IN THE MATTER OF CAFÉ CAMELEON V GUARDRISK INSURANCE COMPANY

WESTERN CAPE HIGH COURT

Below is a summary of the aforementioned case. Some issues discussed in the judgment were omitted for the sake of relevance to the issue currently under discussion.

The applicant sought a declaratory order against the respondent, to confirm the respondent's liability in terms of the Business Interruption (BI) section of the policy.

The respondent raised, amongst others, that the applicant is not insured under the infectious diseases extension clause in the policy, and that there is no causal link between the lockdown regulations and the infectious diseases extension.

Background

The policy commenced in 2007 and renewed annually. The last renewal was done in April 2020.
The events that gave rise to the claim arose on 27 March 2020, thus in the previous insurance policy period of 1 April 2019 – 1 April 2020.

It was further noted that a National Disaster was declared on 15 March 2020. On the same date, regulations were issued prohibiting gatherings of more than 100 people, but the regulations did not initially envisage a national lockdown.

The national lockdown was subsequently introduced on 25 March 2020 through the regulations to the Disaster Management Act. The content of the lockdown regulations is not discussed here.

On 16 April 2020, the lockdown was extended further until 30 April 2020. Subsequently, alert levels were introduced, and the country moved to Level 4 on 1 May 2020. The lockdown as provided for in the original regulations was not extended, however, the regulations provided that people would be confined to their places of residence, subject to certain provisions relating to essential or permitted services.

Restaurants at this point were therefore entitled to commence operations, however, subject to certain conditions.

Impact on the restaurant of the applicant

The first and most direct interruption on the restaurant was on 25 March 2020, when the restaurant was prevented from conducting its business operations; and since 26 March having been prohibited from permitting the public onto its business premises. From 1 May 2020, the restaurant was allowed to sell cooked foods, however, only on a delivery basis. Collection of food by patrons remained prohibited.

The business of the applicant is primarily a sit-down restaurant, and prior to the pandemic only an estimated 5% of its turnover was generated by food deliveries. It is thus not the market for which the applicant's business is geared. Therefore, since 27 March 2020, the applicant has been unable to trade or to receive customers, and suffered significant business interruption.

The applicant further stated that the lockdown had severely interrupted his business to the extent that the services of its 41 employees could not be utilised since 27 March 2020. Staff were not retrenched, but the applicant cannot afford the wage bill of R165 000 per month. Full salaries were last paid in March 2020. Applications for TERS funding were submitted, but only a certain portion of the salaries were funded, leaving the applicant to fund the balance. The applicant's personal funds were exhausted, and he would therefore be unable to continue supporting his employees.

Arguments advanced

Declaratory order

The respondent argued that the claim of the applicant was premature, as it had not submitted various information that was still required to finalise the claim, despite a report from the loss adjustor.

However, the applicant (and so acknowledged by the court) was seeking declaratory relief with regard to the respondent's liability under the policy, and not quantification of the respondent's liability. The argument of the respondent was therefore rejected.

Interpretation of the contract

With reference to case law, the judge mentioned that words have to be interpreted sensibly and not have an un-business-like result.

Counsels for both parties argued about the interpretive approach to be adopted, and the "business like" meaning that must be found in the interpretation of the contract under consideration.

The judge demonstrated by means of case law that "business like" means that an insurance policy should be interpreted in accordance with sound commercial principles and good business sense, so that its provisions receive fair and sensible application. A restrictive consideration of words without regard to context has to be avoided.

Counsel for the applicant noted that:

- 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 not disclosed to the applicant;

- The policy should not be interpreted with reference to other policies of which the applicant had no knowledge; and
- The policy should not be interpreted on the basis of generalised concerns about the impact of Covid-19 on the insurance industry at large, specifically when the respondent had made no attempt to establish what the impact of the disease on its own business could be.

The respondent noted that:

- Prior to the Covid-19 crisis and the imposition of the lockdown, there were several types of insurance cover available that would have offered the applicant cover for the losses it may have suffered as a result of the lockdown, but the applicant did not obtain that cover. To this extent, the respondent argued that no premium was charged for the Notifiable Disease cover, which would indicate that the applicant's interpretation of the cover was wrong;
- The insurance industry views the losses suffered as a result of the lockdown not indemnifiable under a notifiable disease type insuring clause; and
- If the insured were to be indemnified within this policy, it may have the potential to destabilise the global and South African market.

The judge on this point noted that it cannot be that the policy under consideration must be interpreted with reference to other policies, or on the basis of the generalised concerns about the impact of Covid-19 on the insurance industry at large, of which the applicant had no knowledge. Consideration must therefore be given to the contractual terms of the policy, in a sensible manner which underpins the sound commercial sense, and does not have an un-business-like result.

Does the claim fall within the insuring clause?

With reference to the policy wording, it was noted that notifiable disease is defined in the policy as:

Notifiable disease occurring within a radius of 50 km of the premises

and

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 HIV and AIDS.

The respondent deliberated much on what a "competent local authority" is, the history of the notifiable disease extention and the legislative environment.

The respondent admitted that Covid-19 occurred within 50 kms of the applicant's premises, that it is a human infectious disease, and that there has been an outbreak. However, the respondent denied that a competent local authority has stipulated that Covid-19 shall be notified to them, as stipulated in the policy wording.

The respondent further suggested 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. Therefore, the applicant's claim does not fall within the insuring clause.

The court was of the view that the respondent's arguments were misguided. Having regard to the legislative framework (explained in detail in the judgment), it was evident that once Covid-19 was by law reportable to a competent local authority, it cannot matter that the source of the obligation is national legislation rather than an ordinance, bylaw or subordinate legislation enacted by a local authority.

The reason why the notification requirement was introduced to the Notifiable Disease Extension, was to ensure that cover thereunder would be trigged only by outbreaks of the most serious diseases.

The judge read the extension to be a triggering of an obligation to report the disease to a local authority. In the absence of an obligation by a by-law, 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, which is what the National Disaster Management Centre did on 15 March 2020.

The respondent's interpretation was therefore a "narrow peering of words", and cannot be regarded as fair and business like. It may have the unintended consequence that a person in one province may have cover, whilst a person in another province will not have cover, despite the same applicable policy wording.

On this point, the judge concluded that Covid-19 falls substantially within the ambit of the Notifiable Disease Extension, and the fact that National Legislation declared it so, does not offend the provisions of the policy.

Causation

It was noted that in insurance contracts, the insurer's duty to perform is made conditional upon a particular peril causing a particular loss or an occurrence. In this 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".*

The question that had to be answered, is 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, caused the loss.

Stated 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. If it did not, there is no legal liability. If it did, the second question is whether the conduct is linked sufficiently close or direct for legal liability to ensue.

The applicant argued 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. The common cause facts in this instance demonstrated that the applicant brought its claim within the ambit of the notifiable disease clause.

The respondent however argued that the policy insured the loss resulting from the interruption where the interruption is due to the notifiable disease, and not losses as a result of another cause. The applicant in the respondent's view, failed to demonstrate that its business was interrupted due to the Covid-19 outbreak, but rather that its business was interrupted by the lockdown, which was not insured under the policy. There was therefore no sufficient causal link between the Covid-19 outbreak and the applicant's eventual loss.

With reference to several cases, the judge explained causation as it is applied in law. The test is two fold. First, consideration is given to factual causation – the *causa sine qua non* or "but-for" test. Secondly, legal causation, or "proximate cause" has to be established.

Factual causation

The judge noted that the application of the "but-for" test 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, thus, what is more likely?

Applied to the facts of the 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.

After assessing the potential impact of Covid-19, it was declared a national state of disaster. This was followed by restriction of movement and the closure of businesses, like that of the applicant.

It was accepted that Covid-19 occurred within the 50km of the applicant's premises, that it is a human infectious disease and that there had been an outbreak. It would therefore be difficult not to accept the clear nexus between the Covid-19 outbreak, and the regulatory intervention that caused the interruption of the applicant's business. Factual causation was therefore established.

Legal Causation

The test provided by the law is a flexible one, and factors to be considered include directness, the absence or presence of a *novus actus interveniens* (a break in the causal chain), legal policy, reasonableness, fairness and justice.

Citing case law, the judge noted that in determining the presence of legal causation, the question is whether the harm is too remote from the conduct, or whether it is fair, reasonable and just that the respondent be burdened with liability. (In other words, is there a close enough link between the conduct and the harm caused).

The court was not satisfied with the respondent's arguments that the floodgates will be opened if this claim would be permitted, or that the industry will suffer substantial losses if business interruption claims under the current circumstances are allowed.

The court found that there is no reason to suppose, whatever the general concerns in the insurance industry may be, that the respondent will be unable to discharge its obligation in the ordinary course. Even if a problem in this regard should arise, 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.

The respondent's liability cannot be determined with reference to the alleged condition of the insurance industry in general.

The court found that it is fair, reasonable and just that the respondent be held liable to indemnify the applicant for any loss suffered since 27 March 2020, as a result of the Covid-19 outbreak which resulted in the promulgation and enforcement of the relevant regulations made in terms of the Disaster Management Act.

The respondent was ordered to make payment of the applicant's quantifiable losses, and granted costs in favour of the appellant.