„U Save (Pty.) Ltd."; dat die maatskappy op die 11de Oktober 1961 onder 'n voorlopige likwidasie bevel geplaas was; dat Christiaan M. de Beer op die 25ste Oktober 1961 deur die Meester van die Hooggeregshof aangestel is as likwidateur van die betrokke maatskappy; dat op die 17de Oktober 1961, dit wil sê agt dae voor sy aanstelling, het de Beer sy opwagting gemaak by die maatskappy se geregistreerde kantoor te 4 Sauergebou waar hy appellant gevra het na die bates van die maatskappy. Volgens de Beer, gesteun deur 'n getuie Boyes, sou appellant gesê het dat die „maatskappy hoegenaamd geen bates het nie."

Appellant het die getuienis betwis. Hy sê dat hy de Beer meegedeel het dat die maatskappy maar min bates het.

Die landdros het die getuienis van de Beer en Boyes aanvaar.

Omdat de Beer vermoed het dat daar van die bates van die maatskappy verberg word het hy aansoek gedoen om die uitreiking van 'n huissoekingslasbrief. Op die 23ste Oktober het de Beer saam met die Adjunk Offisier van die Suid-Afrikaanse Polisie, Swanepoel, gewapen met sodanige lasbrief, die appellant se woonstel besoek. Swanepoel het die lasbrief aan appellant getoon en hom gevra of hy enige bates van die maatskappy het. Volgens die getuienis van Swanepoel en de Beer het appellant geantwoord dat hy geen bates van die maatskappy in sy besit of in die woonstel het nie.

Hierdie getuienis is ook deur die landdros aanvaar, en na my mening het die landdros nie in dié verband fouteer nie.

Die soek is uitgevoer. In die laai van 'n skryftafel het getuie Swanepoel 'n gebruikte optel masjien gevind wat appellant aangedui het as 'n bate van die maatskappy. Appellant het toe 'n nuwe Contex optelmasjien van uit 'n kas in sy spens te voorskyn gebring, wat aan die maatskappy behoort. Ten opsigte van die twee artikels het appellant geen verduideliking van sy besit in sy woonstel aan Swanepoel gegee nie. 'n Minderwaardige lintroller, die eiendom van die maatskappy, is ook in die woonstel gevind. Ten opsigte hiervan het appellant 'n verskoning van sy besit aangebied.

Vir doeleindes van hierdie uitspraak aanvaar ons die landdros se bevinding dat, omdat appellant hierdie bates van die geregistreerde kantoor van die maatskappy verwyder het na sy woonstel, hy die tweedehandse optel masjien in sy lessenaarlaai geplaas het en die nuwe Contex masjien in 'n kas in sy spens gelaat het en dat hy op die 17de Oktober 1961 aan de Beer gesê het dat die maatskappy hoegenaamd geen bates het nie, asook day hy op die 23ste Oktober 1961 aan Swanepoel in die teenwoordigheid van de Beer gesê het dat hy geen bates van die maatskappy in sy besit of in sy woonstel het nie, dat appellant hierdie bates van die gelikwideerde maatskappy verberg het tot op die 23ste Oktober toe dit òf gevind is òf deur hom aan de Beer oorhandig is.

Die vraag ontstaan weereens of dit die oortreding beoog deur art. 132 (*b*) van die Wet konstateer.

Verder in sy redes vir uitspraak sê die landdros as volg:

„Dit was aangevoer deur die verdediging dat die likwidateur, C. M. de Beer, nie *skriftelik* aangestel was op die 17de Oktober 1961 toe die beweerde verberging plaasgevind het nie. Art. 132 verbied 'n verberging van bates wat ter beskikking van 'n likwidateur behoort gestel te word en sodanige verberging kan geskied selfs *voor* likwidasie wanneer daar nog geen kurator aangestel kan wees nie. Die aanstelling van die likwidateur is dus nie 'n noodsaaklike voorvereiste tot die verberging nie."

Dit wil my voorkom dat die landdros aanvanklik die regsvraag te wyd gestel het wat hom tot hierdie foutiewe gevolgtrekking gebring het. As die bepalings van art. 136 (*b*) (i) en (ii) in oënskou gehou word is dit duidelik dat die blote fisiese verberging van 'n boedelbate voor likwidasie 'n bestanddeel mag vorm onder die bepalings van art. 132 (*b*) indien die „insolvent", in die onderhawige geval die appellant, hom skuldig maak aan die verberging van maatskappybates ten aansien van 'n behoorlik aangestelde likwidateur. Tot tyd en wyl de Beer as likwidateur aangestel is—en dit het geskied op die 25ste Oktober 1961—kan dit nie gesê word dat die verberging van hom *qua* likwidateur geskied het nie. Afgesien van enige ander moontlike oortreding wat appellant deur sy handelwyse mog gepleeg het (sien bv. art. 142 van die Insolvensiewet) is die oortreding van art. 132 (*b*) van die Wet nie bewys nie.

Dit volg dus dat die appèl slaag. Die veroordeling en vonnis word ter syde gestel.

DE WET, R.P., het saamgestem.

Appellant se Prokureurs: *Schwartz & Goldblatt.*

S.A. WOOD TURNING MILLS (PTY.) LTD. v. PRICE BROS. (PTY.) LTD.

(TRANSVAAL PROVINCIAL DIVISION.)

1962. *August* 7, 16. KUPER and MARAIS, JJ.

Sale.—Reduction of purchase price.—Defects.—Quantum meruit.—*Printer supplied with descriptive matter and photographs for a catalogue —Catalogue printed containing defects.—Customer accepting such catalogues with knowledge of defects and distributing same.—Customer sued for full contract price.—Contract that of purchase and sale.—Customer not entitled to rely on equitable relief of* quantum meruit.

The appellant had contracted with the respondent to print 1,000 catalogues, the descriptive matter and photographs being supplied in the form of a complete dummy catalogue. The respondent only delivered 890 which contained certain patent defects in the printing. The appellant accepted delivery and distributed the catalogues amongst its customers. It refused to pay the full contract price. The respondent having successfully sued for the costs of the catalogues delivered, in an appeal it was contended that the respondent was only entitled to a *quantum meruit.*

Held, that the contract was one of purchase and sale.

Held, further, that the appellant therefore could not rely upon the equitable relief of *quantum meruit.*

Held, further, as the appellant had failed to cancel the contract and/or claim and prove damages, as it was entitled to do, that the appeal should be dismissed.

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

V. T. Pienaar, for the appellant: The appellant accepted the goods delivered to it as being defective. It was entitled to do this, Mackeurtan *Sale*, 3rd ed. p. 320; de Wet & Yeats *Kontraktereg*, (1947 uitg.) bl. 138-9 en 108-9. The principles of *quantum meruit* apply. *Voet* 19.2.40; *Hauman* v. *Nortje*, 1914 A.D. 293. These principles are applicable to all contracts, including sale. The *onus* of proving the extent of the accepting party's enrichment lies on the contractor or seller. See *Wegerle* v. *Pretoria Machinery Sales*, 1946 T.P.D. 319; *MacFarlane* v. *Crooke*, 1951 3 S.A. 256. There was no evidence in this regard, and the correct judgment should have been one of absolution from the instance.

D. A. Kuny, for the respondent: The contract for the printing, preparation and supply of the catalogues was a contract of sale. See *Tulloch* v. *Marsh*, 1910 T.P.D. 453. The appellant accepted delivery of and used 890 catalogues notwithstanding that only 890 and not 1,000, as provided for in the contract, were delivered, and that the catalogues were on delivery patently defective. As such the appellant acquiesced in the position, and in fact accepted the catalogues as constituting the seller's performance under the contract. The appellant was therefore obliged to pay for the catalogues in terms of the contract. See *Koenig* v. *Johnson & Co. Ltd.*, 1935 A.D. 262 at p. 295; *Hauman* v. *Nortje*, 1914 A.D. 293 at p. 310; Mackeurtan, *supra* at pp. 297 *et seq.*; *Voet*, 18.1.7. The appellant had an election as to whether to accept or reject the catalogues and, once having accepted them, could not refuse to pay *pro rata* for the number of catalogues accepted and used. The only remedy which might have been available to the appellant in the circumstances was an *actio ex empto* for damages, in which event the *onus* would have been upon the appellant to establish the damages suffered. See *Mackeurtan*, *supra* at pp. 297-8. This is not a case in which the respondent seeks to recover on a *quantum meruit*. A claim based on a *quantum meruit* applies to contracts for services rendered or work done, i.e. contracts *locatio conductio operis* and *operarum*, (see *Inkin* v. *Borehole Drillers*, 1949 (2) S.A. 366 (A.D.) at pp. 371-2), and it is of no application to a contract of sale. Even if the Court were to find that the respondent was only entitled to recover on a *quantum meruit*, and that there was therefore an *onus* on the respondent to establish the amount to which it was entitled, the respondent has discharged such *onus*, since: (*a*) It has placed evidence before the court as to the contract price and the fair and reasonable price. (*b*) The question of the value of the catalogues to the appellant is a matter entirely within the appellant's own knowledge, and to the extent that the appellant claimed that the catalogues did not serve their purpose, and that it thereby suffered damages, the *onus* was upon the appellant to satisfy the court in regard to the amount of any such damages. See *Koenig* v. *Johnson & Co. Ltd.*, *supra* at pp. 277 and 295

Cur. adv. vult.

Postea (August 16th).

KUPER, J.: The appellant is a company carrying on the business of furniture manufacturers. As part of its advertising campaign each year it causes catalogues to be printed and distributed amongst its customers. These catalogues show the various articles produced by the appellant and the prices at which these articles are sold. New catalogues are printed each year because the appellant produces new lines of articles and the prices of the articles vary from time to time. The descriptive matter contained in the catalogues as well as the photographs are supplied by the appellant to the printers in the form of a complete dummy catalogue.

On the 29th August, 1959, and in preparation for the approaching Christmas trade season the appellants placed an order with the respondents, a firm of printers, for the printing of 1,000 catalogues each of 18 pages and cover for the sum of £138 (R276). It was also agreed that if extra pages were required by the appellant it would pay for these pages on a *pro rata* basis. The dummy catalogue was handed to the respondent. There was some delay in the printing and delivery of the catalogues by the plaintiff, into the details of which it is unnecessary to enter, and eventually 890 catalogues of 20 pages each (the extra two pages having been required by the appellant) were delivered by the plaintiff. It was common cause that there were certain defects in the printing of the catalogues; these were, in the main, that portions of the printed matter were too light in print, that a number of photographs were printed and published in reverse and that the inking as a whole showed unevenness. The defects were of such a nature that, in the view of one Morley, a technical printing consultant, the whole job could have been rejected quite apart from the fact that only 890 catalogues were delivered instead of 1,000. The appellant did not reject the catalogues, and its attitude is made clear in a letter it sent to the respondent after the first 71 catalogues had been delivered, the relevant portion of the letter reading as follows:

> "This is a very big mistake on your part and we feel that, as you did not supply us with any proofs with the illustrative part but merely went ahead with the printing without consulting us, we cannot take responsibility for the negligence on your part and to save yourself from reprinting the whole order, and also satisfy ourselves with catalogues which at this late moment are extremely urgent on account of the tremendous loss of business, an account equal to half the cost of this order to us will be fair as the appearance of this catalogue will no doubt be a hindrance in our sales promotion and even spoil our name."

The appellant accepted delivery of 890 catalogues and distributed them amongst its customers. It however refused to pay the respondent in accordance with the contract price, and in due course the respondent instituted proceedings in the magistrate's court at Johannesburg claiming the sum of R432.50 for the supply of 1,000 catalogues at a price which provided for special covers and fasteners and for catalogues of 20 pages instead of 18 pages. After hearing evidence the magistrate came to the conclusion that only 890 catalogues had been delivered and that the original contract price included the special covers and fasteners. He found in favour of the respondent on the legal issues involved and gave judgment for the respondent in the sum of R268.42. Although there was an error in the calculation in favour of the appellant, the respondent has not asked that the judgment should be increased by the additional R4.50 involved.

Mr. *Pienaar*, who appeared for the appellant, contended that on the admitted facts the respondent was not entitled to the contract price (adjusted both in regard to the number of catalogues and the number of

pages) because it had not fulfilled its contract and that it was only entitled to a *quantum meruit* which had to be determined on the basis set out in cases such as *Hauman* v. *Nortje*, 1914 A.D. 293, namely to award the respondent the contract price after deducting therefrom the cost of supplying the omissions or defects. The general principle explained in that case was that neither party could have called upon the other party to perform his contract without himself having performed, or being ready to perform, his part of the contract unless special circumstances existed which would render the application of that general principle inequitable. Special circumstances were held to exist in the case of *locatio operis* where a contractor honestly believes that he has performed his part of the contract whilst the employer relies upon some alleged defects of construction or omissions as reason for refusing to pay for the work. In such an event if the employer enjoys the benefit of the work and labour done he is obliged to pay because of the application of the equitable principle of our law that no one shall be unjustly enriched at the expense of another. Applying that principle to the present case Mr. *Pienaar*, on the authority of the case of *Wegerle* v. *Pretoria Machinery Sales*, 1946 T.P.D. 319, contended that the *onus* rested on the respondent to prove the cost of remedying the admitted defects and that as the respondent had not discharged this burden, the magistrate should have ordered absolution from the instance.

Mr. *Kuny*, who appeared for the respondent, contended that the transaction in this case was one of purchase and sale and that consequently the rule in regard to *quantum meruit* did not apply. That the transaction was one of purchase and sale seems to me to admit of no doubt.

"The rule laid down in the *Digest*, 19.12.3 and 18.1.20"
said INNES, C.J. in the case of *Tulloch* v. *Marsh*, 1910 T.P.D. 453,
"is a very simple one. When the client or customer supplies the material, and the other party the work, then it is letting and hiring. When the workman provides an article manufactured by himself out of his own material, which he supplies to the customer, then the contract is one not of letting and hiring, but sale."

In that case the Court held that, where a dentist supplied and fitted a set of artificial teeth, made from his own material for an inclusive charge, the transaction was a sale and not a contract of letting and hiring. In the present case, it is true, the appellant gave the respondent a dummy catalogue, but that was only in the nature of a sample, and all the work that was done by the respondent was done on paper and other material supplied by it and no portion of the finished article was made from anything supplied by the appellant.

I also agree with Mr. *Kuny* that once it is established that the transaction was one of purchase and sale the equitable relief offered by a *quantum meruit* was not open to the appellant. When the appellant received the defective catalogues it was clearly open to it to reject the catalogues, cancel the contract and claim damages for the breach. As the defects were patent and were in fact clearly observed by the appellant on delivery, the fact that the appellant did not cancel the contract but did take delivery and used the catalogues as its own by distributing them amongst its customers meant that it could no longer cancel the contract. Nor was the *aedilitian* remedy of the *actio quanti minoris* open to it for the defects were not latent and were clearly observed by the appellant at

the time of delivery (*S.A. Oil and Fat Industries Ltd.* v. *Park Rynie Whaling Co. Ltd.*, 1916 A.D. 400 at p. 413). There is no scope for any further equitable relief in contracts of sale and the only other remedy open to a purchaser who, with knowledge of the defects, receives delivery and uses the goods sold as his own, is to sue the seller for damages because of the seller's failure to deliver goods according to the contract terms.

In the present case the appellant sought to obtain equitable relief by means of a *quantum meruit*, and it did not seek to recover damages. In any event on the evidence it tendered the appellant failed to prove the *quantum* of damages it suffered if it in fact suffered any at all. It follows that the appellant misconceived its remedy and that consequently the appeal must be dismissed with costs.

MARAIS, J., concurred.

Appellant's Attorneys: *Raubenheimer & Donen*. Respondent's Attorneys: *Kantor, Zwarenstein & Partners*.

SMIT v. BOTHA.

(TRANSVAAL PROVINCIAL DIVISION.)

1962. *August* 9, 14. DE WET, J.P., and THERON, J.

Bills of exchange. Cheque. Dishonouring of.—Claim by holder.—Notice of dishonour dispensed with.—Sufficiency of averment.—Proc. 11 *of* 1902, *sec.* 48 (c) (iv).

Plaintiff, the holder of a cheque, in issuing a summons against the defendant, the drawer thereof, had alleged that the cheque had been presented at the Bank at which it was payable and had been dishonoured and that notice of dishonour "is hereby dispensed with". In refusing an application for condonation of late filing of an exception that the summons disclosed no cause of action, and for a postponement, a magistrate's court had granted summary judgment as prayed. In an appeal,

Held, as the summons was capable of being understood as meaning that the plaintiff had relied upon section 48 (*c*) (iv)of the Bills of Exchange Proclamation, 11 of 1902, i.e. that the Bank was under no obligation to pay the cheque, that the summons did disclose a cause of action. Appeal accordingly dismissed.

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

H. Schwarz, for the appellant.

P. Bosman, for the respondent: *Burton* v. *Roth*, 1915 T.P.D. 76, which held that in magistrates' court pleadings it was necessary to include an allegation that notice of dishonour had been given or was dispensed with, was decided before the present Magistrates' Courts Rule, 10 (8) (*v*), was promulgated. Subsequent cases which followed or approved of *Burton* v. *Roth* were all cases concerning pleadings in the Supreme Court. See *Tradin* v. *Reichman*, 1917 T.P.D. 573; *Goldberg*