes I would have to agree to that. They looked very competent indeed.

And as far as size and function and purpose is concerned they do relate to one another, the furnace is the child of the calculation? ---

The furnace has to be the child of the calculation yes. In that sense."

Although a few errors and peculiarities (which did not appreciably affect the conclusions) were winkled out in cross-examination, it was never suggested that the calculations could not serve the purpose for which they were made or that Van der Veen was not competent to make them. The main thrust of the attack upon him was directed

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at showing that he was not truthful in denying that he had been given any information about the Harchris furnace.

It is contended, and the court a quo so held, that it is improbable that Van der Veen could have visualized a concept of a furnace for purposes of his calculations in the short time it took him to drive from Fokker's office to his own house. Under cross-examination the following exchange between Van der Veen and Counsel took place:

"Now you told me that you began your drawings, not your drawings, your calculations immediately you got home? --- Correct.

Right. Now tell me when did you conceive of this furnace? --- How does one answer a thing like that, one imagines a furnace as I, if you spoke to me about a bogey hearth, an open hearth furnace I would know exactly what you are talking about you know.

No. I know you would know about a bogey hearth.

But now let us look at a top hat. --- Top hat

I think is the simplest form of furnace that

one can really get.

I see. So tell me when did you form your conception of how this particular one would look? --- Well I presume I was thinking about it on the way home and when I got home. Then it is a case of putting a couple of sketches out on paper and then starting to calculate. In other words you would start off with your plate size."

At a later stage the court intervened:

"COURT: Mr Labe before you start on calculations again I would like the witness to clarify one point on which you have questioned him. Mr van der Veen in answer to the question when did you conceive the furnace you said you were thinking about it on the way home? -- Yes.

Does your evidence amount to this that when you did the calculations you visualised what the furnace would look like? --- I already knew, I visualised it, correct.

And where various things would be positioned?

--- That is correct.

And that visualisation corresponds with what was subsequently constructed? --- Correct.

I see. Yes. Proceed."

It is/.....

It is true that Van der Veen does not profess to be a designer of furnaces and that he should perhaps be better described as a refractory installer, but he had great experience in this field, including the redesigning of refractories. Given the dimensions of the largest plate to be normalized it does not, with respect, seem at all improbable that Van der Veen could almost immediately have visualized the required enclosure and apply the theoretically sound rule that the burners should fire above the load and the gases be exhausted through the base. He certainly cannot be understood to have claimed to have visualised every nut and bolt.

Some point is made of the fact that in calculating the heat losses Van der Veen assumed a blanket of ceramic fibre on the base of the proposed furnace, the

suggestion/.....

suggestion being that this was derived from MacDonald's experiments with a fibre blanket. However, Van der Veen explained that in doing the preliminary calculations he had to assume some value for the refractory material on the base and to expedite matters he assumed this to be the same as for ceramic wool. This seems an adequate explanation. It was never proposed in fact to place a wool blanket on the base of the ZD.

The ZD furnace is 2 metres high, which is more or less the height of the Harchris furnace. Van der Veen was at a loss to explain how he arrived at this measurement. He tried to relate it to the height of the stack of plates expected to be heated, but he was in difficulty. It is contended on behalf of Harchris that the height was derived from the Harchris furnace/.....

furnace, but this seems hardly likely. Obviously the

height is related to the height of the load - thus the

Harchris furnace was built to accommodate coils of wire.

It is difficult to envisage Iscor adopting a particular

height for the ZD simply because the height of the Hal-

chris furnace was of this order. The true explanation

why Van der Veen could not clarify this dimension seems

much rather to flow from his inability to remember the number and the

proposed spacing of the plates which would constitute the

load, than from an uncritical and slavish adoption of the

height of the Harchris furnace.

Much is made of the fact that on one page of the

calculations by Van der Veen, which he relates to a later

stage in the evolution of the ZD when, according to him,

6 HV burners were proposed instead of 12 Maxon burners

(so as to allow tempering cycles), there appears the

following: "13700 x 3000 x 65(85?) by 5(?)"

This is similar to part of a calculation which Van der

Veen made during the evening of the 9th of the weight

of the load and then rejected as giving an "impossible"

result: he accepted that he must have misunderstood

Fokker in this regard. He then proceeded simply on the

assumption that production of the furnace would be 1000

tons per month. Van der Veen could not really explain

why these figures appeared on the sheet of calculations

which he claims to have made subsequent to the 9th. He

thought it might have been written as a reminder to ask

Fokker about this. The contention by Harchris, accepted

by the court a quo, is that these figures indicate that

the/.....

the calculations on that page were also made on the 9th.

This would mean that high velocity burners were in fact

mooted from the very outset, which is contrary to Van der

Veen's evidence. There is, however, at least one aspect

which gives considerable support to Van der Veen's sugges-

tion that the figures were a mere reminder: they play no

part whatever in the calculations on the page in question.

These calculations proceed on the basis of a load of 16,3

ton (which is that derived from a production rate of 1000

tons per month).

It has been mentioned that prior to the second

meeting on 9 October Fokker instructed J S Allison to

arrange a visit to Harchris the next morning, a public holi-

day. The visit took place and Fokker and a number of his

staff (including Allison) spent some hours there. The

court/.....

court a quo found that Allison carried out a "detailed inspection of the top hat furnace" and that "it is difficult to see what purpose Allison, who was not called as a witness, could have had in mind other than the obtaining of information to be used in the design of the furnace" which Iscor considered building (p554 A - D).

It may be mentioned that a careful perusal of the evidence of MacDonald and that of Mr Errol Preston, who testified to what transpired that morning, does not seem to justify the designation of Allison's conduct as "a detailed inspection" of the top hat. Members of the party headed by Fokker, did look at the cover standing on trestles and the two bases on which Errol Preston was working and listened to MacDonald's hopes of the new furnace succeeding

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to normalize plate without distortion but this is a far cry from a "detailed inspection". Moreover, as has been pointed out above, it is difficult to see what Iscor could have hoped to gain by taking the Harchris furnace as a prototype. Allison, it is true, had previously expressed admiration for the furnace to MacDonald, but he was hardly the best qualified member of the party to spy. Moreover, he was to undergo an operation the next day and would play no further role.

There appears to be no firm ground for rejecting Fokker's explanation of the reason for the visit to Harchris and the outcome thereof. Fokker's mandate as a result of the "dinkskrum" the previous afternoon was not only to investigate the building of a furnace but also to determine/.....

determine finally the prospects of Harchris meeting Iscor's requirements. That he should take along a number of his colleagues does not per se raise suspicion. Fokker had never been to Harchris before and he kept in mind that the distortion of the plates could be owing to an error in handling. He believed that for distortion-free normalizing plates had to be removed from the furnace at the proper time and individually placed on supports for cooling. He immediately noticed that Harchris had neither the space nor the equipment to do this. In his view, therefore, the solution of Iscor's problems did not lie with Harchris. It is true that the party spent some time at the works, but, clearly, the individual examination of the plates already treated took some time.

The/.....

The similarities between the Harchris furnace and the ZD, in view of the new materials and components available, do not necessarily point to copying. Even details such as the sand used as a seal and the positioning of the locating pins appear to be insignificant. Forster generally recommended chromite sand and the mere location of the pins could very well be a coincidence. There is, in my view, no sound reason for totally rejecting the evidence of Fokker and Van der Veen to the effect that the ZD was developed independently and not derived from the Harchris furnace. The Court a quo should have found that Harchris had not proved the allegation of copying. It follows that it is unnecessary to investigate the difficult and important questions of law that would otherwise/.....

otherwise arise, such as e.g. the requirements for an idea to qualify for protection by the actio Legis Aquiliae or otherwise and in particular the nature of the remedy afforded to the "owner" once the idea becomes public knowledge as a result of an unlawful act by another.

The following order is made:-

(1) The appeal is allowed with costs

(including the costs of two counsel);

(2) The order of the Court a quo is altered

to read as follows:

"(a) the defendant is absolved from

the instance;

(b) the plaintiff is to pay the

defendants costs of suit, such

costs/.....

costs to include:

(i) the qualifying fees of

F.J. Koinis;

(ii) the costs of the pro-

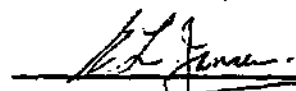
ceedings in the matter by

way of notice of motion;

(iii) the costs attributable to

the employment of two

counsel.*



E L JANSEN JA

VILJOEN JA)
) concur
ELOFF AJA)

69a/87

Case No. 455/82/

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN IRON AND STEEL
INDUSTRIAL CORPORATION LIMITED

Appellant
(Defendant in the
Court a quo)

and

HARCHRIS HEAT TREATMENT
(PTY) LIMITED

Respondent
(Plaintiff in the
Court a quo)

CORAM: JANSSEN, VILJOEN, HOEXTER, BOTHA, JJA
et ELOFF, AJA

HEARD: 5 March 1985

DELIVERED: 23 July 1987

J U D G M E N T

HOEXTER et BOTHA, JJA

HOEXTER et BOTHA, JJA,

Having had the advantage of reading the judgment in this matter prepared by JANSEN, JA we find ourselves unable to agree either with the reasons therein advanced for disturbing the findings of fact made by the learned Judge in the Court below or with the conclusion reached by JANSEN, JA that the appeal should be allowed with costs. So far from entertaining doubt as to the correctness of the trial Court's findings of fact these appear to us, examined in the light of the evidence as a whole, to be unassailable. Nor, in our judgment, did the learned Judge err in any way in applying the law to the facts as found by him. For the reasons which follow we consider that the appeal should be dismissed with costs. A further observation unconnected with the fate of the appeal is necessary. Judgment in this appeal has been reserved for an inordinately long time. Long delay in the despatch of the work of the Courts is

corrosive

corrosive of justice. In the present case the prejudice and inconvenience suffered by both litigants as a result of the delay in the delivery of judgment is keenly regretted.

The case for the defendant was that the ZD furnace (to which reference is hereafter made simply as "the ZD") was the brainchild of Van der Veen uninspired by the concept of the Harchris furnace; and, indeed, that the idea of the ZD was conceived in total ignorance on the part of Van der Veen that the Harchris furnace so much as existed. In support of its case the defendant relied chiefly upon the testimony of Koinis, Fokker and Van der Veen. Koinis, an expert in the field of furnace design, stressed such differences as may be found between the Harchris furnace and the ZD; and he expressed as his unqualified opinion that the latter had not been copied from the former. Fokker and Van der Veen were adamant that no mention whatever was made to Van der Veen of the existence

existence of the Harchris furnace or what it embodied.

The trial Court concluded that Koinis was not an impartial witness; and it disbelieved Fokker and Van der Veen. On the evidence as a whole the Court below found (at 554F/G):-

".....that the defendant arrived at the design of the ZD furnace by copying the Harchris furnace and that it saved itself a good deal of time, trouble and expense by so doing."

Our brother JANSEN holds the view that no sound reasons exist for rejecting the evidence of Fokker and Van der Veen that the ZD was developed independently and that it was not derived from the Harchris furnace. Dealing with the judgment of the Court below JANSEN, JA points out that the trial Court's assessment of these two witnesses was based not on demeanour but "inter alia on a finding that certain aspects of their evidence ~~were~~ against the probabilities." It is true that in his judgment the learned trial Judge made no comments on the demeanour of any

any of the witnesses who testified during the trial.

However, as has often been pointed out by this Court,

the observation of the demeanour of a witness is but one of the advantages which a trial court has over an appellate

tribunal; and the latter, having only the bare record

before it, can seldom, if ever, be in as favourable

a position as the former even to draw inferences as to

what is more probable conduct on the part of the particular

witnesses it has actually heard and observed. Nothing

more need be said on this aspect of the matter, however,

for the reasons that in our view an examination of the bare

record in the instant case by itself proclaims the fact

that both Fokker and Van der Veen were plainly unsatisfac-

tory witnesses; and that Koinis was an obviously partisan

witness.

At the outset it is necessary to see in what

fashion JANSEN, JA sought to test the evidence of Fokker

and

and Van der Veen. Having discussed certain aspects of the evidence bearing on the design of furnaces JANSEN, JA remarks:-

"It would therefore not be surprising that if two furnaces of the same type (such as a top hat) are newly designed and constructed that they should have common features without any copying being involved. Unless the similarity of detail is so great that coincidence is excluded or a feature of the one is so novel that a similar feature in the other is hardly to be explained except on the basis of copying, such an inference cannot legitimately be drawn. The mere fact that they both in certain respects differ from all other existing furnaces of that type cannot be conclusive; the availability of new materials and components may lead to independent but similar adaptation. This is clearly to be gleaned from the evidence given by M van Dorfy (an expert called by Harchris) under cross-examination

It is against this background that the evidence of Fokker and Van der Veen must be evaluated. They both say that at the meeting on the 9th Iscor's problem was posed without reference to the top hat^{under} construction at Harchris"

That the evidence establishes as a possibility that the

ZD could have been evolved independently of the

Harchris

Harchris furnace is clear. But to isolate that possibility from the matrix of the evidence in the case and then to use it as the sole criterion of the cogency of the evidence of Fokker and Van der Veen is, in our respectful opinion, artificial and unsound. It is wrong because it postulates that the plaintiff's case rests wholly upon the resemblance between the Harchris furnace and the ZD. In truth such resemblance, arresting though it undoubtedly is, constitutes only one of several props sustaining the plaintiff's case. Accordingly it is necessary to subject the evidence of Fokker and Van der Veen to scrutiny against a rather wider and more elaborate backcloth than the mere theoretical possibility of an independent evolution of the ZD. The case for the plaintiff is founded upon a number of fundamental and interrelated facts. To these reference will be made as "the basic facts". They may be summarised as follows:-

(1)

- (1) In October 1979 the plaintiff's Harchris furnace, which is suitable for the particular purpose of normalising large steel plates, was nearing completion.
- (2) The Harchris furnace represented a significant departure from the conventional furnaces generally in use at the time for the heat treatment of steel plate, and a step forward in the art of heat treatment. Not a single witness who testified at the trial was aware of the existence, in October 1979, anywhere in the world, of a similar furnace employed for the purpose of normalising large steel plates.
- (3) During September and early October 1979 the defendant obtained information regarding the Harchris furnace in the context of negotiations, as well as an existing contract, between

between the defendant and the plaintiff.

(4) Before 9 October 1979 Allison had made a careful examination of the Harchris furnace. Allison told MacDonald that he was very impressed with the Harchris furnace and the advance which it represented.

(5) During the late afternoon of 9 October 1979 a number of the defendant's senior officials decided, as a matter of urgency, that the defendant would build a furnace for the purpose of normalising large steel plates. Fokker was appointed the leader of the project. Van der Veen was asked to assist with the design of a top hat furnace with twin bases which was required to be in operation within a few weeks.

(6) Van der Veen works for a firm that installs refractories in furnaces. Van der Veen

was

was not a furnace designer. He had never before designed a top hat furnace, or a furnace using a ceramic blanket as a base, or a furnace with flues exhausting through the base.

(7) During the night of 9 October 1979 Van der Veen made detailed calculations of the new furnace. He was assisted by Vermaak who was in charge of the defendant's drafting office. Fokker and Allison joined Van der Veen during that night.

(8) On the morning of the very next day, 10 October 1979, which was a public holiday, a team of the defendant's senior officials paid a visit to the plaintiff's premises, where some of them carried out an inspection of the Harchris furnace which lasted at least for one hour. The visiting team

included

included Fokker, Allison and Vermaak.

(9) Within the short period of 18 days thereafter the defendant managed to design and build the ZD, a top hat furnace for the purpose of normalising large steel plates. The defendant claimed this feat as a world record.

(10) The ZD bore a striking resemblance to the Harchris furnace and embodied those features of the latter enumerated by the trial Court at 550C/F of its judgment.

It is against the background of the basic facts that the evidence of Fokker and Van der Veen has to be assessed. Taken together the basic facts, in themselves, are readily susceptible of an inference that the ZD was copied from the Harchris furnace.

Before considering whether the trial Court

rightly

rightly rejected the testimony of Fokker and Van der Veen it is convenient to see whether the trial Court was correct in preferring the views expressed by the plaintiff's expert witnesses to those of Koinis. As is pointed out by our brother JANSEN the trial Court accepted the opinions stated by Dr Allen (see the reported judgment at 550H-551A/B) and rejected those of Koinis (for the reasons set forth at 554D/F).

Dealing with the expert evidence in the case JANSEN, JA observes in his judgment "that little appears on the record to show undue bias on the part of Koinis". In our view, however, the record of the proceedings provides abundant evidence to indicate that the trial Judge's strictures on Koinis were well-founded. The fact that in 1979 no furnace similar to the Harchris furnace was known to exist anywhere was a fact that Koinis conceded with marked reluctance and only after much prodding in cross-examination. The reason for the studied reluctance on

on the part of the witness is not far to seek: such a concession is logically irreconcilable with the evidence of Koinis that the concept embodied in the ZD was so obvious that to hit upon it would require no more than a few seconds. To demonstrate the unsatisfactory quality of the testimony of Koinis it is necessary first to quote at some length from the evidence of Allen, whose independence as an expert witness was not questioned in the Court below. In regard to the ZD Allen in his affidavit in the anterior motion proceedings expressed the view that:-

"....it would have been impossible for the Respondent" (the defendant) "to develop, design and build such a furnace as is referred to in the brochure in the short period of time claimed by the Respondent without reference to an existing design and concept."

In his written report, which he confirmed in his evidence, Allen analysed the salient features of the Harchris furnace (these features are summarised in the reported judgment at 550C-F and quoted in the judgment of JANSEN, JA). Allen

then

then went on to say -

"Although the principle of the Top Hat furnace is not new, and the tape controllers, high velocity burners and ceramic fibres used by the Plaintiff are generally available in the open market, it is in a summation of those parts, coupled with the design features such as take-off flues, locating devices, chromite sealant, which makes the Plaintiff's furnace unique. No other furnace of its type is known to exist."

When this part of his report was put to Allen in evidence

he commented as follows:-

".....there was at that time no other furnace in the world that consisted of all these various features using ceramic fibre insulation and high velocity burners. It is as simple and straightforward as that."

And again:

"Would you agree that the process of developing and designing such a furnace involves the expenditure of mental skill, expense, time and experimentation?----- Yes I certainly would

.....
Now in designing a furnace there are a number of choices which are open to a designer, would you agree with that?-----I would agree, yes.

Now

Now are all those choices obvious choices?---
Certainly not."

Dr Allen was examined on the resemblance between the
Harchris furnace and the ZD. His evidence then proceeded
as follows:-

".....I find it quite incredible that two
furnaces should appear in South Africa within
a few miles of one another and within a time
scale of a few weeks of one another. We
know already that the Preston furnace was
being developed for a considerable length
of time and yet within the number of three
weeks, I think it was, or four weeks, of
Isacor personnel seeing that furnace we had
another furnace similarly on the market
and you know these were the only two
furnaces of this type that were known to
me. That is why I find it a rather, it
seems to me to be much more than a
coincidence in this particular case."

Elaborating on para 8(c) of his report Allen remarked:-

"Well

"Well the concept of the" (Harchris)
"furnace as envisaged by Harry Preston was
to utilise a top hat furnace and together
with ceramic fibres and high velocity burners
which fired above the load. This obviously
necessitated taking the exhaust gases through
the base and to control the furnace in such
a way that he could achieve greater economy
and also flexibility in his particular
business. That is the way I would see
the sort of concept of that furnace."

In cross-examination of the witness it transpired that

Allen had visited the plaintiff's premises by chance

before there was any prospect that he might be called as a

witness

witness in the case. He recalled his impressions of that visit in the following words:-

"Well I was quite amazed that there was such a furnace in existence and I recollect telling Mr Preston so and saying that he must feel quite proud to have achieved thisbreakthrough in the context of his particular company."

In stark contrast with the evidence of Allen the defendant's expert witness Koinis sought throughout to negate the notion that there was anything unique in the concept of either the Harchris furnace or the ZD. (As to the ZD it may be mentioned in passing that, as will emerge later in this judgment, this denial by Koinis conflicts with a claim advanced by Fokker in his evidence that the ZD was in fact unique.) The relevant passages in the evidence of Koinis are the following:-

"Mr Koinis do you consider that the Harchris No 15 furnace is in any way unique or novel or startling in either engineering or its design?
----- No.
It may just be a matter of semantics but how would you define 'concept' in relation to furnace engineering and design? ----- I do not think a

list

list of several items is a concept. In my opinion that is a collection. A concept is an idea of how you are going to do something and those items listed do not become a concept until they are placed in the furnace in a manner to execute the task set for them. In the case of the 2D furnace that concept is the burners alternately firing across the furnace to establish a circulatory pattern in the vertical plane so that gas can be recirculated back through between the plates in order to heat them properly. The other portion of the concept is the three zones in which separate and individual control is given to each zone to take care of the effects of non-uniform loading so that the furnace can all be brought up at a uniform temperature

How long would it take you to decide upon first of all the concept as defined by you?

----- It would take a very short time, a few minutes, several seconds. You really do not have many choices, especially with the thirty day limitation.

Alright. Now how long would it take you to decide upon the following collection of features, a top hat, the ceramic fibre lining with high velocity burners firing above the load, flues in the base, more than one base and a chromite sand seal with locating pins at the ends?----- Well that would not take very long either, not any longer than it takes to make a quick sketch to define your idea of the concept.

Alright. Now having been given those parameters you as a designer or an engineer and

designer,

designer, sets about engineering a furnace. What in your opinion would the furnace which you would design look like? ----- For plate it would be rectangular in shape, the width and length would depend on the width and length of the plate plus a short distance for clearance at each end, the height would depend upon the height of the plates plus a space above for locating the burners and permitting firing of the burner without possible damage to the plates, that is a configuration that would ensure that there is no flame impingement or hot products in contact with the plate.

The ZD furnace, would your furnace look different to that? ----- No I think it would look just like that."

The gross exaggeration reflected in the above evidence speaks for itself. Next attention should be focussed on the manner in which Koinis dealt with the two major differences between the Harchris furnace and the ZD, i.e. the presence in the ZD of cross-firing burners and the three temperature zones. (These are referred to in the passage of the judgment of the trial Judge at 553A-D which is also quoted in the judgment of JANSEN, JA.) Ignoring the

the other attributes common to the Harchris furnace and the ZD Koinis fixed upon these two features of the ZD and put them forward as embodying the "concept" of the ZD; a position from which he would not budge in cross-examination:-

"You see Mr Koinis you chose the two differences, the two aspects in which the ZD furnace differs from the plaintiff's furnace and identified that as the concept of the ZD furnace. Now is that really your impartial professional opinion?
----- Yes it is."

It is hardly surprising that Koinis found himself in serious difficulties in cross-examination. A few examples will suffice. Having been closely questioned about the operation of the cross-firing burners in the ZD, the following passage in his evidence is to be found:-

"Well Mr Koinis that sounds very nice in theory but you do not know whether that works in practice do you? ----- Well as I said I have seen some charts the last couple of days that indicate it works fairly well. I works very well in fact.

This particular firing arrangement? ----- Yes.
I see. And did you know any of this in October 1979? --- In October 1979?

Yes? ----

Yes? ----- No I did not. I did not know anything about this in October 1979."

So much for the ~~assertion~~ that he would have hit upon the concept of the ZD within a matter of seconds. Later in his cross-examination the answers of Koinis were rather more tentative than they had been during his evidence in chief:-

"Now in the light of what you have said I want to suggest to you it does not necessarily follow that the furnace designer, given the facts that you stated, would have designed a furnace similar to the ZD furnace? ---- Well the features of the ZD furnace had nothing to do with the facts that were given to the designer.

Mr Van der Veen? ---- To Mr Van der Veen.

.....
The designer would not necessarily design such a furnace with those facts? Not so? ---- Well Mr Van der Veen's decisions were based on his knowledge of the art, his cognisance of what other people were doing, the magazines he reads, the other furnaces he has worked on or redesigned or rebuilt.

Yes well that is not an answer to my question. I am not really interested in Mr Van der Veen as such and I do not want you to speculate about what knowledge he has. The

question

question was Mr Koinis that the designer would not necessarily choose this very furnace or one similar to it? ----- Which furnace are you talking about?

The 2D furnace? ----- No I think the 2D furnace is a logical conclusion from the statement of the problem and the facts available.

Yes but not the only conclusion Mr Koinis is it? -----Well that is a matter of opinion of course but it was a good conclusion that does the job."

On the critical question whether he knew of the existence of a similar furnace anywhere else the answer initially given by Koinis was distinctly cagey:-

"You also have not mentioned in your evidence-in-chief Mr Koinis that you were aware of anyone who used furnaces of the top hat configuration in October '79 for normalising and tempering? --- Oh I cannot say, I have to think about that, whether in my experience I know of people that have used that type of equipment. I would have to review my experience which goes back thirty years and on the spur of the moment here I cannot answer that one way or the other."

Much

Much later in his evidence Koinis was nevertheless constrained to make the concession sought by counsel. During cross-examination affecting the combination of features comprised in the Harchris furnace as set forth in the plaintiff's further particulars, the truth finally emerged:-

"You have not said Mr Koinis that as at October 1979 you had seen a furnace which combined the features referred to in paragraph 2.7? -----No I cannot say that I have."

In our view the learned trial Judge had ample reasons for concluding that Koinis was not an unbiased witness and for preferring the views expressed by Dr Allen. There is no room, so we consider, for this Court to come to a different conclusion on the point. The passages from the evidence of Koinis quoted above by no means exhaust the examples of the unsatisfactory nature of his evidence. A single further illustration may be mentioned because it bears on an aspect of Van der Veen's evidence which is discussed in the judgment of JANSEN, JA. One criticism of Van der

Veen's

Veen's evidence mentioned by the trial Judge (at 553 G-H) related to Van der Veen's inability to explain how he had arrived at a height of the ZD which happened to correspond to that of the Harchris furnace. JANSEN, JA questions the validity of this criticism on the basis of the following supposition made in his judgment:-

"The true explanation why Van der Veen could not clarify this dimension seems much rather to flow from his inability to remember the number and the proposed spacing of the plates which would constitute the load, than from an uncritical and slavish adoption of the height of the Harchris furnace."

During part of his cross-examination which extends over some eight pages of the record Koinis found himself unable to relate Van der Veen's own calculations to the height of the ZD, saying that there "was some misunderstanding on some of these details." Upon making his own calculations Koinis discovered that in fact the ZD was too high; a conclusion in conflict with his earlier evidence that he would

would have constructed the ZD to the same height. In the end, and after much prevarication, Koinis flatly refused to take a firm stand on the question on whether or not he would have made the ZD lower. Looking cumulatively at the unsatisfactory evidence of Koinis and Van der Veen on this score the effect is twofold. It provides further justification for the trial Judge's general criticism of Koinis. At the same time it shows that the hypothesis propounded by JANSEN, JA cannot serve to refute the trial Court's criticism of Van der Veen's evidence on this point. So much for the evidence of Koinis. He was described by the learned trial Judge as a witness whose qualifications were beyond question but whose impartiality was not (at 554D). On the record before us we find ourselves impelled to exactly the same conclusion.

We consider next the quality of Fokker and Van der Veen as witnesses. A convenient starting-point is supplied by one of the basic facts already mentioned: that

on

on 9 October 1979 a number of the defendant's senior officials decided to build a furnace for the normalising of steel plates. This is a factor of considerable importance in the whole case because it bears directly upon the answer to the critical question: what was the real motive which prompted the visit by Fokker and others to the premises of the plaintiff on the following day? The fact that a decision to build the furnace was taken on 9 October 1979 is in accordance with a finding of fact by the trial Judge (at 552 D-E). As will presently appear it is likewise consonant with a number of passages to be found in the earlier evidence of Fokker. However, in pondering the probable reason for the visit to the plaintiff on 10 October 1979, the judgment of our brother JANSSEN proceeds from the following premise:-

"Fokker's mandate as a result of this 'dinkskrum' the previous afternoon was not only to investigate the building of a furnace but also

to

to determine finally the prospects of Harchris meeting Iscor's requirements."

It is true that there are passages in Fokker's later evidence to the effect that the decision to build a furnace was subject to a final investigation of the prospects that the plaintiff would be able to meet the defendant's requirements; but it is clearly implicit in the judgment of the trial Judge that he rejected this part of Fokker's evidence (at 554A-D). This at once raises the question whether this Court should accept Fokker's evidence on a matter of fact in regard to which he was disbelieved by the trial Judge. The answer to this question necessitates an analysis of Fokker's evidence as to what was decided on the afternoon of 9 October 1979; and, flowing from that, an investigation of the real reason underlying the visit to the plaintiff on 10 October 1979. Initially Fokker's version was that on the afternoon of 9 October 1979 an

unqualified

unqualified decision was taken to build a furnace. It was only at a fairly late stage of his evidence that he stated explicitly that the decision had been provisional and subject to an appraisal of the capacity of the defendant's facilities to satisfy the defendant's needs. Taken as a whole Fokker's evidence leaves a distinct impression that his subsequent description of the decision on 9 October 1979 as being subject to reservation or limitation was an afterthought devised to bolster up his explanation for the team's visit on 10 October 1979. Much of his evidence on this point is equivocal. One begins with the affidavit made by Fokker in answer to the motion proceedings initiated by the plaintiff which preceded the action. The affidavit contains the following averments by Fokker:-

"Because of the critical position in which the Respondent found itself, a management meeting of the Respondent was called on October 9, 1979 to discuss various ways of solving the problem. The problem was more acute because the shortage of this material was already affecting projects of strategic and national importance, namely,

the

the Koeberg Power Station, Sasol II and III and the Drakensberg Pump Storage Scheme. The decision to build a low-cost furnace was taken. The decision to build a new furnace had to be justified to the Respondent's Board. As the Applicant's Top Hat furnace was not yet in operation, I had to make a final assessment on the prospects of it coming into operation on a successful basis and whether the crisis situation could ever be alleviated by the Applicant. It is for this reason that senior managers were sent to visit the Applicant on October 10, 1979 and to make absolutely certain, in their own minds, that there was no chance of the Applicant managing to normalize the plates to the standards required by the Respondent, and furthermore to make final assessment of the plates already normalized by the Applicant. The assessment of the group that visited the Applicant confirmed that the decision taken on the previous day was the correct one. This information was needed to complete the motivation to the Respondent's top management to build a furnace."

It is to be observed that the tenor of the above statements in Fokker's affidavit is crystal clear: the decision to build a furnace taken on 9 October 1979 was a final one; the visit to the plaintiff on 10 October was intended only to enable adequate grounds to be stated to the defendant's

top

top management in vindication of the final decision.

Fully consistent with the finality of the decision on

9 October (subject only to formal approval by top manage=

ment) is the detailed circumstantial account of the events

in question to be found in Fokker's evidence in chief:-

"Op 9 Oktober is daar in beginsel tot die besluit gekom dat ons moet kyk of ons self=voorsienend kan wees Hierdie besluit is deur die werkebestuurspan van Vanderbijlpark geneem Wie was die sameroeper? ----- Die hoofwerkebestuurder mnr Riddell

..... Hy het navraag gedoen ten opsigte van die posisie by Harchris. Dit is aan hom verduidelik dat daar groot twyfel bestaan of Harchris plate wel in die toekoms sal kan normaliseer. Daar is oorgegaan in die vorm van 'n dinkskrum en uit hierdie vergadering het ek die opdragte gekry om ondersoek in te stel om 'n dopoond of 'n waherdoond daar te stel en te kyk wat die beste gaan wees, wat gaan die maklikste, wat gaan die gouste wees. Wel, ek is direk na die vergadering na my kantoor toe en ek het begin dink dat ek het hier 'n groot opdrag wat ek moet uitvoer en my eerste gedagte was gewees om vir Dickinson en Seuns te bel aangesien hulle vir ons heelwat werk op oonde in die verlede gedoen het

Het

Het u toe mnr Van der Veen in die hande gekry? --- Wel, hy het my teruggeskakel hy het toe na my gekom in my kantoor en ek het die twee moontlikhede aan hom gestel, dat ons dink daaraan om 'n waherdoond of 'n dopoond te bou, dat ons hierdie oond in bedryf wil hê in die periode van 'n maand, dat dit vir ons strategies van belang is

.....
Mnr Van der Veen het die besliste voorstel aan my gemaak dat ons hoef nie eers na die waherdoond te kyk nie, want dit gaan vir ons veel moeiliker wees om komponente bymekaar te kry as wat dit sal wees vir 'n dopoond.

Wat u nou net van getuig het, is die besluit op die tipe oond was Van der Veen s'n? ----
Van der Veen in samewerking met my en die persone wat teenwoordig was in die vergadering

.....
Nou goed, tot hoe laat het julle vergader op hierdie geleentheid? --- Die tyd sal ek u nie kan sê nie, want ek onthou dat mnr Van der Veen gesê het as dit die opdrag is wat hy het beter hy loop. Dat hy gou kan gaan kyk wat hy kan doen Ek het die res van die aand saam met my mense na
plasingsmoontlikhede gekyk vir so 'n oond
toe ek die taak by die werk afgehandel het, is ek na mnr Van der Veen se huis toe en vir hom gevra hoe ver hy is, is dit 'n moontlikheid, wat is die vooruitsigte en ek was verbaas gewees om toe te sien dat hy het klaar 'n berekening gedoen

Hoe

Hoe laat was dit min of meer? ---- Wel, dit was laat in die nagAs dit nie na middernag was nie.Toe is ek huis toe.

Nou, die volgende dag, die 10dehet u Harchris se werke besoek? --- Dit is korrek ... Ek was vergesel gewees van mnr Allison, mnr Theron en mnr Vermaak.

Wat was die doel van u besoek gewees? --- Die doel was tweeledig gewees. Die eerste doel was gewees om 'n finale aanslag te maak van die moontlikheid van Harchris om plate suksesvol te kan normaliseer, op daardie stadium en in die onmiddellike toekoms, en dan wou ek ook, het ons 'n finale inspeksie gaan doen van die plate wat by Harchris reeds genormaliseer was. Op daardie stadium was feitlik alle plate wat aan Harchris gestuur was vir verwerking reeds nog by Harchris self gewees.

Ons het gehoor dat mnr Allison die aand van die 9de blykbaar die reëlings gemaak het vir die besoek? --- Dit is korrek. Ek het hom gevra om die reëlings te maak, want mnr Allison het voorheen kontak gehad met die Harchris-manne. Ek het dit nie gehad nie.

Op watter stadium het u hierdie opdrag aan Allison gegee? Was dit voor die eerste vergadering, mnr Fokker, of daarna? ---- Nee, dit was daarna.

Was daar een of ander soort van voorlegging wat u nog moes doen aan die topbestuur van Yskor? ---- Ja. Dit word van ons verwag wanneer ons enigsins kapitale uitgawes aangaan dat ons 'n motivering vir topbestuur moes opstel

Ons

Ons het 'n mondelinge voorlegging gedoen en die voorlegging wat ons gedoen het, het gegaan daaromtrent dat die bevinding is dat Harchris nie in staat sal wees om plate vir Yskor te normaliseer nie, dat ons verder agteruit sal gaan ten opsigte van afleweringe aan klante en dat dit vir ons noodsaaklik is om self fasiliteite daar te stel en op daardie stadium het ek alreeds 'n syfer gehad van wat ons kan dink die kapitale uitgawe sou wees. Ek dink die syfer was in die orde van R168 000 wat toe genoem was op die stadium.

Daar was nie probleme dat geld beskikbaar was nie? --- Ons het glad nie oor geld gepraat nie. As ons moes oorgaan na boeteklausules was hierdie kleingeld gewees.

Is u toe die volgende dag na Harchris, vergeesels van die here wat u nou net genoem het? --- Dit is korrek."

In the long passage just quoted there is no suggestion by Fokker that the decision on 9 October to build a furnace was anything but final, or that it was subject to a final assessment of the Harchris facilities. The same emphasis on the finality of the decision is to be found a little later in Fokker's evidence:-

"Op

"Op 9 Oktober was daar twee vergaderings gewees. Die eerste vergadering was van die bestuursplan waarvan ek die name gister gegee het. Dit was in die vorm van 'n dinkskrum gewees. Op hierdie vergadering is daar toe ooreengekom dat ons hettwee opsies oop, òf 'n dopoond òf 'n waherdoond. Daarna het ek in my kantoor 'n tweede vergadering belê met my eie personeel. Twee name dink ek wat ek gister nie genoem het nie wat op hierdie vergadering teenwoordig was, was mnr Willie Botha en mnr Johnny Allison en dit was die vergadering wat toe gehou is saam met mnr Van der Veen om finaal te besluit op een of die ander.

Was dit op daardie tweede vergadering op die 9de dat in beginsel besluit is oor die tipe oond wat ontwerp moes word? --- Dit is korrek."

Very shortly after the commencement of Fokker's cross-examination he gave an answer precisely to the same effect :-

"As I understand your evidence on 9 October 1979 Iscor was in a state of crisis in connection with its normalising? --- Dit is korrek.

And they therefore took a decision to build a new furnace? --- Dit is korrek.

And I put it to you that the reason why you decided to build a new furnace was that none

of

of your existing furnaces would meet your requirements? ---- Dit is ook korrek.

Including your top hat annealing furnaces?
---- Dit is korrek."

Shortly afterwards in cross-examination came Fokker's volte face. For a proper appreciation of Fokker's demerits as a witness it is necessary to quote at some length from the passages reflecting his change of front in connection with the finality of the decision taken on

9 October:-

"So, are you telling us that on 9 October when this meeting took place you had no idea that Harchris was working on a top hat furnace for normalising? --- Op die vergadering was dit genoem gewees. Dit was deur mnr Hoffman genoem gewees dat Harchris besig is met 'n oond, maar ek het geen idee gehad van watse oond of hoe groot of watse oond dit is nie

Had Mr Allison not mentioned the furnace to you? --- Dit mag wees dat hulle met my gepraat het, maar dat dit by my geregistreer het, kan ek dit nie sê nie.

Allison works under you, doesn't he? ---
Heeltemal korrek.

And

And he is responsible to report to you? ---
Dit is reg.

And yet as far as you can remember Allison made no report to you about Harchris's top hat furnace? --- No detailed report.

Well, a detailed report is one thing. Did he report to you about that furnace? --- Ek kan werklik nie onthou nie

So, did you discuss the bad results that you had had from the Harchris ...? --- Dit was bespreek.

So, at that meeting it was an accepted fact that Harchris had performed very badly? --- Dit is reg.

And the meeting proceeded on the basis that Harchris would not be able to assist Iscor...? --- Nee.

In this time of crisis? --- Nee, dit is nie korrek nie. Soos ek reeds gesê het een van die dinge wat my opdrag was, was om 'n finale aanslag te maak van Harchris se toerusting en om te sien is daar enige moontlikheid of Harchris in 'n kort tydperk in 'n posisie sou wees om Yskor se situasie te kon verlig.

Now, when did you say that? --- Gister.

I do not remember that being part of your mandate? --- Ek het gister gesê ek het op die lode na Harchris gegaan met 'n tweeledige doel. Die een deel van die doel was gewees om 'n aanslag te maak oor hulle toerusting en die tweede deel van die doel was om te kyk na die Hubert Davies-plate.

No,

No, I remember you having said that. What I did not remember was that it was part of your mandate given to you at that meeting..? ---
Ek verstaan nie die woord 'mandate' nie.

Your instruction. It was not part of your ...
---- Dit was deel van my opdrag.

To go to Harchris? --- Dit is reg.

And were you told to go to Harchris for those two specific purposes? --- Dit is reg
.....

So, before the 10th we have this situation:
You have had reports in writing about the plate that had been normalised which showed unsatisfactory results? --- Dit is korrek.

In great detail? --- Dit is korrek.

Hoffman had previously been to talk to them, to Harchris, about it and to find out what they could do? --- Dit is reg.

And yet you still found it necessary to go and look at those plates? --- Dit is reg
.....

So, you knew what the condition of the plate was before you went? --- Dit is reg, dié wat ek verslae op gehad het. Op daardie stadium het ek nog nie van almal verslae gehad nie.

Well, of how many did you have? --- Ek is nie seker daarvan nie.

What exactly was decided at the end of the meeting of the afternoon of 9 October? What was the decision of the meeting? --- Die

besluit

besluit van die vergadering was gewees dat
 ondersoek ingestel moet word na die moontlikheid
 om 'n eie fasiliteit daar te skep en ook dat daar
 moet 'n finale aanslag gemaak word van Harchris
 se posisie en verder was daar besluit ons moet
 poog om die plate wat wel gedoen is nog
 aan die klant te verkoop.

So, the decision was to investigate the
 possibility of increasing your facilities? ---
 Dit is korrek, deur gebruik te maak van òf 'n
 dopoond òf 'n waherdoond.

Didn't you actually take a decision at that
 meeting actually to build a furnace? --- Die
 vergadering is nie in staat om dit te doen nie.
 So 'n besluit kan alleenlik deur die hoofkwartier
 geneem word

Laat ek dit so probeer verduidelik: Enige
 kapitaalprojek wat ons aanpak, moet ons motiveer.
 So, daar was besluit gewees dat ons hierdie
 moontlikheid moet ondersoek en dit dan motiveer,
 as ek dit so mag stel.

Did you at that meeting decide that if 'hoofbestuur'
 agreed you would build a low cost furnace? ---
 Ek volg nie die vraag nie.

Did you agree at that meeting that if 'hoofbestuur'
 or whoever had to authorise it, would agree you
 would build a low-cost furnace? --- Nee. Daardie
 besluit was nie geneem nie. Soos ek gesê het
 daar was twee dinge. As dit moontlik was vir
 Harchris om plate suksesvol te normaliseer sou
 ons en was ons bereid om vir Harchris by te
 staan om die plate suksesvol te normaliseer,
 maar nadat ons op die lode gesien het dat Harchris
 sal nooit 'n plaat kan normaliseer nie, het ons
 besluit dat ons ons oond gaan bou.

So,

So, are you telling us that at the end of your management meeting of 9 October, in the afternoon, you did not take a decision to build a low-cost furnace? --- No, it was not a final decision to build. It was a decision to investigate

So, before you could come to your decision you say you had to make an investigation of Harchris?
---Dit is reg."

That Fokker's evidence was glaringly unsatisfactory is sufficiently indicated by the extracts from the record quoted above. It is clear, in our opinion, that in many respects he was an untruthful witness. This conclusion is underscored by the fact that later in his evidence, when questioned as to what was said to Van der Veen when the latter arrived at his office on 9 October, Fokker half-heartedly reverted to his original stand:-

"What did you tell Van der Veen when he arrived at your office? --- Ek het hom van ons agterstandprobleme vertel op die voorsiening van genormaliseerde plate En ek het hom verder ook vertel dat ons reeds onder mekaar besluit het dat ons 'n lottipe oond wil installeer en die oond wat ons in gedagte het, is 'n waherdoond of 'n dopoond op daardie stadium.

Did

Did you tell him you had come to that decision? --- Dis is reg.

You did not tell him it is only in principle, did you? --- Ek is nie seker daarvan of ek dit gesê het nie."

And finally, in relation to the issue under discussion, the following passages in Fokker's evidence are significant:-

"Now, do you accept that you were shown the top hat furnace in connection with the contract which had been entered into between Iscor and Harchris? --- Nee.

Was there any other reason for you to have been shown that top hat furnace? --- Ek het gedink dat MacDonald wou graag besigheid vir sy firma inwin en hy het gespog met die toerusting wat tot hulle beskikking is.

But it was all in connection with the contract or the hope of getting a contract from you, wasn't it? --- Ek dink dit was meer 'n geval van 'n hoop vir 'n verdere kontrak.

But it was also in connection with the existing contract, wasn't it? --- Nee. Die huidige kontrak het net gegaan oor die putoond by Harchris.

It was expected and hoped that when the top hat came into commission further work would be forthcoming, wasn't it? --- Dit is seker wat Harchris gedink het.

And that is one of the reasons why you went there, to see whether in fact you could give them further work, isn't that right? -----

Ons

Ons het gegaan om, soos ek sê, 'n aanslag te maak en was hulle suksesvol sou hulle wel verder werk gekry het, maar dit moet by gesê word dat die hoeveelheid afkeurings tot op daardie stadium is totaal onaanvaarbaar in enige man se terme.

Well, I am going to put it to you that in fact by 9 October you were pretty damn sure that Harchris could not do the job? --- Nie in sy volheid nie.

The results were according to you so bad that Harchris could not do the job, I am putting to you? --- Ja, maar ek aanvaar dit nie so nie omdat ek gesê het ek nie geweet het wat hulle in die proses doen nie en ek wou seker gaan maak wat doen hulle in die proses. Dit is dalk 'n kleinigheid wat net reggestel moet word en dan kan hulle die plate suksesvol gedoen het

.....
Would you turn in your affidavit to page 132

.....
That is the meeting of 18 September, isn't it? --- That is right.

.....'It soon became clear to the respondent that the applicant did not have the necessary expertise to maintain the standards required by the respondent'

Heeltemal reg.

'It was also clear that the applicant could not normalise any of the respondent's steel plate of under 60mm thickness.'

Dit is korrek.

'Since the production section of the respondent bears the terminal

responsibility

responsibility for the product, Mr Allison was called in by the technology and quality assurance division of the respondent when reports of repeated failure to conform to the required standards were made.'

Heeltemal reg.

You agree with that? --- Yes.

So: it very soon became apparent that Harchris could not do this work? --- Ek dink u is reg.

And I put it to you that it was not necessary for you to go to Harchris on a public holiday in order to investigate plates in respect of which you already had written reports? --- Dit was nodig gewees om te gaan en dit was nodig vir die rede dat ek moes terugrapporteer aan die hoofwerkbestuurder wat dan op sy beurt weer aan hoofkwartier sou terugrapporteer of ons van ons kant af totaal seker gemaak het en oortuig is daarvan of Harchris kan plate normaliseer, ja of nee."

On all the evidence indicated above the trial Judge was fully entitled to reject as false Fokker's assertions that the decision to build a furnace taken on 9 October 1979 was subject to a final assessment of the plaintiff's facilities. Equally unacceptable, in our view, is

Fokker's

Fokker's claim that an inspection of the plaintiff's premises on 10 October was necessary in order to justify the decision to build a furnace to the defendant's top management. The trial Judge found (at 554B-C) that the state of affairs existing at the plaintiff's plant must then have been fully known by the defendant; and such finding is fully borne out by the evidence of Fokker, as appears from the extracts from his evidence already quoted. Fokker's explanation that since he was ultimately responsible he had to go and see for himself is quite unconvincing. There are further strong pointers leading to the conclusion that Fokker's explanation for the visit on 10 October is unworthy of credence. These are to be found in a survey of his evidence relating to the inclusion of Allison and Vermaak in the visiting team; and to his professed lack of interest in the Harchris furnace.

It is clear, we consider, that Allison played an important role in the decision as to how the plaintiff's problems

problems were to be resolved." According to Fokker Allison "was also tied up with this heat treatment of steel," and Fokker used him in a specialised field to carry out experiments in connection with the normalisation of steel:-

"Ons het in die probleem geraak ten opsigte van normalisering en aangesien hy nie toe in sy huidige funksie gefunksioneer het nie, het ek hom verder gevra om verskeie oonde, toetse te doen ten opsigte van normalisering van plate en dit is hoe mnr Allison hierby betrokke was."

As was pointed out by the trial Judge (at 552A-B), Allison had visited the plaintiff's premises a week before 10 October 1979 and he was very impressed with the Harchris furnace. Allison was present during the meeting with Van der Veen in Fokker's office on 9 October; and later that night Allison accompanied Fokker on a visit to Van der Veen. Not surprisingly the trial Judge mentioned (at 554C) the significance of Allison's examination of the Harchris furnace on 10 October. It is true that Allison

was

was due to go to hospital on the following day; but Vermaak was a party to the inspection of the Harchris furnace, and it is obvious that Allison and Vermaak worked together on the inspection. Indeed, although no mention hereof is made by the trial Judge, Vermaak's inspection of the Harchris furnace has even greater significance than that of Allison. Fokker said of Vermaak that the latter was going to be in charge of the drawings relating to the project of the new furnace. Vermaak was present during the meeting with Van der Veen on 9 October, and in fact on that same night he went to Van der Veen's house in order to assist him in planning the project. Against this background Fokker's attempts during his evidence to play down the roles of Allison and Vermaak in the project, and the significance of their presence during the visit on 10 October are quite unconvincing. Bearing in mind (1) the crisis that the defendant was facing, (2) Allison's experiments in heat treatment processes, (3) Allison's high opinion

opinion of the Harchris furnace and (4) the fact that Allison was working under and responsible to Fokker, Fokker's version that he was unable to remember whether Allison had made a report to him about the Harchris furnace is thoroughly improbable and palpably untrue. The extent to which Fokker was evasive in regard to what Allison told him in regard to the Harchris furnace is reflected in the following passages of Fokker's evidence:-

"Who reported to you about that furnace of Harry Preston. You said 'dit was gerapporteer aan my'. Who reported to you about it? --- Allison.

And he gave you no details at all? --- Nee.

He just said old Harry Preston is building a furnace? ----- Ek dink u verstaan die ding in die verkeerde konteks

Ons het die slegte resultate gekry en Allison het vir my gesê man, hulle is besig om 'n ander oond te bou wat hulle kapasiteit kan opstoot wat moontlik 'n beter produk kan lewer en dit is sover as wat ek in enige oond op daardie stadium belang gestel het. Ek stel nie verder in die ding belang nie.

Even though you were in a state of such crisis you did not ask Allison for details? --- Nee.

You did not ask him if he thought it could work? --- Nee ek het dit nie vir hom gevra nie, want Allison is nie in daardie

veld

veld nie. So, dit sou vir my verkeerd wees om vir hom so 'n vraag te vra.

It would have been wrong of you to ask him?
--- Ja.

Why wrong? --- Omdat hy nie in daardie tegniese veld is nie."

Again the record speaks for itself. We are satisfied that this evidence cannot be true. The same observation applies to Fokker's evidence that his reason for taking Allison with him to the plaintiff's premises on 10 October was in order that Allison might show him the way and perform the task of introducing him to the people at Harchris. Totally unconvincing, in our judgment, was Fokker's explanation that Vermaak was a member of the visiting team because of an uncomplicated drawing which had to be executed of a lifting beam:-

"Do you have a number of people at work in your drafting department at Iscor? --- Ja.

And anyone of them could have executed that drawing? --- Ek glo enigeen sou dit wel gedoen het

Now, why was it necessary to take the chief draftsman to Harchris for this purpose? --- Ek dink dit kom daarop neer dat enige senior

amptenaar

amptenaar van 'n organisasie sal nie die laagste amptenaar saam met hom neem nie

But wasn't Vermaak helping Van der Veen? --- Hy het die vorige aand, het hy by Van der Veen gewerk, ja.

I see, the next day he did nothing for Van der Veen? ----- Nee die volgende dag het hy die tekenaars aan die gang gesit. Die tekenaars was aan die gang."

Last but not least, on this aspect of the case, it should be said that in our view Fokker's professed lack of interest during the inspection of the Harchris furnace on 10 October is transparently untrue:-

"So, do I understand you to say that you did not make a very detailed inspection of the furnace? --- Nee.

You did not? --- Nee.

Why not? --- Ek het dit nie nodig geag nie.

Why not? Why was it not necessary? --- Ek kon mos sien dit is 'n dopoond wat daar staan. Ek het na die oond gekyk en in my eie agterkop sal ek sê is dit geklassifiseer as 'n dopoond.

Well, having once classified that there is a top hat surface which was going to be used for normalising, weren't you interested in it? In the way in which it was manufactured, the way it was put together? --- Ek kan nie sê dat ek geïnteresseerd was daarin nie."

Having

Having regard to the drift of Fokker's evidence discussed above the conclusion seems unavoidable that he gave a false reason for the Iscor team's visit to the premises of the plaintiff on 10 October 1979; and that such explanation was rightly rejected by the trial Court. In our opinion the record reveals several other examples of Fokker's mendacity. Here it is convenient to refer to a particular one. It relates to whether the concept of either the Harchris furnace or the ZD was unique, an issue to which reference has already been made in dealing with the witness Koinis. The evidence of Fokker in this regard reads as follows:-

"Mr Fokker, you have said under oath in the motion proceedings that the Z.D. furnace is unique. Do you remember saying that? --- Ja.

And do you remember saying that no other furnace of its type is known to exist? --- Dit is korrek.

In sy totaliteit sal ek sê net soos wat Harchris in hulle eedsverklaring gesê het hulle oond is uniek, as hulle dit hulle kan aanmatig om te sê dat hulle oond is uniek, dan kan ek seer sekerlik my dit ook aanmatig

om

om te sê ons oond is uniek.

Do you concede then that Harchris's furnace was in fact unique? --- Nee

.....
Well, what is the difference between your furnace and Harchris's furnace that makes yours unique and Harchris's not? --- Ek glo dat ons het alreeds deur die verskille gegaan en as ek die Afrikaanse terminologie uniek gebruik, dan beteken dit dit is een van sy eie en as ek na die Yskoroond kyk en ek kyk na die Harchrisoond, dan sê ek die twee is nie dieselfde nie. Die Yskoroond is een van sy eie.

And the Harchris furnace? --- Ek is nie op hoogte om daaroor kommentaar te lewer nie.

So, you cannot dispute then that it is unique? --- Nee, ek sal dit nie bestry nie."

The next matter to be examined, which is also of vital importance in the case, is the question whether in his discussion with Van der Veen Fokker made mention of the Harchris furnace. Both Fokker and Van der Veen deny that any such mention was made. The trial Judge regarded their version as "highly improbable" (at 553E). In our view there can be no doubt that this assessment of the

the probabilities was entirely correct. In what manner Fokker sought to explain his failure to make mention of the Harchris furnace to Van der Veen will be indicated shortly. The cogency of that explanations falls to be considered in the light of a web of surrounding circumstances of which the following require particular mention:

(a) Iscor had had no experience of a furnace whose basic concept resembled that of the Harchris furnace; (b) Fokker did not know whether Van der Veen had ever designed a top hat furnace; and (c) Iscor was faced with a crisis which called for a speedy solution. In the light of these circumstances the reasons advanced by Fokker for his alleged reticence in this regard, far from being "eminently reasonable" (per JANSEN, JA), appear to us to be patently absurd. Again the record must speak for itself:-

"Did you go and see Van der Veen? --- On the 10th? Hm. ----- No.

.....

Did

Did you not think of telling him what you had seen at Harchris? --- Nee, dit het niks met hom te doen gehad nie.

.....
So, isn't it of interest to find out or to discuss what another man is doing in exactly the same type of furnace with exactly the same purpose? --- Ek het Harchris se oond nie so beskou nie ... dat dit vir dieselfde doel gebou is nie.

What did you see it that it had been built for? --- Ek het dit gesien as 'n oond wat deur - let us use the English word, a jobber - sal gebruik word."

And later in his evidence:-

"When did you give that status report to Mr Riddell?

On the 11th.

Of October? --- Yes.

Now as I understand you you regarded nothing as confidential, that was told to you? --- Dit is heeltemal korrek.

Is there any reason therefore why you should not have discussed it with Van der Veen?

--- Ja, daar is redes hoekom ons dit nie sou bespreek nie.

What are the reasons? --- Dit is gebruik by Yskor dat as ons 'n kontrakteur inkry of so dat ons vir hom die taak gee, maar in geen omstandighede sal ons vir hom sê so en so moet jy die taak uitvoer nie. Ons sal dat hy sy gang gaan en as ons met sy ontwerp nie

tevrede

tevrede is nie, dan eers sal ons samesprekings vra met die kontrakteur en samesprekings hou en veranderings aanbring waar ons voel dit is nodig.

Does that apply even in a state of national emergency? --- Ja."

Apart from the inherent implausibility of this explanation, it should be pointed out that it is contradicted by what Fokker himself says elsewhere. First, metallurgists were called in to give advice in regard to Van der Veen's task; and second, the defendant did in fact end up with a multi-purpose furnace which was at least partially suitable for "jobbing". The following passages in Fokker's evidence bear on these points:-

"Die berekenings wat mnr Van der Veen aan u oorhandig het, is dit berekenings wat binne u vak val, dat u dit kan verstaan en begryp of val dit wel buitekant u besondere vak? --- Ek sou sê dat dit wel tot 'n mate binne my vakgebied val, maar ek het ook van ander deskundiges van Yskor se kant gebruik gemaak om my by te staan Wel, ons het planne beraam hoe die siviele werk aan die gang kon kom. Die aand het ek

egter

egter weer 'n vergadering met mnr Van der Veen gehad. Ek het gevoel om my te steun dat ek graag 'n metallurg se opinie wou gehad het oor die berekeninge wat hy gedoen het en die vermoë van die dopoond. Ek het toe een van ons metallurge gevra om die vergadering by te woon. Dit was mnr Van Schoor gewees. Ek het ook mnr Filmalter by my gehad. Hy is superintendent van die bandwalswerk, maar hy het voorheen in ons verbrandingsafdeling gewerk. Hy was aan die hoof van die verbrandingsafdeling. So, ek het van sy kundigheid gebruik gemaak om die berekenings wat gedoen was na te gaan."

And later:-

"What else could you do in that furnace? --- I can normalize and I can temper.

Anything else? --- I suppose we can stress relieve with the furnace if it is necessary. We can also anneal with the furnace. I imagine that the furnace itself will be able to do all heat-treating processes, but it was not built for that purpose. It was built for the normalising and tempering of plate.

But at the end of the day you ended up with a multi-purpose furnace? --- No, I would not call it a multi-purpose furnace. The base was not designed for multipurpose conditions."

It remains to measure Van der Veen's worth as

a witness. A perusal of his evidence in the record

reveals

reveals that he too was in many respects a thoroughly unsatisfactory witness. In order to establish his proclivity to untruthfulness it is fortunately not necessary to embark upon a particularly minute examination of his evidence. We say this because on a matter of cardinal importance Van der Veen was guilty of a blatant falsehood which could only have been inspired by a deliberate intent to mislead the trial Court. In our opinion Van der Veen's untruthfulness on this crucial point by itself serves utterly to destroy his credibility as a witness.

For a proper appreciation of the magnitude and significance of the falsehood to which we refer it is important to sketch the setting in which it came to be uttered. Van der Veen was (as the extract from the record quoted immediately hereunder will show) almost vehement in his denial that no mention of the Harchris furnace had been made to him:-

"COURT:

"COURT: Mr Van der Veen perhaps I could put one question to you. Did anybody, on the 9th of October, or any subsequent stage mention to you that the plaintiff, the Harchris company, were busy constructing a top hat furnace? --- Under oath My Lord, no. Definitely not.

Never said a word about it? --- I am emphatic about that, nothing was mentioned to me."

However, despite the fact the ZD was the first top hat furnace he had ever designed, the whole tendency of Van der Veen's evidence in chief was calculated to convey the distinct impression that the idea embodied in the ZD presented nothing new or novel for him at all. So, for instance, at the outset of his evidence he explained to the trial Court that the work of his employers, J R Dickinson & Sons, involved "mainly building of furnaces, installation of refractories"; that he had prepared a list of some 80 furnaces "that we have done"; and that he had known about "the top hat type furnace over here, I would say since 1950". (Later in his evidence it transpired that Dickinson & Sons in fact

did

did not build furnaces; they merely installed refractories in furnaces built by others. But be that as it may.) The whole tenor of Van der Veen's evidence, simply put, was that he knew everything there was to know about a furnace such as the ZD. Thus, for example, he professed to have been able to visualise the concept of the ZD in the short time it took him to drive from the defendant's premises to his home on the night of 9 October 1979. This appears from the passage of his evidence quoted in the judgment of JANSEN, JA. It is in the context of this ostensible familiarity with the ideas embodied in the ZD furnace that Van der Veen told his huge falsehood. It is underlined in the following passage occurring at the end of his evidence in chief:-

"Now it is the plaintiff's contention in this case that the design features or the concept of the plaintiff's furnace for want of a better word has been stolen and incorporated in the Iscor furnace. What is your comment on that? --- It was not ... stolen. Nobody told me what to do, that was

entirely

entirely my concept as is.

Now would you describe the ZD furnace at Iscor as anything extraordinary? --- No.

We have built quite a, as a matter of fact we had built one at Usco possibly a few months before that very very similar in concept. I do have a drawing here if the court wishes to see it.

I have not seen the drawing so do not confuse me with more please. The technology, was any of it new or was it merely what was known at that stage? --- No I think it was generally known technology, readily available."

(Our underlining.)

In the passage of his evidence quoted above Van der Veen went out of his way to impress upon the trial Court his complete familiarity with the concept of the ZD on the strength of his participation in the building of the Usco furnace which was "very very similar in concept". The utter falsity of this evidence was easily demonstrated in a portion of the cross-examination of Van der Veen in which his demerits as a witness were glaringly exposed. It is necessary to quote the relevant passages at some length:-

"What

"What was the concept? --- The concept would have been a top hat furnace, basically a cover with a fixed base on the ground.

That is right, with burners firing above the load? --- Burners firing above the load, perfectly correct.

And exhausting through the base? --- Exhausting through the base because we wanted the products of combustion to go underneath the bottom plates.

Lined with ceramic fibre? --- Correct.

Well that is the concept is it not? --- Basically, yes.

Right. Now you went on to say that we had built one very similar to that in concept at Usco? --- Correct.

Now But I also said

Just a, I have not asked you a question yet.

When you say you built one I had the firm impression that you built the whole furnace? --- No not at all.

I beg your pardon? --- I said we, when I said we, I clarified that earlier, J.R. Dickinson & Sons, had built, installed the refractories, built the refractories.

Oh. So when you say you built the furnace you mean you installed the refractories? ---Correct.

Now that is a very different type of thing is it not? --- Correct.

.....
.....

Right. Now you specially mentioned the Usco furnace did you not? --- Right.

And

And you actually gratuitously brought the plans to Court? --- Right.

We assumed from that that the Usco furnace was the closest in concept to what you had done for Iscor? --- Not at all, not at all.

That is a mistake? ---That is a mistake.

.....
Now let me test with you how close that Usco concept was to the concept of the 2D. First of all did you yourself instal these refractories or did somebody else at Dickinson do it? ---

No somebody else at Dickinson's, obviously we supplied labour to instal.

Yes but you yourself had nothing to do with it?

--- No.

At all? --- No I visited site a few times.

You visited site a few times. But that was the sole involvement? --- Sure.

Your own involvement. Now tell me or tell the court rather where are the burners situate in the Usco furnace? --- The burners are situate at the bottom firing upwards over the top.

Right. When you say at the bottom you mean situate in the base? --- In the base.

Right. How many bases did it have? --- It had two bases.

Did it? ---It did. Two furnaces.

I beg your pardon? --- There was two bases there, two furnaces.

You mean there were two separate furnaces? --- Two separate furnaces, correct.

That

That means you installed refractories at Usco in two separate furnaces? --- That is correct.

Right. And each of those furnaces had one base? --- Correct.

Right. So it was not a two based furnace? --- This is correct.

Well why did you say it was? --- My apologies, let me correct it then, it was two bases, I misinterpreted your question, there are two bases there, one for a ten metre furnace and one for a seven metre furnace.

That is right. --- Correct.

But each furnace only has one base? --- That is correct.

Whereas the ZD has two bases? --- Correct.

Okay. Now the configuration of the ceramic fibre in the Usco furnace is quite different from the configuration of the fibre in the ZD is it not? --- Totally different configuration, also the type of material that is installed there was different to the type of material installed in the Iscor furnace.

That is right. So we now have that the ceramic fibre was totally different in configuration. No only that but the modules were used and not the blanket? --- Correct.

Now also the fibre was in the shape of an arch, was it not? --- That is correct.

It was not flat on top was it? --- No.

The roof of the furnace was also an arch was it not? --- Correct.

Where

Where are the locating pins in the Usco furnace? --- I do not know where they are.

Well have a look at the plan and you can tell His Lordship where the locating pins are. --- There is one locating pin shown here.

Well where in relation to the hood is that locating pin? --- It is on the side.

On the side of the hood. Does it come out of the ground or is it on the hood? --- The locating pin is attached to the hood and goes into the base.

On the side? --- Correct.

Okay. Now the mechanism to lift off the hood is very different is it not? --- I am not sure what mechanism they use for lifting the hood. The hood is merely lifted away off the thing, in other words it is a lift-off cover.

It is an hydraulic lift, would you agree with that? --- I do not know.

Well can you tell from the plan whether it is an hydraulic lift? --- No but it just shows over here that the hood lifts up 1300 or whatever the dimension is, 1300 millimeters.

Have a look at the plan. Tell us if it is not a hydraulic lift-off and are there not rails to take those hoods away? --- It is not very clear from this drawing over here, I must honestly say there is a wheel that is shown on the bottom left-hand side over here.

What does that indicate to you? --- Well the wheel, obviously something moves, right.

Can

Can you see the rail in the next drawing? ---

Yes I do.

Right. Now there is nothing like that in the ZD is there? --- No, the ZD is lifted by crane.

Now do you know what that furnace is designed to do? --- That particular one?

Yes. --- No.

You do not? --- I believe it is classified.

Oh I see. --- I do not know.

What type were the burners? --- In that particular furnace? -----Um. ----- Maxon.

Not high velocity. --- Nozzle mix burners to my knowledge.

Have you ever built, and when I say built I mean built not put in refractories, have you ever built a furnace with flues in the base? --- You mean, when you say built you mean designed, built the whole issue, structural, brickwork

Well first of all have you ever designed a furnace with flues in the base? --- No."

In the light of the above the conclusion is unavoidable, so we think, that Van der Veen's protestations that he designed the ZD in total ignorance of the Harchris

furnace

furnace cannot be believed. That being so there is really no need to discuss either certain strange features in Van der Veen's sketches and calculations which were exposed in cross-examination or the often incomprehensible explanations for them proffered by the witness. The trial Court's criticisms of this part of Van der Veen's testimony is to be found in the reported judgment at 553G-554A. In this connection the judgment of JANSEN, JA makes reference to "a few errors and peculiarities winkled out in cross-examination". In fairness to the learned trial Judge it should be said that in our view the incongruities in question are many and substantial and they serve further to discredit the witness.

A single example will illustrate the point. Van der Veen said that for the purpose of calculating the design stock Fokker supplied him with the following figures: 3 000 x 13 700 x 80. What these figures signify does not matter; what has to be considered is what Van der Veen said

said about them. The trial Judge (at 553H-554A) referred to a document in Van der Veen's handwriting in which the figures appear. Van der Veen's explanation was that the figures were there written down merely as an aide memoire, and it is clear that the trial Judge considered this explanation to be false. In his judgment our brother JANSEN seeks to shield Van der Veen from censure on this score by saying that the figures played no role in the calculations on the page in question and that Van der Veen in fact worked on the basis of a load of 16,3 ton. However, a perusal of the evidence on record shows that the trial Judge's view was fully justified; and that the observations of JANSEN, JA are, with respect, inapplicable to the matter in hand. Relevant to the issue are three pages of sketches and calculations in Van der Veen's handwriting. They are referred to in the record by means of the pages of the record where they are reproduced. The relevant page numbers are 1418, 1332 and 1333. In

his

his evidence in chief Van der Veen explained that the document at 1418 was the first page of the calculations made by him on the night of 9 October 1979. On 1418, and under the heading "AVERAGE STOCK", he had originally written the figures "3 000 x 13 700 x 80". The witness said that these figures produced a result of 370 000 lbs (which is reflected on the document). This result, in the words of the witness "was obviously impossible". He said that there had been a "misrepresentation" of the "parameters" that had been given to him at Iscor. He told Vermaak, who was with him at his house, that this result could not be right. Accordingly they took a figure of 1 000 tons per month, from which they calculated a daily figure of 37 000 lbs. which was the equivalent of 16,8 metric tons. These figures, newly calculated, are also reflected on 1418, and in fact a line was drawn (so 1418 shows) through each of the original figures 3 000, 13 700 and 80 ; and above them were then written in the

new

new figures 2 500, 5 000 and 60 . On this part of Van der Veen's evidence it is therefore clear that the figures "3 000 x 13 700 x 80" had already been jettisoned on the night of 9 October; and that he had already at that stage decided to work on the basis of a figure of 16,8 tons. At a later stage in his evidence in chief Van der Veen was referred to the documents at 1332 and 1333. The witness said that the drawing on 1332 and the calculations on 1333 were his: they were done on the evening of Friday 12 October 1979, and the two documents are to be read "in conjunction together". A short description of these documents is necessary. 1332 is a sheet of foolscap on which there appear a series of three drawing or sketches extending from the top to the foot of the page. Interspersed among each of the three sketches are many inscriptions of dimensions and specifications. The upper sketch is separated from the middle sketch by some four lines of the foolscap sheet wherein a number of dimensions have

have been inscribed; and vertical lines between the two sketches conjoin them. The impression is clearly conveyed that the two sketches are linked. In the middle of the space between them is written: "DESIGN STOCK 13 700 x 3 000 x 80". This inscription, on the face of the document, constitutes an integral part of what is there being portrayed. 1333 is a sheet of foolscap setting forth a series of calculations. The top left-hand side of the document bears the heading "DESIGN STOCK", underlined. Directly beneath the word "STOCK" there appear three figures separated by the multiplication symbol of "x". The first two figures are clear: "13 700 and 3 000"; the third one is difficult to make out but it appears to be "65". What was there written therefore appears to be "13 700 x 3 000 x 65". These figures are followed by the word "by" followed by certain undecipherable matter. Below the first line of the document various specifications are set out. In the second line of the specifications

specifications the word "STOCK" appears (preceded by an undecipherable word) followed by "3 700 lbs - 16,8"; the latter being followed by an undecipherable symbol.

Reverting to Van der Veen's evidence, one notices that at a later stage of his evidence in chief the contents of 1332 and 1333 were explored with the witness in great detail. In regard to 1332 inter alia the following was said:-

"Now you have written something there that I can hardly read, design stock something? --- Design Stock 13 700 x 3 000 x 80, eight zero.

Does that refer to the top drawing? --- That refers to the top drawing. That is the maximum size plate that we could put into that furnace onto that base."

As to 1333, part of Van der Veen's evidence reads as follows:-

"Now you say we must read page 1333 in conjunction with this plan? --- This is perfectly correct because both of them are drawn up the same night.

And

And which came first? ---

The drawing came first but the next page is a summary which I had prepared for Mr Fokker for the following morning. What I started off by saying over here, having prepared the sketch, I drew up a new specification for him which gave him the option over there of either faster heating rates or alternatively he could put in larger stock. It was up to him, he had to tell us. And that was the object of the whole exercise.

.....
Well first of all I started on the top by saying the Design Stock remained 13 700 mm by, I cannot quite make out this figure whether it is 65 or 85 by 5 slabs, heating rate 50 to 400 degrees per hour. I put that in now because we had doubled the capacity of the burners and that could have been Iscor's heating rate had they wanted to adopt it. Maximum stock still remained 37 000 pounds, 16,8 metric tons. The required heat input that I was originally given was 200 degrees C per hour, which was 5,9 million BTU's an hour because of the larger size burners. Total combustion air was 2670 cubic feet per minute."

And in regard to both documents the witness said the following:-

"So the plan on page 1332 and your calculations on page 1333 were done on the Friday? ---
On Friday night by myself.

And

And as I understand you it represented the options available on which Mr Fokker had to decide? --- Correct.

Or Iscor? --- Or Iscor."

On reading this part of Van der Veen's evidence one is forcibly struck by the fact that there was no suggestion whatever by him that the figures "13 700 x 3 000 x 80" in respect of design stock were erroneous and had been discarded three days before; or that the figures of 37 000 lbs and 16,8 metric tons were based on different calculations. That suggestion came to the fore only in cross-examination. With reference to 1418 he at first reaffirmed that the figures "13 700 x 3 000 x 80" had already been completely discarded, as far as he was concerned, on the night of 9 October. When later confronted with 1332, however, the witness floundered:-

"Okay, while you are on 1332 have a look at that design stock. ---- On 1332?

Yes can you see there is design stock 13 700 times 3000 times 80? --- Ja.

Now

Now had that not, as a calculation been abandoned by the 11th ----- Yes but I mean that is only one piece of stock. I merely put that down as a reference over here to discuss with Mr Fokker what the initial size of stock was. I mean do not forget this lot over here was prepared on the Friday night over here in order that we could go back and discuss with him and say look sorry we have now, we have only got these high velocity burners that are two million BTU's an hour instead of the one.

Mr van der Veen you realised already on the 9th that this configuration of plate of 13 700 times 3000 times 80 was quite out of the question did you not? --- That is correct.

Right. Now I am asking you what it is doing on a drawing which was destroyed on the 10th or made on the 11th? --- This drawing, I have no knowledge of a drawing, any drawings being destroyed on the 10th. I did not state that. This particular drawing was handed to Mr Fokker.

Now if that is the design stock Mr van der Veen how come, how is it shown as going three foot three above the base? --- I cannot remember why I put that design stock, it might have been there to remind me to have that discussion with him. We have already cleared over here that it was absolutely impossible to put more than half a plate in there at a thousand tons per month.

That is right. --- This sketch, as again I repeat that this sketch was made after our meeting with John Forster and we discussed this in Mr Fokker's office, I personally handed him this sketch together with the tabulation

on

on the following page on the following morning, the Saturday morning.

Ja that is what you have told us. ---
Correct.

You see now, in the light of the destruction of these, the originals of these documents on the 10th the fact that in your calculations which are referred to at 1418 onwards
----- Right, 1418 to 1427.

Ja. If you have a look at 1417. ---
1417 right.

And 1416, there is a reference there to Hotwork burners is there not? --- That is correct.

Well that seems to tie in with the fact that Hotwork burners were already considered on the 9th. --- They were not considered on the 9th, and I repeat that again for the second time, they were not. This sketch was, my apologies, this sketch was handed to Mr Fokker on the morning of the 10th, these are purely schematics that were handed back to me at some stage or other by John Forster of Hotwork Holdings.

Which sketch was handed to Mr Fokker on the 10th--- That sketch and that, no not the 10th, my apologies, the Saturday morning the 13th.

The 13th. Okay.

COURT: Mr van der Veen, forgive me interrupting you, but what did you say about the inclusion near the top of page 1332 of the bundle, the reference to design stock and then

certain

certain measurements? That you had no explanation? --- I have no explanation. It might have just been a note for me to discuss with Mr Fokker. Again the three foot three

Is that where you normally put a sort of aide memoire?--- Call it that, all these over here were

Yes but the question is is that where you would normally put it? --- Yes. I put it under the base over here, we did discuss this whole lot in detail with Mr Fokker. The object of that discussion was in fact to inform Mr Fokker of his options that he had on the available burners. Whereas initially we wanted 12 million BTU's and now we suddenly found we had six burners with, what is it, sorry, initially we looked for six million BTU's and now we ultimately found we landed up with six burners of twelve million BTU's an hour. So he had the option of heating quicker, he was a metallurgist, or increasing the capacity of the furnace."

The matter contained on 1332 has already been described. The most cursory glance at 1332 at once demolishes Van der Veen's assertion that the words and figures "DESIGN STOCK 13 700 x 3000 x 80" in 1332 were intended to be a reminder to discuss the matter with Fokker. Nor can Van der Veen be extricated from his

dilemma

dilemma by means of 1333 (to which the judgment of JANSEN, JA refers) because its appearance likewise excludes the possibility that the words and figures in question were a reminder to discuss anything. Moreover, the obvious question which at once suggests itself is: why should there be two reminders in two separate documents that were produced at the same time? The upshot of all this is simply that Van der Veen was patently untruthful in describing the manner in which he did his calculations; which conclusion in turn underscores the falsity of his protestations that he had been told nothing of the Harchris furnace.

The foregoing analysis of the testimony of Fokker and Van der Veen establishes two primary conclusions. The first is that Fokker lied about the reason for the visit of the Iscor team to the plaintiff's premises on 10 October 1979. The second is that both Fokker and Van der Veen lied by pretending that the Harchris furnace had

not

not been discussed between them in the context of the design of the furnace that the defendant had decided to build. A possible secondary conclusion to be drawn from the above review of the evidence hinges on the further question: why would Fokker and Van der Veen so have lied? The answer to this question has to be pondered against the background of the basic facts which constitute the foundation of the plaintiff's case; and the logical inference to be drawn therefrom. Thus approached the answer to the question is perfectly plain: Fokker and Van der Veen so lied because they knew full well that the Harchris furnace had in fact been used as the prototype for the design and construction of the ZD, which was copied from the Harchris furnace.

Nor does the matter end there. Allison was not called to testify. Of the witnesses available to the defendant who were able to explain to the trial Court what the real reason for the visit on 10 October was, only

Fokker

Fokker took the witness stand. His evidence was untruthful, and upon its rejection the true reason for the visit must perforce be determined by a process of inference dictated by the probabilities in the case.

Here a number of factors must be considered. First, the very fact that Fokker lied about the reason in itself gives rise to an inference adverse to the defendant.

Second, regard must be had to the manner in which the Harchris furnace was inspected by the Iscor team during the visit. The trial Judge referred to a "detailed inspection" by Allison (at 554C). In his judgment our brother JANSEN opines that "a careful perusal" of the evidence of MacDonald and Errol Preston casts doubt upon the correctness of this description. To us it seems that a careful perusal of the evidence reveals the following.

In the first place it shows that MacDonald testified as follows about the visit:-

"Did

"Did you show all of them the control rooms?

--- All of them the control rooms, yes. Then we went over and inspected the top hat furnace itself. At that stage the top hat was on trestles and Mr Errol Preston was working on the bases of the top hat. I was left with two of the visitors at the top hat and another two of the visitors went off to the bases where Mr Errol Preston was working and inspected the bases there.

What sort of inspection was it? --- Did it take some time? Was it a fleeting inspection? --- No it took some time.

How long would you say it took? --- A couple of hours.

So they went through it in some detail then? ---Yes they did.

Did anybody in particular show particular interest in the control room? --- Well Mr Allison was enthusiastic again about the control rooms and the top hat furnace.

Do you know whether his enthusiasm was shared by any of the others? --- I did not notice."

In the second place it shows that this evidence by MacDonald was never challenged in the slightest way during cross-examination. In the third place it shows that the evidence of Errol Preston on this particular point amounted to

to no more than the following:-

"Are you able to say for how long the representatives of Iscor were at the Harchris plant on that day? --- I could not really say. What I saw they probably spent an hour where I was working but I was busy working really hard at the concrete castable."

Accordingly it seems to us that there can be no real doubt that the Iscor team carried out a detailed and lengthy inspection of the Harchris furnace.

A further factor to be considered is this. How could the defendant have profited by an inspection of the Harchris furnace? JANSEN, JA has difficulty in seeing what the defendant could have hoped to gain by using the Harchris furnace as a prototype. It seems to us that the advantage which would accrue to the defendant from obtaining information about the details of the Harchris furnace is as plain as ^a pikestaff. H. Preston testified that he had put a great deal of time, effort and money into evolving the concept of the Harchris furnace; and that

that he considered information relating to the furnace as confidential. There is no reason to doubt this evidence and in our view the trial Judge rightly found (at 550G) that the concept of the Harchris furnace possessed the quality of confidentiality. It is common cause that Fokker did not tell MacDonald what the purpose of the team's visit was. From MacDonald's evidence it is clear that he assumed that the visit was connected with the existing contract between the plaintiff and the defendant; and he was fully entitled to make this assumption. On MacDonald's view of the matter the reason for the visit was that the defendant was the plaintiff's client. Fokker and his men must have been aware that MacDonald so assessed the situation. It is perfectly obvious that MacDonald would never have allowed the inspection of the furnace had he known that the Iscor team were there as spies for their own purposes; and Fokker must also have been fully aware of that. But

Fokker

Fokker suppressed the real purpose of the inspection and so deliberately left MacDonald under a misapprehension. What all this amounts to is that, in breach of the fiduciary relationship between the plaintiff and the defendant as parties to a contract, the Iscor team gained access to the Harchris furnace by means of a ruse. Their subterfuge was a fraudulent one and their conduct amounted to nothing less than theft by false pretences of the concept of the Harchris furnace which was the property of the plaintiff.

In the light of the above there can, in our view, be little difficulty in applying the law to the facts of this case. In our law the delict known as unfair and unlawful competition, which is Aquilian in character, is still in somewhat of an embryonic stage. The principles governing it and the criteria to be applied in deciding whether a particular form of competition should be adjudged unlawful, have recently been enunciated and discussed by this Court in Schultz v Butt 1986 (3) 667 (A)

at

at 679 - 683. In delivering the judgment of the Court

NICHOLAS, AJA made the following observations (at 678G

- 679E):-

"In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a requisite of Aquilian liability may fall into a category of clearly recognized illegality, as in the illustrations given by CORBETT, J in Dun and Bradstreet (Pty) Ltd v S A Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 216F-H, namely trading in contravention of an express statutory prohibition; the making of fraudulent misrepresentations by the rival trader as to his own business; the passing off by a rival trader of his goods or business as being that of his competitor; the publication by the rival trader of injurious falsehoods concerning his competitor's business; and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade. But it is not limited to unlawfulness of that kind. In the Dun and Bradstreet case supra at 218 CORBETT, J referred to the fact that in the cases of Geary & Son (Pty) Ltd v Gove (supra) and Combrinck v De Kock (1887) 5 SC 405 emphasis was placed upon criteria such as fairness and honesty in competition and said:

'Fairness

'Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade.'

See also Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another 1972(3) SA 152 (C) at 161G-H. In judging of fairness and honesty, regard is had to boni mores and to the general sense of justice of the community. (cf Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 188-189 and the cases there cited, and Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant 1981 (3) SA 1129 (T) at 1152-1153). Van der Merwe and Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 5th ed at 58 note 95 rightly emphasize that:

'die

' die regsgevoel van die gemeenskap' opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter'.

While fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria. As pointed out in the Lorimar Productions case ubi cit, questions of public policy may be important in a particular case, eg the importance of a free market and of competition in our economic system."

In the Court below O'DONOVAN, J applied the norms of justice and fair play as the criterion of unlawfulness, and in our opinion he was entirely right in his conclusion that the defendant was not entitled to make use of the confidential information regarding the Harchris furnace gained by it in the manner already indicated; and that in using that information as it did the defendant acted wrongfully. In our judgment the conduct of the defendant in this case involves an infraction of boni mores from which the general sense of justice of the community must

inevitably

inevitably recoil. It follows that the plaintiff was entitled to come to Court to enforce its proprietary right against the defendant's illegal invasion thereof.

It merely remains to consider the propriety of the twofold interdict granted by the trial Court (at 555G-H). On behalf of the defendant an argument was pressed upon us that, even accepting that the defendant had illegally filched confidential information from the plaintiff, the commission of the delict was an accomplished fact and in consequence there was no continuing wrong in respect whereof an interdict could be granted. The matter cannot, so we consider, be disposed of quite so easily. A Court granting an interdict must no doubt be satisfied of the probability of the continuance of the wrongful act of which the plaintiff legitimately complains. In the present case, however, the injury to the plaintiff's property is clearly of a continuing nature. The actionable wrong with which we are here concerned is theft of property.

Theft

Theft is a continuing offence. The defendant's contrectatio was not extinguished when the defendant, adding insult to injury, brazenly caused the concept of the Harchris furnace to become part of the public domain. The ZD represents the concrete embodiment of the abstract concept purloined by the defendant, and the illegality of the defendant's misappropriation of that property persists for as long as the defendant possesses and uses the ZD. But then it is said that the interdict will serve merely to punish the defendant. There are two answers to that contention. The first is that juristically, for the reasons stated above, the interdict is not merely (or even primarily) punitive. The second answer, and perhaps the more decisive one, is that this particular objection lies ill in the mouth of the defendant. It seems to us that the defendant can hardly complain if it is prevented by the grant of an interdict from plucking the fruits of its own duplicity. ^hShould the defendant desire to continue
its

its exploitation of the ZD it is free to negotiate with the plaintiff with a view to payment to the latter of suitable compensation for the wrong suffered by it..

Although there can be no doubt that the defendant's delict has resulted in patrimonial loss to the plaintiff, this is a case in which the quantification of the plaintiff's damages will be very difficult if not impossible. To deny the plaintiff an interdict and to leave it to pursue, as its sole remedy, the cold comfort of a claim for damages would be to turn a blind eye to a form of business immorality which cannot be countenanced.

For all these reasons we would dismiss the appeal with costs, including the costs of two counsel.

G G HOEXTER et A S BOTHA