

experienced in the past. While drafting should be left to those who are experts in this field, I suggest that a general legal rule which determines that the risk-based approach must be elucidated by the insurer to the insured should be incorporated in the relevant provision. The measures to implement this general rule could be left to the industry itself to fashion in the context of the general practice and policy of insurers.

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Banda v Van der Spuy

2013 4 SA 77 (SCA)

Quantifying a claim with the actio quanti minoris

1 Introduction

The *actio quanti minoris* is one of the so-called *Aedilitian* actions developed in Roman law to provide relief for a purchaser who discovered latent defects in a thing sold. The remedy is aimed at reclaiming a fair portion of the purchase price as redress for the fact that the thing sold is defective and consequently worth less than the price actually paid for it. To succeed with a claim based on the *actio quanti minoris*, a plaintiff must not only show that the thing sold was defective at the date of the sale, but also establish the exact amount by which the purchase price should be reduced. The question is, therefore, how a claim with the *actio quanti minoris* must be quantified. This was one of the issues which the court had to decide in the case of *Banda v Van der Spuy* 2013 4 SA 77 (SCA).

2 Facts

In June 2007, the appellants bought a house from the respondents. The house had a thatch roof that leaked prior to the sale of the house and which continued to leak after the sale (78G). The appellants instituted action in the South Gauteng High Court to claim a reduction in the purchase price with the *actio quanti minoris*. The appellants quantified their claim with reference to the cost of repairing the roof to cure the leaks (78H). However, the agreement of sale contained a *voetstoots* clause, which placed an additional burden on the appellants to prove not only the existence of the latent defects in the roof, but also that the respondents were aware of these defects which caused the roof to leak and fraudulently neglected to inform the appellants of their existence (78I).

The court *a quo* found that the defects in the roof were latent in nature, but upheld the defence of the respondents that they were excused from liability in terms of the *voetstoots* clause (79B).

On appeal, the main issue for determination was whether the appellants had proven knowledge on the part of the respondents with regard to the latent defects in the roof and that they had fraudulently concealed the defects from the appellants. Because the respondents had effected repairs to the roof before the sale, the court also had to decide whether, to the knowledge of the respondents, the repairs had adequately rectified the defects in the roof to prevent the roof from leaking.

The evidence presented by the expert witnesses clearly established that the cause of the leaks in the roof was twofold. Firstly, the wooden roof poles were inadequate to support the weight of the thatch roof and this led to the roof sagging downwards and moving laterally. As a consequence of the movement in the roof, openings had appeared between the flashing and the thatch, through which rainwater flowed down the internal walls of the house (79F-H).

Secondly the pitch of the roof was inadequate. While the recommended pitch for a thatch roof was 45 degrees, the roof of the house was less than 30 degrees in places and could not be regarded as functional, because the thatch fibres would have a negative gradient and water would not run off the roof, but into the thatch. As a consequence, the thatch would stay wet and would rot much more quickly than it was supposed to (79I *et seq*).

3 Judgment

In handing down the judgment of the court, Swain AJA held that the respondents had been aware of one of the causes for the leaking roof – the inadequate roof design – and the fact that they were unaware of the other cause of the leaking roof – the inadequate pitch of the roof – made no difference (83A-I). The respondent's conduct in concealing the existence of the defective, leaking roof meant that they could not rely on the protection of the *voetstoots* clause in respect of this latent defect. As a result, Swain AJA held that the appellants were entitled to the difference between the purchase price of the house and its value with the defective roof (83H-I). He then explained (84A-B):

No evidence was led of the market price of the house with the defective roof at the time of the sale. It seems self-evident, however, that there would not be a market for a house where the whole roof has to be replaced. Where there is no market the court is entitled to fix the sum for which the house could have been restored ... The cost of repairs may be used as a measure of the award to be made where the actual value could not be determined, or is difficult to determine.

As a result, the court upheld the appeal and ordered the respondents to pay to the defendants an amount of R449,499.00, which the court found

would have been the cost to adequately repair the roof at the time when the sale was concluded in 2007.

4 Discussion

The question arises whether the cost of repair, calculated at the date when the sale was concluded, is the appropriate measure to determine the exact amount of the purchase price which should be refunded to the purchasers. Kerr and Glover (LAWSA (ed Joubert) 24 (2010) par 32) indicate that the:

... seller's obligation and the buyer's right [under the edict] arise *by operation of law*, and not by reference to the intention of the parties'. It follows that it is unnecessary for the buyer to try to fit his or her resultant right into the concept of a so-called implied warranty against latent defects and that the buyer does not need to aver any breach of contract. (Emphasis as per original text.)

(See also *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A).) The *actio quanti minoris* is therefore clearly not a claim based on breach of contract and consequently also not a claim for contractual damages (*McDaid v De Villiers* 1942 CPD 220). Nor is it a claim in delict for negligent or fraudulent misrepresentation (*Truman v Leonard* 1994 4 SA 371 (SE) 373H).

This begs the question whether the actual cost of repair is the correct measure to apply when calculating the amount by which the purchase price must be reduced. In *McDaid*, Sutton J explained (240) that the:

[p]urchaser, under the *actio quanti minoris*, ... has no claim, ordinarily, to the amount necessary to put him in the position he would have occupied had he bought an article without the defects in question.

Kerr and Glover (LAWSA 24 par 43) also emphasise that the "*actio quanti minoris* is an action 'for the return of portion of the purchase price'". A claim for contractual damages, on the other hand, is aimed at putting the prejudiced party in the position it would have been in had the contract been properly fulfilled. And awarding the actual cost to repair the roof of the house seems to do just that – it puts the purchasers in the position they would have been in, had the roof been fully functional to repel the rain. Or to put it differently, it seems to put the purchasers in the position they would have occupied had they bought the house without the defects in question, since the costs of repairs would then certainly not have been incurred. The purpose of this note is therefore to consider the appropriate manner in which a claim with the *actio quanti minoris* must be quantified.

5 Historical Analysis

Around the second century BC, the *curule aediles* in Rome issued an edict which imposed a duty on any seller of a slave to inform the purchaser of any disease or defect in the slave (Daube *Forms of Roman Legislation*

(1979) 95). Later, Ulpian indicated that the edict also applied to all kinds of sales (D 21 1 1; D 21 1 63).

If the thing sold was defective, the seller was liable to the extent that the purchaser would have paid less if the purchaser had been aware of the defects (D 19 1 13). Paul indicated that the seller then had to refund the excess paid by the purchaser (D 21 1 61). In other words, the purchaser could claim the difference between the actual purchase price paid and the hypothetical purchase price that would have been paid if the purchaser had been aware of the defect. However, according to Gaius (D 21 1 18) there was another way to determine the apportionment of the purchase price. Instead of the hypothetical purchase price the purchaser would have paid for the defective thing, the purchaser could recover the reduction in the value of the *merx* due to the defect.

A significant distinction was made by Ulpian (D 19 1 13). He stated that if the seller was ignorant of the defects, the purchaser could only recover a portion of the purchase price to the extent that the purchaser would have paid less if he had been aware of the defects. However, if the seller was aware of the defects, kept silent and deceived the purchaser, the seller was liable to compensate the purchaser for all the loss which the purchaser sustained from the sale. The seller, therefore, had to indemnify the purchaser to the extent of the interest which the purchaser had in the sale of the property in good condition. Ulpian referred to this as “the amount of the interest of the purchaser in not being deceived” (“*quantum emptoris interfuit non decipi*”) (D 19 1 13 1). Consequently, it seems that even in Roman times, there was no single formula with which the reduction in the purchase price was quantified.

The *actio quanti minoris* was also received in Roman-Dutch law (Voet *Commentarius ad Pandectas* 19 1 1, 21 1 5; De Groot *Inleidinge tot de Hollandsche Rechts-geleertheid* 3 15 8). If the thing sold was defective, the purchaser could recover that portion of the purchase price by which the purchaser had overpaid for the defective thing. The purchaser had overpaid to the extent that the purchase price did not reflect the market value of the thing with its defects.

It is significant, though, that both De Groot (3 15 7) and Voet (21 1 10) also mentioned the same distinction that Ulpian had made in Roman law. If the seller had knowledge of the defect (or, according to Voet (*ibid*) was a skilled craftsman), the seller was liable for any damages which the purchaser suffered as a result of the defect. However, if the seller was ignorant of the defects, the purchaser only had a claim for the amount which he had overpaid for the thing sold, unless the seller was a skilled craftsman.

The *actio quanti minoris* was subsequently also received in the various colonies and republics that would eventually constitute South Africa (*Fry v Reynolds* (1828-1849) 2 Menz 161; *Irvine & Co v Berg* (1879) 9 Buch 183; *Ohlsson's Cape Breweries Ltd v Levison* 1905 TH 330; *Truter v Dunn* 1905 ORC 115; *Didcott v White* 32 NP 269).

6 Current South African Law

In *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 Innes CJ explained (413) that:

[T]he *quantum minoris* action which has descended to us from the Civil Law, entitled the purchaser who after delivery became aware of redhibitory defects to claim back a proportionate share of the purchase price. The standard of relief approved by Roman lawyers in such a case was the difference between the price actually given and the price which the purchaser would have been given had he known of the defects. ... That was a standard not easy of application. The difficulty of deciding what a buyer, wise after the event, would have given for the defective article if he had known of its defects, must have been great. And the measure adopted by many Roman-Dutch writers was the difference between the purchase price and the actual value of the thing sold. ... That was a more satisfactory standard for the real worth of the defective article could be more accurately ascertained than the price which the buyer would have been willing to pay under circumstances with which he had never been actually confronted. That standard has been sanctioned by South African practice ... and should have been applied in the present case.

This principle has been followed in various cases since (See *Katzenellenbogen Ltd v Mullin* [1977] 4 All SA 818 (A). See also *Crawley v Frank Pepper (Pty) Ltd* [1970] 1 All SA 206 (N); *Grosvenor Motors (Border) Ltd v Visser* [1971] 3 All SA 398 (E); *Du Plessis v Semmelink* [1976] 3 All SA 60 (T); *Bloemfontein Market Garage (Edms) Bpk v Pieterse* [1991] 1 All SA 69 (O)).

SA Oil and Fat (above) seems to have provided a simple measure to quantify the amount that may be claimed with the *actio quantum minoris*. However, while the actual purchase price is fairly easily determined, the market value of the (defective) thing sold is not so clear-cut. It is trite that the market value is a question of fact which must be proven by adducing relevant evidence. But what exactly does the market value entail? Market value can only be determined with reference to a particular time, place and thing sold.

As far as the time and place is concerned, market value is generally determined with reference to the time and place of sale (*Wilson v Simon and Lazarus* 1921 OPD 32 37; *Katzoff v Glaser* 1948 4 SA 630 (T) 638; *Banda*). Market value must also be determined with regard to the thing sold. In *Didcott* Broome J explained that “[t]he object of the *actio quantum minoris* is the recovery of the excess of the agreed price over the real value of the thing after allowing for the defect”. And in *Ranger v Wykerd* 1977 2 SA 976 (A) Trollip JA (although referring to a claim in delict) confirmed (999A) that “the market value of the *merx*” ... means the [market value of the] *merx* in its deficient state”.

Furthermore, where a number of items, such as a flock of sheep, were sold collectively for one price (as opposed to a number of items sold and billed individually), it is the collective market value of the collective items

which must be established, even if only one of those items is defective (*Malcolm v Conradie* 1920 OPD 125).

All of this complicates the matter somewhat. The concept “market” usually conjures an image of willing buyers and willing sellers trading items that are intact, rather than defective. The sale of defective goods is the exception rather than the rule. Therefore, in *Katzenellenbogen* Wessels JA explained (878E *et seq*) that

[w]hen one refers to a market or market value in the context of a claim for contractual damages, the reference is not necessarily to an organised market like a stock exchange or municipal produce market. ... It is a reference to any source to which the purchaser might reasonably have gone, in the circumstances, in order to replace the goods which ought to have been delivered to him ... [T]he phrase ‘current value’ instead of ‘market value’ [may be more appropriate] because the latter phrase is sometimes incorrectly interpreted ‘to mean solely the value at the municipal market or the particular public market of the neighbourhood’. ... It follows, in my opinion, that if ordinarily any commodity is of a kind which, if offered for sale, is likely to attract potential purchasers who would be prepared to buy if agreement on the purchase price (the contract price) were to be reached, the commodity in question is in a commercial sense a marketable one and, as such, capable of having a determinable money value.

Kumleben JA mentioned further in *Sarembok v Medical Leasing Services (Pty) Ltd* (1991 1 SA 344 (A) 352B *et seq*) that

[a]s a general rule the value of an article is to be determined with reference to the price it would fetch in the open market ... However ... [t]here may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. ... There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. If the evidence proves or indicates that sales of such cars with grafted chassis take place with sufficient regularity for them, or certain of them, to serve as a guide to market value, it may well have been incumbent upon the appellant to produce such evidence. If not, the Court must do the best it can and, with reliance on some other legitimate method of valuation, make a fair and reasonable estimate on the evidence of the value of the car.

However, Dowling J cautioned in *Katzoff* (637 *et seq*) that

[i]t will be seen that ... the value of anything is ‘what it is worth’, meaning thereby ‘what it will fetch’. This has been a test of market value which has, necessarily, been widely used although it may not be the only or a conclusive test. ... In the case of sales out of hand where there is no immediate urgency to sell, a careful and shrewd campaign of advertising and sales promotion may also result in the realisation of prices which may be called ‘high’. Still more is this likely to be the case when the advertisements put forward prognostications which may be over-optimistic though not fraudulent. Nevertheless, the fact that many people do buy at such prices is an important though not necessarily a reliable index of market value. In saying this I do not

intend to subscribe to the contention ... that 'price' and 'value' are different conceptions; or that the true object of search in a case of this kind is for the 'permanent natural value to which the market value after every variation tends to return' ... [T]he real object of search is 'the temporary or market value' which may fluctuate to different levels at different times and vary as the mood of the general buying public is sanguine, pessimistic or apathetic.

As a result, market value can be described as the price which the defective product would reasonable have attained at the time and place when the actual sale was concluded, where a willing seller and willing buyer who was aware of the defects, entered into a putative contract of purchase and sale in respect of the defective thing.

The implication of this is that where the purchaser bought the thing at a price below the putative market value of the defective product, the purchaser would not have a claim for reduction of the purchase price (*Bloemfontein Market Garage*).

To quantify the market value, Wessels JA explained in *Katzenellenbogen* (825) that "[a] court ... must necessarily be furnished with an appropriate yardstick by which to measure the sum of money (if any) required".

The question, then, is: What is the "appropriate yardstick" that must be furnished to the court?

7 The Appropriate Yardstick

An analysis of the cases shows that the courts have made use of various yardsticks to quantify the market value of the thing at the time of the sale:

- (i) Expert valuations (*Katzoff; Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 3 SA 216 (C); *Sarembok* 353C *et seq*).
- (ii) Opinions of dealers experienced in the sale of the particular kind of thing (*Sarembok* 353C *et seq*).
- (iii) Actual sales of similar things (*Bloemfontein Market Garage; Sarembok* 354A *et seq*). However, in *Grosvenor Motors* (216H), which dealt with the sale of a new 1968-model motor vehicle represented to be a 1969-model, the court held that evidence of trade-in or selling values of similar used motor vehicles, was irrelevant to prove the true value of the motor vehicle concerned at the time of the sale.
- (iv) Actual disposal by the purchaser of the defective thing or similar things (*Didcott* 275).
- (v) Industry standards or guides (such as the *Auto Dealer's Digest* in *Colt Motors (Edms) Bpk v Kenny* 1987 4 SA 378 (T)).
- (vi) The value of the shortfall (*Rustenburg v Douglas* 1905 EDC 12).

The subjective evidence of the price the purchaser would have been willing to pay for the defective thing if he had known of the defect, cannot be considered (*Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 2 SA 824 (T)).

The courts have only rarely used the cost to repair the thing sold as a yardstick to quantify the reduction of the purchase price. In *Maennel v Garage Continental Ltd* (1910 AD 137), the court indicated that the cost of repair could be considered if it was very difficult to ascertain the market value of the thing in its defective state or if it is clear that there is no market for the thing in its defective state (*Crawley*). However, the court will only apply this measure if the purchaser can prove that the market value of the thing in its defective state cannot be determined or that there is no market for the thing in its defective state (*Katzenellenbogen*).

8 Conclusion

It is clear that the court in *Banda* was justified in using the cost of repair as the yardstick to quantify the purchasers' claim with the *actio quanti minoris*. As Swain AJA indicated (84A) it would be very difficult indeed to imagine that there would be a reasonable market for a house with a roof that is so defective that it would require substantial alterations to the structure of the house and an effective rebuild of the roof. On this basis, the only reasonable measure to quantify the reduction in the purchase price, would be the cost to repair the roof. However, this case also clearly involved a fraudulent concealment of the defective roof (82H *et seq*). Based on the common law as set out by both De Groot and Voet (*supra*), the purchasers would also have been entitled to claim from the sellers their actual damages (which would be the cost to repair the roof), as opposed to the difference between the purchase price and the market value of the thing in its defective state.

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