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DATE:	7 August 2020	E-MAIL:	MakgOMPI.raphasha@fsca.co.za

**To:** All Affected Non-Life Insurers offering CBI Cover

Dear Sir/Madam

**FINANCIAL SECTOR CONDUCT AUTHORITY  
CONTINGENT BUSINESS INTERRUPTION (CBI) COVER  
LEGAL CERTAINTY- PROPOSED WAY FORWARD**

**Introduction**

1. The Financial Sector Conduct Authority (FSCA) has, as indicated in its letter dated 2 August 2020, been consulting with its legal team on the way forward in order to achieve legal certainty with regard to CBI cover.
2. The FSCA has taken note of non-life insurers' concerns with regard to arbitration proceedings, the ambit of existing court proceedings and rulings and possible appeal proceedings relating to such matters as well as the implications and possible differentiating factors of the test case launched by the Financial Conduct Authority in the United Kingdom. The FSCA has taken note of non-life insurers' view that legal certainty will be achieved only through Court proceedings.
3. The FSCA envisages a process of engagement with non-life insurers and their legal teams with regard to such proceedings. The purpose of this letter is therefore to outline some of the pivotal issues for consideration, comment and discussion with non-life insurers concerning any legal process. Non-life insurers are therefore invited to engage their legal teams on these issues for further engagement with the FSCA.
4. The FSCA emphasises that the content of this letter is a proposal for consideration and discussion aimed at reaching an understanding as to the framework for the process that may be followed in order to attain legal certainty.

**Nature of proceedings**

5. The FSCA is of the view that the most expedient process to be undertaken in order to achieve legal certainty would be by way of application proceedings, more specifically an application for declaratory relief in the High Court on the interpretation

and application of specific clauses in business interruption (BI) insurance policies in the context of Covid-19-related claims.

6. Such applications are contemplated by section 21(1)(c) of the Superior Courts Act, 2013 which deals with the High Court's power to grant declaratory relief and *inter alia* provides that the Court may:

*In its discretion, and at the instances 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.*

7. The FSCA envisages, subject to what is stated below with regard to locus standi, that it may possibly be the applicant for purposes of an application for declaratory relief. Relevant non-life insurers may be cited as respondents.

### **Other interested parties**

8. There are other parties with an interest in the points of legal principle which the contemplated application would be directed at determining, particularly the insured parties.
9. An obvious difficulty which could ensue if all such persons are not joined as parties to the application is that such persons may not be bound by the decision of the court.
10. The non-life insurers are invited to consider whether they would support an application by the FSCA for the determination of points of legal principle, if any decision which might be made in their favour may not bind the insureds.
11. Alternatively, non-life insurers are invited to suggest a process whereby all persons with an interest in the issues to be determined could be brought into the process in a manner which may result in them being bound by the outcome.<sup>1</sup>
12. A further problem that will have to be considered is that it may not be legally tenable for the FSCA to ask a court to determine questions of legal principle without joining all parties with a legal interest in such questions as parties to the proceedings. The FSCA is not aware of any procedure in South Africa which equates to the Financial Markets Test Case Scheme in the United Kingdom and which permits the determination of issues of general importance in the public interest. Non-life insurers are therefore invited to indicate whether they are of the view that the FSCA is

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<sup>1</sup> For example, could this problem be addressed by **the insurers**, if they so wish, seeking some form of rule *nisi* directed at requiring their insureds to show cause why a declaration on a point of principle, which the court may *prima facie* be minded to make in their favour, should not be finally determined against the insureds? The FSCA's current thinking is that it is not open to it to bring a class action in respect of the present matter but would be willing to consider any views to the contrary.

entitled in law to bring a case of the type proposed in this letter and, if so, to explain on what basis they have reached this conclusion.

## Forum

13. The FSCA considers that the Johannesburg Commercial Court may be the most appropriate forum to launch declaratory proceedings. This is so for four reasons:
  - a. The first is that the subject matter of such an application may satisfy the criteria to be classified as a commercial court case in so far as it will cover claims relating to “insurance and reinsurance” contemplated in Schedule 1 to the Commercial Court Practice Directive of 3 October 2018.
  - b. The second reason is that the Practice Directive provides for applications to be brought on an urgent basis – See Chapter 8 of the Practice Directive.
  - c. The third reason is that such applications may be dealt with on an expedited basis by way of directives issued by the judge(s) allocated to the matter both with regard to time frames and the format of pleadings.
  - d. The fourth reason is that the application may be heard by a full bench of two judges.
14. The Practice Directive contemplates an initial approach to the Judge President or Deputy Judge President to recognise (or allocate) the case as an urgent commercial court case.
15. The party making the request is required to set out in writing:
  - a. A broad and uncontroversial description of the case;
  - b. The motivation for the designation of the case as a commercial case;
  - c. The motivation for the case warranting treatment under the Commercial Court Directives; and
  - d. The reason why the applicant contends that the matter is urgent
16. The above criteria suggest that an allocation of a matter as a commercial court case does not necessarily imply that the Commercial Court Directives will apply. These are separate requirements. Whilst all the criteria must be assessed holistically, the party making the request must motivate why the Directives must apply to the matter.
17. On the basis that the subject matter of the envisaged application falls within the scope of Schedule 1 to the Commercial Court Directives and the Judge President or Deputy Judge President is satisfied that the matter should be allocated as a Commercial Court case, then case management for Applications as contemplated in the Directive may apply. The process has the advantage that the initial approach may already give direction as to the process and possibly such issues as the involvement of other interested parties, before the parties commence with the preparation of court papers.

18. In order to satisfy this initial step of approaching the Commercial Court, non-life insurers are invited to consider the following questions:
  - a. Do non-life insurers consider that the Johannesburg Commercial Court is an appropriate forum to launch declaratory proceedings?
  - b. Do non-life insurers consider that the subject matter of the application will satisfy the requirements to be allocated the status of a commercial court case?
  - c. Do non-life insurers have any alternative proposals in this regard?

### **Urgency**

19. In the initial letter to the Commercial Court motivation must be provided for the application to be brought on an urgent basis.
20. The FSCA invites all non-life insurers to provide motivation as to urgency. The FSCA considers the following factors as contributing to urgency:
  - a. Ongoing financial impact on policyholders and imminent financial failure of many;
  - b. Crisis of confidence in the market;
  - c. Possible issues of prescription in insurance and reinsurance policies (subject to the next point of discussion).

### **Prescription**

21. The FSCA and the PA did not explicitly discuss the issue of prescription with non-life insurers that offer CBI cover during the meetings relating to the interim relief measures.
22. However, this issue was raised in correspondence exchanged with some of the most affected non-life insurers. These non-life insurers indicated that they would not raise prescription as a defence should policyholders decide to lodge court actions against them at a later stage.
23. The FSCA requests all non-life insurers that offer CBI cover to confirm their position in this regard because, depending on the position taken, this may or may not affect the viability of it bringing the contemplated proceedings and/or affect the question of urgency.

### **Locus standi of the FSCA**

24. As stated, the FSCA envisages that it may be the applicant and dominus litis in issuing a declaratory application.

- 25 However, the interpretation and application of specific clauses in CBI policies are essentially matters of contractual interpretation that affect the parties to these insurance contracts. The FSCA is not a party to such contracts.
- 26 The FSCA's interest in the matter must therefore be clearly established and motivated with reference to its regulatory mandate and its statutory powers as it is a creature of statute and not a party with a direct interest in the contractual agreements of non-life insurers.
- 27 The Financial Institutions (Protection of Funds) Act, 2001 provides in section 6(1)(d) that the FSCA may institute proceedings in the High Court having jurisdiction in order to obtain a declaratory order relating to any law or the business of an institution.
- 28 The FSCA has been advised that the subject matter of any contemplated application will not relate to "any law". The FSCA's locus standi will therefore presumably have to be determined with reference to the interest that it has in the "business of" non-life insurers as institutions, more specifically as "supervised entities" as defined in the Financial Sector Regulation Act, 2017 (FSR Act).
- 29 Whilst the interpretation and application of policy wordings in CBI policies in the context of Covid-19-related claims undoubtedly relate to the business of non-life insurers, the FSCA's interest (a legal interest) in such relief must still be considered and sufficiently established.
- 30 Non-life insurers' attention is invited to the following considerations and/or potential difficulties:
- a. The FSCA's objectives are set out in section 57 of the FSR Act and include enhancing and supporting the efficiency and integrity of "financial markets" and protecting "financial customers" by promoting their fair treatment by financial institutions.
  - b. Section 58(4) of the FSR Act empowers the FSCA to do anything else reasonably necessary to achieve its objective.
  - c. This might include taking steps to achieve legal certainty which, at a high level, will assist to achieve the FSCA's objective of enhancing and supporting of the integrity of the market in which non-life insurers operate and sell CBI cover to the extent that such market forms part of the "financial markets" contemplated by the FSR Act, particularly where legal certainty may assist in addressing the crisis of confidence in the market and in addition it may prevent a multiplicity of litigation and reduce the potential for conflicting judgments.
  - d. The FSCA's objective to promote the fair treatment of financial customers by financial institutions may not be sufficient to satisfy the requirement of a legal interest to confer locus standi. This is so because the fair treatment of CBI policyholders by non-life insurers may not be the central issue but rather relate to the legal question of causality.

e. In any event, the Policyholder Protection Rules (PPR) issued during 2017 in terms of the Short-term Insurance Act, 1998 and which incorporate the principles relating to the fair treatment of financial customers apply to policyholders of short-term insurance policies for personal lines and small commercial lines where the annual turnover of the juristic person is less than R2 million per annum.

31 Non-life insurers are therefore invited to consider and put forward their views as to the locus standi of the FSCA to act as an applicant and its legal interest in such application, more particularly its interest in any “*existing, future, or contingent right or obligation*” contemplated by section 21 of the Superior Courts Act (refer to paragraph 6 above).

### **Set of agreed facts**

32 In order to ensure that the Commercial Court focuses on the issues of dispute between the parties to the application, the FSCA proposes that for purposes of the application the parties discuss the need to either agree or not to agree on a set of facts relating to the outbreak of Covid-19 and its classification and declaration as a National Disaster well as the timing and extent of the relevant measures taken by Government under the Disaster Management Act, 2002 (DMA).

33 For example, the parties may agree on the following common cause facts and others as may be gathered from government websites and official information published as from the beginning of March 2020:

- a. On 1 March 2020, the first patient later confirmed with Covid-19 in South Africa returned with his wife and a group of eight others from Milan in Italy and landing at King Shaka International Airport in Durban;
- b. On 3 March 2020 the patient reported his symptoms to a private general practitioner and isolated himself.
- c. On 5 March 2020 the Minister of Health announced this as the first confirmed case of Covid-19 in South Africa.
- d. A lockdown was imposed from 27 March 2020, restricting the movement of persons, confining people to their homes, and enforcing a closure of businesses to the public, except to the extent that they involve the supply of essential goods or services as defined in the Regulations issued under the DMA.

34. The need to either agree or not agree on a set of common cause facts may be informed by the issues for consideration by a court in such an application and which may be relevant to specific examples relating to CBI cover that may be used in the application.

## The issues to be considered

- 35 The purpose of the proposed proceedings will be to achieve legal certainty as to the meaning and effect of certain clauses commonly found in policies pertaining to business interruption resulting from contagious or infectious disease. More particularly, the purpose is to determine whether certain scenarios (applicable to many insureds) do or do not fall within the risk covered by these terms.
- 36 The FSCA hopes to be able to reach consensus with the principal non-life insurers who are party to such policies, as to which specific terms should be selected with a view to enabling the required legal certainty to be achieved and what the questions are on which declaratory orders should be sought.
- 37 In what follows the FSCA shall attempt to illustrate what it has in mind and what it regards at this stage as the core questions on which legal certainty is required. The details would be a matter to be agreed in due course, if possible.
- (i) Cause of loss in a "radius" policy: first scenario
- 38 A core set of questions, as the FSCA sees it, are whether various assumed facts do or do not fall within the insured risk in the following clause:

### “SECTION 4 - BUSINESS INTERRUPTION

#### **Murder, Suicide, Illness or disease extension**

In consideration of the payment of an additional premium which is included in the premium for this insurance damage is deemed to include loss following the interruption of or the interference with the business as a result of

a. ...

b. ...

c. ...

d. contagious or infectious disease at the insured's premises

e. contagious or infectious disease within a fifty kilometre radius of the insured's premises

Provided that the municipal, regional, local or government authority responsible for the area has declared a notifiable medical condition or communicable disease to exist within the area and / or has imposed quarantine regulations and / or has acted to restrict access to the area in terms or any local municipal, regional or national law, by law or regulation pertaining to public health and safety

#### **For the purpose of this extension:**

i) "Indemnity period" shall mean the period commencing with the occurrence of (a) or (b) above or for (c), (d) and (e) the date on which restriction on the premises were applied and ending not later than three months thereafter

ii) "Insured Premises" shall mean those locations listed in the schedule as the Insured's premises and shall not include the premises of suppliers, customers, contractors (or subcontractors) notwithstanding that this insurance may otherwise be extended to include such premises

iii) The Company's liability for any one incident during any twelve consecutive months of insurance (calculated from the inception of this policy) is limited to the amount stated in the schedule.

The cover granted by this extension does not include any costs arising from cleaning, repair, recall or checking the Insured's premises.”(our emphasis)”

39 The FSCA does not understand there to be any dispute that Covid-19 is a contagious or infectious disease.

40 The FSCA proposes that the following facts should be assumed as a *first scenario*:

- a. Covid-19 was to be found within a 50 km radius of the insured's premises before 27 March 2020.
- b. Before 27 March 2020 the presence of this disease within the above radius did not bring about any interruption or interference with the insured's business.<sup>2</sup>
- c. On 27 March 2020 a lockdown was imposed by the national government, confining persons to their homes and enforcing a closure of the business of the insured.
- d. From 27 March 2020 (and for a period to be set out, e.g. x weeks) the insured's business was, as required by the national lockdown, closed (and therefore “interrupted” as contemplated in the policy).

41 The first question arising is whether the insured's loss following the interruption of its business on and after 27 March 2020 was “*as a result of*” contagious or infectious disease within a 50 km radius of the insured's premises? (Put differently, can the insurer avoid liability on the basis that the cause of the loss was the national lockdown and not the presence of the disease within the specified radius?).

(ii) Compliance with one or more of the proviso requirements?

42 If the answer to the first question arising under the above term is in the affirmative, it may be necessary to determine (if this is disputed by any relevant non-life insurer) whether one or more of the three alternative stipulations in the underlined proviso were met. To test this, it may be necessary to set out agreed facts and then to pose the necessary questions

(iii) Cause of the loss: a second scenario.

43 The FSCA proposes that the following facts should be assumed as a *second scenario*:

- a. Covid-19 (which is a contagious or infectious disease) was not to be found within a 50 km radius of the insured's premises before 27 March 2020.
- b. On 27 March 2020 a lockdown was imposed by the national government, confining persons to their homes and enforcing a closure of the business of the insured.
- c. From 27 March 2020 (and for a period to be set out, e.g. x weeks) the insured's business was, as required by the national lockdown, closed.
- d. On and from 1 April 2020 (or some other agreed date after 27 March 2020), Covid-19 was to be found within a 50km radius of the insured's premises.

44 Under this scenario, a *first question* which arises is whether, with effect from 27 March 2020 and before 1 April 2020, the insured's losses arising from its closure

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<sup>2</sup> Different questions will arise where the presence of the disease did interrupt or interfere with an insured's business before the lockdown.

fall within the insured risk. (The FSCA does not presently think so, but it reserves its right, if so advised, to argue to the contrary, particularly if it should be decided that this question needs to be tested in order to achieve legal certainty.)

- 45 Under the same scenario, a second question which arises is whether the insured's losses arising from its closure from 1 April 2020 onwards fall within the insured risk. The FSCA contends that it does.

(iv) Clause requiring loss to arise from disease "at the insured's premises"

- 46 There are clauses which cover losses following the interruption of the insured's business as a result of contagious or infectious disease "at the insured's premises". Sub-clause (c) of the first clause quoted above is an example.

- 47 A question which arises is whether any claim lies under such a clause if there is no evidence of Covid-19 at the insured's premises, but the insured has had to close down pursuant to the national lockdown.

- 48 The FSCA does not presently take the view that any such claim arises but reserves its right to argue to the contrary if so advised.

(v) Different "notification" clause

- 49 The following is an example of a clause with a different "notification" requirement from that in the above-quoted clause:

*"... loss as insured by this section resulting in interruption of the business as a result of:*

*(d) Notifiable disease occurring within a radius of 50 kilometres of the premises stated in the schedule;*

*Notifiable diseases shall mean illness sustained by any person resulting from any human infection diseases, an outbreak of which the competent local authority has stipulated shall be notified to them but not excluding Human Immune Virus (H.I.V), Acquired Immune deficiency Syndrome or any related conditions" (emphasis added)*

- 50 It may be necessary to determine (if this is disputed by any relevant non-life insurer) whether the fact that the notification obligation in respect of Corona-19 was imposed by the national government (and not by a local authority) entitles the insurer to avoid liability. To test this, it may be necessary to set out a set of agreed facts and then to pose the necessary question.

(vi) Invitation to insurers to propose questions requiring resolution

- 51 The above clauses and questions serve as examples but are not intended to be prescriptive. Non-life insurers are invited to propose alternatively worded clauses requiring definitive interpretation and questions which need to be decided as a matter of considerable urgency.

52 However, every effort will need to be made to confine the issues to be determined to manageable proportions.

### **Timeline**

53 The FSCA invites non-life insurers to respond to the content of this letter and for the parties to thereafter engage in order to reach understanding on the process to be followed with regard to the possible approach to the Commercial Court outlined above.

54 The FSCA also envisages that in the event of the matter being classified as an urgent commercial matter, the timelines and procedures may be stipulated by the judge or judges to whom the case may be assigned and it is therefore not possible to stipulate timelines in this regard.

### **Finality of legal proceedings**

55 The FSCA accepts the indications by some non-life insurers that legal certainty may only be reached once an authoritative ruling is issued by the Supreme Court of Appeal on some or all of the issues.

56 In the event of any party being granted leave and lodging an appeal to the Supreme Court of Appeal, the FSCA will support an expedited hearing.

57 However, the FSCA is of the view that whilst it is possible for the FSCA and non-life insurers to agree (and in doing so waive their rights) not to seek a further ruling on any issue by the Constitutional Court, this will not be binding on other interested parties.

### **Costs**

58 The FSCA will propose to non-life insurers that any litigation process that may be launched will be for the cost of each party and that none will seek costs against any other party. Such a proposal, if accepted, will not bind other interested parties.

### **Competition law**

59 The FSCA is aware of non-life insurers' concerns regarding their obligations in terms of the Competition Act.

60 The FSCA intends communicating with non-life insurers in a uniform and standardised manner, i.e. by addressing correspondence to all concerned. Non-life insurers may communicate with the FSCA on a bi-lateral basis.

61 The FSCA advises that it remains the responsibility of each non-life insurer to seek guidance and advice from their lawyers with regard to their statutory obligations under the Competition laws of the Republic.

### **Transparency**

62 In the event of the FSCA and non-life insurers reaching an understanding with regard to the process to be followed and the content of a letter to be addressed to the Commercial Court, such letter and any further directives as may be issued by the Judge President or Deputy Judge President or any judge(s) allocated to the matter as well as the pleadings and all notices and process related to the matter will be published on the FSCA's website.

63 The FSCA also intends issuing, after consultation with non-life insurers, regular media releases to update the public on developments concerning the legal process.

### **Conclusion**

64 The FSCA again acknowledges the efforts by non-life insurers with regard to the interim relief measures that have been announced and envisages that the co-operation between the regulatory Authorities and non-life insurers with regard to the process to attain legal certainty will continue.

65 The purpose of this letter is, as stated above, a step towards constructive engagement between the FSCA and non-life insurers as to the process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'MHR', with a large, sweeping flourish extending to the right.

**Makgampi Raphasha**  
**For the Financial Sector Conduct Authority**