



## Tshwane Tourism Association (TTA) Member Communication

### Joint Effort Regarding Insurance Issues

With regard to the business insurance issues related to Covid-19, we have consulted various relevant specialists and professionals who advise that the following course of action would be the most likely to succeed in ensuring that the insurance companies treat you, the insured fairly (Treating Customers Fairly is a firm requirement of Financial Sector Conduct Authority).

It is important to note that this document is purely our opinion and proposes how we intend to approach this matter. We would like our members to present a unified front and approach the insurance companies in a coordinated manner. Be advised that anything said by us herein is purely our opinion which is communicated without prejudice and we reserve the right to amend or withdraw it, or part thereof, at any stage. *The content hereof is not intended to be legal or other advice, and should not be interpreted or construed as such.*

We aim to approach this matter with as many affected businesses on board as possible in order to:

- a) Make the process, and the access to professional advice and assistance, affordable to all
- b) Ensure that the number of claimants, applicants and submissions is consistent, and immense enough to make a significant positive impact (the higher the numbers the better the chance of success).

We therefore ask you all to consider the following process and join together to show the insurers that they have no choice but to treat you fairly:

#### 1) Insurance claim

- a) Each insured party must submit a claim. Ensure that your claim is submitted within the prescribed time and before any changes are made to your policy wording or content if your insurer has advised that they will be making changes.
- b) Ensure that all aspects of your claim are submitted in writing and record is kept thereof. If your claim is submitted via a broker or other third party, request documented (written) proof of the following:
  - i) That the claim was submitted
  - ii) How it was submitted
  - iii) What was submitted
- c) Even in cases where the insurer advises that there is no valid claim the advice is to submit a claim. In short: **No Claim. No Case.**
- d) You can only proceed with further action once your claim has been rejected.
- e) If and when your claim is rejected insist on receiving the rejection, as well as the reasons for such rejection, in writing. Each insurer has a "Compliant Procedure"

available to all policyholders. These producers must be added to the insurers' claims repudiation letters when they decline the claim, so that the policyholder is made aware of his / her rights, what remedies are available and how to access them.

- f) Do not engage in written or verbal communication with your insurer (other than to submit standard documentation etc.) without legal advice. You may inadvertently invalidate your claim through the unintentional misunderstanding of terminology etc.

## 2) Appointment of a Public Loss Adjuster<sup>1</sup>

- a) Formulating a proper insurance claim is complex and time consuming. The onus is on the claimant to formulate and justify any claim. The recent Covid-19 outbreak is an unprecedented event. This has caused much uncertainty in the insurance market with Insurance companies having engaged specialist Insurance Law Firms, Senior Counsel and professional Loss Adjusters to act on their behalf. The average claimant does not have comparable skills to match this, and would therefore be unlikely to receive an appropriate settlement on their own. We have been advised that the insurers are seemingly following a narrow interpretation of the policy wording to the detriment of policyholders and this requires a professional response.
- b) We have identified Insurance Claims Africa (ICA) to assist business owners who would like assistance with compiling and submitting their claims. ICA is a specialist-consulting firm of Public Loss Adjusters who act exclusively on behalf of the claimant in preparing, motivating and quantifying insurance claims. ICA was established nearly 30 years ago, and are recognised as the leading business interruption claims consultants in Southern Africa. ICA do not work for insurance companies and only prepare claims for the claimant. ICA can assist you in compiling your claims and negotiating a fair quantum. We recommend that as many tourism businesses as possible appoint ICA to form a collective effort to research and prepare claims for submission. ICA have already received Senior Counsel opinion which will be leveraged across all their clients, by pooling resources and claims they should have a compelling case to put to Insurers. There is also no upfront payment and ICA are undertaking COVID-19 claims at a contingency fee of 5% of the claim settlement therefore the fee is tied to the success of the claim. More information on ICA, and the role of a Public Loss Adjuster, is available here: <https://www.insuranceclaimsafrika.com/index.html> and here: <https://www.cover.co.za/the-role-of-the-public-loss-adjuster/>
- c) ICA's approach is to try and achieve a sensible solution to claims with the Insurers. However, should this not be possible, with the support of key brokers in the industry, approaches will be made to the Regulator, Government and if necessary targeted litigation will be pursued.
- d) Should you wish to appoint ICA please send an email with your insurance policy to [BICOVID19@insuranceclaimsafrika.com](mailto:BICOVID19@insuranceclaimsafrika.com) and they will make contact with you.

## 3) Engagement with the relevant authorities

- a) The FSCA is the [Financial Sector Conduct Authority](#) and is the regulator for market conduct. Should it become necessary, after analysis of step 1 and 2 above, engagement with the FSCA on any improper market conduct of short-term insurers will be carried out – the principle on which to judge this is the principle of "Treating

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<sup>1</sup> What is a Public Adjuster: [https://en.wikipedia.org/wiki/Public\\_adjuster](https://en.wikipedia.org/wiki/Public_adjuster)

Customer's Fairly" or TCF. See Joint Communication issued by FSCA and SA Reserve Bank, addressing the matter, [here](#).

- b) The [Ombudsman for Short-term Insurance](#) (OSTI) provides consumers with a free, efficient and fair dispute resolution mechanism and a collective bundle of complaints will be lodged with the Ombudsman should it be deemed necessary. We have been advised that OSTI does not normally adjudicate Loss of Profit claims because of the complexities but our advisors feel that perhaps they would make an exception due to the expected volume of disputed claims. The Ombud will not hear individual cases if available internal dispute resolution mechanisms with the insurer has not been exhausted.

#### 4) **Litigation and legal advice**

Should all else fail, group litigation, against the insurers, will be the final recourse. To proceed as a group would make a lot more sense and be cheaper for each than to proceed individually. At present it appears, and that is the collective opinion of the legal experts that we have consulted, that we shall need to proceed with Group or Class Action against the insurers. The process is in short that an application must be brought to the High Court to proceed collectively with a class action and, once such an order has been granted, to proceed with the claim and/or application, depending on what the legal experts' advice at that stage. The process, like all legal processes, can be lengthy and the sooner we start the better. Hopefully the matter can be resolved before we reach that stage with competent legal assistance.

Herewith a brief summary of the Class action mechanism:

"The procedure adopted to deal with class actions in South Africa is a two stage process. Firstly a certification application needs to be undertaken. In essence this entails that all potential plaintiffs must obtain permission from the court to be joined, the result of certification being granted results in the certification of the class action.

There are certain factors that will be taken into account before a court certifies a class action with the overriding test being the interest of justice. The list is also not a closed list and the court can decide to add or remove from the list.

The factors are:

- The class must be identifiable by objective criteria;
- The court must be satisfied that there is a case that is legally tenable and that a prima facie case exists on the facts;
- Sufficient issues of law or fact are common to all members of the class;
- The relief sought or the damages claimed flow from the cause of action;
- The class action should be the most appropriate mechanism of allocating damages to the members of the class. Appropriate mechanisms must exist and be proposed by the applicants to ensure that damages, if awarded are allocated to members of the class in a particular manner;
- The proposed representatives of the proposed class must be suitable to conduct the action and to represent the class;
- The class action should be the most appropriate means of determining the claims of the members given die composition of the class and the nature of the proposed action

Thereafter, and due to the fact that there exists no separate legislation dealing with class actions, normal civil procedure rules are applied. After certification the matter

will be enrolled for trial in accordance with the Uniform Rules of the High Court regarding trial proceedings. The trial is conducted in the same manner as any other High Court trial and is also subject to the same appeal mechanisms."

If it is only a point in law that needs to be decided an Application can also be brought to court and will the process not be in the form of an action. If urgency can be proved then the Application can be brought on an urgent basis which will be a much faster process.

**Burden Swart Botha & Maluleke** attorneys are TTA members who are prepared to take on this matter for you on a contingency basis. They have already consulted a Senior Advocate with vast experience in similar matters who is also prepared to take on the matter on a contingency basis. **(The contingency fees act** stipulates that a legal practitioner who takes on work on a contingency basis is, only if he is successful, entitled to a percentage of the amount recovered, but not more than **25%** of such amount recovered **or** double his normal fee **whichever is the lesser amount.**)

Should you wish to join the legal efforts in this regard please send a copy of your policy, and any other communication received from your insurance company, to [submit@tshwanetourism.com](mailto:submit@tshwanetourism.com). Burden Swart Botha & Maluleke will assess your submission for a valid case and will contact you regarding a contingency fee agreement. The attorneys will also assist those who join this effort with legal opinions and draft responses to insurer communication.

It is important to note that:

- Due to the volume of cases the response time by the Public Loss Adjuster and/or the attorneys, should you choose to make use of their services, may extend to 3 weeks.
- The legal question under scrutiny is whether damages have been caused/losses suffered as a result of the virus or the lockdown.
- Case viability is determined by policy clauses and extensions (i.e. for infectious diseases), policy wording, whether your claim has been interrupted and the like. Each case will have its own merit.
- The process and procedure for submitting claims must have been followed completely correctly to avoid nullification based on technicalities.
- This is a complex legal matter and no quick-fix is available.
- Due to the volume and complexity of cases and the nation-wide interest in this matter legal and other service providers may choose to combine their efforts with firms working on similar matters.

**To conclude:**

1. Ensure that your claim is submitted and is submitted on time.
2. If you would like assistance submitting your claim, and gathering evidence to support your claim, send an email with your insurance policy to [BICOVID19@insuranceclaimsafrika.com](mailto:BICOVID19@insuranceclaimsafrika.com) and ICA will make contact with you.
3. Should you wish to receive legal opinions and advice and join a possible class action send an email with your insurance policy to [submit@tshwanetourism.com](mailto:submit@tshwanetourism.com) and Burden Swart Botha & Maluleke attorneys will make contact with you.