LPL401-8

## JANSE VAN RENSBURG v GRIEVE TRUST CC 2000 (1) SA 315 (C)

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| **Citation** | 2000 (1) SA 315 (C) |
| **Case No** | A581/98 |
| **Court** | Cape Provincial Division |
| **Judge** | Van Zyl J, Griesel J |
| **Heard** | April 23, 1999 |
| **Judgment** | August 5, 1999 |
| **Counsel** | J A L Beyers for the appellant.<br>L Fichardt for the respondent. |
| **Annotations** | ☐ |

### Flynote : Sleutelwoorde

Sale - Of goods - 'Trade-in' agreement - Whether aedilitian actions applicable - Aedilitian actions available in case of contract of purchase or sale irrespective of whether relating to corporeal or incorporeal thing or whether thing containing latent defect or merely misrepresented as being something it is not - Does not matter whether defective or misrepresented thing not object of sale or barter - Aedilitian actions applicable to object forming part of purchase price or *pretium* of thing purchased - *Actio quanti minoris* available to seller in trade-in agreement if item traded in defective or misrepresented.

### Headnote : Kopnota

The aedilitian actions are available in the case of a contract of purchase and sale irrespective of whether it relates to a corporeal or incorporeal thing or whether such thing does not contain a latent defect but has merely been



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misrepresented as being something which it is not. It further does not matter whether the defective or misrepresented thing was not the object of a sale or barter. The aedilitian actions are equally applicable to an object forming part of the purchase price or *pretium* of a thing purchased. The *actio quanti minoris* is therefore available to a seller in a trade-in agreement should the item traded in be defective or misrepresented. (At 327F/G-I.)

### Cases Considered

### Annotations

Reported cases

*Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A): referred to

*Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O): not followed

*Blower v Van Noorden* 1909 TS 890: dictum at 905 approved

*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA): dictum at 319B applied

*Jajbhay v Cassim* 1939 AD 537: referred to

*Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D): not approved and not followed

*Pearl Assurance Co v Union Government* 1934 AD 560: dictum at 563 applied

*Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A): dictum at 418G - 419F applied

*S v Graham* 1975 (3) SA 569 (A): referred to

*Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C): followed

*Zandberg v Van Zyl* 1910 AD 302: referred to.

**Case Information**

Appeal from a decision in a magistrate's court. The facts and the nature of the issues appear from the reasons for judgment.

*J A L Beyers* for the appellant.

*L Fichardt* for the respondent.

*Cur adv vult.*

*Postea* (August 5).

**Judgment**

**Van Zyl J :**

Introduction

This is an appeal against the judgment of the magistrate's court, Worcester, in terms of which the claim of the respondent (plaintiff) against the appellant (defendant) succeeded in the amount of R9 800, together with interest and costs.

At the hearing of the matter the Court was requested to adjudicate the claim on the basis of an unnecessarily prolix stated case. From this it appears that the parties entered into an agreement in accordance with which the appellant purchased a used 1990 model Opel Kadett motor vehicle from the respondent for the sum of R38 046. Payment was to be effected partially by way of a trade-in of the appellant's interest in a used Isuzu vehicle. Such interest was valued as the difference between the vehicle's trade-in value of R44 000 and the amount of R28 582 still owing on it by the appellant in terms of a credit agreement concluded by him with a third party. The balance of R22 628 would be paid in cash.

At all relevant times the appellant was under the *bona fide* but mistaken impression that the Isuzu vehicle was a 1993 model. It later turned out,

however, to be a 1989 model. The parties were in agreement that any representation by the appellant regarding the model of the said vehicle was innocent and in good faith. It was further agreed that, should the respondent have been aware of the true state of affairs, he would not have consented to a trade-in amount of more than R34 200. The difference between this amount and the agreed trade-in value of R44 000, namely R9 800, was hence the reduction in purchase price claimed by the respondent. It was common cause that he would be entitled to such amount should his claim succeed.

In his judgment the learned magistrate held that, despite contrary decisions in Natal and the Orange Free State, he was bound by the decision in *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C). In this case it was held that the action for a reduction in purchase price (*actio quanti minoris*) is applicable to a latent defect in a vehicle traded in as part of the purchase price. In addition the court *a quo* held that the principle of substituted or alternative performance (*in solutum datio*) was applicable inasmuch as the parties had agreed that, should the respondent be successful in his action against the appellant, judgment should be granted in the aforesaid amount of R9 800.

In his argument on behalf of the appellant, Mr *Beyers* submitted that the *Wastie* decision *supra* was distinguishable, alternatively wrong, and should hence not be followed. In this regard he suggested that the Court in that case had wrongly extended the applicability of the *actio quanti minoris* to the price (*pretium*) whereas it had been intended only to provide relief in cases of latent defects in or misstatements relating to the object of purchase (*merx*). He found support for these contentions in the cases of *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D) and *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O).

Ms *Fichardt*, for the respondent, submitted that the court *a quo* had correctly held that the *Wastie* decision was binding on it and that this Court should not overrule it in favour of the approaches advocated in the Natal and Orange Free State cases.

In the alternative Ms *Fichardt* suggested that the appellant should be held to have committed a breach of contract by not delivering a 1993 model Isuzu vehicle. During the course of argument, this alternative became somewhat watered down in the face of the justifiable criticism thereof by Mr *Beyers*. For present purposes I do not believe that it is necessary to deal with it. A further alternative raised by Ms *Fichardt* was that the principle of *in solutum datio* was indeed applicable to the facts in the present case, as held by the court *a quo*. I shall return to it briefly later on in this judgment.

The aedilitian actions

During the Republican period of Roman history (509 - 27 BC) the consensual contract of purchase and sale (*emptio venditio*) underwent an important change when the *aediles curules*, Roman officials charged with, *inter alia*, supervision of the public markets, introduced edicts relating to defects in things sold. Sellers (*venditores*) were obliged to make **full**

disclosures in this regard and were considered to have tacitly warranted against the presence of latent defects. Should such defects become apparent, the purchasers (*emptores*) could avail themselves of either the *actio redhibitoria*, which was directed at full restitution (*restitutio in integrum*), or the *actio quanti minoris*, with which a reduction in the purchase price could be claimed. In later Roman law the action arising from the agreement of purchase and sale (*actio empti*) could be used for the same purpose as the aedilitian actions. See *D* 19.1.11.3, 5 and 8; *D* 19.1.13 *pr*-3; *C* 4.58.4.1.

Of some significance is that the actions were available also where the seller had made statements (*dicta*) or promises (*promissa*) relating to the absence of defects or the presence of particular qualities in the thing sold (*res vendita*). See *D* 21.1.1.1 and *D* 21.1.38 *pr*. A *dictum* is loosely described in *D* 21.1.19.2 as a verbal pronouncement characterised by the use of words alone, whereas a *promissum* relates to that which is in fact promised or solemnly undertaken.

In *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 418A Holmes JA suggested that a *dictum et promissum* may be regarded as 'a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation'. This definition is criticised by De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed (1992) at 346 - 7 as emanating from neither Roman nor Roman-Dutch law, but in fact constituting a 'legislative creation' or 'discovery' of the Appellate Division. This criticism may well be justified on a strict interpretation of the common-law sources, but the flexible approach adopted by Holmes JA is in keeping with the equitable and reasonable principles underlying such sources. This appears clearly from the judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA), where the role of good faith (*bona fides*) in the law of contract is considered in depth.

On the further development of the aedilitian actions and their introduction into South African law one need go no further than the impressive judgment of Holmes JA in the case of *Phame v Paizes* (*supra*). Of particular importance is his finding that the aedilitian actions are available even where a misrepresentation, be it by way of a *dictum* or *promissum*, is innocently made. Likewise significant, for purposes of the present case, is his *obiter* observation (at 418G - 419F) that aedilitian relief may well, under certain circumstances, be extended to the sale of incorporeal things. See further the full discussion in De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed (1992) at 332 - 47.

The *actio quanti minoris* and trade-in agreements

In *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) the Court was confronted with *res nova*. The issue arose whether the *actio quanti minoris* was available in a trade-in agreement where the vehicle traded in (the non-money portion of the purchase price of the vehicle sold) was defective. In that case the purchaser of a used Valiant vehicle traded in





his used Peugeot vehicle as part of the purchase price. It subsequently appeared that the Peugeot had a cracked cylinder block, which the seller of the Valiant was able to have

repaired for R120. The seller, as plaintiff, successfully sued the purchaser, as defendant, for payment of such amount by means of the *actio quanti minoris*.

On appeal Van Zijl J (sitting with Baker AJ, who concurred in the judgment) accepted (at 130H - 131B) that the nature of an agreement depends on the intention of the parties, as held in *Zandberg v Van Zyl* 1910 AD 302 at 309 - 11. This would determine whether the trade-in agreement was a sale or an exchange. On the evidence before him the learned Judge was satisfied that the parties had intended to conclude an agreement of purchase and sale of the Valiant and that the Peugeot was part of the purchase price. In response to the argument that the *actio quanti minoris* was applicable only to the thing sold (*merx*) and not to the purchase price (*pretium*), the learned Judge held (at 131H):

> 'I have been able to find no authority dealing directly with this point, but an analysis of the law on sale and exchange leads to the conclusion that where portion of the purchase price consists of something other than money, the same principles that apply to the *merx* must apply with equal force to the non-money portion of the *pretium*.'

The learned Judge then (at 131H - 132B) proceeded to compare this situation with that pertaining to a contract of exchange, where the aedilitian actions are, according to common-law authority, equally applicable to exchanged or bartered things, such being regarded as simultaneously *merx* and *pretium*. This being so, he pointed out (at 132B), '(i)t would indeed be unfair and illogical not to afford similar protection to the seller in respect of the *pretium*'.

In an attempt to explain the dearth of authority in this regard, the learned Judge observed (at 132C - E) that it is 'not easy to conceive how a latent defect could occur in respect of coin without destroying its inherent quality as money'. Inasmuch, however, as ownership of the money has to be passed when the purchase price is paid, 'the law demands the same good faith from the purchaser that it demands from the seller'. This led the learned Judge to the following conclusion (at 132E - H):

> 'As stated it is difficult to envisage money with a latent defect. To be money it must be up to standard, otherwise it is not money. The only real concern of the seller is therefore to receive ownership of the money. Where, however, in addition to money a specific thing has been made portion of the purchase price, this thing can be subject to a latent defect. In respect of this thing, this portion of the *pretium*, the parties find themselves in the same position as barterers. In respect of this aspect of the contract they must be dealt with on the same footing as two barterers. It does very little violence to the contract of sale as the buyer always warrants that he will give the seller ownership in the *pretium*. The purchaser gives no such undertaking in respect of the *merx*. He only undertakes to give undisturbed possession.
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> In terms of the aedilitian actions the seller warrants to the purchaser that the *merx* is free from defects and, where portion of the *pretium* consists of a thing other than money, then in respect of that thing the purchaser gives to the seller - unless he contracts out - a similar warranty that it is free of latent defects. If this were not so that careful balance which the law preserves between





> purchaser and seller would be disturbed and the innocent seller might on account of an inability to prove the deception of the purchaser be overreached by an unscrupulous purchaser feigning ignorance of the latent defect in the non-money portion of the *pretium*.'

This approach was criticised and rejected by the Court in *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D), in which one BMW vehicle was traded in on the purchase of another. The vehicle traded in was represented by the purchaser (defendant) as being a

1985 model, whereas it was in fact a 1983 model. The seller (plaintiff) claimed a substantial reduction (R16 970) in its agreed trade-in value.

It was accepted by Bristowe J (at 180C) that the aedilitian actions were applicable to contracts of both sale and exchange. After finding (at 179F) that the vehicle traded in was neither sold nor bartered but was, at all relevant times, part of the purchase price of the vehicle purchased, the learned Judge observed (at 180E - G):

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

With reference to the *Wastie* case *supra* and Van Zijl J's reliance in this regard on logic and fairness and 'the careful balance which the law preserves between purchaser and seller', Bristowe J made the following observation (at 180J - 181C):

> 'With great respect to the learned Judge, this passage has caused me considerable difficulty. There is, so far as I can find, no authority for the proposition that there is an implied warranty in law that the non-monetary portion of the *pretium* (or indeed the monetary portion) is free from latent defects. Nor am I aware of a "careful balance which the law preserves between purchaser and seller"; on the contrary the law obliges the seller to honour duties (unless he contracts out of them) which are not imposed on the buyer. And finally the proposition that an innocent seller may be overreached "by an unscrupulous purchaser feigning ignorance of a latent defect" is, with great respect, not convincing. Quite apart from the fact that the seller can protect himself by requiring an express warranty against latent defects, it is, I believe, a most doubtful proposition that it is the law's function so to regulate matters as to come to the aid of a litigant who finds it difficult to prove his case.'

In any event, Bristowe J suggested (at 181C - D), *Wastie's* case is distinguishable in that it holds merely that the non-monetary portion of the purchase price is free from latent defects: it does not seek to render a purchaser liable under the *actio quanti minoris* for an innocently made, but incorrect, *dictum* or *promissum*.

A similar approach was followed by Wright AJ (with whom Smuts JP concurred) in the matter of *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O). As in the *Mountbatten* matter *supra*, an innocent, but false, misrepresentation was made in respect of the model of a vehicle traded in on another vehicle. The purchaser (defendant)





represented it as being a 1981 model Chev Rekord whereas it was in fact a 1980 model. This prompted the seller (plaintiff) to claim a R790 reduction in its trade-in value. The claim was dismissed in the magistrate's court on the basis that the said reduction had not been proved. On appeal Wright AJ accepted (at 211E - J) the finding in the *Mountbatten* case *supra* that the *actio quanti minoris* was applicable only to things sold in terms of contracts of sale and exchange. Inasmuch as the vehicle traded in was simply part of the purchase price of the vehicle purchased, and not the object of a sale or exchange, the said action was not applicable.

The issues arising in the above-cited cases have taxed a number of academic minds, although not always leading to the same conclusions. Reference may be made to the

following academic contributions.

In a discussion of the *Mountbatten Investments* matter *supra* in (1989) *TSAR* 442 at 447 Professor Reinecke shares the view of the Court in rejecting the decision in the *Wastie* case *supra* and in distinguishing it as relating to latent defects and not to *dicta et promissa*. He is sceptical, however, as to the Court's finding that the purchase price can consist partly of money and partly of a thing. In his view the purchase price was linked to a 'facultative performance' ('fakultatiewe prestasie') to deliver a sum of money plus a thing. This approach would exclude the possibility that the transaction may be construed as a contract of exchange.

Advocate (now Judge) Flemming goes a step further in his work on credit transactions, *Krediettransaksies* (1982) at 204, when he observes that the aedilitian actions are not available in trade-in transactions, so that the purchaser is not liable for latent defects in the vehicle traded in. The learned author suggests that the trade-in should be regarded as an alternative or substituted performance (*in solutum datio*). Should the vehicle traded in be defective, it may be rejected and its equivalent in money be claimed.

Professors De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed (1992) at 314 n 5 suggest that neither the *Wastie* nor *Mountbatten Investmens* decisions *supra* is correct. Like *Flemming* (*loc cit*), they are firmly of the view that a trade-in transaction is an *in solutum datio*, in that the seller accepts the traded-in vehicle as part of the purchase price. Should it be defective, he may effect restitution thereof and claim either the value placed on it by the parties or damages arising from the latent defect.

In her discussion of the *Mountbatten Investments* case *supra* in (1990) 53 *THRHR* at 116 - 21, Prof Hawthorne deals with the nature of trade-in agreements. Although (at 120) she is critical of Van Zijl J's *ratio* in the *Wastie* case *supra*, she applauds his finding that it would be unfair and illogical not to make the aedilitian actions available to the seller in a trade-in transaction when regard is had to the true nature thereof. In this regard she also suggests that the trade-in is an *in solutum datio* (or *datio in solutum debiti*, as she describes it), in the sense that 'the creditor then agrees to accept something else as part of the performance which is due'. See also her discussion of the *Bloemfontein Market Garage* case *supra* in (1992) 55 *THRHR* at 143 - 51. She observes (at 150) that

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> 'there seems to be no reason not to apply the aedilitian actions as extended in *Wastie v Security Motors (supra)* and *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) to protect a seller where a buyer has delivered a thing as part payment of the purchase price and the traded-in thing proves to be defective'.

In a contribution entitled '*Hereditas damnosa?* Some remarks on the relevance of Roman law' in (1991) 54 *THRHR* at 175 - 88 at 184, Prof B C Stoop discusses the *Mountbatten Investments* case *supra* as a

> 'poignant example where the Court, with respect, adopted an antiquarian approach to Roman law and disregarded policy considerations and the broad and general development of the Roman law. By applying Roman law in the strict sense of the word, the Court in fact denied the very essence of Roman jurisprudence, namely justice.'

He then goes on to say (at 185):

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'The Court was correct in finding that no authority exists for the proposition that an implied warranty that the non-monetary portion of the *pretium* is free from latent defects existed in law, the reason being simply that Roman law required the *pretium* to sound in money and the buyer's principal obligation therefore was to make the seller owner of the money. Thus the need never arose for any additional liability on the buyer. However, in keeping with the innovative spirit of the Roman jurists and their creation of liability for latent defects in the *res vendita* where no liability previously existed, the Court had the possibility of extending the *actio quanti minoris* to this case as well.'

*Stoop* (at 186) lauds the *Wastie* decision as being 'in perfect accordance with the true spirit of good faith that has formed the basis for the contract of sale ever since the days of classical Roman law'. The *Mountbatten Investments* case, however, is severely criticised (at 187):

'It is submitted that the Judge [Bristowe J] applied the law in a dogmatic and unyielding manner and did not search for what is just and equitable. Surely, the fact that an inequitable situation could possibly exist in the case of contracts such as lease or mandate cannot serve as an excuse to allow it to exist in another? . . . It has become axiomatic that it would militate against the nature of a contract as an institution based on good faith to expect of the parties to insist on all kinds of guarantees.

In South Africa today, the practice of trading in one vehicle for another is an established fact of everyday commercial life. . . . Equitable considerations today demand that the buyer should warrant that the non-monetary portion of the *merx* is free from defects.'

Similarly critical of the *Mountbatten Investments* case *supra* is Prof A J Kerr *The Law of Sale and Lease* 2nd ed (1996) at 92, where he says that 'the Court in the *Mountbatten Investments* case misunderstood the terminology used in *Wastie's* case'. With reference to the extension of the aedilitian actions to contracts of barter or exchange, while taking cognisance of Prof *Stoop's* aforesaid article, *Kerr* observes (at 94) as follows:

'Whether the law should come to the aid of the person in receipt of a *res* as part of a price is, with respect, just such a question as that with which the aediles were faced: should the law come to the aid of a person to whom a *res* is handed over in pursuance of a contract of sale, which *res* is later found to suffer from a latent defect or not to be in accordance with what was stated or promised? The aediles decided that the law should come to the aid of such a person though they made no mention of goods traded-in, presumably because this was not an issue at the





time. The aedilitian actions were, however, extended to both parties to an exchange. Does the reason given by Ulpian [in *D* 21.1.1.2], namely, that what is said in the edict is not unfair "for the seller was in a position to inform himself on these matters", not apply to a purchaser who was in a position to inform himself on the condition of the car he trades in, just as it applies to both parties to a contract of barter? With respect, I suggest that it does apply. Further, with Professor B C Stoop [in 1991 (54) *THRHR* 175 at 184 - 8], I am of the opinion that there are good grounds for extending the aedilitian actions to cover goods traded in.'

This leads the learned author to conclude (at 95) that the *Wastie* decision *supra* is preferable to that in the *Mountbatten Investments* decision *supra*.

A number of observations on whether or not the *actio quanti minoris* applies to trade-in agreements may, I believe, be warranted.

At the outset it must be borne in mind that the equitable extension of the applicability of the aedilitian actions in *Phame v Paizes* (*supra*) relates to innocently made (material) misrepresentations (*dicta et promissa*) in the context of a contract of purchase and sale. This means that relief will be provided when it appears that the thing sold (*merx* or *res vendita*) is misrepresented and such misrepresentation, albeit innocently made, is of a

material nature. The Court, in the said matter, did not give consideration to the extended application of the aedilitian actions to trade-in agreements, because it was not an issue before it. I am inclined to the view, however, that, if it had been called upon to do so, it might well have concluded, albeit *obiter*, that the time was ripe to consider such extension. This would be fully in accordance with its *obiter* finding (at 419F), with regard to the extension of the aedilitian actions to the sale of incorporeal things, 'that the current climate of opinion is propitious and receptive to such extension by the Courts, in appropriate circumstances'.

It would appear that, in the *Wastie* case *supra*, Van Zijl J was pre-empting the approach by Holmes JA in the case of *Phame v Paizes* (*supra*). Considerations of fairness and reasonableness prompted the former to seek an analogy in the contract of barter or exchange for his finding that a defect in the vehicle traded-in should be subject to the aedilitian actions. This he did despite its being common cause that the said vehicle was part of the purchase price (*pretium*) of another vehicle and hence not itself an object of sale or barter (*res vendita* or *merx*).

This Court is, of course, bound by the *Wastie* decision unless it should be of the view that such decision is clearly wrong. After due consideration of the stated law, academic comments thereon and arguments competently presented by counsel in this matter, I have not been persuaded that this is the case, for the reasons set out below.

Our law does not recognise a law of equity as in English law, although a limited reception of the equitable principles of Roman law into English common law did take place as from the early Middle Ages. See P Stein *Roman Law and English Jurisprudence Yesterday and Today. An Inaugural Lecture* (1969); J L Barton 'Roman Law in England' in *Ius Romanum Medii Aevi* V 13a (1971); R C van Caenegem *The Birth of English Common Law* (1973). These very equitable principles became part and parcel of Roman-Dutch and Roman-European common law (*ius commune europaeum*), whence they were introduced into South African





common law. It is the fundamental equity of our law that has prompted our Courts, from time to time, to point out the flexibility and adaptability of the legal principles which constitute such law. Thus Sir James Rose-Innes said in *Blower v Van Noorden* 1909 TS 890 at 905:

> 'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature.'

With reference to our Roman-Dutch common law, Lord Tomlin made the following observation in *Pearl Assurance Co v Union Government* 1934 AD 560 at 563:

> 'That law is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.'

See also *Jajbhay v Cassim* 1939 AD 537 at 542; *Phame v Paizes* (*supra* at 418H - 419C); *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) at 749D - E; *S v Graham* 1975

(3) SA 569 (A) at 576F.

This approach is eminently applicable in the case of trade-in agreements which, though unknown to the *aediles curules* and many subsequent generations of lawyers, have become a commercial reality in this day and age. I venture to say that the *aediles curules*, or at least later legal commentators, would have had no difficulty whatever in extending the application of the aedilitian actions to such agreements. This is particularly so in view of the logical extension of their application to agreements of exchange or barter, as pointed out above.

In the *Wastie* case *supra* the Court was perfectly justified in using the analogy of an agreement of barter to explain the need to extend the use of the *actio quanti minoris* to trade-in agreements where the vehicle traded in is defective. Although the said vehicle is part of the purchase price and is not itself being sold or bartered, its delivery, along with the money-portion of the purchase price, bears a strong resemblance to barter, albeit in a limited or qualified form.

The suggestion that the *Wastie* case is distinguishable because the issue before the Court was a latent defect and not a *dictum* or *promissum*, does not bear scrutiny in the light of the *Phame v Paizes* decision *supra*. Similarly the positive *obiter dictum* of Holmes JA, on the question of the applicability of the aedilitian actions to incorporeal things, has paved the way for the extension of such actions to defects in or misrepresentations relating to the vehicle traded in by way of a trade-in agreement. I have no doubt that 'the current climate of opinion is propitious and receptive to such extension' and that the circumstances are appropriate, as required therefor by the learned Judge at 419E - F of the said case.

This in fact also dispenses with the argument that the *Wastie* case is distinguishable because the non-money portion of the purchase price was not the vehicle as such, but an incorporeal right thereto in terms of an agreement between the purchaser and a third party. Just as trade-in agreements are a commercial reality at the present time, just so credit

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agreements, *inter alia* relating to vehicles tendered for purposes of a trade-in, have become a regular occurrence in the commercial world. Holmes JA was, with great respect, perfectly correct in his aforesaid *obiter dictum* relating to incorporeal things.

Even if the barter analogy should be unacceptable, and the findings, *obiter* or otherwise, in the *Phame v Paizes* case *supra* not be applicable, I am nevertheless firmly of the view that the aedilitian actions should apply to trade-in agreements. More particularly, the seller in a trade-in agreement should be protected from the consequences of latent defects in, or misrepresentations relating to, the vehicle traded in by the purchaser. Such relief is, I believe, required by the principles of justice, equity, reasonableness and good faith inherent in our common law and strongly evident in our law of contract. In addition public policy (the ancient concept of *boni mores* or 'good morals') demands that the relevant law be extended and adapted to meet the needs of modern commercial practice. This arises from the flexibility of our legal system, as pointed out above, and accords with the recent observations of Olivier JA in the *Saayman* case *supra*, where the learned Judge said (at 319B):

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'Die funksie van die *bona fide*-begrip (ook genoem die goeie trou) was eenvoudig om gemeenskapsopvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik.'

In his concurring minority judgment the learned Judge considered the role of good faith (*bona fides*) in the modern South African law of contract, with reference to a number of Appellate Division decisions which have played an important role in finding fair and just solutions to thorny legal issues. In doing so it has established equitable principles on the basis of public policy and reasonableness.

In applying principles of logic and fairness in the *Wastie* decision *supra*, Van Zijl J was, in my respectful view, doing just what the said Appellate Division decisions have been advocating over a long period of time. His concept of logic should, I believe, be understood to mean the reasonableness required by public policy to achieve justice and fairness between contracting parties. Together with the fundamental principle of good faith underlying the contractual relationship between such parties, public policy indeed requires a fine balance to be established between the relative rights, duties and interests of the parties, as held by Van Zijl J in his aforesaid judgment.

It goes without saying that, in a trade-in agreement, it would be unjust, inequitable and unreasonable should the seller be liable for latent defects in, and misrepresentations relating to, the vehicle sold by him, while no such liability attaches to the purchaser in regard to the vehicle traded-in by him. The purchaser would in fact be at large, while proclaiming his innocence and good faith, to deliver a defective trade-in vehicle in the knowledge that the seller will have no recourse against him by means of the aedilitian actions. If the aedilitian actions are available to the one, so also should they be available to the other. If this were not so, the law would be paying lip-service to the good faith required of parties to a synallagmatic contract, with its reciprocal rights and duties. It would also be in conflict with the behests of public policy, which represents the





balanced interests of all members of a community, including those participating in commercial interaction with one another.

It follows that I must respectfully associate myself with the findings of Van Zijl J in the *Wastie* case *supra*, and likewise respectfully reject the contrary findings of Bristowe J in the *Mountbatten* case *supra*. In the latter case the learned Judge failed, in my respectful view, to take cognisance of the adaptability of our common law and of the need to adopt a flexible approach in applying ancient principles to modern legal issues, particularly in the rapidly developing commercial world.

Bristowe J's example, in his criticism of the *Wastie* case, of a misrepresentation by a lessor as to the quality of the premises leased in terms of an agreement of lease does not, in my respectful view, constitute a proper analogy. The aedilitian actions are not applicable to agreements of lease, which provide the parties thereto with particular remedies in the event of a breach of contract. The same applies to the example of a misrepresentation by an agent as to his 'capabilities'. Contracts of mandate or agency agreements are subject to their own forms of relief in the event of misrepresentations of whatever nature.

Inasmuch as the *Bloemfontein Market Garage* case *supra* has accepted and followed the

*ratio* in the *Mountbatten* case *supra*, it must likewise be respectfully rejected.

That there should be an extension of the application of the aedilitian actions, as advocated above, is, in my view, consonant with the spirit and values contained in the Bill of Rights as set forth in chap 2 of the new South African Constitution (the Constitution of the Republic of South Africa Act 108 of 1996). This may be inferred from the following.

Section 8(3)*(a)* of the Constitution enjoins a Court, when giving effect to a right contained in the Bill of Rights, to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. One such right is the right to equality before the law, as contained in s 9(1):

> 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

This is confirmed by s 39(1)*(a)*, which requires a Court, in interpreting the Bill of Rights, to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. With specific reference to the development of the common law, s 39(2) provides:

> 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

It also accords with the inherent power of the courts, as set forth in s 173, 'to develop the common law, taking into account the interests of justice'.

The alternative of *in solutum datio*

As mentioned above, a number of academic commentators have opined that the principle of substituted or alternative performance (*in solutum datio* or *datio in solutionem*, as preferred by Hiemstra and Gonin *Trilingual Legal Dictionary* (1981)) is applicable to trade-in agreements.

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VAN ZYL J

There is no merit in this suggestion. *In solutum datio* means that performance of something other than the agreed or due debt is made to the creditor. It relates to the whole debt originally agreed upon and not merely to a part thereof. The whole debt is in fact substituted by an alternative debt. If performance of the substituted or alternative debt should be accepted by the debtor, the original debt would, under normal circumstances, be discharged. See *G* 3.168; *Inst* 3.29 *pr*; *D* 12.1.21, 13.5.1.5 and 46.3.46 *pr*-1; D J Joubert '*Datio in Solutum*' (1997) 10 *De Jure* at 29 - 36.

In the case of trade-in agreements, the vehicle traded-in is not a substituted or alternative debt due by the purchaser to the seller. It is part and parcel of the original debt agreed upon by the parties, being a portion of the price that the purchaser is obliged to pay for the vehicle purchased by him from the seller. Delivery of the traded-in vehicle by the purchaser constitutes part-performance of his agreed obligation to pay the price of the purchased vehicle, the remainder of the performance relating to payment of the balance of the purchase price. Part-performance can never be equated with substituted or alternative performance.

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Evaluation of the facts in the present matter

On the facts appearing from the stated case, it is clear that the parties entered into a single contract of purchase and sale, the traded-in vehicle ostensibly forming part of the purchase price of the vehicle purchased in terms of such contract. In fact it was not the vehicle as such which was traded-in, but the purchaser's incorporeal right thereto in terms of his credit agreement with a third party.

It is common cause that the appellant, as purchaser, made an innocent misrepresentation relating to the model of the traded-in vehicle. On the strength of such misrepresentation, the respondent, as seller, agreed to place a higher valuation on such vehicle than was warranted by its actual model. In view of the legal considerations set forth above, it is irrelevant whether the contract of purchase and sale relates to a corporeal or incorporeal thing. It is likewise of no moment that the said thing does not contain a latent defect or defects, but has merely been misrepresented (by way of a *dictum* or *promissum*) as being something which it is not. In all these cases the aedilitian actions are available.

Most importantly, for present purposes, is the fact that it does not matter that the defective or misrepresented thing is not the object of a sale or barter. The aedilitian actions are equally applicable to an object forming part of the purchase price or *pretium* of a thing purchased. Hence, on the grounds set forth above, the *actio quanti minoris* is available to a seller in a trade-in agreement should the vehicle traded in be defective or misrepresented as aforesaid.

Conclusion

It follows that the Court *a quo* was correct in following the *Wastie* decision *supra* and properly gave judgment in favour of the respondent. In the event the appeal must be dismissed with costs.

Griesel J concurred.

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