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

Case No: 6499/2020

In the matter between:

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

and

SANTAM LIMITED, a division of which is HOSPITALITY AND LEISURE INSURANCE	**Respondent**

Coram: Goliath DJP *et* Cloete J *et* Mantame J

Heard: 16 February 2021

Delivered electronically: 22 February 2021

JUDGMENT IN RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

THE COURT:

[1] For convenience, the parties are referred to as they were in the court *a quo*. This is an application by the respondent for leave to appeal (to the Supreme Court of Appeal) which is now only directed at that portion of the judgment and order which pertain to the duration of the indemnity period, which was held by this Court to be 18 and not 3 months. The respondent has made a

tender in respect of wasted costs which has been accepted by the applicants, and it is incorporated in the order hereunder.

[2] The case made out in the applicants' founding affidavit with regard to the indemnity period is encapsulated in paragraph 67 as read with Annexure "FA18"[1]. Paragraph 67 reads as follows:

> *'Paragraph 5 of the letter* [from the applicants' attorney] *informed the indemnity period for business interruption cover is 18 months and not 3 months. It was drawn to the respondent's attention to the indemnity period of 18 months that appears in the policy documents, as well as the fact that infectious disease cover is not listed in the policy documents as an extension where the indemnity period shall not exceed three months. It was further pointed out that the applicants selected business interruption cover under Item 3, which is headed "Revenue". The description of the insurance cover under this heading expressly contemplates the indemnity period exceeding 12 months.'*

[3] In paragraphs 72 and 74[2] of the founding affidavit the applicants referred to a letter from the respondent's attorney dated 25 May 2020[3] in which the following was stated:

> *'The policy wording and schedule make it clear that any claim under an extension to the business interruption policy (which the infectious diseases extension clearly is) is limited to three months…'*

[4] The respondents' case in relation to the indemnity period was set out at paragraphs 72 to 78 of the answering affidavit[4] as follows:

> *'72 The indemnity period is defined in the business interruption wording (record: p 53). It begins with the commencement of the damage and ends not later*

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1 Record pp16 and 228.
2 Record p18.
3 Annexure "FA20", Record p234.
4 Record pp286 – 288.

than the number of months stated in the schedule during which the result of the business shall be affected in consequence of the damage.

73 It follows that the requirement of proximate causation determines not only whether there is an indemnity, but also the duration over which such indemnity will operate (subject to a maximum period stated in the schedule).

74 The maximum period of the indemnity is three months, and not 18 as contended by the applicants. A "memorandum" to the business interruption section contained in the policy schedules provides as follows (record: p 29):

> *"NOTE: Extensions under this Section are limited to an Indemnity Period of 3 months".*

75 There is an identical recordal in the business interruption schedule (record: p 45):

> *"NOTE: Extensions under this Section are limited to an Indemnity Period of 3 months".*

76 The infectious diseases extension is an extension to the business interruption cover. It is therefore subject to the memorandum and the further recordal which clearly provides for a three-month indemnity period.

77 The applicants argue that the infectious diseases extension is not specifically listed in the schedule under the business interruption cover, and is therefore not subject to the memorandum. That is incorrect. There is no requirement in the policy that the infectious diseases extension need be specifically stated in the schedule to be included in the cover or be subject to the memorandum. The fact that it is not stated in the schedule does not mean that the policy does not contain the extension, and, equally, that the extension is not subject to the memorandum.

78 The extension is expressly relied upon by the applicants, and it clearly constitutes an extension. It is accordingly subject to the three-month limitation period set out in the memorandum and the further recordal.' [emphasis supplied]

[5] These averments were dealt with in the applicants' replying affidavit at paragraphs 85 and 86 as follows:[5]

'85 I admit the allegations in these paragraphs to the extent that Santam correctly quotes from the policies.

86 I deny that the applicants' claim is limited to an indemnity period of three months. This is, I stress, a significant issue between the parties, having as it does a very large effect on what compensation the applicants are set to receive, given that Covid-19 is widely projected to endure well beyond this year. The applicants are entitled to declaratory relief on the length of the indemnity period. There is a live dispute between the parties. Declaratory

[5] Record pp452 – 453.

> *relief will settle this dispute, leaving only the calculation of the applicants' losses for a set period.'* [emphasis supplied]

[6] In the applicants' heads of argument filed in the main application it was submitted that the respondent was adopting an impermissibly narrow interpretation, essentially because it "skipped over" the indemnity period in the business interruption schedule which is listed as 18 months; instead it focussed on a memorandum at the end of that schedule that extensions under the section are limited to a 3 month indemnity period. It was also submitted that the 3 month indemnity period does not apply to the infectious diseases extension, because it is a standard feature of the business interruption section; but in any event, on the most generous reading of the schedule in the respondent's favour, there is obvious ambiguity which fell to be resolved against the respondent on the basis of the *contra preferentem* rule.

[7] In the respondent's heads of argument filed in the main application its submissions were limited to the following single paragraph:

> *'234 Finally, the applicants contend that the indemnity period in terms of the policies for the loss is a period of 18 months, and they seek declaratory relief to that effect. It is clear from the policies, and in particular the schedule thereto, that extensions under the section, which would include the extension relied upon by the applicants, are limited to an indemnity period of 3 months. The schedule to the business interruption section records the following:*
>
> ***"MEMORANDUM NOTE:***
>
> ***Extensions under the Section are limited to an Indemnity Period of 3 months".'***

[8] In oral argument in the main application the dispute pertaining to the indemnity period was fully canvassed by *Mr Van der Nest SC*, who made

submissions on this part of the case on behalf of the applicants. Numerous references were made to other clauses or sections in the policy under scrutiny for purposes of advancing the interpretation upon which the applicants relied. It was not suggested by the applicants that it was patently obvious that on any reasonable interpretation the indemnity period was 18 months. *Mr Van der Nest* himself submitted:

> *'And then the question arises, whether the memorandum at the foot applies to that which precedes it, to the menu, where each one is listed as having a three-month indemnity, and the notifiable disease extension does not say it is limited to three months. So, now one says does that memorandum note apply to what precedes it, or does it apply in addition to a clause, which does not on its own say it is limited to three months, and which is embedded in the cover, whether paying for a premium or not. So, now to resolve that ambiguity at the very lowest…'*[6]

[9] The same approach was followed by *Mr Fine SC* who argued on behalf of the respondent. He too dealt with the issue as an interpretive exercise with reference to other clauses and sections of the policy. In essence the interpretation advanced was that the business interruption cover referred to in the first "block" of the schedule[7] is limited to that caused by physical damage to the premises; whereas the infectious diseases extension, even though it appears elsewhere in the policy, is nevertheless an extension and must thus be interpreted as limited to the 3 month residual indemnity period in the third "block" of that schedule. It was similarly never suggested that it was patently obvious the indemnity period for business interruption due to infectious disease is 3 months and no more.

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6 Transcript argument pp166-167.
7 On the example used, Record p29.

[10] One of the grounds in the respondent's notice of application for leave to appeal is the Court's finding that there was ambiguity in the wording of the policy in respect of the indemnity period.[8] In heads of argument subsequently filed on the respondent's behalf it was submitted that the extensions are *'plainly not subject to the physical damage 18 months indemnity period'*.

[11] This was the same argument advanced by *Mr Plewman QC*, who replaced *Mr Fine SC*, during the hearing of the application for leave to appeal. He made clear that the respondent's case is that the policy wording in relation to the indemnity period is *'squarely non-ambiguous'*. We were unable to extract a clear answer from him as to whether this was a new case being made out on appeal.

[12] Be that as it may, we understood the respondent's argument in the main application to be directed at an interpretation which would resolve an apparent ambiguity, which understanding is reinforced by the case made out by the applicants as well as the arguments advanced on their behalf, and which, after all, was the one the respondent was called upon to meet. At no point was it the respondent's argument that the indemnity period is, as *Mr Plewman* later put it, *"terribly clear"*.

[13] Despite the absence of a straight answer from the respondent on this score, we are of the view that this is a new point raised on appeal. Perusal of the relevant portions of the affidavits in the main application indicate that the point

[8] Paragraph 38 of the notice of application for leave to appeal.

now raised can nonetheless be canvassed on appeal without the applicants having to file any further affidavits. Accordingly prejudice should not arise.[9]

[14] It is also our view that the submissions made by *Mr Plewman* provide a *'…sound, rational basis for the conclusion that there are prospects of success on appeal'.*[10] We are therefore unable to conclude that the appeal would have no reasonable prospect of success. In any event the Supreme Court of Appeal has made clear that the nature of proceedings before it are such that it is at large to make findings in relation to any matter flowing fairly from the record[11] without being limited to any grounds contained in a notice of appeal. By necessary implication this would include this Court's findings on the interpretive exercise argued before us.

[15] It was contended on behalf of the applicants that since the respondent itself has recently informed the public *'this case has become a once-off dispute about the interpretation of this particular policy'*[12] the single remaining dispute must be considered of limited importance to it. This overlooks what the applicants themselves stated in their founding affidavit,[13] which makes clear how important it is to them. We also note the respondent's undertaking conveyed during oral argument that it will co-operate fully with the applicant in securing an expedited date for the appeal (subject of course to the parties deferring to the Supreme Court of Appeal in this regard).

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9 *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paragraph [30].
10 *S v Smith* 2012 (1) SACR 567 (SCA) paragraph [7].
11 *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA) paragraph [5].
12 Applicants' heads of argument in the application for leave to appeal paragraph 23.
13 To which we refer at paragraph [5] above.

[16] **The following order is made:**

1. **The respondent's application for leave to appeal to the Supreme Court of Appeal on the limited issue of the indemnity period is granted;**
2. **In accordance with its tender the respondent shall, in addition to the costs of the main application (reflected in paragraph 93 of this Court's judgment) also pay the applicants' costs in the application for leave to appeal, but excluding those pertaining to the hearing on 16 February 2021, on the scale as between party and party as taxed or agreed and including the costs of three counsel; and**
3. **The costs of the hearing on 16 February 2021 shall be costs in the appeal.**

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GOLIATH DJP

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CLOETE J

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MANTAME J