## MOUNTBATTEN INVESTMENTS (PTY) LTD v MAHOMED 1989 (1) SA 172 (D)



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| **Citation** | 1989 (1) SA 172 (D) |
| **Court** | Durban and Coast Local Division |
| **Judge** | Bristowe J |
| **Heard** | March 21, 1988 |
| **Judgment** | March 31, 1988 |
| **Annotations** | Link to Case Annotations |

### Flynote : Sleutelwoorde

Contract - Nature of - Whether a sale or barter (exchange) - Principles applicable in determination thereof.

Sale - Of goods - 'Trade-in' agreement - 1986 model motor car bought - Purchase price paid partly in cash and partly by 'trade in' of a motor car - Car traded in as a 1985 model found to be a 1983 model - Seller of 1986 model seeking to claim an amount representing the difference in trade-in allowances for 1985 and 1983 models by way of actio quanti minoris - Traded-in car neither sold nor bartered - Remedies in respect of latent defects and for dicta promissave (such as actio quanti minoris) peculiar to sale or barter - Claim as formulated dismissed.

### Headnote : Kopnota

In order to determine whether a contract, eg a 'trade-in' agreement, is a sale or a barter the principles applicable are these:

*(a)* If no part of the consideration for the delivery of a *res* is in cash, the contract cannot be classified as a sale and must be regarded as barter.

*(b)* If part of the consideration is in cash and part in kind, the intention of the parties must be looked to in order to determine whether the contract is truly a sale or whether it is barter.

*(c)* If the parties disagree as to their intention or if there is reason not to accept their description of what contract they intended to enter into, the relative values of the cash and kind should be looked at as one of the factors relevant to a determination of the issue. There may be other factors.

*(d)* Only if all else fails or is equivocal should the presumption described by Voet *Commentary on the Pandects* 18.1.22 and Huber *Jurisprudence of my Time* 3.4.3 be resorted to.

Plaintiff had sold to the defendant a 1986 BMW motor car for R58 535, R14 535 of the

purchase price to be paid in cash and the balance by plaintiff accepting as a trade-in another BMW represented by the defendant as being a 1985 model, but in fact found to be a 1983 model. Plaintiff accepted that the misrepresentation was innocent, but sought to rely on the *actio quanti minoris* in claiming payment of the difference between the trade-in value of a 1983 as against a 1985 model. The defendant excepted to the pleadings, contending that the 1983 model traded in had not been sold and hence the *actio quanti minoris* was not available to the plaintiff. The case then proceeded to trial on agreed facts.

*Held*, that one contract had been entered into in terms whereof the defendant bought and the plaintiff sold the 1986 BMW and in terms of that contract the 1983 BMW was delivered in part payment of the purchase price payable for the 1986 BMW: the 1983 BMW was not sold, however, nor was it bartered.

*Held*, further, that the remedies available in respect of latent defects and for *dicta promissave* (such as the *actio quanti minoris* ) were peculiar to sale or barter.

*Held*, accordingly, that the plaintiff's claim as formulated, based upon the *actio quanti minoris*, had to be dismissed with costs.

## Case Information

Civil trial on agreed facts. The nature of the case appears from the reasons for judgment.



BRISTOWE J

*M F Moosa* for the plaintiff.

*P M Meskin* for the defendant.

*Cur adv vult*.

*Postea* (March 31).

## Judgment

Bristowe J: With one exception the facts in this case are, and since the action commenced have been, common cause. They can be summarised as follows: both parties are dealers in motor cars. On 18 September 1986 they entered into an agreement in terms of which the plaintiff sold to the defendant a 1986 BMW motor car for R58 535. The agreement provided that R14 535 of the purchase price was to be paid in cash prior to delivery. The balance of R44 000 was provided by the plaintiff accepting as a trade-in a BMW 733i motor car. This was represented by the defendant to be a 1985 model but was in fact a 1983 model. Up to the date of trial the pleadings alleged that the misrepresentation had been fraudently made, an allegation which was denied by the defendant. At the trial that allegation was abandoned and the matter proceeded upon the basis that the representation had been innocent. It was a common cause that it was material (as to which, see *Van Niekerk v Thompson Motors* 1966 (2) PH A70), that it was made with the intention of inducing the plaintiff to agree to the trade-in

allowance of R44 000 and that the plaintiff in fact relied upon it.

At the Rule 37 conference the parties agreed that the proper trade-in allowance for the 1983 BMW was R27 030. The plaintiff's claim, if it had one, was thus for R16 970. It was also common cause that the plaintiff tendered to return the 1983 BMW to the defendant against payment by the defendant of the full sum of R44 000.

The case therefore proceeded at the trial without evidence. Both parties were content to argue the matter on the agreed facts, although Mr *Meskin*, who appeared for the defendant, asked for a special order for costs in view of the fact that the claim based on the defendant's alleged fraud was abandoned only on the day of trial.

These facts gave rise to a lively debate upon the points of law arising. Since the defence was in the nature of an exception to the plaintiff's claim (which incidentally only formally became part of the pleadings when I allowed the appropriate amendment to be made at the trial) Mr *Meskin*, by agreement with Mr *Moosa* for the plaintiff, began. His argument can be summarised thus:

1. Where as here the plaintiff's claim is based upon an innocent misrepresentation, the plaintiff is entitled to rescind the contract and claim restitution but he is not entitled to damages. (See Joubert (ed) *The Law of South Africa* vol 5 para 136 at 65.)

2. Admittedly in a contract of sale, where a *dictum promissumve* is made bearing on the quality of the *merx* which is both material and incorrect, the purchaser can rely upon the Aedilitian remedy embodied in the *actio quanti minoris* : *Phame (Pty) Ltd v Paızes* 1973 (3) SA 397 (A) .



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3. However, in this case the 1983 BMW which was traded in was not *sold* and hence the extended *actio quanti minoris* is not available to the plaintiff.

4. *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) does not decide the contrary. Alternatively, if it does, it was wrongly decided.

Mr *Moosa's* answer may be summarised thus:

1. The 1983 BMW was or should be deemed to have been sold to the plaintiff.

2. The Aedilitian remedy referred to in *Phame (Pty) Ltd v Paizes* (*supra* ) is therefore available to the plaintiff.

3. Alternatively, *Wastie's* case *supra* did decide the point and it should be followed.

It follows that two questions have to be decided. First, what was the true nature of the transaction referred to as a trade-in? Second, and only if it was not a sale, should the remedy afforded by the *actio quanti minoris* be extended to the plaintiff? Implicit in these are two further questions. What was decided in *Wastie's* case and does it apply, or should it be applied to the

plaintiff?

Where two parties agree that one will deliver a *res* to the other who will in turn deliver another *res* plus money to the former, it seems to me that the contract may be a sale or it may be an exchange. There are no other possibilities that I can visualise.

In dealing with the price payable under a contract of sale, Voet *Commentary on the Pandects* 18.1.22 says the following (*Gane's* translation):

> 'It must also consist of a payment in cash money of which the passage cited below speaks; and not of other things....
>
> If partly money and partly something else is given for a thing, we must look to see what was in the mind of the contracting parties, whether purchase or barter. If the matter is not at all clear, the transaction may be classified according to its leading factor. Thus, if there is more in money and less in the value of other things given, the contract ought to be deemed to have been one of sale; but the contrary if there is more in the thing given than in the money.'

It is to be noted that *Voet* regards the problem first and foremost as a matter of the actual intention of the parties. Only if that is not decisive does he propose the relative value test. Huber *Jurisprudence of my Time* 3.4.3 accepts the proposition that the price in a contract of sale may be partly in money and partly in kind and says (*Gane's* translation):

> 'It is reckoned as a sale if the money is the larger amount; if the kind is worth more then it is held to be barter; if the amounts are about the same then it is still held to be a sale since sale is more usual than barter and the presumption always applies in favour of what is most usual.'

It seems to me that *Huber* was not necessarily ruling out the relevance of the parties' intention and was doing no more than supply a test which could be used to determine the matter should the parties be uncertain. He quotes a case in which the parties

> 'did not agree whether their contract by which a farm had been given for a house with two rooms and 1 175 guldens of Philip in money was sale or exchange'.

Pothier on *Sale* para 30 apparently takes a similar view but the work is not available to me. So do several of the modern textbooks. See, for



example, *Law of South Africa* (*op cit* ) vol 24 para 14; Mostert *et al Die Koopkontrak* at 9 - 10; De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 278; Kerr *The Law of Sale and Lease* at 25; and Mackeurtan *Sale of Goods in South Africa* 5th ed para 2.3.7 and especially at 271. The views of Norman *Purchase and Sale in South Africa* 4th ed at 63 are not clear to me. The learned author does, however, appear to have misunderstood the tenor of *Massyn's Motors v Van Rooyen* 1965 (3) SA 717 (O) which he miscites as *Meintjies v Van Rooyen*. Certain of the old authorities apparently take the view that the price must consist of money and nothing else. They are listed in *Law of South Africa* (*loc cit* ). This view cannot be regarded as sound now, if it ever was. In *Van der Merwe v Viljoen* 1953 (1) SA 60 (A) the Court had to deal with a contract for the sale of immovable property where the price was agreed in the sum of 6 000. It was

provided that in certain circumstances the seller would be obliged to accept as part of the purchase price a certain fixed deposit receipt for 2 000 and an acknowledgment of debt by a third party for 2 000. This agreement was subsequently varied so as to oblige the buyer to pay an additional 1 000 in cash and the acknowledgment of debt was substituted by another fixed deposit receipt for 1 000. The company which issued the fixed deposit receipts was then placed under judicial management and the question arose as to who should bear the loss caused by the depreciation in value of the fixed deposit receipts. At 65A - B Van den Heever JA said the following:

> 'Na my oordeel is die akte duidelik. Verkoper moes die waardepapiere ontvang as deel van die koopskat en daarna het die risiko van waardevermindering op hom oorgegaan net soos hy hom die waardevermindering of devaluasie van gangbare munt sou moes getroos.'

It is implicit in the judgment that the Court accepted that a contract of sale in this form was in order. To like effect was the case of *Lee v Solomon* 1949 (2) SA 255 (C) where the purchaser was required to pay part of the purchase price by delivering certain shares. Newton Thompson J said at 257:

> 'Now, when we look at the portion of the document which is set out in the pleadings, we see that the contract is described as a sale; we see that the purchase price was to be the sum of 1 500; that an arrangement was made whereby portion of the purchase price should be paid by handing over 700 Greaterman's shares at an agreed value of 25s; we see further that it was stipulated that the balance - by which I take it is meant the balance of the purchase price, 625 - was to be paid to the seller against registration of transfer. Paragraph 5 of the declaration, which I have already quoted, says that if the sale is of no force and effect, and is cancelled, the defendant shall be obliged to refund to the purchaser all moneys paid on account of the purchase price. It seems to me that all these points to which I have alluded show clearly that what was in contemplation between the parties was a sale. There is no question of any other contract.'

Likewise in the *Massyn's Motors* case *supra* a trade-in was involved. The plaintiff relied upon a contract in terms of which the deposit was paid by way of the value placed upon the trade-in and the balance was payable in instalments. It was argued that the agreement to trade-in amounted to a separate contract. Smuts AJ, as he then was, disposed of this argument as follows:



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> 'Met die betoog dat die inruiling van 'n saak waarop 'n waarde geplaas word, niks anders as 'n koopkontrak van die ingeruilde saak is nie, kan ek nie saamstem nie. Waar by die 'inruiling' van 'n saak daar niks meer gebeur nie as dat die verkoper sy bereidwilligheid te kenne gee om as deel van die koopprys 'n saak te aanvaar wat deur die koper aangebied word as gedeeltelike betaling van die koopprys en die partye daarna 'n waarde op die saak plaas vir die doeleindes van die huurkoopkontrak, kom daar geen koopkontrak tot stand met betrekking tot die saak wat aldus 'ingeruil' word nie. Daar is geen bedoeling dat die 'ingeruilde' saak moet dien as die *merx* van 'n afsonderlike koopkontrak nie; die 'ingeruilde' saak word deur die koper aanvaar as gedeeltelike betaling van die prys wat hy vra vir die saak wat hy verkoop en die koopprys van die onderwerp van die huurkoopkontrak is die totaal van die waarde wat op die ingeruilde saak geplaas is en die verdere geldelike bedrag wat ook betaal moet word deur die koper.
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> Steun vir hierdie sienswyse is myns insiens te vinde in die beslissings *G J Dawson (Clapham) Ltd v H & G Dutfield* [1936] 2 All ER 232 en *Antonie v The Price Controller and Another* 1946 TPD 190 te 192, 193.'

*Dawson's* case to which the learned Judge referred certainly follows the same line. So, too,

does *Antonie's* case which also deals with a trade-in. At 193 of the report, the following is said:

> '... (A)ccording to the terms of the contract the delivery of the Hudson car was taken as the equivalent of 450. The value of the traded-in car, at an agreed price, is the determining factor that the contract is one of sale not of exchange - *Voet* (18.1.22) supports this view.'

In reaching this conclusion Barry JP relied largely on English authorities, but it seems to me with respect that the logic underlying the decision on which he relied is sound and, as he pointed out and as I have tried to show, it was supported by Roman-Dutch authority. I do not, however, with respect, share his view of the effect of *Muller v Steenkamp* 1937 TPD 248. It seems to me that Greenberg J was not considering the nature of the contract at all; his view was focused on the right of the party receiving the vehicle traded-in to deal with it.

More recently there has been the decision in *Bouwer v Adelford Motors (Pty) Ltd* 1970 (4) SA 286 (E) , where substantially the same points arose and the Court readily followed *Antonie's* case. There had also been the decision to like effect in *Wastie's* case *supra*. At 131 Van Zyl JP said the following:

> 'The nature of a contract is determined by the true intention of the parties. See *Zandberg v Van Zyl* 1910 AD 302 at 309 *et seq*. This is of particular importance where the contract from its form could as likely be one of sale as one of exchange. See, too, *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369....'

After considering the evidence he said:

> 'We have therefore to do with a contract of sale in the terms contended for by the defendant, viz plaintiff sold the Valiant to defendant for R1 250 payable: R400 in cash and the balance of R850 by giving plaintiff ownership of the Peugeot at an agreed valuation of R850. The Peugeot is therefore portion of the *pretium*.'

In my respectful view the learned Judge's conclusion on this aspect of the case was correct.

Against this view can be ranged only two cases that I can find. The first is *R v Van Heerden* 1935 EDL 292 at 295 - 6 where Gane J said the following:

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> 'A reference to the authorities shows that, however little sale or barter are now to be distinguished in their legal complexion and effects, there is a clear distinction between them as transactions. *Voet* 18.1.22 says that the *pretium* in sale must consist in money; Schorer *ad Grot* 3.31.6 says that 'generally when a statute speaks of purchases, it must not in case of doubt be extended to exchanges'. Huber *Heed Regts* 3.4.1 says that 'the third essential point of purchase and sale is a price reckoned in money, without which no purchase can exist'. Benjamin on *Sale* 5th ed at 3 says:
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> 'So, in relation to the element of price, it must be money, paid or promised, according as the agreement may be for a cash or a credit sale; but, if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter.'

It will, however, be remembered that the learned Judge was dealingwith a case where the appellant was trying to escape a conviction for carrying on the business of a hawker without the necessary licence. The argument which was being dealt with in the passage quoted arose because the appellant's employer held a speculator's licence which entitled him to 'buy'

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livestock. The transaction under consideration, however, involved a direct exchange of an ox for four bags of mealies. The learned Judge was therefore dealing with a clear case of barter and his views, which were in any event *obiter*, should not be taken as having been intended to go further than covering the situation with which he was dealing.

The other case is *Vizirgianakis v Karp* 1965 (2) SA 145 (W) . At 150A Colman J said this:

> 'It seems to me that (although the English Courts apparently take a different view) there is a good deal to be said for the proposition that a 'trade-in' transaction, even if the parties choose to call it a sale, is really a contract of exchange if the major consideration on each side is property and not money. The fact that a value is assigned to each item of property which is to pass does not, in my view, detract from the validity of this view. That is no more than a part of the negotiations whereby the parties decide whether any money is to pass between them, in addition to the goods, and if so how much.
>
> It was argued that the judgment of Greenberg J in *Muller v Steenkamp* 1937 TPD 248 is in conflict with this view. But I cannot accept that contention. What that case decided, it seems to me, was no more than this: the motor dealer, under an ordinary 'trade-in' transaction, is at liberty to dispose of the car 'traded in'. But, even if he has done so, that will not bar an action by him for restitution based upon his repudiation of the contract. Although ordinarily the party claiming restitution must himself make restitution, in a case of this kind the dealer may tender money in place of the car which he has disposed of. It is true that the learned Judge used the word 'price' in relation to the 'trade-in' transaction: but the juristic nature of the contract was not in issue, and I cannot regard his use of that word as a decision, or even a *dictum*, that the transaction was one of sale, rather than exchange.'

However, he went on to say:

> 'But this question was not fully argued before me, and I do not think it necessary to reach a definite conclusion thereon.'

However one regards the views expressed by the learned Judge, they clearly do not constitute authority for the proposition canvassed by him.

To summarise on this aspect, it seems to me to be correct both in principle and on authority to say that:



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*(a)* If no part of the consideration for the delivery of a *res* is in cash the contract cannot be classified as a sale and must be regarded as barter.

*(b)* If part of the consideration is in cash and part is in kind the intention of the parties must be looked to in order to determine whether the contract is truly a sale or whether it is barter.

*(c)* If the parties disagree as to their intention or if there is reason not to accept their description of what contract they intended to enter into, the relative values of the cash and kind should be looked to as one of the factors relevant to a determination of the issue. There may of course be other factors.

*(d)* Only if all else fails or is equivocal should the presumption described by *Voet* and *Huber* be resorted to.

The nature of barter has already emerged from what I have said, but perhaps it is as well to deal with it a little more fully. *Voet* (*op cit* at 19.4.1) defines it as

> 'a *bonae fidei* innominate contract by which a thing of one's own is given in order that the other party may give in return a thing of his own'.

Grotius *Introduction to Dutch Jurisprudence* 3.31.6 (*Maasdorp's* translation) contains a very similar definition. *Mackeurtan* (*op cit* at 271) defines it as

> 'a contract for the transfer by one person of the property in a thing to another in return for a similar agreement by the latter',

a definition which stresses the fact that in barter it is ownership that is transferred and not merely *vacua possessio* and that consequently one cannot barter with which one does not own. This was the view taken in *Pennefather v Gokul* 1960 (4) SA 42 (N) which relies on *Voet* (*op cit* 19.4.2); *Huber* (*op cit* 3.23.14) and *Grotius* (*op cit* 3.31.7). This view has been criticised by J E Scholtens in an interesting article appearing in the (1960) 77 *SALJ* at 403. The strict Roman law rule appears to have given way so that it is now possible to exchange that which one does not own.

It is clear that a contract of exchange is different from a contract of sale; although *Huber* (*op cit* 3.23.13) says that

> 'it generally resembles sale and purchase in that eviction applies to both, also the annulling of the contract on the ground of lesion to the extent of more than half, where that appears, and on the ground of defects found in the property sold or bartered'.

*Grotius* 3.31.6 agrees. This is also what the *Digest* seems to say. See Buckland's *Textbook of Roman Law from Augustus to Justinian* 3rd ed at 523 and the relevant texts translated by De Zulueta *The Roman Law of Sale* at 137 and 143.

Turning to the facts of the present case there seems to me to be no reason to doubt the parties' own view of the matter. In its particulars of claim the plaintiff made the following allegations:

'3. On or about 11 September 1986 the plaintiff and the defendant concluded a contract in terms of which

*(a)* the plaintiff sold to the defendant a 1986 model BMW motor car;

*(b)* the defendant undertook to pay a price of R58 535 for the said motor car;



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*(c)* the defendant was to trade in a 1985 model BMW 733i motor car against the said purchase price;

*(d)* the trade-in allowance agreed upon in respect of the motor car referred to in subpara *(c)* hereof was R44 000;

*(e)* the defendant undertook to pay the balance of the purchase price of R14 535 prior to taking delivery of the said 1986 model BMW 535.'

These allegations were admitted without qualification by the defendant. Admittedly one can visualise circumstances where the contract would produce the same physical results and yet be properly classified as an exchange. If for example either party had offered one vehicle in exchange for the other and thereafter a cash adjustment was agreed upon, each would have obtained the vehicle of his choice (as here) and there would have been a cash payment (as here). The contract would then, as I say, have been an exchange but that is not the normal way in which motor car dealers do business. Normally the price of the vehicle sought is fixed and the trade-in is offered as part payment. In those circumstances it seems to me the contract would be sale and not exchange. This is what happened here. The order reflecting both the sale and the trade-in was annexed to the plaintiff's further particulars and admitted by the defendant. It shows a selling price and deducts from it the 'allowance' on 'T/I' (trade-in) and the defendant expressly agreed 'to purchase' the 1986 BMW (wrongly referred to as the 'undermentioned vehicle': it was actually the 'above-mentioned').

In all the circumstances therefore it seems to me inescapable that one contract was entered into in terms of which the defendant bought and the plaintiff sold the 1986 BMW. In terms of that contract the 1983 BMW was delivered in part payment of the purchase price payable for the 1986 BMW. The 1983 BMW was not sold, nor was it bartered.

I turn now to a consideration of the rest of *Wastie's* case *supra*. At 131G the learned Judge says the following:

> 'Defendant alleges that he cannot be sued successfully by plaintiff for any latent defect in the Peugeot, as the Peugeot is portion of the *pretium* for the Valiant and the *actio quanti minoris* entitles to purchaser to compensation for a latent defect in the *merx*, but does not entitle the seller to compensation for a latent defect in the *pretium*.
>
> I have been able to find no authority dealing directly with this point, but an analysis of the law on sale and exchange leads to the conclusion that, where portion of the purchase price consists of something other than money, the same principles that apply to the *merx* must apply with equal force to the non-money portion of the *pretium*.
>
> The remedies given to a purchaser in a contract of sale are given to both the contracting parties in a contract of exchange. See *D* 21.1.19.5. Pothier in his *Treatise on the Contract of Sale* deals with this matter in similar terms:
>
> > '... (I)n the contract of sale, we distinguish the thing and the price; we distinguish between the contracting parties, one of whom is the seller and the other the buyer. On the contrary, in the contract of exchange, each of the things is both the thing and the price; each of the contracting parties is both seller and buyer.'



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(Para 619 (*Cushing's* translation at 373).) The same attitude is taken up by our Roman-Dutch writers. See *De Groot* 3.31.6; Van Leeuwen *Censura Forensis* 1.4.13.7; and Van der Keessel *Praelectiones Juris Hodierni* vol 5 at 317:

'Indien 'n gebrekkige saak verruil is, is daar ook in daardie kontrak, so na aan koop verwant, geleentheid vir die *actio redhibitoria* of die *actio quanti minoris*.'

We have, therefore, the position that in contracts of exchange both contracting parties are protected by the aedilitian actions against latent defects in the things which are the subject-matters of these contracts.'

So far there can be no quarrel with the learned Judge's exposition, save for his acceptance of the extension of the *actio quanti minoris* to the non-money portion of the *pretium*. On the express wording of *Digest* 21.1.19 one would have to hold that the decision in *Phame v Paizes* (*supra* ) is equally applicable to contracts of exchange, that is that either party to an exchange can hold the other liable for his *dicta et promissa* :

'It must, however, be understood that there are some statements which a seller is not bound to make good, namely those which are merely laudatory of the slave; for example, if he says the slave is frugal, honest, and obedient. For, as *Pedius* puts it, there is a great difference between a statement which is mere puffing and a promise to make good what is stated (ss 1 - 4;... s 5). When the aediles go on to say 'we will grant an action to the buyer and to all whom the matter concerns', they are promising an action to the buyer and to his universal successors. We must understand by 'buyer' anyone who acquires a thing for a price. In the case of exchange both parties are to be considered as being in the position of both buyer and seller and either can proceed under this edict.'

I have stressed, however, that delivery of goods traded in is not pursuant to the sale of those goods nor is it barter of them. The remedies given for latent defects and for *dicta promissave* are peculiar so far as I can see to those contracts. A tenant does not have a similar right to reduce his rental if there has been an innocent misrepresentation as to the quality of the premises which he wishes to hire. Nor may a principal reduce the remuneration which he is otherwise obliged to pay to his agent if the agent has gone beyond the realms of mere puffery and has said something akin to a *dictum promissumve* as to his capabilities. Why should the seller who accepts a trade-in be any better off? The answer given by Van Zijl J at 132B is:

'It would indeed be unfair and illogical not to afford similar protection (to that accorded to the buyer) to the seller in respect of the *pretium*.'

And he went on to hold that the seller would enjoy the same protection so far as latent defects are concerned as does the buyer. His last reason for reaching this conclusion is:

'In terms of the aedilitian actions the seller warrants to the purchaser that the *merx* is free from defects and, where portion of the *pretium* consists of a thing other than money, then in respect of that thing the purchaser gives to the seller - unless he contracts out - a similar warranty that it is free of latent defects. If this were not so that careful balance which the law preserves between purchaser and seller would be disturbed and the innocent seller might on account of an inability to prove the deception of the purchaser be overreached by an unscrupulous purchaser feigning ignorance of the latent defect in the non-money portion of the *pretium*.'

With great respect to the learned Judge, this passage has caused me considerable difficulty. There is, so far as I can find, no authority for the proposition that there is an implied warranty in law that the non-monetary





portion of the *pretium* (or indeed the monetary portion) is free from latent defects. Nor am I

aware of a 'careful balance which the law preserves between purchaser and seller'; on the contrary, the law obliges the seller to honour duties (unless he contracts out of them) which are not imposed on the buyer. And finally the proposition that an innocent seller may be overreached 'by an unscrupulous purchaser feigning ignorance of a latent defect' is, with great respect, not convincing. Quite apart from the fact that the seller can protect himself by requiring an express warranty against latent defects, it is, I believe, a most doubtful proposition that it is the law's function so to regulate matters as to come to the aid of a litigant who finds it difficult to prove his case.

But, in any event, *Wastie's* case goes no further than holding that the person delivering a *res* in part payment for other goods purchased impliedly warrants that the *res* is free from latent defects. That was not the basis for the present plaintiff's claim. *Wastie's* case does not go the length of holding that t he buyer is also liable under the *actio quanti minoris* for an incorrect *dictum promissumve* made innocently. This does not deprive the seller of all remedies. If the misrepresentation is material he can cancel the bargain if he so chooses, but he should not in my view be entitled to come to Court to have his bargain re-written. The conclusion then is inevitable. In my judgment Mr *Meskin's* argument is sound, and the plaintiff cannot succeed.

So far as costs are concerned, I am of the view that a special order for costs should not be granted. I accept that an allegation of fraud should not be lightly made, but I have no reason to think that it was. More importantly, the plaintiff did not persist with the allegation. No evidence was led on this aspect, and indeed the plaintiff expressly abandoned it.

In the result the plaintiff's claim is dismissed with costs.

Plaintiff's Attorneys: *Jackson & Ameen*. Defendant's Attorneys: *Ebrahim & Associates*.