IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN) **Reportable**

CASE NO: 10906/2020

In the matter between:

INTERFAX (PTY) LTD First Applicant
LUGGAGE GLOVE CC Second Applicant

and

OLD MUTUAL INSURE LIMITED Respondent

Judgment: **25 November 2020** :

DAVIS J:

Introduction

[1] On 31 December 2019 the World Health Organisation (WHO) was informed that there were cases of pneumonia of an unknown cause which had been found in the city of Wuhan in the Hubei Province of China. Twelve days later, on 12 January 2020, the WHO announced that a new Corona Virus had been identified from cases which had occurred in Wuhan. The virus was named Severe Acute Respiratory Syndrome, which later became known as Covid 19. It spread with astonishing speed throughout the world causing death, severe injury and massive disruption to businesses. Sadly, South Africa, was not immune from the effects of Covid 19. On 23 March 2020 President Cyril Ramaphosa announced a lockdown of South Africa for

21 days from 26 March to 16 April 2020 in order to contain the spread of Covid 19 throughout the country.

[2] On 25 March 2020 the Minister of Cooperative Governance and Traditional Affairs ('the Minister') acting in terms of s 27 (2) of the Disaster Management Act 57 of 2002 issued certain regulations which provided, inter alia, for a lockdown defined as a 'restriction of movement of persons during the period for which these regulations are enforced…'. In addition, Regulation 11 B (1) (b) provided 'that all businesses and other entities shall cease operations during the lockdown save for any business or entity involved in the manufacturing, supply or provision of an essential good service.' The Regulations restricted the movement of persons and national borders were only opened for very specific and limited purposes.

[3] The effect on the economy has been profound and understandably affected the business of the first applicant which conducts business as a retailer of luxury travel goods such as suitcases and the like. Its flagship store is in Cape Town's V&A Waterfront while it also has outlets in Kenilworth and Bellville.

[4] Mr Warncke, the managing director of the first applicant, has stated in his founding affidavit that 'the applicants' businesses, together with those small entities which rely on the applicants have been (and continue to be) significantly interrupted if not entirely suspended by the Covid 19 pandemic. The applicants have suffered a substantial loss of gross profit… It is not overstating the issue to state that the impact of this loss with a sustainability of the businesses and the continued employment of 40 people has been catastrophic.'

[5] The second applicant withdrew from this application after a settlement had been agreed between the parties. Thus, in this judgment the first applicant is referred to as the applicant. It enjoys insurance cover under the Business Protection Interruption section of Marsh Policy Number 750424*004 (the policy) in respect of which the respondent is the insurer.

[6] Applicants now approaches this court for a declaratory order to the effect that the promulgation and the enforcement of the Regulations made by the Minister in response to the outbreak of the Covid 19 pandemic in South Africa and the consequent interruption of applicant's businesses constitute a defined event for which insurance cover is provided in terms of the policy. Accordingly, applicant seeks a declarator that the respondent is liable for the losses suffered by the applicant, calculated in accordance with the definition of loss of gross profit set out in the policy and subject to a maximum period of 6 months.

[7] This case, which holds considerable importance to businesses such as that of applicant, turns on a crisp question: is the applicant, in terms of the wording of the policy, covered for insurance in terms thereof in that the Covid 19 pandemic constitutes a defined event in terms of the policy.

The factual background

[8] There is no dispute that the applicant concluded an insurance policy in terms of which the respondent would indemnify the applicant against business interruption for loss of gross profits for a period of 6 months. The insured peril included cover for a loss resulting from an infectious or contagious disease. Applicant has paid all the

premiums due, has lodged its claim timeously and has complied with all of its obligations, to the extent relevant, in order to pursue its claim in terms of the policy.

[9] The dispute between the parties is whether the applicant's business was interrupted in consequence of the loss caused by a contagious or infectious disease within a 50 km radius of its various premises referred to above which in turn triggered a regulatory response.

[10] The disputed clause headed 'Murder, Suicide, Food Poisoning' etc. reads thus:

'Loss resulting from interruption of or interference with the business in consequence of the following events, shall be deemed to be loss resulting from Damage (as defined)–

(a)	murder or suicide food or drink poisoning	) at the premises of the insured)
(b)	vermin, pests or defective sanitary arrangements at the insured's premises	) provided that the local, regional,) municipal or government authority) responsible for the area has declared a) notifiable medical condition or) communicable) disease to exists within the area and/or) has imposed quarantine regulations) and/or to restrict access to the area in) terms of any local, regional, municipal,) or
(c)	contagious or infectious diseases at the premises	) national law or bye-law or regulation) pertaining to public health and safety
(d)	contagious or infectious diseases within a 50 km radius of the premises	)
(e)	shark scare	)
(f)	oil pollution	) within a 50 km radius of the premises)

[11] There is thus a proviso in respect of paras (b), (c) and (d) of this clause which reads:

'Provided that the local, regional, municipal or government authority responsible for the area has declared a notifiable medical condition or communicable diseases to exist

within the area and/or has imposed quarantine regulations and/or acted to restrict access to the area in terms of any local, regional, municipal or national law or bye-law or regulating pertaining to public health and safety.'

[12] Notwithstanding an extensive record and very detailed heads of argument provided by counsel for the parties, the issue for determination is narrow: whether para (d) of the relevant clause together with the proviso justifies the issuing of the declaratory order as sought by the applicant. The nature of the dispute can be clarified by recourse to respondent's argument which shifted through the argument before this court but essentially was the following: although the disease may be widespread, the clause requires that there be a local occurrence of the defined disease which must cause the business interruption and consequent loss.

[13] In other words, respondent's argument is that the clause requires the contagious or infectious diseases to occur only within a prescribed radius of 50 km of the applicant's premises as aforesaid coupled to the regulatory action of the authorities which must not only 'be exclusively due' to some local outbreak and no other outbreak but must focus exclusively on the local area within 50km of the insured's premises. Expressed in the negative, the respondent's argument ultimately was that the policy does not cover the applicant where both the disease and the response thereto are national in nature.

[14] Respondent initially contended that its then argument was sourced in the clear language of the policy that it was the local occurrence which had to cause the business interruption loss in order for the claim to fall within the insured peril. Mr Fine, who

appeared together with Mr Lamplough, Ms Maddison and Ms Lengane for the respondent, then shifted ground and placed considerable emphasis on the proviso. In short, Mr Fine thus submitted that the words after 'provided that' which appears at the commencement of the proviso must be understood as qualifying the preceding words employed in the clause . In his view, it now followed that something more was needed over and above a local occurrence of the illness resulting in an interruption of the business; that is the declaration by the relevant authority that there would be a notifiable medical condition or communicable disease within the precise area; that is within 50 km of the location of the insured's premises.

[15] Ultimately, Mr Fine settled on an interpretation in terms whereof the policy covered a loss to the business caused by local government regulatory action in response to a local outbreak of the infection which had occurred within the 50km of where the relevant premises were situated.

[16] By contrast, Mr Brown, who appeared on behalf of the applicant, contended that this distinction (which was central to respondent's opposition to the declaratory order) was fundamentally flawed. He contended, by way of example, that, if there had been an outbreak of rat infestation at shops at the Waterfront, and the local authority had intervened and imposed a quarantine on the whole area of the Waterfront, on the logic of Mr Fine's submission an insured would be covered. By contrast, if the national government shut down the entire Western Cape because of an outbreak of this disease, then any area which was located within the Western Cape would not be covered. In his view, there was no plausible, logical or linguistic reason for drawing such a distinction. If an outbreak of vermin triggered a response from the relevant

authority, then this occurrence fell within the peril against which the insured had sought to enjoy the cover of insurance protection.

[17] It therefore mattered not that the response which could, on the wording of the proviso, have included that of a national government authority, amounted to the imposition of a quarantine not only in the local area but beyond this area so as, in the case of the Regulations, to cover the entire country. In Mr Brown's view, there was no justification for restricting the policy so that no insurance protection would follow a decision by the national government to impose a quarantine or other restriction of movement that extended beyond the 50 km radius so long as the latter was included therein.

[18] It would therefore appear that the dispute between the parties can be reduced to the following: Respondent contends that the business was disrupted by a national response to a national outbreak of Covid 19, that this was not contemplated by the parties and thus was not provided for in the insurance policy. In my view the question that therefore arises for interpretation is whether the peril as described in the clause incorporates a response from national government in circumstances where the focus is exclusively on the locally defined area, or whether a response from national government which covers a broader area of the country but includes the defined area, falls within the scope of the clause read together with the proviso.

Evaluation

[19] This Court was royally entertained to a discussion of cases from many jurisdictions. A cautionary observation: the use of comparative law to assist in the determination of a dispute should not be an exercise in a jurisprudential Cook's tour. It must focus on whether the dispute before the foreign court and the law applied in the foreign judgment so cited can assist in the application or development of domestic law. Hence I confine myself in this judgment to those foreign judgments which may assist in this interpretative endeavour.

[20] Mr Fine referred to certain English cases which, in his view supported, respondent's case. In *Orient Express Hotels Ltd v Assicurazion General* [2010] EWHC 1186 (Comm) Hamblen J was required to deal with a claim following damage to a luxury hotel in New Orleans where Hurricanes Katrina and Rita had damaged much of the city surrounding the hotel. The hotel claimed in terms of a business interruption clause in a policy that required it to show that the loss had occurred as a result of the damage to the property. The insurer argued that the "but for test" in respect of the requirement of causation justified its refusal to honour the claim. It contended that one can imagine an undamaged hotel in an otherwise damaged city. Since it was the destruction of the city which had radically depressed the profit of the undamaged hotel, the loss could not be ascribed to the damage of the hotel itself and hence the policy did not apply.

[21] Hamblen J held in favour of the insurer, finding that the insured peril was the damage to the hotel and not the cause of the damage. Significantly, this finding found little sympathy with the Fourth Circuit Court of Appeal of the United States of America

in *Prudential LMI Commercial v Colleton Enterprises Inc* 976 F 2d 727 1992 where the same argument was employed on behalf of the insurer, only to be dismissed at paragraph 22 thus:

> "Merely to state the claim is to confirm its intuitively-sensed local flaw and its unreasonableness as a reflection of what the contracting parties rightly could have expected respecting policy coverage. It would allow the insured to have it both ways – by failing to carry the premise of the interrupting peril's non-occurrence all the way through proof of 'what the business would have done' in the circumstances. This simply will not do."

[22] The references to these cases forms a backdrop to a vigorous debate between counsel with regard to the judgment in *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2020] EWHC 2448 (Comm) ("FCA"). Although this matter is on appeal, the approach adopted in a very lengthy judgment was employed in different ways by both Mr Brown and Mr Fine in support of their respective submissions.

[23] I do not propose to engage in a totally unnecessary hermeneutic exposition of the whole judgment but prefer to focus upon that those sections which hold clear relevance to the present dispute. I say this because the judgment is hardly a model of clarity, which is partly the result of complex pleadings instituted by the Financial Conduct Authority which requested the court to construe a number of wordings of different policies which contain non damage extensions to the standard business interruption cover provided by the relevant insurers.

[24] Of particular relevance to the present dispute is a clause which required the consideration of the Court:

"We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:

a) any

i. occurrence of a Notifiable Diseases (as defined below) at the Premises or attributable to food or drink supplied from the Premises;

ii. discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;

iii. occurrence of a National Diseases within a radius of 25 miles of the Premises;

...

1. 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 excluding Acquired Immune Deficiency Syndrome (ADIS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them."

[25] In interpreting this clause the court said at para 160 – 161:

"Critical here again is the fact that Extension 4 (d) does not say 'any occurrence of a NOTIFIABLE HUMAN DISEASE only within a radius of 25 miles of the PREMISES' or anything which dictates such a reading. Essential also is that what was being insured under Extension 4 (d) was business interruption resulting from Notifiable Human Diseases, and that it was known at the time of the conclusion of the contracts that such diseases embraced the list to which we have already referred, including SARS and other highly contagious or infectious diseases, which were required to be notified precisely in order to permit a response from the authorities, and some of which were capable of spreading over large areas, as infected people moved around. Furthermore, the nature of the definition of Notifiable Human Diseases in the policy meant that newly occurring diseases, if made notifiable by the relevant authorities, would count, even if they had not existed or been notifiable at the outset of the policy.

The potentially widespread effects of the diseases in question were recognised by the fact that the 'relevant policy area' was stipulated to be a radius of 25 miles which, as the FCA reminded us on a number of occasions is an area of about 2,000 square miles, or as we were told, an area the size of Oxfordshire, Berkshire and Buckinghamshire combined. The ways in which a disease could have such an effect must have been recognised as including via the reaction of the authorities and/or the public. The parties thus knew or must have be taken to have known that what was being insured under Extension 4 (d) was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance from a particular case, including through the reaction of the authorities, and where it might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area.

In those circumstances, we consider that the proper construction of the agreement is that the parties were not agreeing that it was the business interruption consequences of a notifiable disease only insofar as it was within the 'relevant policy area' that was being insured, but the business interruption arising from a notifiable disease of which there was an occurrence within the relevant policy area. We consider that this is consistent with and does no violence to the language used and avoids what we see as significantly anomalous results of the insurers' construction, some of which we have already mentioned."

[26] To the extent that this passage is unclear, the court provided further clarity of its approach at para 226:

"We consider that, within the insured peril, the required causal link ('arising from') is between the interruption or interference with the business on the one hand and the notifiable diseases on the other, provided it has been 'manifested' by a person within the 25 mile radius. We do not consider that the clause most naturally reads, or should be construed, as saying that the interference has to result from the particular case(s) in which the disease is manifested with the 25 mile radius. Instead the cover is for the effects of a notifiable disease if it has been manifested within the 25 mile radius. This appears to us to be apparent from the juxtaposition of the phrase relating to business

interruption with that relating to notifiable disease, and the fact that the phrase '*manifest by any person whilst in the premises or within a twenty five mile radius of it*' is most naturally read as an adjectival clause limiting the class of notifiable diseases which, if they interfere with the business, will lead to coverage."

[27] In interpreting the clause set out above, the Court was extremely critical of the reasoning employed in the *Orient Express* case, which criticism can be found in the following passage at para 523:

"First and foremost, as we see it, there was a misidentification of the insured peril. It was an all risks policy which thus insured against material damage and consequent business interruption caused by a fortuity unless it was accepted. It did not insure against Damage in the abstract but Damage caused by a covered fortuity, here the hurricanes, which were not accepted. What we see as the fallacy in the judge's reasoning can be found in the last sentence of [52] of the judgment quoted above. 'However, the relevant insured peril is the damage; not the cause of the damage'. The hurricanes as the cause of the Damage were an integral part of the insured peril, not separate from it. It seems to us that the error in the reasoning may have come about because the judge focused only on the 'but for' causation issue and, to our minds surprisingly, did not pose the question of what was the proximate cause of the loss claimed, which must be the primary question in relation to claims under contracts of insurance."

[28] I have cited extensively from this section of the FCA judgment in that these passages assist in the interpretation of the clause in dispute in the present case. The implications of these passages from the judgment in the FCA case are the following: the relevant clause requires that the disease makes a local appearance and then it requires that the authorities, whether local or national, restrict access to the area or

impose quarantine restrictions. To fall within the scope of the insured peril, the national response does not have to exclusively ~~to~~ regulate access to an area which is close to applicant's premises nor does it require that the government response to the outbreak of the disease be restricted to a defined kilometre radius from the premises as provided for in the clause.

The proper approach to the interpretation of the contract

[29] Since the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), considerable debate has taken place concerning the proper approach to the interpretation of contracts. In the *City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA) the court noted at para 61:

> "It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided."

[30] The court went on to say at para 63:

> "This court has consistently stated within the interpretation exercise that the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by a further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach

nor is it in juxtaposition helpful to debate the correctness of the assertion that it would only lead to self-serving statements by the contestating parties."

[31] This approach was given further content, insofar as insurance contacts are concerned, in *Centriq Insurance Company Ltd Oosthuizen and another* 2019 (3) SA 387 (SCA) at para 21:

> "The consequences of adopting a business–like or commercially sensible construction of an insurance policy is that the literal meaning of words read in their context may have to yield to a fair and sensible application where they are likely 'to produce an unrealistic and generally an anticipated result' which is at odds with the purpose of the policy."

The court warned that it was not for the court to construe clauses in favour of the insured simply because it considered an exclusion to be unfair or unreasonable. A careful engagement with the chosen wording is critical

[32] Lord Hodge in *Wood v Capita Insurance Services* [2017] AC 117 (HL) at para 10 provides further guidance when he states:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. If has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and depending on the nature, formality and quality of drafting of the contract give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

[33] It is a somewhat easier exercise to interpret a contract than it is to interpret a statute where the intention of the legislature triggers a far more complex linguistic inquiry than that which is to be located within the more restrictive confines of a

contractual relationship. It is less of a linguistic obstacle to establish a construction more consistent with business common sense than to divine the intention of a legislature which, in turn, depends on the theory of a legislature which is part of the State. In the case of an insurance contract, business common sense should be applied to ascertain the intention of the insured seeking cover, in this case for loss of business, and that of an insurer, evaluating the risk which it assumes and accordingly the premium which it must charge.

The application of these principles to the contract between the parties

[34] It is prudent to remind ourselves that the insurance contract in question covered a loss resulting from "interruption or interference to the business in consequence of contagious or infectious diseases within a 50 km radius of a premises provided that the local, regional, municipal or government authority responsible for the area has declared that a notifiable medical condition or communicable disease exists within the area and/or has imposed quarantine regulations and/or acted to restrict access to the area in terms of any local regional, municipal or national law or by law or regulation pertaining to public health and safety."

[35] On the facts of this case, it is uncontested that national government imposed restrictions as a result of an outbreak of an infectious disease, Covid 19. It promulgated quarantine regulations which restricted access to a variety of areas, including that which fell within a 50 km radius of applicant's said premises. As described earlier, the respondent adopted the approach that the wording of the policy

clearly and inextricably leads to the conclusion that only a decision of the appropriate government authority to impose restrictions in the particular locality within which the applicant's business is to be found or, putting it more precisely, within a 50 km radius thereof, would trigger an obligation upon the respondent to cover the loss suffered to applicant's business.

[36] Although the court in *Café Chameleon CC v Guardrisk Insurance Company Limited* [2020] 4 All SA 41 (WCC) was confronted with different wording in the policy which was the subject of that litigation, it is of relevance to the present dispute that Le Grange J at para 74 noted:

> "The respondent has also admitted that Covid 19 occurred within 50 km radius of the applicant's premises, that Covid 19 is a human infectious disease and there had been an outbreak. In these circumstances, it is difficult not to accept that there was indeed a clear nexus between the Covid 19 outbreak and the regulatory regime that caused the interruption of the applicant's business."

[37] In the present case, there is no dispute that there was an outbreak of Covid 19 within 50 km of any of the applicant's premises and that the lockdown that followed the outbreak was not as a consequence of the local outbreak alone. This is surely not the critical issue for determination. The effect of the national government's regulatory intervention was to impose a quarantine and consequent restrictions of access as envisaged in the proviso as a result of the outbreak of Covid 19 which outbreak also took place within a 50 km radius of the premises. That the parties envisaged that regulatory steps may be extended beyond a local outbreak is reflected in the clause which provides that either the local, regional, municipal or government authorities may

impose the quarantine in terms of any local, regional, municipal or national law or by-law.

[38] The proviso thus envisaged regulations which could be promulgated either by local, regional or national authorities. The drafters thus can reasonably be taken to have considered the possibility that the regulations which restricted access of movement or imposed quarantine restrictions were not to be confined to a local outbreak. It is correct that a national government has the power to impose local restrictions. However, given the particular powers granted to local and provincial government in terms of the Constitution, a justifiable conclusion, more in keeping with the wording used, is that the intention of the parties was to contemplate the possibility of a local lockdown by a local authority and further a national government imposing broader restrictions than those which would be confined to a local area. Local restrictions would more likely than not fall within the province of a local authority.

The debate about causation

[39] This approach to the interpretation of the clause unlocks the problem of causation. Nonetheless much debate took place between counsel concerning the parameters of causation. Mr Fine submitted that it was a fundamental rule of insurance law that an insurer was only liable for losses proximately caused by the peril covered by the policy and in order to succeed, the applicant had to show that the loss was proximately caused by the peril against which it had insured itself. See for example *Incorporated General Insurances v Shooter t/a Shooters Fisheries* 1987 (1) SA 842 (A).

[40] Applying the "but for" test, Mr Fine submitted that the question to be asked by this court was: "but for" the occurrence of Covid 19 within a 50 km radius of the insured premises, what would have happened? In his view, the appropriate counterfactual could not extend beyond this description. In other words, the counterfactual was not whether there was no Covid 19 outbreak worldwide nor an absence of Covid 19 outbreak in South Africa or a government regulatory response thereto or a national lockdown. Such a counterfactual, in his view, bore no relation to the insured peril in terms of the express wording of the specific clause of the policy.

[41] In the light of these submissions, it is instructive to refer to the approach to causation adopted by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700:

> "Causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but of the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter,* if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability

can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation' ".

[42] The question arises as to the proper counterfactual in order to determine the presence of factual causation. If there had been no outbreak of Covid 19, then there would have been no national lockdown, no closure of business and no interruption of the applicant's business; that is, but for the outbreak of Covid 19, which included outbreaks within the 50 radius of the insured's premises, and regulations which restricted access within a 50 km radius to the insured's premises, there would have been no interruption of its business as covered in terms of the insured peril.

[43] As indicated earlier, the respondent's argument that the policy required a direct connection between a person suffering from Covid 19, who would come within 50 km of the applicant's business and the reaction of the relevant authority was not the indicated counterfactual to be employed in this case. The wording of the policy indicated that there should be an outbreak of the disease within the 50 km radius as defined. It also required that the relevant authority restricted access to the area and/or imposed quarantine restrictions. However, nothing in the wording of the policy required that the response of the relevant authority was restricted to dealing exclusively with a local area; hence the inappropriate counterfactual employed by respondent.

[44] It follows that for all the reasons set out in this judgment, the applicant has established factual causation between the loss to its business and the insured peril. The loss to its business would not have occurred "but for" the outbreak of Covid 19 that triggered a national response which covered the area in which the business was located. It is not clear as to what arguments the respondent advanced to contend, notwithstanding the establishment of factual causation, that the loss was too remote from the peril against which the applicant had insured.

[45] It cannot be contended that the respondent was entitled to resile from its contractual obligations under the policy because it did not foresee the extent of its indebtedness as a result of the unprecedented outbreak of Covid 19. This argument alone cannot make the harm remote for such an argument does not relate to the incidence of harm or the liability that flows therefrom. Legal causation, as Corbett CJ observed, involves questions of policy. Once an insurer has entered into a contract of insurance, the wording of which covers an outbreak of a disease such as Covid 19, it is difficult to argue that the loss caused by business interruption that follows from an outbreak of the pandemic within the 50km radius and in which the regulatory response was one as set out in the proviso would stand to be classified as too remote a loss.

[46] For all of these reasons therefore, the applicant has established both the existence of factual and legal causation in respect of the event against which it had insured in terms of the policy. It therefore is entitled to the declaratory relief it seeks from this Court.

An entitlement to interim payment

[47] Mr Brown contended that the applicant had been insured for a period of six months of business interruption for loss of gross profit up to a maximum amount of R 17 600 000. Applicant claims as an interim payment the sum of R 4,84 m for the months of April, May and June 2020 and a portion for March 2020. Mr Brown contended that this figure was based on a calculation by way of a report of an independent assessor, which calculation was predicated on an estimated turnover during the period of R 10,6 m and an actual turnover of R 1,3 m. Mr Brown further submitted that the applicant did not seek an adjudication on the quantum of its claim which he suggested would greatly exceed any interim amount requested. Further, significant financial information for the period 2017 to 2019 had been provided to respondent in order to justify the interim claim which had been made by the applicant.

[48] The question for determination is the following: once the applicant is successful in relation to the declaratory relief it has sought, should it not be entitled to claim an interim payment in order to survive as a business, given the losses it had suffered during the pandemic which fall within the scope of the policy? Ethical business practice would certainly dictate such a course of action. Unfortunately, however, this court is confined to whether there is a legal basis by which to make such an award. The policy does not expressly make provision for the applicant to claim an interim payment. Not only is the policy silent on the issue but Mr Brown could point to no authority under the common law or any other legal source by which such a payment would be legally justified. Accordingly, and with some regret, the application for an interim payment must be dismissed.

[49] For all of the reasons set out in this judgment the following order is made:

1. It is declared that the applicant enjoys insurance cover under the Business Interruption section of its policy with the respondent, under the Marsh policy number: Marsh Policy Number: 750424*004 ("the policy")

2. With effect from 27 March 2020, the promulgation and enforcement of Regulations made by the Minister of Cooperative Government and Traditional Affairs under the Disaster Management Act 57 of 2002 in response to the Covid 19 pandemic in South Africa and the resultant interruption of applicant's businesses constituted defined events for the purposes of the policy;

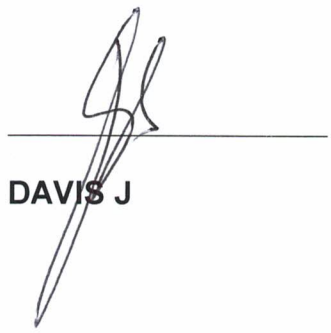
3. The respondent is obliged to indemnify applicant for such loss of gross profit as applicant may have been sustained, arising from the defined events referred to in paragraph 1 above to a maximum of the sum insured, for the period from the occurrence of the defined event and for the time that it takes for applicant's business to resume normal operations, subject to a maximum period of 6 months.

4. The respondent is directed to:

   4.1 Assess and pay applicant's claims, as and when submitted, in an expeditious and bona fide manner,

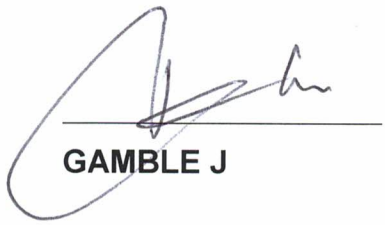
   4.2 Have regard to the purpose of the cover which is to alleviate the financial difficulties caused to applicant by the interruption of each business;

5. The respondent is to pay applicant's costs of this application.



DAVIS J

I agree.



GAMBLE J

I agree

SALIE AJ

For applicant A. Brown instructed by Fairbridges Wertheim Becker

For respondent : D Fine SC with AJ Lamplough , M Maddison and K Lengane instructed by Norton , Rose Fulbright