IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 6499/2020

In the matter between

MA-AFRIKA HOTELS (PTY) LIMITED	First Applicant
THE STELLENBOSCH KITCHEN (PTY) LIMITED	Second Applicant

and

SANTAM LIMITED	Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 The Applicants operate hotels and a restaurant in Cape Town and Stellenbosch. They have five insurance policies with the Respondent, Santam. An infectious diseases clause in the policies extends business interruption cover to losses "due to … [a] Notifiable Disease occurring within a radius of 40 kilometres of the Premises" (for short, the infectious diseases clause).[1]

2 The Applicants' businesses have been brought to a standstill due to Covid-19 and the government's response to Covid-19. Their hotels remain closed, and the restaurant's business is much reduced. The Applicants' losses are more than R5 million and continue to mount.

3 Santam admits that Covid-19 is a "Notifiable Disease" and that there are confirmed cases of Covid-19 within 40 kilometres of the Applicants' hotels and restaurant.[2] Santam also admits that the Applicants' hotels and restaurant had to close under the lockdown that the government put in place in response to Covid-19.[3] Santam even admits that the Applicants' losses—which it does not deny—were as a result of the lockdown.[4]

4 Those admissions should make this a proper case for indemnity under the policies. But, arguing against the plain text and purpose of the infectious diseases clause, Santam refuses to indemnify the Applicants.

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[1] Founding affidavit; annexure "FA1", p 56.

[2] Answering affidavit; p 300, paras 129-130.

[3] Answering affidavit; p 255, paras 11.2-11.3.

[4] Founding affidavit; annexure "FA20", p 236.

5 Santam tries to disarm the infectious diseases clause through two distinct but related devices:

- First, by an artificial separation between Covid-19 and the government's response to Covid-19.
- Second, by confining the insured peril to a local outbreak of a notifiable disease and excluding a more widely distributed (or national) outbreak from the reach of the clause.

6 Santam's attempt to neutralise the clause is unsustainable. Covid-19 and the government's response to it cannot be separated, and the insured peril necessarily covers the government's response to Covid-19 just as much as Covid-19. There is then an unbroken line of causation connecting Covid-19, the government's response to Covid-19, and the Applicants' losses.

7 Nor does the infectious diseases clause require the outbreak to occur *only* within the prescribed area. On the contrary, wider area events are covered, and there is no exclusion for pandemics. The Applicants are accordingly entitled to declaratory relief.

THE FACTS

8 The timeline of the spread of Covid-19 and the government's response are common cause. In short:

- 5 March: South Africa's first case of Covid-19 was diagnosed (in KwaZulu-Natal).
- 11 March: Cape Town's first case of Covid-19 was diagnosed.

- 15 March: Covid-19 was classified as a national state of disaster and international travel to and from high-risk countries was banned.

- 23 March: the President announced a 21-day national lockdown between 26 March to 16 April, which was then extended until the end of April.

9 Regulations published on 25 March governed this ‘hard lockdown’ period. The regulations were published because of, and for the sole purpose of dealing with, Covid-19. During the hard lockdown, hotels and restaurants were required to close.

10 Because the Applicants ask for declaratory relief only, and given Santam’s admissions, it is not necessary to explain the Applicants’ losses in detail. In short:[5]

- After the announcement of the first confirmed case of Covid-19 in Cape Town, the Applicants saw an increase in cancellations.

- Between 11 and 23 March, 241 rooms were cancelled at the Applicants’ hotel in Cape Town—an eight-fold increase in cancellations compared to the ten days prior.

- There was a similar spike in cancellations at the Stellenbosch hotels: between 11 to 23 March, 585 rooms were cancelled—a five-fold increase in cancellations compared to the ten days prior.

[5] Founding affidavit; p 11 para 39; annexures “FA6”-“FA9, pp 193-205. See also replying affidavit; pp 441-445, paras 41-57.

- Across all properties, the Applicants' losses for the period 11 to 26 March are more than R5 million. These losses have only mounted, and will continue to mount, as the lockdown continues in its various forms.

- After 23 March and until early June, the Applicants could not take any bookings for its hotels, and its restaurant was effectively shut down.

11 Beginning in May, the government began gradually to ease lockdown regulations. From then until the end of June, the country was set at Alert Level 4. Under its regulations, international and domestic leisure travel remained prohibited and hotels closed, with restaurants open for take aways only.

12 Since end-June, South Africa remains on Alert Level 3. International and interprovincial travel is still prohibited. And although restaurants may open for ordinary trade, alcohol sales are, for the time being, prohibited.

13 In April, the Applicants submitted claims under their policies.[6] Santam's lawyers rejected the claims because "the national lockdown was not a direct result of a notifiable disease occurring within a 40km radius" and had "nothing to do with the [confirmed cases of Covid-19] that occurred within the 40 km radius."[7]

14 Santam's rejection letter makes several important admissions:

- Santam admitted that "there [were] recorded cases of Covid-19 within a 40km radius from [the Applicants' premises]".[8]

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[6] Founding affidavit; annexures "FA10"-"FA14", pp 206-220.

[7] Founding affidavit; annexure "FA20", p 234.

[8] Founding affidavit; annexure "FA20", p 236.

- Santam admitted that the interruption to the Applicants' business "is the result of the [n]ational lockdown".[9]

- Santam admitted that the cancellations that make up the Applicants' losses were "specifically due to the restriction of movement implemented by the government"[10] and that the "reasons for cancellation … were due to the national lockdown and travel restrictions imposed by the national government".[11]

- Santam did not deny that the Applicants suffered losses of revenue.[12]

- Santam admitted that these losses were "as a result of the nationwide lockdown."[13]

15 Despite those admissions, Santam asserted that the lockdown that the government put in place as a response to Covid-19 was causally unrelated to Covid-19.

16 About a month later, this Court delivered judgment in a case dealing with an identically worded policy.[14] A Cape Town restaurant, Café Chameleon, successfully sued its insurer, Guardrisk, for indemnity for business interruption losses "due to … [a] [N]ofitifiable Disease occurring within a radius of 50

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[9] Founding affidavit; annexure "FA20", p 237.

[10] Founding affidavit; annexure "FA20", p 238.

[11] Founding affidavit; annexure "FA20", p 239.

[12] Founding affidavit; annexure "FA20", p 236.

[13] Founding affidavit; annexure "FA20", p 236.

[14] *Cafe Chameleon CC v Guardrisk Insurance Company Ltd* (5736/2020) [2020] ZAWCHC 65 (26 June 2020).

kilometres of the Premises".[15] Santam relies on substantially the same arguments advanced by Guardrisk in that matter:[16]

- the infectious diseases clause "does not cover losses following the closure of the premises as a result of a government order";
- "[t]he relevant peril that is insured is the occurrence of a notifiable disease" and that the policy "does not indemnify the interruption of the business due to the closure of the premises following an order by the government to close the premises";
- the lockdown "is not insured under the policy";
- "[t]he national lockdown was not … a direct consequence of the insured event or a response thereto" but it was a "pre-emptive measure to prevent and delay the spread of the virus"; and
- certain third-party reinsurers many thousand kilometres away in London do not read the infectious diseases clause to include a pandemic.

17 This Court rejected Guardrisk's arguments about, amongst other things, causation and one-sided industry expectations. As this Court found, "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."[17]

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[15] Replying affidavit; p 429, para 8.

[16] Replying affidavit; p 430, para 9; annexure "RA2", pp 456-463.

[17] *Café Chameleon* (note 14) at para 74.

18 At the beginning of July, the Financial Sector Conduct Authority stepped in.[18] In the view of the expert industry regulator, "the "National Lockdown cannot be used by any Insurer as grounds to reject a claim".[19] The FSCA's position aligns with this Court's conclusion in *Café Chameleon*: "[i]f a policyholder has a [business interruption] policy with a radius clause and such policyholder can prove that it suffered a loss for example, less bookings, cancellations of bookings and so forth as a result of the contagious/infectious disease in the area specified in the radius clause, and its business was interrupted or interfered with as a result of measures taken as a consequence of the contagious/ infectious disease, including the National lockdown, then the policyholder has a valid claim". Santam however has still not budged.

THE INTERPRETATION QUESTION: THE INSURED PERIL INCLUDES THE GOVERNMENT'S RESPONSE TO COVID-19

<u>The infectious diseases clause</u>

19 The infectious diseases clause extends business interruption coverage to losses "due to", amongst other things, a "Notifiable Disease occurring within a radius of 40 kilometres of the Premises".[20] In full, the clause reads:

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[18] Replying affidavit; annexure "RA4", p 465.

[19] Replying affidavit; annexure "RA4", p 466.

[20] Founding affidavit; annexure "FA1", p 56.

“**Infectious Diseases/Pollution/Shark and Animal Attack Extension**

Loss as insured by this Section resulting in interruption or interference with the Business due to:

(a) Murder or suicide occurring at the Premises

(b) Notifiable Disease occurring at the Premises or attributable to food or drink supplied from the Premises

(c) Closure of the Premises due to defective sanitation, vermin or pests on the order of the competent local authority

(d) Notifiable Disease occurring within a radius of 40 kilometres of the Premises

(e) Witness call and/or jury service by the Insured or any of the Insured’s directors, partners or employees

(f) Chemical or oil pollution of beaches, rivers or waterways within 40 kilometres of the Premises

(g) Shark attack or attack by wild game including hippopotamus, rhinoceros, lion, leopard, cheetah, crocodile and elephant within 40 kilometres of the Premises

Special Provisions

(a) “Notifiable Disease” shall mean illness sustained by any person resulting from

(i) Food or drink poisoning, or

(ii) Any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them Excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.”

<u>The law on interpretation</u>

20 The usual rules of interpretation apply to insurance contracts: interpretation according to the plain language of the clause, read with its context and purpose, all guided by good commercial sense.[21] Ambiguity should be resolved against the insurer.[22]

- Interpretation is objective, not subjective.[23] It does not involve a search for the intention of the contracting parties; the law is concerned with "external manifestations, and not the workings, of the minds of parties to a contract."[24]

- Context and purpose are informed by "material known to those responsible" for the production of the contract,[25] not materials known only to one party, and certainly not materials known only to a third-party who has nothing to do with the contract (like, for example, an underwriter sitting in London).[26]

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[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18. See also *Centriq Insurance Company Limited v Oosthuizen* 2019 (3) SA 387 (SCA) at para 17 (applying *Endumeni* to insurance contracts). See also the line of older cases starting with *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5 running through to *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

[22] *Centriq* (note 21) at para 18.

[23] *Endumeni* (note 21) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 18.

[24] *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 238I-J.

[25] *Endumeni* (note 21) at para 18.

[26] Answering affidavit; p 258, para 15.2.

- Insensible and unbusinesslike results should be avoided, where the text allows.[27]

- Interpretation remains "a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses."[28]

- "Context" is not an open sesame for evidence that adds to, or modifies, words in a contract. Despite *Endumeni*'s promise of contextual and purposive interpretation, the parol evidence rule—that is, the rule that a party may not "alte[r], by the production of extrinsic evidence, the recorded terms of a contract in order to rely upon the altered contract"—is still part of our law.[29]

- Courts have long accepted that because insurance contracts are "contract[s] of indemnity", they should be construed "reasonably and fairly to that end" and so "provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract".[30]

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[27] *Endumeni* (note 21) at para 18.

[28] *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) at para 39.

[29] *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at paras 62-69 (confirming that *KPMG* and the parol evidence rule remain good law).

[30] *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 at 222. See also *May on Insurance* (4ed) at 174-175 ("No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted.")

21 It is common ground that Covid-19 is a "Notifiable Disease",[31] and that there are confirmed cases of Covid-19 within 40 kilometres of the Applicants' properties.[32] The remaining interpretation question is whether the infectious diseases clause covers the government's response to Covid-19.

The insured peril includes the government's response to a notifiable disease

22 To trigger coverage under the infectious diseases clause, not any disease will do. The disease must be "Notifiable". Notifiable diseases pose particular "public health risks".[33] They are the types of diseases that the government needs to know about and needs to do something about. The regulations dealing with notifiable diseases indicate as much in their title: "Regulations relating to the Surveillance and Control of Notifiable Medical Conditions". These diseases are so serious that they require active "[s]urveillance and [c]ontrol".

23 The types of diseases that count as "notifiable" prove the point. History teaches the need for governments to respond quickly and decisively to diseases like smallpox and the plague—and the deadly consequences of not doing so.[34] As far as the Regulations go, Covid-19 is just as serious; all three must be reported to health authorities within 24 hours of diagnosis.

(cited with approval in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 107A-B).

[31] Answering affidavit; p 301, para 132.

[32] Answering affidavit; p 300, paras 129-130.

[33] Paragraph 12(2) of the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions published in GN 1434 of 2017 under the National Health Act 61 of 2003.

[34] Table 1 of the Regulations.

24 The very concept of a notifiable disease owes its existence to the need for a coordinated, government-led response to diseases that pose peculiar and immediate public health risks. Other diseases may be responsible for more deaths; heart disease and strokes, for example, probably kill more people globally than all the notifiable diseases combined.[35] But the government does not need to know about another heart attack. Notifiable diseases are different; the government does need to know because it needs to react.

25 In this way, a notifiable disease requires and includes a government response, with the attendant risk that interruption to an insured's business will follow because of both the disease and the government's response to it. A government response can cause collateral damage. As firefighters sometimes have to cut through the roof of a house to get to a fire inside, or flood it, health authorities as part of their response to a notifiable disease sometimes have to close factories, put people in quarantine, and even put the whole country in lockdown.

26 A notifiable disease cannot be separated from the government's response to the disease. "Notifiable" in "notifiable disease" makes a government response (or the risk of one) as much a part of the insured peril as the disease itself. Covid-19 and the government's response to Covid-19 are inseparably part of the same insured peril.

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[35] According to the World Health Organisation, heart disease and strokes have been the leading causes of death globally for the past 15 years: https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death.

27 Surrounding context supports this interpretation. Other insured perils under the infectious diseases clause do not link the event or incident to a government response. Take the example of a lion attack, which the clause covers in sub-clause (g). The sub-clause would cover a game lodge if a lion attack causes guests to stay away out of fear for their safety. But it may not cover the lodge if the government orders the whole game reserve to close while a manhunt for the man-eating lion is underway. In contrast, the insured peril of a "Notifiable Disease" includes losses due to measures that the government puts in place to respond to, and control the spread of, the disease.

28 Santam tries to separate the "Notifiable" from the "Disease". It argues that "the worldwide spread of Covid-19 and the restrictions imposed by the South African government, including the national lockdown" caused the applicants' losses, not Covid-19.[36]

29 Santam's distinction between Covid-19 and the government's response to Covid-19 is artificial. The distinction effectively writes "Notifiable" out of the clause. A notifiable disease always comes with a risk of a government response, making a government response part and parcel of the insured peril of a "Notifiable Disease". And because it is part of the insured peril, the government's response is covered not because it is *caused* by what was insured against; it is covered because it *is* what was insured against.

[36] See, for example, answering affidavit; p 274, para 43.

30 The unsustainability of this distinction between Covid-19 and the government's response is further illustrated by Santam's response to the business interruption claim for The Stellenbosch Hotel. There the admitted business interruption occurred because the First Applicant itself closed the hotel and placed staff in quarantine for a two-week period. Santam did not seek to distinguish between Covid-19 and the First Applicant's response to Covid-19, as being relevant in any way (and nor could it).

31 Santam then doubles down on its narrow interpretation of the infectious diseases clause with the following argument: the clause "does not cover loss caused by a worldwide pandemic".[37] Santam fails to locate this pandemic exclusion anywhere in the text of the policy. Its failure is decisive in light of the policy already containing broadly worded exclusions for wars and other rare, often once-in-a-lifetime occurrences.[38] Also the specific reference to just one pandemic, AIDS. Trying to read in another exclusion also runs contrary to the interpretive rule that exclusions in insurance policies are interpreted narrowly (here, of course, the policy's silence means there is nothing to interpret in the first place).[39]

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[37] Answering affidavit; p 257, para 13.4.

[38] Founding affidavit; annexure "FA1", p 58.

[39] *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd* 2008 (3) SA 425 (SCA) at para 7 ("[A]n exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify"). See also *Kliptown* (note 30) at 106H-107C ("The warranty must be interpreted in the same way as any other conditions of the policy … In interpreting those conditions not only may the rule *verba fortius accipiuntur contra proferentem* operate against the company, but there is the further rule that the Court should incline towards upholding the policy and against producing a forfeiture").

32 Apart from having no basis in the text of the policy, excluding “worldwide pandemic[s]” would also have the absurd result that the more widespread the notifiable disease, the less the coverage.

33 Unable to find any text in the policy to support a pandemic exception, Santam relies on parol evidence from foreign insurance industry insiders about what they think the infectious diseases clause means.[40]

34 Mr Clegg, an underwriter from Lloyd’s in London, states as follows: a pandemic is “not limited either by time or geographically”, which makes an insurer’s exposure “not … quantifiable”, and insurers are “unwilling to issue cover for unquantifiable risk.”[41] Mr Clegg—a stranger to these policies between a South African insurer and South African insured businesses—goes on to assert that underwriters in London “could not have anticipated a worldwide economic shutdown caused by pandemic such as Covid-19.”[42] Mr Clegg ends with insurance companies’ bogeyman of systemic risk, warning this Court, vaguely, of a “complete reversal of the whole basis on which insurance exists”.[43]

35 This Court in *Café Chameleon* rejected exactly this evidence because 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

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[40] Supporting affidavit of Trevor Clegg; p 404. Guardrisk tried this too: see *Café Chameleon* (note 14) at para 65. See also replying affidavit; p 430, para 10.

[41] Supporting affidavit of Trevor Clegg; p 409, para 22.

[42] Supporting affidavit of Trevor Clegg; p 410, para 27.

[43] Supporting affidavit of Trevor Clegg; p 413, para 33.

when entering into an insurance contract."[44] Mr Clegg's evidence amounts to an after-the-fact explanation from a stranger to a contract speculating about one of the parties' unwritten expectations.

36 Even if Mr Clegg were somehow able to speak for Santam, his evidence would still amount to an irrelevant unexpressed reservation by Santam that *it* did not expect the infectious diseases clause to cover a pandemic. The law is concerned with what Santam's policy *says*, not what Santam *thinks* its policy says—a policy, after all, that Santam drafted. The Applicants are small businesses; they run restaurants and hotels. They do not, and are not expected to, know the arcane intricacies and expectations of the insurance and reinsurance industries now invoked. If Santam wanted the policy to say what Mr Clegg opines Santam meant to say, it lay within Santam's power, as *proferens*, to ensure the policy objectively said it, and said so clearly.

37 Mr Clegg's evidence is also inadmissible parol evidence. Interpreting the infectious diseases clause is "a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses."[45] Santam's attempt to use an expert to explain the meaning of a "Notifiable Disease" is no different from KPMG and Securefin asking experts to explain the meaning of "verify".[46] The Supreme Court of Appeal rejected those attempts. Like the parties there, Santam makes the mistake of "ignor[ing]" the old rule that "[i]f a document was intended to provide a complete memorial of a jural act, extrinsic

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[44] *Café Chameleon* (note 14) at para 65.

[45] *KPMG* (note 28) at para 39.

[46] *KPMG* (note 28) at para 38.

evidence may not contradict, add to or modify its meaning".[47] Santam's attempt to use expert evidence does just that: it attempts to "add to" or "modify" the meaning of the infectious diseases clause with a pandemic carve-out. Nor can Santam get this in "under the guise that such evidence [is] being introduced as to context."[48] Courts have seen through that subterfuge before.[49]

38 In any event, on its own terms, Mr Clegg's evidence is not part of the context of this particular contract. Even when limited contextual evidence is allowed, it must be party- and contract-specific.[50] The context of a run-of-the-mill insurance policy for a restaurant in Stellenbosch does not, it bears reiteration, include what is asserted to be in the minds of reinsurers in London.

39 The interpretation of the infectious diseases clause depends on text, not the workings of Santam's mind or the mechanics of distant insurance markets. The text of the clause covers a notifiable disease. Covid-19 is a notifiable disease. It did not all of a sudden cease being a notifiable disease when it reached pandemic status, even if Covid-19 reaching pandemic status turned these policies into bad bets for the insurers. It would be no different from an Australian insurer trying to get out of a wildfire insurance policy because the insurer "could not have anticipated" that the recent fires there would last months and spread

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[47] *KPMG* (note 28) at para 39.

[48] *Auckland Park Theological Seminary v University of Johannesburg* (1160/2018) [2019] ZASCA 24 (25 March 2020) at para 10.

[49] *Auckland Park* (note 48) at para 10.

[50] *Endumeni* (note 21) at para 18 ("…and the material known to those responsible for its production.").

across an area bigger than the Netherlands.[51] Nor would cover under an earthquake policy stop if an earthquake reached an unprecedented number on the Richter scale.

Santam misconstrues the radius requirement

40 Santam tries to use the radius requirement to narrow the class of diseases that count under the infectious diseases clause. The clause requires a notifiable disease to occur "within a radius of 40 kilometres" of the insured premises. Santam uses this to argue that the clause covers *only* "local events".[52]

41 Santam's interpretation of the radius requirement is contrary to the text of the clause and its purpose. The clause requires a notifiable disease to be "occurring within a radius of 40 kilometres" of the insured premises, not "occurring *solely* within a radius of 40 kilometres" of the insured premises". A disease that spreads from kilometre 50 to kilometre 39 is still "within a radius of 40 kilometres" of the premises. The fact that the disease occurs elsewhere and also within the radius does not detract from the cover; it merely indicates that the notifiable disease, prevalent elsewhere, has penetrated the radius.

42 The radius requirement sets a minimum proximity for the occurrence of the insured peril from the premises, for the purpose of triggering cover. Coverage triggered, what then arises is the extent to which the peril has caused loss.

[51] See https://tinyurl.com/ydqmvbu8. For similarly inverted reasoning, compare the unsuccessful argument in *Nyakambiri Farm (Pvt) Ltd v Zimnat Insurance Co Ltd* 1996 (2) ZLR 67 (H) at 72 *in finem.*

[52] Answering affidavit; p 257, para 13.3.

43 Santam's argument also proves too much. The effect of its interpretation is that there is coverage only if the insured premises is ground zero of the outbreak (which presumably means, on Santam's argument, that the only businesses covered are those within 40 kilometres of the Huanan Seafood Market in Wuhan).

44 Nothing in the language of the clause requires the disease to *start* or *stay* within 40 kilometres of the insured's premises, or that the 40 kilometre radius is to form a maximum area for purposes of cover. Santam's insistence on a "local[ised]" disease yields absurd results. Take the example of an oil spill in Cape Town (which would be subject to a similar radius requirement under sub-clause (f)). An oil-soaked beach might well result in closure of a beachfront restaurant in Hout Bay while the spill is being cleaned. Why should it matter whether the tanker that sprung the oil leak is floating a few metres away in Hout Bay, 20 kilometres away in Table Bay, or 600 kilometres away off the coast of Port Elizabeth? It is irrelevant to the consequence for the insured victim in Hout Bay. All that matters is that there is an oil spill within 40 kilometres of the premises; where the oil floated *from* is irrelevant. Swap the ocean for the population and the oil for Covid-19, and the conclusion should be the same for Covid-19 occurring within 40 kilometres of the Applicants' premises.

45 Santam's reading of the radius requirement also defeats the purpose of the clause. A nationwide order requiring all businesses to close has the same effect on an insured's business as an order that applies only to the insured's premises.

46 The radius requirement plays a more modest role: it excludes coverage for a farflung peril that may affect an insured economically but does not manifest itself within 40 kilometres of the insured premises. It operates only as a trigger requirement for the purposes of cover. Imagine, for example, that Covid-19 was confined to Gauteng without any cases anywhere else in the country. The government places Gauteng under lockdown, but the rest of the country remains as normal. Because of travel restrictions into and out of Gauteng, a group of Gauteng residents have to cancel an upcoming trip to Cape Town. Their Cape Town hotel would presumably not be entitled to cover under the infectious diseases clause because there would not be a notifiable disease occurring within 40 kilometres of the hotel.

Santam's interpretation impermissibly resolves ambiguity in favour of the insurer

47 Santam's interpretation arguments ignore the commercial reality of standard-form insurance policies. Santam and its lawyers drafted these policies. They are, as insurance policies tend to be, long and confusing, even for people like lawyers and judges who spend most of their days interpreting documents. The open market provides not much relief for confused consumers because standard-form contracts are, as their name suggests, standard in the industry.[53] And even if a small business owner does manage to work out what a policy

[53] Replying affidavit; p 429 para 8.

means, the insurance company gives itself a right to amend the policy by decree.[54]

48 Despite bargaining power being unequal from the start, Santam still insists on a thick-spectacled[55] parsing of its policies to avoid coverage. Santam seems to insist on every interpretive doubt being resolved in its favour. The *contra proferentem* rule of interpretation remains part of our law and it says the opposite (the rule deserves a more robust role to better promote and protect constitutional values of fairness, reasonableness, and justice that underlie the law of contract, but more on that later).[56] If Santam's arguments do show ambiguity in the infectious diseases clause about whether the government's response to Covid-19 triggers cover, the ambiguity should be resolved *against* Santam.

Conclusion on interpretation

49 In the end, though, there is little or no ambiguity—certainly none which assists the *proferens*, Santam. The infectious diseases clause covers notifiable diseases which are, by their nature, diseases that entail a government response (or at least a risk of a government response). The only text- and purpose-faithful

[54] Betraying its confidence in its interpretation of the infectious diseases clause, Santam amended its policies to exclude cover for Covid-19 and the government's response to Covid-19 with effect from 1 June 2020.

[55] See the most recent strictures, again, by the SCA against a "narrow peering at words" in construction, in *Blair Atholl* (note 29) at para 61.

[56] *Centriq* (note 21) at para 18. See too the discussion, and authorities collected, by the Hon PM Nienaber and Profs MFB Reinicke and JP van Nierkerk in Joubert *et al* (eds) *Law of South Africa* (2nd ed 2013) vol 12 Part I para 283.

interpretation of the clause is that the insured peril covers Covid-19 *and* the government's response to Covid-19.

THE CAUSATION QUESTION: COVID-19 AND THE GOVERNMENT'S RESPONSE TO COVID-19 CAUSED THE APPLICANTS' LOSSES

50 There is an unbroken line of causation connecting the Applicants' losses and Covid-19. Guests cancelled hundreds of bookings because of Covid-19, and the lockdown regulations required the Applicants' hotels and restaurant to close for the better part of four months. Covid-19 is still affecting their businesses: international and interprovincial leisure travel is still not allowed; the alcohol ban and curfew means less revenue for restaurants; surging Covid-19 numbers makes people wary of nights out. Covid-19 is the cause of these losses.

<u>The law on causation</u>

51 The general approach to causation is "equally applicable to insurance law."[57] Factual causation is the starting point, and the usual diagnostic tool for factual causation is the but-for test.[58] This involves a "hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant" (or, in the insurance conduct, but for the insured peril).[59]

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[57] *Napier v Collett* 1995 (3) SA 140 (A) at 144C-G.

[58] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at para 40.

[59] *Lee* (note 58) at para 40 (citing *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-H).

52 Factual causation has never been a slave to "rigid deductive logic".[60] The common law test has never been applied "inflexibly" but has always recognised that sometimes "common sense may have to prevail over strict logic."[61] In the contractual context, causation rules should be applied "with good sense to give effect to, and not to defeat the intention of the contracting parties".[62] For insurance contracts, the ultimate question should be "has the event, on which I put my premium, actually occurred?"[63]

53 Legal causation comes next, which tests whether there is a "sufficiently close relationship" between a factual cause and the loss complained of.[64] In delict, legal causation is a conduit for policy considerations and, in particular, a guard against "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[65] In contract, though, these policy considerations "usually

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[60] *Lee* (note 58) at para 44. See also *Mashongwa v PRASA* 2016 (3) SA 528 (CC) at para 65 ("[*Lee*] adopted an approach to causation premised on the flexibility that has always been recognised in the traditional approach"). Thus too in *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32, the House of Lords rejected the notion that claimants employed by multiple employers in an industry had to prove which particle of mesothelioma from which employer had caused their condition. See further *But for Lord Hoffmann* in Davies and Pila (eds) *The Jurisprudence of Lord Hoffmann: Festschrift* (2015) ch 3.

[61] *Lee* (note 58) at para 49 (explaining *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A)).

[62] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365.

[63] *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 118.

[64] *Napier* (note 57) at 144E-G. In the simple language of Corbett J (later CJ in this Court, in what is still its leading case, this entails "applying ordinary, common-sense standards": *Wells v Shield Ins Co Ltd* 1965 (2) SA 865 (C) at 870E-F).

[65] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para 24 (citing *Ultramares Corp v Touche* 174 NE 441, 444 (1931)).

do not enter the enquiry".[66] Instead, and particularly in the insurance setting, the focus should be on the provisions of the policy because the policy may "extend or limit the consequences covered by the policy, for example by laying down exceptions."[67] (Here, Santam included generous exceptions in the policy; none of them excludes pandemics or the government's response to a pandemic, despite the Spanish Flu, ebola and the like.) Ultimately, "the type of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether a factual cause should be regarded as the cause in law."[68]

54 If there are "two or more possible causes", the "proximate or actual or effective cause" must be identified.[69] Even if a loss is "not felt as the immediate result of the peril insured against, but occurs after succession of other causes, the peril remains the proximate cause of the loss, as long as there is no break in the chain of causation."[70] A proximate cause should be identified as a matter of "reality, predominance [and] efficiency".[71] Or, said in another way, the "real or dominant cause is to be ascertained by applying the common sense of a business [person]."[72]

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[66] *Napier* (note 57) at 143J (citing *Concord Insurance Co Ltd v Oelofsen NO* 1992 (4) SA 669 (A)).

[67] *Napier* (note 57) at 144E-G.

[68] *Napier* (note 57) at 144F-G.

[69] *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) 862C-E.

[70] *Mutual and Federal Insurance Co Ltd v SMD Telecommunications CC* 2011 (1) SA 94 (SCA) at para 11.

[71] *Leyland Shipping* (note 62).

[72] *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* [2011] UKSC 5.

55 Small businesses like the Applicants paid their premiums for cover if, amongst other things, a notifiable disease interrupted their businesses. As a matter of "reality, predominance [and] efficiency", Covid-19 is the cause of the Applicants' losses.

The straightforward answer to causation

56 Despite Santam's best efforts to muddy these waters, causation is not particularly difficult once the insured peril is properly defined.

57 The previous section showed that the government's response to Covid-19 is, like the fireman's axe, part and parcel of the insured peril. Causation is then straightforward even on the traditional but-for test: but-for the insured peril—that is, Covid 19 *and* the government's response—the Applicants' businesses would not have been interrupted and they would not have suffered their losses.

58 Seen in this way, the Applicants' losses are exactly what they insured themselves against. As this Court rightly found, "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."[73]

59 Santam's approach to causation relies on two arguments:

- first, Santam argues that because all local cases of Covid-19 are part of the global pandemic, the Applicants cannot show that their losses were "due to" a confirmed case of Covid-19 within the specified radius; and

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[73] *Café Chameleon* (note 14) at para 74.

- second, Santam creates an artificial distinction between Covid-19 and the government's response to Covid-19 and then uses mechanistic but-for thought experiments to show that the government's response to Covid-19 is an intervening cause.

<u>Santam's first causation contrivance: pandemics are different (they aren't)</u>

60 Santam's first attempt to avoid the straightforward answer to causation is to rely on Covid-19's status as a pandemic. Santam argues that the confirmed cases of Covid-19 in Cape Town and at Tygerberg Hospital did not cause the Applicants' losses because those particular cases were not the reasons for the lockdown or the cancelled bookings.[74]

61 Diseases do not spread as linearly, and governments do not act as precisely, as Santam's approach requires. Santam's level of specificity means that a business would be covered for Covid-19 related losses in only three narrow circumstances:

61.1 there is a confirmed case of Covid-19 at the business premises and the premises is forced to close because of that confirmed case (which would be covered by another sub-clause entirely);

61.2 there is a confirmed case of Covid-19 within 40 kilometres of the business premises and quarantine measures are put in place for that area because of that confirmed case (which is an improbable way to expect a government to respond to a widespread disease); or

[74] Answering affidavit; pp 290-292, paras 84-90.

61.3 a potential customer (a guest at a hotel or a patron of a restaurant) who happens to live within 40 kilometres of the premises contracts Covid-19 and cancels his booking (which is absurdly specific).

62 Taken to its logical endpoint, Santam's approach all but guarantees that *no one* in South Africa has a claim for business interruption due to Covid-19. A contagious disease does not infect people in an orderly fashion; confirmed case 1 does not cause confirmed case 2, which does not cause confirmed case 3, and so on. It follows that no single confirmed case of Covid-19 in South Africa is essential to the spread of the disease.

63 This is the fallacy of Santam's counterfactual.[75] Santam points out that notionally removing the confirmed cases of Covid-19 in Cape Town and at Tygerberg Hospital "does not extinguish the worldwide spread of the virus the declaration of a national state of disaster and thereafter the national lockdown."[76] But on that approach, there is no but-for cause of the spread of Covid-19 in South Africa (and perhaps not even in the world). The first confirmed case in South Africa was a KwaZulu-Natal resident who returned from Europe on 1 March. A few days later, a resident of Western Cape also returned from Europe carrying the disease. Others followed. Any infected individual could be notionally eliminated from the timeline and the end result—

[75] Answering affidavit; p 285, para 70.

[76] Answering affidavit; p 285, para 70.

500 000 confirmed cases and counting, and a national lockdown—would remain the same.[77]

64 At times, Santam suggests the causation analysis should apply differently in this case because Covid-19 is "an entirely new virus and an unprecedented worldwide pandemic."[78] But Santam's disaggregated approach to diseases does not even work for more 'localised' outbreaks.

- Imagine a listeria outbreak in Cape Town, with hundreds of Cape Town residents diagnosed with listeriosis.[79]
- Western Cape health authorities do not know where the outbreak started, but they suspect the culprit is processed meat. They order all factories involved in production of processed meat in Cape Town to close for three weeks.
- It turns out the source of the outbreak was a batch of polony shipped to a Cape Town supermarket from a factory in Johannesburg; the Cape Town factories that were ordered to close had no listeria.

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[77] The leading work, still, in the field is HLA Hart and AM Honoré *Causation in the Law* (2nd ed 1985). At 124 it gives the answer: "*Two sufficient causes of an event of a given kind are present and, however fine-grained or precise we make our description of the event, we can find nothing which shows that it was the outcome of the causal process initiated by the one rather than the other.* ***It is perfectly intelligible that in these circumstances a legal system should treat each as the cause rather than neither, as the <u>sine qua non</u>*** **test would require"** (our emphasis). The resonance (if not the clarity of expression) in both *Fairchild* and *Lee supra* is apparent.

[78] Answering affidavit; p 291, para 87.1.

[79] Listeriosis is also listed in Table 1 of the Regulations.

- Would one of the Cape Town factories have a claim under the infectious diseases clause for the losses it incurred during the three-week closure? On the plain meaning of the clause, it would: there were confirmed cases of listeriosis within the specified radius, and listeriosis was the only reason for the closure.

- Arguing against the text and the purpose of the clause, Santam would presumably say 'no': the Cape Town factory is not covered because even though there were local cases of listeriosis, the listeria originated in Johannesburg. Santam would presumably also say that the provincial government's closure order is too general to count as an insured peril; it was not a response to a local listeria outbreak (listeria was only in the Johannesburg factory, not the Cape Town factories).

65 The absurd implication is that the more a disease spreads, the less it has an actionable cause. The more realistic approach is to focus on the causation question on the disease itself, not the individual cases that comprise the disease. Individual cases of a disease in a particular area are all part of one single, indivisible disease.

66 This way of testing causation does not make the radius requirement redundant.[80] Covid-19 could have been the factual cause of the Applicants' losses even if the disease had not reached South Africa at all (because of travel restrictions imposed by other governments, say). The radius requirement would serve as a sensible brake on liability for those types of cases.

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[80] Answering affidavit; p 306, para 158.

67 A disease is made up of individuals who contract the disease. Even though no single carrier is a but-for cause of the outbreak, there would be no outbreak without carriers—just like there would be no riot without rioters, but even the most enthusiastic rioter is not the but-for cause of the riot. The “common sense” way to test causation is to aggregate the individual occurrences of Covid-19; to look at the complete jigsaw puzzle (Covid-19), not its individual pieces (a particular individual infected with Covid-19). The but-for thought experiment is simpler and more intuitive than Santam lets on: but for Covid-19, would the Applicants have been forced to close? Obviously not.

Santam’s second causation contrivance: the government’s response to Covid-19 is independent from Covid-19 (it isn’t)

68 Santam’s second causation argument relies on an artificial distinction between Covid-19 and the government’s response to Covid-19. According to Santam, the Applicants’ losses were caused by the lockdown, not Covid-19. And the lockdown, so the argument goes, “was not … a direct consequence of the insured event or a response thereto” but it was a “preemptive measure to prevent and delay the spread of the virus.”[81] In other words, a loss caused by the Covid-19 lockdown is, somehow, not ultimately caused by Covid-19.

69 Santam’s proposition makes no sense because there is no suggestion that the government would have put a lockdown in place without an outbreak of Covid-19. The lockdown has no independent existence from the outbreak. Santam’s separation only works if the one has nothing to do with the other, like if the

[81] Answering affidavit; p 292, para 88.

government enacted, for some policy reason unrelated to Covid-19, a prohibition-style ban on alcohol in, say, February 2020 before Covid-19 even reached South Africa. A shuttered bar or bottle store would then be hard-pressed to argue that the Covid-19 lockdown was the cause of its losses (because notionally eliminating Covid-19 and the lockdown still leaves the—in that case, unrelated—ban on alcohol).

70 In contrast, the lockdown cannot be separated from Covid-19, just like water-damage caused by firefighters' efforts to put out a fire cannot be separated from losses caused by the fire itself.[82] Like the water damage, losses caused by the lockdown "resul[t] from an apparently necessary and bona fide effort" to stop or reduce the insured peril.[83] It follows that the only realistic way to apply the but-for test is to notionally eliminate the outbreak of Covid-19 *and* the government's response to Covid-19.

71 Santam cannot contend that government's firefighting of Covid-19 is an 'overtaking cause', 'supervening cause' or 'extraneous cause'.[84] It is of course not its case that the government's response was unlawful, because it was unauthorised or culpable (like a fireman gratuitously wielding his axe). At best for Santam, its artificial separation between Covid-19 and the government's

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[82] *Symington & Co v Union Ins Sy of Canton Ltd* (1928) 139 LT 386 (CA) ("Any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of furniture out of a window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy.").

[83] *Symington & Co* (note 82).

[84] As to these, see Prof A.M Honoré *Causation and Remoteness of Damage*, ch 7 in André Tunc (ed) *The International Encyclopaedia of Comparative Law* vol XI at 7-129 paras 130-132.

response to Covid-19 means there are concurrent causes of the Applicants' losses. Even on this generous approach to Santam's case, Covid-19 would still be *a* proximate cause, which is enough for causation.[85] English law provides useful guidance:[86]

- A yacht, The Miss Jay Jay, was damaged at sea. Its owners had insured the yacht against "all loss of or damage to the insured craft … which is directly caused by external accident means". The insurer argued that there was no cover because there "had been nothing exceptional about the sea at the material time" but rather "the damage had been done by the ordinary and to be anticipated action of the sea on the hull."[87] The evidence showed that the yacht's design was faulty, making it "unseaworthy for a cross-Channel passage during which seas of this kind could be anticipated." A properly designed yacht would have withstood the moderate sea conditions.

- The insurer argued that "the design defects, not the adverse sea, were the dominant and effective cause of the loss" (the policy covered adverse sea conditions, not design defects).[88]

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[85] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 66.

[86] *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* ("*The Miss Jay Jay*") [1987] 1 Lloyds Rep 32 (CA).

[87] *The Miss Jay Jay* (note 86).

[88] *The Miss Jay Jay* (note 86).

- The Court of Appeal disagreed. Proof of "a peril which was within the policy was enough to entitle the [insured] to judgment".[89] The question was thus "whether on the evidence the unseaworthiness of the cruiser due to the design defects was such a dominant cause that a loss caused by the adverse sea could not fairly and on common-sense principles be considered a proximate cause at all."[90]

- The evidence showed that "but for a combination of unseaworthiness due to design defects and an adverse sea, the loss would not have been sustained" and that "[o]ne without the other would not have caused the loss."[91] That was enough to show that the adverse sea conditions was *a* proximate cause.[92]

- The Court agreed with the trial judge's assessment that "a chain of causation running – (i) initial unseaworthiness; (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured – is treated as a loss by perils of the seas, not by unseaworthiness".[93]

- The Court concluded that there "may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is

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[89] *The Miss Jay Jay* (note 86) (emphasis in original).

[90] *The Miss Jay Jay* (note 86).

[91] *The Miss Jay Jay* (note 86).

[92] *The Miss Jay Jay* (note 86).

[93] See also *The Cendor Mopu* (note 72).

insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover".

72 Santam's argument closely tracks the unsuccessful argument of the insurer in *The Miss Jay Jay*. Like the insurer argued that unseaworthiness, not the rough sea, caused damage to The Miss Jay Jay's hull, Santam argues that the lockdown, not Covid-19, caused the Applicants' losses. This ignores the "chain of causation" running from Covid-19, to the government's response, to the Applicants' losses.

The trends clause does not support Santam's artificial approach to causation

73 Santam contends that the "trends" or "other circumstances" clause[94] operates to deny the Applicants cover.[95]

74 The Applicants accept that their expected revenue is subject to adjustment under the trends clause. Santam correctly states that the adjustment has to provide for variations or other circumstances affecting the business, either before or after the insured event, or which would have affected the business had the insured event not occurred.

75 Santam argues that this means that the adjustment has to take into account the government response, the national lockdown and the restrictions imposed by regulation. The Applicants were prohibited from carrying on their businesses and people were prohibited from going to hotels and restaurants. To the extent that the Applicants were prevented by these measures from earning revenue

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[94] Founding affidavit; annexure "FA1", p 53.

[95] Answering affidavit; p 286, para 71.

during the period of the prohibition, this would have been the case even had the insured event (a case of Covid-19 within the 40 km radius) not occurred. For this reason Santam contends that the Applicants are not entitled to indemnity under their policoes for losses of revenue.

76 The submission is without merit. The purpose and application of a trends or adjustment clause is well understood in business interruption insurance claims. It identifies well-known adjustments to a business' performance, both positive and negative. Its purpose is to assist in the presentation of the fairest and most practicable summary of how the business would have performed had "the damage" not occurred. It moderates or adjusts the claim. It makes provision for the vicissitudes of commercial life. A trends clause does not refer to causes of interruption or loss. It goes to the *valuation* of the claim.

77 It cannot have been within the contemplation of the parties that an adjustment clause could be interpreted to exclude the basic cover for which the insured had already qualified. To produce such a result would require the clearest of language which is completely absent from these policies and which does not follow from the purpose of the business interruption cover as contemplated in the policy.

78 The government's response to Covid-19 cannot legitimately be interpreted as a trending "circumstance", the like of which has never been seen before, thus having the absurd effect of rendering the Applicants without business interruption cover. A legal absurdity arises where the ordinary interpretation of two different sections of a policy results in an insured both meeting the

requirements of cover and being excluded from cover. Time and again, our courts have not countenanced this absurdity.[96]

79 Santam cannot double-count the loss-causing event as both the insured peril and a trend affecting an insured's business. After all, the point of the trends clause is to adjust loss "as may be necessary to provide for the trend of the business and for variations or other circumstances affecting the business either before or after the Damage or which would have affected the business had the Damage not occurred".[97] The government's response to Covid-19 is part of, and intricately linked to, the insured peril; it is not an ordinary vicissitude of commercial life. Had Covid-19 not occurred, there would have been no government response, and no Covid-19 related business trend.

80 Courts elsewhere have rejected similar artificial trends-clause constructions.[98]

- Hurricane Katrina damaged the Imperial Palace Casino in Mississippi. Imperial Palace reopened several months later. When it reopened, nearby casinos were still under repair, giving Imperial Palace a first-mover advantage in a previously saturated market. This first-mover advantage meant that when Imperial Palace reopened, its revenues were actually greater than before.

- Imperial Palace claimed under its business interruption policy for losses during its repair. The insurer argued that in applying a trends clause in

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[96] *Concord* (note 66) at 674C (declining to follow an interpretation that made a "mockery" of the agreement).

[97] Founding affidavit; annexure "FA1", p 53.

[98] *Catlin Syndicate Ltd v Imperial Palace of Mississippi Inc* 600 F.3d 511 (5th Cir. 2010).

the policy, Imperial Palace's recovery should be based on net profits it would probably have earned had Hurricane Katrina not struck (in other words, Imperial Palace's losses should be determined by looking solely at pre-hurricane revenue). Imperial Palace argued that the correct hypothetical was not one in which Hurricane Katrina did not strike *at all*; it was one in which Hurricane Katrina *did* strike but (miraculously) left Imperial Palace undamaged (but still damaged its competitor casinos).

- The United States Court of Appeals for the Fifth Circuit disagreed. The trends clause could not be applied to give Imperial Palace windfall profits that it would have made had Hurricane Katrina left it as the only casino in town.

- The purpose of a trends clause is to "predict a company's probable experience had the loss not occurred". Imperial Palace used the wrong hypothetical to test this: trying to argue that "the occurrence occurred, but the loss did not", Imperial Palace argued that the counterfactual should be "Hurricane Katrina hit Mississippi, damaged all of Imperial Palace's competitors, but left Imperial Palace intact". The Court disagreed. The "loss caused by Hurricane Katrina" could not distinguished from "the occurrence of Hurricane Katrina itself."

81 In the same way, losses from the government's response to Covid-19 cannot be distinguished from the insured peril of Covid-19 itself. There was no world where Hurricane Katrina left Imperial Palace standing but destroyed its competitor casinos; there is similarly no world where the government responds to Covid-19 but there is no Covid-19.

82 Santam's reliance on the trends clause only works for an insured peril unrelated to Covid-19. Take, for example, a restaurant that is damaged in a fire during the lockdown. The restaurant is closed for three months for repairs, say between April and July. In calculating the restaurant's business interruption loss due to the fire, the trends clause would rightly work into the calculation the downward trend in the restaurant industry brought about by Covid-19. That makes sense because the trend (Covid-19) is independent from the insured peril (fire); even without the fire, the restaurant still would not have traded at its normal levels. But when the trend and the insured peril is the same thing, it makes no sense to double count the insured peril through the backdoor using the trends clause; without Covid-19, the Applicants' restaurant *would* have traded at its normal levels.

Conclusion on causation

83 In the end, separating Covid-19 and the government's response to Covid-19 is artificial. It is neither conceptually sound—it is no overtaking, supervening or extraneous cause—nor does it accord with Corbett J's touchstone of common sense.[99] The artificial separation anyway does not actually help Santam's case. Even if Santam's logic were assumed, Covid-19 remains *a* proximate cause that is "insured against under the policy" and the government's reaction to Covid-19 is not "expressly excluded from the policy".[100]

[99] *Wells* (note 64) at 870E-F.

[100] *The Miss Jay Jay* (note 86).

84 Whether on that approach or the way to look at causal sequence set out at the beginning of this section, Covid-19 caused the Applicants' losses.

SANTAM'S INTERPRETATION OF THE INFECTIOUS DISEASES CLAUSE AND ITS APPROACH TO CAUSATION ARE UNFAIR, UNREASONABLE, AND UNJUST

85 The previous sections showed that Santam's interpretation and causation arguments are, as a matter of existing law, unsustainable. Considerations of fairness, reasonableness, and justice support that conclusion.

86 The Applicants operate hotels and restaurants. They are not experts in insurance, reinsurance, and risk adjustment. They took out insurance to protect their businesses from unexpected risks. Now, when one of those risks happens, the insurer tries strained interpretation arguments and complicated causation hypotheticals to escape liability.

87 This compounds the unfairness of a contractual relationship that is stacked against the insured from the start. The heavily lawyered insurance companies draft the policies. The policies are presented to small businesses on a take-it-or-leave-it basis. And without exception, the policies come not in plain English, but complicated legalese: policy schedules to be read with policy wordings; specific conditions but general exclusions; a few extensions but many exceptions; and even, for the dedicated reader who makes it far enough, "[s]pecial extension[s] to [g]eneral exception[s]".

88 Constitutional and public-policy considerations of fairness, reasonableness, and justice should loom large. These considerations should be given effect to through existing doctrines invoked in the previous sections:

- the doctrine of interpretation that ambiguity in a policy should be resolved against the insurer; and
- a flexible, common-sense approach to causation.

89 If those existing doctrines are inadequate, they should be developed to better promote the spirit, purport, and objects of the Bill of Rights.[101]

90 Take the *contra proferentem* rule. At best for Santam, its arguments about the meaning of the infectious diseases clause show that it is ambiguous. If so, the ambiguity should be resolved against Santam. But if the *contra proferentem* rule were not held robust enough to achieve that result—it is just an "aid" to interpretation, after all[102]—then in that case the common law approach to interpreting insurance contracts would deviate from, and offend, the spirit, purport and object of the Bill of Rights and should be developed.

91 In particular, in such a case the *contra proferentem* rule should be developed to apply not just as a tiebreaker in cases of ambiguity. More explicit recognition should be given to the need for the interpretation of standard-form contracts to give effect to constitutional values of fairness, reasonableness, and justice that inform and underpin the law of contract.[103] That should be the starting point, not a mere "aid" reserved for ambiguity.

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[101] See, for example, *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 33.

[102] *Centriq* (note 21) at para 18.

[103] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (CCT109/19) [2020] ZACC 13 (17 June 2020) at para 72.

92 Santam's rigid and artificial approach to causation compounds the unfairness. The plain wording of the infectious diseases clause insures the Applicants against losses caused by a notifiable disease occurring within 40 kilometres of their premises. Yet on Santam's interpretation, the Applicants are not covered if the spread of the notifiable disease amounts to a national or global outbreak. The inequitable, insensible (in the language of *Endumeni supra*), indeed absurd implication: on Santam's argument, the more serious and widespread the outbreak, the less the coverage.

93 The nature of a pandemic means that the causation analysis should be viewed in the aggregate; as the complete jigsaw puzzle (Covid-19), not its individual pieces (a particular individual infected with Covid-19). That is, the question is not whether the applicants would have suffered their losses *but-for a particular individual* contracting Covid-19 (like an individual within a 40-kilometre radius of their premises). The question is whether the applicants would have suffered losses *but-for Covid-19*? Obviously not.

94 If the existing common law test for causation (even as it has been interpreted and applied by the Constitutional Court) were in fact to yield Santam's artificial answer that the lockdown, and not Covid-19, caused the Applicants' losses, then the common law would need to be developed. At least in the contractual context, an overly rigid test for causation deviates from the spirit, purport, and objects of the Bill of Rights because it undermines values of fairness, reasonableness, and justice that underpin all contracts. Developing the common law to allow a more common-sense approach to causation allows courts to achieve fairer and more just outcomes which better align with those underpinning values.

THE INDEMNITY PERIOD IS EIGHTEEN MONTHS, NOT THREE MONTHS

95 The Applicants also ask for declaratory relief that the indemnity period under their policies is eighteen months. Santam, again adopting an impermissibly narrow interpretation of the policies, argues that the indemnity period is a mere three months.

96 In the business interruption section of each policy, “indemnity period” is defined like this—the important part is “stated in the schedule”: “the period beginning with the commencement of the Damage and ending not later than the number of months thereafter stated in the schedule during which the results of the business shall be affected in consequence of the Damage.”[104]

97 In the schedule for business interruption cover, the “Indemnity Period” is listed as—in capital letters, presumably for emphasis—“18 MONTHS”.[105]

98 Santam argues that the infectious diseases clause is an extension to business interruption cover, and so the indemnity period is limited to three months.[106] Skipping over “Indemnity Period: 18 MONTHS”, Santam focuses on a “Memorandum” tucked away at the very end of the schedule, which buries this fine print: “Extensions under the Section are limited to an Indemnity Period of 3 Months”.[107]

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[104] Founding Affidavit; annexure “FA1”, p 53.

[105] Founding Affidavit; annexure “FA1”, p 29.

[106] Answering Affidavit; p 262, para 24.

[107] Answering Affidavit; p 287, para 74.

99 Santam does not explain how a layperson is meant to reconcile these conflicting indemnity periods. That aside, Santam misplaces reliance on the three-month indemnity period for extensions.

100 The infectious diseases clause is not one of the twenty-six items listed under the "Extensions and Clauses" heading in the schedule. Some of these items, like "Loss of Tourist Attraction" and "Loss of Aesthetic Attraction" expressly record an indemnity period of three months.[108] Others do not, like the "Bush Fire" extension. It is for these listed extensions that the residual three-month period may apply.

101 The residual indemnity period does not apply to the infectious disease clause because it is not a listed extension. Instead, it comes as a standard feature of the business interruption section.

102 Santam's insistence on a three-month limit to the clause amounts to a limitation on a clearly expressed obligation to indemnify. It must, accordingly, be restrictively interpreted. As the Supreme Court of Appeal recently held, "any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer's duty to spell out clearly the specific risks it wishes to exclude."[109]

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[108] Founding Affidavit; annexure "FA1", p 56.

[109] *Centriq* (note 21) at para 18. See also *Allianz Insurance* (note 39) at para 7 ("[A]n exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify"). This is a pedigreed rule of interpretation: see *Norwich Union* (note 39) at 222 ("It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract.").

103 In any event, on the most generous reading of the schedule in Santam's favour, there is obvious ambiguity between the two indemnity periods. The ambiguity must be resolved against Santam. And for good reason: if Santam wanted to limit the indemnity period for infectious diseases to three months in this contract that it drafted, it could simply have added the clause to the long list of specific extensions.

104 Ultimately, as written, the policy is "capable of both a broader and narrower meaning it is that which is favourable to the insured … which must be employed."[110] The broader meaning is, of course, the eighteen-month indemnity period.

THE APPLICANTS ARE ENTITLED TO DECLARATORY RELIEF

105 In addition to declaratory relief about the indemnity period, the Applicants ask for an order declaring that Santam is liable to indemnify the Applicants in terms of the business interruption section of their policies for such losses that the Applicants are able to prove to have suffered as a result of loss of revenue occasioned by Covid-19.

106 Under section 21(1)(c) of the Superior Courts Act,[111] this Court may in its discretion enquire into and determine any existing, future or contingent right or obligation.

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[110] *Barnard v Protea Assurance Co Ltd t/a Protea Assurance* 1998 (3) SA 1063 (C) at 1068D.

[111] Act 10 of 2013.

107 Declaratory relief involves a two-stage approach.[112]

- First, this Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation".
- Second, if so, "the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".[113]

108 The first leg focuses "only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists."[114] The second leg then asks whether declaratory relief should be granted.[115] If the first enquiry establishes that the applicant has an interest in an existing, future or contingent right or obligation, then the court must "exercise the discretion by deciding either to refuse or grant the order sought."[116]

109 The Applicants are entitled to declaratory relief. They have an existing contractual right to indemnity under the infectious diseases clause to the policies (and to indemnity for a period of eighteen months).

110 For its part, Santam disagrees that the Applicants are entitled to indemnity (at all and for eighteen months). There is, accordingly, a live dispute between the parties; as this Court held in *Café Chameleon*, it is "clear that it is the antecedent liability of the [insured] that has become ripe as the primary dispute between

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[112] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at paras 16-18.

[113] *Cordiant Trading* (note 112) at para 16.

[114] *Cordiant Trading* (note 112) at para 18.

[115] *Cordiant Trading* (note 112) at para 18.

[116] *Cordiant Trading* (note 112) at para 18.

the parties."[117] Declaratory relief will settle a substantial part of that dispute, leaving only a calculation of the Applicants' losses. In this way, declaratory relief will therefore produce a tangible and justifiable advantage to the applicants. It is also convenient to decide whether the applicants are, in principle, entitled to indemnity under the infectious diseases clause before quantifying their losses.

CONCLUSION

111 The Applicants ask for the declaratory relief set out in the notice of motion. Costs should follow, including the costs of three counsel.

JJ GAUNTLETT SC QC

M DU P VAN DER NEST SC

SP ROSENBERG SC

G ELLIOTT SC

P LONG

J MITCHELL

Counsel for the Applicants

7 August 2020

[117] *Café Chameleon* (note 14) at para 29.

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