IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of :-

CAXTON LIMITED..... First Appellant

MARILYN LOUISE HATTINGH..... Second Appellant

LIN SAMPSON ..... Third Appellant

C T P WEB PRINTERS (PROPRIETARY) LIMITED ..... Fourth Appellant

NATIONAL NEWS DISTRIBUTORS..... Fifth Appellant

CENTRAL NEWS AGENCY LIMITED..... Sixth Appellant

and

REEVA FORMAN (PROPRIETARY) LIMITED..... First Respondent

REEVA SUCCESS DYNAMICS (PROPRIETARY) LIMITED..... Second Respondent

CORAM: CORBETT CJ, HOEXTER, E M GROSSKOPF JJA, FRIEDMAN et NIENABER AJJA.

DATES OF APPEAL: 5 & 6 March 1990.

DATE OF JUDGMENT: 17 May 1990

J U D G M E N T

CORBETT CJ:

The first respondent, Reeva Forman (Proprietary) Limited, carries on business in South Africa as an importer, distributor and seller of cosmetics and beauty products. It markets its products by means of what is termed the "direct-selling" system. I shall later describe this in more detail. The second respondent, Reeva Success Dynamics (Proprietary) Limited, carries on the business of offering training courses to the public and to persons engaged in selling the products of first respondent by means of so-called "beauty consultants" and "business management" schools. First and second respondents share the same principal place of business, which is located in Johannesburg.

The founder of and driving force behind first and

second respondents is Miss Reeva Forman. She holds 80% of the shares in each of the companies and is their chief executive officer. She also lectures in the schools run by second respondent. The remaining 20% shareholdings in the companies are held by a Mr C Vassiliades.

The first appellant, Caxton Limited, whose principal place of business is also in Johannesburg, publishes a monthly magazine called "Style", which is distributed to the public throughout South Africa through the medium of fifth appellant, National News Distributors, and of sixth appellant, Central News Agency Limited. Second appellant, Miss M L Hattingh, is the editor of "Style" and fourth appellant, C T P Web Printers (Proprietary) Limited, prints it. In the July 1985 edition of "Style" there appeared an article under the following title:

"QUESTION

HOW DID REEVA FORMAN
GET TO BE SO SUCCESSFUL?

ANSWER:

SHE BELIEVES IN GOD, SELF-PROMOTION
(and a couple of other little things)."

As the title indicates, the article is devoted to Miss Forman and her two companies, first and second respondents. It was written by third appellant, Miss L Sampson.

This particular edition of "Style" was published and distributed to the trade on 25 June 1985. On the same day Miss Forman and first and second respondents, claiming that the article was defamatory of them, applied to Kriegler J in the Witwatersrand Local Division for an order interdicting the further distribution of the article. The Court granted a rule nisi. The appellants opposed the confirmation of the rule upon various grounds, including the defence that what had been said in the article was true and had been published in the public interest. The interdict

proceedings were protracted and voluminous affidavits were filed. The case was widely reported in the press. Eventually appellants undertook not to continue to publish the article and the rule was extended as against certain of the appellants until the final determination of a trial action to be instituted by Miss Forman and first and second respondents. This action was commenced by the issue of a combined summons in the Witwatersrand Local Division on 1 August 1985. The matter came to trial before Curlewis J on 28 April 1988. Shortly before the commencement of the trial Miss Forman's claim for damages in respect of the injury to her good name and reputation (she figured as first plaintiff in the pleadings) was settled by the payment to her of R35 000 and costs. The action proceeded at the instance of first and second respondents. Each claimed two items of damages: (i) impairment to or loss of goodwill and (ii) nett loss of profit. First respondent's claim, as

finally computed, amounted to R2 079 694 under item (i) and R250 000 under item (ii); and second respondent's claim was R119 029 and R75 000 under each item respectively. The respondents also asked for the rule nisi granted by Kriegler J in the interdict proceedings to be made final. After a lengthy hearing, during which in all seventeen witnesses were called and much documentary evidence was placed before the Court, Curlewis J gave judgment in favour of the respondents, ordered a final interdict and awarded first respondent damages in the sums of R250 000 and R1 800 000 (in respect of loss of goodwill and loss of profit respectively) and the second respondent damages in the globular sum of R75 000, these amounts to carry interest from the date of judgment. He also ordered the appellants to pay the costs of the suit (apart from the trial costs of two particular days), such costs to be taxed on the scale as between attorney and client. With leave granted by this

Court, appellants noted an appeal against the whole of the judgment, apart from the order of a final interdict.

Before considering the issues raised on appeal it is necessary to say something about the businesses run by first and second respondents, the nature of the defamatory article and its alleged impact upon the respondents.

The business of first respondent is, as I have indicated, the marketing of cosmetics and beauty preparations. It does so not through the ordinary retail outlets or from shop premises of its own, but by means of a sales force of individuals, almost exclusively women, who are recruited for this purpose (hence the term "direct-selling"). A new recruit to the organization is given a preliminary training course relating to the product to be marketed and to the method of demonstrating the product and concluding sales. She also receives what is known as a "basic kit", consisting of the product range, which she uses

for demonstration purposes and for which she pays. She is then termed a "beauty adviser" and may commence selling the products direct to customers. She does so not as an employee or agent of first respondent, but as an independent saleswoman on a commission basis. Goods sold are invoiced by her to the customer. The saleswoman collects the goods from first respondent's office, pays the full price as per invoice to first respondent and delivers the goods to the customer against payment of the price. The commission accruing on sales is calculated and paid by first respondent to the saleswoman monthly.

Saleswomen are encouraged to attend the course for beauty consultants run by second respondent - after which they can call themselves "beauty consultants" - and the business management course, also run by second respondent and designed to teach marketing and proper business methods. Fees are charged for these courses. Before a saleswoman

can give a beauty treatment known as "a facial" it is necessary for her to attend a beauty consultant's course.

A saleswoman is also encouraged to recruit other saleswomen as part of a "team". If she succeeds in building up a team of at least three other saleswomen and the team achieves a certain level of sales of cosmetics (at the time R3 000 worth) in one calendar month, she may become what is described as a "distributor". While maintaining what is termed a "retail sales volume" at a certain level the distributor is entitled to an overriding commission of 40 per cent on the team sales volume, out of which she would have to pay commissions to her team members, on a sliding scale, on their individual sales. A saleswoman can also qualify to become a distributor by a combination of retailing a proportion of the R3 000 volume through her team's efforts (the team being a minimum of three beauty advisers) and by purchasing the balance of the R3 000 volume

in the same calendar month; or by making a single payment of "such amount for stocks as may be determined by the Company (first respondent) from time to time" (see chapter 11 of the Reeva Forman Training Manual, exhibit "FF"). Team members may, by doing the necessary recruiting, establish teams of their own and qualify to become distributors in their own right. Where this happens the original distributor becomes a senior distributor.

The whole organization thus has a pyramid-like structure, with the first respondent at the apex and the individual saleswoman at the base, the two linked by a network of teams, headed by distributors and senior distributors. Since the product is marketed through the efforts of the individual saleswoman it is obvious that the more saleswomen there are the greater the sales are likely to be. Accordingly the growth of the business depends upon ever-increasing recruitment. And, since for various

reasons there is a continuous drop-out of saleswomen from the organization, recruitment is necessary even to maintain the status quo. Recruitment is done through personal contact and by means of advertising. Customers are canvassed also by personal contact and by what are termed "promotions" at other functions. The giving of a facial is often a prelude to the establishment of a supplier/customer relationship. To achieve maximum sales it is thus necessary to be a beauty consultant. Some distributors establish their own business premises; others work from their homes. That briefly is the modus operandi of the business.

First respondent commenced business in 1975. In its first four years the growth of the business, as measured by sales, was steady but not spectacular. In about 1980, however, the picture changed and the business went into a phase of very rapid growth. This continued into 1985. By then first respondant had established regional offices or

branches, staffed by full-time employees, in Pretoria, Bloemfontein, Cape Town, Durban and Port Elizabeth. These offices assisted distributors and beauty consultants in their areas, saw to the necessary administration and carried the stocks required by saleswomen.

In order to stimulate and motivate its sales force first respondent periodically ran competitions, the prize for which was a free holiday in some attractive location. In May 1983 it was in Greece, in March 1984 it was at Umhlanga in Natal and in May 1985 it was a trip to Rio de Janeiro. In each case the competition ran for a period prior to the holiday trip (in the case of the "Rio trip", as it was called, the period was approximately the 9 months ending with March 1985) and in order to qualify for the trip a saleswoman had to achieve certain levels as regards personal sales volume, team volume and/or recruitment. After 1985 there were similar holidays in Thaba'Nchu (April

1986) and Israel (June 1987), but the Rio trip seems to have engendered the greatest interest and provided the greatest stimulation.

I turn now to the defamatory article. It is a lengthy one, occupying four-and-a-half pages of fairly small print. Respondents' counsel divided it into five portions. It is convenient to do likewise. The first portion is devoted to the writer's impressions of Miss Reeva Forman, gleaned during an interview given in the latter's flat in Johannesburg and at lunch in a nearby restaurant. The writing is full of brittle satire and the general tone is cruelly critical of Miss Forman. The author mocks her gestures, her appearance, her philosophy, her devotion to her dog (recently deceased) and her way of life. She purports to penetrate what she perceives to be a facade and to find a person who is basically insecure. The opening sentences read:

"Reeva Forman talks for four hours: she lectures. On reflection it seems a time dominated by hair, lips and the cliché."

I quote, too, other illustrative extracts:

"She appears to belong to that group of women who, although shrewd when it comes to making money, have chosen to market themselves as innocents, full of wonder and sweetness. She is much occupied with the sauntering prospect of ever-lasting youth."

.....

"The hours are consumed by a set of gestures that as the day progresses seem to assert a pattern on the proceedings, rather like punctuation in a story. There is the Confident Nose Wrinkle (let's be friends), Big Brown Eyes (wonder), Hand on Chest (coy), Hands in Prayer (pleading), Hands Clasped (surprise). Sometimes she pounds the air with a tiny clenched feminine fist (anger, sort of). It is when these gestures are used in conjunction that her vivacity becomes threatening, almost like a physical

onslaught."

.....

"She curls and twirls her long legs against the fern pattern of her bamboo sofa as she happily rifles through the luxurious landscape of one-line destiny-makers."

.....

"She tells me that Ronald Reagan is her hero. Then she says something which might partly explain her appointment to the board of the SABC: 'I don't think it's lying or falsifying to present the positive side of a situation."

.....

"Sometimes her expression slips the braces of buoyancy and positive thought and slips into an anxious and unsettled gaze declined by a high, small laugh. Here perhaps is the insecure teenager who although terribly short-sighted would not wear glasses, the girl whose hand shook so much she could not hold a glass at a party, the child who found it difficult to make friends at school, the little girl who spent six months in bed with rheumatic fever. Here is the woman who stayed with her parents until they died, her

father only four years ago, her mother seven."

The second portion deals with Miss Forman's business achievements, the success of her companies, her business philosophies and the methods employed on the business management courses run by second respondent. Thus, the article mentions that in 1983 Miss Forman won the Businesswoman of the Year Award and that her direct sales cosmetic company has an annual growth of 50 per cent and a turnover of more than R10m per annum. An ex-employee is quoted as having been told by a fellow employee when she joined the organization: "Of course you'll be able to make money with Reeva because God looks after this company and God looks after Miss Forman". There are other passing references to Miss Forman's religious beliefs.

The article goes on to refer to "one of the largest direct-selling cosmetic companies" in the United

States of America, Mary Kay, which is described as being "based on a partnership of God and Mary Kay Ash, its founder". An article on Mary Kay in the English Sunday Times supplement is quoted as saying:

> "The elementary commercial purpose of the company is all too easily obscured by the spiritual cloaks which are heaped upon it. Everyone in this church of materialism is dedicated to turning their gaze away from its pyramid structure."

The writer (third appellant) proceeds to refer to other deceptions upon which the Mary Kay company is based, chief of which is -

> "...the fiction that Mary Kay Ash is a being of superhuman qualities. The creation of a cult of personality around the dumpy figure of Mary Kay Ash is a miracle of projection;..."

The article then wonders at "people who are able to regard a

cosmetic company and its figurehead as a fount of divine revelation" (a further citation from the Sunday Times article), but says such people do exist and proceeds to quote a former employee of "Reeva Cosmetics" (first respondent) to the effect that she started a business management course hating the sight of Reeva Forman and ended it thinking of her "like a god". (Thus a link is forged between Mary Kay and the respondents.)

The rest of the second portion of the article is devoted to quoting descriptions by former members of the courses run by second respondent and to a reference to a certain William Penn Patrick. The former course members are referred to as Lucy, Janie and Martha (the names are fictitious). They describe the courses as "a lot of brainwashing", a "process designed to break us down" and as presenting Miss Forman "as if she were a god". According to them, a lot of music was played, the hours were excessively

long and "they tried to condition us". Course members were encouraged to confess things in the past of which they were ashamed, such as having an illegitimate child. An incident is recounted of a course member who, after listening during a lecture to a tape by Miss Forman talking about faith, lay on the floor "crying and carrying on". The lecturer told the class to leave her alone, not to touch her as she was "going through the breakdown process, getting rid of everything." The girl lay there for about an hour and a half and afterwards was "pale and shaky" and "felt dreadful". She did not want to come the next day but was told she must. Martha is quoted as saying, inter alia (with reference to Miss Forman) - "I now think her attitude about caring was false. When you really want something, when you really have a problem, then the door is closed".

The article states that during the interview Miss Forman stated that "her mentor" was William Penn Patrick, by

whom she was trained in the United States, and that it gave her "such a kick to know that in South Africa we have a model of the same thing". The author then proceeds to do what is commonly known as a "hatchet job" on William Penn Patrick, who apparently also used pyramid selling techniques to build a corporate empire around the cosmetics company, Holiday Magic, and in conjunction therewith ran courses in "leadership dynamics". Newsweek magazine and the English Sunday Times are quoted as alleging that these courses relied on physical assault and abuse, psychological torment, sexual confrontation and general brainwashing in order to achieve their objects. Again a link is forged between the courses run by Patrick's companies, with all their bizarre characteristics, and the business of Miss Forman and her companies; and this is driven home by a statement prominently featured in large type in a "box" in the middle of the page reading -

> "Her mentor William Penn Patrick's leadership course was a 'bizarre enterprise that relied on physical and psychological torment'".

The third portion of the article describes a visit by the writer to the "Reeva Offices" in Cape Town. She gives an unflattering description of the offices and their furnishings ("the word 'tacky' would not be an exaggeration") and of the lady employee whom she interviewed ("a girl who has on so much purple eyeshadow that it is rather like being confronted by the Hex River mountains at sunset"). There is again emphasis on the so-called "cult" of Reeva Forman. The article quotes the motto: "A beautiful life with Reeva" appearing on "battered posters" in the office.

The fourth portion describes, with reference to the Reeva Forman training manual, the character of the business run by first respondent - the teams of saleswomen,

consisting of beauty advisers, distributors and senior distributors, the commissions, how one becomes a distributor and the vital need for recruitment. It is emphasized that prospects are held out of "very large earnings", but that -

> ".... the most curious aspect of the manual is that nowhere does it mention that you have to pay for a course before you start selling."

Then reference is made to the tightening of local laws on pyramid selling "after Holiday Magic reached South Africa" and to the Trade Practices Act of 1976. This portion concludes with the observation -

> "But the fact that Kubus surfaced buoyantly and legally last year illustrates that the Law is still full of loopholes. Finally a bill is to be tabled in Parliament in the near future which will try to cope with this problem."

(The reference to "Kubus" is to a notorious, pyramid selling

scheme which amounted to a fraud upon the public.)

The fifth and final portion of the article commences:

> "It seems that while some people do experience 'a beautiful life with Reeva', many do not."

The article goes on to stress the "large drop-out rate" and says -

> "The story becomes particularly nasty during a recession when all direct sales companies boom .... catering to the desperate."

The experiences of Mrs B, Lucy, Martha and Kathy are then quoted. There is a common theme to their stories: being persuaded by false promises of rich earnings to part with (for them) large sums of money and getting little or nothing in return. A statement by Mrs B -

> "So far I've spent R1 000 and I've only made

R4 which I haven't even received"

is highlighted by being repeated in a "box headline" in the middle of the page. The husband of one woman is quoted as saying that his wife was "conned into the whole thing". Other snippets from their complaints read: "They seduce you with large numbers...."; "the other thing I think was iniquitous was that they encouraged us to borrow money"; "the whole thing turned out to be a lot of brainwashing"; "after you've bought in they really lose interest in you"; and Kathy's husband: "You know Kathy, if you had never joined Reeva we would have the car by now".

The author comments -

> "The complaints form a dialogue of disappointment against the tinkling sound of Miss Forman's voice saying: 'I attribute my success to sound basic principles such as honesty, caring and trust'."

The article concludes with the following two paragraphs:

> "It is an interesting mathematical speculation that if each distributor recruits only one distributor a month, that means that the number of distributors doubles every month. After ten months the number of distributors will have increased by a factor of more than a thousandfold. After 20 months the number of distributors will have increased more than a millionfold. After three years the number of distributors will exceed the total population of the world.
>
> I end with a quote from the Reeva Marketing Plan: 'It is somewhat sad to come to the realisation that in many businesses today some share the belief that to tell a few "white lies", to bend ethics a degree, to sacrifice integrity and principle for a moment, and sometimes to out and out "lie, cheat and steal" is essential to compete successfully'."

It is common cause that the article is defamatory, though the parties are not ad idem as to its precise

meaning. It is respondents' case that the article not only injured generally their respective business reputations and goodwill, but also actually caused them special patrimonial loss in the form of reduced profits. A trading corporation has a right to sue for damages in respect of a defamatory statement which is calculated to injure its business reputation (see Dhlomo N O v Natal Newspapers (Pty) Ltd and Another 1989 (1) SA 945 (A), at 948 G - 953 G); and it is common cause that such a corporation may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation. It is not necessary in this case to decide whether this latter claim falls under the actio injuriarum or is rather to be classed as Aquilian (cf Bredell v Pienaar 1924 CPD 203, at 213; Van Zyl v African Theatres Ltd 1931 CPD 61, at 64-5; Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways 1946 AD 999, 1011). The question

as to whether and to what extent the article in all its facets was calculated to injure respondents in their respective business reputations is one to be decided by reference to the nature of the defamation, the character of the businesses conducted by them and the likely impact thereon of the defamation; and the damages must be assessed in accordance with the principles relating to claims for defamation, bearing in mind that a corporation has "no feelings to outrage or offend" (per Schreiner JA in Die Spoorbond case, supra, at 1011). And the further question as to whether the article caused the respondents actual patrimonial loss, and the quantum of such loss, must be determined on the evidence adduced. I shall in due course deal in detail with this evidence. For reasons of convenience rather than because the nomenclature is necessarily correct I shall refer to the damages for injury to business reputation as "general damages" and to damages

for actual loss as "special damages".

On appeal basically four matters were argued. They were:-

(1) A ruling by the trial Judge that the appellants were not entitled to lead certain evidence. Appellants' counsel contended that in so ruling the trial Judge erred and that in the circumstances the judgment should be set aside and the matter remitted to Curlewis J to enable him to hear the evidence and, having done so, to come to a fresh decision; or, preferably, that a trial de novo be ordered. Respondents' counsel supported the Judge's ruling.

(2) The quantum of damages. Appellants' counsel submitted that the general damages awarded to each of the respondents was excessive. As regards special damages, appellants' counsel initially (ie

in their heads of argument) put in issue whether any actual loss was proved to have been caused by the defamatory article. In oral argument, however, Mr Shaw, who led for the appellants on appeal, conceded that respondents had probably suffered actual loss because of the article, but contended that respondents had failed to establish the quantum of such loss. This was disputed by respondents' counsel who supported the awards of the trial Judge.

(3) The applicability of the regulations framed in terms of sec 15 of the Trade Practices Act 76 of 1976. It was the contention of the appellants that in terms of these regulations the business conducted by the respondents constituted a "pyramid selling scheme"; that as a result certain of their income, at least, was earned in

contravention of the regulations; and that they were not entitled in law to recover damages which would in effect compensate them for the loss of unlawful earnings. Respondents denied that the business conducted by them constituted a pyramid selling scheme or that it contravened the regulations in any way.

(4) The award of attorney client costs. Appellants contended that in awarding costs on this scale the trial Judge had wrongly exercised his discretion and that costs on a party-and-party basis ought to have been awarded. Respondents supported the award

I shall deal with each of these matters in turn.

The Ruling on the Evidence

In their particulars of claim (paras 21 and 22) the respondents (and Miss Forman) set forth in detail

those averments in the article concerning them which they alleged to be defamatory. In doing so they paraphrased the relevant passages to point to the sting of the defamation. In dealing with defamatory material pertinent to first and second respondents, the pleader highlighted the averments that the business was conducted on the lines of a cult, with Miss Forman being portrayed as a godlike figure; that participants or trainees in the beauty consultants and management schools were brainwashed, manipulated and exploited and that the courses relied on physical abuse, psychological torment and sexual confrontation; that the name and sanctity of the Almighty were exploited and defiled; that trainees were recruited by dishonestly misleading them, by improper pressure and by confidence tricks; that first respondent was dishonest in its professed concern for the well-being of trainees; that first respondent conducted its business "close to the wind"

by exploiting loopholes in existing legislation; and that references to Mary Kay and William Penn Patrick implied that the aspects of their business criticized in the article applied to, or were the inspiration of, respondents' businesses. In addition, an innuendo, or perhaps quasi-innuendo, was pleaded with reference to the suggestion that the business was a pyramid selling operation, which was in the nature of a confidence trick and would in the end collapse and result in participants losing their money, as had happened in the case of the so-called "Kubus scheme".

In their plea (para 9(a)) the appellants gave their version of what the article meant. They stated that it would be understood by a reasonable reader to mean that -

> "(i) The business with which the first plaintiff was associated had features which were similar to those of the 'pyramid selling schemes' which had been

made the subject of control in terms of the Trade Practices Act 1976, and the features of the business included the following -

(aa) a participant who recruited another person into the business received a percentage of the price of products sold by that person;

(bb) participants in the business were encouraged to recruit other participants.

(ii) It was a matter of mathematical logic that all participants in such a scheme could not in practice continue to recruit other participants indefinitely.

(iii) The operation of the business had been structured in such a manner as to avoid the provisions of one or more of the controls on 'pyramid selling schemes' which had been imposed in terms of the Trade Practices Act, but in substance it was still such a scheme insofar as it incorporated the features referred to in (i) above.

(iv) Participants and potential participants in the business are diverted from applying their minds to the true

structure of the business by conditioning purporting to have a spiritual and theological foundation.

(v) The business is in fact a materialistic operation, the true nature of which is obscured by a philosophy purporting to be based upon a theological foundation and by the personality of the first plaintiff, and is accordingly deceptive and misleading and in this respect is conducted on lines similar to that of the business conducted by Mary Kay Ash.

(vi) Unwary participants in the business are misled and exploited to the benefit of the plaintiffs.

(vii) The first plaintiff attributes her success to her faith, and participants in training courses associated with her business are encouraged to accept that her philosophy and teaching are based upon fundamental truths revealed in the scriptures.

(viii) The first plaintiff is held out as having insight into divine revelation.

(ix) The structure upon which the business was based was inspired by William Penn

Patrick, and modelled upon the business operated by him."

The appellants further admitted that the meanings given in sub-paras (iv), (v) and (vi) were defamatory of the respondents, but pleaded that in these respects the article was true and for the public benefit or, alternatively, constituted fair comment on a matter of public interest (para 9(b)). As to the meanings in the other six sub-paragraphs, it was in the first place denied that they were defamatory; and then, alternatively, it was pleaded that if these meanings were defamatory, they were true and published for the public benefit or, alternatively, constituted fair comment on a matter of public interest (para 9(c)). Otherwise the relevant averments in the particulars of claim were denied (para 9(d)).

It will be evident from a comparison of my summary of the averments in the particulars of claim concerning the

defamatory material with para 9(a)(i) - (ix) of the plea that there is a wide gulf between the respective interpretations placed by the parties on the defamatory article. In giving further particulars to the plea and further particulars for trial appellants appeared to narrow down the ambit of the plea, particularly sub-paras (iv), (v) and (vi), and thus to widen the gulf.

In his opening address Mr Kuper, who led for the respondents both at the trial and on appeal, submitted that the defamatory meanings pleaded in para 9(a)(iv), (v) and (vi), which appellants proposed to justify, were so far removed from the actual sting of the article that appellants were not entitled to lead evidence in justification thereof and indicated that he would at the appropriate time object to such evidence. Later, while evidence was being presented on behalf of the appellants, their counsel indicated that the next witnesses would be persons who had

attended various courses run by second respondent and that their evidence would be relevant to para 9(a)(iv), (v) and (vi) of the plea in that they would depose to what had happened on the courses. In view of respondents' attitude, as indicated by Mr Kuper in his opening, the Court was asked to give a ruling on the issue.

In doing so Curlewis J held that the public would not understand the article to mean what was set out in para 9(a)(iv), (v) and (vi) of the plea and that the evidence was accordingly irrelevant to the plea of justification and on that ground inadmissible. It was argued by appellants' counsel, in the alternative, that the evidence was relevant and admissible as partial justification of the defamation and, therefore, in mitigation of the damages to be awarded. The learned Judge rejected this contention, seemingly for two reasons: (i) that where a defendant in a defamation suit pleads a meaning which is not a meaning which the

public would attach to the defamatory statement, evidence to justify that meaning is irrelevant not only to justification but also to partial justification; and (ii) that partial justification in reduction of damages has to be specifically pleaded. (This need to plead partial justification had virtually been conceded by appellants' counsel in argument.) He consequently ruled that on the pleadings as they stood no evidence could be led to establish the averments in para 9(a)(iv), (v) or (vi) of the plea.

After a short adjournment appellants' counsel made application for an appropriate amendment of the plea in order to allege the substance of para 9(a)(iv), (v) and (vi) in mitigation of damages. In a supporting affidavit it was stated that there were twelve witnesses whom appellants wished to call on this issue, if the amendment were granted. The application was opposed by the respondents. The Court refused the application with costs. In the result

appellants were precluded from adducing this evidence.

I understood Mr Shaw, in oral argument before us, to concede that the defamation went much further than the very limited meanings attributed to it in para 9(a) of the plea. Consequently, evidence in support of plea 9(a) would not sustain a defence of justification. As Innes CJ remarked in Sutter v Brown 1926 AD 155, at 169:

> "..... the justification to be effective must be as broad as the slander....."

In this respect, therefore, the ruling of the trial Judge, which related specifically to sub-paras (iv), (v) and (vi), was unquestionably correct. Mr Shaw argued, however, that though these sub-paragraphs and the proposed evidence in support thereof would not amount to justification, they were relevant to the quantum of damages on the basis of the so-called "partial justification" principle.

This principle is referred to in the case of Sutter v Brown, supra. In that case Sutter, an hotel proprietor in Warmbaths, Transvaal, published of the manager of a rival establishment in the town the following defamatory statement: "Brown is nothing but a damned illicit liquor seller". In the action for defamation which ensued Brown (the plaintiff) assigned to these words the meaning that he had committed the crime of selling liquor to coloured persons against the law. The defendant (Sutter) pleaded, inter alia, that the words merely meant that the plaintiff had sold liquor contrary to the terms or outside the provisions of his hotel liquor licence and that thus understood the words were true and their publication for the public benefit. The trial Court found that the meaning assigned to the words by the plaintiff was the correct one and that this meaning was more harmful to the reputation of the plaintiff than the meaning pleaded by the defendant.

The plea of justification accordingly failed and damages were awarded to the plaintiff. In assessing the damages the trial Judge took into account evidence adduced by defendant in support of his unsuccessful plea of justification to the effect that plaintiff had on several occasions sold liquor in breach of the conditions of his licence. On appeal it was argued that the trial Judge had erred in so doing. The argument was rejected by this Court. Said Innes CJ (at p 172):

> "Here evidence which could not be objected to was led in support of a plea which justified the slanderous language in the sense in which appellant contended that it had been used. He failed in his contention as to the interpretation of the words; but the facts adduced which established justification in the less harmful sense should clearly be taken into account in mitigation of damages."

(See also Williams v Shaw (1884) 4 EDC 105, at 163; cf

Leibenguth v Van Straaten 1910 TS 1203, at 1208, 1210-11; and as to the English law on the topic, see Gatley on Libel and Slander, 8th ed, par 357; Duncan & Neill on Defamation, 2nd ed, p 52-3).

In his final judgment on the merits the learned trial Judge stated his reasons for refusing the amendment. These may be summarized as follows: the late stage of the application for amendment and the lack of an acceptable explanation; the prejudice to respondents resulting from the inevitable postponement of the matter ("plaintiffs are entitled.... in a defamation action particularly to have the matter speedily resolved"); the issues raised by the amendment could cause the matter to "drag on"; the facts stated in the proposed amendment would not "persuade any reasonable man to reduce the damages claimed for reasons of moral disapproval of the plaintiffs or because there was any

possibility that those facts contributed to those damages as claimed".

The correctness of the trial Judge's refusal of the amendment may be open to debate. Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in the judgment of Caney J in Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D), at 640 H - 641 C. In portion of the passage referred to Caney J states (at 641 A) -

> "Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He

> cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable".

With this should be read the remarks of De Villiers JP in Krogman v Van Reenen 1926 OPD 191, at 195 -

> "....he must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement..."

It should further be noted that in the Trans-Drakensberg Bank case, supra, it was held that mere delay in bringing forward an amendment is no ground for refusing it (see p 642 H).

It seems to me that the most cogent reason advanced by the trial Judge for refusing the amendment was that the facts stated in the proposed amendment, if

substantiated by evidence, could not possibly affect the quantum of damages. If this is correct, then it is arguable that the amendment did not raise a "triable issue" or was not a matter of "sufficient importance" to justify the inconveniences resulting from an amendment.

Assuming, however, in favour of the appellants that the trial Judge erred in refusing the amendment (and thereby excluding the evidence which the appellants proposed to lead), the question arises as to whether this refusal warrants the setting aside of the judgment and a referral back. Upon this assumption the Court a quo committed an irregularity. This would entitle the appellants to have the proceedings set aside unless this Court is satisfied that the irregularity did not prejudice the appellants (see Jockey Club of South Africa and Others v Feldman 1942 AD 340, at 359). The onus to so satisfy the Court is on the respondents (see Le Roux and Another v Grigg-Spall 1946 AD

244, at 254). The enquiry is thus whether prejudice was suffered by the appellants.

In this connection it is instructive to look at what, according to the heads of argument of appellants' counsel, the proposed evidence would have embraced. Therein it is stated (in para 6.8) that a number of persons who attended one or other of the courses offered by second respondent would have been called as witnesses in order to establish -

" (i) that the real nature and structure of the business was as set out in paragraph 6.4(i) above (viz 'a materialistic operation' with the structure of a 'pyramid selling scheme', in which participants could not be recruited 'indefinitely'). This was to be established from the course manuals distributed at the schools and the lectures delivered;

(ii) that in the course of the training offered by the Plaintiffs, participants were in fact diverted from a proper analysis of the

business by being subjected to conditioning purporting to have a philosophical or theological basis and that the true structure of the business was obscured. There was to be the evidence of a number of witnesses who would have told the court how in the course of their instruction:

(a) they were influenced to believe that their success depended entirely on themselves and their faith;

(b) that they were told to seek their guidance only from successful people, who were identified as the achievers in the Reeva organisation, and not outsiders;

(c) it was demonstrated to them theoretically that virtually any amount of money was within their reach if they accepted what was being taught to them;

(d) they were influenced to believe that it was sinful to be poor;

(e) induced by this, they were encouraged to invest money in the organisation and if necessary take out loans to do so, on the principle that they had to give if they wanted to receive;

(f) at no stage were they told that in reality substantial numbers of people earned nothing or very little, and that the logical extension of the principles, which they were being taught would bring them great reward, was that there would be more and more people all trying to do the same thing;

(iii) that people who attended such courses had in fact been induced to part with money and had thereby been exploited."

This must be compared with the substance - the real stings - in the defamatory article, as I have analysed it above. Practically all the matters referred to in para 6.8 of

counsels' heads are of a non-defamatory, indeed innocuous, nature. Take, for example, par (ii)(a): that trainees were influenced to believe that their success depended entirely on themselves and their faith. To say that this happened on training courses is certainly not defamatory of either of the respondents and consequently evidence aimed at establishing the truth of the averment would have been absolutely pointless. Possibly there is some defamatory sting in the statement that trainees had been induced to part with money and had thereby been exploited. The statement is vague. The word "exploited" has a pejorative ring to it, but without more detail it is difficult to assess the significance of the averment. In any event, it pales into insignificance when set against the background of the actual defamation relating to the courses - the brainwashing, manipulation and exploitation of trainees and the reliance on physical abuse, psychological torment and

sexual confrontation - and all the other defamatory statements contained in the article. Accordingly, I am satisfied that the evidence which appellants proposed to lead in partial justification would have had no significant influence on the quantum of damages awarded; and that consequently appellants suffered no prejudice from being prevented from leading this evidence. (Cf. Sutter v Brown, supra, at 170-1.) Appellants' argument that the judgment must be set aside and the case remitted accordingly fails.

The Quantum of Damages

I shall deal first with the question of special damages. The evidence adduced by respondents with regard thereto fell broadly into two categories: (1) the testimony of six saleswomen who marketed first respondent's products over the relevant period and who deposed to the alleged effect of the defamatory article on their sales and their

ability to attract new recruits; and (2) evidence as to the financial performance of the respondents before and after the publication of the article, and an analysis thereof with a view to showing a decline in profits attributable to such publication. In the light of Mr Shaw's concession (which incidentally was rightly made) that the publication did cause some actual (but, according to him, unproven) loss to respondents, the evidence of the six saleswomen loses much of its importance and I shall concentrate mainly on the question as to whether the other evidence adduced established the alleged loss of profits and was sufficient for this loss to be quantified. In doing so I shall commence with the claim by first respondent.

In order to demonstrate the loss, and the quantum thereof, suffered by first respondent evidence was given of the sales (net of discounts) achieved by first respondent over the period July 1981 to December 1986. The relevant

figures were extracted from first respondent's books of account, verified and when necessary adjusted. Their correctness is not in dispute. These figures (given on an annual, half-yearly and a quarterly basis) showed a steady annual growth in sales up to June 1985. Using the year July 1981 to June 1982 as the base year, respondents' expert witnesses determined an average annual growth rate up to June 1985 (ie over a period of 3 years) of ± 41%. During the first quarter after June 1985 there was a material slowdown in the growth-rate and in the ensuing three quarters there was an unprecedented "negative growth", ie an actual decline in sales as compared with the corresponding periods of the previous year; and during the last two quarters of 1986 (and during the first two quarters of 1987) there was a partial recovery. To quantify the alleged loss respondents' experts extrapolated hypothetical sales for the period July 1985 to December 1986 on the supposition that an

annual growth rate of 41% would have been maintained over that period. From this figure they deducted the actual sales over this period in order to determine lost sales. From the figure for lost sales they deducted the estimated cost of such sales and other expenses so as to arrive at the lost profit. The calculation, in summary, gave the following result:

Total extrapolated sales July 1985 to December 1986.....	R10 911 815
Actual sales for the same period	6 474 456
Lost sales	4 437 359
Less cost of lost sales and other expenses	2 357 665
Lost profit.....	R2 079 694

And accordingly R2 079 694 represented the amount of the claim for special damages. These calculations and the figure for the cost of lost sales and other expenses are not in dispute.

In respect of this claim the trial Judge awarded, as I have indicated, an amount of R1 800 000. His reasons for not accepting in its entirety the figure put forward by first respondent were, it would seem, a feeling that the "optimistic prognostications" of hypothetical sales made by first respondent's expert witnesses might not have been realised ("... there are slips between the cup and the lip"); and the fact that in years when there was no overseas convention (as in the case of 1986) real growth tended to drop. On the other hand, there is no indication in the judgment as to how or on what basis the learned Judge arrived at the figure of R1 800 000. Presumably it was an estimate based upon the general parameters provided by the figures put forward by first respondent.

It was submitted on behalf of the appellants that the calculation by respondents' expert witnesses and the trial Court's computation of damages failed to take account

of four factors and were consequently flawed. These were:-

(a) the Rio incentive scheme;

(b) the economic recession during 1985 and 1986;

(c) price increases in October 1985; and

(d) a change in advertising policy.

I do not propose to say much about (c) and (d). The evidence shows that first respondent raised the price of its products in October each year. In October 1985 the increase was 24,4% overall. This was substantially higher than the increases in previous and subsequent years. (In 1984 the increase was 18,9% and in 1986 18,6%.) It was suggested that this unusual increase in 1985 might have caused the slump in first respondent's sales after June 1985. There is nothing to support the suggestion (indeed it hardly explains reduced growth between June and October 1985) and Mr Shaw did not rely upon this factor in oral

argument.

A change in advertising policy, as a cause of retarded growth, was a theory advanced by one of appellants' experts, Prof C G Robinson. His evidence on the point was, in my view, not convincing and again no reliance was placed on this factor by Mr Shaw. It may be disregarded.

As to (a), I have already referred to the Rio trip. The incentive provided by the very successful competition to qualify for this trip gave sales and recruitment prior to the closing date in March 1985 a tremendous boost, especially in the first quarter of 1985. During this quarter sales showed an increase of 94% over the corresponding quarter in 1984 and 1 100 new saleswomen were recruited, as compared with 1 684 recruits in the six months ending December 1984 and 1 477 in the first six months of 1984. Furthermore, as pointed out by Mr Stride, one of respondents' experts, sales for the year ending March 1985

(during which period the competition was in progress) showed an abnormal 52% increase over the sales for the year ending March 1984.

On behalf of appellants it was submitted that it was fallacious to include the growth in this abnormal year in the figures used to obtain the average of 41% and then to use that average to extrapolate over the next 18 months. The Rio competition not only distorted the figures for average annual growth, but also caused a natural slump after the end of March 1985, which would have occurred whether or not the article had been published: once the Rio incentive had been removed there would inevitably have been a falling off in the momentum of recruiting and sales.

There is some substance in these arguments, but I do not think that they have great practical effect. One cannot entirely ignore the effect of the Rio trip: as I have shown, such incentives were part of first respondent's

modus operandi. From the figures placed on record it would seem that the distorting effect of the Rio competition was really confined to the first quarter of 1985, which showed this abnormal growth rate of 94%. The growth rates of the previous three quarters, viz. 46%, 48% and 26% (average: 40%) are not out of the ordinary. If one were to take this average of 40% and project it into the first quarter of 1985 then it would seem to have the following effect on the average growth rate based on the quarterly figures from July 1982 to June 1985:

Average growth rate (including 94,16% for first quarter 1985):	43,7%
Average growth rate (including 40% for first quarter 1985):	39,2%

And coincidentally it was common cause between the expert witnesses at the trial that the average annual growth rate for the three years up to March 1984 (which thus excludes the year affected by the Rio competition) was 39%.

The actual growth rate used by respondents'

experts in calculating the claim was 41,47%. Recalculating the claim on the basis of a 39% growth rate would seem to yield a total extrapolated sales figure for July 1985 to December 1986 of R10 643 748, which is R268 067 less than that arrived at using a growth rate of 41,47%. In order to determine the effect of such a reduction in total sales upon the calculation for loss of profit the figure for cost of sales and other expenses would also have to be adjusted, but bearing in mind the various imponderables in any such computation of damages I do not think that this figure of R268 067, which incidentally is slightly less than the difference between first respondent's claim and the trial Judge's award, is very significant.

I come now to the question of the recession. According to Prof Robinson there was a "downturn" in the South African economy, starting in the third quarter of 1984 and continuing through until the third quarter of 1986. It

was brought about by a tightening of monetary policy by the Government in response to what was regarded as an "overheated" economy. During this downturn retail sales in all three primary categories of consumer goods, ie durable goods, semi-durable goods and non-durable goods (which would include cosmetics) declined substantially. Prof Robinson roughly estimated the overall decline over the two years in real terms as 12% and in monetary terms (taking into account inflation) as 48%. There was, in Prof Robinson's words, "a major change in the South African economy". Moreover, the recession differed from previous downturns in that for the first time since the 1960's it caused a drop in the retail sales of non-durable goods. This evidence, substantiated as it was by reference to authoritative statistical data, was not seriously in dispute.

At the trial appellants sought to use the

recession as one of the factors which, to the exclusion of the defamatory article, caused the decline in first respondent's business after June 1985. This contention is untenable and, as I have indicated, was not persisted in on appeal. What was argued on appeal, however, was that the trial Judge ought to have taken the recession into account, as a substantial factor, in the quantification of first respondent's loss.

It is clear from his judgment that Curlewis J rejected the recession as even a material factor in the decline of first respondent's growth rate. He did so partly because the saleswomen who gave evidence stated that the recession did not affect their sales; and partly because of the general contention that the recession did not affect direct selling businesses, like that of first respondent.

With respect, I do not find the evidence of the

saleswomen on this point very cogent. Mrs Lombard, so far as I can ascertain, was not asked about the recession. Mrs Hewson preferred not to express any view about the recession. Mrs Fowler was not aware that there had been a recession in 1985. Mrs James was "not very much concerned with the economy"; she noticed that interest rates went up, but did not notice that sales "were vastly reduced"; everyone seemed "to spend money like water". Mrs Le Roux did not consider that a recession made it more difficult to sell first respondent's products. Mrs Boyd-White also rejected the suggestion that a recession caused sales to drop, but neither she nor Mrs Le Roux was able to rationalize her replies effectively. Both deposed to reduced sales and recruitment after June 1985, but ascribed this to the article. They do not appear to have adverted to the possibility of the negative effect of the article

having been aggravated by the recession or vice versa; and, even if they had done so, I doubt whether they would really have been in a position to give worthwhile evidence on the topic.

In order to determine whether, unlike other retail enterprises, direct-selling businesses were unaffected by the recession reference was made in the evidence to the experience of certain other direct-selling companies. The evidence relating to two of these, Housewares Limited and a company referred to in the evidence as Springtex, is not particularly relevant. Housewares Ltd markets crockery and glassware; Springtex pots and pans. On the other hand, the experience of two others, Avroy Shlain Cosmetics (Pty) Ltd ("Avroy") and Justine (Pty) Ltd ("Justine"), both involved almost exclusively in the marketing of cosmetics and first respondent's major competitors, is very relevant.

Prof Robinson was forced to concede, for reasons that need not be detailed, that the information about Justine, however, was not helpful. It may consequently be disregarded.

With reference to Avroy there were placed before the Court its quarterly turnover figures in regard to cosmetics for the calendar years 1982 and 1983 and its monthly turnover figures for the calendar years 1984 to 1986 inclusive (see exhibits S31 to S35). These figures are inclusive of trade discounts allowed and consequently for the purpose of comparing them directly with first respondent's figures (which are net of discounts) they had to be adjusted. This was done as regards annual figures and the results were incorporated in an exhibit (S51). The gross figures in exhibits S31 to S35 can, nevertheless, be used to demonstrate how by its own standards Avroy fared

during the years under consideration. To do so I have drawn up the following tables reflecting annual and half-yearly turnovers and growth rates (in the cosmetic side of the business only) on lines similar to those appearing in paras 2 and 3 of Mr Stride's summary of expert opinions in respect of first respondent. These tables are merely a matter of mathematical calculation from the figures provided by exhibits S31 to S35.

Annual turnover (in rands):

1982	1983	1984	1985	1986
6 894 328	9 989 424	12 984 357	13 943 549	17 118 677

Annual growth (year on year):

1982/83	1983/84	1984/85	1985/86
44,9%	30%	7,4%	22,8%

Half-yearly turnover (in rands):

To	1982	1983	1984	1985	1986
June	2 923 245	3 966 754	6 537 295	6 808 751	7 571 274
Dec	3 971 083	6 022 670	6 447 062	7 134 798	9 547 403

Half-yearly growth (Year on year):

To	1982/83	1983/84	1984/85	1985/86
June	35,7%	64,8%	4,2%	11,2%
Dec	51,7%	7%	10,7%	33,8%

Exhibit S51 which reflects the "corrected figures" (ie less trade discounts) for Avroy gives the following annual growth rates for the company:

1982/83	1983/84	1984/85	1985/86
42,9%	32,6%	3,5%	29,7%

These tables (as also the figures shown in S51) indicate that in the second half of 1984 there was a sudden drastic decline in Avroy's growth rate and that this persisted until the second half of 1986. This more

or less corresponds with the period of the economic downturn. And in Prof Robinson's opinion there was a very strong correspondence between Avroy's turnover figures and the downturn in the economy.

It is true that Avroy represents only one other direct-selling cosmetics company, but it is an important one, showing an annual turnover substantially greater than that of first respondent. And it appears that there were no statistics available for direct-selling cosmetics companies as a group. It is possible that the dip in Avroy's growth rate was caused by some factor other than the recession, but none was suggested; and the correspondence between this dip and the period of the recession seems, on the face of it, to be more than coincidental.

The trial Judge took the view that no inferences favouring appellants' case could be drawn from a comparison

between first respondent and Avroy. He emphasized that they acted "in a quite different fashion both before the article and after the article". And in this connection he pointed to the facts that (as shown in exhibit S51) in 1984 Avroy showed a decline in growth (compared with 1983), whereas first respondent's growth figures for these years showed an increase; and that in 1986 Avroy showed a healthy growth increase, whereas first respondent did not.

I must point out that these remarks were made with reference to the thesis then being put forward by appellants that the recession, and not the article, was the cause of the decline in first respondent's turnover. And certainly in this context first respondent's failure to recover in 1986, contrasted with Avroy's recovery in that year, is a valid point. But the learned Judge does not appear to have considered the significance of the evidence concerning Avroy's turnover during the recession as an indication that

direct-selling companies marketing cosmetics were affected by the recession and that, therefore, the recession probably aggravated the effects of the defamatory article.

With regard to the learned Judge's observation that in 1984 Avroy had a decline in growth, whereas first respondent experienced the converse, there are two points to be made. Firstly, as the tables which I have compiled in regard to Avroy show, this decline commenced in the second half of 1984 (which more or less coincided with the onset of the recession); the first half of the year showed very healthy growth. Secondly, while it is true that in 1984 first respondent enjoyed a growth of 35% over 1983 and that this was carried over into the first quarter of 1984, this movement against the recessionary trend may well have been due to the Rio competition, which as we know had a powerful disturbing effect upon the figures.

A further point which seems to me to have some

relevance in this connection is the relatively poor turnover achieved by first respondent in the quarter ending June 1985, ie immediately after the Rio competition closed. The growth figure, as compared with the corresponding period in 1984, of 23,66% was well below the average of 41% (or 39%, whichever figure one takes) and indeed the sales for June 1985 were actually less than those for June 1984, resulting in negative growth for that month (see exhibit O5). This was never satisfactorily explained by respondents' witnesses and would seem to point to the onset of a measure of decline prior to, and therefore unconnected with, the publication of the article.

The onus was upon the first respondent to establish the special damages claimed by it. It sought to do so by projecting its average turnover for the previous three years into the period of 18 months after the publication of the defamatory article and by asking the

Court to infer that the difference between the extrapolated figure thus obtained and its actual turnover during the period represented loss of business due to the article. This process of reasoning is valid provided that the general circumstances pertaining to the conduct and success of the business remained broadly the same during the 18-month period as they had been prior thereto. In that event, in the absence of other possible causes, the inference may be drawn. But in this case it is common cause that circumstances did not remain static. For part, at any rate, of that period there was a severe economic recession, which prima facie appears to have had a sharply adverse effect on the business of one of first respondent's main competitors. This recession as a possible contributory cause cannot be ignored. And in my view the onus was upon first respondent to show that the recession did not in any way contribute to the loss apparently indicated by the drop

in turnover. (Cf International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1) 1955 (2) SA 1 (W), at 19 A-G). In other words, the onus was upon the first respondent to show as a matter of probability that but for the defamation its turnover for the 18 months would have been as high as the extrapolated figure. It could do so only if the recession would not have affected its business during the period in question. In my view, first respondent failed to discharge this onus. It follows that in dismissing the recession as being of any relevance the trial Court erred. In the circumstances the question of the quantum of first respondent's special damages must be considered afresh.

It was argued by Mr Shaw that because first respondent had not quantified the likely effect of the recession upon first respondent's turnover during the 18 months, it had altogether failed to prove its special

damages. I do not agree. It has not been suggested that there is other evidence on the point which first respondent should reasonably have placed before the Court. In my view, this is the type of case where the Court must do the best it can on the material available (cf. Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A), at 969 H - 970 H and the cases there cited). And in the nature of things the Court's assessment of the loss here cannot be more than a rough estimate.

In order to provide some basis for this estimate I have worked on the postulate that even if the defamatory article had not been published, on the probabilities the recession would have retarded first respondent's growth rate to the extent that in the period July 1985 to June 1986 it would have been 20% and in the period July to December 1986, 35%. I do not think that this postulate does injustice to either side. A recalculation of first

respondent's loss of profit using the method set forth in Mr Stride's expert summary in accordance with these growth rates yields the following:

Total expected sales			
To June 1986: R4 517 624 + 20%			R5 421 149
To Dec 1986: R5 421 149 + 35% (6 months)			3 659 275
			R9 080 424
Actual sales			6 474 456
Lost Sales			R2 605 968
Less Cost of lost sales (40%)		R1 042 387	
Railage (1,1%)		28 665	
Manager commission (2,3%)		59 937	
Distributor commission (6,26%)		163 134	
Convention		60 000	
			1 354 113
Lost Profit			R1 251 855

It was argued on first respondent's behalf that even if the recession ought to have been taken into account whatever effect it might have had would be counter-balanced

by what were termed the various "buffers or margins" built into its computation of the special damages. It was said that the most significant of these was the cut-off date of December 1986, there being "no doubt" that first respondent continued to suffer "very considerable loss" thereafter. I am not convinced that such loss after December 1986 was established. In fact, Stride stated in evidence that in calculating first respondent's loss he deliberately chose December 1986 as the cut-off point because that was within three months of the closing of the competition for the Israeli conference, which would have had distorting effects similar to those caused by the Rio conference. But in any event, first respondent chose to limit its claim for special damages in this way and consequently I do not think that it is open to it to advance this argument.

In all the circumstances I am of the view that an award to first respondent of special damages in the sum of

R1 200 000 would meet the justice of the case.

I turn now to the award to first respondent of R250 000 as general damages. This, it is to be noted, is the amount which first respondent claimed under this head. Mr Stride estimated the goodwill attaching to first respondent's undertaking as at February 1985 in the sum of R2m. Seen against that figure the award does not appear to be excessive. On the other hand, in the case of a trading corporation such general damages are intended as compensation for injury to trade reputation. The injury to trade reputation would normally be reflected to a large extent in a reduced volume of business and lower profits. But injury by way of loss of profits is catered for by an award of special damages. I recognize that there is room in a case such as this for claims for both special and general damages - indeed the contrary was not argued by appellants' counsel - but it cannot be denied that

notionally there is a measure of overlapping between the two claims; and I consider that this is a factor which must be taken into account in computing the general damages in this case. It is not clear to me that the trial Judge did so.

The defamation was undoubtedly a very serious one. Here I would emphasize (i) the cult and divine inspiration themes; (ii) the allegations or insinuations of brainwashing, manipulation and exploitation of trainees on courses and the concomitant physical abuse, psychological torment and sexual confrontation; (iii) the suggestions of illegality with reference to the business conducted by first respondent and the Kubus "smear"; (iv) the alleged misleading of recruits, improper pressure, confidence tricks etc; and (v) the emphasis upon hard luck stories of saleswomen who had "invested" what were for them large sums of money for little or no return. The allegations concerning the courses involve second respondent directly,

but also first respondent indirectly, as it is calculated to have an adverse effect on recruiting generally. Both respondents are particularly sensitive to public opinion and, therefore, very vulnerable to this kind of defamation. There are also certain aggravating factors. These, however, were relied upon by the trial Judge in deciding to make a special order as to costs, viz. costs on the scale as between attorney and client. It would not be equitable to rely upon the same factors to inflate the award of damages.

The award of R250 000 for general damages for defamation is, so far as I am aware, far higher than any other award made by our courts. It is true that in making comparisons with past awards allowance must be made for the erosive effect of inflation, but nevertheless the figure is a very high one. Defamatory statements concerning the way a trading corporation conducts its business can no doubt prove very damaging but, as I have shown, this is largely

compensated for where special damages are awarded. And unlike a natural person a trading corporation does not need a solatium for wounded feelings, etc.

Having given the matter careful consideration, I am of the view that had I been seized of this matter at first instance I would not have have awarded more than R150 000 for general damages. The disparity between that figure and the amount awarded by the trial judge is sufficient, in my view, to warrant interference by this Court.

I now proceed to consider the award of damages to second respondent. As indicated above, the claim was initially R75 000 as general damages and R119 029 as special damages. The general basis of the claim for special damages was the same as that adopted by first respondent: a projection into the period after June 1985 of the general trend of turnover prior thereto and a claim founded upon the

difference between that projection and the actual turnover during that period. I do not propose to enter into the details of this calculation because, owing to the fact that second respondent's accounting records proved "deficient and unreliable" (the phrase used in respondents' own heads of argument) it could not be used in computing second respondent's special damages. The learned trial Judge concluded - rightly in my view - that second respondent did suffer actual loss of profits, but in view of the difficulties of quantification flowing from the defects in the company's accounting records he awarded a lump sum of R75 000 to cover both general and special damage. I do not think that any good ground for interfering with this award has been advanced.

To sum up the position in regard to damages, I am of the view that the award to first respondent should be altered by reducing it to R150 000 general damages and

R1 200 000 special damages; and that the award of R75 000 to second respondent for both general and special damages should stand.

The Trade Practices Regulations

The regulations in question were promulgated in Government Gazette No 6880 of 14 March 1980. They contain a long and complex definition of a "pyramid selling scheme" (reg 1) and various prescriptions and prohibitions in regard to how such a scheme is to be operated. For the regulations to have any relevance to the computation of damages in this case it had to be shown (and in this respect it was common cause that, at lowest, a duty rested on appellants to adduce evidence in this regard) (a) that the business operations carried on by the respondents fell within the definition of a "pyramid selling scheme", and (b) that in the manner of conducting their business

operations respondents had breached the regulations. Appellants did not lead any evidence in this regard, but relied upon the testimony of the six saleswomen called by respondents.

The definition of "pyramid selling scheme" appears to contemplate a trading scheme relating to the provision of goods or services and involving three persons or groups of persons: (1) the person promoting the scheme (Afrikaans: "die persoon wat die skema instel"), referred to in the regulations as "the promoter"; (2) a person to whom or for whom goods or services are to be supplied, whom I shall call "the consumer"; and (3) a person (other than the promoter) who participates in the scheme and effects the transactions in terms of which the consumer is supplied with goods or services (such a person being designated in the regulations "a participant"). The definition prescribes that in order to constitute a pyramid selling scheme the trading

scheme in question must contain various elements. These include -

(i) that the goods or services are to be provided by the promoter or under arrangements to which he is a party (para (a) of the definition);

(ii) that the goods or services are to be supplied "to or for" consumers under transactions effected by a participant (para (b)); and

(iii) that the transactions, or most of them, are to be effected elsewhere than at the premises at which the promoter or the participant effecting such transactions carries on business (para (c)).

In regard to element (ii) appellants argued that the evidence showed that the goods in question (first respondent's cosmetic products) are supplied "to or for" consumers by participants in that beauty advisers, beauty consultants and distributors conclude transactions with

consumers of the goods and that pursuant to these transactions goods are supplied by first respondent for those consumers. This argument is based on the premise that para (b) contemplates the supply of goods "to or for" consumers or the provision of services "to or for" consumers. The premise is, in my view, ill-founded. It is clear to me from a consideration of the ordinary meaning of the language used and its context that what para (b) contemplates is the supply of goods to consumers and the supply of services for consumers. Linguistically, it is more correct to speak of supplying goods to consumers and supplying services for consumers. And in regard to context, para (d) of the definition contains the following:

> "(iii) the supply of goods to other participants;
>
> (iv) the supply of training facilities or other services for other participants;
>
> (v) transactions effected by other

> participants under which goods are to be supplied <u>to</u>, or services are to be supplied <u>for</u>, other persons;....."
> (My emphasis.)

It is thus clear to me that in para (b) the word "to" relates to goods and the word "for" to services; "to" and "for" do not relate to both goods and services. First respondent does not supply its goods to consumers: the goods are supplied to the beauty advisers, beauty consultants and distributors (who may be regarded as "participants"), who in turn supply to goods to consumers. This element in the definition is, therefore, not satisfied.

As to element (iii), the evidence does not, in my opinion, show, or even suggest, that all the transactions, or most of them, are effected elsewhere than at the premises at which the promotor or the participant (ie the beauty adviser, beauty consultant or distributor) effecting the

transactions carries on business. The evidence establishes that the transactions in terms of which first respondent sells its products to beauty advisers, etc are concluded at the offices of first respondent. And as regards the transaction between the beauty adviser, etc and the consumer, it has not been shown that it is effected at any particular place, let alone wholly or mostly elsewhere than at the business premises of the beauty adviser, etc.

These two elements are consequently missing in the case of the business undertaking carried on by the respondents and thus it is not a "pyramid selling scheme" as defined. The regulations do not apply and the argument based thereon collapses. In view of this finding it is not necessary to consider the further argument of respondents' counsel, viz that even if the business undertaking did constitute a pyramid selling scheme, there had not been any breach of the regulations.

Attorney and Client Costs

In deciding to award respondents attorney and client costs the learned trial judge took into account a number of factors. These may be briefly referred to as -

(1) The instigation by the appellants of certain newspaper reports concerning the age of Miss Forman in May 1986.

(2) The manner in which the writer of the article (third appellant) and the editor of Style (second appellant) published it, viz recklessly and without checking its truth and without giving Miss Forman an opportunity to respond - in fact after having fobbed off Miss Forman's enquiries as to its contents.

(3) The ineffective and improper plea of justification.

(4) The publication of the article in the absence of evidence of its truth.

(5) The role of the appellants in requesting the publication of an article in The Sunday Star in June 1985.

The reluctance of a court of appeal to interfere with the exercise by a trial judge of his discretion in awarding costs is well-known. In the present case the only ground of attack upon the order was that the trial Judge misdirected himself in that the evidence did not establish factor (5) above.

The key piece of evidence in this connection is a computer print-out, which was discovered and disclosed by the appellants. The evidence establishes that the print-out emanates from the computer operated by The Star newspaper and that the information contained in the print-out was fed into the computer in about June 1985 by a Mr

Brendon Nicholson, who at the time was news editor of The Sunday Star. The print-out reads as follows:

> "Counsel for Style have been granted an adjournment to allow them to present an affidavit from a key witness (a disillusioned former Reeva employee).
> They will send you a complete set of affidavits.
> The lawyers say they expect Reeva's counsel will try to have proceedings delayed until Monday morning.
> They say it would help if we published our Reeva story because it would help Style's lawyers prove that the material in the magazine was already widely known.
> Now that this key witness has come to light they have changed the in (sic) tactics and have deleted the last para of Mrs Quayle's affidavit to avoid any risk of being accused of collusion (between us and Style).
> Now a Mr Steinhower (from Style's legal team) has phoned to....."

It is not in dispute that in terms of secs 3 and 4

of the Computer Evidence Act 57 of 1983 the print-out was admissible "as evidence of any fact recorded in it of which direct oral evidence would be admissible" and that it has "the evidential weight which the court in all the circumstances of the case attaches to it".

The background facts are that for some time prior to the publication of the Style article a Mrs Anne Quayle, a journalist working on The Sunday Star, had herself been engaged on investigating and "doing a story on" Miss Forman and her business undertaking. She wrote up the results of her investigation in the form of an article and it was intended that it be published in The Sunday Star of 23 June 1985. Prior to this date Miss Forman was invited to comment on certain allegations in the article and at her request it was agreed that publication would be deferred until 30 June 1985. This was the "our Reeva story" referred to in the print-out.

As events turned out this story was anticipated by the Style article, much to the annoyance of the editor of The Sunday Star. And it seems clear that the print-out relates to a communication to Mr Nicholson after the interdict proceedings had been commenced and while the appellants were in the process of filing opposing affidavits. These included an affidavit by Mrs Quayle, which is also referred to in the print-out.

It is respondents' contention that this print-out establishes prima facie that lawyers then acting for appellants approached Mr Nicholson with a view to persuading The Sunday Star to publish Mrs Quayle's article to help prove that the material in the Style article was "already widely known"; and that Mrs Quayle's draft affidavit was amended by the deletion of a paragraph in order to avoid any risk of The Sunday Star and the publishers of Style being accused of collusion.

There are two other pieces of evidence which are very significant in this context. The first of these is a letter dated 27 June 1985 (exhibit JJ) from one of the firms of attorneys representing the appellants in the Court a quo, Messrs Webber Wentzel & Co, addressed to the editor of The Star and marked for the attention of Mr Tyson and Mr Nicholson. It reads:

> "Dear Sir,
>
> REEVA FORMAN STORY
>
> We enclose for your perusal a copy of the Supporting Affidavit, together with the relevant transcript in the above-mentioned matter.
>
> We shall contact you early tomorrow morning to discuss with you any story which The Star may wish to run in connection with this matter.
>
> If you have any queries, please contact Mr P Prinsloo of our office."

It is accepted by appellants that this letter was signed by a Miss P Stratten, a professional assistant in the employ of Webber Wentzel & Co. The supporting affidavit referred to in the letter is that of Mrs Quayle. The second piece of evidence is that a comparison between the copy of the affidavit enclosed with the letter of 27 June 1985 (exhibit JJ) and the affidavit as actually filed reveals that in the latter the last paragraph appearing in the former had been omitted. This appears to have a direct connection with what is stated in the print-out.

Various members of the legal team which acted for appellants in the interdict proceedings, advocates and attorneys, were called to give evidence. They all denied any complicity in, or knowledge of, the communication reflected in the print-out or of any collusion between appellants, or their legal advisers, and The Sunday Star in regard to the "Reeva story".

Reading exhibit JJ and the print-out in conjunction with one another, I find the inference virtually inescapable that the writer of exhibit JJ, evidently Miss Stratten, telephoned Mr Nicholson on 28 June 1985 and communicated to him the information and suggestions contained in the print-out. Obviously the two key persons who could have given direct evidence on this issue were Miss Stratten and Mr Nicholson; but neither was called to do so. At the time of the trial Mr Nicholson was in Perth, Australia working on a newspaper there; and Miss Stratten was in London, working in the office there of Messrs Shepstone and Wylie. There is no indication that any attempt was made to obtain their evidence.

In all the circumstances I consider that the learned trial Judge was fully justified in coming to the conclusion that there had been collusion along the lines reflected in the print-out between an attorney acting on

behalf of the appellants and The Sunday Star newspaper. The editor-in-chief of The Sunday Star, Mr H Tyson, agreed with counsel for the respondents that the request referred to in the print-out was a "disreputable" one; and I do not think that the Court a quo can be said to have erred in taking this factor into consideration when deciding to award attorney and client costs. The appeal against this portion of the order of the Court a quo accordingly fails.

Costs of Appeal

In the result the appeal succeeds to the extent that the damages awarded to first respondent are reduced, in the case of general damages, from R250 000 to R150 000 and, in the case of special damages, from R1 800 000 to R1 200 000. In all other respects the appeal fails. Nevertheless, although the reduction achieved in regard to first respondent's damages must be accounted substantial

success vis-à-vis that party, I do not think that appellants should be awarded all their costs of appeal. The issues upon which they failed did not occupy a very substantial portion of the appeal record and consequently no special order in regard to the costs relating to the record is warranted. On the other hand the hearing of the appeal did take up two full days before this Court. Had appellants not pursued the preliminary point concerning the alleged wrongful exclusion of evidence and the points relating to the Trade Practices Regulations and attorney and client costs, I have no doubt that this hearing would have been completed in one day. In the circumstances, I am of the view that while appellants' substantial success as against first respondent should carry the general costs of the appeal, it would be equitable if the costs occasioned by the second day of the hearing of the appeal before this Court (ie 6 March 1990) to both appellants and first respondent be

borne by appellants.

Both appellants and respondents asked that all costs awarded in respect of the appeal should include the costs occasioned by the employment of three counsel. An order to this effect was made by Curlewis J in regard to the trial costs awarded respectively to appellants and respondents. Having had regard to the length and complexity of the case and the importance thereof to the parties concerned, I consider that it is appropriate to allow the costs of three counsel.

The Order

It is accordingly ordered as follows:

(1) As against first respondent:-

(a) The appeal is allowed in part and para 2.1 only of the order of the Court a quo is altered to read:

"Payment to the second plaintiff of the sums of R150 000 and R1 200 000, together with interest thereon from date of judgment at the rate of 12% per annum".

(b) Appellants are entitled to the costs of appeal, save those occasioned to both appellants and first respondent in connection with the second day of the hearing before this Court on 6 March 1990, which costs shall be borne by the appellants.

(c) The costs of appeal awarded respectively to appellants and first respondent shall include those occasioned by the employment of three counsel.

(2) As against second respondent, the appeal is dismissed with costs, including the costs occasioned by the employment of three counsel.

M M CORBETT

HOEXTER JA)
E M GROSSKOPF JA)
FRIEDMAN AJA) CONCUR.
NIENABER AJA)