Café Chameleon CC v Guardrisk Insurance Company Ltd
[2020] JOL 47594 (WCC)

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Country:	South Africa
Jurisdiction:	High Court
Division:	Western Cape, Cape Town
Judge:	Le Grange J
Bench:	A le Grange J
Parties:	Café Chameleon CC (At); Guardrisk Insurance Company Ltd (R)
Appearance:	Adv SP Rosenberg SC, Adv TR Tyler (At); Adv SF Burger SC, Adv IP Green SC, Adv R Ismail (R)
Categories:	Application - Civil - Substantive - Private
Function:	Confirms Legal Principle
Relevant Legislation:	Disaster Management Act 57 of 2002, Sections 23, 27; Superior Courts Act 10 of 2013, Section 21; Health Act 63 of 1977, Section 33; National Health Act 61 of 2003, Section 90 English Public Health (Control of Disease) Act 1984

Key words

Corporate and Commercial - Insurance - Loss to business - Business interruption - Covid-19 lockdown regulations - Impact on business - Interpretation of insurance policy

Mini Summary

The applicant, which conducted the business of a restaurant, sought a declaratory order that the respondent insurance company was obliged to indemnify it as policyholder, in terms of a "Business Interruption" section of the policy, for the loss suffered as a result of the interruption caused by the Covid-19 pandemic and the resultant promulgation and·enforcement of the Regulations ('Lockdown Regulations") made by the Minister of Cooperative and Traditional Affairs ("the Minister") under the Disaster Management Act 57 of 2002.

In seeking the relief in question, the applicant explained how the regulatory regime put in place to counter the pandemic impacted on its business.

Held that an insurance policy has to be interpreted so that its provisions receive fair and sensible application and a restrictive consideration of words without regard to context has to be avoided. The policy under consideration could not be interpreted with reference to other policies or on the basis of generalised concerns about the impact of Covid-19 on the insurance industry at large, of which the applicant had no knowledge. The policy instead had to be considered on the contractual terms to which both parties had assented, in a sensible manner which underpinned sound commercial sense, and not have an unbusinesslike result.

The main points taken by the respondent were that the applicant's loss, if any, was not insured under the Infectious Diseases Extension clause in the policy; and that there was no causal link between the lockdown Regulations and the Infectious Diseases Extension. Properly interpreted, insofar as the indemnity was conditioned upon a ''human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them'; Covid-19 fell substantially within the ambit of the Notifiable Disease Extension.

The court then turned to the issue of causation. A claim in terms of an insurance contract requires a claimant to prove not only of the peril and of the loss or occurrence as described in and covered by the contract, but also of a causal nexus or link between the two. The question was whether the applicant had established that the regulatory regime that was imposed on its business from 27 March 2020 was directly caused by the
Covid-19 outbreak within the permitted radius of its premises and as a result it suffered a loss. The court accepted that there was a clear nexus between the Covid-19 outbreak and the regulatory regime that caused the interruption of the applicant's business. Factual causation was thus established by the applicant. In determining the presence of legal causation, the question was whether, having regard to the considerations alluded to, the harm was too remote from the conduct or whether, it was fair, reasonable and just that the respondent be burdened with liability. That question was answered against the respondent.

The respondent was therefore liable to indemnify the applicant in terms of the Business Interruption section of the policy.

LE GRANGE J:

Introduction

[1] This matter arises as a result of the current Covid-19 pandemic, which our country is not immune to. The applicant which conducts the business of a restaurant is seeking, on an urgent basis, a declaratory order that the respondent, an insurance company, is obliged to indemnify it as policyholder, in terms of a Business Interruption section of the policy, for the loss suffered, as a result of the interruption caused by the Covid-19 pandemic and the resultant promulgation and·enforcement of the Regulations ("the Lockdown

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Regulations") made by the Minister of Cooperative and Traditional Affairs ("the Minister") under the Disaster Management Act 57 of 2002. The applicant is also seeking that the respondent make certain interim payments to the business to survive the interruption.

[2] The respondent, in opposing the relief sought, raised three main grounds, namely:

(i) the matter lacks urgency as the applicant is currently not entitled to any relief under the policy;

(ii) the relief claimed by the applicant is inappropriate;

(iii) the applicant's loss, if any, is not insured under the Infectious Diseases Extension clause in the Policy; and lastly,

(iv) there is no causal link between the Lockdown Regulations and the Infectious Diseases Extension.

Counsel

[3] Messrs SP *Rosenberg* SC assisted by TR *Tyler* appeared for the applicant. Mr SF *Burger* SC appeared for the respondent. He was assisted by Messrs IP *Green* SC and R *Ismail*.

Background

[4] It is not in issue that the applicant and the respondent entered into a written contract of insurance ("the Policy")1. The Policy commenced in 2007 and contained various sections. The Policy was renewed and extended annually since its inception. The latest renewal date of the Policy was with

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effect from 1 April 2020 and remains in force. The applicant recorded that the events giving rise to its claim arose on 27 March 2020 that was within the period of the previous insurance policy of 1 April 2019 to 1 April 2020.

[5] It well known that on 15 March 2020 the Head of the National Disaster Management Centre, after assessing the potential magnitude and severity of the Covid-19 pandemic in the country, acting in terms of section 15(1)(aA) read with section 23(8) of the Disaster Management Act2 declared a national disaster.3

[6] On the same date the Minister of Cooperative Government [*sic*: Governance - Ed] and Traditional Affairs ("the Minister"), declared the Covid-19 pandemic a national state of disaster.4 Thereafter the Minister, in terms of section 27(2) of the Disaster Management Act made certain Regulations.5 These Regulations did not initially envisage a "Lockdown" but prohibited gatherings of more than 100 people.6

[7] On 25 March 2020, the Minister acting again in terms of the Disaster Management Act7 amended the Original Regulations and introduced a new Chapter 2, containing new Regulations 11A-11G, and also introduced new annexures "A"-"D". The new Regulations introduced was what we came to

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know as the "Lockdown". The salient provisions introducing the Lockdown provided the following:

7.1 Regulation 11A defined "lockdown" as "the restriction of movement of persons during the period for which these regulations are in force and effect namely from 23H59 on Thursday, 26 March 2020, until 23H59 on Thursday 16 April 2020, and during which time the movement of persons is restricted".

7.2 Regulation 11B(1)(a) provided that "for the period of the 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 . . .".

7.3 Regulation 11B(1)(b) provided that "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".

7.4 Regulation 11B(4) provided that "all places or premises provided for in Annexure D must be closed to the public except to those persons rendering security and maintenance services at those places or premises".

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7.5 Annexure "D" referred to various places normally open to the public, but did not initially refer to restaurants.

[8] The Minister thereafter, further amended the Original Regulations.[8] The salient provisions of the further amended Regulations provided as follows:

8.1 Regulation 11B(1)(b) was amended to provide that "during the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply or provision of an essential good or service, save where operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence".

8.2 Annexure "D" was amended by the introduction of the item "restaurants".

[9] Thereafter the Minister, in Government Notice 465 dated 16 April 2020 further amended the Original Regulations. The most notable impact of the amendment Regulations, in this instance, was the extension of the period of the lockdown to 30 April 2020. Regulations 11A was amended so that "lockdown" was defined to mean "the restriction of movement of persons during the period for which Chapters 2, 3, and 4 of these Regulations apply, namely, from 23H59 on 26 March 2020 until 23H59 on 30 April 2020".

[10] On 19 April 2020 [*sic*], further amendments to the Regulations were introduced by the Minister.[9] The main focus of the New Regulations was to empower the Minister to declare various "Alert Levels", namely, Alert Level 1 to Alert Level 5. Chapter 2 contains Regulations of general application during the state of disaster. Thereafter, Chapter 3 contains a declaration that Alert Level 4 will be applicable as from 1 May 2020.[10] The rest of Chapter 3 contains provisions which structure the Alert Level 4.[11]

[11] The lockdown, as provided for in the Original Regulations, was not extended. However, regulation 16(1) of the New Regulations provided that "every person is confined to his or her place of residence". This prohibition is subject to six limited exceptions as set out in regulation 16(2) of which one, in paragraph (d), is that someone is permitted to leave his or her place of residence to "obtain services that are allowed to operate as set out in Table 1 of the Regulations".

[12] Regulation 16(3) provided that "every person is confined to his or her place of residence from 20:00 until 05:00 daily, except where a person has been granted a permit to perform an essential service or permitted service as listed in Annexure D, or is attending to a security or medical emergency". The New Regulations contained no blanket prohibition, as existed under regulation 11B(1)(b) of the Original Regulations, against the operation of all businesses save those involved in the manufacturing, supply or provision of essential goods or services. There was no provision (as had existed under

regulation 11B(4) read with Annexure D of the Original Regulations) that restaurants must be closed to the public.

[13] The New Regulations now provided that "businesses and other entities as set out in Table 1 may commence operations".[12] The relevant items in Table 1 of the New Regulations, in this instance, provided the following:

(i) Item 2 in Part E of Table 1 is "the sale of hot cooked food, only for home delivery".

(ii) Item 2 in Part I of Table 1 is "restaurants only for food delivery services (09H00-19H00) and subject to restriction on movement (no sit down or pick-up allowed)".

[14] According to the applicant, the regulatory regime as above-mentioned had the following impact on the business. The first, and most direct was the interruption since 25 March 2020, from conducting its business operations, and it has since 26 March 2020 been prohibited from permitting members of the public into its business premises. And, although these prohibitions were relaxed somewhat from 1 May 2020, permitting the applicant to produce and sell cooked food, but only for home delivery, the collection of take-away food by patrons themselves remains forbidden and only members of the public who work in the food delivery business (for example, employees of "Mr Delivery" or "Uber-Eats" are permitted to enter the applicant's business premises to collect food. Secondly, members of the public have since 25 March 2020

been prohibited from leaving their places of residence, except for very limited purposes. That prohibition remained in place as far as the applicant's business was concerned (except, it appeared, in relation to members of the public who work in the food delivery business).

[15] According to the applicant, at the time of hearing of the case, the vast majority of potential patrons of the applicant's business have been, and are still, prohibited from leaving their places of residence to travel to or be inside the applicant's business premises.

[16] The applicant further recorded that its business is primarily a sit-down restaurant and prior to the Covid-19 pandemic an estimated 5% of its turnover was generated by food deliveries and it is not a market for which the applicant's business is geared. According to the applicant, the direct result of the regulatory regime as described above is that the applicant has since 27 March 2020 been unable to trade or to receive customers, and that it has therefore, since that date, suffered significant business interruption.

[17] The applicant further contented that the Lockdown Regulations has [*sic*] severely interrupted his business to the extent that the services of its 41 employees could not be utilised since 27 March 2020. According to the applicant it did not retrench its staff, who depends on the business for their livelihoods, but cannot afford to pay the wage bill of its employees which amounts to R165 000 per month. The employee's full salaries were paid for March 2020.

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[18] According to the applicant it also applied to the Unemployed Insurance Fund ("the UIF") Covid-19 TERS National Fund for assistance. The Fund made payment on account of only 25 employees in the amount of R106 000 and the sole member of the applicant had to use his own resources to pay the rest of the employees between 20%-30% of their ordinary salaries in respect of April 2020. The assistance for the month of May 2020, at the time of the hearing was still uncertain, as the Department of Employment and Labour, at 25 May 2020, was still not accepting applications for the month of May. It was further recorded that the sole member of the applicant have [*sic*] exhausted his own personal funds and will be unable to further assist the business and its employees.

[19] The applicant has also advanced the proposition that, once Covid-19 was by law reportable to a competent local authority, it matters not that the source of that obligation is national legislation, rather than an ordinance, bylaw or other subordinate legislation enacted by a local authority. According to the applicant, such distinction is irrelevant to the gravity of the peril insured against under the Notifiable Disease Extension. And accordingly, in so far as the indemnity is conditioned upon a "human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them", Covid-19 falls substantially within the ambit of the Notifiable Disease Extension, properly interpreted.

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Urgency

[20] The applicant has advanced the financial distress it experiences as its principal reason for urgency, and the imminent danger that the Policy would cease if the applicant is liquidated or permanently discontinued, except with the written agreement of the respondent. According to the applicant, if the business fails due to the financial distress it suffers, the respondent is able to engineer a significant saving to itself by simply waiting a few months to lapse, in order for the applicant's business to fail.

[21] The respondent contented that the applicant has failed to make out the requirements for urgency and on that basis alone the matter should be struck from the roll. According to the respondent, the applicant is in breached [*sic*] of the Policy as it failed to furnish the loss it suffered in writing as soon as possible after the event as required, but instead elected to launch these proceedings on an urgent basis. Moreover, the respondent is in no position to quantify the potential loss of the applicant and is not obliged to do so under the Policy. It was argued that the applicant knew since 27 March 2020 that the respondent disputes its entitlement to indemnification under the Business Interruption Extension of the Policy but despite that, the application was only launched on 15 May 2020, to be heard on 28 May 2020.

[22] It is trite that a court has a discretion to hear and determine matters on an urgent basis. However, an applicant that seeks relief on an urgent basis must in its founding affidavit set out the circumstances which render the

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matter urgent and the reasons why the applicant cannot be afforded substantial redress at a hearing in due course.[13]

[23] In my view, despite the opposition by the respondent that the matter was not urgent, I am satisfied that the applicant has advanced sufficient circumstances in its papers to render the matter sufficiently urgent and that substantial redress at a hearing in due course will not be afforded to it. The respondent, in any event, was able to fully and comprehensively oppose the application in its answering papers, despite the truncated time periods and therefore was not exposed to any real prejudice.

[24] The applicant has therefore established that the matter was ripe for hearing on an urgent basis.

Declaratory relief

[25] It was argued by Counsel for the respondent that the granting of the declaratory relief sought by the applicant would be flawed as the respondent was still waiting for more information from the applicant, and as such it would be premature to accept liability or reject the applicant's claim. Furthermore, the applicant on its own version has a complete cause of action and can sue the respondent for specific performance in terms of the Policy.

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[26] In terms of section 21(1)(c) of the Superior Courts Act,[14] a court can "in its discretion enquire into and determine any existing, future or contingent right or obligation".

[27] In *Cordiant Trading CC v Daimler Chrysler Financial Services* (*Pty*) *Ltd*,15 the Supreme Court of Appeal in considering the equivalent section in the Supreme Court Act 59 of 1959, held that the two-stage approach under the subsection consists of the following. First, the court must be satisfied that the applicant has an interest in an "existing, future or contingent right or obligation". At the first stage the focus is only on establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If satisfied the existence of such condition has been proved, a court has to exercise its judicial discretion (the second stage of the enquiry) whether to refuse or grant the order sought.

[28] The respondent accepted that the applicant has overcome the first hurdle of the enquiry. The respondent however had difficulty with the second. The respondent is of the view that the applicant failed to furnish all the necessary information, as required in clause 6(a)(iv)16 in the General

Condition in the Business Interruption Section, to make a final decision whether to accept or deny liability. According to the respondent in the absence of such a decision, it would be unjust to grant the relief sought by the applicant.

[29] The latter contention by the respondent is unsustainable for two reasons. The first being that since the respondent appointed the Loss Adjuster to assess the applicant's claim, various schedules of the applicant's loss during the relevant period has [*sic*] been submitted. Since 27 March 2020 to the date of the launch of this application, the applicant has generated no business at all. According to the financial information furnished to the respondent, the comparative loss of the applicant between March 2019 and that of 2020 amounted to 30.46%. The loss of income which the applicant has already suffered and likely to continue to suffer is manifest. But secondly, and perhaps more importantly, the applicant's founding papers and notice of motion make it plain that at this stage of the proceedings, the applicant is purely seeking declaratory relief with regard to the respondent's lability under the Policy and not the quantification of the respondent's liability. It is therefore clear that it is the antecedent liability of the respondent that has

become ripe as the primary dispute between the parties. The latter view is also fortified by the correspondence of the respondent's own Lost Adjuster who on 1 May 2020, *inter alia*, advised the applicant in an e-mail of the following:

> ". . . [H]IC's stance is that for a claim to be successful in these circumstances, it must be proved there was the existence of a COVID-19 incident/s and should you do so, the policy requires that the Loss arises due to this incident or incidents. You should be in a position to substantiate the actual incident of COVID-19 within the radius of 50 km.
>
> Initial advices indicate the Loss arises due to the lockdown and are not related to the individual COVID-19 incidents themselves. HIC are clear that a generalised or national occurrence of COVID-19 does not satisfy this requirement, nor does a general concern that COVID-19 may be present within the area.
>
> If evidence of the occurrence of COVID-19 at or in the stated radius of the insured premises exists, this along with proof of the extent to which this incident has directly resulted in or proximately caused the interruption or interference with the business, must be submitted.
>
> The imposition of the national lockdown may not be a trigger event for a claim under the Policy."

[30] In view of the above-mentioned, it follows that the respondent's contention that the applicant's relief cannot be entertained at this stage, is tenuous.

Interpreting contracts

[31] The approach to interpreting contracts is now well established and had been considered in a number of cases by our Higher Courts.17 The Supreme Court of Appeal, in *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*,18 has again restated the position and said the following:

> "[61] It is fair to say that this Court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This Court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) [also reported at [2012] 2 All SA 262 (SCA) - Ed], stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors

> have to be considered holistically, akin to the unitary approach."

[32] Counsel for both parties argued about the interpretive approach to be adopted, and the "businesslike" meaning that must be found in the interpretation of the contract currently under consideration.

[33] Mr *Rosenberg* advanced three further points, namely:

(i) the Policy must not be interpreted with reference to views and reservations about liability under the Notifiable Disease Extension, which may have been prevalent in the insurance industry but never disclosed to the applicant;

(ii) the Policy should not be interpreted with reference to other policies, of which the applicant had no knowledge;

(iii) the Policy should not be interpreted on the basis of generalised concerns about the impact of Covid-19 on the insurance industry at large when the respondent has made no attempt whatsoever to establish what the impact of the disease on its own business is likely to be.

[34] The respondent, in its answering papers, has advanced some information which it regards as relevant contextual information under the heading "Relevant Contextual Facts and the South African Insurance Markets". At the heart of it all is the respondent's assertion that firstly, prior to the Covid-19 crisis, and the imposition of the national lockdown there were several types of insurance cover available in the South African insurance market that would have offered cover to the applicant for losses it may have suffered as a result of the national lockdown but the applicant did not do so;

secondly, the insurance industry view[s] the losses suffered as a result of the national lockdown to not fall to be indemnified under a Notifiable Disease type insuring clause; and thirdly, if the insured are simply to be indemnified within their policies for the Covid-19 losses they may have suffered, without applying the terms of the policies, it may have the potential to destabilise the global and the South African insurance market.

[35] Mr *Burger* suggested that the applicant had the choice to purchase other policies that were available which could have covered it in the present circumstances but elected not do so, and the fact that the Notifiable Disease Clause in the policy is "free cover" and no premium is charged must demonstrate that the applicant's view of the extent of the insurance cover cannot be correct.

[36] The "businesslike" meaning that must be found in the contract of insurance was referred to in *Grand Central Airport* (*Pty*) *Ltd v AIG SA Ltd*19 where the court stated the following:

> "An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive fair and sensible application."

[37] Having regard to the above, it is evident that an insurance policy has to be interpreted so that its provisions receive fair and sensible application and that a restrictive consideration of words without regard to context has to be avoided. It cannot be that the Policy under consideration must be interpreted with reference to other policies or on the basis of generalised concerns about the impact of Covid-19 on the insurance industry at large, of which the applicant had no knowledge of. The Policy under consideration must therefore be considered on the contractual terms to which both parties had assented to, in a sensible manner which underpins sound commercial sense, and not have an un-business-like result.

Does the claim fall within the insuring clause?

[38] The applicant in this instance relies on subclause (e) of the Business Interruption section of the Policy which provides as follows:

> "(a) . . . (d);
>
> (e) notifiable Disease occurring 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."

[39] The respondent has fully dealt with the origin of the phrase "competent local authority", the history of the extension and the Special Provision, as well as the legislative environment, from which I will borrow.

[40] The extension was apparently introduced in South Africa in mid-1990. The wording for the extension was

adopted from wording used in the London insurance market. The comparable Special Provision in the Association of British Insurers' (ABI) 1989 standard wording read as follows:

> "Notifiable Disease shall mean illness sustained by any person resulting from . . . any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated shall be notified to them."20

[41] The 1989 ABI wording is adopted from the English Public Health (Control of Disease) Act 1984 ("the English Health Act").21 Section 10 of the English Health Act provided as follows:

> "A local authority may by order direct that an infectious disease other than one specified in section 10 above or one to which regulations under section 13 above relate shall, for the purpose

> of the application to their district of such of the provisions of this Act relating to notifiable diseases as are specified in the order, be deemed to be a notifiable disease."22

[42] The English Health Act required a medical practitioner who becomes aware, or suspects, that a patient whom he is attending within the district of a local authority is suffering from a notifiable disease, to report this to the "proper office of the local authority".23

[43] In South Africa, at the time that the extension was introduced, the Health Act 63 of 1977 ("the Health Act") was the relevant legislation in force.

[44] In terms of the Health Act:

44.1 "local authority" was a defined term.24 This is apparently why the Special Provision refers to a "local authority". Competent essentially means the one that has jurisdiction in the area.

44.2 The Minister of Health was empowered to make regulations relating to communicable diseases,25 and notifiable medical conditions.26 Section 45 provided the Minister to:

> ". . . restrict the application of the provisions of this Act relating to the

> notification of any medical condition, to the district of any local authority or to any other area defined in the notice [and to] declare, on the application of a local authority, that any medical condition, other than a medical condition declared a notifiable medical condition under paragraph (a), shall be a notifiable medical condition within the district of that local authority for a period specified in the notice or until the notice is withdrawn."

[45] Acting in terms of section 33 of the Health Act, the then Minister of Health issued Regulations relating to communicable diseases and the notification of notifiable medical conditions ("the 1987 Regulations").27 The 1987 Regulations placed a responsibility on a local authority to prevent, restrict and control communicable diseases that are present or has [*sic*] occurred in its district.28

45.1 A local authority was able to direct that a premises be evacuated if it "is satisfied on medical scientific grounds that there is sufficient reason to suspect that the occupation or use of premises or any part thereof is likely to favour the spread or impede the eradication of a communicable disease".29

45.2 Notifiable medical conditions were to be notified to the local authority.30

[46] A local authority would in terms of the 1987 Regulations discharge its responsibility by way of municipal by-laws.

[47] The 1987 Regulations survived the repeal of the Health Act by the National Health Act 61 of 2003 ("the NHA").

[48] The NHA provided as follows:

48.1 It introduced the terminology of a "health district" whose boundaries coincide with district and metropolitan municipal boundaries,31 ie a local authority as was defined under the repealed Health Act.

48.2 "municipal health services" was defined to include health surveillance of premises.32

48.3 Section 90 empowered the Minister of Health to make regulations dealing with, *inter alia*, communicable diseases and notifiable medical conditions.

[49] Acting in terms of section 90(1)(j), (k) and (w) of the NHA, the then Minister of Health issued the Regulations relating to the Surveillance and the Control of Notifiable Medical Conditions, 2017 ("the 2017 Regulations").33 The

2017 Regulations repealed the 1987 Regulations.34 The reporting structure in the 2017 Regulations are [*sic*] as follows: it starts at the lowest level, that of a health care provider (regulation 8), who has to report to health sub-district level (regulation 6), who in turn has to report to health district level (regulation 5), and that entity in turn to provincial level (regulation 4). The duty to ensure adherence to the use of the national departmental forms and tools for reporting notifiable medical conditions are only imposed at the levels above that of health care provider, the latter having the actual duty to adhere to national department guidelines on the surveillance and control of notifiable medical conditions.

[50] A health district council (ie a local authority) would comply with regulation 5(2)(d) of the 2017 Regulations by way of by-laws.35

[51] It was suggested by the respondent that as an example, the City of Johannesburg issued Public Health by-laws36 which state:

"The owner or occupier of premises who knows of a public

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health hazard37 on those premises, must within 24 hours of becoming aware of its existence-

(a) eliminate the public health hazard; or

(b) if the owner or occupier is unable to comply with paragraph (a), take reasonable steps to reduce the risk to public health and forthwith report the existence of the public health hazard to the Council in writing."38

[52] According to the respondent, the City of Cape Town by-laws, in so far as they have been able to ascertain, does [*sic*] not have a provision which requires notification to it of a notifiable medical condition or communicable disease.

[53] In this instance the respondent has admitted that Covid-19 occurred within 50km of the applicant's premises, that Covid-19 is a human infectious disease and there has been an outbreak. The respondent however denies that the competent local authority has stipulated that Covid-19 shall be notified to them, as stipulated in the contract. Moreover, the respondent asserted that the applicant's business was interrupted by Regulations that were promulgated to prevent the spread of Covid-19 and to "flatten the curve" and not because of the presence thereof in a particular area, accordingly it was submitted that the applicant's claim does not fall within the insuring clause.

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[54] Both these contentions, in my view, are misguided. In South Africa, section 29(1) of the National Health Act39 provides for the establishment of a district health system. According to section 29(2) the system consists of various health districts, the boundaries of which coincide with district and metropolitan municipal boundaries. According to section 30 health districts may be subdivided into sub-districts.

[55] The Minster of Health, may in terms of section 90(1) of the National Health Act make regulations regarding, *inter alia*, communicable diseases and notifiable medical conditions. The Minister of Health did, in terms of section 90 of the National Health Act, promulgate the "Regulations relating to the Surveillance and the Control of Notifiable Medical Conditions" ("the Surveillance Regulations").40

[56] In terms of Surveillance Regulations, the following provisions are of relevance in this instance, namely:

56.1 In regulation 1 "category 1 notifiable medical condition" is defined as "a condition indicated in Annexure A, Table 1, that requires immediate reporting by the most rapid means available upon clinical or laboratory diagnosis followed by a written or electronic notification to the Department of Health within 24

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hours of diagnosis by health care providers/private laboratories or public health laboratories".

56.2 Regulation 13 provides for a "Notification and Reporting process". It imposes the primary obligation, amongst others, upon health care providers, pathologists and laboratory personnel, who diagnose a notifiable medical condition listed in Annexure A Table 1, "to report the medical condition to the focal person at the health sub-district level by the most rapid means available upon diagnosis".

56.3 Annexure A Table 1, contains the following item, numbered 18: "Respiratory disease caused by a novel respiratory pathogen." A footnote to that item contains the following explanatory statement: "Examples of novel respiratory pathogens include novel influenza A virus and MERS coronavirus."

[57] It is by now accepted throughout the world that Covid-19 is a respiratory disease caused by a novel respiratory pathogen, as contemplated and exemplified in Annexure A Table 1, of the Surveillance Regulations.

[58] It can only follow that Covid-19 falls within the ambit of regulation 13 read with Annexure A Table 1, of the Surveillance Regulations. It is therefore a category 1 notifiable medical condition, as defined in regulation 1, which must be reported by the most rapid means available to the focal person at the health sub-district level.

[59] In this case, it is correct that the Surveillance Regulations were made by the Minister of Health, who is an officer of the National Government and not an officer of any "competent local authority". Therefore, no local authority itself stipulated that the outbreak of any human infectious or human contagious disease must be notified to it, but it was the National Government, acting through the World Health Organisation ("WHO"), and the Minister who did so.

[60] *In casu*, it is common cause the Regulations were promulgated under the Disaster Management Act and had countrywide effect, but that is not the end of the matter. We also know that it was the Head: National Disaster Management Centre that initially on 15 March 2020 in GN 312, classified the Covid-19 pandemic a national disaster in terms of the Disaster Management Act, in order to deal effectively with the Civid-19 pandemic.

[61] In terms of the National Disaster Management Act[41] the National Disaster Management Centre is an institution within a department of State for the public service which the Minister is responsible. The object of the National Centre is to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation by national, provincial and municipal organs of State, statutory functionaries, other role-players involved in disaster management and communities.[42] The National

Disaster Management Centre, had also called upon all organs of State to implement contingency arrangements and to ensure that measures be put in place to enable the National Executive to deal effectively with the Covid-19 pandemic.

[62] Having regard to the above-mentioned legislative framework it is evident that once Covid-19 was by law reportable to a competent local authority, it surely cannot matter that the source of that obligation is national legislation, rather than an ordinance, by-law or other subordinate legislation enacted by a local authority. Based upon an interpretative approached [*sic*], the principal reason why the notification requirement was introduced to the Notifiable Disease Extension, was to ensure that cover thereunder would be triggered only 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.

[63] Moreover, according to my reading of the Extension, it simply requires the triggering of an obligation to report the disease to a local authority. In the absence of such an obligation in any by-law, common sense dictates it must have been contemplated that the obligation would be applied by National

legislation, provided that it imposed an obligation to report to a local authority. In my view, that is exactly what the National Disaster Management Centre did on 15 March 2020 in GN 312.

[64] The suggestion therefore that the history of the Special Provision clearly demonstrates that the purpose of the Extension was to operate locally on a local government level and its purpose was not to deal with a national lockdown, would amount to a "narrow peering of words" in isolation. In any event, such an interpretation can hardly be regarded as fair and business-like because on the respondent's reasoning, an insured who conducts business in the City of Johannesburg may be covered under the Extension as a result of Johannesburg City's Public Health by-laws, allowing the local authority to stipulate the outbreak of a Notifiable Disease to it, but the same insured who may have a business in Cape Town, where the National Government, stipulated on behalf of all competent local authorities in South Africa that they must be notified of such disease, cannot be covered under the Extension as the City of Cape Town, firstly, lacked such provisions in its by-laws and secondly, the City of Cape Town did not stipulate that the outbreak must be reported to it.

[65] The views of the insurance industry that demonstrate insurers generally do not actually mean to provide cover in accordance with the literal meaning of the Extension is insight full, but in this case, it is hardly of assistance to the respondent. It is inconceivable to reasonably expect that an ordinary person who is not involved in the insurance industry must have such

insight and knowledge of the industry when entering into an insurance contract.

[66] It must therefore follow that, properly interpreted, in so far as the indemnity is conditioned upon a "human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them", Covid-19 falls substantially within the ambit of the Notifiable Disease Extension, and the fact that the Surveillance Regulations were made by the National Government, rather than by any local authority, does not offend against the provisions of the Policy under consideration. In any event the proposition advanced by the respondents, in my view, goes against construing an insurance policy "in accordance with sound commercial principles and good business sense, so that its provisions receive fair and sensible application".[43]

Causation

[67] This brings me the question of causality. It is trite that in insurance contracts risk is commonly a causal

concept:

> ". . . the insurer's duty to perform is made conditional upon a particular peril 'causing' a particular consequence or 'fact', such as a loss or an occurrence. A claim in terms of an insurance contract therefore requires a claimant to prove not only of the peril and of the

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> loss or occurrence as described in and covered by the contract, but also of a causal nexus or link between the two."44

[68] In the present instance, the only reference to causation in the Notifiable Disease Extension, is that cover is promised for "interruption or interference with the business due to (e) notifiable disease occurring within a radius of 50km of the premises".

[69] The question that now arises, is whether the applicant has established that the regulatory regime that was imposed on its business from 27 March 2020 was directly caused by the Covid-19 outbreak within the permitted radius of its premises and as a result suffered a loss. Put differently, whether the Covid-19 as a Notifiable Disease, caused or materially contributed to the "Lockdown Regulations" that gave rise to the applicant's claim (this is a factual enquiry). If it did not, then no legal liability can arise. If it did, then the second question becomes relevant, namely, whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether the harm is too remote from the conduct.45

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[70] On this issue, Mr *Rosenberg* made the point that, the imposition of the Lockdown Regulations was a national public health response to the Covid-19 outbreak, which caused the peril of business interruption and the common cause facts in this instance, demonstrated that the applicant brought its claim within the casual regime as contemplated in the Notifiable Disease.

[71] Mr *Burger* argued that the Policy, in this instance, insures the loss resulting from interruption where the interruption is *due to* the Notifiable Disease and not losses as a result of other causes. It was further contented that the applicant failed to demonstrate that its business was interrupted due to the Covid-19 outbreak but rather that its business was interrupted by the regulatory regime which is not insured under the Policy. Furthermore, it was contended that there was no sufficient casual link between the Covid-19 outbreak and the applicant's eventual loss.

[72] The issue of causation in insurance law was fully discussed in the matter of *Napier*46 and was stated as follows:

> "The general approach to questions of causation as laid down in the context of criminal law and the law of delict, based as it is on principle and logic, is equally applicable to insurance law, although its application will be subject to the provisions of the policy in question. A particular policy will, however, seldom affect the basic approach which requires, in the first place, and inquiry into the presence of 'factual causation'. If this initial enquiry leads to the conclusion that the prior event was a *causa sine qua non*, of the subsequent one, the further question

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> of whether the relationship between the two events is sufficiently close for the form of deposit to the legal cause of the latter rises. In answering this question in the context of insurance law, prime regard must be had to the provisions of the policy question, which may extend or limit the consequences covered. In addition, the specific provisions, matters such as the type of policy the nature of the risk insured against and the conditions of the policy may assist the court in deciding whether the factual cause should be regarded as the cause in law." [*sic*]

[73] In *Minister of Finance and others v Gore NO*,47 the Supreme Court of Appeal said the following:

> "The legal mind enquires: what is more likely? The issue is one of persuasion, which is ill reflected in formulaic quantification . . . Application of the 'but for' test is not based on mathematics, pure signs or philosophy. It is a matter of common sense based on the practical way in which the ordinary person's mind works against the background of everyday life experiences."

This approached [*sic*] was also confirmed by the Constitutional Court in *Lee v Minister for Correctional Services*.48

[74] Applying the above-mentioned approach to the facts in this case, it must be asked whether, but for the Covid-19 outbreak, the interruption or interference to the applicant's business would have occurred when the Lockdown Regulations were promulgated. In this regard it is common cause that the Head of the National Disaster Management Centre, on 15 March 2020 in GN 312, after assessing the potential magnitude and severity,

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classified the Covid-19 pandemic as a national disaster. The Minister of Cooperative Governance and Traditional

Affairs, thereafter on the same day having considered the magnitude and severity of the Covid-19 outbreak, declared a National State of Disaster. Thereafter, several regulations were published pursuant to the declaration of the National State of Disaster, including the restrictions on movement, and the closure of businesses like that of the applicant, to the public. The respondent has also admitted that Covid-19 occurred within 50km of the applicant's premises, that Covid-19 is a human infectious disease and there had been an outbreak. In these circumstances it is difficult not to accept that there is indeed a clear nexus between the Covid-19 outbreak and the regulatory regime that caused the interruption of the applicant's business. The suggestion therefore that the regulatory regime was only introduced to "flatten the curve" and had little to do with the Covid-19 outbreak is misplaced. In my view, factual causation was established by the applicant.

[75] With regard to legal causation, the test provided by the law for this part of the enquiry is a flexible one. Factors to be considered include, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice. In *International Shipping Co* (*Pty*) *Ltd v Bentley*49 Corbett CJ neatly summed up the position with regard to legal causation as follows:

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> "[D]emonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, *viz* whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[76] In determining the presence of legal causation, the question is whether, having regard to the considerations alluded to, the harm is too remote from the conduct or whether, it is fair, reasonable and just that the respondent be burdened with liability. In my view, the question should be answered against the respondent.

[77] The respondent has advanced evidence to demonstrate that the business interruption losses caused by Covid-19, both worldwide and in South Africa, are likely to be very substantial, and that insurers are therefore likely to face a significant demand upon their resources. The latter may be true, but it is a general proposition and cannot be a consideration in the proper interpretation of the Notifiable Disease Extension in this instance.

[78] The same applies with regard to the argument that if an order favours the applicant, it will create a precedent which will open the floodgates of liability (whether generally or in relation to the respondent). The respondent did not provide any basis for this suggestion. In any event, each case must be

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decided upon its own facts and the law. Whether the floodgates will open as suggested by the respondent will ultimately depend upon the prevalence of the precise wording of the Notifiable Disease Extension in any contract of this nature. The gloomy predictions of industry collapse within the insurance world by the respondent are therefore nothing more than speculation. No substantive information was provided by the respondent regarding its own exposure (for instance, its assets and liabilities, its reinsurance cover, and the estimated liability to its clients as a result of business interruption due to Covid-19).

[79] However, it may happen that the respondent is confronted with substantial insurance claims, but there is no reason to suppose, whatever the general concerns in the insurance industry may be, that it will be unable to discharge its obligations in the ordinary course. But even if a problem should arise in this regard, it 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.

[80] In my view, it will therefore be impermissible to determine the respondent's liability with reference to the alleged condition of the insurance industry in general.

[81] It follows, in determining the presence of legal causation and having regard to the relevant considerations alluded to, namely, whether the harm is too remote from the conduct or whether, it is fair, reasonable and just, that

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that the respondent be burdened with liability, that the question should be answered against the respondent.

The Policy

[82] The applicant's claim occurred on 27 March 2020, and the Policy relied upon for present purposes incepted on 1 April 2020 and remains in force. It appears, the respondent suggested that the applicant should have made its claim under the previous Policy, and not under the Policy presently in force.

[83] It is evident that the two policies carried the same policy number, namely, HIC 000-02950 were identical (except in relation to the cover amounts). The relief sought in paragraph 2 of the notice of motion refers simply to the policy number, and it seems to me immaterial that the applicant had in his affidavit invoked the present duplication of the Policy. In any event, the applicant has sought an amendment of prayer 2 of its notice of motion, to rectify any misunderstanding, which was not objected to by the respondent.

Conclusion

[84] For all these reasons stated, in so far as the primary dispute is concerned, I am satisfied the applicant has established 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 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 Cooperative

Government [*sic*] and Traditional Affairs under the Disaster Management Act 57 of 2002. It follows that the application must succeed with costs.

[85] In the result the following order is made:

1. The respondent is declared 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 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 [*sic*] and Traditional Affairs under the Disaster Management Act 57 of 2002.

2. The respondent is ordered to make payment(s) in respect of such losses as the applicant is able to calculate and quantify from time to time.

3. The applicant is given leave to approach this Court on the same papers, supplemented as may be necessary, on no fewer than five days' notice to the respondent, for such further, supplementary, clarificatory or incidental relief as may be necessary.

4. The respondent to pay the applicant's costs, such costs to include the costs of two counsel.

Footnotes

1 Policy No. HIC 0000-02950.
2 Act 57 of 2002.
3 GN 312 dated 15 March 2020.
4 GN 313 dated 15 March 2020.
5 GN 318 dated 18 March 2020.
6 Reg (3)(1).
7 GN 398 dated 25 March 2020.
8 GN 419 dated 26 March 2020.
9 GN 29 April 2020 [*sic*: GN 480 - Ed].
10 Reg 15(1).
11 Regs 16-31.
12 Reg 28(1).
13 *Eniram* (*Pty*) *Ltd v New Woodholme Hotel* (*Pty*) *Ltd* 1967 (2) SA 491 (E) at 493A [also reported at [1967] 2 All SA 470 (E) - Ed].
14 Superior Courts Act 10 of 23 [*sic*: 2013 - Ed] s 21:
"Persons over whom and matters in relation to which Divisions have jurisdiction:
(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it might according to law take cognisance, and has the power-
(a) . . .;
(b) . . .;
(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."
15 2005 (6) SA 205 (SCA) [also reported at [2005] JOL 15915 (SCA), [2006] 1 All SA 103 (SCA) - Ed] at para [18].
16 Cl 6 provide as follows:
"Claims
(a) On the happening of any event which may result in a claim under this Policy the insured shall, at their own expense:
(i) . . . (iii);
(iv) give the Company such proofs, information and sworn declaration as the Company may require and forward to the Company immediately any notice of claim or any communication, writ, summons or other legal process issued or commenced against the insured in connection with the event giving raise to the claim."
17 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) [also reported at [2012] JOL 28621 (SCA) - Ed]; *Bothma-Batho Transport* (*Edms*) *Bpk v S Bothma & Seuns Transport* (*Edms*) *Bpk* [2014] 1 All SA 517 (SCA) [also reported at [2014] JOL 31199 (SCA) - Ed].
18 [2019] 1 All SA 291 (SCA) at para [61].
19 [2004] JOL 12586 (W) at para [9].
20 Fitzpatrick at 357-8 para 10.
21 Fitzpatrick at 358 para 13.
22 Fitzpatrick "JF2" at 370.
23 S 11 of the English Health Act.
24 S 1.
25 S 33.
26 S 45.
27 GNR 2438 of 30 October 1987.

28 Reg 2.
29 Reg 16.
30 Reg 19.
31 S 29.
32 S 1.
33 GN 1434 in *GG* 41330 of 15 December 2017; FA at 88 Annexure "F".
34 Reg 21.
35 Read with Ch 7 of the Constitution dealing with local government, and Sch 4 Part B of the Constitution, read with s 156(2) thereof.
36 City of Johannesburg Metropolitan Municipality Public Health By-Laws (Published Under Notice 830 in *Gauteng Provincial Gazette Extraordinary* 179 Dated 21 May 2004).
37 Public health hazard includes, *inter alia*, "circumstances which make it easier for a communicable disease to spread".
38 At para 6.
39 Act 61 of 2003.
40 The Surveillance Regulations were promulgated in Government Notice 1434 in *Government Gazette* 41330 dated 15 December 2017.
41 S 55(2).
42 See CHAPTER 3 NATIONAL DISASTER MANAGEMENT
"Part 1: National Disaster Management Centre Establishment
8. (1) A National Disaster Management Centre is established as an institution within 55(2)
The National Centre forms part of, and functions within, a department of state for the public service, which the Minister is responsible. 16 No. 24252 GOVERNMENT GAZETTE, 15 JANUARY 2003 Act No. 57, 2002 DISASTER MANAGEMENT ACT, 7002 [*sic*: 2002 - Ed].
Objective
9. The objective of the National Centre is to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities."
43 See fn 8 above.
44 See Reinecke et al *South African Insurance Law* at para 13.74 and the case law referred to therein.
45 *Napier v Collett and another* 1995 (3) SA 140 (A) at 143E-144F [also reported at [1995] 2 All SA 457 (A) - Ed]; *Petropulos and another v Dias* (1055/2018) [2020] ZASCA 53 (21 May 2020) [also reported at [2020] 3 All SA 358 (SCA) - Ed] at para [46].
46 See fn 45 at 144B-F/G.
47 [2007] 1 All SA 309 (SCA) [also reported at [2006] JOL 18264 (SCA) - Ed].
48 2013 (2) SA 144 (CC) [also reported at 2013 (2) BCLR 129 (CC) - Ed] at para [47].
49 1990 (1) SA 680 (A) at 700H-J [also reported at [1990] 1 All SA 498 (A) - Ed].