GOLDEN CAPE FRUITS (PTY) LTD v FOTOPLATE (PTY) LTD
[1973] 3 All SA 118 (C)

Division:	Cape Provincial Division
Judgment Date:	8 March 1973
Case No:	not recorded
Before:	Diemont J and Corbett J
Parallel Citation:	1973 (2) SA 642 (C)

Keywords . Cases referred to . Judgment

Keywords

Contract - Implied term - Trade usage - Knowledge

Damages - Mitigation - Defective goods supplied - Use of defective goods - Nature of duty

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Trade usage - Printing - Printer's proofs - Consequences of approval of proofs

Trade usage - Proof - Distinction between trade usage and express term in contract - Witnesses - Number of

Cases referred to:

Barnabas Plein and Co v Sol Jacobson and Son 1928 AD 25 - Considered

Berman and Berzak v Finlay Holt and Company Ltd 1932 TPD 142 - Applied

Catering Equipment Centre v Friesland Hotel 1967 (4) SA 336 (O) - Applied

Coutts v Jacobs 1927 EDL 120 - Referred to

Crook v Pedersen Ltd 1927 WLD 62 - Referred to

Frank v Ohlsson's Breweries 1924 AD 289 - Referred to

Hazis v Transvaal and Delagoa Bay Investment Corporation Ltd 1939 AD 372 - Applied

Tropic Plastic and Packaging Industry v Standard Bank of SA Ltd 1969 (4) SA 108 (D) - Applied

Van Breda and Others v Jacobs and Others 1921 AD 330 - Applied

View Parallel Citation

Judgment

CORBETT, J.: The appellant (plaintiff below) sued the respondent (defendant below) in the magistrate's court for payment of the sum of R912 (R25 of the total of R937 claimed in the summons being abandoned by appellant during the course of the trial) as constituting damages for breach of contract or, alternatively, as damages for negligence. At the conclusion of the trial, during which both parties placed evidence before the court, the magistrate ordered absolution from the instance with costs. The appeal is against this order, appellant contending that the magistrate should have granted judgment in its favour as claimed.

The facts, as revealed by the evidence adduced before the court a quo, are briefly as follows:

The appellant carries on from Cape Town, a mail order business for the delivery of gifts in the United Kingdom and Europe. The orders are taken from people in this country and executed abroad. An important part of appellant's modus operandi is the issue to potential customers, by means of a mailing list and through the agency of leading hotels and retail stores, of a brochure describing in detail, with prices, the various types of gifts for which appellant caters and containing a detachable order form which the customer may use to place his order.

In about August, 1971 appellant decided to have a new brochure printed. The printing was to be done by the photolithographic process. According to the evidence, the more usual procedure in such a case is for the customer (i.e. the person wishing to have the printing work done) to approach a printer and commission him to execute the entire

order. If the services of a specialist photolithographer are required, then it would be the function of the printer to engage him and all arrangements for the photolithographic aspect of the work would be between the photolithographer and the printer. Appellant, however, chose to deal directly with a specialist photolithographer, viz. the respondent, and to order from it certain photolithographic plates which appellant then passed on to the printer, Derek Butcher (Pty.) Ltd., for the printing of the required number of copies of the brochure. Appellant had dealt with respondent in this way on a number of occasions in the previous four years and it would seem that this procedure could result in a saving in costs. It is this transaction between appellant, as customer, and respondent, as photolithographic specialist, that has given rise to the present litigation.

Appellant's case against respondent is based principally upon the following factual allegations, all of which are common cause between the parties:

(1) that during August, 1971 appellant entered into an oral agreement with respondent in terms whereof the latter undertook, for a reasonable remuneration, to design and prepare what are termed photolithographic "positives" to be used for the printing of the mail order brochure in question incorporating an order form;

(2) that it was a term of this agreement that the positives would be so designed and prepared that the order form would appear on the face and obverse (sic) sides of a tear-off portion of the brochure and that on this order form being detached from the brochure the information contained in the latter, pertaining to the articles which could be ordered, would remain intact;

(3) that respondent knew, at the time of the conclusion of the agreement, that these positives were to be used for the printing of brochures for despatch by appellant to its prospective customers and agencies;

(4) that, in breach of the term of the agreement described in (2) above, respondent prepared and delivered to appellant "positives" which were so designed that a brochure printed therefrom would not have the order form appearing on the face and obverse sides of a tear-off portion; nor would the brochure be such that, upon detachment of the order form, the information therein pertaining to the articles available for order would be left intact; and

(5) that, in ignorance of the fact that the "positives" were defective in this way, appellant delivered them to the printer and a large number of copies of the brochure were printed before the error was discovered.

It is further averred by appellant-and this is not common cause-that the brochures printed in this way could not be used for the purpose for which they were required and that consequently the cost of this printing, amount to R912, constituted damages, claimable by appellant, either on the basis of defendant's breach of contract or on the ground of defendant's negligence.

The main defence raised by respondent was that the contract was

entered into subject to a trade usage which in the circumstances absolved it from liability for having produced positives which were not in accordance with the terms of the agreement between the parties. This trade usage, as pleaded, was to the effect that respondent would exhibit to appellant "rough proofs" of the "positives" for approval, amendment or rejection and that, if the rough proofs were approved by appellant, then respondent's obligations under the agreement would be fulfilled by its completing and delivering the positives in accordance with the rough proofs. It was further alleged that rough proofs in which the order forms had been arranged in the manner complained of by appellant were delivered to appellant; that appellant approved of the rough proofs and instructed respondent to proceed; and that respondent duly completed the positives in accordance with the rough proofs and so delivered them to appellant, who accepted them.

Two other defences were raised on the pleadings. They were (i) that there was a term of the contract to the same effect as the trade usage alleged; and (ii) that, in any event, if there was a breach of contract, appellant acquiesced therein.

Neither of these appears to have been seriously pursued at the trial; there is, in my view, no substance in either; and, on appeal, Mr. Hathaway, who appeared on behalf of respondent, did not seek to rely upon either.

In addition, respondent put in issue the quantum of damages claimed. It appeared at the trial that in this connection it was contended that appellant should have used the defective brochures and in this way mitigated-or rather obliterated-his damages. I shall deal with this point at a later stage since it only arises if there was any liability in law to pay damages. As far as this latter issue is concerned, the sole issues would thus appear to be whether the trade usage alleged by respondent was proved to exist; and, if so, whether it applied in the instant case.

It was held by the court a quo that the trade usage had been established by respondent and that the usage protected respondent from liability for the defective positives. Upon this basis absolution from the instance was ordered. Before considering the correctness of this decision in the light of the evidence adduced, it is necessary to make some general observations regarding trade usage.

At the trial it appeared that appellant-through its director, Ashworth, who contracted upon its behalf-had no knowledge of the alleged trade usage. This was accepted by the magistrate and his finding in this regard was not challenged on appeal. Accordingly, this is not a case where the trade usage could be said to have been incorporated by the parties as an implied term of the agreement. Nevertheless, despite its ignorance, appellant would be bound by-and the contract in question would be subject to-the alleged trade usage provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract (see. *inter alia*, *Coutts v. Jacobs*, 1927 E.D.L. 120; *Crook v. Pedersen Ltd*., 1927 W.L.D. 62; *Catering Equipment Centre v. Friesland Hotel*, 1967 (4) S.A. 336 (O); also *Frank v. Ohlsson's Cape Breweries* Ltd., 1924 A.D. 289 at p. 297).

The *onus* of establishing these requirements rested upon the respondent (*van Breda and Others v. Jacobs and Others*. 1921 A.D. 330 at p. 333; *Berman & Berzak v. Finlay Holt & Co. Ltd*., 1932 T.P.D. 142 at p. 147).

Generally speaking the Courts require convincing evidence of the existence of a trade usage conforming to the requirements listed above. In van Breda's case, supra, SOLOMON, J.A., speaking of the establishment of a custom having the force of law and having referred to the views of *Voet* that a *turba* of witnesses (not fewer than ten) was required in order to do so, remarked (at p. 333)-

> "I think we should refrain from laying down any fixed rule on the subject, as the requisite number of witnesses might very well vary with their character and with the nature of the custom which is set up. Much must in every case be left to the discretion of the Court, which, however, must be satisfied beyond any reasonable doubt that the alleged custom does in fact exist. It is desirable, however, to add that it is better for him who sets up a custom to err on the side of calling too many rather than too few witnesses."

In Catering Equipment Centre v. Friesland Hotel, supra, ERASMUS, J., held that (at p. 340)-

> "In order to prove such a trade custom, the same degree of proof is required as is necessary to prove the existence of a custom in our law . . ."

The same view was adopted in *Tropic Plastic and Packaging v. Standard Bank of S.A. Ltd*., 1969 (4) S.A. 108 (D) at p.119. In *Barnabas Plein & Co. v. Sol Jacobson and Son*, 1928 A.D. 25 at pp. 30-1, however, STRATFORD, J.A., doubted whether a trade usage had to be as strictly proved as a custom in order to have the force of law. In *Crook v. Pedersen Ltd*., *supra*, KRAUSE, J., stated that (at p. 70)-

> "The evidence must amount to something more than mere opinion; it must establish the fact of the existence of the usage, and provide instances of the usage having been acted upon, otherwise the testimony will be of little weight."

In English law a similar approach is adopted. According to Halsbury, vol. II, secs. 367 and 369-

> "A usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation, trade, or position. The evidence must be clear and convincing; it must also be consistent . . . The evidence of witnesses, in order to prove the existence of a usage, must amount to something more than mere opinion; it must establish the fact of the existence of the usage, and provide instances of the usage having been

acted upon; otherwise the testimony will be of little weight. In order to establish a mercantile usage it is necessary, not only to show that a large number of influential people at the place where it is alleged to exist have agreed that it would be a good thing to have such a usage, but also that the agreement has, in fact, been acted upon; because unless it is acted on, no one is likely to challenge it."

While these views may not be entirely harmonious, they indicate, in my view, that, putting the position at its lowest, the evidence required to establish a trade usage must be clear, convincing and consistent. It must, moreover, amount to something more than mere opinion: instances of the usage having been acted upon should be provided in order to establish the fact of the existence of the usage. No rule can be laid down as to the number of witnesses required. This depends very much upon the nature of the usage in question, the character and quality of the witnesses and the extent to which their evidence is placed in issue by other evidence. In the nature of things the Court would not readily act upon the evidence of a single witness, even if uncontradicted (cf.

Berman & Berzack v. Finlay Holt & Co. Ltd., *supra* at p. 147); a fortiori if there is a conflict in the evidence. Coming now to the evidence adduced at the trial, it appears that the transaction in question was entered into by Ashworth, acting on behalf of appellant, and one Lumb, the managing director of respondent, acting on behalf of the latter. There is little difference between them as to the basic facts. Ashworth initially approached Lumb with a brochure (exh. "A") which he (Ashworth) had received from England and asked Lumb to prepare a photolithographic positive for the printing of a similar brochure, containing essentially the same information but with certain minor alterations as to content and size and with an order form attached. Exh. "A" is a rectangular piece of paper, printed on both sides. Its contents are divided, on each side, into three vertical compartments or panels (those on one side more or less coinciding with those on the other) and the brochure is evidently designed to be folded along the spaces dividing these panels. When folded the cover comes uppermost. The remainder of the brochure consists of information and illustrations relating to the various types of gift that may be ordered. The brochure is printed in red and blue upon a white background.

Lumb first produced what is termed a "bromide" (i.e. a black and white print of exh. "A") for Ashworth's approval. The purpose of this was to determine the correct size. This having been agreed to, Ashworth returned the bromide with a typed order form attached by means of scotch tape. This order form was designed to occupy both sides of a fourth panel which in the finished article would be detachable by tearing along a line of perforations. The next step was for Lumb to produce a "rough positive", which he did. Ashworth saw this, inspected it and approved it. The rough positive (exh. "B") consists of two sheets of a transparent material similar in appearance to photographic film. The two sheets are intended to be viewed, the one superimposed on the other. They were evidently exhibited in this way to Ashworth, attached in some manner to a heavy cardboard backing. On the one sheet appears all the printing and on the other, indicated by means of black shading, the disposition of the colours. Each sheet shews each side of the proposed brochure. The side containing the cover panel appears as a continuous strip on the lower half of the sheet; and the other side as a similar strip on the upper half. As one views the sheets (superimposed), the lower strip commences with the order form panel on the extreme left; and then there are three other panels, ending with the cover panel on the extreme right. The upper strip appears, in relation to the lower, upside down. If one views it upside down, the order form panel is on the extreme right, with the other three panels ranged to the left; or, if one turns the whole sheet so that this upper strip is the right way up, then the order form is on the extreme left and the other panels ranged to its right.

Thereafter Ashworth was sent the final positive which is essentially similar to the rough positive, save that it was a more finished product and incorporated any corrections that Ashworth may have made to the rough positive. Ashworth then passed the final positive on to the printer who proceeded to print 198 000 copies of the brochure. Then, at the

stage when cutting and perforating and certain overprinting had to be done, it was discovered by the printer for the first time that there was an error in that the two sides of the order form did not match up. In fact the one half of the order form appeared on the reverse side of the cover panel and the other half of the order form had on its reverse side one of the panels containing gift information. This error, which appears clearly from samples of the printing (exhs. "E" and "F") flowed directly from an incorrect layout of the photolithographic positive produced by respondent, and there is no doubt that *prima facie* respondent committed a breach of its agreement by supplying a positive with this defect. The critical question is whether the absolving trade usage contended for by the respondent was established.

The question of such a trade usage was canvassed in the evidence of all the witnesses. Ashworth, as I have indicated, had no knowledge thereof. Butcher, the proprietor of the firm which did the printing of the brochure, and who was called by the appellant, was cross-examined about the consequences of approving a rough proof and the relevant evidence reads as follows:

> "Now in your 30 years' experience as a printer, can you tell us anything about a practice Mr. Ashworth acknowledges exists as well as myself of producing rough proofs for customer's approval before finalising a printing job?-This is normal practice, yes.
>
> Now if a customer approves the rough proof and the printer then produces something there is a mistake in is the printer responsible?-Provided the proof has been adequately clear and been able to be understood I would say that the customer would be responsible.
>
> The customer would be responsible?-Provided there was adequate provision made.
>
> In other words if the rough proof is, how can we put it, if the rough proof of the job can be checked by the customer and he does check it and if the printer then produces something which corresponds with the rough proof, you say the customer is responsible for anything that happens after that?-Provided it was clear that the customer understood what he was getting.
>
> Providing the customer understood what he was getting?-Correct."

In essence this opinion would seem to amount to the following: that where a rough proof is presented to the customer for approval in such a way as to clearly convey to him what he is getting and he approves it, he cannot thereafter complain about any error in the final printing which was reflected in the proof. An important feature of this evidence is the qualification that it must be clearly conveyed to the customer what he is getting. The witness re-emphasised this point in subsequent passages in his evidence. In the course of cross-examination a document (exh. J.) issued by the Federation of Master Printers of South Africa and headed "Standard Conditions and Recognised Customs of the Printing Industry of South Africa" was put to Butcher. This contains a paragraph reading-

> "2. Proofs-Author's corrections on and after first proof, including alterations in style, will be charged extra. Proofs of all work may be submitted for customer's approval, and no responsibility will be accepted for any errors in proofs which may be passed by him."

The witness acknowledged that this paragraph reflected "a normal condition" and that the document contained "the standard conditions normally printed on the back of printers' estimate forms and so on". Butcher was also questioned about the error which occurred in the positives in question. It appeared from his evidence that it had not been noticed by the members of his own firm until the late stage already described.

He further expressed the view that it was not fair to have expected a layman customer to have "picked up" the error. When asked by the court whether he considered that the approval by appellant of the layout of the rough proof constituted proof reading, Butcher stated-

> "It's a moot point, it could be accepted as that, yes. You are submitting something to somebody to approve, what you have to decide is whether what you are giving him is fair copy on which to judge what he is getting."

Lumb was referred to exh. J and expressed the view that para. 2 thereof was applicable to "his line of business". Later his evidence-in-chief proceeded-

> "But the practice of submitting proofs and of having the customer approve the proofs and then of the printer's obligations being ended if he delivers the final thing and the approved rough proof, you heard Mr. Butcher speak of that, is that your experience as well?-The same.
>
> But does it make any difference, we are concerned with lithography instead of letter press?-I can't see any difference at all.
>
> The same thing is it?-The general same thing."

With reference to the mistake in the positive produced by his firm Lumb admitted that, although all work is checked before being sent out, this mistake was not detected by the employee of respondent handling the job. He stated that the

employee should have detected the error. As to whether the customer should have detected it Lumb was somewhat evasive, as this passage from his evidence indicates:

> "Do you expect the customer who is not a printer to spot it?-I'd say he could.
>
> Do you expect that it is probable that he would?-If he had a copy in front of him, yes.
>
> What copy?-The copy which was sent to me which was returned for checking.
>
> When your firm checks and proof reads the positive, does it have the copy in front of it?-They do.
>
> Did your firm spot the mistake with the copy in front of you?-He did not spot the mistake.
>
> Do you expect the customer to spot it with the copy in front of him?-Well the copy is sent to him for checking.
>
> Do you expect the customer to spot the mistake with the copy in front of him?-I'd say he could have spotted it, yes.
>
> It could be done. Do you expect that he would?-Yes, I thought he would have."

Later in his evidence Lumb indicated that once a positive had been approved by a customer, the photolithographer was protected, even against errors which the customer was not capable of detecting.

The last witness was Uys, the secretary of the Cape Chamber of Printing. He was called as an expert by respondent. His evidence in chief on the alleged trade usage is relatively brief. He described a proof as being

> "what the printer will submit to his client in order to establish what he presents there is what the customer had in mind"

and in regard to the purpose of submitting a proof his evidence reads:

> "What is the purpose of submitting this rough proof to the customer then?- The purpose of that is to make sure that the final product will be in accordance with the customer's order or instruction and it is to safeguard the printer again in loss or any costs thereafter as a result of a misinterpretation of the original instruction.
>
> Now how exactly does it safeguard the printer?-Well, when there is a standard condition in the printing industry ….
>
> If I may just interrupt you if you would like to refer to exh. J, I think it is your Worship, is that the same. All right carry on I was asking you how the submission of a proof protects the printer?-Once the customer has returned the final proof, the printer has then the right to continue according to that final proof and any mistakes therein would be for the account of the customer.

> Now are you saying that this is the practice only because it's referred to in those conditions, exh. K or is there some other … I beg your pardon exh. J?-This is a practise a usage shall we call it of very very long standing.
>
> How long do you think?-I would say perhaps a hundred years or more.
>
> Is it an unusual practice?-Not at all.
>
> Is any printer unaware of it?-No."

He expressed the view that there was no difference in principle between the galley proof submitted by a letterpress printer and rough positive produced by a photolithographer for approval. Only one question was asked in cross-examination. It was whether the witness could say that the final positive in issue (exh. "D") contained an error or not; to which the reply was that the witness could not say without a careful check, which would take about three-quarters of an hour. In reply to questions put at the end of his evidence by the Court Uys averred that proof-reading included a checking of the layout of a photolithographic positive.

The court *a quo* appears to have based its finding that a trade usage such as that contended for by respondent had been established upon exh. J-the Standard Conditions and Customs of the Printing Industry-and, more particularly upon para. 2 thereof, quoted above. This is clearly erroneous and, indeed, on appeal Mr. *Hathaway* did not endeavour to justify or rely upon this finding. Exh. J cannot be regarded as creating or substantiating a trade usage. It appears from the document itself that the 15 conditions listed therein-of which para. 2 constitutes one-were adopted as standard conditions "as amended", at the annual general meeting of the Federation of Master Printers held in 1959. Many of these conditions are

in their nature obscure, unlikely to have been created by usage and onerous to the customer. Moreover, the document concludes with the following instruction in heavy type:

> "It is of utmost importance that these conditions should be printed (without alteration) on the back of Members' Quotation Forms.
>
> A suitable note should be printed on the front of the Quotation Form drawing the customer's attention to the conditions under which the work is accepted, such as-
>
> > 'This estimate is given subject to the Standard Conditions of the Printing Industry as printed overleaf and such Conditions shall be deemed to be embodied in any contract arising out of this Estimate.'"

This instruction clearly indicates that it is contemplated that printers should expressly incorporate the conditions in their contracts by reference and thus make them contractually binding upon customers. This is something very different from the conditions-or some of them-becoming binding upon a customer by trade usage. It is true, as Mr. *Hathaway* pointed out, that this does not prevent individual conditions also reflecting a trade usage but, in my view, the very fact that, as exh. J. would suggest, a condition in the form of para. 2 may often be incorporated as an express term of a printing contract puts a different complexion on the whole matter.

Moreover, this is a very pertinent consideration when the evidence of the witnesses as to trade usage is evaluated. And here I would emphasize that in all cases their evidence consisted of generalized assertions or expressions of opinion: not one single instance of the application of such a usage was quoted. The present case illustrates the danger of relying upon such evidence. Without a deeper enquiry and a proper examination of actual instances it is impossible to determine to what

extent the alleged liability of the customer for faults appearing in approved proofs was due to usage and to what extent to an express term in the contract. Indeed, the fact that the evidence relied upon by respondent is all opinion evidence causes it, in my view, to fall far short of the basic requirements for the proof of a trade usage as stated in the authorities previously quoted.

But I have other problems in regard to the evidence of usage. Firstly, assuming that the usage exists, is it clearly established that it applies to a photolithographic positive? Para. 2 of exh. J speaks of "proofs" and the usage is said to relate to "proofs". In the typographical sense a "proof" means "a trial or preliminary impression taken from composed type in which typographical errors may be corrected, and alterations and additions made" (see *Oxford English Dictionary*). The word is also used in relation to engraving and photography to indicate a trial impression or print, as the case may be. It seems to me that the rough positives, and indeed the final positives, in this case are more analogous to the type-setting in printing or the original plate in engraving or the film in photography than to proofs. In fact a trial impression, using the positives, was never furnished to appellant by respondent. Mr. *Hathaway* argued that the rough positive constituted a "proof" of the final positive. This would certainly involve giving an extended meaning to the word "proof", but this is not an insuperable difficulty if it is shown clearly that this was the scope of the usage. Admittedly Uys stated that the usage applied to photolithographic positives and related, *inter alia*, to the lay-out thereof but again this was an expression of opinion; no concrete instance was cited. Butcher was far more guarded and his description of the proposition as a "moot point" indicates a fair degree of uncertainty in his mind. Furthermore, there would seem to be valid reasons for not extending the usage to photolithographic positives, certainly in so far as lay-out is concerned. In the case of a proof proper the customer receives a fair impression of the final printed product and there is no difficulty in understanding it or checking its correctness. In the case of the photolithographic positive the customer does not receive a fair impression of the final printed product and it would seem that errors as to lay-out, at any rate, may easily escape not only the layman but the technical expert too.

The second problem is to determine what the precise ambit of the usage is-assuming it to exist. Here there is an important difference between Butcher and Uys. Butcher qualified the usage by limiting it to cases where it is clearly conveyed to the customer what he is getting. Uys made no such qualification. Which of them is correct? The magistrate made no findings on credibility. In fact he did not advert to this difference. The difference is of importance because Butcher went on to indicate that he would not have expected a layman customer to have picked up the error-which would imply that it was an aspect of the positive which was not clearly conveyed to him. Uys, not having been accorded the required 45 minutes to check the positive, was not in a position to comment upon this. Mr. *Hathaway* urged the Court to prefer the evidence

of Uys as to the ambit of the usage. But is there any reason to do so? Had the evidence of one or the other been fully substantiated by reference to concrete cases, the Court might well have

been in a position to do so; but, as matters stand, where the assertion of the one is matched by the assertion of the other, I fail to see upon what basis the evidence of one can be said to carry with it a preponderance of probability. If anything, Butcher's version has the edge over Uys' on the score of reasonableness.

For these reasons, and more particularly because of the lack of evidence of instances of such a usage having been acted upon, the evidence on record fails to satisfy me (i) that a trade usage (as distinct from a commonly utilised contractual term) in regard to the consequences of a customer's approval of proofs exists; (ii) that, if there is such a usage, it applies to photolithographic positives and relates, without qualification, to all errors, including those occurring in aspects not clearly conveyed to the customer; and (iii) that, if one accepts the application to photolithographic positives subject to the qualification as formulated by Butcher, the error in the present case was in regard to a matter clearly conveyed to the customer. It follows that respondent failed to discharge the onus of establishing a trade usage which absolved it from liability for breach of contract. It is accordingly unnecessary to enter into the enquiry as to whether the alleged trade usage measures up to the legal requirements of reasonableness, certainty, notoriety, etc.

Finally, there is the question of mitigation of damages. Mr. *Hathaway* contended, albeit somewhat tentatively, that appellant could have used the defective pamphlets and so mitigated its loss. That the appellant could have done so is unquestionable; but that is not the enquiry. The enquiry is whether respondent has shown that this was a reasonable step for appellant to take in order to mitigate its loss: and in this connection it is appropriate to recall that the duty to mitigate damage does not impose upon a party-

> "an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business".

(see TINDALL, J.A., in *Hazis v. Transvaal and Delagoa Bay Investment Co. Ltd*., 1939 A.D. 372 at p. 398).

Ashworth gave convincing reasons as to why it was not reasonable to have expected appellant to use the defective brochures. It would have meant that the two halves of the order form would not have been back-to-back on a single panel but widely separated at opposite ends of the brochure. This would have been inconvenient-the order form could not be detached along a single line of perforations-and confusing to the customer, especially as the one half of the form has at the bottom of the page the instruction "P.T.O.". The detachment of the two halves of the form-or one of them-would remove the information relating to the appellant's products contained on the reverse sides. And as Ashworth forcibly pointed out prospective customers and agencies would have thought how can we trust appellant with orders when it cannot even print a correct brochure. It is also significant that when the error was discovered respondent immediately undertook to produce a corrected positive: it was never then suggested that the defective printing should be used. In my view there is no substance in this point.

Accordingly I have come to the conclusion that the magistrate

reached the wrong conclusion. The appeal succeeds with costs and there is substituted for the magistrate's order the following:

"Judgment for the plaintiff in the sum of R912 and costs."

DIEMONT, J., concurred.

Appearances

L Rose-Innes - Advocate/s for the Appellant/s

EW Hathaway - Advocate/s for the Respondent/s

Reilly, Reilly and Tucker - Attorney/s for the Appellant/s

*Fairbridge, Arderne and Lawto*n - Attorney/s for the Respondent/s