HOLMDENE BRICKWORKS (PTY.) LTD. v. ROBERTS CONSTRUCTION CO. LTD.

(APPELLATE DIVISION.)

1977. *May* 5, 22. HOLMES, J.A., CORBETT, J.A., HOFMEYR, J.A., DE VILLIERS, J.A., and KOTZÉ, J.A.

Sale.—Latent defect.—Damages.—When manufacturers liable for consequential damages.—Defect.—What amounts to.—Latent defect.—What constitutes.—How discernible.—Question raised but not decided.—Whether liability for consequential damages is founded upon breach of contract or delictual.—Question raised but not decided.

Appeal.—Judgment for plaintiff.—No interest claimed.—Defendant noting appeal.—Application by plaintiff for amendment claiming interest from date of judgment at 6 per cent and 11 per cent from date of judgment in Appeal Court:—To grant amendment would be tantamount to a variation of Court's order in absence of a cross-appeal.—Act 55 of 1975 coming into operation after date of judgment in Court a quo.—Amendment refused.

A merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the above-mentioned categories, the law irrebuttably attaches this liability to him, unless he has expressly or impliedly contracted out of it. The liability is additional to, and different from, the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect.

Broadly speaking, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used. Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.

Quaere: Whether to be latent the defect must be not "easily visible" or whether the test is rather that it should not be reasonably discoverable or discernible by the ordinary purchaser.

Quaere: What effect, if any, is produced by the fact that the purchaser is himself an expert in regard to the *res vendita* or employs an expert to examine the goods.

Quaere: Whether the liability of the manufacturer/seller for consequential damages arising from a latent defect in the *res vendita* is founded upon breach of contract or delictual.

Respondent, which carried on business as building and engineering contractors, had contracted to purchase bricks from the appellant, which carried on business as the manufacturers and sellers of bricks. In certain walls of a building being built by the respondent with bricks supplied by the appellant, respondent contended that a substantial portion of the bricks used were found to be defective, necessitating the demolition of such walls. Respondent had purchased other bricks from another brick company. The appellant was sued for consequential damages arising from the breach of contract. On 2 July 1975 judgment was granted in the respondent's favour. No interest had been claimed and naturally none was awarded. In an appeal by the appellant the respondent applied, by way of an amendment, for (1) interest at six per cent from 2 July 1975 and (2) interest at 11 per cent from date of judgment in the Appeal Court in terms of Act 55 of 1975. Only the first application was opposed.

Held, on the evidence, that appellant had sold respondent bricks containing a latent defect.

Held, further, that the demolition of the walls was a natural and foreseeable consequence of the seller's default.

Held, further, that the respondent had acted reasonably in demolishing the brickwork.

Held, further, that to allow now the two applications for the payment of interest would in effect be varying the order of the Court to the detriment of the appellant. This the Court could not do in the absence of a cross-appeal.

Held, as to the second application, that, as the Act came into operation on 16 July 1967, after the judgment in the Court *a quo*, section 3 (2) of the Act did not apply. Accordingly the application should be refused.

The decision in the Transvaal Provincial Division in *Roberts Construction Co. Ltd.* v. *Holmdene Brickworks (Pty.) Ltd.* confirmed.

Appeal from a decision in the Transvaal Provincial Division (HIEMSTRA, J.). The facts appear from judgment of CORBETT, J.A.

K. van Dykhorst, S.C. (with him *D. H. van Zyl*), for the appellant: The respondent's case was based on the rule that a merchant-seller and therefore a manufacturer-seller is liable for consequential damage arising from a latent defect in the product even though such seller was ignorant thereof. *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk.* v. *Botha*, 1964 (3) S.A. 561. The trial Court correctly rejected the argument on behalf of the respondent that in the case of a manufacturer-dealer foreseeability is irrelevant, and that the manufacturer-dealer's liability is absolute. The manufacturer-seller is in no worse position than an ordinary seller who has expressly warranted against the occurrence of a defect. *Bowker* v. *Sparks Young and Farmers' Meat Industries Ltd.*, 1936 N.P.D. at pp. 12-15; *Lavery & Co. Ltd.* v. *Jungheinrich*, 1931 A.D. at p. 172; *Marais* v. *Commercial General Agency Ltd.*, 1922 T.P.D. at pp. 442/3, 444; *Jaffe & Co. Ltd.* v. *Bocchi and Another*, 1961 (4) S.A. at p. 364A-B. The trial Court correctly accepted that efflorescence is no reason for demolition and is in fact quite harmless.

R. S. Welsh, Q.C. (with him *I. W. Schartzman*), for the respondent: It was a term of the contract between the parties that the bricks to be delivered by the appellant to the respondent should be free from any defect which was not apparent upon a reasonable examination of the samples which the appellant had supplied to the respondent. See Mackeurtan, *Sale of Goods in South Africa*, 4th ed., p. 94, footnote 12; *Drummond and Sons* v. *Van Ingen & Co.*, (1887) 12 App. Cas. at pp. 296-297; *S.A. Oil and Fat Industries Ltd.* v. *Park Rynie Whaling Co. Ltd.*, 1916 A.D. at p. 410. This, as *Mackeurtan* remarks, "is only the warranty against defects of our law". The Court below was wrong in saying that the purpose for which the bricks were to be used "played no part at all in the agreement". It was therefore a term of the contract between the parties that the bricks delivered should be fit for the purpose for which, to the knowledge of the appellant, they were to be used by the respondent, and that they would be free from any latent defects rendering them unfit for that purpose. Furthermore, the Court below held (and it is apparently common cause) that the appellant, having been the manufacturer as well as the seller of the bricks, is liable for consequential damages sustained by the respondent

as a result of a breach of the implied warranty against latent defects. See *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk.* v. *Botha and Another*, 1964 (3) S.A. 561. The respondent's complaint is that the bricks were unfit for the purpose for which they were purchased. The appellant's argument in regard to the "possible remedial measures" is really no more than an assertion that the respondent failed to take reasonable steps to mitigate its loss. The *onus* was therefore on the appellant to show that the demolition of the walls was not reasonable in all the circumstances and that an alternative mode, less expensive or burdensome, was available. "The Court should not be too astute to hold that this *onus* has been discharged." See *Everett and Another* v. *Marian Heights (Pty.) Ltd.*, 1970 (1) S.A. at pp. 201-202; *Ntuli* v. *Hirsch and Adler*, 1958 (2) S.A. at p. 295.

The appellant has not referred to the recent decision of this Court in *Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas*, 1976 (2) S.A. 545, where it was held that the "convention principle" underlying the majority judgment of WESSELS, J.A., in *Lavery and Company Ltd.* v. *Jungheinrich*, 1931 A.D. 156, has not yet been "jettisoned". Even if the "convention principle" be applied to the present case, the circumstances are such that the appellant "virtually or tacitly assumed liability" for the damages suffered by the respondent, just as the defendant in the *Shatz* case was held to have done. If the parties had addressed their minds to this question at the time when they entered into the contract, it would have been quite obvious to them that if the bricks which the appellant delivered to the respondent turned out to be so defective that the walls would have to be demolished and rebuilt, the respondent would hold the appellant liable for its ensuing loss. If this Court is of the opinion that the correctness of the principles stated in *Lavery's* case should now be reconsidered in the context of this appeal, those principles are open to the most serious criticism and should now be "jettisoned". As Lord UPJOHN said in *Koufos* v. *C. Czarnikow Ltd.*, (1969) 1 A.C. at pp. 421-422, "if parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach. It is quite unnecessary that it should be a term of the contract". American law is the same: see *Shatz's* case, *supra* at p. 552G-H. It seems that the so-called "second branch" of the rule in *Hadley* v. *Baxendale* was originally derived from the passage in *Pothier* on which WESSELS, J.A., relied in *Lavery's* case. It is significant that the English and American Courts have seen fit to place the liability for special damages on a broader basis than the "convention principle". This Court should do likewise. Cf. Professor A. J. Kerr, "Special Damages in Contract", (1976) 93 *South African Law Journal*, pp. 259-265.

Because of the provisions of sec. 3 (2), read with sec. 2 (1), of the Prescribed Rate of Interest Act, 55 of 1975, which came into operation on 16 July 1976, the judgment in favour of the respondent does not bear interest at the prescribed rate of 11 per cent provided for in *Government Notice* R1217, *Regulation Gazette* 2338, *Government Gazette* No. 5215, dated 16 July 1976. Cf. *Rielly* v. *Seligson and Clare Ltd.*, 1977 (1) S.A. at pp. 641-642. The respondent did not include in its prayer a claim for

interest from the date of judgment to the date of payment. Accordingly the judgment of the Court below (which was given on 2 July 1975) does not bear interest. If a claim for interest had been made in the third party notice, or if the respondent had sought and been granted an amendment during the trial, the Court below would have ordered the appellant to pay interest at the rate of 6 per cent per annum from the date of judgment.

Van Dykhorst, S.C., in reply: The respondent makes no clear-cut choice as to whether its case is founded on general or special damages. If respondent's case is founded on general damages it means that it alleges that it is a normal and necessary consequence of the delivery of defective bricks that buildings are demolished. If this is the allegation, a reference to *Lavery* v. *Jungheinrich, supra*, and *Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas*, 1976 (2) S.A. 545, is entirely irrelevant as in those cases special damages were dealt with (i.e. damages which do not normally and necessarily follow upon the specific breach). If this is therefore the case for respondent, a reconsideration of the principles enunciated in *Lavery's* case is not called for. On this basis the respondent cannot succeed in view of the evidence that demolition of a building due to this cause is unheard of. If the respondent's case is that the damages are "special" it has to rely upon the principles set out in *Lavery's* case and that is in fact what was pleaded. It is the respondent's case on the pleadings that the parties contracted upon the basis thereof. In view of the respondent's pleadings it is therefore not open to it to argue that the "convention principle" laid down in *Lavery's* case and reiterated in *Shatz's* case be jettisoned. If the respondent's case is that Bowker, at the date the contract was entered into, was aware of and contracted on the basis of the following special circumstances then, firstly, this should have been specifically pleaded (*North and Son (Pty.) Ltd.* v. *Albertyn*, 1962 (2) S.A. at p. 215) and, in the second place, this should have been proved by way of evidence. In any event it is submitted that there is no sound basis for jettisoning the "convention principle". The *ratio* of *Hadley* v. *Baxendale* appears to be the following: a party is liable for general damages, that is those that normally flow from a breach, as he is deemed to have impliedly assumed liability therefor. A party is liable for special damages (i.e. those that do not normally flow from a breach of contract) only if it is proved that he has in fact assumed liability therefor (i.e. that the contract was concluded upon the basis of his liability). It is the second category of damages which is dealt with in *Lavery's* case. Seen in this light, there is no reason to deviate from the "convention principle" requiring knowledge of the *special circumstances* on the part of the party sought to be held liable and a submission by him to such liability. This is the underlying *ratio* of the following cases: *Victoria Falls and Transvaal Power Co. Ltd.* v. *Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1; *Lavery and Co. Ltd.* v. *Jungheinrich*, 1931 A.D. 156; *Whitfield* v. *Phillips and Another*, 1957 (3) S.A. at p. 325; *North and Son (Pty.) Ltd.* v. *Albertyn*, 1962 (2) S.A. 212A; *Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas*, 1976 (2) S.A. 545. See also Pothier, *Traité des Obligations*, paras. 159-164; Molinaeus, *Tractatus de eo quod interest* (translation of H. J. Erasmus), para. 62 (pp. 71-73). Reference can also be made to the English law set out in *Hadley and Another* v. *Baxendale and Others*, 1843-1860 All E.R. 461; *The*

Heron II. Koufos v. *C. Czarnikow Ltd.*, (1967) 3 All E.R. 686. The principles laid down in *Lavery's* case have been accepted and acted upon in practice for several decades and a Court should be hesitant to discard deeply entrenched legal principles.

The effect of noting of appeal is to suspend the judgment against which appeal is noted. *Reid and Another* v. *Godart and Another*, 1938 A.D. at p. 513. A final judgment arises only when the decision on appeal is delivered and on an unliquidated claim interest does not run until it has been finally liquidated. Therefore interest will run only from the date of delivery of this Honourable Court's judgment. In the absence of anything in a judgment stating that interest is payable on the judgment debt, our Courts have held that a judgment creditor cannot recover interest from the judgment debtor. *African Mutual Trust and Assurance Co. Ltd.* v. *Murray, N.O.*, 1914 C.P.D. at p. 1113; *Victoria Falls and Transvaal Co. Ltd.* v. *Consolidated Langlaagte Mines Ltd.*, 1915 A.D. at p. 33; *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Co. (South) Ltd.*, 1955 (2) S.A. at p. 27H. At no stage during the trial or before judgment in the Court *a quo* was an application made for amendment to make allowance for interest on the judgment debt. In any event our Courts have no inherent equitable jurisdiction to award interest. See *Sammel and Others* v. *President Brand Gold Mining Co. Ltd.*, 1969 (3) S.A. at pp. 698-699. It is furthermore trite law that a party applying for an amendment should convince the Court that the opposing party will not be prejudiced. The liability for interest on a judgment debt is a material factor in the consideration of the risks of appealing.

Cur. adv. vult.

Postea (May 27).

CORBETT, J.A.: The appellant company carries on business in the district of Standerton as the manufacturer and seller of bricks. Appellant's brickfield and quarry are situated about 16 km from the town of Standerton. The managing director of the appellant is a Mr. L. H. Bowker. He and his son own all the shares in appellant. The respondent company carries on business as building and engineering contractors, with its registered head office in Johannesburg. Respondent sued appellant in the Transvaal Provincial Division for damages arising from the purchase of certain bricks by the respondent from the appellant and the appellant counterclaimed for the amount of R2 192, being the balance of the purchase price of the bricks. The trial Court (HIEMSTRA, J.) granted judgment in favour of the respondent and awarded damages in the sum of R27 086,24 and costs of suit. The appellant's counterclaim was dismissed with costs. The appellant appeals to this Court against the decision of the trial Court that appellant was liable to respondent in damages (the *quantum* of damages awarded is not challenged) and against the dismissal of its counterclaim.

The pleadings in this case are detailed and voluminous and tend to obscure rather than to elucidate the real issues. Respondent's case, as finally formulated before this Court, is in essence —

(*a*) that during June and July 1971 it purchased from appellant some 212 000 bricks, most of which were of the variety known as "fair face" and the remainder being what are known as "stock" bricks, for use in the erection of certain factory buildings at Standerton for Nestlé (S.A.) Ltd. ("Nestlé");

(*b*) that these bricks were delivered to respondent at the construction site in a number of loads over the period 1 July to 30 November 1971 and were in fact used in the erection of the factory buildings;

(*c*) that in January 1972, after the completion of all the brickwork, it was found that a substantial proportion of the bricks so used were defective in that they manifested a condition known as "efflorescence" and were beginning to crumble and decompose;

(*d*) that in order to remedy the position respondent demolished the walls containing the defective bricks and rebuilt them with other bricks obtained from a different source (the cost of such demolition and reinstatement being assessed by the trial Court at R27 086,24); and

(*e*) that appellant, as the manufacturer and seller of bricks containing a latent defect, was bound to compensate respondent for the consequential loss suffered in the aforementioned sum of R27 086,24.

To this claim appellant raised a number of defences, both on the law and on the facts. It will be convenient to consider these defences in their appropriate context. Before coming to them, however, it is necessary to sketch the salient facts as revealed by the evidence.

The story commences with a visit by a Mr. J. O. Lubke to the appellant's place of business. Lubke, a building supervisor in the employ of the respondent, had been sent to establish the building site at the Nestlé factory and one of his instructions was to obtain samples of bricks in the Standerton area. He did not have authority to conclude any contract for the supply of bricks. His visit to appellant's brickfield took place on 13 May 1971. He saw Bowker and asked him for samples of bricks suitable for the construction of a factory. He was shown and given samples of three different types of brick — fair face, stock and rustic. Prices were discussed and a quotation given by Bowker. Lubke states that he also asked Bowker whether the bricks conformed to the standards laid down by the South African Bureau of Standards ("S.A.B.S.") and that Bowker stated that they did. Bowker himself denies this. According to him Lubke asked whether the bricks had been tested by the S.A.B.S. and was told that they had not been passed by the Bureau. Mrs. Bowker, who was present, gives a slightly different version of the conversation. Nothing vital turns on this conflict however. Although respondent originally relied upon a false representation that the bricks conformed to S.A.B.S. standards, this was not ultimately pursued.

Lubke took the samples away with him and they were submitted to Mr. A. Michael, respondent's contracts manager in charge of the Nestlé contract at Standerton. He was satisfied and passed them on to Mr. C. F. Beguin, the consulting engineer, who designed and supervised the building work. Beguin subjected the samples to a water absorption test and, this being satisfactory, he approved of them and requested respondent to order the bricks in accordance with the quantities stated in the bill of quantities. On 8 June 1971 respondent sent to appellant a written buying order for

"125 000 red semi-face bricks" at R20 per 1 000, delivery to be as and when required by the agent on the site and to commence on 28 June 1971. This was followed in July by a second written order for "±100 000 only stock bricks" at R16 per 1 000, delivery again to be as and when required by the agent on the site. (The prices stated were those quoted by Bowker.)

At this point I must digress and refer to some of the evidence relating to the manufacture of bricks, the different varieties of bricks which may be produced and some of the problems that may be encountered with the finished product. The appellant manufactures bricks by the open clamp kiln method — as opposed to the closed kiln. The process starts with the removal of the brick-making clay from the quarry. Coal dust is added to the raw clay and this mixture is then crushed by being put through roller mills. It is thereafter fed into a mixer, where water is added, and from there the mixture is passed through an extruder, which produces a column of wet clay. This column is passed on a conveyer belt through a wire cutter which cuts it into individual bricks. The bricks are then put into drying kilns. Once dry, they are packed into clamp kilns about 30 bricks high for burning, or firing. In the kiln are put layers of coal, known as "skindles". The bricks in the kiln are closed off by side walls and a top covering of old bricks and the side walls are plastered with a mud mixture. Firing of the kiln commences at one end of the kiln before the clamp is complete. It is the particles of coal in the clay which actually do the burning of the bricks. The purpose of the coal skindles is to start and maintain the burning process. Once the firing process, which takes between two and three weeks, is complete and the bricks have cooled down, the clamp is opened up. The bricks are then ready for marketing.

There are many variations in the colour, general appearance and quality of the finished product. This will depend upon the type of clay used and upon the process of manufacture, particularly the degree of firing to which the brick is subjected. For the purpose of laying down standards for compressive strength and efflorescence, the S.A.B.S. divides bricks into four classes. These, listed in a descending order as to the stringency of the requirements, are engineering, facing, general purpose (special) and general purpose. In this case the terms "semi-face" and "fair face" figure frequently. The bricks described in the first order form were semi-face, whereas the vast majority of bricks actually delivered were described as fair face — the balance being stock bricks. There was no unanimity among the experts as to the meaning of these terms. According to some they denoted different types of brick: the semi-face being a face brick of a poorer or cheaper type and falling into the S.A.B.S. category of general purpose (special); and the fair face being a stock brick with one smooth, or fair, face which enabled it to be used in an unplastered wall and falling into the S.A.B.S. category of general purpose. Others considered that semi-face and fair face meant the same thing. Nothing of real importance hinges on this difference of opinion but it shows that these terms are loose ones and it seems to go a long way to explain why an order for semi-face bricks was executed by the delivery of fair face bricks. Appellant itself manufactures only fair face, stock and rustic bricks. These are all made in the same way save that in the case of fair face there is a die fitted to the end of the extruder which produces smooth faces, whereas in the case of the

stock brick the die has points on it which produce grooves in the sides of the brick. Rustic bricks are produced with a special machine which is inserted between the extruder and the cutter and roughens up the edges.

One of the main requirements of a satisfactory finished product is that the brick should be properly fired. During the firing process various reactions take place. At about 500° to 600° C the brick loses its crystalline water. At about 950° to 1 000° C new minerals are formed in a process termed vitrification. A lump of clay is converted into a ceramic product. It is this process which gives a properly made brick its hardness, strength, durability and characteristic colour. The precise temperature at which these reactions take place depends upon the type of clay used and may vary considerably. According to Mr. K. D. Eaton, an expert called on respondent's behalf, a well-fired brick is one that has been fired to such a degree that it "reaches its optimum properties in strength, size, colour, ferocity (*sic*)." It is then that the clay "matures". Some clays mature at 1 000°, some at 950° and some at 1 600° C. The proper firing of a brick depends partly on the temperature attained and partly on the time for which it is subjected to that temperature. Bricks are often underfired. This occurs particularly in the case of open clamp kilns in which it is difficult to control the temperature of firing and to maintain an even temperature throughout the kiln. The open kiln process is also vulnerable to the vagaries of the weather, such as wind or rain, which may affect temperatures and the rate of burning. "Underfired" and "well-fired" are, however, loose terms and there may be various gradations between a brick which in substance has not been fired at all and one which has been fired to its optimum. Mr. W. R. Widdicombe, a brick-making expert called by the appellant, conceded that virtually no brick is fired to its optimum hardness and all that was to be expected was that the brick should be adequately fired for the purpose for which it was intended.

Although there are accordingly various degrees of underburning, underburning to a substantial degree can be a fault in a brick, particularly if it is to be used for brickwork unprotected from the weather. It is relatively soft and driving rain may eventually disintegrate it. A far more serious position arises, however, where underburning is combined with the presence of deleterious salts in the brick. Of these the most destructive is magnesium sulphate. This compound is formed in the brick during the process of firing if the clay contains magnesium salts. These react with sulphuric acid in the mixture to produce magnesium sulphate. The usual source of the acid is iron pyrites, derived from coal dust which reacts with moisture in the brick during the firing process to form sulphuric acid. Other salts, such as calcium, sodium or potassium compounds, which are also found in certain clays, may also react during the firing process to form calcium sulphate, sodium sulphate or potassium sulphate, as the case may be.

The presence of any these salts in the finished brick is the root cause of the condition known as "efflorescence". This occurs when the finished brick is saturated with water. The water penetrates the brick through its pores and comes into contact with the salts, which being soluble go into solution. Later when the brick dries out the salts crystallise. Some of the salt solution is "pulled" to the surface by capillary action, where after

crystallisation it forms a whiteish, furry deposit on the outside of the brick. This can readily be brushed off brickwork where it occurs but if the brickwork continues to be subjected to alternate wetting and drying conditions, the processes of which efflorescence is the symptom may cause the disintegration of the affected bricks. This disintegration is caused by the crystallisation process, which involves an expansion taking place in the brick pores. It often results in powdering, crumbling and flaking of the brick surface. Disintegration may take place from the centre of the brick outwards or from the outside inwards. Of all the salts magnesium sulphate, owing to the very high force of crystallisation, is the most destructive and the one most calculated to cause distintegration. Other salts can cause damage but only when in high concentration. Mr. E. R. Schmidt, an expert on building ceramics and clay minerology in the employ of the Council for Scientific and Industrial Research, stated that the presence of magnesium sulphate in brickwork was "highly deleterious". Widdicombe stated that it was well known in the brick-making world that of all the sulphate salts in bricks which cause efflorescence magnesium sulphate is the worst; and that he would not sell a brick which he knew to contain magnesium sulphate. Mr. J. Arnold, another brick-making expert called on behalf of the appellant, agreed that, in bricks, magnesium sulphate was a "highly dangerous salt".

Proper firing of a brick reduces the risk of it containing magnesium sulphate in deleterious quantities because at a certain temperature salts in the brick decompose or volatilise. According to Schmidt, such volatilisation commences at a temperature of at least 1 050° C. Eaton stated that dissociation, or volatilisation, takes place "at about 1 100° C up to about 1 300° C". On the other hand, if a brick is underfired then any deleterious salts which may have been produced in the firing process will probably not have been volatilised.

Various empirical tests for determining whether a brick is well-fired or not were propounded in evidence. These were based upon the appearance, feel, colour and size of the brick and the so-called "ring test", i.e., the sound made when a brick is knocked against another or is tapped with a metal object, such as a bricklayer's trowel. It was said that anyone with experience in the handling of bricks could determine, by means of these tests, whether a brick was underfired or well-fired. None of these tests, however, has any bearing on the presence or absence of magnesium sulphate in the brick. This could be detected only by proper chemical analysis.

I return now to my recital of the facts. Respondent's written orders were received by appellant and dealt with by Mrs. Bowker. At the time she kept the books of the company, took orders for the supply of bricks, gave instructions for delivery and recorded their execution. Bowker himself did not apparently see the orders at the time. He was more concerned with the manufacturing side of the business. On 21 June 1971 Mrs. Bowker received a telephone call from Mr. P. H. Fechter, respondent's site engineer at the Nestlé premises, asking that appellant commence making delivery. The first loads were sent on 1 July and deliveries continued to be made every four days through the months of July, August, September, October and November. During the month of July 12 loads of fair face bricks

(28 000 bricks in all) and 4 loads of stock bricks (12 000 bricks) were delivered. Thereafter, apart from one load in September, all bricks delivered were fair face. It is clear from the invoices sent that the written order for "red semi-face" bricks was interpreted as referring to appellant's fair face bricks. The discrepancy between the number of fair face and stock bricks ordered and the number delivered is to be explained by an agreement reached during the course of deliveries between Bowker and Fechter.

It appears that at a certain stage Fechter complained to Bowker that some of the fair face bricks delivered were chipping badly and consequently could not be used as face bricks on unplastered walls. Bowker visited the site and agreed that a number of the bricks were not up to standard. There is some dispute about what exactly was discussed at this meeting and the full terms of the agreement arrived at. It is at least common cause that it was agreed that henceforth appellant would deliver only fair face bricks; that respondent would use the defective bricks as stocks on internal walls; and that 25 per cent of the fair face bricks to be delivered (or every fourth load) would be charged to respondent at the price for stock bricks. Bowker stated in evidence that he found that —

"... there were bricks that were chipped, they had been chipped, there was flaking and there was underburning on the edges of some of the bricks."

He emphasized that the flaking and underburning was easily visible. His evidence about the conversation is not satisfactory because at one stage he alleged that he discussed, *inter alia*, underburning with Fechter but later conceded that this was not mentioned; he thought that Fechter knew what the problem was. The trial Judge found that Bowker did not mention underburning and I agree with this finding. In its plea appellant also alleged, in effect, that the Fechter/Bowker agreement provided that appellant would continue to deliver bricks "without any better method of selection" and that respondent itself would be responsible for selection; and that, accordingly, respondent accepted the bricks with full knowledge of the defects. This was not substantiated in Bowker's evidence. Indeed at one point he stated that after the complaint he went back and gave instructions that the selection "had to be very much more carefully done". He also spoke to the contractor responsible for the delivery of the bricks, as it had been suggested that careless handling by the contractors was partly the cause of the chipping.

After this agreement Bowker gave instructions to his wife as to future deliveries being only fair face bricks and as to the agreed method of charging for these bricks. According to both Fechter and Bowker this agreement was reached early in July after only a few deliveries had been made. Assuming that the agreement was immediately implemented, this does not appear to accord with the evidence of the delivery notes and invoices; but this is not of any great moment.

In the meanwhile the building work on the site proceeded. The concrete frame was built, the brick walls were laid and during November 1971 the roof was erected. On about 10 December all work was suspended for the annual three-week builders' holiday. By that stage all the walls were complete, plastered and painted where required, apart from possibly a few small areas. On the return of the building contractors to the site early in

January they, and the owners, were amazed to find that very extensive areas on both outside and internal walls of the new buildings were grossly affected by efflorescence and that the brick surfaces were flaking and crumbling. Fechter estimates that about 50 per cent of the exposed (i.e., unplastered) brickwork was affected by efflorescence and that about 10 per cent of the bricks were flaking and crumbling. Beguin said there was such deterioration of the brickwork that he could just not believe it; he was shocked by the crumbling of the bricks. He estimates that at least 30 per cent of the bricks in the walls were crumbling. In these instances, as he put it, "the brick was just falling to pieces". Mr. W. J. Olivier, the works foreman on the Nestlé site, gave similar evidence, though he placed the proportion of affected bricks as high as 80 per cent. Michael put the figure even higher.

A meeting was immediately arranged with Bowker. This took place on 4 January 1971. Present were Michael, Olivier and Bowker. They inspected the affected brickwork. Bowker conceded that there was a problem. In evidence Bowker stated that both the interior and exterior brickwork was affected by efflorescence, the interior being worse than the exterior. He estimated that about 30 per cent of the exterior was so affected. He also noticed crumbling and flaking and conceded that it was more than he had ever seen before.

Respondent then engaged a materials consultant, the late Mr. W. Burger. (Burger died before the trial but certain letters written by him to respondent and statements made by him at two meetings on the site, as recorded in minutes taken, were admitted in terms of sec. 34 of the Civil Proceedings Evidence Act, 25 of 1965. The admissibility of this evidence was not in dispute.) A second meeting took place on the site on about 11 January. Burger, Michael, Fechter, Olivier and Bowker were present on this occasion. Burger examined the bricks. He took samples of the efflorescent powder and of a number of bricks. There is a dispute as to whether the powder samples were put into one or more than one envelope; also as to whether some of the brick samples were cut from the walls and whether Bowker approved the samples or was present when this was done. I shall return to certain of these disputes later.

The powder samples and the brick samples were submitted by Burger to the National Building Research Institute ("N.B.R.I.") of the Council for Scientific and Industrial Research, where they were investigated by Schmidt. He prepared a written report. He found that the samples of powder consisted mainly of magnesium sulphate and a smaller amount of calcium sulphate. The brick samples, 13 in number, were subjected to a number of tests. Eight of the bricks were found to be underfired and the remaining five well-fired. Most of the underfired bricks complied with S.A.B.S. standards for compressive strength but a water absorption test showed that their absorption capacity was fairly high to high. An efflorescence test showed that the underfired bricks were more liable to efflorescence than the well-fired ones (which showed little efflorescence) and that the crystallising salts tended to disrupt the surface of the underfired bricks. The pertinent conclusions in Schmidt's report read as follows:

"2. The soluble salt content in the underfired bricks was high. In particular the magnesium sulphate content is high and it is known to be very deleterious to brickwork. It is most probably the magnesium sulphate that caused the quick deterioration of the underfired bricks.
3. The underfired bricks cannot be regarded as durable if they are built into brickwork exposed to moist conditions.
4. The well-fired bricks appear to be sound and should be acceptable for building purposes. However, one should keep in mind that even well-fired bricks can deteriorate if they are subjected to moisture in the presence of soluble salts, i.e. should water containing soluble salts enter the brickwork, or should water enter brickwork containing soluble salts, deterioration of bricks can occur.
5. The underburnt bricks can lead to plaster failures."

The report which is dated 4 February 1972 was sent to Burger and passed on by him to respondent.

Burger himself submitted two written reports. The first, dated 12 January, was given immediately after his first inspection. In it he stated, *inter alia*, that the semi-face bricks were underburnt to various degrees; that excessive efflorescence was occurring in most bricks, "i.e., about 80 per cent on the walls where excessive water got to the bricks"; and that due to this the bricks were crumbling and would continue to do so on wetting and drying. The second, dated 11 February, accompanied Schmidt's report and stated *inter alia* —

"The degree of burning varies, but I would say that these bricks are unsuitable in particular for unplastered walls exposed to any type of moisture, i.e. rain-water, wash water for floors, and condensation. The worst is if the walls are intermittent wet and dry."

Appellant's counsel endeavoured to negative or discredit this evidence in various ways. He submitted that it had not been established that the powder samples analysed by Schmidt were those scraped off the walls by Burger or, even if they were, that Schmidt's method of analysis effectively showed that all the individual samples contained magnesium sulphate. He also contended that it had not been shown that the 13 bricks investigated by Schmidt came from the Nestlé building work. This latter argument was summarily rejected by the trial Judge who described it as a "quibble". I am inclined to agree. The evidence of respondent's witnesses — Fechter, Olivier and Michael — was that the bricks taken by Burger for testing were intended to be a representative sample. Some were cut out of the walls, others were selected from stacks of unused bricks. Both good, bad and average bricks were chosen. Bowker denied this and said that bricks on the walls were merely marked to show the type of brick whch should be taken as a sample from the heaps of unused bricks. This strikes one as being an improbable procedure (why not simply select representative samples from the heaps right away?) and in any event Bowker's evidence on this point is inconclusive because he denies having been present when the final selection was made. It is difficult to believe that Fechter, Olivier and Michael would deliberately have invented the story of cutting some of the samples from the walls. Possibly Bowker misunderstood the purpose of marking the bricks. Admittedly Burger was not available as a witness to provide the necessary identificatory link between the bricks taken by him from the Nestlé work and those examined by Schmidt but I am satisfied on the evidence available that this was satisfactorily established as a matter of probability. Mr. J. H. P. van Aardt, of the N.B.R.I., was called to depose to the fact that in the beginning of 1972 Burger handed over to him a sample of bricks for testing. He handed them over

to Schmidt for investigation. According to Schmidt, this took place after Burger had left Van Aardt's office. In his report Schmidt clearly identified the bricks as having come from Standerton, as did Burger in his covering report. Admittedly, Van Aardt conceded that Burger often submitted samples for testing but he said that these were not often burnt bricks. Much play was made by appellant's counsel of certain evidence given by Schmidt under cross-examination in which he agreed that the bricks investigated by him appeared to be "unused" bricks, i.e., bricks which had not been built into a wall. Schmidt's evidence in this regard was rather vague. He qualified it by saying "as far as I can recollect" and further stated:

"... as I recollect most of these bricks were loose bricks which were not built into the wall. There might have been one, I cannot recollect."

In re-examination Schmidt stated that as far as he could recollect he could not see mortar attached to any of the bricks or marks where mortar could have been, but he later appeared to agree that a brick could be removed from a wall without taking mortar with it. I do not think that this evidence is sufficiently cogent to neutralize the positive evidence to show that some of the samples were removed from the walls of the building and that it was Burger's samples from the Nestlé building which Schmidt examined and on which he reported.

Nor do I think that there can be any real doubt that the powder samples analysed by Schmidt were those taken by Burger. They were handed over at the same time as the bricks; they were contained in envelopes bearing writing which Van Aardt, who knew Burger's handwriting well, seemed to recognize as being Burger's, although he guarded himself by saying that he was not "one hundred per cent sure about that". The notations on the envelopes, which appear to record from where the samples were taken, are all consistent with their having come from the Nestlé building. As to the criticisms of Schmidt's method of analysis of the powder samples, I do not think that they are well-founded. It is true that Schmidt did not analyse separately the contents of each envelope: he combined them and did one analysis. On the evidence, however, the probabilities are, in my opinion, overwhelmingly in favour of the inference that the efflorescence which many bricks manifested to a lesser or greater degree was caused by the same constituent salts in more or less the same proportions. Indeed, the conclusion that it was magnesium sulphate, with its known propensities, which was responsible for the extensive and rapid disintegration of those bricks which were badly affected by efflorescence, seems virtually inescapable.

During January and February 1972 the problems of the efflorescence and deterioration of the brickwork continued to engage the urgent attention of the builders, the owners and the consultants. Meetings were held and various remedies were suggested and discussed. Eventually at a meeting held at the Nestlé head office on 25 February 1972 (after the receipt of all the reports) it was decided that all the brick walls would be demolished and rebuilt with bricks to be purchased from Brickor, said to be the largest manufacturer of bricks in the Republic. This was then done: hence the claim for damages.

The legal foundation of respondent's claim is the principle that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the abovementioned categories, the law irrebuttably attaches this liability to him, unless he has expressly or impliedly contracted out of it. (See *Voet*, 21.1.10; Pothier, *Contrat de Vente*, para. 214; *Kroonstad Westelike Boere Ko-op. Vereniging* v. *Botha*, 1964 (3) S.A. 561 (A.D.); also *Bower* v. *Sparks, Young and Farmers Meat Industries Ltd.*, 1936 N.P.D. 1; *Odendaal* v. *Bethlehem Romery Bpk.*, 1954 (3) S.A. 370 (O).) The liability is additional to, and different from, the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect (see *Botha's* case, *supra* at p. 572).

In this case it is common cause that the appellant, as manufacturer of the bricks in question, falls into one of the categories of sellers who can, in accordance with the above-stated principle, become liable for consequential damages. The next step is to enquire whether appellant sold goods containing a latent defect.

There was considerable argument as to what constituted the contract between the parties. Appellant's counsel submitted that the so-called Bowker/Fechter agreement was the contract. He did so, despite the facts that this agreement is referred to in appellant's own pleadings as a "variation agreement" and that by the time this agreement came to be made a number of loads of bricks had been delivered. In my view, the submission is without foundation. The contract was made when appellant accepted respondent's written orders for bricks. Such acceptance is to be inferred from appellant's conduct in accepting subsequent requests for the delivery of bricks and in fact executing these deliveries. The fact that semi-face bricks were ordered and fair face delivered has already been explained. I have also explained how, as a result of a variation of the contract flowing from the Bowker/Fechter agreement, fair face bricks came to be substituted for most of the stock bricks referred to in the second written order. The discrepancy between the total quantities ordered, viz. 225 000 bricks, and those delivered, viz. 212 000 bricks, is of no moment. The second order of 100 000 bricks was stated to be approximate and it was clearly implicit that the precise quantities would be a matter of subsequent arrangement between the parties. Some point was also made by appellant's counsel of the fact that this was a sale by sample, which it probably was; the relevant samples having been the bricks handed over to Lubke and subsequently approved by Beguin. But, in my view, that would not relieve the appellant of its liability for defects, provided that, if they were present in the sample, they were latent ones. (Cf. *S.A. Oil and Fat Industries Ltd.* v. *Park Rynie Whaling Co. Ltd.*, 1916 A.D. 400 at pp. 409-10; *Drummond* v. *Van Ingen*, (1887) 12 A.C. 284 at pp. 296-7.)

Did the bricks contain a latent defect? Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used (see *Dibley* v. *Furter*, 1951 (4) S.A. 73 (C) at pp. 80-2, and the

authorities there cited; also *Knight* v. *Trollip*, 1948 (3) S.A. 1009 (D) at pp. 1012-13; *Curtaincrafts (Pty.) Ltd.* v. *Wilson*, 1969 (4) S.A. 221 (E) at p. 222; De Wet and Yeats, *Kontraktereg*, 3rd ed., p. 236; Mackeurtan, *Sale of Goods*, 4th ed., p. 246; Wessels, *Contract*, 2nd ed., para. 4677). Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*. I refrain, however, from entering into the question as to whether to be latent the defect must be not "easily visible" (see *Blaine* v. *Moller & Co.*, (1889) 10 N.L.R. 96 at p. 100) or whether the test is rather that it should not be reasonably discoverable or discernible by the ordinary purchaser (cf. *Schwarzer* v. *John Roderick's Motors (Pty.) Ltd.*, 1940 O.P.D. 170 at p. 180; *Lakier* v. *Hager*, 1958 (4) S.A. 180 (T)). Nor is it necessary to consider what effect, if any, is produced by the fact that the purchaser is himself an expert in regard to the *res vendita* or employs an expert to examine the goods (see in this connection *Knight* v. *Hemming*, 1959 (1) S.A. 288 (F.C.)).

In the present case it is clear on the evidence that a substantial number of the bricks did contain a defect. The excessive efflorescence and the crumbling of individual bricks which manifested itself early in January 1972 after the builder's holiday provided dramatic and incontestable proof of this. Even Bowker conceded that there was a "problem". There was also, in my opinion, ample proof of the causes of these conditions. The expert evidence, the analysis and testing of the powder and brick samples by Schmidt and the evidence of those who inspected the brickwork in January point strongly to the basic cause of the trouble having been the presence of magnesium sulphate in deleterious quantities in the defective bricks. This fault was further compounded by many of the bricks having been insufficiently fired, in varying degrees. During the progress of the work the brickwork (and also presumably bricks lying in piles ready for the bricklayer) were exposed to the elements. Prior to the completion of the roof this applied to the interior walls as well. Evidence of rainfall figures for Standerton during this period (which were admitted by agreement between the parties) shows that there was some rain in each of the months of July, August and September 1971 and that during October, November and December 1971 and January 1972 the rain was heavy and persistent. This was partly confirmed in evidence. The conditions were thus ideal for the development of efflorescence and the other chemical processes which were the cause of the deterioration of the defective bricks.

In addition to challenging the relevance of Schmidt's tests (on the grounds considered above) appellant's counsel raised certain other arguments designed to show that respondent had failed to establish that magnesium sulphate was the fundamental cause of the trouble in the bricks. I have carefully considered these arguments. In my opinion, they are not well-founded but to deal with each in detail would unduly protract an already lengthy judgment. And, finally, on this aspect of the matter I would stress (i) that respondent did not have to demonstrate his case — proof on a preponderance of probability was all that was required; and (ii) that appellant made no attempt itself to place evidence before the Court to explain the deterioration of the bricks or to rebut respondent's evidence in that regard.

The next question is whether the defect which thus affected many of the

bricks was a latent one or not. According to the evidence someone with a knowledge of bricks, such as a bricklayer or a builder's foreman, should be able to detect an underburnt brick by applying the various tests referred to above. But, as has already been pointed out, there are degrees of underburning and as the degree of underburning diminishes it becomes progressively more difficult to distinguish an underburnt brick from a well-fired one. Furthermore, the essential defect, viz. the presence of magnesium sulphate, could not be detected by a normal examination of the bricks. This was conceded by appellant's counsel. In addition, a brick could be moderately well-fired, say to a temperature of 900° to 1 000° C, and yet retain all the magnesium sulphate which the firing process had generated. On the evidence, as I understand it, such a brick would also be liable to rapid and substantial deterioration if the magnesium sulphate content were relatively high and it were exposed to water. In my view, it was established that the defect was a latent one.

At all stages of the case appellant placed much reliance upon the Bowker/Fechter agreement and the discussions which were alleged to have taken place on the site when this agreement was concluded. Particular stress was laid upon the averment that it was agreed in effect that the *onus* of selecting bricks would be on respondent. It was contended that, therefore, respondent accepted the bricks with full knowledge of the defects and that this was a case not of a defect but of the use of the wrong material (i.e. unburnt bricks) on face work. It would seem that these submissions relate to three possible defences:

(*a*) that by accepting the bricks with full knowledge of their defects and by assuming the *onus* of selecting the bricks respondent waived its rights in respect of bricks already delivered and agreed to an exclusion of liability on appellant's part in regard to future deliveries;

(*b*) that by either knowingly or negligently using defective bricks on face work the respondent was the author of its own misfortune; and

(*c*) that the use by respondent of defective bricks on face work was, from appellant's point of view, not a reasonably foreseeable event and, therefore, that appellant could not be held liable for the consequences thereof.

It seems to me that there are a number of answers to these averments and contentions. In the first place, as I have already indicated, I do not think that the evidence substantiates the averment that as part of the Bowker/Fechter agreement respondent undertook the *onus* of selection. Secondly, for reasons already stated, I agree with the trial Judge that no mention was made of underburning at this meeting; what was discussed was excessive chipping and it was this that gave rise to the agreement. To the argument that respondent's employees on the job could have seen for themselves that certain of the bricks were underburnt there is the reply that there are degrees of underburning and that, in any event, the real complaint and cause of respondent's misfortune was the presence of magnesium sulphate in deleterious quantities in probably all but those bricks which were burnt to maturity. There is no suggestion that respondent was or should have been aware of this. Appellant's argument really amounts

to saying that, because respondent used bricks which it knew or should have known were subject to a particular defect (viz. underburning), it thereby assumed legal responsibility for another, associated defect (viz. the presence of magnesium sulphate in underburnt bricks) of which it was justifiably ignorant. This is clearly an untenable proposition. These considerations amply answer the three defences listed above. In view thereof, it is not possible to find that appellant established a waiver by respondent or contracting out of liability by appellant; nor can it rightly be said that respondent was knowingly or negligently the author of its own misfortune. In so far as the criterion of foreseeability may be relevant, the test must be an objective one (cf. *Everite and Another* v. *Marian Heights (Pty.) Ltd.*, 1970 (1) S.A. 198 (C) at p. 201). It seems to me that a seller in appellant's position should have foreseen that if bricks, sold as fair face, contained deleterious quantities of magnesium sulphate the purchaser was likely to suffer damage through using them on face work. I shall deal with this more fully later.

To sum up thus far, I am persuaded that appellant, a manufacturer of bricks, did sell to respondent bricks containing a latent defect and consequently rendered itself liable for any consequential damages suffered by respondent by reason of the defect. The next stage of the enquiry is whether respondent is entitled to the damages claimed. These damages are based upon the cost to respondent of demolishing the brick walls, both external and internal, and rebuilding them with other bricks, together with certain concomitant expenses. The *quantum* of the amount computed on this basis is not in dispute but the basis itself is. The main contentions advanced by appellant in this regard are (i) that it was not necessary to demolish the defective brickwork: there were other, less costly, remedial measures which could have been adopted; (ii) that, in any event, it was not necessary to demolish the internal walls; and (iii) that generally the demolition of the walls was not a natural or foreseeable consequence of the sale of the defective bricks.

Counsel for both parties argued the matter on the basis that the liability of the manufacturer/seller for consequential damages arising from a latent defect in the *res vendita* is founded upon breach of contract. It is by no means clear that this is so. If the liability be regarded as one flowing from an implied warranty or undertaking, imported by law, that goods sold by a manufacturer are free of latent defects (see *Hackett* v. *G. & G. Radio and Refrigerator Corporation*, 1949 (3) S.A. 664 (A.D.) at pp. 691-2; *Jaffe & Co. (Pty.) Ltd.* v. *Bocchi and Another*, 1961 (4) S.A. 358 (T) at pp. 364, 368; cf. *Minister van Landbou-Tegniese Dienste* v. *Scholtz*, 1971 (3) S.A. 188 (A.D.) at pp. 196-7), then the remedy is contractual. If, on the other hand, the manufacturer/seller is held liable on the ground that he is taken to have knowledge of the defect (see *Erasmus* v. *Russell's Executor*, 1904 T.S. 365 at pp. 373-4; *Seggie* v. *Philip Bros.*, 1915 C.P.D. 292 at p. 306; *Marais* v. *Commercial General Agency Ltd.*, 1922 T.P.D. 440 at pp. 444-5) and that the sale of defective goods with such imputed knowledge is treated as being a case of implied fraud or something cognate to fraudulent misrepresentation (see Mackeurtan, *Sale of Goods*, 4th ed., p. 265; De Wet and Yeats, *Kontraktereg*, 3rd ed., p. 235), or if the ground of liability be the fault, or *culpa*, of the seller in that, being the

manufacturer of the goods, he ought to have knowledge of his wares (*Hackett's* case, *supra*, judgment of Court *a quo*, cited in *Kroonstad Westelike Boere Ko-op. Vereniging* v. *Botha*, *supra* at p. 570; also *Button* v. *Bickford, Smith & Co.*, 1910 W.L.D. 52; *Evans and Plows* v. *Willis & Co.*, 1923 C.P.D. 496 at pp. 503-5), then the remedy would seem to be delictual rather than contractual. The question whether it be breach of contract or delict would affect the basis upon which damages are computed and in practice might lead to different results. In the present case, however, it does not seem to me that there is any likelihood of practical differences and, in the absence of proper argument, I prefer to express no opinion upon this question. I shall simply assume, as did counsel, that it is a case of breach of contract and approach the problem of consequential damages on that basis.

The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party (see *Victoria Falls & Transvaal Power Co. Ltd.* v. *Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1 at p. 22; *Novick* v. *Benjamin*, 1972 (2) S.A. 842 (A.D.) at p. 860). To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage (*ibid.*) and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (*a*) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (*b*) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas*, 1976 (2) S.A. 545 (A.D.) at p. 550). The two limbs, (*a*) and (*b*), of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley* v. *Baxendale*, 156 E.R. 145, which read as follows (at p. 151):

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

As was pointed out in the *Victoria Falls* case, *supra*, the laws of Holland and England are in substantial agreement on this point. The damages described in limb (*a*) and the first rule in *Hadley* v. *Baxendale* are often labelled "general" or "intrinsic" damages, while those described in limb (*b*) and the second rule in *Hadley* v. *Baxendale* are called "special" or "extrinsic" damages.

It was suggested in argument that in the present case the damages claimed were special or extrinsic and had to be considered in terms of the test laid down in limb (*b*) above. As a corollary to this the Court was

invited to resolve the controversy as to whether in this connection the "contemplation" principle" or the "convention principle" should prevail (see *Shatz's* case, *supra* at pp. 552-4, in which the point was left open). In my opinion, however, for the reasons which follow, it is limb (*a*) that is relevant and I see no need to accede to counsel's invitation.

Assuming, at this stage, that respondent acted reasonably in deciding to demolish all the brickwork, then it is clear that such demolition and the resultant loss suffered by respondent were in fact directly caused by the latent defect in the bricks. Moreover, the respondent sustained this loss as a consequence of using the bricks for the very purpose for which such articles are ordinarily purchased and used — by a building contractor at any rate — namely, as building units in the erection of a structure, in this case the walls of certain buildings. Bearing in mind, too, the fact that the seller of the brick (appellant) was the manufacturer thereof, and knew who the purchaser was and was generally aware of the purpose for which the bricks were to be used, it seems to me that respondent's loss was one flowing naturally and generally from appellant's breach of contract and one which the law should presume to have been contemplated by the parties as a probable result of the breach. It, therefore, falls fairly and squarely within the category of loss for which general damages are awarded, i.e., limb (*a*) above and the first rule in *Hadley* v. *Baxendale*, as counsel for respondent contended near the end of his oral argument. Support for this view may be found in McGregor on *Damages*, 13th ed., at pp. 431-2, where, with reference to defects in goods sold which caused physical damage to the buyer's interests, it is stated:

> "If the buyer adopts the ordinary use of the goods, as where food sold for human consumption is eaten by him, or adopts one of the ordinary and well recognised uses although not the only one, as in *Bostock* v. *Nicholson*, or adopts even a use which is not the predominant one provided it is a use which is sufficiently common, as in *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association* where contaminated groundnut extractions were supplied for compounding into a poultry food and the compound was fed to pheasants and partridges, he will recover under the first rule in *Hadley* v. *Baxendale*. If, however, he puts them to some special use, he will recover only if this intention is communicated to the seller, i.e., under the second rule in *Hadley* v. *Baxendale*."

(See also *Bostock and Co. Ltd.* v. *Nicholson and Sons Ltd.*, (1904) 1 K.B. 725.)

In arguing that the demolition of the walls was not a natural or foreseeable consequence of the sale of the defective bricks (the third of the contentions listed above) appellant's counsel submitted in their heads that

> "no reasonable manufacturer/seller would have expected the demolition of a building from the delivery of obviously defective bricks".

The crux of the submission is the word "obviously". Since I have held that the essential defect was not an obvious one, the submission loses all its force. Postulating, as I do, a defect of which the purchaser was justifiably ignorant, the demolition of the walls was, in my view, a natural and foreseeable consequence of the seller's default. (Cf. *Evans and Plows* v. *Willis & Co.*, 1923 C.P.D. 496; *Smith* v. *Johnson*, 15 T.L.R. 179.)

I turn now to the question as to whether respondent acted reasonably in demolishing the brickwork. This appears to me to be a question of mitigation of loss. It is true that respondent's loss occurred as a result of action taken by it to remedy the consequences of appellant's breach of

contract, viz. the defective brickwork, but when appellant contends that there were other less costly remedies which could, and should, have been adopted, it amounts, in my view, to saying that respondent failed to mitigate its loss. An analogous case is the decision of the House of Lords in *Banco de Portugal* v. *Waterlow and Sons Ltd.*, 1932 A.C. 452, where the Central Bank of Portugal sued the printer of its bank notes for a breach of contract which led to the printing, and circulation by a gang of forgers, of a large number of unauthorized, or counterfeit, bank notes of a certain denomination. Upon discovery of this the bank decided to call in all notes of this denomination in circulation, both genuine and counterfeit, and give other notes in exchange. The bank claimed as damages from the printer the value of the genuine currency exchanged for the spurious notes. One of the issues which arose was whether the bank's loss had not been aggravated by the failure of the bank to take certain further remedial steps, viz. after a certain date, to distinguish between the genuine and the spurious notes and to exchange the former only. This appears to have been regarded as a question of mitigation of damages, by at least three of the five members of the Court at any rate. (See also McGregor on *Damages*, *supra* at pp. 60, 162, 166.)

Being a question of mitigation, the *onus* of establishing that there were other less costly remedies which respondent ought to have adopted rested upon the appellant. In a case such as the present one, where the breach of contract creates something of an emergency and the sufferer finds himself in a position of embarrassment as a consequence of the breach, the measures which he may be faced to adopt to extricate himself ought not to be weighed in nice scales and the Court should not be astute to hold that this *onus* has been discharged (see remarks of Lord MACMILLAN in *Banco de Portugal* case, *supra* at p. 506; *De Pinto and Another* v. *Rensea Investments (Pty.) Ltd.*, a decision of this Court delivered on 28 March 1977 and not yet reported).* The law is satisfied if the sufferer from the breach has acted reasonably in the adoption of remedial measures, *ibid.*

The two alternative remedies suggested by appellant were (*a*) the use of sealers and (*b*) the excision of the defective bricks. At the time when the parties concerned were considering what steps to take in order to remedy the defective brickwork the use of sealers was discussed. It appears that the respondent's representatives were not prepared to give any undertaking as to the effectiveness of sealing compounds and one, a black rubber-based substance, was objected to by Nestlé for aesthetic reasons. Appellant's witness, Widdicombe, suggested that a way of treating efflorescence would be to remove it, dry the wall out and "try to prevent moisture from attacking the brick surface" by applying a brick dressing or sealer. He prefaced this by saying "depending on the efflorescence"; and when asked in cross-examination whether there was a clear, translucent sealer which was completely water-tight, he said that he believed that there was one but confessed to having no personal experience thereof. Another of appellant's witnesses, Mr. P. M. Boer, a building contractor, suggested the use of a water-repelling paint but he did not appear to have any expert knowledge of the use of such an application. Ranged against this was the evidence of Schmidt and Eaton, and to some extent that of

*See 1977 (2) S.A. 1000 (A.D.) — Eds.

Beguin. Schmidt expressed the view that brickwork liable to efflorescence should not be treated with a sealer since if water reached the brickwork or was still contained therein the resulting efflorescence would tend to push off the impervious skin formed by the sealer, the sealer thus causing more harm than good. He conceded that his knowledge was based on what he had read about researches conducted in England and that he had no personal experience of the use of sealers for this purpose. The lifespan of the silicone-based sealers was of the order of 10 years. Eaton, though conceding limited experience of sealers, stated that his organisation had experimented with them but did not generally use them. He said that he did not know of a sealing compound which would effectively protect a brick containing magnesium sulphate from disintegration. He explained: "I feel it would be impossible to protect it because the crystallisation of the salt takes place below the surface that you have sealed and the salt will force the surface off, seal and all."

Beguin referred to the discussions which had taken place between respondent's representatives and Nestlé in regard to sealers and the reasons which caused them to decide against this remedy.

Weighing all the evidence, I am satisfied that it was not established that the use of a sealer was a feasible and effective remedy for the defective brickwork and one which respondent ought to have adopted in preference to demolition. On the contrary, the evidence seems to show (i) that it is, at least, doubtful whether there was an aesthetically satisfactory sealer which would be completely water-proof or water-repellant; (ii) that there was a danger that water which had entered the brickwork or was retained therein, might cause efflorescence and push off the sealer; and (iii) that the application of the sealer could not take place until the walls had dried out. In regard to this last point, August 1972 was mentioned as a possible time for such application. Steiner estimated a possible loss of R50 000 if the completion of the work was delayed until then. Finally, on this aspect of the matter, it must be borne in mind that respondent was contractually bound to Nestlé to produce properly constructed brickwork and that Nestlé would not have been obliged to accept brickwork which was aesthetically unpleasing (in a large building the appearance of which was important to Nestlé) or liable to possible future deterioration or which required periodic treatment to prevent it deteriorating.

As to the excision of the defective bricks, it is clear that this would have been a very laborious process. It would have been necessary for each such brick to have been drilled with a rotary drill and the remainder chipped out. Boer estimated that a workman could remove 150 bricks per day in this manner; and that another would replace them in a day. Whether this poses a feasible alternative to demolition obviously depends upon the number of bricks involved. Widdicombe stated that replacing 25 per cent or 30 per cent of the bricks would have been a "very costly operation". He conceded that he would not adopt this remedy if more than 10 per cent of the bricks in a wall were defective. Accepting that about 200 000 bricks were used in the building work by respondent, these percentages clearly represent very large numbers of individual bricks. The evidence as to the extent of the efflorescence and deterioration of brick, as observed in January 1972, has already been canvassed. From this it

seems to have been common cause that at least 30 per cent of the brickwork was affected. Some estimates were much higher than this. In the circumstances it cannot be said that it has been shown that excision and replacement was a practical and economic alternative remedy.

I, therefore, conclude that in deciding upon demolition respondent acted reasonably. At all events, it has not been shown that it acted unreasonably.

The final point raised by appellant in regard to the damages claim was whether it was necessary to demolish the internal walls. This was not a matter which was properly canvassed by appellant in the course of the trial. The evidence, so far as it goes, indicates that in January 1972 the appearance of the internal walls was, if anything, worse than that of the external walls. Bowker himself, amongst others, stated this. Olivier deposed to the fact that when the walls were demolished it was found that in the case of the plastered sections (which were mainly on internal walls) there was no bond between the plaster and the brick face and that in fact in places there was a gap between the plaster and the brick face into which a trowel could be inserted. In addition patches of paintwork on the walls were blistered and inclined to crumble. It was argued, however, that, since internal walls would be protected from the elements in the completed building, it was not necessary to demolish them. The efflorescence could simply have been brushed or washed off. Postulating the need to demolish external walls, this argument could obviously apply only to true internal walls (as opposed to the interior surfaces of external walls). The argument also assumes that internal brickwork containing bricks affected by magnesium sulphate could be remedied by simply removing the traces of efflorescence. I am not persuaded that this assumption can be made. Apart from the fact that some of the bricks had already begun to disintegrate, the evidence indicates that the internal brickwork must have been saturated by the heavy rain which occurred before the building was completed. How long it would have taken for it to dry out completely and how much further deterioration of the brickwork would have occurred during this drying out process are matters for speculation. Nor is it clear to me that in the completed building the internal brickwork would be immune from moisture during the ordinary use of the building by Nestlé. In all the circumstances I do not think that respondent acted unreasonably in deciding, in consultation with its own experts and the representatives of Nestlé, to demolish all the brickwork.

For these reasons I hold that the appeal against the award of damages to respondent is ill-founded and must be dismissed. For similar reasons the appeal against the dismissal of appellant's counterclaim must also be dismissed. Counsel drew no distinction between the appeals in respect of the claim and counterclaim. Clearly they stand or fall together. If the bricks contained an actionable latent defect, then respondent could justifiably refuse to pay the purchase price (or the balance thereof) and it was not suggested by appellant that in the circumstances it was incumbent upon respondent to return or tender the return of the bricks.

The only matter remaining for consideration is an application by respondent for (i) an order that appellant should pay interest on the award of damages at a rate of 6 per cent per annum from the date of judgment of the Court *a quo* (which was delivered on 2 July 1975); and (ii) an

order that, in terms of the Prescribed Rate of Interest Act, 55 of 1975, appellant pay interest on the award at the rate of 11 per cent as from the date of the judgment of this Court. The first of these applications was opposed by appellant; the second was not.

It is clear that respondent would have been entitled, as of right, to an order for the payment of interest on the award of damages as from the date of the judgment of the Court *a quo* (i.e., from 2 July 1975) if it had duly claimed such interest in the Court *a quo* (see *Russell, N.O. and Loveday, N.O.* v. *Colllins Submarine Pipelines Africa (Pty.) Ltd.*, 1975 (1) S.A. 110 (A.D.) at p. 156). But in fact respondent did not make such a claim in the Court below and naturally no interest was awarded. Can respondent now, by way of an amendment, claim interest on the damages award as from 2 July 1975? In my view, it cannot. Were this Court to allow such an amendment and make an award of such interest it would in effect be varying the order of the Court *a quo* to the detriment of the appellant. This it is not empowered to do in the absence of a cross-appeal by the respondent (see *Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas, supra* at p. 560; *South African Railways and Harbours* v. *Sceuble*, 1976 (3) S.A. 791 (A.D.) at p. 794). It seems to me, moreover, that the absence of a cross-appeal is an insuperable obstacle in the path of not only the application for interest at 6 per cent as from the date of the judgment of the Court *a quo* but also the claim for 11 per cent (the prescribed rate under Act 55 of 1975) as from the date of this judgment. An order awarding interest as from the date of the judgment of this Court is, in my view, just as much a variation of the order of the Court *a quo*, to the detriment of the appellant, as an order awarding interest as from the date of the judgment of the Court *a quo*. Act 55 of 1975 does admittedly provide for judgment debts to bear interest, unless the judgment or order otherwise provides (sec. 2 (1)), but in sec. 3 (2) of the same Act it is provided that sec. 2. "shall not apply to a judgment debt . . . which became payable before the commencement of this Act".

The Act came into operation on 16 July 1976, whereas the judgment debt in this case became payable on 2 July 1975. In terms of sec. 3 (2), therefore, sec. 2 of the Act would not apply to it. It is true that when appellant on 29 July 1975 noted an appeal to this Court the execution and operation of the judgment of the Court *a quo* was suspended (*Reid and Another* v. *Godart and Another*, 1938 A.D. 511). The dismissal of the appeal by this Court will consequently terminate such suspension and bring the judgment into operation; but I do not think that on that account it can be said that the judgment debt became payable after the commencement of the Act. For these reasons respondent's applications for orders for the payment of interest must be refused.

The appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

HOLMES, J.A., HOFMEYR, J.A., DE VILLIERS, J.A., and KOTZÉ, J.A., concurred.

Appellant's Attorneys: *Odendaal, Van Eeden & Du Plessis*, Pretoria; *Symington & De Kok*, Bloemfontein. Respondent's Attorneys: *George Rabin*, Johannesburg; *Israel & Sackstein*, Bloemfontein.

MENDELSON AND FROST (PTY.) LTD. v. PRETORIA CITY COUNCIL.

(TRANSVAAL PROVINCIAL DIVISION.)

1977. *March* 16, 18. ESSELEN, J.

Prescription.—Extinctive prescription.—Leave to serve a summons under sec. 2 (1) (a) of Act 94 of 1970 after a lapse of period of prescription. —Power of Court circumscribed by sec. 4 of Act.—Scope of sec. 4.
Municipality.—Limitations of time for proceedings against.—Relief under sec. 2 (1) (a) of Act 94 of 1970 after priod prescribed.—Power of Court to grant circumscribed by sec. 4 of Act.

On an analysis of section 4 of the Limitations of Legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970, it is apparent that the Court's power to grant the creditor leave to serve the notice after the lapse of the prescribed period in section 2 (1) (*a*) has been specifically restricted by making such power subject to the provisions of section 2 (1) (*b*) and (*c*). The words "but subject to" in section 4 should accordingly be construed as meaning "save" or "except as curtailed by". Where the debtor has not in writing denied liability for the debt before the expiration of the 90 day period referred to in section 2 (1) (*b*), this curtailment has the following effect. Where the creditor applies in terms of section 4 for leave to serve a notice at a stage when, within the period of 24 months from the date on which the debt became due, a full 90 day period referred to in section 2 (1) (*b*) plus a sufficient period thereafter for the institution of legal proceedings cannot run, the Court is precluded from coming to the assistance of the creditor. If this were not so it would mean that the Court would in effect be extending the prescriptive period of 24 months by such a period as would be sufficient to enable not only such 90 day period to expire but legal proceedings to be instituted thereafter. This would result in an arbitrary extension of the prescriptive period laid down in section 2 (1) (*c*) of the Act and consequently in uncertainty concerning the actual prescriptive period, which construction the Legislature could hardly have intended. If the words of the said section are given their ordinary signification then it cannot be said that such power of extension in regard to the prescriptive period has been conferred on the Court. If in such cases the position were otherwise then the actual period of prescription would only be determined when the application in terms of section 4 is granted by the Court.

Application for an order declaring that a notice served on respondent be accepted as being in compliance with the provisions of sec. 2 (1) of Act 94 of 1970. The facts appear from the reasons for judgment.

A. P. Kruger, for the applicant.
C. P. Beyers, for the respondent.

Cur. adv. vult.

Postea (March 18).

ESSELEN, J.: In this case the applicant, in terms of a notice of motion, seeks the following order: That the Court in terms of sec. 4 of Act 94 of 1970 grant to the applicant on such conditions as the Court may deem fit relief as follows: that the notice of 21 May 1976 served on the respondent