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BUSINESS INTERRUPTION CLAIMS UNDER COVID-19: THE FIRST CASE

1. By now you would almost certainly have seen (or even authored) rants on social media to the effect that *"insurers just want your money, but when it's time to pay, they find whatever excuse they can to reject your claim"*. Perhaps the most vocal critics of the insurance industry are those who, with the advent of COVID-19 and the ensuing economic fallout, have tried to lodge business interruption claims on the strength of "infectious diseases" extensions found in some, but not all, commercial insurance policies.

2. It is perhaps unsurprising therefore that the recent judgment of the Western Cape Division of the High Court in the matter between *Café Chameloen CC and Guardrisk Insurance Company Ltd* has been described by media houses as "precedent setting" and a "big win" for beleaguered restaurants, as well as the hospitality industry in general. However, before policyholders start celebrating, it is important to consider precisely what the Court held, as well as the limitations of the judgment.

3. The insured, Café Chameleon, sought an urgent declaratory order from the High Court which would require the insurer, Guardrisk, to indemnify it for losses suffered as a result of the interruption to the insured's business caused by the COVID-19 pandemic and the "Lockdown Regulations" promulgated under the Disaster Management Act of 2002. The insured also sought certain interim payments to enable its business to survive.

4. Guardrisk opposed the relief sought on the basis that, amongst other things, Café Chameleon's loss was not insured under the infectious diseases extension clause in the policy, while also contending that there was no "causal link" between the Lockdown Regulations and the infectious diseases extension.

5. The Court noted that on 25 March 2020, South Africa's Minister of Cooperative and Traditional Affairs introduced new regulations which ushered in what is now widely known as the "Lockdown". This regulatory regime, according to the insured, impacted its business severely. Since the 25th of March 2020, the insured could not conduct business operations. Although the various Lockdown

prohibitions were somewhat relaxed from the 1st of May 2020 (which permitted the insured to sell cooked food, but strictly for home delivery), the collection of takeaway food by patrons themselves remained forbidden. Given that the business was primarily a sit-down restaurant and that food deliveries only constituted about 5% of its turnover, Café Chameleon contended that its business had suffered a significant interruption.

6. The insured advanced the proposition that once COVID-19 had become reportable, by law, to a competent local authority, it did not matter that the source of the obligation to report was national legislation rather than an ordinance, bylaw or subordinate legislation enacted by a local authority. The insured contended that the distinction was irrelevant to the gravity of the insured peril. So, to the extent that indemnity under the policy was conditional 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 infectious diseases extension, properly interpreted.

7. On the subject of interpreting contracts, the Court cited authority from the Supreme Court of Appeal which warned against *"a narrow peering at words in an agreement"* and emphasised that a restrictive consideration of words without regard to context had to be avoided. The Court also considered the judgment of *Grand Central Airport (Pty) Ltd v AIG SA Ltd*, in which it is was held that 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. Bearing this in mind, the Court took the view that an insurance policy had to be interpreted so that its provisions received fair and sensible application, as opposed to being 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"*, which Café Chameleon would have had no knowledge of. Therefore, said the Court, the policy under consideration had to be considered on the contractual terms which both parties had assented to, in a sensible manner which underpinned sound commercial sense, and not have an "un-business-like" result.

8. The insurer, for its part, argued that the City of Cape Town – the competent local authority in this instance – had not promulgated any bylaws which required it to be notified of a notifiable medical condition or communicable disease. So, although the insurer conceded that instances of COVID-19 had occurred within 50 kilometres of the insured's premises (which was a requirement for cover under the infectious diseases extension), it denied that a competent local authority had stipulated

that COVID-19 would be notified to it. In addition, the insurer's position was that Café Chameleon's business had been interrupted by regulations that were promulgated to prevent the spread of COVID-19 and not because of the presence of the disease in a particular area. Therefore, the claim did not fall within the insuring clause.

9. Evidently, the Court was not persuaded and found that both of the insurer's contentions were "misguided". The Court, having considered the regulations promulgated under the National Health Act, was satisfied that COVID-19 was a notifiable medical condition which had to be reported by the most rapid means available to the relevant person at the health sub-district level. These regulations had been made by the Minister of Health, who was an officer of national government and not of a "competent local authority". Therefore, no local authority itself had stipulated that the outbreak of an infectious disease would be notified to it; instead it was the national government (acting through the WHO) and the Minister who had done so. The Court also remarked that the that National Disaster Management Centre had classified the COVID-19 pandemic as a national disaster in terms of the Disaster Management Act. The object of the National Disaster Management Centre was to promote a co-ordinated system of disaster management and it had called upon all organs of state to implement contingency arrangements, in order to ensure that measures were put in place to enable the national executive to deal effectively with the pandemic.

10. The Court therefore held that, having regard to this legislative framework, it was evident that once COVID-19 had become reportable to a competent local authority, it did not matter that the source of the obligation to report was national legislation, as opposed to an ordinance or bylaw enacted by a local authority. The Court, on the strength of the interpretative approach it adopted, found that the principal reason why notification to a local authority was required was so that cover under the policy would only be triggered by outbreaks of the most serious diseases. Based on the Court's reading of the infectious diseases extension, the clause merely required the triggering of an obligation to report the disease to a local authority. In the absence of such an obligation in any bylaw, common sense dictated that 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 the Court's estimation, that was precisely what the National Disaster Management Centre had done.

11. It followed that there could be no merit in the suggestion that the infectious diseases extension was intended to operate locally and not to deal with a national lockdown. To adopt such an

interpretation would, in the Court's opinion, have amounted to a *"narrow peering of words"* in isolation, which could hardly be regarded as fair and business-like. Therefore, the Court held that COVID-19 fell substantially within the ambit of the infectious diseases extension

12. However, that was only part of the enquiry, and the question of causality remained to be determined. It was trite, said the Court, that risk in insurance contracts was commonly a causal concept, such that the insurer's duty to perform was made conditional upon a particular peril "causing" a particular consequence such as a loss or an occurrence. A claim in terms of an insurance policy therefore required the claimant to prove not only the peril and loss as described in the policy, but also a casual link between the two. The question that faced the Court was whether the insured had established that the regulatory regime that was imposed on its business was directly caused by the COVID-19 outbreak within the permitted radius of its premises, as well as a whether the insured had suffered loss as a result.

13. This involved a two-step enquiry. Firstly, there was a factual enquiry, in terms of which one had to consider whether COVID-19 caused or materially contributed to the Lockdown Regulations that gave rise to the insured's claim. If it did not, then COVID-19 was not a "factual" cause, and no legal liability could arise. However, if it did, the second question became relevant – namely whether the factual cause was linked sufficiently closely to the harm suffered by the insured for legal liability to ensue (rendering it a "legal" cause).

14. Counsel for the insurer contended that the policy covered loss resulting from an interruption where the interruption was "due to" the notifiable disease and not losses as a result of other causes. It was argued, furthermore, that the insured's business had not been interrupted by the outbreak of COVID-19, but rather as a result of regulatory regime, which was not insured under the policy.

15. On the issue of factual causation, the Court asked whether, but for the COVID-19 outbreak, the interruption of the insured's business would have occurred when the Lockdown Regulations were promulgated. It was not disputed that COVID-19 was an infectious disease, that it had occurred within 50km of the insured's premises and that there had been an outbreak. In the circumstances, said the Court, it was difficult not to accept that there was a clear nexus between the COVID-19 outbreak and the regulatory regime that caused the interruption of the insured's business.

16. As far as legal causation was concerned, the Court remarked that the test employed by our law was a flexible one which required various factors to be considered, including directness, the absence of presence of an intervening act (or *novus actus interveniens*), legal policy, reasonableness, fairness and justice. In determining the presence of legal causation the question was whether, having regard to these factors, the harm was too remote; or whether it was fair, reasonable and just that the insurer be burdened with liability. In the Court's view, the question had to be answered against the insurer.

17. The insurer advanced the contention that business interruption losses in South Africa and abroad were likely to be substantial, and that insurers would likely face a significant demand on their resources as a result. Nevertheless, the Court held that while the latter might be true, it was a general proposition that could not be taken as a consideration in the proper interpretation of the infectious diseases extension of the policy. The insurer also alleged that if judgment was given in favour of the insured, it would create a precedent that would *"open the floodgates"* of liability. The Court found that the insurer provided no basis for this suggestion and held that, in any event, each case would have to be decided on its own facts and the law. Whether the floodgates would indeed be opened would ultimately depend on the prevalence of the precise wording of the infectious diseases extension in policies akin to the one before the Court. The *"gloomy predictions of industry collapse within the insurance world"* were therefore held to be nothing more than speculation. The insurer offered no substantive information regarding its own exposure and its estimated liability to its clients as a result of business interruption due to COVID-19. Even assuming that the insurer would be faced with substantial insurance claims, it could not be a defence for the insurer to say that it had to be excused from honouring its contractual obligations merely because its business had unexpectedly incurred greater debt than had been expected.

18. Having established causation, the Court was satisfied that the insurer was liable to indemnify its insured for losses suffered as a result of the COVID-19 outbreak in South Africa, which resulted in the promulgation and enforcement of the Lockdown Regulations. Accordingly, the insurer was declared liable in terms of the business interruption section of the policy and was ordered to make payments in respect of such losses as the insured was able to calculate and quantify.

19. While the judgment is certainly encouraging to policyholders in a similar position to Café Chameleon, a word of caution is warranted. The judgment will almost certainly be appealed by the insurer, which will have the effect of suspending the Court's order pending the outcome of the

appeal process. In addition, not every insurance policy with a business interruption section necessarily includes an extension for infectious diseases. Even policies which do contain such extensions might not be identically worded, in which case they will need to be carefully considered and properly interpreted. As the Court correctly stated, each case will need to be decided on its own facts and the law, so the present judgment ought not to be regarded as equally applicable to any business interruption claim against any insurer, regardless of the circumstances. Policyholders are still responsible for bringing their claims within the ambit of their insurance policies and the occurrence of the insured peril, as well as the ensuing loss, will both have to be proven in every instance. It bears repeating that, in this matter, there was no dispute regarding the fact that COVID-19 had occurred within the required proximity to the insured premises – a fact which will not necessarily be undisputed in every case. Finally, it bears mentioning that, while the judgment would hold persuasive value in other Divisions of the High Court, it would not necessarily be binding upon them. It is therefore conceivable that other courts, faced with similar facts and circumstances, might come to a different conclusion.

20. As is often said in the legal fraternity, "this case might go all the way", and it is quite possible that the issue of liability for business interruption claims in the wake of COVID-19 might only become settled when the Supreme Court of Appeal rules on the matter. It remains to be seen when exactly that might be.

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