Grassy Knoll Trading 78 CC t/a Fat Cactus and another v Guardrisk Insurance Company Limited
[2020] JOL 49042 (WCC)

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 10035/2020

In the matter between:

GRASSY KNOLL TRADING 78 CC First Applicant
t/a FAT CACTUS

FAT CACTUS WOODSTOCK (PROPRIETARY) LIMITED Second Applicant

and

GUARDRISK INSURANCE COMPANY LIMITED Respondent

Coram: Norton AJ
Heard: 15 September 2020
Delivered: 20 November 2020

JUDGMENT

Norton AJ

[1] The applicants operate restaurants in Cape Town which suffered losses and were compelled to close within weeks of the first cases of COVID-19 being identified in South Africa. They seek a declaratory order that the respondent (Guardrisk), an insurance company, is obliged to indemnify them as policyholders under a business interruption section of their insurance policy, for the losses which they suffered as a result of the interruption of their business.

[2] The policy clause upon which they rely, which I shall call 'the disease clause', insures the applicants against loss resulting from interruption of, or interference with their business due to 'Notifiable Disease occurring within a radius of 50 kilometres of the Premises', with 'Notifiable Disease' defined as meaning -

> 'illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition'.

[3] Guardrisk concedes, for the purposes of this application, that COVID-19 is a notifiable disease within the meaning of the disease clause, and it is common cause that before the applicants closed their restaurants, cases of COVID-19 had been identified within 50 kilometres of each restaurant's premises.

[4] Guardrisk opposes the relief sought on the basis that the business interruption suffered by the applicants was not caused by the occurrence of COVID-19 within a 50 kilometre radius of their premises, which Guardrisk contends is the relevant insured peril, but by the global COVID-19 pandemic and the South African government's response it, which in Guardrisk's submission are not perils covered by the policy.

[5] The applicants do not assert, nor have they established on the evidence, that the occurrence of COVID-19 within the specified radius caused the closure of their restaurants. They also do not dispute the evidence adduced by Guardrisk that the governmental measures – in particular the national lockdown - which imposed restrictions on restaurants in South Africa were a response to the COVID-19 pandemic, and not to the occurrence of COVID-19 within 50 kilometres of the applicants' restaurants, or in any other localised area.

[6] Their case is that the closure of their restaurants was occasioned by the COVID-19 pandemic and the measures introduced by the government in response to it, but that 'there is nothing in the wording to exclude…the effect of the occurrence of the notifiable disease within the defined radius that is a part of a greater occurrence of the disease where the disease as a whole causes the business interruption'.

[7] The key issue to be determined is whether the disease clause provides cover for business interruption caused by the COVID-19 pandemic and the government's response to it, where there has been an occurrence of COVID-19 within the specified radius which itself is not causally related to the

business interruption. This turns on the proper interpretation of the disease clause.

[8] This court has recently considered the proper interpretation of the same disease clause (per Le Grange J in *Cafe Chameleon CC v Guardrisk Insurance Company Ltd* [2020] ZAWCHC 65 (6 June 2020)) and a clause in precisely the same terms (per Goliath DJP, Mantame J and Cloete J in *Ma-Afrika Hotels (Pty) Ltd and another v Santam Limited and another* [2020] ZAWCHC 160 (17 November 2020)). The full bench in *Ma-Afrika Hotels* upheld the interpretation adopted by Le Grange J in *Café Chameleon*, and in determining this application I am bound by that decision unless I find it to be distinguishable.

The pertinent facts

[9] The first human infection with COVID-19, a disease caused by a new human respiratory virus called Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), was recorded in Wuhan, China, on 31 December 2019.

[10] On 30 January 2020 the World Health Organisation (WHO) declared that the SARS-CoV-2 outbreak constituted a public health emergency of international concern. COVID-19 was declared a pandemic by the WHO on 11 March 2020. The WHO defines a pandemic as ‘a worldwide spread of a new disease’, while an epidemic is defined as a disease occurring in a community or region.

[11] As the capacity for COVID-19 to spread became apparent, governments around the world became concerned about the risk it posed to public health and the capacity of health services to respond to it. A range of different measures were introduced to pre-empt and combat the spread of COVID-19. These included restrictions on international travel; various forms of 'lockdown' to control movement within national, regional and local boundaries, and quarantining and isolating of persons who were or might be infected.

[12] On 5 March 2020 the first case of COVID-19 in South Africa was confirmed in KwaZulu-Natal, and on 11 March 2020 the first case was confirmed in Cape Town. By 14 March 2020 the City of Cape Town had ten confirmed cases.

[13] On 15 March 2020 the COVID-19 pandemic was declared a national disaster in South Africa in terms of s 23(1)(b) of the Disaster Management Act 57 of 2002 (the Disaster Act). On the same date the Minister of Cooperative Governance and Traditional Affairs (the Minister) declared a state of national disaster in terms of s 27(1) of the Disaster Act, and the President announced the state of disaster in a nationally televised address to the nation. On that date there were 51 confirmed cases in South Africa.

[14] On 18 March 2020 the Minister issued regulations in terms of s 27(2) of the Disaster Act (the Disaster Regulations) which were expressly aimed at preventing an escalation of the national disaster. They included provision for compulsory quarantining or isolation of persons diagnosed with or suspected of having contracted COVID-19; the banning of assemblies of more than 100 persons; the closing of schools; and limitations on the sale, dispensing

and transportation of liquor. The Minister of Transport issued regulations limiting rights of embarkation and disembarkation at South African airports and sea ports, and advising South African citizens and permanent residents to refrain from all use of air travel until further notice.

[15] On 23 March 2020 the President announced a national lockdown to commence at midnight on Thursday 26 March 2020 and continue until midnight on Thursday 16 April. There were at that time 402 confirmed cases in South Africa.

[16] On 25 March 2020 the Minister amended the Disaster Regulations to make provision for the nationwide lockdown. Regulation 11B provided as follows:

> '**11B.** (1)(*a*) For the period of lockdown –
>
> (i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention;
>
> (ii) every gathering, as defined in regulation 1, is hereby prohibited, except for funerals as provided for in subregulation (8);
>
> (iii) movement between provinces is prohibited; and
>
> (iv) movement between the metropolitan and district areas, is prohibited.
>
> (*b*) All businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in

the manufacturing, supply, or provision of an essential good or service.'

[17] On 16 April 2020 the national lockdown was extended until 30 April 2020, and on 29 April 2020 new regulations were promulgated which authorised the Minister to declare various alert levels in order to manage the pandemic.

[18] The applicants closed their restaurants on about 20 March 2020, shortly before the national lockdown was announced. In their founding papers they state that their business started falling off almost immediately after the announcement that COVID-19 had arrived in South Africa and in particular within the boundaries of Cape Town. Their turnover dropped even before government announced its interventions, and their losses accelerated after the government stepped in.

[19] They went from trading at full capacity during the busy summer season to 25% of their capacity 'almost overnight', by 16 March 2020. The fall in turnover was exacerbated by the prohibition on alcohol sales in the evenings, and after trading at a loss for a short period of time, they closed their restaurants in order to reduce their overall losses.

[20] The applicants submitted claims in terms of their respective policies on 22 June 2020. On 24 June 2020, Guardrisk's underwriting manager (HIC) advised the applicants on behalf of Guardrisk that their claims were rejected on the grounds that they had not provided evidence that their loss was a consequence of a confirmed case of COVID-19 within the specified radius of their premises.

Interpretation of insurance contracts

[21] Insurance contracts must be interpreted in accordance with the usual rules of interpretation, having regard to their language, context and purpose, and preferring a 'commercially sensible' meaning over one that is insensible or at odds with the purpose of the contract (*Centriq Insurance Company Limited v Oosthuizen* 2019 (3) SA 387 (SCA) para 17. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18).

[22] 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 in which they concluded the contract' (*Centriq,* para 17).

[23] In *Centriq* the Supreme Court of Appeal outlined specific considerations which apply to the construction of insurance contracts. The first is that provisions which limit or exclude an obligation to indemnify will be usually be interpreted restrictively because 'insurance contracts have a risk-transferring purpose' and it is the insurer's duty to 'spell out clearly the specific risks it wishes to exclude' (para 18. See also *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 at 222 and *May on Insurance* (4ed) at 174-175). The second is that in the event of real ambiguity, the *contra proferentem* doctrine applies, and the policy is generally construed against the insurer (para 18). Cachalia JA however sounded the following cautionary note:

> ‘[C]ourts are not entitled, simply because the policy appears to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permits. For, if that is what the insured contracted for that is what he is entitled to, and no more. It is not for the courts to construe exclusions in favour of the insured simply because it considers them to be unfair or unreasonable’ (para 21).

[24] A commercially sensible meaning, in respect of an insurance contract, is ‘a meaning that both the prospective insured and the insurer must have regarded as meeting their aims in concluding the policy’ (*Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* [2002] 4 All SA 355 (SCA) para 43). Finding such a meaning involves interpreting the contract ‘in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application’ (*Grand Central Airport (Pty) Ltd v AIG SA Ltd* [2004] JOL 12586 (W) para 9).

[25] The insured bears the onus of proving that it falls within the insuring clause (*Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) at 334B – 335).

The proper interpretation of the disease clause

The disease clause in its context

[26] The policy relied upon by the applicants provides cover for a wide range of perils, including fire, business interruption, theft, accidental damage and public liability.

[27] The primary insuring clause in the 'Business Interruption' section of the policy provides cover for loss suffered in consequence of physical damage to property at the business premises. There are two types of extensions to the indemnity in the primary insuring clause: (a) 'damage extensions', which include cover for business interruption due to damage to property in locations other than the business premises; and (b) 'non-damage extensions', which include cover for business interruption due to defined events that do not cause damage to property but occur at or within a specified radius of the business premises.

[28] The business interruption clause on which the applicants rely - the disease clause - falls within a non-damage extension which reads as follows:

> **'Infectious Diseases/Pollution/Shark Attack/Additional Interruption Extension**
>
> Loss as insured by this Section resulting in 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 premises
>
> (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 the 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 or 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, lion, 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 the competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (H.I.V), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'

[29] It is readily apparent, and not in dispute, that the opening words 'resulting *in* interruption or interference with the business' (emphasis added) were meant to read 'resulting *from* interruption or interference with the business'.

The interpretation issues

[30] The disease clause on its plain terms covers loss resulting from an interruption to, or interference with a policyholder's business where that interruption or interference is 'due to ...notifiable disease occurring within a radius of 50 kilometres of the Premises'.

[31] There are two principal issues of interpretation before me. The first is the nature and scope of the insured peril described by the words 'notifiable disease occurring within a radius of 50 kilometres of the Premises' (the notifiable disease peril). The second is the required causal relationship between the notifiable disease peril and the business interruption. A further, related issue is the consideration of measures introduced by the government in response to the occurrence of notifiable disease as part of the causal matrix.

[32] I turn first to the causal relationship issue.

The causal relationship which is required

[33] The words 'due to' connote a causal connection (*Mey v SA Railways and Harbours* 1937 CPD 359 at 363) and require, on the ordinary grammatical meaning of the disease clause, a causal link between the business interruption and 'notifiable disease occurring within a radius of 50 kilometres of the insured Premises'.

[34] In an insurance contract the nature of the causal link which is required depends on the intention of the parties and is a matter of interpretation. As

Hefer JA observed in *Concord Insurance Co Ltd v Oelofsen NO* 1992 (4) SA 669 (A) at 674A-B*:*

> 'In criminal law and the law of delict legal policy may provide an answer but in a *contractual* context, where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend'.

[35] The general approach, unless a different intention appears from the insurance contract, is that the insured peril must be the factual cause and the legal cause of the loss or occurrence which is covered by the contract (*Napier v Collett and Another* 1995 (3) SA 140 (A) at 144B-C).

[36] Factual causation is established if, hypothetically speaking, the loss or occurrence would not have happened 'but for' the insured peril (*Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) para 40, citing *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-H).

[37] Legal causation is established if there is a sufficiently close relationship between the insured peril and the loss or occurrence that the former can be said to be the legal cause of the latter. The test for legal causation has been described as 'a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part' (*Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 766F-G).

[38] In *Napier* Grosskopf JA observed that in applying these factors in the context of insurance contracts, prime regard must be had to the provisions of the insurance policy.

> 'Thus 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 of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether a factual cause should be regarded as the cause in law' (144 D-E).'

[39] When there are two or more possible causes of the loss or occurrence which is covered by the contract, a court must determine which is the 'proximate cause' (*Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) 862 C-D) as the insurer will only be liable if the loss or occurrence for which a claim is brought is the proximate result of the peril insured against.

[40] A cause has been held to be proximate if it can be described by terms such as dominant, effective, direct, real, actual, determining, operative, predominant or efficient (Reinecke et al, *South African Insurance Law*, 2013, para 13.85). If the causal relationship is indirect and fortuitous, the cause is not proximate and there is no legal causation (*Napier,* 146H). The proximate cause is not merely the one which was latest in time, but the one which is 'proximate in efficiency' (*Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another* 1995 (3) SA 751 (A) at 759H).

[41] In the absence of the express incorporation of the proximate cause rule in an insurance policy, it will be implied on the basis that 'it reflects the presumed intention of the parties to an insurance contract' (*Napier,* 144A).

[42] In the absence of any indication to the contrary in the disease clause, I consider that it provides cover where the insured peril was the factual and legal cause of the insured's business interruption, and the proximate cause if there are other competing causes.

Government measures in response to an occurrence of notifiable disease

[43] On the facts in this matter the applicants closed their restaurants on or about 20 March 2020, after the first COVID-19 cases were identified in Cape Town and after the Disaster Regulations introduced limitations on the sale of alcohol, but before the implementation of the national lockdown which required the closure of all businesses not providing essential services. The applicants ascribe the interruption of their business over the period in question to the effects of the COVID-19 pandemic and the measures introduced by the South African government in response to it.

[44] Whether the words 'notifiable disease occurring within a radius of 50 kilometres' are given a restrictive or a broad interpretation (an issue to which I turn below) I consider that it must have been within the contemplation of the parties that interruption or interference with a restaurant business might be occasioned not only by the occurrence of a notifiable disease, but also by the response of the public or the government to that occurrence. Indeed, in the case of each of the insured perils in the

non-damage extension which is subject to a specified radius – notifiable disease, attacks by sharks or wild game, and pollution of beaches or rivers – it is more likely that the key elements of a restaurant business – its premises, staff, supply chain and patrons – would be affected by the public or government's response to the incident than by the incident on its own.

[45] In the case of notifiable diseases, the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions published under the National Health Act (GN 1434 of 2017) recognise that a notifiable disease 'may require immediate, appropriate and specific action to be taken by the national department, one or more provincial departments or one or more municipalities' (reg. 12(2)).

[46] The applicants rely on the government's response to COVID-19 as an event in the chain of causation between the insured peril and the interruption of their business, citing Tshiqi JA's observation in *Mutual and Federal Insurance Co Ltd v SMD Telecommunications* CC 2011 (1) SA 94 (SCA) at para 11 that:

> '[t]here is a long line of cases in which it has been recognised that, even if the loss is not felt as the immediate result of the peril insured again, 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'.

[47] Thus, it was submitted on behalf of the applicants,

> ‘It is clear that but for the pandemic, there would have been no Lockdown Regulations and that they were imposed solely because of the pandemic and its effects or likely effects on the population. The pandemic is therefore linked sufficiently closely and directly to the business interruption for the factual causation aspect to have been satisfied. There is, furthermore, undisputed evidence of the disease within the prescribed radius.’

[48] Guardrisk does not dispute the causal relevance of the government’s response to notifiable disease, nor does it deny that the measures taken by the South African government in response to the COVID-19 pandemic were causally relevant to the applicants’ business interruption. Its opposition to the relief sought is based on its contention that the peril covered by the disease clause is not the COVID-19 pandemic, but the occurrence of COVID-19 within the specified radius.

[49] As will appear from my consideration, below, of this court’s decision in *Ma-Afrika Hotels*, the full bench in that case accepted that COVID-19 and the government’s response to it ‘are inseparably part of the same insured peril’ (per Goliath DJP and Mantame J at paragraph 75 and per Cloete J at para 15). In so finding the Court expressly endorsed a conclusion reached by the Queen’s Bench of the High Court of England and Wales in respect of several of the eight disease clauses in insurance policies which came before it in the test case *Financial Conduct Authority v Arch Insurance (UK) Limited and Others (Hospitality Insurance Group Action and Another Intervening* [2020] EWHC 2448 (Comm) (*FCA).*

[50] The Court in *FCA* accepted that the nationwide outbreak of COVID-19 in the United Kingdom and the resulting government and public response to it formed a 'composite peril' (paras 110, 113, 278, 385 and 471) which was covered by the relevant disease clauses. The Court noted that once the government response is seen as part of the insured peril, the causation issues 'largely answer themselves' (para 110).

[51] Whether public and government responses to an event defined in an insurance policy are more appropriately considered as part of the causal matrix, or subsumed into the insured peril, is a matter for consideration by a higher court.

The nature and scope of the notifiable disease peril

[52] The parties have advanced competing constructions of what is encompassed by the words 'notifiable disease occurring within a radius of 50 kilometres of the insured Premises'.

[53] In the applicants' contention, the words encompass notifiable disease, wherever it occurs, provided there has also been an occurrence of the notifiable disease within the specified radius.

[54] Guardrisk contends that the words encompass only the occurrence of notifiable disease within the specified radius.

[55] The construction advanced by Guardrisk finds support in the language and the contractual setting of the disease clause.

[56] On an ordinary grammatical reading, the clause ‘occurring within a radius of 50 kilometres’ expressly qualifies the ‘notifiable disease’ which must cause the business interruption covered by the disease clause, and sets a geographical limit on the scope of the notifiable disease peril. Conversely, there is no linguistic indication that the notifiable disease peril includes notifiable disease occurring *outside* the specified radius, whether in a wider local area, countrywide, or globally.

[57] The contractual context of the disease clause points in the same direction. In the non-damage extension which includes the disease clause, all but one of the events which constitute insured perils must have a specified geographical connection with the insured’s business premises. The events in sub-paragraphs (a) to (d) must occur at the premises themselves, and the events in sub-paragraphs (e), (g) and (h) must occur within a 50-kilometre radius of the premises. Just as there is no basis for concluding that the insured perils relating to events which occur *at* the premises might include events which occur *outside* the premises, or that the specified radius in respect of the other insured perils is not causally relevant, there is no linguistic or contextual basis for ignoring the specified radius in the notifiable disease peril.

[58] Recognising that the radius requirement cannot be altogether disregarded, the applicants propose that it be read as a qualifier: the disease clause covers business interruption caused by notifiable disease wheresoever it occurs, provided that there has *also* been an occurrence within 50 kilometres. This construction reduces the occurrence of the notifiable disease within a specified radius – which on a grammatical construction of

the disease clause is the causally relevant peril - to a mere proviso with no causal relevance whatsoever. It also gives rise to the arbitrariness of what Guardrisk has characterised as a 'postcode lottery', with cover depending on the happenstance of a case of COVID-19 occurring within the specified radius.

[59] A reading which expands the scope of the notifiable disease peril beyond the specified radius also risks unbusinesslike results, from the perspective of the insurer, which must then be taken to have agreed to indemnify the insured against the effects of notifiable disease wheresoever it might occur – in a wider local area, nationally or globally - subject to an occurrence within the specified radius being shown.

[60] Pertinently, Guardrisk's underwriting manager explained on affidavit that no premium is charged for the extension in which the disease clause falls, and it is included in all the policies issued to insureds in the restaurant industry, 'because the cover that is offered by the extension is limited in scope and the probability of loss is very low'.

[61] There are thus cogent bases for Guardrisk's contention that the disease clause covers no more than what is indicated by its plain language.

[62] The construction advanced by the applicants, however, has been upheld by this court in *Café Chameleon* and *Ma-Afrika Hotels* and finds support in the decision of the Queen's Bench in *FCA.*

[63] The decision of a full bench of this court in *Ma-Afrika Hotels* is binding upon me unless I find it to be distinguishable. I consider that there is

no basis upon which it can be distinguished. The clause under consideration in that case was in precisely the same terms as the disease clause before me (save that the specified radius was 40 kilometres) and the factual premises of the decision - that the measures taken by the South African government under the Disaster Act were a response to the COVID-19 pandemic and that the insured's business interruption loss had been caused by the COVID-19 pandemic and the government's response to it – are matters of common cause in this application.

[64] In *Ma-Afrika Hotels* the applicant insured sought and obtained a declarator that the respondent insurer is liable in terms of the relevant clause -

> 'for such loss that the … applicant is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 11 March 2020.'

[65] Although not apparent from the terms of the declarator, the Court found that on a proper interpretation of the relevant clause, it covers business interruption loss caused by the COVID-19 pandemic and the government's response to it, where there has been an occurrence of COVID-19 within the specified radius.

[66] The Court (per Goliath DJP and Mantame J) explained its construction of the relevant clause as follows:

> ‘The purpose of the policy is to provide the applicant protection in the event of its business being interrupted due to the outbreak of *an infectious disease that has a local occurrence and which triggers a response from the authorities that results in a disruption of the business to trade*. The infectious diseases clause covers notifiable diseases which are, by their nature, diseases that entail a government response, or at least the risk of a government response. It is evident that a notifiable disease and government response is inextricably linked due to the public health risk imperatives. It therefore, appears to be a logical conclusion that the only textual – and purposeful – interpretation of the clause is that the insured peril covers Covid-19 and the government’s response to Covid-19’ (para 40). (Emphasis added)

> ‘We accordingly conclude that the national response to the Covid-19 disease that has a local occurrence is sufficient to satisfy the policy. Had it not been for Covid-19 and the government’s response, the applicants’ business would not have been interrupted and they would not have suffered their loss. In our view the applicants’ losses are exactly what they had insured themselves against’ (para 75).

[67] In a separate concurring judgment, Cloete J underscored the broad public health risk posed by notifiable diseases and concluded:

> ‘I do not accept Santam’s argument that cover only arises where the disease itself is limited to a defined geographical area in which the prescribed radial limit is located. This interpretation would render the

> express reference to 'notifiable disease' in the extension clause entirely at odds with the accepted (and indeed regulated) meaning of a 'public health risk' (para 24).

[68] The interpretation adopted in *Ma-Afrika Hotels* is consistent with the decision in *Café Chameleon* and the findings in *FCA* in respect of several of the disease clauses under consideration.

[69] In *Café Chameleon* Le Grange J considered precisely the same clause which is before me and declared Guardrisk -

> 'liable to indemnify the Applicant… for any loss suffered since 27 March 2020 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'.

[70] In *FCA* the Court found in respect of six of the eight disease clauses before it (each of which, although differently worded, provided for business interruption caused by notifiable or infectious disease within a specified radius), that they provided cover for business interruption caused by the nationwide outbreak of COVID-19 in the United Kingdom and the resulting government and public response to it.

(In respect of the two clauses which, arguably, most closely approximate the disease clause before me – 'QBE2' and 'QBE3' – the Court went the other way, finding that the insured would only be able to recover under those clauses if they could show that 'the case(s) within the specified radius, as

opposed to any elsewhere, were the cause of the business interruption' (paras 235 and 236). The Court distinguished those clauses on the basis that they identified the insured perils as 'events', thus indicating that 'what is being insured is matters occurring at a particular time, in a particular place and in a particular way' (paras 231 and 236).)

Conclusion on the interpretation of the disease clause

[71] Once I have accepted, as I must, that the disease clause provides cover for business interruption caused by the COVID-19 pandemic and the government's response to it, provided that there has been an occurrence of COVID-19 within the specified radius of the insured's premises, the applicants are entitled to the declaratory relief which they seek in respect of Guardrisk's liable to indemnify them for losses resulting from such business interruption.

[72] As it is common cause between the parties that the government measures which caused the business interruption suffered by the applicants were a response to the COVID-19 pandemic as a whole, any causal questions which might otherwise have arisen fall away when the insured peril is construed as including the COVID-19 pandemic and the government's response to it.

Relief

[73] The declaratory relief sought in the applicants' notice of motion in respect of Guardrisk's liability to indemnify them does not accurately reflect the case advanced in their papers and in argument.

[74] I consider it appropriate to grant a declarator in terms based on the *ratio* of the decision in *Ma-Afrika Hotels* and in similar terms to the declarator granted in *Café Chameleon*, declaring that Guardrisk is liable to indemnify the applicants for any loss, as insured by the Business Interruption section of their policy, which they have suffered as a result of interruption of or interference with their business caused by the COVID-19 pandemic and the South African government's response to it.

[75] In addition to the declarator in respect of indemnification, the applicants seek the following further relief:

> '2.6 That the respondent is ordered to make payments in respect of such losses as the applicants are able to calculate and quantify from time to time;
>
> 2.7 That the respondent is directed to process all claims submitted by the applicants within 10 days of receipt of any such claim and supporting documentation and to pay all amounts owing under said claims within a further 5 days;
>
> 2.8 That the applicants are given leave to approach this Honourable Court on the same papers, supplemented as may be necessary, on no fewer than five days' notice to the respondent for such further relief as may be necessary, including clarification, incidental or payment relief, as may be necessary'.

[76] As Guardrisk has submitted, the processing of the applicants' claims, the quantification of their applicant's losses, and payment of any sums due to them are matters governed by the terms of the applicants' policies. The applicants have not made out a case for this further relief and I decline to grant it.

[77] The following order is made:

(a) The respondent is liable to indemnify the first applicant in terms of the Business Interruption section of policy number *** for any loss suffered as a result of interruption to or interference with its business caused by the COVID-19 pandemic and measures introduced by the South African government in response to the COVID-19 pandemic.

(b) The respondent is liable to indemnify the second applicant in terms of the Business Interruption section of policy number HIC *** for any loss suffered as a result of interruption to or interference with its business caused by the COVID-19 pandemic and measures introduced by the South African government in response to the COVID-19 pandemic.

(c) The respondent shall pay the costs of the application.

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Michelle Norton

Acting Justice of the High Court
Western Cape Division

APPEARANCES

For Plaintiffs:	M Seale SC Instructed by Mcaciso Stansfield Inc Cape Town
For Third Defendant:	I Green SC and R Ismail Instructed by Clyde & Co Inc Sandton