THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1212/19

In the matter between:

THE MINISTER OF POLICE **APPELLANT**

And

UNDERWRITERS AT LLOYDS OF LONDON **RESPONDENT**

Neutral citation: *The Minister of Police v Underwriters at Lloyds of London* (Case no 1212/19) [2021] ZASCA 72 (8 June 2021)

Coram: WALLIS and MAKGOKA JJA and KGOELE, PHATSHOANE and GOOSEN AJJA

Heard: 14 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The

date and time for hand-down is deemed to be 09h45 on 8 June 2021.

Summary: Delict – claim against Minister by insurance underwriters on ceded claim – involvement of members of police in robbery of company providing security and cash management services to banks – employee of company conspiring with robbers – proposed amendment of plea to introduce defence based on principles of *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defenditis* alternatively common law principle of illegality – availability of proposed defence – respondent alleged to be vicariously liable for conduct of employee – no basis to attribute fault to respondent to found participation in illegal conduct – proposed amendment rendering plea excipiable - position of concurrent and joint wrongdoers discussed—appeal dismissed.

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ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J, sitting as court of first instance).

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Goosen AJA (Wallis and Makgoka JJA and Kgoele and Phatshoane AJJA concurring)

[1] A dispute over a proposed amendment to the appellant's plea is the subject of this appeal. It arose in the following circumstances. On the night of 27 and 28 April 2014 a group of robbers gained entry to the premises of SBV Services (Pty) Ltd (SBV) in Witbank, accessed a secure vault and made off with approximately R100 million, which SBV was holding on behalf of several banks. Investigation of the robbery established that a number of persons, including two police officers, Warrant Officer Khubeka (Khubeka) and Detective Constable Lekola (Lekola) were involved in the planning and execution of the robbery. The investigation also established that an employee of SBV, Ms Gift Nkosi (Ms Nkosi), who was employed as a security compliance officer, had conspired with Khubeka and Lekola and had provided information to them to facilitate the commission of the offence.

[2] The respondent, Underwriters at Lloyds of London (the Underwriters), had provided insurance cover to SBV against this type of event. This was in terms of a written contract of insurance rendering them liable to compensate SBV for losses that it might incur arising from the provision of the cash handling and storage services it offered to its clients. Under the terms of the written contracts concluded with its clients, Standard Bank, First Rand Bank, Absa Bank and Nedbank, SBV was said to be obliged to compensate them for any and all losses incurred as a result of the theft or destruction of cash held by it on behalf of its banking clients.[1] They have done so and in turn the Underwriters paid SBV in terms of the insurance policy.

[3] Thereafter the Underwriters took cession of the banks' claims against SBV and third parties, including the Minister, and cession of SBV's claims arising from the robbery. It instituted a delictual claim against the Minister of Police in which it claimed damages in an amount in excess of R100 million. The cause of action was based on the allegation that the appellant's employees, Khubeka and Lekola, had acted within the course and scope of their employment as police officers in failing in their legal duties to prevent the robbery and not to participate in criminal activity. It was alleged that this rendered the appellant, the Minister of Police (the Minister), vicariously liable for the losses incurred as a result of the robbery.

[4] The Minister raised defences founded upon the terms of the contractual relationship between SBV and its clients which, it was alleged, limited the liability of SBV. It was accordingly pleaded that the Underwriters had not

[1] There were some differences between the contracts concluded with the different banks but these did not affect the issues before us.

incurred liability to compensate SBV and therefore had not suffered losses for which the Minister was liable. In relation to the element of vicarious liability, the Minister denied that it was so liable. A number of admissions had been made in relation to these defences at pre-trial conferences. Both the defences and the admissions remain extant and it is unnecessary for us to consider them further.

[5] The trial was scheduled to commence in the high court on 7 October 2019. Shortly before the commencement of the trial the Minister gave notice of its intention to amend its plea. The trial court, Mavundla J, after hearing argument at the commencement of the trial, dismissed the application in an *ex tempore* judgment. On 9 October 2019 the trial court furnished reasons for the order in the light of an intention to appeal the order. It thereafter granted leave to appeal to this court. The trial was, inevitably, postponed.

[6] The proposed amendment sought to delete paragraph 11 of the plea (which contained a blanket denial of facts pleaded in relation to the robbery at SBV's premises) and replace it with the following averments:

'11.1 Save for admitting that a robbery occurred at the place and date alleged, Defendant has no knowledge of the remainder of the allegations and accordingly deny same.

11.2 Defendant further pleads that Ms. S. G. Nkosi, who was during the relevant period employed by SBV Witbank ("SBV") as security and compliance officer, wilfully and intentionally participated in the planning, preparation and execution of the robbery by inter alia;

What followed were a number of subparagraphs that detailed conduct on the part of Ms Nkosi indicative of her collaboration and conspiracy with the co- perpetrators of the robbery. The pleading then proceeded:

11.3 Defendant denies, based on the principles of *ex turpi causa non oritur actio* and / or *in par delicto* and / or the common law principle that courts ought not to sanction or encourage illegal activity that the Plaintiff has a claim against Defendant for inter alia the following reasons:

11.3.1 SBV is vicariously liable for the conduct of Gift [Ms. Nkosi] as pleaded above; and

11.3.2 Gift intentionally participated in the robbery that allegedly caused the damages Plaintiff now claims from the Defendant in this action; and

11.3.3 SBV participated in the alleged illegal conduct and is a joint wrongdoer who intentionally planned and perpetrated the robbery which allegedly caused damages to SBV; and

11.3.4 SBV's claim against Defendant was ceded to Plaintiff and / or Plaintiff claims on the basis of subrogation.'

[7] The Underwriters opposed the proposed amendment on the basis that the defence sought to be pleaded was bad in law; that it lacked averments necessary to sustain a cause of action; and, accordingly, that the amendment would render the plea excipiable. The trial court dismissed the application to amend the plea on two bases. It held that the vicarious liability of SBV for the unlawful conduct of Ms Nkosi cannot be used "as a shield to ward off" a claim directed against the Minister. As such the proposed amendment did not introduce a triable issue. The court also held that the belated introduction of the amendment, given that the facts supporting the amendment had been known to the Minister for some time, militated against granting the amendment.

[8] Before this court it was argued that the trial court's conclusion that the amendment did not introduce a triable issue, was wrong. The argument was

based on what counsel contended was a generally applicable principle of the common law, that a court will not sanction illegality. On this basis, so it was argued, the maxims *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defenditis* applied. The pleaded facts, so the argument went, established that SBV was a 'co-perpetrator' insofar as the robbery was concerned. Accordingly, it (and by extension the Underwriters) could not profit from its own wrongdoing by pursuing a claim against the other wrongdoer. It was submitted that, insofar as might be necessary, the common law ought to be developed to recognise the application of the principle of illegality in relation to a delictual cause of action.

[9] Counsel for the Underwriters argued that the pleaded 'defence' was founded upon a misconception of the basis upon which SBV may be held liable for the conduct of its employee, Ms Nkosi. It was submitted that no basis existed to attribute Ms Nkosi's intentional and unlawful conduct to SBV. SBV was accordingly not a party to any illegal conduct and no basis existed to non-suit it (and by extension the Underwriters) against those joint wrongdoers who conspired to cause SBV harm through their unlawful conduct.

[10] The scope and operation of the maxims *ex turpi causa* and *in pari delicto* was definitively set out by this court in *Jajbhay v Cassim*.[2] Watermeyer JA after tracing the *condictio ob turpi vel iniustum causam* and the exceptions thereto said the following:[3]

[2] *Jajbhay v Cassim* 1939 AD 537.
[3] Ibid at 550 – 551.

'The principle underlying the general rule is that the Courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule. The real difficulty lies in defining with any degree of certainty the exceptions to the general rule which it will recognise.'

[11] In a concurring judgment Stratford CJ identified the essential character of the maxims in the following terms:[4]

'We are concerned with the application of two legal maxims taken from Roman law by all modern civilised legal systems. The first is the maxim *ex turpi causa non oritur actio* and the second *in pari delicto potior conditio defendentis.* They have been called "cognate" doctrines, an expression, which I think, perhaps has served to confuse their essential distinctive character. In my view the first maxim prohibits the enforcement of immoral or illegal contracts and the second curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts.'
(Emphasis added.)

[12] Stratford CJ went on to explain that:

'The moral principle which inspired the enunciation of those two maxims is obvious and has often been expounded. It is to discourage illegality and immorality and advance public policy.'

[13] The exposition of the law in *Jajbhay v Cassim* has been consistently followed by our courts since 1939. Reference need not be made to the many cases which have referred to and applied the principles it enunciated.[5]

[4] Ibid at 540.
[5] For a more recent treatment see *Afrisure CC and Another v Watson NO and Another* [2008] ZASCA 89; 2009 (2) SA 127 (SCA), [2009] 1 All SA 1 (SCA).

[14] In debating the argument that the maxims *ex turpi causa non oritur actio* and *in pari delicto potior conditio defenditis* are to be applied in the context of a delictual claim, counsel on both sides referred us to a Canadian judgment and a number of English cases dealing with these principles. They could not, however, point to any South African authority which suggested that these maxims have found application outside the field of contract and restitution under the *condictiones*, on which our law of enrichment is based. Nor could I find any such authority. For reasons which will be set out more fully below it is not necessary to decide whether these maxims, as presently applied by our courts, find application in the context of a delictual claim and if so, whether a defence based upon such principles is sound in law. Nor is it necessary to traverse the foreign authorities to which reference was made or to consider the effect of the judgment in *Patel v Mirza*[6] by which the English law on the maxims has been clarified in terms very similar to the law as laid down in *Jajbhay v Cassim*.

[15] The reason for this lies in the manner in which the Minister has framed the proposed amendment of the plea. This court is not concerned with the merits of the plea. It is concerned with a far narrower determination, namely whether the pleading introduces a sustainable defence in the sense that it sets out averments which if established at trial would afford a defence or whether in its form it is excipiable.

[16] In order to place the plea in a proper perspective it is necessary to examine the nature of the claim by the Underwriters. They advanced their

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[66] *Patel v Mirza* [2016] UKSC 42; [2017] AC 467; [2017] 1 All ER 191 (SC).

claim on three distinct bases. First, they sued as cessionary of SBV's claim against the Minister. Secondly, they sued on the basis that they had been subrogated to SBV's claim in consequence of their obligation to indemnify SBV against its liability to the banks. Thirdly, they sued as cessionaries of the banks' claims against both SBV and the Minister. All three bases were advanced in delict on the basis of a breach by the two policemen of a 'statutory, constitutional and/or legal duty' owed to SBV to prevent the robbery and resultant loss and not to take part in such criminal activity. No separate legal duty was alleged in relation to the claims ceded to the Underwriters by the banks. Notwithstanding the absence of any such allegation, it was alleged that the Minister became vicariously liable to each of the banks and their retail customers for the loss each client sustained in the robbery.[7] It is unclear on what basis the Underwriters contended that a breach of a duty owed to SBV gave rise to a claim by the banks against the Minister.

[17] The first two bases pleaded by the Underwriters are based upon a legal duty owed by the South African Police Service to protect SBV against crime and to prevent the robbery. SBV possessed, but did not own, the money that was stolen and alleged various bases upon which it nonetheless claimed to have suffered loss as a result of its being stolen. The claim advanced by the Underwriters on the first two grounds was therefore SBV's claim. This leads to the first significant problem with the proposed amendment, namely that it involves an allegation that SBV is vicariously liable for a theft from

[7] The respondent's heads of argument ignored the first of these bases and suggested that the Underwriters had a claim for the loss they had suffered due to the robbery in consequence of being liable to indemnify SBV. Such a claim was not pleaded, does not appear to be based on any legal duty owed by the Minister to the Underwriters and seems on the face of it to be entirely novel. As it was not pleaded it can be disregarded.

itself. In this regard *Absa Bank v Bond Equipment (Pretoria) Pty Ltd*[8] is instructive.

[18] In that matter, Bond Equipment (the plaintiff) had instituted a claim for damages against the Bank (the defendant) based on the alleged negligence of the defendant's employees. It was alleged that the plaintiff was the true owner of non-transferrable cheques which were delivered to its employee, one Steyn, who stole the cheques. The defendant collected the cheques for payment to Bond Equipment (Pretoria) (not the plaintiff) an account set up by Steyn. The defendant defended the action on the basis that it was absolved from liability for its negligence because the plaintiff was vicariously liable for Steyn's conduct.

[19] Harms JA, writing for the majority, said the following:

'Two of the questions of law are interrelated and they are (a) whether the plaintiff is in law vicariously liable for the actions of Steyn (its employee who stole the cheques) and (b) whether the Bank is liable to the plaintiff for any negligent actions performed by its employees in view of Steyn's conduct as described in the stated case.

In order to answer these questions, it is necessary to understand the defence upon which the Bank wishes to rely. Its case is that Steyn, acting within the course and scope of his employment with the plaintiff, stole the cheques after they had come into his possession; since Steyn was so acting as employee, the plaintiff is vicariously "liable" for his intentional wrongful act; the Bank's employees were merely negligent in collecting the cheques on Steyn's behalf; a plaintiff who acts with *dolus* (albeit through an employee) cannot claim damages from a negligent defendant; therefore the Bank cannot be held liable for the plaintiff's loss.

[8] *Absa Bank v Bond Equipment* 2001 (1) SA 372 (SCA); [2001] 1 All SA 1 (A).

In the court below Willis AJ had some difficulty with the formulation of question (a) and redrafted it by asking whether the plaintiff is in law vicariously liable to the defendant for the actions of Steyn (at 67I). Both the formulation and the original question tend to obscure the issue. *A plaintiff can never be "liable" to another for a delict committed against him. The theft was not a delict vis-à-vis the Bank and vicarious liability on the part of the plaintiff can therefore not arise.* The question which should have been posed is whether the plaintiff is answerable or responsible for the theft by Steyn, in other words, whether his (intentional) wrongdoing can be taken into account in reducing or expunging the liability of the concurrent wrongdoer (the Bank).'(Emphasis added)

[20] The passage I have emphasised from Harms JA's judgment is applicable in the present case. Ms Nkosi's theft of the money in SBV's possession, in conjunction with the other robbers, was not a delict vis-à-vis the Minister. Accordingly, no question of vicarious liability on the part of SBV for her actions arises as alleged in para 11.3.1 of the amendment. It follows that SBV cannot have 'participated' in the robbery as alleged in para 11.3.3. The whole notion of someone participating in a robbery, where they are both the person robbed and at the same time liable in delict for the actions of the robber, is a contradiction in terms.[9] The proper question, as Harms JA pointed out, is whether the conduct of Ms Nkosi can be taken into account in reducing or expunging the liability of the Minister.

[21] In this case SBV might be vicariously liable to its clients, the banks, for harm they suffered in consequence of Ms Nkosi's conduct, but it is not vicariously liable to itself. If, as a consequence of delictual conduct on the part of an employee, such as Ms Nkosi acting in concert with employees of the Minister, SBV had suffered harm, SBV was entitled to institute a delictual

[9] There may be a liability in contract, as in this case, as between SBV and the banks.

claim against the appellant and Ms Nkosi, or any other member of the gang of robbers. Ms Nkosi could hardly contend in her defence that, by virtue of the fact that her conduct would theoretically render SBV liable to another party, SBV had no claim against her because her fault was to be attributed to it. The delict was committed against SBV. For the same reason Ms Nkosi's conduct cannot be attributed to SBV in order to enable the Minister to resist the Underwriters' claim.

[22] That takes me to the next problem with the draft amendment, namely, the allegation that the Minister and SBV were joint wrongdoers in relation to the robbery. The distinction between joint wrongdoers and concurrent wrongdoers was explained in *Lloyd-Gray* in the following terms:[10]

'At common law a distinction is drawn between joint wrongdoers and concurrent wrongdoers. … Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers, on the other hand, are persons whose independent or "several" delictual acts (or omissions) combine to produce the same damage … It was accepted by this Court in *Union Government (Minister of Railways) v Lee* 1927 AD 202 that, subject always to there being an intact chain of causation, one concurrent wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum* ...

….The distinction between joint and concurrent wrongdoers is of course now largely academic in view of the provisions of the Act which recognise and regulate a right of contribution between "joint wrongdoers" who are so defined as to include both joint and concurrent wrongdoers at common law.

Joint wrongdoers are undoubtedly jointly and severally liable at common law. This has always been so even when the one paying was not entitled to recover a contribution from

[10] *Nedcor Bank t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA).

another. The absence of a right to a contribution *inter partes* has no effect on their joint and several liability to the plaintiff. In the case of concurrent wrongdoers a right to a contribution has generally been recognised …. But even if in a particular case such a right were not to be afforded, that would not affect the nature of their liability to the plaintiff. In any event, it is difficult to appreciate why a concurrent wrongdoer guilty of *culpa* who pays a plaintiff in full should be precluded from having recourse against a concurrent debtor guilty of *dolus*. At common law a defendant guilty of *dolus* could not raise a defence of contributory negligence on the part of the plaintiff (*Pierce v Hau Mon* 1944 AD 175 at 197–198) and this rule and the denial of a right of recourse against a joint wrongdoer were probably founded on the principle embodied in maxims such as *ex dolo malo non oritur actio* and *ex turpi causa non oritur actio*…. Joint wrongdoers, having committed the delict acting in concert or in furtherance of a common design, would usually have acted wilfully. But if a concurrent wrongdoer guilty of *culpa* has recourse against another concurrent wrongdoer similarly guilty of *culpa* it follows *a fortiori* that he would have such right against a concurrent wrongdoer whose fault took the form of *dolus.*'

[23] I accept that Ms Nkosi and the two policemen, together with other members of the gang,[11] were joint wrongdoers in relation to SBV insofar as the robbery was concerned. But that does not mean that their respective employers are joint wrongdoers on the basis of vicarious liability for their actions. As already pointed out SBV cannot be liable to itself for the robbery. The only basis upon which it could be contended that SBV and the Minister are joint wrongdoers would be in relation to an un-particularised duty owed to the banks. But the pleaded basis for the Minister's alleged liability is a breach of the legal duty to prevent crime and safeguard the public against it.[12] The liability of SBV to the banks is contractual not delictual.[13] Given the

[11] Thirteen individuals were subsequently convicted of various charges and significant evidence was given for the State by Ms Nkosi and another member of the gang.
[12] *Minister of Safety and Security v Van Duivenboden* [2002] 6 SA 431 (SCA) paras 21-22.
[13] *Trustees for the time being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA); [2007] 1 All SA 240 (SCA) paras 21-26.

different legal bases for claims by the banks against both SBV and the Minister they cannot be joint wrongdoers under the common law as alleged in para 11.3.3.[14]

[24] The proposed plea, in my view, fundamentally misconstrues the concept of vicarious liability. 'Vicarious liability' is a form of liability which is imposed upon one person for the wrongful and unlawful conduct of another. It is, in essence, a strict liability, that is, liability which arises through no fault on the part of the person held liable. It is imposed by law on the basis of the nature of the relationship between the actual wrongdoer and the person held liable.[15] Whether, in a particular case, the law requires that liability be imposed is a matter informed by legal and public policy and the values that underpin the operation of the law. In the present matter the application of the principles by which, and the test for vicarious liability need not concern us. What is at issue is the nature of the concept of vicarious liability itself, and what the consequence is of a pleading premised thereupon.

[25] In *Minister of Safety and Security v F*[16] Nugent JA said,

'Vicarious liability has a long but uncertain pedigree. In essence, it may be described as the liability that one person incurs for a delict that is committed by another, by virtue of the relationship that exists between them. There are two features of vicarious liability in its traditional form that are trite but they bear repetition. The first is that vicarious liability arises by reason of a relationship between the parties and no more – it calls for no duty to be owed by the person who is sought to be held liable nor for fault on his part. The second

[14] The expression 'joint wrongdoer in the Apportionment of Damages Act 34 of 1956 encompasses both joint and concurrent wrongdoers.
[15] *Minister of Safety and Security and Others v Van der Walt and Another* [2014] ZASCA 174 (SCA), [2015] 1 All SA 658 (SCA) at par 23.
[16] *Minister of Safety and Security v F* [2011] ZASCA 3; 2011 (3) SA 487 (SCA) at par 15.

feature is that it is secondary liability – it arises only if there is a wrongdoer who is primarily liable for the particular act or omission.[17]

[26] Since vicarious liability is, insofar as the liable party is concerned, not fault based, the imposition of liability upon that person does not involve the attribution of fault. In simple terms this means that the intention to commit unlawful conduct on the part of the primary wrongdoer (in this instance Ms Nkosi) is not attributed to the party secondarily liable (in this instance SBV). Paragraph 11.3.3, as pleaded, is therefore, as a matter of law, in conflict with the concept of vicarious liability pleaded in paragraph 11.3.1 of the proposed amendment

[27] The Underwriters claims, on the basis of having taken cession of the banks' claims against wrongdoers who caused them harm consequent upon the robbery, are delictual claims which, at least notionally, may be pursued against several parties. The possibilities are that they lie against the Minister on the basis of its vicarious liability for the conduct of Khubeka and Lekola; against SBV on the basis of its vicarious liability for Nkosi's conduct, and probably directly against Nkosi and other members of the gang. In each instance the basis upon which liability would need to be established would differ – a different set of duties would be involved and a different set of policy considerations would apply. In the case of the Minister and SBV, the actions for which they are said to be vicariously liable are independent of one another, but contributed to the same loss to the banks. They would be

[17] Although the Constitutional Court reversed the judgment in *Minister of Safety and Security v F* (supra) (see *F v Minister of Safety and Security* 2012 (1) SA 536 (CC)), it did so upon the application of the test to establish vicarious liability on the part of the Minister and without comment upon the SCA's exposition of the concept of vicarious liability.

concurrent wrongdoers at common law. Their conduct vis-à-vis the primary wrongdoers who acted in concert would also be concurrent.[18] Since the losses suffered by the banks would involve several concurrent wrongdoers, the position of the wrongdoers inter se, may be regulated by the Apportionment of Damages Act 1956 (the Apportionment Act). This is the point made by Harms JA in the passage quoted above.[19]

[28] The parties were requested by the court to address this question directly. Counsel for the Minister took the view that the Act does not apply on the basis that the Act seeks to deal with contributory negligence and that the term 'fault' as used in the Act does not contemplate intentional conduct. Counsel, however, suggested in supplementary heads of argument on this point that in the event that the trial court found that the maxims *ex turpi causa* and *in pari delicto* did not apply it would be open to it to determine the liability *inter se* on the basis of negligence. What was clear from their submissions was that reliance on the Apportionment Act raises a number of difficult issues that have not been fully debated before us and do not arise under the existing pleadings or the amendment.[20] It is preferable therefore to say nothing further under this head.

[29] The proposed pleading is, in its formulation, bad in law and will result in the pleading being excipiable for the reasons I have given. It follows that

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[18] See *Nedcor Bank t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA).

[19] In any proceedings where this was raised attention might have to be given to the implications of the judgment in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 (4) SA 551 (SCA); [2001] 4 All SA 161 (SCA).

[20] We were referred under this head to *Greater Johannesburg Metropolitan Council v Absa Bank t/s Volkskas Bank* 1997 (2) SA 591 (W); *Randbond Investments (Pty) Ltd v FSP (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W); and *Lloyd Gray Lithographers v Nedcor Bank Ltd t/a Nedbank* 1998 (2) SA 667 (W).

the trial court was correct to dismiss the application for leave to amend the plea. As I have stated, the trial court refused leave to amend also on the ground that the delay in seeking to amend was inadequately explained and would give rise to prejudice. That aspect of the case was rendered academic when the trial was postponed to allow the appeal to be prosecuted.

[30] In the result I make the following order:

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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G GOOSEN

ACTING JUDGE OF APPEAL

Appearances

For appellant:	M. M. W. Van Zyl SC, with him C.G.V.O. Sevenster
Instructed by:	State Attorney Bloemfontein
For respondent:	M. A. Kriegler SC, with him N. K Nxumalo
Instructed by:	Norton Rose Fulbright Webbers Attorneys Bloemfontein.