Onlangse regspraak/Recent case law

Jerrier v Outsurance Insurance Company Ltd 2013 JDR 0562 (KZP)

The duty to disclose: An ongoing problem?

1 Introduction

The recent case of *Jerrier v Outsurance Insurance Company Ltd* 2013 JDR 0562 (KZP) highlights the fact that the duty to disclose is still problematic. This is so despite the cogent reasons put forward almost a decade ago by Van Niekerk for its farewell (Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 1) 2005 *SA Merc LJ* 150; Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2) 2005 *SA Merc LJ* 323). Whether or not one agrees with the outcome of the case, the valid concern has been raised that short term insurers, rightly or wrongly, have interpreted the judgment to mean that "consumers are now obliged to report to their insurers every minor incident or scratch on their cars" failing which insurance claims might be rejected.

The concern voiced is that:

> Such interpretations seek to shift the onus onto customers away from the short-term insurers, who do need to examine whether these disclosure practices are fair to the consumer and not out of proportion to the risk-based approach that is necessary for the insurance industry to function efficiently.

(National Treasury "Treasury calls on the insurance sector to be fair to car owners" (2013) available at www.info.gov.za (accessed 2013-08-26)). As will be outlined below, measures have been taken in an attempt to address this concern. However the question arises as to whether these are adequate.

2 Facts and Judgment

The plaintiff, Sherwin Jerrier sued his insurer, Outsurance Insurance Company Ltd for R608,772.20, the sum necessary to restore his Audi R8 to its pre-accident condition. The action arose as a result of Outsurance repudiating Jerrier's claim for damages to his vehicle which in turn arose from a motor vehicle collision on 8 January 2010. The claim was founded on an insurance contract between the parties, which was concluded sometime between December 2008 and January 2009 and in terms of which, according to Jerrier, Outsurance was liable to indemnify him for his loss. Outsurance elected to avoid the insurance agreement, as it averred it was entitled to do, and to reject the claim made upon it by the plaintiff, alternatively to avoid the insurance agreement coupled with tendering the return of the premium paid by the defendant in respect of the cover provided under the agreement. However, pursuant to the parties consent, an order was granted that the trial would proceed on the issue of liability only.

In this regard the insurer had ensured its protection against future liability on various fronts. First the policy contained a clause which read as follows:

> In order to have cover you need to:
>
> (i) pay your premiums
>
> (ii) provide us with true and complete information when you apply for cover, submit a claim or make changes to your facility. This also applies when anyone else acts on your behalf.
>
> (iii) inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge.

The insured specifically had to report his claim or any incident that might lead to a claim to the insured, as soon as possible, but not later than 30 days, after any incident. This included incidents for which he did not want to claim but which might result in a claim in the future (par 5). In the result, besides the pre-contractual duty of disclosure, there was an additional duty of disclosure by incorporation in the contract and one which possibly extended, as Van Niekerk ("More on Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses: *Mahadeo v Dial Direct Insurance Ltd*" 2008 *SA Merc LJ* 427 438) points out in another context, "beyond facts that are material in the pre-contractual situation". In other words in the *Jerrier* case, there was a contractual duty on Jerrier to notify Outsurance of any changes to the risk that Outsurance had taken over, that occurred during the duration of the policy.

Secondly, as is apparent from the defendant's pleadings, the plaintiff warranted that statements made and answers given during the application for insurance and at each renewal of the contract were true and correct (par 6).

As well as the defence embodied in the contract that Outsurance would not be liable where the insured was driving under the influence of alcohol or drugs, (par 5) the defence raised to deny liability for the claim was based on non-disclosure. The court referred to the latter defence as the "non-disclosure defence" and accepted that the non-disclosure related to two previous incidents involving Jerrier's motor vehicle, the first to a minor incident and the second to a more serious one (par 17).

The first occurred on 2 April 2008 when Jerrier damaged his motor vehicle when a wheel struck a pothole. The damage, which he self-funded, apparently amounted to R15,000. The second incident related to a collision with another vehicle on or about 11 April 2009, in Beach Road, Amanzimtoti. The plaintiff testified that in the light of the amount of his excess payable, he did not think it would be worthwhile to claim and furthermore believed that as the damage caused was due to his fault he could not claim. Initially he thought that the damage would amount to R20,000. However, within two weeks of the accident he discovered that the damage in fact amounted to some R200,000. There was a dispute on the facts of how the Amanzimtoti collision had occurred and what it entailed. However the court accepted that it was not a minor accident and that the conduct of the plaintiff "suggests gross negligence, if not reckless driving and behaviour" (par 22).

In determining whether or not the defendant escaped liability, (that is in respect of the damage caused by the third and latest accident) the court referred first to the plaintiff's contractual obligation in terms of the relevant provision of the policy, to make disclosure at the time of claiming. On this score on the evidence before it, the court determined that it could not be found that the only reasonable inference to be drawn was that the plaintiff did not provide "true and complete information when submitting the claim" (par 27). The court did however find that the only contractual context in which the non-disclosure of the previous accidents could be raised to exclude liability, was in terms of the clause that provided "you need to ... inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge ... this includes incidents for which you do not want to claim but which may result in a claim in the future" (par 28). In the view of the court both were incidents which might, in the sense that they could possibly, result in a future claim irrespective of whether or not they did result in such claim (par 29). Secondly, the court determined that, in the words of the judgment, "both incidents would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstances, at the very least from a claims history perspective, but also as a moral risk, that may (not necessarily would) influence whether the defendant would give the plaintiff cover, the conditions of cover or the premium they would charge" (par 30). Moreover the court determined that the expert evidence of the in-house actuary of the defendant, was consistent with what the court believed the view of a reasonable man would be in respect of the two incidents and the impact they would have had on the issue (par 32).

It held that Jerrier should have reported the previous incidents within the time frames of the policy, even if he did not want to claim and that the failure amounted to a material non-disclosure or breach of the terms of the policy. As a result Outsurance was absolved from liability and the court did not deem it necessary to consider the "driving under the influence" defence.

3 Comment

At the outset it is unfortunate that Koen J remarked that "it is trite law that Insurance is a contract based on the utmost good faith" (par 9). Although the contract of insurance is often regarded as being a contract *uberrimae fidei*, it should be remembered that all contracts are based on good faith and as Joubert JA (writing for the majority) opined in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1 SA 419 (A) 433)

> ... *uberrima fides* is an alien, vague, useless expression without any particular meaning in law ... it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our insurance law has no need for *uberrima fides* and the time has come to jettison it.

Moreover, according to Joubert JA the duty to disclose does not flow from the requirement of *bona fides* but it is imposed *ex lege* (par 433; *cf* Van Niekerk "The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: Bruwer v Nova Risk Partners Ltd" 2011*SA Merc LJ* 135 who holds that the basis is delictual).

The duty to disclose is a pre-contractual duty, which as in the *Jerrier case*, becomes an additional or continuous duty when it is incorporated into the contract (Reinecke *et al General Principles of Insurance Law* (2002) par 196; Van Niekerk 2011*SA Merc LJ* 135).

Where there has been misrepresentation or failure to disclose information with regard to short term insurance, the insurer can avoid the insurance contract or deny liability and reject the insured's claim. In terms of section 53 of the Short-term Insurance Act 53 of 1998 (STIA), the information must however be material. In this context material information is that which is likely to have materially affected the assessment of the risk under the policy concerned or the premiums. Possibly where the duty of disclosure as contained in the contract calls for disclosure of specific facts, materiality as posited in the statute may be irrelevant. On the other hand where the contract determines that the insurer must disclose material facts generally, then arguably the insurer should be taken to have intended this to have the meaning assigned to materiality in terms of the statute (see the discussion by Van Niekerk 2011*SA Merc LJ* 135 144).

In terms of section 53(1) of the STIA the non-disclosure is regarded as material if a reasonable, prudent person would consider that the particular undisclosed information should have been correctly disclosed to the short-term insurer so that it could form its own view as to the effect of such information on the assessment of the relevant risk. It is clear that the provision embodies what may be termed a risk-based approach and the test of materiality is an objective test. As Boruchowitz J stated in *Mahadeo v Dial Direct Insurance Ltd* (2008 4 SA 80 (W)) the question

> whether the particular information ought to have been disclosed is judged not from the point of view of the insurer, or the insured, but from the point of view of the notional reasonable and prudent person

(par 17; see too *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); Van Niekerk 2008 *SA Merc LJ* 427). However, as the judge further explained, the test is not whether the reasonable person would have disclosed the specific fact, but whether he or she would have considered that fact reasonably relevant to the risk and its assessment by an insurer (par 18). As further explained by the court, the reasonable person's assessment of whether the fact is material or not will often be influenced by the questions which the insurer may ask, and what the insured considers to be relevant will often depend upon the nature of the questions asked and the nature of these questions posed may indicate what a reasonable person would have regarded as material. Questions asked by an insurer may therefore affect the ambit of the proposer's duty of disclosure and moreover might in the circumstances, serve to determine what is material or not (par 19).

In the same way, the wording of the terms of the contract could serve to elucidate what the reasonable person would consider to be material in the specific circumstances. Clearly, as Van Niekerk points out although the test is an objective one, practically in its application, the reasonable person has to be placed in a particular context, here the situation of the insured. Respectively, in this regard, I would like to endorse Van Niekerk's suggestion:

> [t]hat the reasonable person test for materiality, on the face of it the ultimate in objective tests, may in the process of practical contextualisation have to be filtered through a subjective lens…

(Van Niekerk 2008 *SA Merc LJ* 427; *Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)).This interpretation of the application of the test I believe would be fair to both parties.

The further question, also raised by Van Niekerk, is as to who the reasonable person would have had in mind as being the one who assesses or who is to assess the risk. As indicated above section 53(1)(b) of the STIA refers to *the* insurer as opposed to *an* insurer (emphasis supplied) and it is suggested that that person should be the particular insurer (see too *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika* 1989 1 SA 208 (A); but *cf Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)). It would seem, (although not clear) that this was also the approach of the court in the *Jerrier* case when reference was made to the evidence adduced by Mr Luan Van Rooyen, an in-house actuary of the defendant. However, with regard to the evidence of the actuary, the following statement of the judge is open to criticism:

> [h]is evidence is simply consistent with the view … a reasonable man would have taken of the two incidents and the impact they would have, being the question decisive of the issue, namely that they amounted to a change to the

> plaintiff's circumstances that may influence whether cover is given (or continued), the conditions of such cover, or the premium charged. (par 32).

Surely it would not be equitable to liken a reasonable man's knowledge of risk to that of an expert actuary and to do so would place the insured in an invidious position.

The non-disclosure of a fact, driving into a pothole, for example, might be regarded as not being material in one case but material in another depending on the circumstances. As in the *Mahadeo* case, in the *Jerrier* case the question of non-disclosure related to damage suffered as a result *inter alia* of driving into a pothole. However, in the former case, the insured had not disclosed a previous claim in this regard because he had been asked to disclose prior "accidents" and the insured believed that driving into a pothole could not be classified as an accident or collision. This the court found accorded with the conclusion that a reasonable person would reach in the circumstances: Non-disclosure of this fact was therefore not material. However in *Jerrier* the court found that both the pothole incident and the Amanzimtoti collision

> would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstance, at the very least from a claims history perspective, but also as a moral risk, that *may* (not necessarily would) influence whether the defendant would give the plaintiff cover, the conditions of cover, or the premium they would charge (emphasis added).

Although it is debateable whether a reasonable prudent person would always consider the fact of damage caused by driving into a pothole to be likely to, in other words that it probably would, materially affect the insurer's own view on the assessment of the risk, it may well have been so in the specific circumstances of the *Jerrier* case. Here the insured was under a contractual obligation to report *all* changes that *might* influence the granting of cover, the conditions of cover or the premium charged (my emphasis)**.** It may therefore be argued, that a reasonable person would consider such fact to be likely (that is that it probably would) to materially affect the insurer's own view on the assessment of the risk. The rationale for holding that this would be the view of the reasonable person, may be that, as informed by the contract, he or she would be alerted to the fact that *all* changes that *may* (as in possibly could) affect the granting of or conditions of cover or the premium charged must be reported since these may be relevant to the risk assessment.

This being so I believe the judge in *Jerrier* case did not formulate a general rule that all minor incidents would always be considered by the reasonable man to be material to the assessment of the risk. However, be that as it may, it seems strange that the court referred to the necessity to disclose the pothole incident at all. Although not specifically stated so in the facts, it is implied that there was a renewal of the contract. The current insurance contract, that is the one in terms of which the plaintiff was claiming, was concluded during or about December 2008 to early

January 2009. It appears from the pleadings of the defendant insurer that at the conclusion of this December/January 2009 insurance contract, the plaintiff had warranted that he had been involved in only one incident during the previous three years, and that was the pothole incident on 2 April 2008 (par 6).

Although there would have been a pre-contractual duty to disclose material facts, at the time of the conclusion of the contract, albeit a renewal, facts that the insurer was aware of need not have been disclosed (Reinecke *et al (*2002) par 195). Furthermore, because a new contract comes into existence at the renewal of the contract, the fact that the plaintiff had not reported the pothole incident at the time, in terms of the "old contract", is now irrelevant. In any event, the occurrence of this incident did not reflect changed circumstances as laid down in the contract since it occurred prior to the conclusion of the contract and at the time of the conclusion of the contract the insurer was aware of it. Clearly on the facts there is a distinction between the pre-contractual duty to disclose the pothole incident and the contractual obligation regarding the Amanzimtoti collision. However, in *Jerrier* the fact that there was a measure of confusion is reflected in that the court opined:

> The Plaintiff should have reported these previous incidents within the time frames required in terms of the policy, even if he did not want to claim. He failed to do so. This failure amounted to a material non-disclosure or breach of the terms of the policy, absolving the Defendant from liability (par 34).

However, the decision did not turn on the non-disclosure of the pothole incident alone, as there was a second incident, the Amanzimtoti collision, which was not a minor accident and which was not disclosed.

Despite this, as already indicated the pothole incident did raise concern in the short-term insurance industry when some insurers interpreted the *Jerrier* case to mean that an insured must disclose every minor incident and which led to a call by the National Treasury on the insurance sector to be fair to car owners. That it did so highlights the fact that the duty of disclosure is still problematic. While recognising that the insured has a duty to disclose material information honestly, Treasury, in the present culture of consumer protection, determined that the insurance industry, in an endeavour to avoid poor market conduct practices, needs to evaluate whether enough is being done by insurers to inform them of the importance of disclosing material risk-related information and to ensure that they understand the implications of not doing so.

Against the background of on-going discussions between the National Treasury, the Financial Services Board (FSB) and the South African Insurance Association (SAIA), aimed at the broad objective of improving the conduct of insurers towards their clients, the FSB initiated the establishment of what is known as the Treat Customers Fairly (TCF) framework. Although the framework is not yet fully implemented, Treasury has encouraged insurers to incorporate its principles into their existing insurance contracts and business practices (National Treasury *op cit*). As a result of the interpretation of the *Jerrier* case by certain insurers, as mentioned above, Treasury specifically called upon the insurance sector "to be fair to motor car policy holders when considering insurance claims" and a meeting was subsequently held between Treasury, the FSB and the SAIA. The outcome was that SAIA declared that member companies (insurers) would not reject motor car claims on the grounds that the insured did not report minor incidents, but that customers

> are however encouraged to report any material information to their insurers in terms of the policy conditions, even if there is no intention to claim against the policy. Where vehicle damage is concerned, this would generally include damage above the excess or when a third party is involved.

The member companies then reaffirmed their commitment to embracing the TCF initiative (National Treasury FSB SAIA "Joint Media Statement: Treasury and SAIA agree on measures to enhance insurance disclosures to protect car owners" 2013-04-11 available at www.treasury.gov.za/comm_media/press/2013/2013041101.pdf (accessed 2013-08-26)).

Possibly this is a step in the right direction. However it is not sufficient. Not all insurance companies are members of SAIA and the agreement would therefore not be binding on those non-members and undesirable litigation might still follow. Moreover giving examples to serve as the guideline as to what would be material is not satisfactory. As correctly noted in *Jerrier* examples are not exhaustive (par 33) and merely positing a list of examples would not, I believe, resolve the problem.

The crux of the problem it seems to me is that an average insured person might not understand and appreciate the general principles embodied in the risk-based approach that underpins the insurer's decision to grant cover and at what premium.

Although it may be argued that in modern times the relationship between the insurer and insured is not a fiduciary one, it is certainly one that is informed by principles of fairness and good faith. One must agree with Treasury that where short-term insurers interpret the *Jerrier* case to mean that those insured are now obliged to report every minor incident or scratch on their cars to their insurer, failing which the contract may be avoided, this would not be fair to the insured and "out of proportion with the risk-based approach that is necessary for the insurance industry to function efficiently." Although Van Niekerk (2005 *SA Merc LJ* 150; 2005 *SA Merc LJ* 323) has in any case convincingly argued that the duty of disclosure should not form part our law, it currently does. As in previous cases the *Jerrier* case has shown how difficult it may be to determine what the reasonable person would have considered to be likely to have materially affected the risk to be taken by the insurer.

In modern times and specifically with regard to short-term insurance, where disclosure should take place within the context of the specific risk and within the context of the practice and policy of a specific insurer, it ought to be incumbent on the insurer to explain the risk-basis to the insured. While it may be so that the insured and insurer are not on equal footing as far as information bearing on the risk is concerned, as possibly only the insured would be in possession of the relevant information, the insurer would be in a very good position to know how the risk is determined. The risks that the insured offers for insurance are very often assessed and the premium determined according to categories: All risks that fall into a certain profile are then rated in the same way. Especially with regard to certain types of policies, such as motor vehicle policies, the insurer would know what the categories are and what the risk and rating factors would be. The insurer therefore would be in the best position to explain the "workings" of the risk-based approach and to ask the relevant questions in order to alert the insured to the kind of information required. In the *Jerrier* case for example, the actuary's testimony as to what would result in an adjustment in premium and acceptance of the risk could be briefly summarised in one paragraph. A better informed insured person who is able to assist the insurer in its assessment of its risk, would surely serve the interest of both the insured and the insurer and minimise undesirable litigation. (This would obviously not affect the remedy of the insurer if non-disclosure were fraudulent.)

If the risk-based approach is clearly explained to the insured by the insurer in the contract, it would be easier in the first place for the insured to determine the kind of circumstances that would be likely to affect the risk and what information would be material to disclose and secondly where information was not disclosed it would be easier for the court to determine what a reasonable prudent person (as informed by the risk-based explanation) would consider as being likely to have materially affected the insurer's own view on the assessment of the risk.

Where the insured makes use of the services of a broker, it is to be expected that he or she would warn the insured to disclose all material information and to assist the latter in this regard (see too Reinecke *et al* (2002) par 474). However, in the present commercial climate the practice is becoming more and more prevalent to exclude an intermediary. This makes it even more urgent that the insurer should explain the risk-based approach to the insured. Moreover, often the contract is concluded telephonically and when procuring insurance, the proposer insured may deal with an employee of the insurer at a call centre who simply records answers in respect of questions asked in a questionnaire and who personally may not even understand the risk-based approach. In consequence the proposer insured and employee may end up speaking at cross purposes.

Since insurance legislation is in the offing to replace both the Long-term and Short-term Insurance Acts by 2015 (see the National Treasury Policy Document 2011-02-23) it might be an opportune time to revisit the duty of disclosure. If it is to be retained rather than discarded, at least the reform measures should serve to resolve the problems that have been 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" ("*quanti 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 NPD 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 *quanti 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 quanti 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 quanti 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 (*Malcolmess 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 *Sarembock 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); *Sarembock* 353C *et seq*).

(ii) Opinions of dealers experienced in the sale of the particular kind of thing (*Sarembock* 353C *et seq*).

(iii) Actual sales of similar things (*Bloemfontein Market Garage*; *Sarembock* 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 (*Rusteburg 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 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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