THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20/10

FREDDY HIRSCH GROUP (PTY) LTD Appellant

and

CHICKENLAND (PTY) LTD Respondent

Neutral citation: ***Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*** **(20/10) [2011] ZASCA 22 (17 March 2011)**

BENCH: **HARMS DP, PONNAN, MAYA, SHONGWE and TSHIQI JJA**

HEARD: **14 FEBRUARY 2011**

DELIVERED: **17 MARCH 2011**

SUMMARY: Purchase and sale – delivery of prohibited foodstuff – claim *ex contractu* – whether loss too remote – claim *ex delicto* – pure economic loss – wrongfulness – policy considerations determining liability considered.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Blieden 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

PONNAN JA (HARMS DP, MAYA, SHONGWE and TSHIQI JJA concurring):

Introduction

[1] Messrs Robert Brozin and Fernando Duarte entertained the vision of establishing a chain of fast food chicken outlets. In time they were joined by Mr Eric Parker, who had expertise in marketing and brand development and the three of them launched Nando's, a branded fast food franchise chain specialising in grilled Portuguese chicken. From those relatively humble beginnings in 1991, the Nando's brand rapidly expanded within South Africa, into neighbouring countries and some 30 countries internationally. The respondent, Chickenland (Pty) Ltd (Chickenland), a wholly owned subsidiary of Nando's Group Holdings Limited, is the primary operating entity within the Nando's Group.

[2] The business model chosen by Chickenland for the franchise business is what may loosely be termed a joint venture partnership. Each new franchise store became a subsidiary of Chickenland. Typically Chickenland owned 51 percent of that subsidiary and its joint venture partner, who was the actual operator of the store, owned 49 percent.

[3] Whilst still in its infancy, Chickenland prepared the chicken in a central kitchen

and delivered them in refrigerated trucks to the restaurants of its joint venture partners, where they were sold to customers. But, as the Nando's brand expanded it proved more convenient for Chickenland to supply its joint venture partners with marinades, sauces and dressings that were prepared to its specifications. In time, it also began to market bottled sauces initially through its restaurants and thereafter through leading supermarket chains, both locally and internationally.

[4] Spices and condiments were important ingredients of Nando's sauces and marinades. When Chickenland experienced problems with its then supplier of spices, it turned to the appellant, the Freddy Hirsch Group (Pty) Ltd (Hirsch), whose primary business was the manufacture of spices. On 29 August 1994, Chickenland applied in writing to Hirsch on the latter's standard credit application form for a line of credit. Hirsch approved the application and took to supplying the latter with spice packs consisting of a blend of different spices prepared in accordance with the latter's specifications.

[5] The reverse of the Hirsch credit application form that had been completed by Miss Lesley Smith, who was duly authorised to do so on behalf of Chickenland, contained what were termed Standard Conditions of Sale and Credit. Those included, inter alia, provisions relating to payment (which had to be effected with 30 days), interest, reservation of ownership and delivery. Most importantly it provided:

'4. LIMITED LIABILITY

4.1 The Company shall not be liable for any defect in the goods by reason of faulty production, workmanship, quality of raw materials or otherwise unless:

4.1.1 it is established that the goods were correctly installed and properly cared for and used, and

4.1.2 the Customer notifies it in writing of the defect within 7 (SEVEN) days of the delivery of the goods.

4.2 The Company's liability shall be limited, as its option, to:

4.2.1 repairing such goods free of charge: or

4.2.2 supplying the Customer with similar replacement goods free of charge or

4.2.3 passing a credit for the purchase price of the goods.

provided that the Company shall under no circumstances whatsoever be responsible for any consequential or other damages whatsoever.

4.3 Notwithstanding anything to the contrary contained or implied in these conditions the liability of

the Company arising out of any defect in the goods shall not exceed the purchase price of the goods concerned.

4.4 Save as set out herein all conditions, terms, warranties or representations (express or implied statutory or common law) as to quality fitness, performance or otherwise in relation to the goods are excluded.

4.5 When the Customer purchases the goods for re-sale, the Customer shall ensure that the purchases of the goods is appraised of these conditions so as to ensure that the purchaser's claims (if any) against the Company are limited to the extent stated herein.

4.6 The Customer indemnifies and holds the Company harmless against all claims, loss, damage, expense or proceedings of whatsoever nature against or on the part of the Company arising out of the sale or distribution of the goods whether defective or not for any reason whatsoever.'

[6] In signing the application on behalf of Chickenland, Ms Smith inscribed the words 'standard conditions not checked' immediately above her signature and below the following warranty:

'I/we warrant and certify that the above information is true and correct and that I am/we are duly authorised to sign this application for credit facilities and I/we have read the conditions of credit set out on the reverse hereof and agree to be bound thereby'.

[7] During January 2004 Geoff Bloch, the group technical compliance officer, who was responsible for all facets of food safety within the Nando's group both locally and globally, was visiting the United Kingdom when he was informed that the UK health authority in Manchester had tested Nando's extra hot peri-peri sauce and found it to be positive for Sudan 1 dye. Sudan 1 is a red dye that is used in colouring solvents, oils, waxes and shoe and floor polishes. It is considered to be a genotoxic carcinogen rendering it unfit for human consumption. It has been banned by the World Health Organisation and its presence is not permitted in foodstuff for any purpose in this country and most others internationally.

[8] Chickenland was obliged by the Food Standards Agency of the UK to cause newspaper advertisements to be placed in newspapers in the UK informing consumers of the Agency's finding and given 48 hours to withdraw any contaminated products from all supermarket shelves in the UK. Subsequent investigations identified cayenne pepper that had been sourced in India by Hirsch and supplied to Chickenland in certain of the

spice packs as the contaminant. A worldwide recall of Chickenland's peri-peri sauces followed.

[9] The directors of Chickenland then met on several occasions with Freddy Hirsch, the chairman and founder of the Hirsch Group and his sons, all directors of Hirsch in the hope that they could persuade Hirsch to compensate them for their losses, which at that stage was assessed to be in the region of R12m. Aside from an undertaking by Hirsch to extend the credit period first from 30 to 60 days and thereafter to 90 days, no further agreement could be reached. Hirsch having referred the claim to its insurers eventually refused to engage in any further discussions with representatives of Chickenland, on the basis, so it was asserted by them, that continuing to negotiate had the potential to jeopardise their insurance claim.

[10] In the meanwhile the extended period of 90 days for repayment having been exceeded by Chickenland, Hirsch began to agitate for payment of the outstanding moneys due to it. Chickenland refused to pay. Impasse having been reached, Hirsch relying on the standard terms and conditions to be found on the reverse of Chickenland's credit application, caused summons to be issued against Chickenland for payment of the sum of R1 368 861.69 in respect of goods sold and delivered by it for the period November 2002 to April 2004. That claim was admitted by Chickenland. But, Chickenland asked that judgment on Hirsch's claim be stayed pending adjudication on its counterclaims.

[11] Chickenland alleged that the material, express and/or implied and/or tacit terms of the agreement were that:

(a) each of the spice packs would be fit for human consumption;

(b) each of the spice packs would be subjected to a stringent process of quality control and testing which would include the detection and removal of any foreign matter or substance not fit for human consumption;

(c) the ingredients in the spice packs would be subjected to acceptable selection processes to comply with the requirements of the Food Standards Agency in the UK and the applicable South African legislation including the Foodstuffs, Cosmetics and

Disinfectants Act 54 of 1972 and the regulations promulgated thereunder and with the applicable law in foreign jurisdictions where the spices were to be supplied;

(d) the spice packs would be free of any banned substance.

Asserting that those terms had been breached inasmuch as the spice packs contained Sudan 1, which at all material times was banned for use in food products thus rendering them unfit for human consumption, Chickenland's counterclaim for damages for breach of contract and delict alleged, inter alia, that:

'12 In breach of the terms and warranties applicable to such transactions however:

12.1 each of the spice packs listed . . . contained a substance known as Sudan 1 which is and was at all material times:

12.1.1 banned for use in food products in terms of GNR1008/1996 promulgated under the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (the Act) . . . ;

12.1.2 a substance which rendered the spice packs unfit for human consumption and which contaminated the spice packs;

12.1.3 a substance considered by the Food Standard Agency in the United Kingdom and relevant South African Statutory Authorities as being a banned substance in foodstuffs and/or harmful or potentially harmful to human beings;

12.1.4 an added colourant.

12.2 the spice packs were unfit for human consumption or for use in products prepared for human consumption;

12.3 the spice packs had not been subjected to a stringent process of quality control and testing or to a process for the detection of and removal of foreign matter;

12.4 the ingredients in the spice packs had not been subjected to acceptable selection and blending processes;

12.5 the ingredients in the spice packs were not of German origin and source;

12.6 the plaintiff had not performed such test/s as was required to detect the presence of an added colourant in the spice packs which the plaintiff could have done cost effectively and without difficulty.

13 In the *bona fide* and reasonable but mistaken belief that the spice packs complied with the terms of the agreements:

13.1 the defendant made payment to the plaintiff of the total sum of R1 209 632,83 made up as . . . ;

13.2 the defendant utilised such spice packs in the manufacture and production of various sauces, marinades and bastings (the defendant's sauces);

13.3 the defendant sold and supplied the defendant's sauces to Brotrade (Pty) Limited ("Brotrade"):

13.4. Brotrade in turn sold and supplied the defendant's sauces to:

13.4.1 the following country-based distributors ("country-based distributors"):

13.4.1.1 Nando's Chickenland Inc. (USA);

13.4.1.2 Nando's Chickenland (Canada) Inc. (Canada);

13.4.1.3 The Grocery Company Limited (United Kingdom);

13.4.1.4 Nando's Grocery Australia Pty Limited (Australia);

13.4.1.5 Patleys (Pty) Limited (South Africa); and

13.4.1.6 Lufil Packaging (Pty) Limited (South Africa);

13.4.2 Nando's Chickenland Ltd (United Kingdom) ("Nando's UK") a restaurant operation;

13.5 The country-based distributors, in turn, sold and supplied the defendant's sauces to retail outlets in the countries in which they conduct business.

14 In consequence of the breaches referred to . . . above;

14.1 the defendant's sauces were subject to recall and were recalled from wherever they had been supplied and were subjected ultimately to destruction;

14.2 the defendant was obliged to and did replace the defendant's sauces that had been supplied to each of Brotrade, the country-based distributors and Nando's UK;

. . .

14.4 the defendant incurred the . . . wasted expenditure[1] thereby suffering damages in such amount.'

[12] Save for admitting that it was:

(a) an implied term of the agreement that the spice packs would not contain any banned substance; and

(b) a tacit term that the spice packs would be fit for human consumption,

the remainder of Chickenland's counterclaim was denied by Hirsch. Hirsch, moreover, relying on the standard conditions, alleged that:

'The plaintiff in any event pleads that if it is liable for any defect in the spice packs supplied (which liability is denied), then in terms of clause 4.2 of the standard conditions of sale the plaintiff's liability is limited at its option to repairing such goods free of charge, supplying the defendant with similar replacement goods free of charge or passing a credit for the purchase price of the goods. In the event of any liability on the part of the plaintiff, the plaintiff elects to supply the defendant with similar spice packs free of charge.'

Hirsch furthermore sought in terms of clause 4.6 of the Standard Conditions of Sale an indemnity from Chickenland 'in respect of any claim or proceedings against [it] for, inter alia, damages, such claims including the claims of the country based distributors,

1 The alleged wasted expenditure incurred was inter alia in respect of the following: Microbiological testing of the affected products by forensic laboratories and the Department of Health to establish/confirm the presence of Sudan 1 and costs associated therewith, costs of the preparation of advertisements for the recall and press releases relating thereto, additional labour costs incurred pursuant to the employment of temporary personnel to attend to various aspects of the recall of affected products, truck-hire to facilitate upliftment of affected products and transport to central warehouse, costs of destruction of affected products and provision of certificates of destruction, incremental overtime labour costs incurred in relation to the manufacture of replacement products, transportation costs for delivery of replacement products to retailers, additional insurance premiums incurred as a direct result of the product recall.

Nando's UK and Brotrade which [Chickenland] has acquired by cession'. It thus joined Chickenland as a third party to those proceedings. In response Chickenland filed a replication. To paraphrase from the replication, Chickenland alleged that:

(a) it had not assented to the standard terms and conditions;

(b) it had made a counter offer to trade with Hirsch on the basis that the latter's standard conditions did not apply;

(c) the standard conditions do not bind third parties;

(d) upon a proper construction of the standard terms and conditions they do not apply to claims of the nature forming the subject matter of the counterclaims; and

(e) the provisions of clause 4 are unconscionable and *contra bonos mores* and accordingly unenforceable.

[13] The issues of the merits and quantum having been separated the matter proceeded to trial before Blieden J in South Gauteng High Court solely in respect of the former. The judgment of Blieden J is reported sub nom *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ). Blieden J held in favour of Chickenland. The learned judge concluded (para 63) that it is entitled to rely on all four of its counterclaims and that Hirsch's claim falls to be set off against the amounts which are found to be due to Chickenland in terms of such counterclaims. The learned judge accordingly postponed the trial *sine die* in order for the issue of the quantum of Chickenland's counterclaims to be determined. Hirsch appeals against the whole of the judgment and orders of Blieden J with his leave.

[14] In heads of argument filed with this court, Hirsch states that it does not challenge the finding of the court below that it was negligent and that contributory negligence on the part of Chickenland had not been proved. It is thus contended that only two issues arise for determination in this appeal: First, did the respondent discharge the onus of proving that the terms relied on by the appellant were not part of the agreement between the parties? And, second, in the light of the facts, including the fact that the delictual claims were claims for pure economic loss, was Hirsch's negligent conduct wrongful vis-a-vis (i) Chickenland, and (ii) the country-based distributors?

The Standard Conditions

[15] The first issue for consideration is thus whether the standard conditions of sale and credit on the reverse of the credit application form, formed part of the agreement. It will be recalled that in signing the application on behalf of Chickenland, Ms Smith inscribed the words 'standard conditions not checked' immediately above her signature and below the relevant warranty. According to Greenberg JA in *Worman v Hughes & others* [2]

'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract. As was said by Solomon J in *van Pletsen v Henning* (1913, A.D., p 82 at p. 89): "The intention of the parties must be gathered from their language, not from what either of them may have had in mind.". . . '

[16] It follows that much of the evidence adduced by the parties on this aspect of the case was plainly inadmissible. What Ms Smith subjectively intended to convey when she inscribed those words in manuscript on the credit application form was irrelevant. The same holds true for the evidence of the various Hirsch employees who dealt with the credit application – what they subjectively understood Ms Smith to have conveyed was likewise irrelevant.

[17] Blieden J concluded (para 30) that the warranty was not given. The warranty contains three distinct components: that the information furnished is true and correct; that the signatory is authorised; and, that the conditions on the reverse have been read and are binding. Ms Smith merely recorded that she had not checked the standard conditions. That was a simple statement of fact. It does not amount to an intimation from her that she did not agree to be bound by those standard conditions. In my view it hardly seems likely that a line of credit would have been approved absent any agreement at all. It must therefore be accepted, it seems to me, despite counsel's submission to the contrary, that the application for credit that one encounters here had to be subject to conditions of some kind - at the very least conditions as to payment and delivery. Thus whilst I incline to a different view to that of Blieden J, it is unnecessary that any firm conclusion be reached on this aspect of the case. I shall accordingly

2 1948 (3) SA 495 (A) at 505.

assume in favour of Hirsch, without deciding, that Chickenland are bound by the conditions of credit set forth on the reverse of the credit application.

[18] I now turn to consider the proper construction to be placed on the non-liability clause. The approach to the interpretation of exemption clauses is well known. In *Durban's Water Wonderland (Pty) Ltd v Botha & another*[3] Scott JA, stated:

'Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens.* (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C - D).'

[19] According to Freddy Hirsch, when he started the Hirsch group some 53 years ago, it sold equipment and machinery in addition to blended and milled spices. Clause 4.1 obviously dates back to the days when Hirsch sold machinery and equipment. Clause 4.1.1 thus refers to installation, proper care and use of those goods, whilst clause 4.2 limits Hirsch's liability to repairing such goods or supplying replacement goods free of charge. It is thus plainly inapplicable to the sale and supply of spices.

[20] Moreover clause 4.1 excludes liability by reason of any defect in the goods. But here one is not dealing with defect in the *res vendita*. Rather one is dealing with the delivery to a purchaser of a *res* different to that which had been bargained for. Chickenland were entitled to delivery of spices free of Sudan 1, that being what they had bargained for. Failure by Hirsch to deliver spices free of that banned contaminant was in effect a failure to perform in terms of the contract because what was delivered was different in substance to that purchased.[4]

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3 1999 (1) SA 982 (SCA) at 989 G-I.

4 *Roff and Co. Ltd v Mosely* 1925 TPD 101 at 105; *Naran & another v Pillai NO* 1974 (1) SA 283 (D) at 285G-H; *Ornelas v Andrew's Cafe & another* 1980 (1) SA 378 (W) at 389A-G; *Cladall Roofing (Pty) Ltd v SS Profiling (Pty) Ltd* [2010] 1 All SA 114 (SCA).

[21] In *Marais v Commercial General Agency Limited*[5] a seed merchant inadvertently supplied a farmer with seeds of a character different to that purchased. Mason J said:

'Now it seems to me somewhat a mis-use of terms to say that to supply one article in lieu of another article which was ordered can be brought under the term of "latent defect" ─ that because a mistake had been made in a matter in which admittedly mistakes may easily be made, particularly if there is any carelessness, such a mistake can be called a latent defect. As I understand the term "latent defect", it means a latent defect in the thing actually sold and intended to be sold. It seems to me, therefore, that *Erasmus's* case would not protect the defendant. If a man undertakes to deliver a particular article then surely he is bound by his undertaking, even if it is a matter in which a mistake may easily be made. If it is such a matter he ought to protect himself by a special contract or take very special care that no such mistake is made.'

[22] It follows in my view that as one is here dealing with non-performance as opposed to defective performance, Clause 4.1 does not avail Hirsch. It was conceded by counsel for Hirsch that if Clause 4.1 did not find application then Clauses 4.2 to 4.6, which are linked to and dependent upon Clause 4.1, likewise could not avail Hirsch. That notwithstanding, it nonetheless remains to say something about clauses 4.4 and 4.6. In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary.[6] Here clause 4.4 purports to go further - the assemblage of words includes statutory law. But such an exclusion if it is enforced would necessarily result in a contravention or tend to induce a contravention of statutory law. The following postulation illustrates the point: The relevant statute here not only prohibits the delivery of foodstuff that contains a prohibited substance, but also makes it an offence for one to do so. That notwithstanding, can Hirsch nonetheless adopt the stance that it can because the contract permits it do so? The answer has to be 'surely not'.

[23] In *Johannesburg Country Club v Stott & another*[7] Harms JA observed:

'The conduct sought to be exempted from liability may involve criminal liability, however, and the question is whether a contractual regime that permits such exemption is compatible with constitutional values, and

5 1922 TPD 440 at 443-444.
6 *First National Bank of SA Ltd v Rosenblum & another* 2001 (4) SA 189 (SCA) para 6.
7 2004 (5) SA 511 (SCA) para 12.

whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation.'

but thought it unnecessary, in the light of the proper reading of the contractual exclusion encountered there, to determine it.

Of clause 4.6, Blieden J said:[8] 'this is not a limitation of liability clause, it is an indemnity by the "Customer" for any claims by third parties which may be lodged against the "Company" for losses suffered because of the company's fault or 'for any reason whatsoever". Counsel for the defendant referred to this clause as "Draconian". I would say this is an understatement.'

In my view the provision is so gratuitously harsh and oppressive that public policy could not tolerate it.[9] Or, in the language of the majority judgment in *Sasfin v Beukes*,[10] it is '... clearly inimical to the interests of the community, . . . or run[s] counter to social or economic expedience...' Blieden J added:[11] 'It further seems to me that the words "for any reason whatsoever" in clause 4.6 . . . cannot be interpreted to mean that the plaintiff does not have to perform in terms of the contract, and that any loss resulting from such failure would justify the indemnity claimed.' Those conclusions by Blieden J were not challenged on appeal. Nor, could they be. For, on the view that I take of the matter, it was plainly improper and unconscionable for Hirsch to purport to contract out of liability in that fashion. Against that backdrop I turn to consider Chickenland's counterclaims.

Claim 1

[24] Claim 1 alleges that:

'15 The payments by the defendant, pleaded in paragraph 13.1 above were accordingly not due and/or are liable to be refunded by the plaintiff.

16 In the circumstances the plaintiff is liable to the defendant in the sum of R1 209 632,83.'

It is a claim for the refund of the purchase price paid to Hirsch for the contaminated goods. It presents no difficulty. Section 2(1) of the Act makes it an offence for any person to sell, manufacture or import for sale any foodstuff which contains or has been treated with a prohibited substance. It is common cause in this case that the contractual performance undertaken by Hirsch was illegal. In *Schierhout v Minister of Justice*[12] Innes CJ said:

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8 Para 34.3.
9 *Botha (now Griesel) & another v Finanscredit* (Pty) Ltd 1989 (3) SA 773 (A) at 782.
10 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C-D.
11 Para 42.
12 1926 AD 99 at 109.

'It is a fundament principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect . . . (*Code* 1.14.5). So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done — and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act.'

Chickenland having performed under the agreement by paying the purchase price to Hirsch, is entitled to its return. It follows that there can be no warrant for Hirsch to retain those moneys and that sum must accordingly be restored to Chickenland.

Claims 2 and 4

[25] Claim 2 alleges:

'17 In consequence of the defendant having incurred the wasted expenditure referred to in paragraph 14.4 above and having suffered damages accordingly, the plaintiff is further liable to the defendant in the sum of R1 779 545,96 . . . .'.

And, claim 4 alleges:

'24 At all material times hereto-

24.1 the plaintiff was aware of the matters set out in paragraph 13.2 above;

24.2 the plaintiff was aware that should there be any breach of the nature pleaded in paragraph 12 above, there would or could reasonably be consequences of the nature set out in paragraph 14 above;

24.3 the plaintiff accordingly owed the defendant a legal duty to comply with the terms and warranties pleaded in paragraph 4.2 of the defendant's plea and to avoid any breach of the nature identified in paragraph 12 above.

25 The breaches identified in paragraph 12 above were occasioned by the negligent acts or omissions on the part of the plaintiff on the grounds detailed in paragraph 19 above.

26 In consequence of the plaintiff's aforesaid wrongful and negligent conduct, the defendant suffered damages[13] for which the plaintiff is accordingly liable in the amount of R6 424 402.04, ...'

Claims 2 and 4 are claims for damages for breach of contract. Claim 2 is for the wasted expenditure incurred by Chickenland in having to recall the affected product, whilst claim 4 is for the wasted expenditure incurred by Chickenland in having to replace the affected product that had been recalled. It is thus convenient that they be considered

13Those included inter alia the cost: to Chickenland of the replacement product, of airfreighting replacement stock; of microbiological testing of affected products by forensic laboratories and Department of Health to establish/confirm the presence of Sudan 1; of preparation of advertisements of recall and press releases relating thereto; of additional labour costs incurred pursuant to the employment of temporary personnel to attend to various aspects of recall of affected products; of truck-hire to facilitate upliftment of affected products and transport to central warehouse; of the destruction of affected products and provision of certificates of destruction; of incremental overtime labour costs incurred in relation to the manufacture of replacement products; of transportation costs for delivery of replacement products to retailers; of additional insurance premiums incurred as a direct result of the product recall; of additional packaging material used for replacement products.

together. The issue that arises for decision on this aspect of the case is whether it can be accepted that the breach of contract proved caused the losses sustained by Chickenland. Hirsch contends that the loss suffered by Chickenland, having regard to the test for causation in a claim for damages for breach of contract, is too remote. Factual causation is not in issue. What is, is whether the loss was not too remote.

[26] According to Trollip JA in *Novick v Benjamin*:[14]

'A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided (*a*) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (*b*) that the parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach of contract (see *Victoria Falls & Transvaal Power Co. Ltd v. Consolidated Langlaagte Mines, Ltd*., 1915 A.D. 1 at p. 22; *Lavery & Co. Ltd. v. Jungheinrich,* 1931 A.D. 156).'[15]

[27] And in *Thoroughbred Breeders' Association v Price Waterhouse*[16] Nienaber JA stated:

'The traditional approach for determining remoteness in a contractual context was restated in 1977 by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-688A in the following terms:

"To ensure that undue hardship is not imposed on the defaulting party . . . the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (*a*) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (*b*) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550). The two limbs, (*a*) and (*b*), of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley v Baxendale* 156 ER 145, which reads as follows (at 151):

'Where two parties have made a contract which one of them has broken, the damages which the other

14 1972 (2) SA (A) 842 at 860A-B.

15 In *Lavery & Co Ltd v Jungheinrich* (at 169), Curlewis JA put it thus:

'The question whether damage claimed in an action for breach of contract is or is not too remote depends in our view on whether at the time when the contract was made, such damage can fairly be said to have been in the actual contemplation of the parties or may reasonably be supposed to have been in their contemplation, as a probable consequence of a breach of the contract.'

16 2001 (4) SA 551 (SCA) para 46.

party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

As was pointed out in the *Victoria Falls* case *supra*, the laws of Holland and England are in substantial agreement on this point. The damages described in limb (*a*) and the first rule in *Hadley v Baxendale* are often labelled 'general' or 'intrinsic' damages, while those described in limb (*b*) and the second rule *in Hadley v Baxendale* are called 'special' or 'extrinsic' damages." '

[28] The facts show that Hirsch was well aware of Chickenland's business model. Mr Bloch testified that he had liaised closely with Hirsch's employess, in particular John Morris. Morris, who was possessed of a BSc Degree and had vast experience in the spice manufacturing industry, knew that the product was required for export purposes. There were ongoing discussions between them as to the need for appropriate quality controls and in particular a need for the existence of a suitably equipped laboratory that was capable of testing spices to the relevant international standards applicable to the spice industry. As the Nando's international footprint grew they had to comply with the labelling legislation of each of the foreign destinations to which their product was to be exported. Both of them thus made a point of staying abreast of the changing industry standards and legislative developments nationally and internationally. They specifically discussed the propensity of some unscrupulous suppliers to use artificial colourants in their spices. Moreover, Morris assured Bloch that appropriate checks were in place and that raw materials would only be sourced from reputable suppliers. Morris knew that Nando's products were marketed as colourant free. Bloch was asked:

'So from 1994 to the period 2003/3004 what was the state of awareness in the industry about colourants?'

He replied:

'As far as I was concerned and where we were, that everybody — we applied our minds to making sure that we met the standards on every consignment we exported to our international jurisdictions. We made sure that our products were colourant free and that would have been indicated on any documentation that we would have received from Freddy Hirsch to do with the actual spice packs that we received from them because that would have — or we did not add any colourants at all to any of our products. I mean that was something that we did not do, specifically at the time to any of restaurant base products, our peri-peri sauces, our basting sauces and our chicken marinade, there was no colourants added whatsoever.'

Bloch's evidence was not disputed. The evidence thus established that Hirsch knew that the spice packs would be used for a specific purpose and that they would be distributed worldwide and had to comply with the legislative and other industry requirements of the destination country. In that regard Bloch testified:

'Normally when one exports anything outside of the country, one is obliged to send with the product to the country that is receiving the product, a product specification and a port health document which is signed off to make sure that the product is fit for human consumption and that is a requirement of most receiving countries from a customer in their port health authorities.'

[29] In terms of the Act colourants are prohibited generally unless specifically permitted. Sudan 1 is not a permitted colourant. Furthermore, no colourants are permitted in respect of certain foodstuff. Spice is one such foodstuff. At all material times Sudan 1 was a banned substance not just in this country but also in the European Union, United Kingdom, Australia and the United States. The World Health Organisation regards it as a banned substance. There is thus zero tolerance for its presence in foodstuff. Its presence is thus plainly illegal.

[30] The commodity, it must be added, was not readily procurable elsewhere. Chickenland, quite clearly relied on Hirsch's skill and expertise – it, after all, was an expert supplier of foodstuff intended for public consumption. Hirsch was clearly guilty of negligence in the discharge of its contractual obligation. That has now been admitted by it. What was delivered by Hirsch was not simply an inferior or defective product but one not fit for human consumption and more fundamentally, dangerous and, indeed, illegal. Chickenland relied on Hirsch to ensure that the product purchased would be fit for human consumption. Once it emerged that it was not, Chickenland had no choice in the matter – it was obliged to give effect to a mandatory recall of all of the contaminated product. And, what was more, it was given just 48 hours by the UK Food Standards Agency within which to do so.

[31] From the commonly known circumstances mentioned above it can thus reasonably be supposed (*Shatz Investments (Pty) Ltd v Kalovyrnas)*[17] that the parties

17 1976 (2) SA 545 (A) at 555 G-H.

contemplated when they contracted that, if the spice packs were delivered by Hirsch with an illegal contaminant, Chickenland would be obliged to recall and replace all of the products affected by that contaminant that it, in turn, had supplied to its distributors and that Hirsch would be taken to have assumed liability for all such costs directly linked to that recall and replacement. It follows that Chickenland has established Hirsch's liability for those special damages.

Claim 3

[32] That leaves claim 3, which alleges:

'18 At all times material hereto:

18.1 the plaintiff was aware of the matters set out in paragraphs 13.2 to 13.5 above and that this was the usual manner in which the defendant conducted its business;

18.2 the plaintiff was aware that should there be any breach of the nature pleaded in paragraph 12 above, there would or could reasonably be consequences of the nature set out in paragraph 14 above;

18.3 the plaintiff accordingly owed each of the country-based distributors and Nando's UK and Brotrade a legal duty to comply with the terms and warranties pleaded in . . . the defendant's plea and to avoid any breach of the nature identified in paragraph 12 above.

19 The breaches identified in paragraph 12 above were occasioned by the negligent acts or omissions on the part of the plaintiff in that:

19.1 the plaintiff failed to subject the spice packs to any, alternatively to adequate and/or proper quality control and testing or to a process for the detection of and removal of foreign matter or Sudan 1 being a substance not fit for human consumption and/or for use in products to be prepared for human consumption, when this could and should reasonable have been done;

19.2 the plaintiff unreasonably failed to subject the spice packs or the ingredients to acceptable selection and blending processes or to ensure that they complied with requirements or specifications of any of the Food Standards Agency, United Kingdom, South African law or the applicable statutory law in foreign jurisdictions into which the spice packs or products in which the spice packs are used were to be supplied;

19.3 the plaintiff failed to establish that the ingredients were all of German origin and source when this ought reasonably to have been established;

19.4 the plaintiff sourced the ingredients from inter alia India, through the medium of agents without knowledge or concern as to the origin or source of supply;

19.5 the plaintiff knew, alternatively ought reasonably to have known of the prevalent usage of Sudan 1 in the ingredients sourced by it from India alternatively of an appreciable risk being attached to the ingredients sourced by it from India and the appreciable risk of such ingredients containing added colourants.

19.6 the plaintiff failed to detect the presence of Sudan 1 in the spice packs, when it ought reasonably to have done so.

20 In consequence of the plaintiff's aforesaid wrongful and negligent breach each of the country-based distributors and Nando's UK suffered damages for which the plaintiff is accordingly liable, as follows . . .

21 Alternatively to paragraph 20 above, Brotade suffered damages for which the plaintiff is accordingly liable in the amount of R7 555 679.80[18] as a result of the plaintiff's wrongful and negligent conduct . . .

22 The defendant has acquired by cession each of the claims which the country-based distributors, Nando's UK and Brotrade has against the plaintiff as particularised in paragraphs 20 and 21 above, . . .

23 Alternatively to paragraphs 18 to 22 above, the defendant itself sustained damages in the amount of R7 555 679.80 reasonably incurred in mitigating greater loss than the defendant would otherwise have suffered and for which the plaintiff is accordingly liable.'

[33] It is clear that the same facts may give rise to a claim for damages both ex contractu and ex delicto.[19] But the breach of a contractual duty is not per se wrongful for the purposes of Aquilian liability. Admittedly there is an important factor present in contract and absent in delict - that is the competence of the parties to regulate, limit or expand by arrangement among themselves the consequences of any prospective breach (*Thoroughbred Breeders Association* (para 52)). A contract, it has been said, is the 'ultimate limiting device', moreover the duty in question is not imposed on the defendant by operation of law – it is one that the defendant was prepared to voluntarily assume.[20]

[34] Blieden J described claim 3 as a products liability claim. But as Professor Boberg[21] suggests 'products liability in our law has perhaps been puffed up a little beyond its true importance'. He thus contends that:

'The reason for regarding it as a special form of Aquilian liability requiring its own dogmatic framework is not readily apparent. Wrongfulness is hardly a problem. As we have seen (above 31), wrongfulness is not a function of an act alone; it is a function of an act plus its consequences. To harm others physically or financially by producing or distributing a defective article is so socially undesirable (or objectively

18 Those included inter alia the costs associated with the recall and replacement of the affected products (including the costs of recall, labour, storage and destruction of the affected product).
19 *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA).
20 MM Loubser 'Concurrence of Contract and Delict' 1997 *Stell LR* 113 at 124.
21 P Q R Boberg *The Law of Delict Vol 1 Aquilian Liability* (1984) p 194.

unreasonable, if you will) that the law should have no difficulty in branding it wrongful. There is therefore a duty to take reasonable care to avoid doing so (or, if you prefer it, to do so is an invasion of the injured party's rights).'

[35] In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*[22] this court, after surveying the academic writings on the subject and acknowledging that those writings had 'appreciably assisted in shaping and determining the debate' (para 8), reaffirmed that: (a) our common law has sufficient flexibility 'which allows sound incremental development as society's circumstances change' (para 30); (b) the Aquilian remedy is presently adequate to protect a claimant's right to bodily integrity; and (c) if strict liability is to be imposed, it is the legislature that must do it (para 38).

[36] Claim 3 is asserted amongst others by Brotrade and various country-based distributors, each of whom alleged that they were owed a legal duty by Hirsch. Various claims have been alleged in the alternative by Chickenland, to whom those claims were ceded. It suffices for present purposes to consider just the one - the claim emanating from Brotrade. The action is Aquilian. Its ordinary requirements must thus be satisfied. A wrongful act is constituted in this case by the production by Hirsch of a defective article that causes physical or purely economic damage to Brotrade. The fault requirement will be satisfied by showing that Brotrade's damage was reasonably foreseeable, that a reasonable person would have guarded against it, and that Hirsch failed to do so.

[37] Brotrade's claim is one for pure economic loss. As Prof Burchell makes plain:

'It is a well-established rule that the negligent causing of *physical injury or tangible property damage* can give rise to a presumption of liability, but the negligent causing of *pure economic loss* . . . requires that the court will not simply jump to the rescue of the plaintiff on proof of negligent conduct causing harm but will require policy factors in favour of imposing liability on the defendant.'[23]

As explained by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*:[24]

' "Pure economic loss" in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit,

22 2003 (4) SA 285 (SCA) at 291.
23 Jonathan Burchell 'The odyssey of pure economic loss' 2000 *Acta Juridica* 99.
24 2006 (1) SA 461 (SCA) [2006] 1 All SA 6 para 1.

being put to extra expenses or the diminution in the value of property.'

It does not, I daresay, encompass within its scope the loss, through theft, of a tangible asset such as a motor vehicle as held in *Viv's Tippers (Pty) Ltd v Pha Phama Staff Services (Pty) Ltd.*[25]

[38] According to Brand JA in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*: [26]

'Recognition that we are dealing with a claim for pure economic loss brings in its wake a different approach to the element of wrongfulness. This results from the principles which have been formulated by this court so many times in the recent past that I believe they can by now be regarded as trite. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages (see eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) paras 12 and 22; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500) para 12; *Telematrix* (supra) paras 13 - 14; *Trustees, Two Oceans Aquarium Trust* (supra) paras 10 - 12).'

[39] The enquiry here is whether as a matter of policy Hirsch should be held liable for the pure economic loss suffered Brotrade. That, according to Brand JA in *Fourways Haulage* para 16 and 17:

'raises a question which is logically anterior: what are the considerations of policy that should be taken into account for purposes of the enquiry? In accordance with what criteria should the relevant considerations of policy be identified? Must we accept that policy considerations are by their very nature incapable of predetermination and that the identification of the policy considerations that should find application in a particular case is to be left to the discretion of the individual judge? Does this mean that in the context of pure economic loss the imposition of liability will depend on what every individual judge regards as fair and reasonable? I believe the answer to the last two questions must be 'no'. Liability cannot depend on the idiosyncratic views of an individual judge. That would cloud the outcome of every case in uncertainty. In matters of contract, for example, this court has turned its face against the notion

25 2010 (4) SA 455 (SCA) para 5.
26 2009 (2) SA 150 (SCA) para 12.

that judges can refuse to enforce a contractual provision purely on the basis that it offends their personal sense of fairness and equity. Because, so it was said, that notion will give rise to legal and commercial uncertainty (see eg *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229) paras 21 - 25; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) ([2004] 4 All SA 168) para 27). I can see no reason why the same principle should not apply with equal force in matters of delict. A legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose. As pointed out by Lord Scott of Foscote in *Lagden v O'Connor* [2004] 1 AC 1067 (HL) para 86:

"One of the main functions of the law of obligations, contractual or tortious, is to provide, or attempt to provide, a set of yardsticks for determining whether a legal injury has been inflicted on a person (the claimant) by another person (the defendant) and, if so, for determining the amount of the damages that the defendant must pay by way of reparation. If the two parties are unable to agree, an answer can be found by recourse to litigation. But the cost of litigation, often excessive both in absolute terms and in relation to the amount in dispute, and the inevitable delay, worry and anxiety that accompany court proceedings provide impelling reasons why the yardsticks by means of which legal liability is to be measured should be kept as simple and uncomplicated as practicable."

We therefore strive for certainty. The question is how can that be achieved in an area directed by considerations of public or legal policy? I believe we must accept at the outset that absolute certainty is unattainable. The moment this court took the first-tier policy decision - in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) - to abolish the absolute exclusion of liability for pure economic loss, it abandoned the bright line of absolute certainty. The second-tier policy decision as to when liability should be imposed must of necessity be accompanied by some degree of uncertainty, at least at the early stages of development in this area of the law. That much was recognised and predicted by Rumpff CJ in *Administrateur, Natal* itself (see 831B). This measure of resulting uncertainty also seems to be an experience shared by those jurisdictions where the same first-tier policy decision has been taken. Thus it was stated, for example, by Gaudron J in the Australian High Court, in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (HC of A) para 25:

"The law as to liability for economic loss is a 'comparatively new and developing area of the law of negligence'. It has not yet developed to a stage where there has been enunciated a governing principle applicable in all cases. Perhaps it never will." '

[40] What then are the considerations of policy that are of particular relevance in this case? First, as always in claims of this kind, is the spectre of the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class (*Perre v Apand* para 32). For, as Prof Burchell observes: 'Problems of limiting the scope of potential indeterminate liability are undoubtedly the stuff of which delictual cases are

made.' According to Mark Radomsky, a director of Chickenland, Brotrade (Pty) was formed in 1997. The thinking within the group was that the retail business had to be separated from the restaurant business. With that in mind Brotrade was formed, which was to operate as the logistics and distribution entity within the Nando's group. The evidence clearly establishes that Hirsch was aware not just of the existence of Brotrade, but also of the pivotal role that it played in the distribution of Chickenland's products. Indeed, as Bloch testified and the correspondence exchanged between Hirsch and Chickenland confirmed, not only was Hirsch aware of the various countries internationally to which Chickenland's products were being supplied but it was also well aware that Brotrade was the vehicle employed for such distribution. The loss claimed here is therefore by a single identifiable plaintiff. The claim by Brotrade is not likely to bring in its wake a multiplicity of actions. It is accordingly finite in its extent.

[41] Second, there is no privity of contract between Brotrade and Hirsch. The former was thus unable to protect itself by contract or by any other means that I can conceive of. Brotrade could therefore not itself have taken any steps to guard against the harm. Third, the imposition of liability imposes no additional burden on Hirsch than that already imposed by law and good practice internationally in the industry. Hirsch's commercial freedom is thus not further impaired in any way. Accordingly, as Van den Heever JA made plain in *Herschel v Mrupe*:[27]

'By putting into circulation potentially harmful things . . . the manufacturer is not merely exercising a legal right but encroaching upon the rights of others to be exposed, when going about their lawful occasions and when accepting the implied general invitation to acquire and use such commodities, to danger without warning and without their having a reasonable opportunity to become aware of such danger before use. In other words, it is an encroachment upon the rights of others to set hidden snares for them in the exercise of their own rights. To refrain from doing so is a duty owning to the world at large.' (See also *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & 'n ander.*)[28]

[42] Fourth, as van der Merwe and De Jager[29] observe:

'In accordance with the guide-lines provided by our case law, it is submitted that a manufacturer has a

27 1954 (3) SA 464 (A) at 486F.
28 2002 (2) SA 447 (SCA).
29 Schalk van der Merwe & Frederick de Jager 'Products Liability: A recent unreported case' 1980 *SALJ* 83.

general duty to take reasonable steps to ensure that defective products do not reach the market or, if they do, to withdraw them from the market or to take other steps to ensure that no harm ensues from the presence of the product on the market. The criterion of reasonableness coupled with the community's concept of what behaviour is reasonable in given circumstances is flexible enough to take into account such factors as the type of product, the nature of the manufacturer's business enterprise, the customs and practices prevailing in a particular trade or industry, the amount of knowledge and expertise of potential purchasers and users of the product, abnormal use, and the specific stage in the production process during which a defect originated. The last-mentioned factor may influence the duties of a manufacturer in different ways. At the stage of planning or design the manufacturer must take into account the most recent knowledge available in its field. When the product is actually manufactured the manufacturer has a duty to inspect and to control; when it is released on the market he has the duty to provide potential users with directions for use and to warn them adequately against dangers inherent in the product. Should a defect be detected after a product has been released, the general duty to act reasonably in order to prevent damage could well be concretized in a duty to withdraw the product from the market.'

I agree that on the facts here present, Hirsch did indeed have a duty to withdraw the contaminated product from the market. That Chickenland and Brotrade, who were the innocent victims of Hirsch's illegal conduct, did so to mitigate their loss, hardly serves to exonerate Hirsch from that duty.

[43] In my view these are all strong policy considerations why Hirsch should be held liable. For, as Howie P stated in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd,*[30] a case where harm was caused to patients by a defective local anaesthetic, Regibloc:

'In deciding the issues raised by the appeal it must be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent's control, that it was administered in accordance with the respondent's accompanying instructions, that it was its defective condition which caused the alleged harm and that such harm was reasonably foreseeable. It must also be accepted, as far as the law is concerned, indeed it was not disputed, first, that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured Regibloc being administered to the first appellant and, secondly, that the duty was breached. In the situation pleaded there would therefore clearly have been unlawful conduct on the part of the respondent: *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander.*'[31]

30 2003 (4) SA 285 (SCA) at 291.
31 2002 (2) SA 447 (SCA).

[44] Having decided wrongfulness in Brotrade's favour there remains causation. Factual causation can hardly be in issue. On the common cause facts, but for Hirsch's negligence (which as I have already indicated is now admitted) Brotrade would not have suffered loss. That leaves legal causation. The question to be answered once again being whether the loss claimed by Brotrade is too remote. A court should be flexible in its approach to this enquiry (*Fourway Haulage* para 35). In my view, on the facts of this case, on either the direct consequences test or the foreseeability test the conclusion that one arrives at is the same. Applying the former - it is clear that the loss followed directly from Hirsch's wrongful and negligent conduct. Applying the latter - it was reasonably foreseeable that because Sudan 1 was a proscribed substance, its presence would (not just could) have as its consequence a recall leading ineluctably to loss by Brotrade.

Conclusion

[45] It follows that Blieden J was correct in upholding each of Chickenland's counterclaims. In the result the appeal must fail and it is accordingly dismissed with costs, such costs to include those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

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