**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 632/20

In the matter between:

**GUARDRISK INSURANCE COMPANY LIMITED** **APPELLANT**

and

**CAFÉ CHAMELEON CC** **RESPONDENT**

**Neutral citation:** *Guardrisk Insurance Company Limited v Café Chameleon CC* (Case no 632/20) [2020] ZASCA 173 (17 December 2020)

**Coram:** CACHALIA, SALDULKER and MBHA JJA and LEDWABA and EKSTEEN AJJA

**Heard**: 23 November 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' 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 09:45 on 17 December 2020.

**Summary:** Insurance law – contract providing cover for loss resulting in interruption of business for notifiable disease occurring within 50 km of business premises – whether Covid-19 pandemic contemplated – whether government response imposing national lockdown part of the insured peril – whether national lockdown causally linked to local occurrence of disease.

---

## ORDER

---

**On appeal from:** Western Cape Division of the High Court, Cape Town (Le Grange J, sitting as court of first instance):

Paragraphs 2 and 3 of the order of the court a quo are set aside. Save as aforesaid, the appeal is dismissed with costs, including the costs of three counsel.

---

## JUDGMENT

---

**Cachalia JA (**Saldulker and Mbha JJA and Ledwaba and Eksteen **concurring)**

### Introduction

[1] The respondent, Café Chameleon CC (Café Chameleon), operates a restaurant in Cape Town. Its business, along with many other businesses, suffered a substantial, as yet unquantified, loss of income following the outbreak of the Covid-19 pandemic. The loss arose from the interruption of its business due to the government having instituted a national lockdown in response to the pandemic. Café Chameleon has an insurance policy underwritten by the appellant, Guardrisk Insurance Company Limited (Guardrisk). The policy indemnifies it against loss from business interruption due to notifiable diseases. Covid-19 is a notifiable disease as envisaged in the 'Regulations relating to the Surveillance and Control of Notifiable Medical

Conditions' (the Surveillance Regulations)[1] promulgated under the National Health Act 61 of 2003 (the Health Act). Café Chameleon says the policy gives it cover for the loss it sustained as a result of the lockdown. Guardrisk believes the indemnity does not extend to the circumstances of this case.

[2] Café Chameleon thus sought a declaration in the Western Cape High Court that Guardrisk was liable to indemnify it for any loss since 27 March 2020, arising from the interruption of its business due to the lockdown. It also sought other incidental relief, including an order that Guardrisk make interim payments in respect of its losses calculated and quantified from time to time. The court a quo (Le Grange J) granted Café Chameleon all the relief it had initially asked for, but granted Guardrisk leave to appeal to this court.[2] It appears that the learned judge inadvertently overlooked that Café Chameleon had abandoned the incidental relief during the hearing. The appeal thus concerns only the declaratory order.

**The Essential Dispute**

[3] It is helpful to describe the essential dispute between the parties before setting out the factual background and terms of the policy. The clause (the infectious diseases clause) that is the subject of this dispute indemnifies the insured for "*loss . . . resulting in interruption (of) the business due to notifiable [disease] occurring within a radius of 50 km of the premises*". Under the 'special provisions' of the policy, a notifiable disease means ". . .

[1] 'Regulations relating to the Surveillance and Control of Notifiable Medical Conditions, GN 1434, *GG* 41330, 15 December 2017.'
[2] *Café Chameleon v Guardrisk Insurance Company Ltd* [2020] ZAWCHC 65; [2020] 4 All SA 41 (WCC).

*illness sustained by any person resulting from any human infectious or human contagious diseases, an outbreak of which the competent local authority has stipulated shall be notified to them . . .*".

[4] Café Chameleon's position is that once it is accepted that there were occurrences of Covid-19 in Cape Town, within 50 km of its business, the government's response to it through the imposition of a national lockdown was part of the insured peril covered by the infectious diseases clause. Guardrisk maintains, on the other hand, that the government's generalised response to the pandemic is not what is covered; what is covered is a public health response aimed only at local occurrences of the disease within 50 km of the business. I shall consider these contentions in more detail later in this judgment.

**The Factual Background**

[5] The first cases of Covid-19 were reported in KwaZulu-Natal, after a group travelling from Italy returned to South Africa, early in March 2020. By 11 March, there were a further six cases, all with recent travel histories. One of these was in Cape Town, announced by the Western Cape Provincial Government. Two more cases were announced in Cape Town, on 13 March. By 17 March, the number of South African cases had risen to 89, which included the first local transmissions. On 23 March 2020, the number had grown to 100 cases in the Western Cape, of which 85 were in Cape Town. At this stage Cape Town had 25 percent of the reported cases in the country, indicating an alarming, rapid spread of the disease. On 28 March, South Africa recorded its first death. By 30 April, the total number of infections was 2020, and four days later it had quickly reached 2 705.

[6] The government embarked on an aggressive response to curb the spread of the disease. Under the Disaster Management Act 57 of 2002 ("the Disaster Act") the responsible Minister declared a 'State of National Disaster' on 15 March 2020. That evening, the President announced this in a televised address to the nation. On 18 March, the Minister published regulations under the Disaster Act prohibiting gatherings of more than 100 people, closing schools and care facilities, and also limiting the sale and transportation of liquor.[3] On 23 March, the President announced a nationwide lockdown, to commence on 23 March, and to continue until 16 April. New stringent regulations (the Lockdown Regulations) were thus issued on 25 and 26 March to give effect to the lockdown, requiring almost everyone to stay at home from midnight 26 March until midnight 16 April.[4]

[7] There were exemptions to allow people to leave their homes for limited purposes to perform essential services, obtain essential goods and services, and for medical emergencies. Restaurants, such as Café Chameleon, were forced to close and cease trading since 27 March 2020. The regulations were relaxed later, permitting take-away food. Café Chameleon has thus sustained devastating losses by the interruption of its business. It sought an indemnity for these losses from Guardrisk, which rejected the claim. Café Chameleon, therefore, approached the high court for relief.

---

[3] 'Regulations issued in terms of s 27(2) of the Disaster Management Act, 2002, GN 318, *GG* 43107, 18 March 2020.'

[4] 'Disaster Management Act, 2002: Amendment of regulations issued in terms of s 27(2), GN 398, *GG 43148*, 25 March 2020 and GN 419, *GG 43168*, 26 March 2020.' Regulation 11B(1)*(b)* provided that '[d]uring the lockdown, all businesses and other entities shall cease operations . . .' It specifically included restaurants, which were not included in previously.

[8] One of Guardrisk's central averments in its answering papers, is that the regulations upon which Café Chameleon relies for its cause of action – reg 11B (1)*(b)* in particular, which applies to the closure of businesses – were not promulgated because of a notifiable disease within 50 km of its premises. Rather its purpose, as appeared from government announcements, was to prevent the spread of Covid-19, and, to allow the health system to create sufficient capacity to deal with the outbreak. Guardrisk submits that Café Chameleon did not dispute this, which is fatal to its case.

[9] The fact is – and this is clear from the papers – when the Lockdown Regulations were promulgated, Cape Town accounted for a large proportion of Covid-19 infections. These infections were notifiable to the government in terms of the Surveillance Regulations. The government was therefore notified of the rapid spread of infections in Cape Town, and also in other parts of the country. It responded by instituting the lockdown throughout the country, including in Cape Town. Although Café Chameleon could have been clearer about drawing the link between the local outbreak and the imposition of the regulatory regime, it did so on any fair reading of the papers. The subtle distinction Guardrisk seeks to draw, between Café Chameleon's pleaded case and Guardrisk's denial as to what the purpose for the institution of the lockdown was, is therefore one without substance. The true question in this case is whether, properly interpreted, the infectious diseases clause covers Café Chameleon for its loss. This is primarily a legal question, and, not one of fact.

**The Policy**

[10] The policy provides cover for specified defined events. The 'Defined Events', described in the 'Business Interruption Section', typically require physical damage to property to be suffered for a successful claim. However, there are two types of extensions to the physical damage requirement. One is the damage extension to property that occurs in locations other than the insured's premises. The other non-damage extension includes loss for events that do not cause damage to property, but occur within a specified radius of the insured premises. The insured peril is, therefore, a defined event that results in a business interruption.

[11] The non-property damage extension with which we are concerned, including the infectious diseases clause (clause (e)), appears under the heading, 'Extensions and Clauses'. It must be read with the 'Special Provisions' clause, which defines a 'notifiable disease'. The non- property damage extension provides:

'Infectious Diseases/Pollution/Shark and Animal Attack Extension

*Loss as insured by this Section resulting [from] interruption or interference with the Business due to*:

(a) murder or suicide occurring at the Premises

(b) armed robbery, malicious and terrorist activities (whether actual or hoax) occurring at the Insured

(c) food or drink poisoning at the Premises or attributable to food or drink supplied from the Premises

(d) closure of the Premises due to defective sanitation, vermin or pests on the order of a competent local authority

(e) *notifiable Disease occurring within a radius of 50 kilometres of the Premises*

(f) summons to appear in court as a witness by the Insured or any of the Insured's directors, partners of employees

(g) chemical or oil pollution of beaches, rivers or waterways within a radius of 50 kilometres of the Premises

(h) shark attack or attack by wild game including hippopotamus, rhinoceros, leopard, cheetah, crocodile, buffalo and elephant within a radius of 50 kilometres of the Premises

**Special Provisions**

(a) *"Notifiable Disease" shall mean illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which a competent local authority has stipulated shall be notified to them . . .*' (Emphasis added).

## Interpreting Insurance Contracts

[12] This court recently restated the approach to interpreting insurance contracts in *Centriq Insurance v Oosthuizen*:[5]

'[I]nsurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.'

[13] In this analysis it must be borne in mind that insurance contracts are 'contracts of indemnity'. They should therefore be interpreted 'reasonably and fairly to this end'.[6] In this regard it is instructive to recall Schreiner JA's adoption of the following statement from the English authorities on insurance law:[7]

---

[5] *Centriq Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 11; 2019 (3) SA 387 (SCA) para 17.

[6] *Norwich Union Fire Insurance Society Ltd v South African Toilet Requisite Co Ltd* 1924 (AD) 212 at 222.

[7] May on *Insurance* (4 ed) at 174-175. Cited with approval in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd.* 1961 (1) SA 103 (A) at 107A-B. However, the recent statement in *Ma-Afrika Hotels and Another v Santam Limited* [2020] ZAWCHC 160 para 74, does not accord with our law. It reads: 'Insurance is intended to serve as a social safety net to cover financially devastating losses and

'No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain the claim and cover the loss, must in preference be adopted.'

## Guardrisk's case a quo

[14] Before interpreting the infectious diseases clause, it is important to understand Guardrisk's opposition to the claim in the court a quo, as outlined in its answering affidavit. It accepted that Covid-19 is a notifiable disease as defined, and, also that it had occurred within 50 km of Café Chameleon's premises – both essential requirements of the insured peril. But it advanced four interrelated arguments as to why the policy did not cover Café Chameleon's loss: First, no competent local authority had stipulated that the disease should be notified in accordance with the policy. Second, as a matter of construction, this requirement localises the scope, and the extent, of the cover to the 50 km radius; the cover did not extend to the consequences of events within a wider area, including countrywide or global events. Third, the policy did not cover loss following closure of the premises as a result of a government order. Finally, there was no causal link between the defined event (the Covid-19 outbreak within the 50 km radius) and the interruption of the business. This is because the interruption was a consequence of the national lockdown, and, not the local occurrence of the disease.

---

compensate injured parties. This is precisely the safety net required as a result of the unprecedented Covid- 19 pandemic.'

[15] As to the contention that no competent local authority had stipulated the disease, the court a quo undertook a comprehensive analysis of the legislative framework governing notifiable diseases. This included an examination of both the Health and Disaster Acts, including the Surveillance Regulations and the Lockdown Regulations promulgated thereunder. The learned judge found that even though the City of Cape Town's by-laws did not provide for the notification of human infectious or contagious diseases, national legislation imposed an obligation to report their occurrence to a local authority. He concluded that:

'[T]he principal reason why the notification requirement was introduced to the Notifiable Diseases Extension, was to ensure that cover thereunder would be triggered by outbreaks of the most serious diseases, and not whether the source of that obligation to report the gravity of the threat was national legislation, rather than subordinate legislation enacted by a local authority.'[8]

[16] On this basis the learned judge rejected Guardrisk's submission that the claim fell outside the scope of the clause, because no competent local authority had stipulated that the disease be notified to it. His criticism that the submission amounted to a 'narrow peering of words', which did not accord with the proper approach to the interpretation of insurance contracts outlined earlier, was well founded. Guardrisk, wisely, abandoned the argument in this court.

[17] The court a quo also dismissed Guardrisk's three other arguments. I shall consider these in due course. It is apposite to begin with the third point raised in the high court i.e., that the policy does not cover loss following

[8] *Café Chameleon CC v Guardrisk Insurance Company Ltd* (fn 2) para 62.

closure of the premises as a result of a government order. Although the high court did not deal with the submission explicitly, it implicitly rejected it. This is apparent from the learned judge's conclusion. This issue lies at the heart of the interpretation question: whether the infectious disease clause covers the government's response to Covid-19 in this case.

**Does the insured peril include a government response to Covid-19**?

[18] The trigger for coverage under the infectious diseases clause is that it is notifiable. Diseases are notifiable when the law requires it to be reported to government authorities.[9] This is because they pose particular 'public health risks'.[10] They have 'a potential for regional or international spread',[11] and may necessitate specific governmental action nationally, provincially and locally.[12] The global response to Covid-19 exemplifies this.

[19] That a notifiable disease usually requires a government response would have been appreciated by the contracting parties. They must therefore be taken to have understood and agreed that 'business interruption' referred to in the infectious diseases clause might result from a public health response to the occurrence of an infectious disease.

[20] Counsel for Café Chameleon persuasively drew an analogy between harm caused by a government response to a notifiable disease and fire insurance, which covers incidental harm unavoidably caused by fire-fighters, in response to a fire at a premises. In both cases the response to a notifiable

[9] Regulation 13 of the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions. Fn 1 above.
[10] Ibid Regulation 12(2)*(a)*.
[11] Ibid Regulation 12(2)*(b)*.
[12] Ibid Regulation 12(2)*(c)*.

disease by public health authorities and of fire-fighters to a fire is integral to the insured peril. That being so the only sensible interpretation of the clause is that it includes and contemplates harm that is attributable to a government response. It might be that the clause envisages only a lawful government response and not any response, but that is not an issue we need consider.

[21] I, therefore, accept Café Chameleon's core submission that a notifiable disease almost always carries the risk of a government response, making it part and parcel of the insured peril. As counsel for Café Chameleon put it: 'because it is part of the insured peril, the government's response is covered, not because it is caused by what was insured against; it is covered because it is what is insured against'.

[22] It follows that Guardrisk's contention in the court below that the policy did not indemnify business interruption due to closure following a government order, had to fail. In this court, Guardrisk's stance underwent some mutation; it accepted, in response to questions from the court, that a local government's response to Covid-19 would be part of the insured peril. But, it maintained, the national response did not fall within the ambit of the clause. This is the gravamen of Guardrisk's complaint.

**Does the policy cover the Covid-19 pandemic?**

[23] I must first deal with the submission Guardrisk made at the outset, which is this. The infectious diseases clause, it argues, does not refer to, nor contemplate, cover for the Covid-19 pandemic. This is because, as it explains in its answering affidavit, the events brought about 'went beyond the imagination of everyone, and every industry, including the insurance

industry'. No one ever thought, Guardrisk asserts, 'there would be a national, and global, lockdown where commercial activity would for all practical purposes cease to exist'. The consequence is that no insurance company would have underwritten a policy where the risk of such large scale and unimagined losses could materialise.

[24] In a nutshell Guardrisk's contention is that because the parties had not thought of the risk of a pandemic at the time they contracted (and the policy does not explicitly refer to a pandemic), Café Chameleon is not covered. This argument is premised on a fallacy that a court determines the intention of the parties by having regard to what the parties subjectively believed or thought when the policy was concluded. But as I have pointed out earlier, the interpretation of a contract requires an objective analysis, regard being had to language, context and purpose. The analysis is aimed at establishing what the parties must be taken to have intended, not what their unexpressed thoughts were, when they contracted. As a member of the court pointed out during the hearing, the fact that a policy may include cover for earthquakes does not mean that the parties realistically thought that the risk of an earthquake could materialise. There is thus no substance in this argument.

**Is the insured peril confined to a localised response to the infectious disease?**

[25] Although Guardrisk no longer persists with the argument that the policy requires a local authority to stipulate the notification of the disease, it contends, as a matter of construction, that this requirement supports its view that the policy localises the scope, and the extent, of the cover to the 50 km radius, and, excludes the consequences of events within a wider area,

including countrywide or global events. Simply put, it says that the cover is expressly limited only to the particular consequences of a local occurrence of the notifiable disease. A generalised government response to a national occurrence of Covid-19, which is not aimed specifically at the local occurrence, and causes business interruption and resultant loss, is not covered. It is, therefore, impermissible, Guardrisk insists, to interpret the 50 km radius requirement, as Café Chameleon does, as a mere qualifying criteria unmoored from the causative link between the business interruption and the local occurrence of the disease.

[26] Café Chameleon's answer is that Guardrisk misconstrues the 50 km requirement as being confined to local occurrences of infectious disease. It submits that the infectious diseases clause has two threshold requirements for indemnification: (a) a notifiable disease occurring, and, (b) within a radius of 50 km of the business premises. Once the threshold is established, the remaining requirement is that the outbreak caused business interruption by deterring potential customers from patronising the business. It does not matter, the argument continues, that the interruption and consequent loss was the result of a national government response to occurrences also extending beyond the radius.

[27] In my view, Guardrisk's interpretation of the insured peril as being confined to local occurrences does not accord with a proper construction of the clause. In response to a question from the court as to whether Guardrisk accepted that Café Chameleon would have been covered if the local authority – the City of Cape Town in this case – had imposed the lockdown, instead of the government, Counsel for Guardrisk, quite properly, accepted that it would

have. Why then, it might be asked rhetorically, should the insured be denied cover only because the government, rather than the local authority, took action against an infectious disease that occurred, not only within the 50 km radius, but also beyond it.

[28] Properly construed, I think, the 50 km radius acts both as a threshold or qualifying requirement for liability under the clause, and, a break against liability for far-flung occurrences beyond it. An example would be where there is an outbreak of the disease on a tourist bus headed for Cape Town, from Johannesburg, and, as a consequence the tourists are quarantined at a hotel more than 50 km from Cape Town through government action. The tourists have reservations at a Cape Town restaurant, but are compelled to cancel the booking, which results in business interruption. It is evident that there would be no cover because there is no notifiable disease occurring within 50 km of the business premises. If, however, the discovery of the outbreak had occurred within this radius it would yield a different result.

[29] Guardrisk sought to argue by reference to several other examples that Café Chameleon's interpretation of the clause yields absurd results, because it grants cover for business interruption caused by an outbreak within 50 km of the premises, but denies cover where the notifiable disease is detected just outside the radius. It criticises this interpretation as having the effect that cover becomes a matter of 'happenstance', amounting to a 'postcode lottery'.

[30] Café Chameleon answers this criticism convincingly: Drawing lines in statutes or contracts, Mr Gauntlett argues on its behalf, often yields arbitrary results. Guardrisk could have drawn the line much tighter at 5 km from the

premises, or chosen other distances arbitrarily – 30 km or 60 km. But it chose 50 km, apparently, without giving this much thought. Drawing lines in this way, without an objective basis, will inevitably result in hard cases at the margins, as in the tourist example given earlier, or when an insured who is 49 km from a reported occurrence of an infectious disease, qualifies for cover, but not the insured who is 51 km away. This is not a problem of interpretation, but arises unavoidably because Guardrisk itself drew these sharp lines.

[31] This much is clear from the facts. When the President announced the lockdown on 23 March there were 100 reported cases of Covid-19 in the Western Cape, of which 85, were in Cape Town. At this stage Cape Town had 25 percent of the reported cases in the country. This represented the highest number in any area or region. It is, therefore, fair to say that the occurrence of the disease was predominantly in Cape Town. There was thus a rapidly spreading 'notifiable disease occurring within a radius of 50 km of the premises', which required an urgent government response.

[32] Guardrisk submits that the lockdown was a response to several outbreaks in different parts of the country, and, not only Cape Town. This is so. But it is also undeniable that the rapid spread of the disease in Cape Town would have weighed with the public authorities in recommending that a national lockdown be implemented, including, and especially, in Cape Town. Despite this, Guardrisk would have us accept that the clause covers only a public health response to local occurrences, and, not to outbreaks in multiple areas, which includes a local outbreak. A proper reading of the clause does not support its stance.

[33] The purpose of the clause, quite clearly, is to provide cover for business interruption due to occurrences of a notifiable disease within a 50 km radius of the premises. The language of the clause contains no indication that cover is provided only for a public health response that does not extend, nor have its genesis, beyond the radial boundary. The parties must have contemplated that the clause would provide cover for any public health response to any outbreak of a notifiable disease, whether or not it occurs in multiple localities, provided only that it also occurs within the 50 km radius. Guardrisk's interpretation is therefore neither commercially sensible, nor does it reasonably or fairly accord with the purpose of the clause.

[34] Once it is understood that a notifiable disease as envisaged in the infectious diseases clause entails a government response (national or local), it must follow that the insured peril includes both its occurrence within the radius, and, the government's response to it. And where, as here, the response is aimed at curbing the spread of the disease in multiple locations, including the area that falls within the radius specified in the policy, it must also be covered by the policy. The government response to Covid-19, which resulted in the interruption of Café Chameleon's business, and its consequent loss are, therefore, covered by the policy. This conclusion renders the question of causation, whether the insured peril ie, the presence of Covid-19 in Cape Town and the government's response, was the cause of the business interruption, superfluous. I shall nevertheless, for the sake of fullness deal with it, not least because Guardrisk's case is framed primarily as one of causation.

**Causation**

[35] The infectious diseases clause provides cover for loss resulting in business interruption *due to* notifiable disease occurring within 50 km of the business premises. Guardrisk, therefore, insists that there be a causal connection between the defined event (the occurrence of Covid-19 within 50 km) and the business interruption. Guardrisk contends that there is no causal link between the defined event, and, the interruption of the business. This is because the interruption was a consequence of the lockdown, and, not due to the local occurrence of the disease. Café Chameleon has, therefore, not shown that the lockdown was the factual or legal cause for the interruption.

[36] The high court did not have the benefit of the argument made on Café Chameleon's behalf in this court dealing with the proper interpretation of the clause. It thus also approached the problem primarily as one of causation. The learned judge found that there was a 'clear nexus' between the Covid-19 outbreak in Cape Town and the imposition of the national lockdown, and also that the harm to the business caused by the outbreak was not too remote. He thus held that factual and legal causation had been established.[13]

**Causation in Insurance**

[37] The general approach to causation also applies to insurance law.[14] Factual causation is the first enquiry. The diagnostic tool is the 'but for' test, which involves a 'hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant'.[15] The test is usually

[13] *Café Chameleon v Guardrisk Insurance Co Ltd* (fn 2) paras 74 and 81.
[14] *Napier v Collett and Another* 1995 (3) SA 140 (A) at 144C-G.
[15] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) para 40.

applied in the law of delict. In the insurance context, the analysis is aimed at establishing what would have happened, but for the insured peril.

[38] The courts have recognised that a rigid application of the test may sometimes yield unpalatable and unfair results, and, have thus cautioned against applying 'rigid deductive logic'.[16] In what is now an oft-quoted passage from this court, in *Minister of Safety and Security v Van Duivenboden*[17] Nugent JA said:

' . . . A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was a probable cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the course of ordinary human affairs rather than an exercise in metaphysics.'

[39] The common law test is thus applied flexibly, recognising that 'common sense may have to prevail over strict logic'.[18] In the contractual context it has long been accepted that causation rules should be applied 'with good sense to give effect to, and not to defeat the intention of the contracting parties'.[19] For insurance contracts the question always is: '[H]as the event, on which I put my premium, actually occurred?'[20]

[40] Of relevance in the instant case is that there may be more than one cause or multiple causes giving rise to a claim. In that case 'the proximate or actual or effective cause (it matters not what term is used) must be ascertained . . .'[21]

---

[16] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) paras 44 and 47.
[17] *Minister of Safety and Security v Van Duivenboden NO* 2002(6) SA 431 (SCA) para 25.
[18] *Lee* (fn 15) para 44.
[19] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365.
[20] *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 118.
[21] *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at 862C-D.

Even if a loss is 'not felt as the immediate result of the peril insured against, but occurs after a succession of other causes, the peril remains the proximate cause of the loss, as long as there is no break in the chain of causation'.[22] A proximate cause should be identified as a matter of 'reality, predominance [and] efficiency'.[23] Put differently the real or dominant cause is ascertained by applying good business sense.[24]

[41] The enquiry into legal causation usually follows factual causation. It asks whether there is a sufficiently close relationship between the factual cause and the consequent loss to give rise to legal liability.[25] Put differently, the question is whether the loss is too remote for the factual cause to also be the legal cause. If not, no legal liability may arise.

[42] In delict, policy considerations are applied to guard against attaching 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[26] In contract, though, these policy considerations 'usually do not enter into the enquiry'.[27] Instead, and in particular with insurance contracts, as Grosskopf JA observed in *Napier v Collett*:

'[O]ne would have prime regard to the provisions of the insurance policy. Thus for example the policy may extend or limit the consequences covered by the policy, for example by laying down exceptions. But in addition to any specific provisions, matters such as the type

[22] *Mutual & Federal Insurance Company Ltd v SMD Telecommunications CC* [2010] ZASCA 133; 2011 (1) SA 94 (SCA) at para 11.
[23] *Leyland Shipping* (fn 19).
[24] *Global Process Systems Inc & Anor v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5.
[25] *Napier* (fn 14) at 144D-F.
[26] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 24 (*citing Ultramares Corporation v Touche* 174 NE 441(1931) at 444).
[27] *Napier* (fn 14) at 143J (citing *Concord Insurance Co Ltd v Oelofsen NO* 1992 (4) SA 669 (A)).

of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether the factual cause should be regarded as the cause in law.'[28]

[43] Sometimes, complex legal questions may arise, 'where several factors concurrently or successively contribute to a single result and it is necessary to decide whether any particular one of them is to be regarded legally as a cause'.[29] Effect must then 'be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend'.[30]

**Was factual and legal causation established?**

[44] As mentioned, Guardrisk contends that there was no causal link between the defined event (the Covid-19 outbreak within the 50 km radius) and the interruption of the business. Café Chameleon has therefore not proved factual causation. Its argument is this. The application of the 'but for' test in an insurance case requires the correct identification of the counterfactual, with reference to the defined event. It involves a mental elimination of the defined event. The counterfactual posited is: but for the elimination of the occurrence what would have happened. Self-evidently, the answer to this question is, there would still have been business interruption because of the national lockdown. Ergo, the defined event was not the factual cause of the business interruption.

[45] There is a seductive allure to the simplicity of the question posed by Guardrisk, and, the answer it inevitably yields. But, I have already found, as a matter of construction, that the defined event or insured peril is the

[28] *Napier* (fn 14) at 144E-F.
[29] *Concord Insurance* (fn 27) at 673I.
[30] Ibid at 674A-B.

occurrence of Covid-19 *and* the government's response. So the proper question in applying the 'but for' test in this case is to ask whether, but for the defined event (properly understood as the occurrence of Covid-19 and the government response) would the business have been interrupted.

[46] Guardrisk pushes back against this approach. It insists that even if the defined event includes a government response, it must be factually linked to the localised outbreak of the disease. On this basis it accepts that a lockdown imposed by a local authority in reaction to the outbreak would have been a factual cause of the business interruption. The national lockdown, which caused the business interruption was, however, aimed at curbing the spread of the disease throughout the country, rather than Cape Town, specifically. Therefore, contends Guardrisk, the outbreak of the disease in Cape Town did not cause the business interruption.

[47] The difficulty Guardrisk cannot overcome is that its central premise is founded on an artificial separation between the occurrence of the local outbreak in Cape Town and government's response to the national outbreak, which perforce included Cape Town, as I have pointed out earlier. As the high court put it, correctly I think, there was a 'clear nexus' between the local occurrence of Covid-19 and the lockdown.

[48] Viewed slightly differently, because the lockdown was a response to a national outbreak, which included, predominantly, the Cape Town outbreak, Café Chameleon's losses were due at the very least to concurrent causes. As a matter of 'reality, predominance and efficiency', therefore, the local outbreak and government response, was the real or proximate cause of

the business interruption. This conclusion not only accords with reality but also makes good business and common sense. So, when Café Chameleon asked the question: '[H]as the event, on which I put my premium, actually occurred', there could have been only one answer.

[49] Having established that the local occurrence of Covid-19 and the government's lockdown was the factual cause of Café Chameleon's loss, the focus shifts to whether it was also the legal cause. In the court a quo, Guardrisk invoked the spectre of indeterminate liability and potential collapse of the insurance industry, should the insured's interpretation of the clause be upheld. The court dismissed the argument on the ground that these gloomy predictions were speculative and that Guardrisk had provided no evidence regarding its own exposure. But even if this were so, it reasoned:

'[I]t cannot be a defence for an insurer to say that it must be excused from honouring its contractual obligations because its business has unexpectedly incurred greater debt than had been expected.'[31]

[50] In this court Guardrisk abandoned this argument because, as is clear from *Napier v Collett*,[32] policy considerations, such as indeterminate liability do not play a role in a contractual setting. Instead the focus is on the provisions of the insurance policy. Accepting this approach, Guardrisk thus contended that Café Chameleon had not proved that the local occurrence of Covid-19 was 'sufficiently intimately connected with the imposition of the regulations' to impose liability on it.

[31] *Café Chameleon v Guardrisk Insurance Company Ltd* (fn 2) para 79.
[32] *Napier* (fn 14) at 143J.

[51] Once we accept, as I have, that the government response through the imposition of the lockdown, was both a proximate cause, or as the high court found, sufficiently closely connected to the business interruption and consequent loss, the conclusion that legal causation was proved, follows inevitably.

**The Financial Conduct Authorities Case**

[52] The parties drew our attention to a recent test case in the UK High Court involving several sample business interruption policy wordings from eight insurers.[33] The case was brought by the Financial Conduct Authority (the FCA) representing the interests of insured businesses. As with the present case, the FCA sought declarations in respect of these wordings in respect of a set of agreed facts.

[53] In this regard it is apparent that the United Kingdom's regulatory response to Covid-19 was similar to South Africa's. In the middle of March, the UK government directed people to stay at home and stop non-essential human contact and travel. On 20 March, it ordered restaurants to close, and, a few days later, it announced a national lockdown, including all non-essential businesses in its dragnet.

[54] Argenta's was one of the policies the court was asked to interpret. It had a remarkably similar infectious diseases clause to the one at issue in this appeal. It extended business interruption cover 'for such interruption as a result of . . . any occurrence of a [notifiable human disease] within a radius of 25 miles of the [premises]. It also took care to limit its liability to £25 000,

[33] *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2020] EWHC 2448 (Comm).

which Guardrisk, doubtless must rue, has not done'.[34] Argenta, nevertheless, sought to escape any liability by contending, as Guardrisk does here, that an insured must show that a business interruption was the 'proximate cause' by the occurrence of Covid-19 within the 25 mile radius. Unless it is able to do so, the argument continued, there is no cover for losses due to measures taken in response to occurrences outside the radius or of the public response to such measures.[35]

[55] The court found, as a matter of construction, that Argenta's argument did not accord with the language of the policy. It reasoned that the text 'is not expressly confined to cases where the interruption has resulted only from the instance(s) of a Notifiable Disease within the 25 mile radius as opposed to other instances elsewhere'.[36] Instead, it continued, 'the clause can and should properly be read as meaning that there is cover for business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance within a specified radius'.[37]

[56] Significantly, the court accepted, as I have, that the nature of a notifiable disease involves a government response. It explained that it is in 'the nature of human infectious and contagious diseases that they may spread in highly complicated, often difficult to predict, and what may be described as "fluid" patterns'. The list of notifiable diseases 'includes some which might attract a response from authorities which are not merely local authorities, and

[34] *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2020] EWHC 2448 (Comm) para 150.
[35] Ibid para 156.
[36] Ibid para 102. Although this quote refers to another clause where the same argument was made on behalf of the insurer ie, in the RSA case, it is clear that the same reasoning was applied for this clause.
[37] Ibid.

which is not a purely local response'.[38] I pause to mention that this observation echoes the requirement in South Africa, that a Category 1 notifiable medical condition, which includes respiratory disease caused by a novel respiratory pathogen referred to in Table 1 of Annexure A of the Surveillance Regulations, which Covid-19 is, must be reported to the Department of Health within 24 hours. The court thus concluded that the parties to this kind of insurance 'must have contemplated that there might be relevant actions of public authorities which affect a wide area' and that 'the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak'.[39]

[57] The court also based its conclusion on its interpretation of the clauses, even though much of the insurers' arguments were put in terms of causation. Put simply, it said that the case was about construction rather than causation.[40] However, it accepted the FCA's argument that given the nature of the cover that was provided 'proximate causation' would be satisfied:

'[In] a case in which there is a national response to the widespread outbreak of a disease. In such a case we consider that the right way to analyse the matter is that a proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts.'[41]

[58] I refer to this case with caution bearing in mind that it was decided on a set of agreed facts and that there were differences – in some instances important differences – in the language of the policies there in issue. We were

[38] *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2020] EWHC 2448 (Comm) para 102.
[39] Ibid.
[40] Ibid para 164.
[41] Ibid para 111.

also informed from the bar that the UK Supreme Court is yet to deliver judgment in an appeal by both the FCA and the insurers in respect of some of these findings. This notwithstanding, I consider the court's reasoning persuasive, at least in relation to the policies that bear a similar wording to the present one.

[59] Guardrisk has three remaining arguments that require brief consideration. I deal with the Trends Clause first.

**The Trends Clause**

[60] As an afterthought, Guardrisk contends that the 'trends' clause or 'other circumstances clause' effectively denies Café Chameleon cover. The purpose of the clause in insurance contracts is to adjust the loss an insured has suffered as a consequence of the insured peril, so that the insured is put in the same trading position after the business interruption, as if it had not happened. The formula, according to which the loss is calculated, is adjusted to reflect the projected fate of the business, as if the business interruption had not occurred. Café Chameleon is not entitled to cover, it argues, because the Lockdown Regulations constituted an 'other circumstance' affecting the business, the effect of which is that it would have suffered a loss even if there was no local occurrence of Covid-19.

[61] Guardrisk did not advance this argument in its answering papers, nor in the court a quo. On appeal Counsel merely stood by his written submissions, apparently without conviction. The short answer to this contention is that the trends clause is relevant to the quantification of loss, not liability, which is what we are here concerned with.

[62] More fundamentally Guardrisk errs in construing the lockdown regulations as an 'other circumstance'. The trends clause applies when an adjustment must be made, in its words, 'to provide for the trend of the business and for variations or other circumstances affecting the business either before or after the Damage or which would have affected the business had the Damage not occurred'. An 'other circumstance' by definition, therefore, refers to an occurrence separate from or independent of the insured peril, not one that is intrinsic to it. The Lockdown Regulations, I have found, were part and parcel of the insured peril. They are not an 'other circumstance' as envisaged in the trends clause. If Guardrisk's submission were correct it would have the extraordinary consequence that despite being part of the insured peril for which cover is provided, the Lockdown Regulations simultaneously operate as a circumstance to negate the cover.

**The Remaining submissions**

[63] Guardrisk persisted with two other submissions in its heads of argument, but not argued orally. The first is that the court a quo erred because the declaratory relief sought, and the order granted, did not mirror the language of the infectious diseases clause. The declaration sought was:

'That it is declared that the respondent is obliged to indemnify the applicant in terms of the Business Interruption section of policy number HIC 0000-2950 for any loss suffered by the applicant, calculated and quantified as provided in that section, arising since 27 March 2020 from the interruption of the business as a result of the promulgation and enforcement of Regulations made by the Minister of Cooperative Government and Traditional Affairs under the Disaster Management Act 57 of 2002 in response to the Covid-19 pandemic in South Africa.'

And what was granted, but apparently not sought was:

'That the Respondent is liable to indemnify the Applicant in terms of the Business Interruption Section of Policy number HIC 0000-02950 for any loss suffered since 27 March as a result of the Covid-19 outbreak in South Africa which resulted in the promulgation and Enforcement of Regulations made by the Minister of Co-operative Government and Traditional Affairs under the Disaster Management Act, 57 of 2002.'

[64] The infectious disease clause covers 'loss as insured by this Section resulting in interruption or interference due to . . . notifiable Disease occurring within a radius of 50 kilometres of the Premises'. It is, therefore, contended that it was not competent for the court to grant relief that was not asked for or fell within the ambit of the clause.

[65] It is apparent that, whatever the formulation of relief of the order sought or granted, the essential dispute between the parties was over whether the business interruption was due to the lockdown. That is essentially the relief that was sought and granted despite the minor differences in language. The argument is devoid of merit.

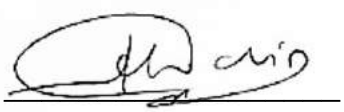
[66] Finally, Guardrisk had one more technical argument, also meritless for its abject formalism. It contended that Café Chameleon relied on the wrong policy, which was the renewed policy that took effect on 1 April 2020 rather than the identical earlier policy. The lockdown commenced on 26 March, and, Café Chameleon claimed loss from 27 March. There is no dispute that both policies applied during the period for which the loss is claimed. In its replying affidavit, Café Chameleon asked the court to grant relief on whichever version of the policy it regarded appropriate. The Court a quo correctly did so.

**Conclusion**

[67] The central question in this appeal was whether the government's imposition of a lockdown in response to multiple outbreaks of a 'notifiable disease' i.e. Covid-19, throughout the country, and predominantly in Cape Town, where Café Chameleon's operates its business, was covered by the infectious diseases clause. The question was answered in favour of Café Chameleon, as was the question whether the outbreak of Covid-19 in Cape Town was the cause of its business interruption. In coming to this conclusion I am fortified by much of the reasoning in the FCA case[42] and two recent judgments of the Western Cape High Court: *Ma-Afrika Hotels and Another v Santam Limited*[43] and *Interfax (Pty) Ltd and Another v Old Mutual.*[44]

[68] In the result the following is made:

'Paragraphs 2 and 3 of the order of the court a quo are set aside. Save as aforesaid, the appeal is dismissed with costs, including the costs of three counsel.'



A CACHALIA

JUDGE OF APPEAL

[42] *Financial Conduct Authority* (fn 33).
[43] *Ma-Afrika* (fn 7).
[44] *Interfax (Pty) Ltd and Another v Old Mutual Insure Limited* [2020] ZAWCHC 166.

Appearances

| | |
|---|---|
| For appellant: | I P Green SC (with him R Ismail and J Chanza) |
| Instructed by: | Clyde & Co Inc, Sandton |
| | Honey Attorneys, Bloemfontein |
| For respondent: | J J Gauntlett SC QC (with him S P Rosenberg SC, |
| | T Tyler, P Long and J Mitchell) |
| Instructed by: | Dunster Attorneys, Cape Town |
| | Phatshoane Henney Attorneys, Bloemfontein |