GLASTON HOUSE (PTY.) LTD. v. INAG (PTY.) LTD.

(APPELLATE DIVISION.)

1976. *November* 19. 1977. *March* 15. HOLMES, J.A., WESSELS, J.A., JANSEN, J.A., MILLER, J.A., and GALGUT, A.J.A.

Sale.—Immovable property.—Property containing pediment which had been declared a national monument.—Purchaser not aware thereof at the time of sale.—But seller so aware.—Proclamation of monument constituted a latent defect.—Quaere: *Whether undisclosed servitude a latent defect.—Seller deliberately concealing fact that pediment a national monument.—Conduct tantamount to deliberate fraud.—Such failure to disclose causing purchaser damage.—Recovery of from seller.—Proof.—Servitude.—Undisclosed servitude.—Whether a latent defect.—Fraud.—What amounts to.*

When the appellant had purchased a dilapidated building from the respondent it was unaware that the cornice and pediment including the sculpture in the building had been proclaimed a national monument in terms of the Act then applicable, viz. Act 4 of 1934. The respondent, as owner of the building, had been advised that the pediment had been so proclaimed (Act 4 of 1934 had been repealed by the National Monuments Act, 28 of 1969, which came into operation on 1 July 1969). It was on this day that the appellant had purchased the property. The respondent knew that the building was being purchased for redevelopment purposes. It however had failed to disclose that the pediment had been declared a national monument. Soon after the sale the appellant, having learned of the proclamation, interviewed the National Monuments Council with the respondent's consent in order to ascertain what could be done to alleviate the burden created. The Council granted permission to the appellant to remove the pediment subject to its being stored and thereafter being installed in the foyer of the proposed new building. This put the appellant to considerable expense. The amount of the expenses so incurred in removing and replacing the pediment was claimed from the seller. A Provincial Division having dismissed the appellant's claim, in an appeal,

Held, per GALGUT, A.J.A. (HOLMES, J.A., and MILLER, J.A., concurring) that the fact that the pediment had been proclaimed a national monument constituted a latent defect.

Quaere: Whether an undisclosed servitude constituted a latent defect.

Held, further, on the facts, that the respondent had deliberately concealed the fact that the pediment had been proclaimed a monument.

Held, further, that there had been a duty on the respondent to disclose the fact that the pediment had been proclaimed a monument and this deliberate concealment constituted fraud.

Held, further, that the failure so to disclose had caused the appellant damage.

Held, further, that the appellant had proved that it was entitled to recover the amount expended by it in removing and replacing the pediment.

The decision in the Cape Provincial Division in *Glaston House (Pty.) Ltd.* v. *Inag (Pty.) Ltd.*, reversed.

Appeal from a decision in the Cape Provincial Division (BURGER, J.). Facts not material to this report have been omitted.

I. J. Aaron, for the appellant: It was necessary for the plaintiff below to prove the defendant's liability for the non-disclosure and the damages it had sustained arising therefrom. In submitting that the case made out was such as to discharge the *onus* upon the plaintiff, the matter will be

approached under two main heads, viz. (A) liability; and (B) damages. As to (A): The Court *a quo* made no clear finding on the question as to whether the pediment constituted a defect. The main burden of the evidence was that the existence of the monument embedded in the building precluded the re-development for which the property had been bought and would inevitably constitute an overall encumbrance, and thus a defect. As the object of the purchase was to develop the site and this necessitated demolition of the old building, the proclamation of the pediment as a national monument was by reason of the provisions of sec. 12 (2) of the National Monuments Act, 28 of 1969, an obstruction to removal of the monument and thus to demolition. At lowest, it adversely affected the purchaser's bargain (cf. *Annual Survey*, 1955, p. 264). It constituted an impairment of the usefulness of the *res vendita* to the purchaser. Mackeurtan, *Sale of Goods*, 4th ed., p. 245, and cases cited at note 47. The material time to assess this (and the seller's state of mind) was at the time of contracting or prior thereto. What transpired after conclusion of the contract is not relevant (see, e.g. Norman, *Purchase & Sale*, 4th ed., p. 317; Wessels, *Contract*, vol. II, 2nd ed., paras. 4697, 8. At all material times, therefore, the pediment constituted a defect.

In every contract of sale the seller is obliged to disclose all known latent defects which render the thing sold substantially unfit for the purpose for which it is sold. *Dibley* v. *Furter*, 1951 (4) S.A. at pp. 82, 86, 87, 88; *Knight* v. *Trollip*, 1948 (3) S.A. at p. 1013; *Crawley* v. *Frank Pepper (Pty.) Ltd.*, 1970 (1) S.A. at pp. 32-36; *Cloete* v. *Smithfield Hotel (Pty.) Ltd.*, 1955 (2) S.A. at p. 632. A seller impliedly warrants the *res vendita* to be free from aedilitian defects. This term includes such defects as would render it useless or partially useless for the purpose for which it was sold. In effect, therefore, the seller affirmatively represents that there are no such defects. *Norman, op. cit.*, p. 308; *Annual Survey* (1955), p. 265 (C. J. Johnson, commenting on the reasoning of HORWITZ, J., in *Cloete's* case, *supra*). Where the parties contract on a voetstoots basis, a seller is only relieved from liability (by a voetstoots clause) in respect of latent defects of which he is genuinely ignorant. *Knight* v. *Trollip*, 1948 (3) S.A. at p. 1013. A person who sells voetstoots and is aware of defects is under a duty to speak. *Hadley* v. *Savory*, 1916 T.P.D. 385; *Van der Merwe* v. *Culhane*, 1952 (3) S.A. 42; *Milne, N.O.* v. *Harilal*, 1961 (1) S.A. at p. 810; *Pretorius and Another* v. *Natal South Sea Investment Trust Ltd.*, 1965 (3) S.A. at p. 418; *Crawley* v. *Frank Pepper (Pty.) Ltd.*, 1970 (1) S.A. at p. 34. It is a duty to speak which the Aediles imposed on all sellers. It is true that a seller is not deemed to say "I warrant that the *merx* has no latent defect", yet he is bound to disclose all latent defects known to him. M. A. Millner, *S.A.L.J.*, vol. LXXIV, part II (May 1957) at pp. 198-199. There was no evidence in fact adduced to support the respondent's plea as to its reason for non-disclosure, viz. that the purchaser or its agent were aware of the proclamation of the pediment as a monument. The respondent was under a duty to speak — regard being had in particular to the following factors: (i) It is common cause that the property was sold to the appellant for the purpose of re-development which would involve the demolition of existing buildings. (ii) The pediment having been proclaimed a national monument, the building housing the pediment

could not be demolished without the approval of the National Monuments Council; Act 28 of 1969, sec. 12 (2). (iii) The proclamation of the pediment accordingly impairs the usefulness of the property for the purpose for which it was bought and is therefore a defect. Cf. *Munnich* v. *Botha*, 10 P.H. A34 (see 1962 (3) S.A. at p. 776H). (iv) Inasmuch as the respondent was aware of the fact that the pediment had been proclaimed, special condition No. 1 of the "deed of sale" does not relieve it of its obligation to make disclosure. *Van der Merwe* v. *Culhane*, 1952 (3) S.A. 42; *Knight* v. *Trollip*, 1948 (3) S.A. at p. 1013. A duty to disclose further arose from the fact that there was an involuntary reliance by the appellant on the respondent for information as to the proclamation of the pediment. *Pretorius and Another* v. *Natal South Sea Investment Trust*, 1965 (3) S.A. at p. 418. Para. 13 of the amended plea has the effect of admitting that the respondent concealed the presence of the encumbrance by deliberately failing to disclose same. In the above circumstances the purchaser is entitled to recover delictual damages. There was no allegation by the appellant that the respondent's non-disclosure was with deliberate intent to induce the sale. Defendant's plea as amended is to the effect that the non-disclosure was deliberate. The questions of inducement or intention to induce are not raised in the pleadings. The question whether such an intention is an element of liability, see M. A. Millner in *S.A.L.J.*, *op. cit.*, at p. 200, isolates three cases of actionable non-disclosure, viz.: (*a*) active concealment; (*b*) designed concealment; (*c*) simple non-disclosure of a material defect. The appellant's case is not based on "active" or "designed" concealment. Simple non-disclosure has been held to be sufficient to found liability where the seller has omitted to disclose an aedilitian defect know to him in the thing sold. There is also a line of cases to the contrary. Generally, non-statement (like misstatement) of a material matter, even though it deceives another, is not fraudulent if not accompanied by a dishonest purpose. Yet different considerations apply to aedilitian defects. The conflict of authority is as to whether or not "simple non-disclosure" is to be designated as fraud. See *Cloete* v. *Smithfield Hotel (Pty.) Ltd.*, 1955 (2) S.A. 622; *Knight* v. *Trollip*, 1948 (3) S.A. 1009; *Forsdick* v. *Youngelson*, 1949 (2) P.H. A57; *Hadley* v. *Savory*, 1916 T.P.D. 385; *Van der Merwe* v. *Culhane*, 1952 (3) S.A. 42. The more recent cases have favoured the Transvaal cases, which warrant the approval of this Court. See *Milne, N.O.* v. *Harilal*, 1961 (1) S.A. at p. 810; *Crawley* v. *Frank Pepper (Pty.) Ltd.*, 1970 (1) S.A. at p. 34. See also *Mackeurtan*, *op. cit.* at p. 249, note 85. The edict enjoins on all sellers the duty to disclose all latent defects known to them. If, in the face of this duty, a seller remains silent, he is to be regarded as declaring that he knows of no defects (not that there are no defects). If he does in fact know of a defect — at the time of the sale — he cannot be heard to say that he was unaware of the positive duty of disclosure imposed upon him by the edict and his silence takes on the colour of a fraudulent action. In other words, in such a case *dolus* is conclusively presumed. The seller cannot by a voetstoots clause seek to escape liability for the consequences of his conduct which is deemed in law to be fraudulent. Furthermore the fraud exists independently of a voetstoots clause. It is the concealment by the seller of what, in such a case, the law requires him to disclose, which makes the seller's

conduct fraudulent. The addition of the voetstoots clause merely aggravates the bad faith which was already implicit in the seller's silence. Consequently, cases *sans* voetstoots clauses are also of application. M. A. Millner, *S.A.L.J.*, *op. cit.*, pp. 199-200. Accordingly in the sale of a thing with an aedilitian defect known to the seller it is not necessary to prove a deliberate intent to induce the sale by such non-disclosure. Upon proof of the aedilitian defect and the seller's knowledge thereof, *dolus* is conclusively presumed.

A further enquiry arises: was such an encumbrance a defect of an aedilitian nature? The term "aedilitian defect" applies equally to defects which render the *res vendita* wholly unfit for the purpose for which it was intended to be used, and those which render it partially unfit for such purposes — i.e. to any latent defect which is such as to ground either of the two aedilitian remedies, viz. the *actio redhibitoria* or the *actio quanti minoris*. There are two questions in this regard which must be answered in the affirmative for the non-disclosure to be actionable. They are (i) was the encumbrance a defect? (ii) If so, was it a defect of such a nature as to warrant aedilitian relief, either to a redhibitorian or an aestimatorian (*quanti minoris*) extent? Furthermore, *Mackeurtan*, referring *inter alia* to *Dibley* v. *Furter*, 1951 (4) S.A. at p. 82, defines it as something constituting an impairment of the usefulness of the *res vendita* to the purchaser, objectively judged. For example, an undisclosed burden on land has been regarded as a latent defect — and in *Munnich* v. *Botha*, (1927) 10 P.H. A34, VAN ZIJL, J., held that the existence of an undisclosed servitude was a defect which depreciated the value and that the *actio quanti minoris* lay. *Mackeurtan*, *op cit.*, pp. 245-246. The defect need not be permanent. D. 21.1.6, 21.1.18; *Voet*, 21.1.8; *Mackeurtan*, *op cit.*, p. 248, note 79; p. 266, note 1. To afford any relief at all, the defect must be such as to prevent or hinder the use or service of the thing to more than merely a trifling degree. The test is objective: if a reasonable man in the circumstances would not have bought with knowledge of the defect, the defect will afford redhibition. Where the *res vendita* suffers from a defect rendering it partially, but not substantially, unfit for its ordinary or specifically communicated purpose, the buyer may sue for reduction of the price — barring trifling defects only. *Mackeurtan*, *op. cit.*, pp. 248-249; 265-266; *Norman*, *op. cit.*, p. 316; *Voet*, 21.1.5; *Van Leeuwen*, II.141; *Grotius*, 3.15.7. If the defect was not such as to warrant redhibition, it was at lowest of a *quanti minoris* dimension: it was an impediment to the necessary development which was to cost a substantial sum of money to overcome. This additional cost to the purchaser implied a commensurate lesser value being received for his outlay. It is not relevant that what was in itself a substantial sum would constitute a relatively small percentage of the overall cost of demolition and development. Provided such additional cost was in itself not negligible nor trifling relief should lie. Is it a further requirement that the defect was material? This has been alleged. It has already been contended that the encumbrance was a defect, and one such as would warant aedilitian relief. This implies, *ex hypothesi*, that the defect is material. It is not trifling. Cf. *S.A.L.J.*, *op. cit.*, p. 200. The requiremen that it be a "material" defect cannot mean "but for which the purchase would not have been concluded" for that would be to confine a

victim of fraud in the circumstances dealt with above to relief only where redhibition is warranted, whereas he would be entitled to relief also where the defect is such as merely partially to render the *merx* unfit for the purpose for which it was purchased. Therefore such an additional element is not required to be proved under this head. Yet in any event, on the facts as analysed above, the defect was material — at lowest in the sense construed in this paragraph.

As to (B). In the circumstances of this case consequential damages should be awarded. These are delictual damages. *Mackeurtan, op. cit.* at pp. 264, 265, 269 (para. 379 read with para. 370). It is fraud where the seller, knowing of, or having reasonable grounds for suspecting, the defect, has said nothing about it. See *Mackeurtan, op cit.* at p. 252, note 4; *Philips & Co.* v. *Greyvenstein & Co.*, 1922 E.D.L. at p. 36. The purpose of delictual damages is to restore to the purchaser the loss sustained because of the wrongful conduct of the seller, i.e. the amount by which his patrimony has thereby been diminished. The appellant is accordingly entitled to recover the amount by which its patrimony has been reduced as a result of the non-disclosure. See *Trotman and Another* v. *Edwick*, 1951 (1) S.A. at p. 449. In each case consequential damages must be assessed on its own facts. *De Jager* v. *Grunder*, 1964 (1) S.A. at p. 450F. There is clear evidence as to the extent to which the appellant's patrimony had at the time of the trial already been diminished. As to the cost of restoring, remounting and accommodating the pediment in the new building: on the evidence as it stands the appellant remains saddled with the obligation to do this, by reason of the fact that incorporation in a new building is practicable and, therefore, on the Council's official and last ruling, peremptory. The appellant is thus entitled to the costs it estimates it will incur in discharging such obligation. In this regard the contention that the appellant's damages ought not to be the full amount claimed because the monument can be transferred to a gallery or museum and therefore need not be incorporated in a new building, is an argument in mitigation of damages. Here the law is clear: it is for the defendant who alleges that a plaintiff could have minimised his damages to prove this. *Hazis* v. *Transvaal & Delagoa Bay Investment Co. Ltd.*, 1939 A.D. at pp. 388-389; *North & Son (Pty.) Ltd.* v. *Albertyn*, 1962 (2) S.A. at p. 217. The fact that the pediment itself may have some intrinsic value is irrelevant. The appellant bought and paid for the pediment. Damages are being claimed not because the building contained the pediment but because the pediment was proclaimed and therefore the property could not be used for the purpose for which it was bought without involving the appellant in the expense for which compensation is sought. The value of the new building as a commercial proposition will not be increased by reason of the fact that the appellant is obliged to reinstate the pediment. Accordingly there is nothing to offset against the expense which the appellant was obliged to incur. The fact that the appellant may have been prepared to pay more for the property than it did is irrelevant. Whatever the sum paid for the property, the appellant has suffered a loss to the extent of the expense involved in removing and reinstating the pediment. It is also irrelevant that even although the property contained a pediment which had been proclaimed, the appellant may have made a good bargain. See *Corbett* v. *Harris*, 1914 C.P.D. at p. 547; *De Jager* v. *Grunder*, 1964 (1) S.A. at p. 451.

N. R. Uys, for the respondent: Appellant does not allege any element which would make the alleged concealment or non-disclosure fraudulent; that is, any element which to put it broadly, would consitute "any craft, deceit, or contrivance employed with a view to circumvent, deceive or ensnare other persons" D. 4.3.1.2 or "a wilful perversion of the truth made with intent to defraud" (in the words of STRATFORD, J.A. in *R.* v. *Davies*, 1928 A.D. at p. 170). *Dolus* was not alleged and for a non-disclosure to be fraudulent, there must be *dolus* (cf. *Meskin* v. *Anglo-American Corporation of S.A. Ltd.*, 1968 (4) S.A. at p. 800F. Even though respondent may have been negligent, even grossly so, this would not be tantamount to fraud, for "the maxim *culpa lata dolo aequiparatur* cannot be applied on the question of absence of honest belief". See *R.* v. *Myers*, 1948 (1) S.A. at p. 384. Appellant appears to seek to base the alleged "duty to speak" on the duties of a seller in terms of a contract of purchase and sale. Further, the authorities cited and submissions made by appellant relate to cases of valid contracts of purchase and sale and to latent defects. Such authorities and submissions are irrelevant inasmuch as the contract of sale in the instant case is void because it does not comply with sec. 1 (1) of the General Law Amendment Act, 68 of 1957, in that the option given by defendant was not accepted in writing, and no written and signed deed of sale was concluded. Accordingly, although such contract was performed by both parties thereto, its terms and conditions are void and no action can be brought upon it. See *Wilken* v. *Kohler*, 1913 A.D. at pp. 145, 150.

No fact was proved from which an inference of fraud could reasonably be drawn. At no time when they might reasonably have been expected to accuse Selige of fraud, did appellant's directors so accuse him. It was not proved that at the times material to this action, Selige was of a state of mind such that he could, and in fact did, form and give effect to a fraudulent intent. If respondent was guilty of an actionable concealment or non-disclosure appellant failed to prove a causal connection between same and the alleged damage. Such a causal connection is essential to delictual liability. See *Bill Harvey's Investment Trust* v. *Oranjegezicht Estates*, 1958 (1) S.A. at p. 489A; *Trotman and Another* v. *Edwick*, 1951 (1) S.A. at p. 450; *Scheepers* v. *Handley*, 1960 (3) S.A. at p. 59D. Appellant has no cause of action based on latent defect. Appellant's allegations on the pleadings and in evidence are so vague and confused as to make it impossible to establish what appellant's case is. Appellant now seeks to contend that the declaration of the pediment as a national monument is a latent defect or "aedilitian defect". Even if the appellant's various allegations could properly be construed to mean that the pediment's being a national monument constitutes a latent defect in the *merx*, the contract of sale being void for lack of of compliance with sec. 1 (1) of the General Law Amendment Act, 68 of 1957, no action may be brought upon it. See *Wilken* v. *Kohler*, *supra* at pp. 145, 150.

Appellant has failed to prove that it has suffered damages. Appellant is not entitled to payment of the sums of R7 350 and R750, or any part thereof. As to the alleged incurred damages of R6 500 the

Court *a quo* adopted the correct approach in confining itself to juxtaposing the commercial value of the pediment and the expenses incurred in connection with the pediment. Because appellant did not allege and prove a dimunition in the market value of the *merx* or the payment of a higher price than he would otherwise have paid, it was not possible to adopt the approach adopted in the decided cases that are reported. Because appellant has failed to show that the commercial value of the pediment does not equal or exceed the aforesaid expenses the Court *a quo* correctly held that appellant had failed to prove damages. Alternatively, the appellant failed to prove damages.

Aaron, in reply.

Cur. adv. vult.

Postea (March 15).

WESSELS, J.A.: I have had the advantage of considering the judgment of GALGUT, A.J.A. For the reasons which follow, I am unable to concur in the order proposed therein.

The issues which arose on the pleadings and required determination by the Court *a quo* are fully set out in the judgment of GALGUT, A.J.A. I would, however, observe that, on my understanding of the pleadings, it was the plaintiff's case (1) that, in the circumstances postulated therein, defendant

> "was in duty bound, prior to the conclusion of the said sale, to disclose the existence of the aforesaid encumbrance and/or defect"

in his title to the immovable property in question; (2) that in breach of his duty to make such disclosure, defendant

> "concealed the presence of the encumbrance and/or defect aforesaid by deliberately failing to make a disclosure thereof";

and, (3) that, by reason of defendant's "concealment and non-disclosure aforesaid" plaintiff had suffered damage. It is to be noted that the draftsman of plaintiff's amended particulars of claim nowhere avers that the "encumbrance and/or defect" in defendant's title constituted a defect in the property itself, i.e., a defect of a kind which could in law give rise to the aedilitian remedies. Furthermore, there is no averment in the plaintiff's particulars of claim to the effect that the defect was latent. It is to be noted, too, that it is not averred in terms in the particulars of claim that Selige's conduct in deliberately failing to make a disclosure of the existence of "the encumbrance and/or defect" in defendant's title to the Inag property constituted fraudulent conduct on the part of Selige with the intention of inducing plaintiff to enter into the sale. Nor is it averred that Selige's conduct in fact induced plaintiff to enter into the sale on the terms and conditions embodied in the agreement. In fact, plaintiff studiously avoided making any averments of the nature referred to above. My Brother GALGUT, refers in his judgment to a passage in the evidence of Mr. L. S. Glaser given under cross-examination where plaintiff's counsel intervened in order to clarify what plaintiff's case was. From his statement to the Court, it appears clearly that

> "no allegation has been made that there was any fraud in order to induce the purchaser to buy".

He stated, further:

> "All that is alleged . . . is that there was a duty to disclose and that in breach of that duty, defendant concealed the presence of the encumbrance and/or defect, as aforesaid by deliberately failing to make a disclosure thereof. There is no allegation that that was done with the intention of inducing plaintiff to purchase. That allegation would obviously have been necessary if plaintiff was seeking to set aside the sale. Plaintiff is not seeking that."

It is, in my opinion, clear that counsel did not regard the fact of Selige's intention or motive in deliberately failing to disclose the existence of the encumbrance as being relevant to his case at all and that it was, therefore, not an issue requiring determination by the Court *a quo*. Neither the learned Judge *a quo* nor defendant's counsel, so it would seem, was content to accept the very clear explanation given by counsel of what plaintiff's case on the pleadings was. The learned trial Judge questioned Glaser regarding the use of the word "deliberately" in the plaintiff's particulars of claim, and elicited the reply that Selige must have had a purpose in deliberately failing to disclose the existence of the encumbrance in question. Defendant's counsel pursued the matter in further cross-examination of Glaser. The record reads as follows:

> "Mr. Uys: M'Lord, I would like, with great respect, to clear up the plaintiff's attitude in this case. I want to say that my general impression, why I put it to the witness earlier that the plaintiff's case boils down to this, that Selige fraudulenly concealed this . . .
>
> Court: Well, clear it up.
>
> Mr. Uys: No, but your Lordship, then . . .
>
> Court: No, Mr. *Hoberman* objected and said that the pleadings did not imply that there was any . . .
>
> Mr. Uys: That is what I want to come to. My impression is that my learned friend . . .
>
> Court: Well, you can complete the cross-examination and you can argue that. Whether the pleadings allege it or not is another matter, but you are obviously entitled to cross-examine . . .
>
> Mr. Uys: Yes. Let us get this quite clear, Mr. Glaser. His Lordship asked you about what purpose Selige could have had in not disclosing this to you. You suggested that he might have for some purpose done so. Now what purpose do you suggest? — Well, he could have been frightened that this could scare us off wanting to buy the property and he would not be able to sell it.
>
> I see. In other words, do you agree that I can interpret that this way, that he concealed this so as to induce you to buy? — Yes.
>
> Do you agree with that? — Yes."

It is by no means clear to me why defendant's counsel pursued the question of Selige's intention after plaintiff's counsel had so clearly intimated that it was not alleged that Selige deliberately failed to disclose the existence of the encumbrance with the intention of inducing plaintiff to conclude the sale. In my opinion, it is somewhat unusual to require a witness to interpret pleadings. It is possible that Glaser's credibility was being tested by defendant's counsel. The mere fact, however, that defendant's counsel pursued the matter in cross-examination cannot by itself serve to place in issue a fact not relied upon by plaintiff in its particulars of claim. Ordinarily, the trial Court would have regard to the way in which the case was conducted by both parties in order to determine whether an issue, additional to those arising on the pleadings, was being raised by them with the intention of leading evidence in regard to that issue and requiring

the Court to adjudicate thereon. I can find no indication in the record that plaintiff's counsel accepted that the issue of inducement had become an issue requiring determination by the Court *a quo* and that, having regard to the fact that the burden of proof on that issue rested on plaintiff, the matter should be fully canvassed in evidence. Plaintiff's counsel led no evidence whatsoever on this issue. I would, therefore, hesitate to conclude that the record discloses that the parties by the manner in which they conducted their respective cases clearly indicated that an additional issue was being raised for determination by the trial Court. It is to be noted too, that defendant's counsel, notwithstanding the fact that the first raised the question of inducement in cross-examining Mr. L. S. Glaser, led no evidence whatsoever thereon. He caused Zietsman to be recalled to testify as a witness on defendant's behalf after plaintiff's case had been closed. He was not led by defendant's counsel on the question of inducement at all. In my opinion, therefore, the question of inducement was not raised as an issue requiring determination by the Court *a quo*. It is to be doubted whether the issue of inducement could arise on appeal for determination by this Court. Indeed, in plaintiff's heads of argument filed in this Court, it is specifically stated:

"The question of inducement or intention to induce are not raised in the pleadings."

I have not overlooked the fact that in the judgment of the Court *a quo* it is stated that the

"issues most closely contested were whether the circumstances placed a legal duty upon the seller to disclose to him prior to the sale the existence of the pediment and whether he omitted to do so because he had the object of misleading the buyer . . ."

The reference to "the existence of the pediment" is to be read as being a reference to the existence of the "encumbrance and/or defect" in defendant's title to the property in question. The judgment of the Court *a quo* does not, in my opinion, deal with the inducement issue at all. Furthermore, on my understanding of the pleadings, and giving due weight to the words

> "concealed the presence of the encumbrance . . . by deliberately failing to make a disclosure thereof",

no specific motive (either to induce plaintiff to purchase the property or to mislead those representing it) is in terms imputed to Selige. In the *Shorter Oxford English Dictionary* two of the meanings given to the adverb "deliberately" are the following: "carefully thought out" and "done of set purpose". It seems that the draftsman of plaintiff's particulars of claim could have substituted the words "of set purpose" for the word "deliberately". If he were to have done so, defendant would in all probability have requested further particulars to ascertain what purpose it was that was being imputed to Selige. From what happened during the trial, it may be inferred that plaintiff would have disavowed any intention of averring that Selige conducted himself in the manner complained of in order to induce plaintiff to purchase the property on the terms and conditions embodied in the agreement of purchase and sale. That would, of course, leave in the air the question, for what purpose did Selige deliberately fail to disclose the existence of the encumbrance in question? Was it his purpose merely to mislead plaintiff in regard to the existence of the encumbrance without intending thereby to

influence plaintiff's representatives to purchase the property? This purpose was not pleaded in terms nor by necessary implication by using the word "deliberately" which, as I have indicated above, has meanings other than "of set purpose". Nor, despite several opportunities to do so, did plaintiff's counsel seek to clarify its case on this issue. On appeal before this Court, plaintiff's counsel submitted in his heads of argument:

"Simple non-disclosure has been held to be sufficient to found liability where the seller has omitted to disclose an *aedilitian defect* known to him in the thing sold."

(My italics.) Reference is then made to the various decided cases which are discussed in the judgment of my Brother GALGUT. A further submission is:

". . . that in the sale of a thing with an aedilitian defect known to the seller it is not necessary to prove a deliberate intent to induce the sale by such non-disclosure. Upon proof of the aedilitian defect and the seller's knowledge thereof, *dolus* is conclusively presumed."

For these reasons I remain unpersuaded that GALGUT, A.J.A.'s approach to the issues which require determination by this Court is correct.

I shall, therefore, approach this matter along the lines suggested by plaintiff's counsel in his argument, and assume in plaintiff's favour that "simple non-disclosure" of the existence of a latent defect by a seller who is aware thereof in our law affords a purchaser, who is unaware of the existence of the latent defect, the remedy contended for, i.e., claim damages on a delictual basis. As appears from the judgment of GALGUT, A.J.A., there are authorities which tend to support the proposition; others require "something more" than mere non-disclosure. Having regard to my view of the facts of this case, it is unnecessary for me to determine the correctness or otherwise of counsel's submissions on plaintiff's behalf on this aspect of the matter.

I have earlier in this judgment stated that, on my understanding of plaintiff's amended particulars of claim (which do not in terms refer to the existence of a latent defect in the property in question, but merely to an "encumbrance and/or defect" in defendant's title thereto), the duty to make disclosure flowed from the particular facts set out therein. On appeal before this Court, however, it was submitted on plaintiff's behalf that the duty to make disclosure is one "which the Aediles imposed on all sellers", who were bound to disclose "all latent defects known" to them. If this duty is breached a voetstoots clause is of no avail to the seller. In this connection, it must be borne in mind that the agreement of purchase and sale in question contains a further so-called special condition, which reads as follows:

"1. The property is sold as described in the seller's title deed/s and subject to all conditions and servitudes attaching to the property or mentioned or referred to in the said title deed or deeds, the purchaser agreeing to accept title as held by the seller, who shall not be liable for any deficiency in the extent of the property which may be revealed on any survey or re-survey, and who does not desire to benefit by any excess."

The so-called voetstoots clause in the agreement, reads as follows:

"2. The property is sold as it stands and the seller shall not be responsible for *any defects in the property* either patent or latent."

(My italics.)

In terms of condition 1 above, the purchaser agreed to purchase the property "subject to all conditions and servitudes attaching" thereto (irre-

spective of the question whether or not they are mentioned or referred to in the relevant title deed). In my opinion, the proclamation of the pediment in question constituted a condition "attaching to the property". It follows, in my opinion, that plaintiff would ordinarily have been bound by the first-mentioned condition in the absence of fraud on the part of the seller. See *Wells* v. *S.A. Alumenite Co.*, 1927 A.D. 69. Quite plainly, the plaintiff did not wish to undertake the burden of alleging and proving fraud on defendant's part. It, therefore, based its case on the proposition that the encumbrance constituted a latent defect of which defendant had knowledge, and that, by reason of its deliberate failure to disclose the existence thereof, the voetstoots clause was of no avail to it. There is authority for the view that an encumbrance of the kind here under discussion might be said to be in the nature of a latent defect, which could give rise to the aedilitian actions. It is not necessary for me to determine whether such an encumbrance is, or is not, a latent defect. I would, however, in this connection refer to the views of the learned authors in De Wet en Yeats, *Kontraktereg en Handelsreg*, 3rd ed., p. 226 (footnote (*o*)). I shall, accordingly, assume in plaintiff's favour, that the encumbrance, which was not endorsed on defendant's title deed, constituted a latent defect in the property in question.

I turn now to the facts. The history of the proclamation of the pediment as a national monument goes back to a date some 12 years prior to the date on which the sale of the property was concluded. The intention to proclaim the pediment a monument was for the first time broached to defendant in a letter dated 9 July 1957. In that letter it was mentioned that one of the members of the Commission (Mr. W. Fehr) had unsuccessfully attempted to arrange an interview with defendant's chairman in order to discuss the proposed proclamation. Defendant was asked to inform the Commission of its views regarding the proposed proclamation. This letter was not replied to. It appears that Selige was at no stage willing to discuss the proposed proclamation with the Commission. Further letters were addressed to defendant during the period from 5 November 1957 up to the date of publication of the Proclamation in question. In a letter dated 22 April 1959 defendant was informed, *inter alia*, that

"sec. 9 *bis* (4) obliges the Registrar of Deeds to endorse such proclamation on his records and on the title deeds of the property".

Defendant was also informed that it was entitled

"within one month to lodge with the Commission in writing any objections you may have to the proclamation of your property".

Defendant did not reply to this letter, which was sent by registered post. Proclamation took place on 24 August 1959, and defendant was informed of this in a registered letter dated 22 September 1959. A copy of the relevant *Government Notice* was posted to defendant on 27 October 1959. Although defendant did not react to any of the above-mentioned correspondence, it is propable that they were received by defendant and that Selige (as managing director) had knowledge of the contents thereof. On 29 June 1967, the Commission addressed a letter to defendant in which it was thanked for steps taken to make good damage caused by fire. Defendant did not react to this letter.

Early in 1969 Zietsman (acting on behalf of Herbert Penny (Pty.) Ltd. — a company carrying on business as an estate agent) initiated negotiations

which resulted in the grant by defendant on 25 June 1969 to Herbert Penny of the

"exclusive option to purchase the immovable property as set out in the annexed deed of sale",

and subsequently (on 1 July 1969) in the sale of the property in question. In his judgment, GALGUT, A.J.A., sets out the effect of the evidence given by the various witnesses who testified in regard to the negotiations which led up to the conclusion of the sale.

I accept that at the close of plaintiff's case the evidence which had been led on its behalf may well be said to have furnished *prima facie* proof in respect of the issue in regard to which the *onus* of proof rested on it. The only evidence led on defendant's behalf was that of Zietsman who had already testified on plaintiff's behalf. The question is, whether, at the end of the case, a finding was justified that plaintiff had proved its case by a preponderance of probabilities. For the reasons which follow, I am of the opinion that such a finding is not justified on the evidence as a whole.

At the outset, I must point out that the Court *a quo* made no findings in respect of any of the crucial issues which arose on the pleadings. It was not required to so do, because, in the opinion of the learned trial Judge, the plaintiff had in any event not established the *quantum* of damages. This is, therefore, not the type of appeal where this Court is faced with a finding by a Court of first instance which can only be differed from if this Court is satisfied that the finding is clearly wrong. I am mindful of the fact that the evidence led on plaintiff's behalf is not contradicted by evidence led on defendant's behalf. Selige was not called as a witness to testify on defendant's behalf. In ordinary circumstances the failure to call Selige would no doubt have operated with decisive effect in favour of plaintiff's case. In this case, however, it appears to have been common cause that Selige was not in a fit condition to testify at the trial. I infer this, firstly, from the following evidence given by Zietsman while he was being led in his examination-in-chief:

"May I interrupt. You refer to having discussions with the attorneys of the seller. Is there a particular individual involved? I know we are talking about a company, Inag, but who was the gentleman who was Inag? — This was the German gentleman, what was his name . . . ?

Selige? — Selige, yes.

I think it is common cause that he is an elderly gentleman? — Yes.

In fact, he is now under curatorship, he has a mental problem, is that correct? — I understand so. He was a rather emotional and erratic gentleman and it was not possible to conduct any really meaningful negotiations with him and as a result we did so through his attorneys, at the time Mr. Prins and Mr. Malherbe.

Did you meet Mr. Selige yourself — Yes, I did."

Secondly, plaintiff's counsel did not ask this Court to draw any adverse inference from the failure to call Selige to testify on defendant's behalf. In my opinion, plaintiff's counsel acted correctly and realistically in not asking this Court to draw such an inference.

Although plaintiff's particulars of claim do not in terms impute fraudulent conduct to Selige, it is, in my opinion, clear that it is nevertheless plaintiff's case that Selige was guilty of dishonesty in deliberately failing to make disclosure of the encumbrance in question. It may well be that this circumstance has to be borne in mind in determining whether, or not, plaintiff has discharged the burden of proof resting upon it. In this con-

nection, I am of the opinion that the remarks of WATERMEYER, J.A., in *Gates* v. *Gates*, 1939 A.D. 150, are of application. At p. 155 he stated that "in certain cases more especially in those in which charges of criminal or immoral conduct are made . . . the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."

It is apparent from Zietsman's evidence that he regarded Selige as being "a rather emotional and erratic gentleman" with whom it "was not possible to conduct any really meaningful negotiations". When Zietsman was recalled to testify as defendant's witness, he gave further evidence bearing upon Selige's ability to conduct "meaningful negotiations". Zietsman stated that it was difficult to negotiate with Selige because the latter had had "unpleasant dealings with another firm of agents previously". He also described Selige as being "a somewhat eccentric gentleman", which also made it difficult to transact business with him. On my reading of Zietsman's evidence, it was not his unqualified opinion that Selige was able to speak "pertinently or relevantly". In examining Zietsman, defendant's counsel put the following question to him:

"Now perhaps I can assist you if I may. Did you find that he spoke to you pertinently or relevantly in regard to what you were saying to him?"

Plaintiff's counsel objected on the ground that the question was of a leading nature. After discussion between the learned trial Judge and plaintiff's counsel, defendant's counsel put certain further questions to Zietsman. As to this, the record reads as follows.

[The learned Judge set out the evidence on this point and proceeded.]

If it was in fact Zietsman's unqualified opinion that Selige was able to speak "pertinently and relevantly", it is difficult to appreciate why it should have been impossible "to conduct any really meaningful negotiations" with him.

Leon Glaser's evidence as to his contact with Selige is of interest in regard to Selige's personality. Glaser stated in evidence that the building was in a dilapidated, indeed dangerous, condition. The pediment itself he described as being "in a scruffy mess". He repeatedly told Selige that he was not interested in the building, because it was going to be demolished. Nevertheless, Selige thought it was "a good building". As to this, Glaser evidence reads as follows.

[The learned Judge set out this evidence and proceeded.]

The fact that Selige (acting on defendant's behalf) granted the option above referred to, evidences the fact that he was willing to sell on the terms and conditions set out in the deed of sale which was annexed thereto. In my opinion, however, the evidence tends to negative a finding that he was a keen seller at the price of R325 000. The question may well be asked: if Selige was a keen seller at that price, why was it necessary to pay a secret commission to certain persons in order to secure their co-operation in helping "to smooth the the detail of the sale". It must also be borne in mind that shortly before Zietsman came on the scene, Selige had refused to consider a lower price than R350 000 for the building. When Zietsman first approached him, Selige still insisted on R350 000. Later he was prevailed upon to agree to a purchase price of R325 000. Under cross-examination Zietsman testified as follows regarding the state of the property market at the time of the sale:

"We were in the midst of a sort of marvellous property boom and everybody thought it would go on forever so they obviously thought land prices would continue to rise and they did not, I think, forsee that they were going to in fact stay static and in some areas slide a bit."

In these circumstances it is, at least, unlikely that Selige would have reasoned that unless he accepted a price of R325 000, he might not in the future receive an offer at that figure. On the evidence as a whole, I am of the opinion that there does not appear to have been any reason why Selige should have embarked on a dishonest course of conduct in order to ensure that an agreement should be concluded at a price of R325 000.

The impression I get from the evidence is that Selige did not take any really active part in the negotiations which led up to the grant of the option. Furthermore, I am of the opinon that the evidence does not, as a matter of preponderant probability, create the impression that Selige was a rather cunning elderly gentleman who, being keen to sell the property in question at the price stipulated in the deed of sale, "carefully thought out" the implications of disclosing the existence of the encumbrance in question and "of set purpose" remained silent. It is, in my opinion, at least as probable that in his discussions with Leon Glaser and Zietsman his mind did not advert at all to the encumbrance in his title and its relevance to the purpose plaintiff had in mind in purchasing the building in question.

I am further of the opinion that another difficulty besets plaintiff's path to success in the action. Plaintiff was required to prove, *inter alia*, that Selige had knowledge of the latent defect, the existence of which is relied upon by it. As I see it, this involves in the circumstances of this case knowledge on Selige's part that the proclamation giving rise to the encumbrance in his title had in fact not been endorsed on the records of the Registrar of Deeds, as was aforeshadowed in the Commission's letter dated 22 April 1959. If such endorsement were to have been made by the Registrar of Deeds, the "defect" would have been patent and not latent. The evidence does not, in my opinion, justify a finding on a preponderance of probabilities that Selige was aware of the fact that endorsement had not been effected, and thus aware of the fact that the encumbrance constituted a latent defect.

To sum up. In my opinion plaintiff failed to establish on a preponderance of probabilities that defendant (through Selige) had knowledge that the encumbrance constituted a latent defect which he was in duty bound to disclose or that, in breach of that duty, it

"concealed the presence of the encumbrance and/or defect . . . by deliberately failing to make a disclosure thereof".

In the result, I would dismiss the appeal with costs.

JANSEN, J.A., concurred in the judgment of WESSELS, J.A.

GALGUT, A.J.A.: In August 1959, by *Government Notice* 1341, the then Minister of Interior, acting in terms of sec. 8 of the Natural and Historical Monuments, Relics and Antiques Act, 4 of 1934, proclaimed as a monument,

"the cornice and pediment including the sculpture therein on the building situate

on certain piece of land in Bree Street, Cape Town, Cape Division being Lot 3 in Block 1."

The then owner of the land and buildings thereon was the respondent in this appeal. I shall refer to it as the defendant. The sculpture was the work of the well known 18th-19th century sculptor, Anton Anreith. Defendant was advised in writing that the pediment (which included the sculpture) had been proclaimed a monument and its attention was drawn to secs. 9 (2) and 9 *bis* (4) of the Act. (The reference to sec. 9 *bis* (4) was an error and should have read 8 *bis* (4).) Sec. 9 (2) provided:

"No person shall, without the written consent of the commission, destroy, or damage any monument or relic or make any alteration thereto or remove it from its original site or export it from the Union."

The commission referred to was "The Commission for the Preservation of Natural and Historical Monuments, Relics and Antiques". Sec. 8 *bis* (4), which was inserted into the Act by sec. 2 of Act 9 of 1937, read:

"The Registrar of deeds shall endorse a reference to the said proclamation, ... upon the title deed of the land in question filed in his office, ...".

Act 4 of 1934 was repealed by the National Monuments Act, 28 of 1969, which came into force on 1 July 1969. Sec. 20 (2) of this latter Act provides that any notice issued under the 1934 Act

"whereby anything has been proclaimed a monument, ... shall be deemed to be a notice under this Act whereby any such thing has been declared to be a national monument."

Sec. 12 (2) of the 1969 Act is to the same effect as sec. 9 (2) of the 1934 Act. The 1969 Act established the "National Monuments Council" to which I shall refer as the Council. The said Act provides that the Minister concerned with the administration of the Act is the Minister for National Education.

On 1 July 1969 the defendant sold the property, which consisted of five erven of ground with two main buildings and outhouses thereon, to the appellant. I shall refer to it as the property or as the Inag property and to the appellant as plaintiff. The defendant failed to disclose to plaintiff that the pediment had been declared a monument. Soon after the sale plaintiff, having learned of the proclamation, interviewed the Council, with the defendant's consent, in order to ascertain what could be done to alleviate the burden thereby created. It was explained that plaintiff wished to demolish the buildings preparatory to a rebuilding scheme. The Council imposed certain conditions. These caused the plaintiff substantial expense. The plaintiff then sued the defendant in the Cape Provincial Division for damages being the expenditure it had been forced to incur, and which it alleges it suffered because of the said non-disclosure. The learned Judge *a quo* found that plaintiff had failed to prove the amount of its damages and made an order absolving the defendant from the instance with costs. The appeal is against that order.

Because of the submissions made by counsel for both parties it is necessary to quote from the pleadings and the evidence in the Court *a quo* in some detail.

The pleadings.

A. It appears from the pleadings that the following facts are common cause:

(*a*) that the defendant was aware that the property was purchased by plaintiff for the express purpose of re-development and that the existing buildings would have to be demolished;

(*b*) that the defendant knew that the property was encumbered in that it had been declared a monument in terms of Act 4 of 1934;

(*c*) that the defendant knew that the buildings could not be demolished without obtaining the consent of the Commission;

(*d*) that the defendant did not disclose to plaintiff that the pediment had been declared a monument.

B. The matters placed in issue by the pleadings appear from the extracts from the plaintiff's particulars of claim and the defendant's plea set out below:

Plaintiff's particulars of claim allege:

"4. At all times material hereto, defendant was aware of the fact that:

(*a*) the site was purchased for the express purpose of redevelopment;

(*b*) the title to the said immovable property was encumbered and/or defective in that the building on the site contained a pediment which had been declared a monument in terms of Act 4 of 1934 as amended;

(*c*) the site could not be levelled for the aforesaid purpose of redevelopment unless and until steps had been taken in terms of the said Act in order to obtain the necessary consent for the removal of the said pediment intact and for the replacement thereof on the building to be erected on the same site;

(*d*) the removal and replacement of the said pediment would involve the developer of the said site in considerable expense.

5. Prior to the conclusion of the said deed of sale, defendant knew that neither the said Herbert Penny nor plaintiff was aware of the facts set out in para. 4 (*b*) to (*d*) inclusive hereof, which facts were material.

6. (*a*) In the premises defendant was in duty bound, prior to the conclusion of the said sale, to disclose the existence of the aforesaid encumbrance and/or defect;

(*b*) In breach of the said duty to disclose, defendant concealed the presence of the encumbrance and/or defect aforesaid by deliberately failing to make a disclosure thereof. (A request for further particulars to this sub-section reads: 'Does plaintiff allege that defendant has been guilty of fraud on plaintiff?' The reply was that 'the particulars requested were matters of evidence or law and not needed to enable defendant to plead'.)

7. (*a*) Upon discovery of the fact that the said pediment had been declared an historical monument ..... plaintiff duly applied for permission to the Commission ..... for its written consent for the removal of the said pediment from its original site;

(*b*) the said Commission was prepared to grant the necessary consent to plaintiff only on the condition that the said pediment was removed intact from the existing building on the site and that it be replaced in a similar position on the building to

be erected by plaintiff.

8. By reason of defendant's concealment and non-disclosure aforesaid, plaintiff has sustained damages in the sum of R14 500 being the reasonable cost of removal of the said pediment intact and replacement thereof on the proposed building to be erected on the aforesaid site."

In its plea dated 31 July 1972, to which I shall refer as the first plea, defendant admitted the facts set out in A (*a*), (*b*), (*c*) and (*d*) above. This plea also admitted that a contract of sale had been concluded. The further relevant paragraphs of the first plea read:

"4. *Ad* para. 4 (*b*)
Save that it is admitted that defendant was aware of the fact that the building on the site contained a pediment which had been proclaimed a monument in terms of sec. 8 (1) of Act 4 of 1934, as amended, plaintiff's allegations, including the allegation that defendant was aware of what plaintiff alleges, are denied.

5. *Ad* para. 4 (*c*)
(*a*) Defendant admits that it was aware of the provisions of Act 4 of 1934, which speak for themselves.
(*b*) Inasmuch as plaintiff's allegations are conclusions of law, defendant declines further to plead thereto.

6. *Ad* para. 4 (*d*)
(*a*) Defendant admits that the removal and replacement of the said pediment would entail expense, but has no knowledge of the amount or degree of such expense, and accordingly makes no further admissions hereanent.
(*b*) Defendant says that it did not prior to the conclusion of the agreement between the parties apply its mind to the question of the cost of removing and replacing the pediment and, insofar as plaintiff may intend to allege that it did, plaintiff's allegations are denied.

7. *Ad* para. 5
(*a*) Defendant has no knowledge as to whether or not the said Herbert Penny and/or plaintiff was aware of the fact that the pediment had been proclaimed a monument as aforesaid, and puts plaintiff to the proof of its allegations, including also its allegation as to the condition of the said pediment.
(*b*) Inasmuch as defendant was at all times material under the impression that the said Herbert Penny and plaintiff were aware of the fact that the pediment had been so proclaimed, defendant specifically denies the allegation that it knew that they were not.
(c) As to the allegations in paras. 4 (*b*), 4 (*c*) and 4 (*d*), defendant refers to paras. 4, 5 and 6 of this plea, has no knowledge as to what was in the minds of plaintiff and the said Herbert Penny in this regard, and puts plaintiff to the proof of its allegations.

8. All the allegations of fact and conclusions of law in para. 6 are denied.

9. *Ad* para. 7
Defendant has no knowledge of these allegations, does not admit them, and puts plaintiff to their proof.

10. *Ad* para. 8
(*a*) Defendant denies that it has been guilty of any concealment or non-disclosure of the kind alleged by plaintiff or at all."

Thereafter on 3 March 1975 defendant gave notice that it would apply to file an amended plea. I shall refer to this plea as the second plea. The effect of paras. 4, 5 and 6 of the second plea is that defendant withdrew its admission that a contract had been concluded and alleged that no valid contract had come into being in that the defendant had not exercised the option in writing. The other relevant paragraphs in the second plea read:

"11. *Ad* para. 5:
(*a*) This allegation is denied. Defendant avers that by virtue of the following facts, defendant assumed that Herbert Penny or plaintiff, or both of them, were aware of the proclamation of the said pediment as a national monument, and defendant avers that such assumption was reasonable and justified:
(i) the said proclamation was published in a *Government Gazette;*
(ii) defendant's said director, Selige, knew at all material times that sec. 9 *bis* (4) (this should have read 8 *bis* (4)) of Act 4 of 1934 placed a duty upon the Registrar of Deeds to endorse the said proclamation upon the title deed of the said property and the said Selige assumed that the said Registrar of Deeds had duly discharged such duty;
(iii) that the said Selige knew that Herbert Penny conducted business on an extensive scale as a property consultant, and the said Selige accordingly assumed that Herbert Penny would take the precaution of perusing the said title deed to ascertain whether the said property was encumbered.
(*b*) (Not relevant to this appeal.)

12. *Ad* sub-para. (6) (*a*):
(*a*) Defendant avers that by reason of the facts set out in para. 11 hereof, defendant was not under a duty to make the said disclosures.
(*b*) (Not relevant to this appeal.)

13. *Ad* sub-para. (6) (*b*):
This allegation is admitted.

14. (Not relevant to this appeal.)

15. (Not relevant to this appeal.)

16. *Ad* para. 8:
Defendant denies the alleged concealment and has no knowledge of the allegations that the said non-disclosure has caused plaintiff to suffer the said damages or any part thereof, does not admit same, and puts plaintiff to the proof thereof."

The application for the amendment of the first plea by substituting therefor the second plea came before the Court *a quo* on 6 March. On that date counsel for plaintiff advised the Court that he objected to the amend-

ment of those allegations, viz. paras. 4, 5 and 6 of the second plea which sought to withdraw the admission that a valid contract had been concluded but did not object to the amendment being granted in respect of the other paragraphs. The learned Judge *a quo*, having heard argument, refused the application for amendment in its entirety but gave defendant leave to re-apply at a later stage. The effect of the learned Judge's order was that the first plea stood. Defendant did not at any later stage renew its application to amend the first plea. Despite the fact that the first plea was not amended, counsel, as will be seen, argued the case as if the amendments envisaged in the second plea had been allowed.

It will be noticed that, in para. 13 of the second plea, the defendant admits the allegation in para. 6 (*b*) of plaintiff's particulars of claim. Counsel for the plaintiff relied, in this Court, on this as an unequivocal admission by defendant that it had deliberately failed to disclose the existence of the encumbrance. It need only be said that that admission, if read in the light of the denials in the first plea and in para. 16 of the second plea, was obviously made in error and this must have been evident to anyone reading that plea.

It will be seen from the above summary of the pleadings that the defendant required the plaintiff to prove:

(*aa*) that the existence of the encumbrance constituted a defect;
(*bb*) that neither it nor Herbert Penny knew of the encumbrance before the sale;
(*cc*) that it was defendant's duty to disclose the existence of the "encumbrance and/or defect";
(*dd*) that defendant concealed its existence by deliberately failing to make disclosure thereof;
(*ee*) that by reason of defendant's concealment plaintiff suffered damage;
(*ff*) the *quantum* of the damage suffered.

The Evidence.

The buildings on the Inag property were in a dilapidated condition. Plaintiff had in 1969 acquired a property referred to in the evidence as the Hepworth property. The Hepworth property adjoins the Inag property. An estate agent named Markowitz, realising that plaintiff was embarking on a rebuilding or development scheme and might be interested in purchasing the Inag property, initiated negotiations between plaintiff and defendant. Plaintiff was prepared to pay R300 000 but defendant wanted R350 000. The parties could not agree and those negotiations fell through. Thereafter, in June 1969, one Zietsman, a director of Herbert Penny, having learned that plaintiff was interested in buying the property, obtained from defendant an option in favour of Herbert Penny or its nominee to purchase the property for R325 000. That option was, on 1 July 1969, ceded to plaintiff and plaintiff exercised it by letter on the same day. As will be seen later, counsel for the defendant did not accept that there had been a proper exercise of the option.

I now turn to the evidence of the individual witnesses.

[The learned Judge analysed the evidence and proceeded.]

It appears clearly from the evidence of Meyer, Zietsman, the two Glasers and the other two directors that, even though the sculpture was

in itself an artistic work, it could not enhance the value of a modern building and had no commercial value. Verboom too, as we have seen, was of the same view, save that he thought that because of its artistic value it should be preserved in a museum. There was also evidence which proved that the cost of putting the pediment back into the new building would be R8 100.

The evidence further reflects that only one of the main buildings has been demolished. The plaintiff has, as yet, not been granted a building permit by the Department of Community Development with the result that the pediment is still being stored by plaintiff.

Having led all the above evidence plaintiff closed its case. The defendant then called Zietsman as its witness. The purpose was to place evidence before the Court as to Selige's mental state. Zietsman, when giving evidence for plaintiff, said the following:

"In fact, he is now under curatorship, he has a mental problem, is that correct? — I understand so. He was a rather emotional and erratic gentleman and it was not possible to conduct any really meaningful negotiations with him and as a result we did so through his attorneys, at the time Mr. Prins and Mr. Malherbe."

The following questions to and answers by Zietsman when giving evidence in chief as a defence witness are relevant:

"Mr. *Uys*: When I used the term I asked you whether he spoke pertinently and relevantly in regard to what you were putting to him. — Yes. But he was difficult to confine to the point.

Mr. *Uys*: Prior to the sale. — Yes. He was — I think if one could put it this way I regarded him as being unbusinesslike. Let's put it that way."

Before dealing with the issues raised in the pleadings and evidence, it is necessary to discuss a preliminary matter raised in this Court by defendant's counsel. The plaintiff alleged that the option had been exercised in writing. In its first plea defendant admitted that a contract had been concluded. In its second plea it sought to withdraw that admission. Counsel for the defendant submitted that it had not been proved in the Court *a quo* that the option was exercised in writing and hence that the contract was invalid and plaintiff's claim could not succeed. This submission cannot be sustained. Plaintiff, in its particulars of claim alleged the grant of the written option, to Herbert Penny; the written cession thereof to plaintiff and the written exercise thereof by the plaintiff. In support of the allegation plaintiff incorporated in its particulars of claim a letter dated 1 July 1969, written by Herbert Penny to defendant. That letter contains a paragraph which reads:

"We enclose a letter from Glaston House (Pty.) Ltd. exercising the option as well as the following."

Also attached to that letter was the written cession of the option to defendant and the defendant's written acceptance of the cession. Leon Glaser, in evidence, testified that the option had been ceded to and accepted by plaintiff in writing; that, pursuant thereto, defendant had on 1 July 1969 exercised the option by letter signed by defendant. He read the letter out in the Court *a quo* and it was handed in as an exhibit. It does in fact exercise the option. The letter forms part of the record. It follows that it had been proved that the option was exercised in writing and that there had been a compliance with sec. 1 (1) of the General Law Amendment Act, 68 of 1952.

An analysis of the pleadings and evidence shows that the issues which

have to be dealt with in this Court are the following:

AA. Did the fact that the pediment was proclaimed a monument constitute a defect, and, if so, was it a latent defect.

BB. Did defendant (through its sole director, Selige) deliberately conceal the fact that the pediment had been proclaimed a monument.

CC. Was there a duty on defendant to disclose the fact that the pediment had been proclaimed a monument.

DD. Did the defendant's conduct herein constitute fraud.

EE. Did the failure to disclose the facts cause the plaintiff damage and, if so, has the plaintiff proved its damage.

Ad AA. Did the fact that the pediment was proclaimed a monument constitute a defect, and if so, was it a latent defect.

Having regard to the fact that the sculpture was valuable as an artistic work, it would normally have been an attribute. The evidence, as we have seen, was to the effect that it had no commercial value; that it would not add to the value of a new, modern building; that the fact that it was proclaimed a monument precluded the demolition of the old building, and hence the rebuilding scheme, without the consent of the Council. The evidence also showed that the obtaining of that consent was by no means a formality, caused a great deal of trouble and expense. The evidence further showed that the buildings were in a dilapidated condition and would be bought, as Zietsman expressed it, by "somebody who would have knocked it down". This impairment is occasioned by the proclamation. It is a statutory prohibition which rendered the property unfit for the purpose for which it was purchased. It is unlike a servitude which affects an owner's title. It has been suggested that an undisclosed servitude is not a latent defect (see De Wet en Yeats, *Kontrakte en Handelsreg*, 3rd ed., p. 226, note *o*) but is a defect in the title of the seller and ultimately the buyer. There are cases in which it has been held that such a servitude is a latent defect; see also *Voet*, 21.1.1. That is an aspect that need not be discussed in this judgment. The main burden of the evidence was that the monument was embedded in the building itself. It precluded the redevelopment for which the property had been bought. It thus constituted a defect. I am strengthened in my view by the *dicta* of HORWITZ, J., in *Cloete* v. *Smithfield Hotel (Pty.) Ltd.*, 1955 (2) S.A. 622 (O) at p. 628, and VAN ZYL, J., in *Dibley* v. *Furter*, 1951 (4) S.A. 73 (C) at p. 81. See also Mackeurtan, *Sale of Goods in South Africa*, 4th ed., p. 246, para. 340, and the authorities there cited. The plaintiff had no reason to suspect the existence of the encumbrance and no matter how reasonably observant or alert it had been it could not have discovered its existence. Accordingly it was a latent defect.

Ad BB. Did defendant (through it sole director, Selige) deliberately conceal the fact that the pediment had been proclaimed a monument.

Selige was the sole director of the defendant. During the period of 1957 to 1958 letters were sent to defendant by the Commission; in 1959 it was notified of the proclamation of the monument in the *Gazette;* in 1967 defendant was thanked for taking steps to preserve the monument; in 1969 defendant was willing to sell the Inag property, first through the agency of one agent, and later through Zietsman, for R350 000; eventually the option was granted in June 1969 and the Inag property was sold; the

details of the method of payment were discussed and fully set out; a voetstoots clause was included. In the light of all these facts I am of the view that, on the occasions when Leon Glaser inspected the property and Selige pointed things out to him, and also when all the details to be inserted in the deed of sale were discussed, Selige could not possibly have forgotten the existence of the encumbrance. One must add that he was told, repeatedly, that plaintiff was going to demolish the building. This, in itself, must have caused him to remember the pediment and encumbrance attached thereto. Furthermore, he obviously knew that the sculpture was regarded as an artistic work and that it was a national monument, yet he never pointed out the pediment or the sculpture, to Leon Glaser. It was suggested, by counsel for defendant, that, as both Leon Glaser and Zietsman had said that he was an old man with whom it was difficult to come to terms (see the extracts from their evidence quoted above), he may have forgotten the fact of the proclamation. This submission overlooks the fact that Zietsman said he spoke "relevantly and pertinently"; that Leon Glaser had no reason to doubt his memory; that two attorneys assisted him in concluding the sale; that it was never suggested that his memory was, in 1969 or at any time, impaired; nor was any evidence led by defendant to suggest this. In para. 7 of its first plea defendant alleged that it was under the impression that plaintiff was aware of the encumbrance (in para. 11 (*a*) (iii) of the second plea it is alleged that defendant assumed this). On either version one would have expected Selige to have pointed out the pediment when showing Leon Glaser the property and also to have asked how he proposed dealing with it.

As stated Selige negotiated and concluded the contract with the assistance of two attorneys. It was not suggested in evidence that he did not have the ability to contract. From all these facts the only inference that can be drawn is that he deliberately refrained from disclosing the encumbrance.

Ad CC. Was there a duty on defendant to disclose the fact that the pediment had been proclaimed a monument; and

Ad DD. Did the defendant's conduct herein constitute fraud.

The question, whether a purchaser, who did not know of a latent defect, is entitled to relief on the mere proof that the seller knew of the defect, and did not disclose it, has been discussed in the various Provincial Divisions of the Supreme Court. It is a matter on which there exists some difference of judicial opinion. These cases are discussed in *Dibley* v. *Furter*, 1951 (4) S.A. 73 (C); in *Cloete* v. *Smithfield Hotel (Pty.) Ltd.*, 1955 (2) S.A. 622 (O); in Mackeurtan, *Sale of Goods in South Africa*, 4th ed., p. 325. In view of the conclusion to which I have come on the facts of the case it is not necessary to discuss these cases and the old authorities to which they refer. It would be a work of supererogation so to do. It is sufficient to say that the earlier Natal cases such as *Knight* v. *Trollip*, 1948 (3) S.A. 1009 (D), and *Forsdick* v. *Youngelson*, 1949 (2) P.H. A.57 (N), are to the effect that mere non-disclosure by the seller, without more, is not sufficient to constitute fraudulent conduct such as to nullify the effects of a voetstoots clause. The Transvaal Courts in *Hadley* v. *Savory*, 1916 T.P.D. 385, and *Van der Merwe* v. *Culhane*, 1952 (3) S.A. 42 (T), held that such mere non-disclosure is sufficient, *prima facie*, to found an action

for fraud and nullify the protection of a voetstoots clause. In the latter two cases reliance was placed on *Voet*, 21.1.10.

In *Dibley* v. *Furter, sup. cit.*, and *Cloete* v. *Smithfield Hotel (Pty.) Ltd., sup. cit.*, the contracts did not contain voetstoots clauses. However, the *dicta* in these two cases indicate that the Judges (VAN ZYL, J., in the C.P.D. and HORWITZ, J., in the O.P.D.) share the views expressed in the Natal cases.

The contract with which we are concerned contained a voetstoots clause. It was not relied on by the defendant. As we have seen (see BB above) the seller deliberately concealed the existence of the defect of which he had knowledge. He furthermore knew that the purchaser, the plaintiff, was buying the property to demolish the buildings; that the pediment had been declared a monument and hence he plaintiff could not demolish the building in which it was situate without the consent of the Council; that the property, to the defendant's knowledge, could therefore not be used for the purpose for which it was purchased. The question is whether the above facts lay the requisite foundation for an inference of fraud. *Voet*, 21.1.10 (see *Berwick's* trans.) reads:

"A vendor who knew of the *vitium* will not be excused by his having contracted generally, and protested at the time of the sale that he sells the thing such as it is (or 'as it stands') and will not be liable for its defects, for in using that general formula he is considered to have spoken obscurely with cunning and craft; ..... If indeed the vendor made an express exception of some particular disease, and represented or stipulated that the thing sold was otherwise sound, the agreement must be stood to if the vendor did not have certain knowledge of that disease; because a person who has remitted his rights of action cannot be allowed to recede from such remission; but if the vendor knew of the existence of the disease, and designedly suppressed it, *Ulpian* states that the replication of 'fraud' will be available".

Pothier, in his *Treatises on the Contract of Sale* (*Cushing's* trans.) in para. 211 says:

"But if the seller, at the time of the contract, has full knowledge of the defect, and instead of declaring it, stipulates that he does not warrant against it, such concealment is a fraud (*dol*) on his part, which renders him subject to warranty, notwithstanding the clause; D. 21.1.14.9".

Moyle in his *Contract of Sale in the Civil Law*, at p. 189, quotes *Dig.* 18.1.43.2, for the statement:

"Of fraud it is unnecessary to say more, except to remind the reader that if the vendor knew, at the time of the contract, of defects in the goods which would impair their utility for the purpose for which they were intended, and deliberately abstained from giving such information to the purchaser, his conduct was fraudulent; and (as in cases of direct and wilful fraud) the purchaser could rescind the contract by *actio de dolo*, and probably also by *actio ex exempto*, by which he could also recover damages for such loss as he had sustained whether he desired to maintain the contract or avoid it".

In Spencer Bower on *Actionable Misrepresentation*, 2nd ed., the learned author says in para. 512 at p. 440:

"Dissimulation is regarded in the *Digest* as an index, or form, of *dolus*, as much as simulation".

Even the cases in which it is said that the mere non-disclosure of the defect does not give rise *per se* to the action for fraud, go on to say that *dolus* exists if the knowledge of the defect is withheld with the object of concealing from the purchaser facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract. See

Dibley v. *Furter, sup. cit.* at p. 88, and *Cloete* v. *Smithfield Hotel (Pty.) Ltd., sup. cit.* at p. 632. In *Knight* v. *Trollip*, 1948 (3) S.A. 1009 (D), the contract contained a voetstoots clause and at p. 1013, SELKE, J., said:

"I think it resolves itself to this, viz. that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or inaptitude is not, in such a case, equivalent to fraud."

In *Van der Merwe* v. *Culhane*, 1952 (3) S.A. 42 (T) at p. 44, MARITZ, J.P., said the following:

"If the language used by the learned Judges in the cases quoted is paraphrased, in my opinion it comes down to this:

'A seller is not liable for defects if the sale is *voetstoots* unless he was aware of the defects and failed to disclose their presence to the purchaser; his failure to disclose their presence is *prima facie* a fraudulent act on his part.'"

The learned JUDGE-PRESIDENT went on to say that in the absence of any explanation by the seller his failure to disclose the known defect "was therefore" a fraud on the purchaser.

In *Hackett* v. *G. & G. Radio and Refrigerator Corporation*, 1949 (3) S.A. 664 (A.D.), the Court was discussing sec. 3 (2) of Act 18 of 1943 and the periods of prescription in relation to the term *actio redhibitoria* as used in that Act. SCHREINER, J.A., who delivered a disssenting judgment on the interpretation of the statute as to the period of prescription, said the following, at p. 690, when discussing remedies based on latent defect:

"The question whether the buyer is entitled to damages beyond those of a restitutionary character depends on whether or not he can prove that the seller either (1) expressly guaranteed that the thing was free of the defects, or (2) must be taken to have given such a guarantee by implication from the particular facts of the case or from the nature of his business, or (3) knew of the facts at the time of the sale. This last case is commonly referred to as fraud. It is a form of fraud which has been treated since Roman times as fraud in the contract itself, giving rise to the *actio empti*, and not as deceit inducing the purchaser to buy, in which case the damages may be different (*Caxton Printing Works (Pty.) Ltd.* v. *Transvaal Advertising Contractors Ltd.*, 1936 T.P.D. 209)."

It appears from what has been said in BB. above that Selige's, and hence defendant's, conduct was not a case of mere non-disclosure. We have here a case in which the seller had knowledge of the defect, knew that the defect rendered the property unfit for the purpose for which it was bought, knew that the purchaser had no knowledge of the defect, must have known that the purchaser would not have bought the property if it had knowledge of the defect. Having regard to all the facts there can be no doubt, it was Selige's duty to disclose the existence of the encumbrance. Despite this he deliberately concealed the existence of the defect and did so craftily. I am of the opinion that it has been shown that this is a case in which the plaintiff was deceived by Selige's silence and that, having regard to the *dicta* in the authorities cited above, his deliberate concealment constitutes fraud in our law.

Before leaving this aspect of the case it is necessary to deal with a sub-

mission made by defendant's counsel. Plaintiff's cause of action as we have seen from para. 6 of the particulars of claim is based on defendant's deliberate concealment of and failure to disclose the encumbrance. Defendant, before pleading, requested further particulars. It asked whether plaintiff was alleging "that defendant has been guilty of fraud". Plaintiff, in reply to the request, merely stated that the particulars were not required to enable the defendant to plead. This was tantamount to saying that the facts alleged set out plaintiff's cause of action sufficiently clearly. Defendant did not take this aspect further. During the trial this issue was again raised as will appear from the following extract from the evidence:

"Mr. *Uys*: ..... You see, the very serious allegation has been made, indirectly it must be laid at your door, as a co-director of the plaintiff company, that Selige fraudulently failed to disclose this pediment so as to induce you to buy this property. Now do you persist in that allegation? Do you say that, or is that a legal submission on your Court papers? Are you personally saying that the man deliberately fraudulently induced you into buying this property?

Mr. *Hoberman*: M'Lord, with respect. no allegation has been made that there was any fraud in order to induce the purchasers to buy. There is no such allegation on the papers.

Court: The allegation is that there was deliberate concealment in order that they should buy.

Mr. *Hoberman*: No. m'Lord, with respect, not. Inasmuch as the plaintiff does not seek to set aside the sale that allegation would have been unnecessary and was, in fact, not made. All that is alleged at p. 18 is that there was a duty to disclose and that in breach of that duty defendant concealed the presence of the encumbrance and/or defects as aforesaid by deliberately failing to make a disclosure thereof. There is no allegation that that was done with the intention of inducing plaintiff to purchase. That allegation would obviously have been necessary if plaintiff was seeking to set aside the sale. Plaintiff is not seeking that."

In this Court counsel for plaintiff (he did not appear in the Court *a quo*) also took up the attitude that the allegations in the pleadings, if proved, were sufficient to enable the plaintiff to succeed on its present claim.

Counsel for defendant urged that plaintiff's attitude was tantamount to a refusal to plead fraud; that as plaintiff had not alleged

"any element, such as craft or deceit employed with a view to deceive or ensnare, which would make the alleged concealment or non-disclosure fraudulent"

it could not succeed. This submission cannot be upheld for the following reasons. Firstly, the allegations in the particulars of claim that there was a deliberate concealment and failure to disclose at a time when there was a duty so to do, does, in my view, lay the foundation to prove facts which will demonstrate fraudulent intent. Once it is alleged that the concealment was deliberate, it is pertinent and necessary to ask: for what purpose did the defendant deliberately remain silent? The answer, in the context of the facts alleged in this case, can only be that the defendant realized that the disclosure of the encumbrance to one whose purpose in buying the property was to demolish the building, would or might be an obstacle to the proposed sale going through. The inference is irresistible that the defendant remained silent with intent to deceive and by such deception to obtain a higher price. The allegation of fraudulent conduct is therefore implicit in the allegations made in the particulars of claim. The above statement by plaintiff's counsel, as I read it, was based on his view of the law. All that it did was to convey that, inasmuch as plaintiff was not seeking to cancel the contract, there was no need in law to allege a fraud which

induced the contract. Counsel's statement does not in any way amount to a withdrawal of any of the allegations of fact in the particulars of claim or of behaviour which, in law, constitutes fraud. These allegations and their effect have been set out above. If the allegations of fact are proved, the statement by its counsel as to the law should not be held to non-suit the plaintiff, particularly as defendant's counsel did not suggest that it had prejudiced his client in any way. Secondly, the question of fraudulent intent was fully canvassed in the Court *a quo* as will appear from what follows:

(*aaa*) At the commencement of the trial an application was made by defendant to amend the first plea by substituting the second plea. In his reasons for judgment when refusing the amendment, the learned Judge *a quo* said that plaintiff's counsel —

". . . says that the action is based on the fraud of the defendant in that at the time of the original agreement he failed to disclose a defect that he ought to have disclosed."

(*bbb*) In his reasons for judgment at the end of the case the learned Judge said:

"The issues most closely contested were whether the circumstances placed a legal duty upon the seller to disclose to him prior to the sale the existence of the pediment and whether he omitted to do so because he had the object of misleading the buyer, and further whether there was a material misrepresentation."

(*ccc*) As we saw above counsel for the defence asked Leon Glaser whether he was persisting in the serious allegation of fraud. Thereafter counsel came back to the issue of fraud as appears from the following questions and answers put to Leon Glaser in cross-examination:

"*Mr. Uys*: Yes. Let us get this quite clear, Mr. Glaser. His Lordship asked you about what purpose Selige could have had in not disclosing this to you. You suggested that he might have for some purpose done so. Now what purpose do you suggest? — Well, he could have been frightened that this could scare us off wanting to buy the property and he would not be able to sell it.

I see. In other words, do you agree that I can interpret that this way, that he concealed this so as to induce you to buy? — Yes.

Do you agree with that? — Yes."

"Are you yourself saying what was argued by your counsel yesterday, namely, that Selige deliberately concealed the proclamation of this pediment from you with the object of inducing you to buy that property at an enhanced value, which is what your counsel's words were? Are you yourself saying that? — Yes, I will say that."

(*ddd*) David Glaser was also asked in cross-examination whether he could point to any fact which showed that Selige was fraudulent. He replied that he had not had any dealings with Selige as he had left everything to Leon Glaser.

(*eee*) The questions and answers in the paragraphs marked (vii) and (ix) earlier in this judgment are also relevant on this aspect.

Thirdly, even if my interpretation of the allegations in the pleadings is not correct, it is clear, from what has been set out above, that the real issue between the parties, viz. whether Selige, by his concealment, intended to mislead plaintiff, and in fact did mislead it, into believing that it was free to demolish the buildings, was fully canvassed. Hence this Court is not debarred from making a finding that Selige's behaviour was, in terms

of the law, tantamount to fraud; cf. *Shill* v. *Milner*, 1937 A.D. 101 at p. 105. Finally, the defendant has not been prejudiced in any way. It was fully aware, both before and during the trial, of the facts which were in issue and which plaintiff was required to prove. Those facts, as we have seen, were fully canvassed and have been proved and constituted fraud.

Ad EE. Did the failure to disclose the facts cause the plaintiff damage and, if so, has the plaintiff proved its damage.

Selige, and thus defendant, knew at all material times prior to the sale, that the purpose of the purchase of the property was its total demolition prior to a rebuilding scheme; he knew that this could not be done by the purchaser before and until it obtained the consent of the Council; he knew that plaintiff did not know of the encumbrance. His deliberate failure to make the disclosure to plaintiff was a fraudulent non-disclosure. It was his duty, in the special circumstances of this case, to disabuse Leon Glaser's (and so plaintiff's) mind before the sale. The effect of the misrepresentation by non-disclosure continued to operate until the option was exercised; the plaintiff would not have bought, had it known of the encumbrance; the link is thus furnished between the misrepresentation, by non-disclosure, and the conclusion of the sale.

This is not an action for breach of contract. The plaintiff's claim is based on delict. It is an action for a wrong done whereby the plaintiff suffered loss. The proper measure of damages for deceit, as distinct from an action based on contract, has been the subject of discussion in recent years in this Court in several cases. See *Trotman and Another* v. *Edwick*, 1951 (1) S.A. 443 (A.D.) at p. 449; *Bill Harvey's Investment Trust (Pty.) Ltd.* v. *Oranjegezicht Citrus Estates (Pty.) Ltd.*, 1958 (1) S.A. 479 (A.D.) at p. 483; *Scheepers* v. *Handley*, 1960 (3) S.A. 54 (A.D.) at p. 59, and *De Jager* v. *Grunder*, 1964 (1) S.A. 446 A.D. at pp. 450, 451, 458 and 467.

In the *Trotman* case, *supra*, VAN DEN HEEVER, J.A., at p. 449 said:

"A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him".

It is, however, significant that the learned Judge went on to add at p. 450:

"I wish to guard myself against seeming to lay down a formula for the assessment of damages in all cases similar to the one with which we are dealing. Conceivably situations may arise in which other factors will enter into the measure of damages arising out of fraudulent misrepresentation. In each case the question will arise whether the plaintiff has established the causal connection between the fraudulent misrepresentation and the alleged patrimonial loss."

Trotman's case was distinguished, and the measure of damages there adopted was not applied in the *Harvey's Investment Trust* case, *supra*. At p. 483 MALAN, J.A., is reported as saying:

"In actions for damages based upon fraudulent misrepresentation the measure of damages is the actual patrimonial loss suffered by the purchaser as the reasonable and natural or the intended result of the misrepresentation. (*Trotman and Another* v. *Edwick*, 1951 (1) S.A. 443 (A.D.).)

The method of assessing the loss must in every case be determined upon its own facts and the present inquiry must be directed to the respect in which, and to the extent to which, the mind of the plaintiff, as an ordinary reasonable buyer, would have been affected by the representations in fixing an increased price for the property purchased. In other words, the question is how much more had he been induced to pay by reason of his having relied upon the truth of the representations?"

In the *Scheepers* case, plaintiff sued for damages on the ground of a fraudulent misrepresentation as to the extent of the land sold. OGILVIE THOMPSON, J.A., said in that case, at p. 59, the proper test was "how much more" was the purchaser induced to pay by his reliance on the truth of the representation.

The *dicta* of STEYN, C.J., in *De Jager's* case, *supra* at pp. 450 and 451, indicate that the method adopted to measure damages resulting from a fraudulent misrepresentation must depend on the facts of each case. See also the remarks of RUMPFF, J.A., at p. 458D.

In the present case the sum of R14 500 is claimed as damages. There is proof, as I shall presently demonstrate, that plaintiff is entitled to recover this amount whether the measure adopted is the rigid one in the *Trotman* case, *supra*, or the less rigid one adopted in the *Scheepers* case, *supra*, and the *De Jager* case, *supra*.

It is convenient at this stage to consider whether the plaintiff has proved that it will have to expend R14 500. The evidence clearly proves that the cost of removing the pediment was R6 500. It also proves that the cost of putting it into the new building will be R8 100. It was suggested that the evidence shows that the Council might be disposed to allow the pediment to be given to a museum or art gallery. Leon Glaser testified that plaintiff only became aware of this on the day before the trial. In any event, it will be remembered that the Council had intimated that it would consider allowing the pediment to be given to a museum or art gallery if it was not practical to incorporate it in the new building. The evidence of Leon Glaser and Meyer is to the effect that it is practical to incorporate it in the foyer of the new building. The Council has agreed to this. The plaintiff has therefore proved that it will have to expend R14 600. Its total loss thus exceeds the R14 500 claimed.

It will be remembered that, immediately the misrepresentation was discovered, plaintiff's attorneys wrote to defendant's attorneys. It was then agreed that an approach would be made to the Council and that that approach should be made by plaintiff. Registration of the transfer was delayed pending the result of the discussions with the Council. Eventually the Council granted permission to plaintiff to remove the pediment subject to it being stored and, thereafter, being installed in the foyer of the projected new building. Plaintiff's directors were most relieved at this solution. The property was eventually transferred to plaintiff in December 1969. All the above events were without prejudice to plaintiff's rights.

The evidence of Zietsman, an expert in this field, said that the market value of the property was less than R325 000. The evidence of the Glasers is that they bought at R325 000 which was their top figure, because the Inag property and the Hepworth property adjoined each other and they required the Inag property for the rebuilding scheme. On this evidence the value of the Inag property at the date of the sale was certainly not more than R325 000, i.e. on the basis that the owner was free to demolish the property. The encumbrance prevented this. There is the evidence of Zietsman that the property could only be sold to a person who would

knock down the buildings. It is implicit in all this evidence that if the Glasers had known of the encumbrance, at the date of the sale, they would not have bought the property. The property was in a dilapidated condition and could only be sold "to somebody who would knock it down". The purpose for which plaintiff purchased it was to demolish it and erect a new building on the Inag and Hepworth properties. It follows that the value of the Inag property to a property developer was substantially less than the purchase price. What this substantially less amount was, has not been shown in the evidence. What is certain is that it exceeded R14 500. The parties apparently both wished to avoid cancellation of the contract. It was agreed that the Council should be interviewed. This was the reasonable and sensible course to adopt. The result of the negotiations was that the plaintiff did not need to cancel the contract and the defendant would receive a great deal more for its property than it was worth. The effect of plaintiff's actions was to avoid cancellation and minimise its damages. The steps which it took were eminently reasonable and in fact resulted from the agreement that it should interview the Council.

It follows that the plaintiff has proved that it is entitled to recover from defendant the sum of R14 500.

In the result the appeal must succeed.

The order made is:

A. The appeal succeeds with costs.

B. The order of the Court *a quo* is set aside and there is substituted an order which reads: Judgment for the plaintiff in the sum of R14 500 with costs.

HOLMES, J.A., and MILLER, J.A., concurred in the judgment of GALGUT, A.J.A.

Appellant's Attorneys: *Roup, Schneider & Wacks*, Cape Town; *Israel & Sackstein*, Bloemfontein. Respondent's Attorneys: *M. R. Orman & Co.*, Cape Town; *Symington & De Kok*, Bloemfontein.

WEBSTER AND ANOTHER v. SANTAM INSURANCE CO. LTD.

(APPELLATE DIVISION.)

1977. *February* 18; *March* 15. TROLLIP, J.A., CORBETT, J.A., HOFMEYR, J.A., KOTZÉ, J.A., and MILLER, J.A.

Insurance.—Motor vehicle.—Compulsory Motor Vehicle Insurance Act, 56 of 1972.—Claim prescribed two days before summons issued.—Application for relief under sec. 24 (2) (a) (ii) of Act.—Proper construction of sec. 24 (2) (a).—Requisite for relief under sec. 24 (2) (a) (ii).—Nature of the phrase "special circumstances" therein.—Neglect of an attorney may frequently be a special circumstance on its own vis-à-vis a client.—Third party entitled to rely on competence, skill and knowledge of his attorney and fulfilment of his professional responsibility.—Third party entitled to withhold power of attorney until insurer rejects his claim.—Third party entitled in circumstances to sign such power three weeks before prescriptive date.—Vital period the three weeks thereafter.—Late service of summons attributable to neglect on part of clerk, messenger and sole partner in such attorney's firm.—Third parties entitled to relief claimed.—Attorney.—Neglect by.—Liability for wasted costs raised but not decided.

On a proper construction of section 24 (2) (*a*) of the Compulsory Motor Vehicle Insurance Act, 56 of 1972, the Court does not retain a residual discretion in the event of the prescribed requisites being fulfilled. The requisite for relief in terms of section 24 (2) (*a*) (ii) of the Act would thus be a finding by the Court that by reason of unusual or unexpected circumstances the third party could not reasonably have been expected to serve a process in time to interrupt prescription. It follows from this that the Court must be satisfied that such circumstances are the cause of (or the reason for) the failure to effect timeous service. Accordingly the question which the Court would have to answer affirmatively in order to determine whether the duty arises to exercise the power of authorising service within an extended period might appropriately be formulated thus: Were there unusual or unexpected circumstances because of which the third party could not reasonably have been expected to serve the summons before the date on which the claim became prescribed?

It depends entirely upon the circumstances of the case on which particular period or stage during the running of prescription the Court ought to focus its attention in order to ascertain (i) the reason for the third party's failure to furnish timeously his written claim for compensation in terms of section 25 (1), or, if he did so, (ii) the reason for his failure to serve or have served any process timeously to interrupt prescription and whether the reason or reasons constitute "special circumstances".

A third party, as a lay client, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. Consequently, in considering whether the neglect of an attorney constitutes a special circumstance within the meaning of that phrase in section 24 (2) (*a*) of the Act, the correct approach should always be to regard it as a relevant factor and to recognize that such neglect by an attorney may frequently be a special circumstance on its own *vis-à-vis* his client.

An application by the appellants, as third parties, for relief in terms of section 24 (2) (*a*) (ii) of the Act having been dismissed in a Local Division, in an appeal direct to the Appellate Division it appeared that the appellants had been injured on 26 May 1973; that they had instructed a legal firm to act as their attorneys on 22 July 1974; that the claims for compensation had been delivered on 20 March 1975; that the running of prescription had thus been suspended from that date to 17 June 1975, and that the two year prescriptive term expired on 23 August 1975. Summons commencing the action had only been served on the respondent two days thereafter, i.e. on 25 August 1975. Respondent had declined a request to waive its right to invoke prescription. The facts attending the failure to effect timeous service were as follows: An attorney's clerk in the firm had handled the claims; by letter dated 23 July 1975 and received by the firm on 28 July 1975, i.e. after expiry of the period during which prescription and been suspended, the respondent had repudiated the claims; the clerk had then communicated with the appellants and had procured their signature to the requisite powers of attorney by 2 August 1975; on 4 August 1975 the clerk caused a brief to prepare the appellants' particulars of claim to be delivered to counsel and diarized the matter for attention on 20 August 1975; on that date the clerk telephoned counsel's chambers and learnt that counsel was engaged elsewhere; during the period of 22 August 1975 (a Friday) to Sunday 25 August 1975 the clerk attended to his personal affairs in the Transkei; on 22 August, during the lunch hour, the sole partner in the firm signed the sum-