NORTON ROSE FULBRIGHT

The Big Read Book series Volume 7

Norton Rose Fulbright's collection of South African insurance judgments of 2020

October 2022

Dear reader

Welcome to Norton Rose Fulbright's The Big Read Book Series.

This is Volume 7 of the Series – A collection of South African insurance judgments of 2020.

2020 saw a limited number of insurance disputes determined by way of litigation, with the main body of judgments dealing with the rapid development of the jurisprudence relating to business interruption cover in the context of the COVID-19 pandemic. This culminated in the Supreme Court of Appeal judgment which settled those issues.

The Supreme Court of Appeal accepted the argument that the government's response to a notifiable disease is part and parcel of the insured peril, not just a separate consequence of it.

The court rejected the argument that the local outbreak had to be the cause of the interruption. The court said that determining proximate cause is a matter of common sense which must prevail over strict logic. Since the defined event (an insured peril) is the occurrence of COVID-19 and therefore the government's response, factual causation is established if, but for those things, including the government response, the business interruption would not have happened.

The effect of the judgments is that, for the purposes of an infectious disease business interruption extension, in the context of the COVID-19 pandemic:

- The insured peril is COVID-19 and the government response to it, including the lockdown.
- It is a threshold requirement that there has been a local radius occurrence, however the insured does not have to establish that the local occurrence caused the lockdown.
- The claim is not defeated by the fact that the losses could equally have been caused by the appearance of a disease outside the relevant radius independently giving rise to the lockdown.

An online version of this publication is available through our Financial Institutions Legal Snapshot blog at https://www.financialinstitutionslegalsnapshot.com/ with links to the judgments. You can also keep up with developments in insurance law including South African judgments and instructive judgments from other countries by subscribing to our blog.

You can access Volume 1, which covers South African insurance judgments of 2018, here.

For more about avoidance and cancellation of non-life insurance policies see Volume 2 of The Big Read Book Series.

Volume 3 is a guide to indemnity and reinstatement value conditions.

Volume 4 collates South African insurance judgments of 2019.

Volume 5 is the comic book edition of avoidance and cancellation of non-life insurance policies.

Volume 6 is on drones.

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COVID-19 and business interruption

There were a number of important COVID-19 Business Interruption related cases in 2020. This jurisprudence developed rapidly in response to the pandemic, with the last case on the matter from 2020 being an SCA judgment.

Keywords proximate cause, trends clause, interpretation, trigger

The relevant judgments are:

- *Ma-Afrika v Santam* (November 17, 2020) – Western Cape High Court
- *Fat Cactus v Guardrisk* (November 20, 2020) – Western Cape High Court
- *Interfax v Old Mutual* (November 25, 2020) – Western Cape High Court
- *Guardrisk v Café Chameleon* (December 17, 2020) – Supreme Court of Appeal

All of the judgments upheld the insured's claims for business interruption cover for COVID-19 related losses. The courts interpreted the defined insured event to include the *consequences* of the notifiable event occurring (that is, the lockdown and its consequences were seen as part of the insured peril). Once the insured peril was interpreted widely to include the government response to the pandemic, finding that the losses were proximately caused by the peril became almost inevitable.

The main issues canvased in these judgments are the interpretation of the insured risk, causation, the trends clause and the indemnity period.

The cases also refer to the UK Test case of *Financial Conduct Authority v Arch Insurance (UK) Limited and others*.

Though the policies and the facts were not similar in some respects, the South African claims all deal with non-damage (infectious disease) extensions to the traditional business interruption cover.

No claimant alleged that COVID19 caused physical damage to the insured premises. This argument was unsuccessfully attempted by a number of claimants in arbitration and has failed multiple times in the US courts.

We begin with the final case, since it is the most authoritative and it covers most of the issues covered in the other cases.

Guardrisk Insurance Company Limited v Café Chameleon CC

[2020] ZASCA 173 (December 17, 2020)

This was the last in a string of COVID-19 cases from 2020, particularly notable because it is a Supreme Court of Appeal Judgment.

The dispute, relating to business interruption insurance, was between a Cape Town restaurant (Café Chameleon CC), and its insurer. The claim was for indemnification for loss caused by the interruption of Café Chameleon's business due to the government lockdown. The insured succeeded.

The clause
The policy indemnified the insured against loss from business interruption due to notifiable diseases occurring within a 50km radius of the premises. COVID-19 is a notifiable disease.

The insured's claim
Café Chameleon argued that once it was established that there were occurrences of COVID-19 in Cape Town within a 50km radius of the restaurant (which was accepted), then the government's response to the pandemic (even on a national level) was part of the insured peril covered by the clause.

The insurer's defence
The insurer argued that the generalised response of government is not covered, but rather that a public health response, aimed only at local occurrences of the disease within 50km of the business premises, is covered. The government response in the form of a nationwide lockdown was not implemented because of a notifiable disease within 50km of the business premises, but it was done to prevent the spread of COVID-19 generally and to allow the health system to build capacity.

Interpretation
Cover for business interruption due to defined events occurring usually requires physical damage to the property for the claim to succeed. However, one of the extensions to this was a non-damage extension that includes cover for events that do not cause damage to property but that occur within a specified radius of the property. The insured peril is a defined event that results in business interruption.

Insurance contracts are like any other contracts and "must be construed by having regard to their language, context and purpose in what is a unitary exercise". The analysis is objective, taking into account what a commercial sensible meaning would be, the intention of the parties, and the words used in light of the document as a whole and the factual matrix within which the contract was concluded. Insurance contracts are contracts of indemnity and they should be interpreted "reasonably and fairly" to this end. Therefore, if the words are capable of two meanings, the one favouring indemnity will be preferred.

Does the infectious disease clause include the government response to COVID-19?
The main issue on interpretation was whether the insured peril included the government response to the pandemic. The trigger for cover is that the disease is notifiable (required to be reported to government authorities), and COVID-19 clearly is.

The court said that the parties must have understood that a notifiable disease may warrant a government response. They would therefore have envisaged that the business interruption referred to in this clause might result from a public health response. The response in this case, like the analogy of harm unavoidably caused by firefighters, is integral to the insured peril. Café Chameleon's argument that a notifiable disease "almost always carries the risk of a government response" was accepted, making the government response a part of the insured peril. The government response is covered "not because it is *caused* by what was insured against; it is covered because it is what *is* insured against".

Scope of cover
The insurer argued that the policy would only cover the consequences of events within the limited area (50km) and excludes the consequences of events within a wider area (that is, the cover is limited to the particular consequences of the local occurrence of the disease). The generalised government response, which is not aimed specifically at the local occurrence, is not covered.

Café Chameleon interpreted the 50km radius requirement as a qualifying criteria for the defined event, unrelated to the causative link between the loss and the local occurrence of the disease. Therefore, once the threshold is reached (infectious notifiable disease, plus 50km radius), cover is triggered if the consequences of the defined event cause loss, irrespective of the fact that the response by government extended beyond the radius.

The court held that the 50km radius is a qualifying criteria for liability and a limiter of liability for far-flung occurrences. Cover is triggered by the occurrence of the notifiable disease within the radius, whether or not that disease occurs in multiple other localities and requires a broader response or not.

Therefore the government response which resulted in business interruption, is covered by the policy. This conclusion rendered the discussion on causation superfluous, but the court addressed causation for the sake of completeness and because the insurer relied heavily on arguments relating to causation.

Causation
The insurer argued that the loss was due to the lockdown and not due to the disease itself, and therefore there was no causal link between the loss and the defined event.

The court said that the common law tests of causation were to be applied flexibly to arrive at a common-sense result, and not to defeat the intention of the contracting parties. In insurance contracts, the question is "has the event, on which I put my premium, actually occurred?"

When there are multiple causes, the proximate or actual or effective cause must be determined. The peril must be the proximate cause of the loss, and can occur after a series of other causes as long as there is no break in the chain of causation. The factual cause must not be too remote from the loss in order for legal causation to be established. The policy, the type of cover and the nature of the risk insured against are all considered.

The separation between the local outbreak in Cape Town and the government response to the national outbreak could not be sustained. It was also found that there was a clear link between the local outbreak and the lockdown, since Cape Town had a large number of COVID-19 cases. At the very least, the losses were due to concurrent causes.

The FCA case and causation

The UK test case between the Financial Conduct Authority and various insurers was discussed (https://www.financialinstitutionslegalsnapshot.com/2020/11/covid-19-infectious-disease-extensions-and-the-fca-test-case/). One of the clauses interpreted in that case was similar to the clause under discussion. The court there construed the clause to provide cover if there had been at least one notifiable incident within the specified radius. In addition, the interruption need not result only from instances of the notifiable disease occurring within the radius as opposed to elsewhere. The court also accepted that the nature of a notifiable disease includes a government response. The parties must have contemplated that there might be a government response, which could affect a wide area, and that government action in these types of cases would be taken as a whole and not be directed at particular parts of an outbreak. The court found that the individual outbreaks formed indivisible parts of the whole (national outbreak). The UK court's reasoning in this FCA case was considered persuasive.

The trends clause

The trends clause provides for an adjustment of cover for the trends of the business had the incident (that caused business interruption) not occurred. The insurer argued that the national lockdown constituted an "other circumstance" that would have affected the business even if there had been no local occurrence. The court said that the trends clause is relevant to quantification of the loss and not liability. The court noted that the lockdown is not an "other circumstance" because it is not separate from the insured peril, but is intrinsic to it.

Conclusion

The loss was covered.

Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited

[2020] ZAWCHC 160; [2021] 1 All SA 195 (WCC) (November 17, 2020)

The applicants are hotel and restaurant operators whose businesses were severely affected by the national lockdown.

This case was decided after the High Court Café Chameleon judgment, but before the SCA handed down judgment in the Café Chameleon appeal. Most of the issues are the same, except for the discussion on the period of indemnification.

The court said that the nature and scope of the insured peril is determined first. Only then is a decision made, with reference to factual and legal causation, as to whether the insured peril caused the loss. Here, the court also concluded that the insured peril includes the government response to the notifiable disease (that is, the lockdown). The "composite peril" eliminates the need for the causation debate.

The requirement that the disease be found locally within a 40km radius was found to be a trigger event for cover and not definitional.

This judgment contains a detailed discussion on the UK FCA test case. The relevant wording of the policies in the FCA case were similar to the wording under discussion in this case.

The court's reasoning around the trends clause followed the FCA case, and matches the determination in the SCA Café Chameleon case as well: the trends of the business will not be judged against whether there had been no local occurrence of the disease while the pandemic raged around the rest of the country – the trends would be judged against the counterfactual of there having been no pandemic at all.

Indemnity period

The insured argued that the indemnity period was 18 months, while the insurer argued for 3 months of cover. The indemnity period under the business interruption cover section is listed as 18 months, and the memorandum after the extension schedule states that extensions under the section are limited to an indemnity period of three months.

The court found that the infectious disease clause is not one of the listed items under the extensions section, and therefore it fell under the main business interruption cover clause. The court therefore found it "reasonable" to conclude that cover for infectious diseases is for 18 months.

Discussion
The court erred in its description of insurance being "intended to serve as a social safety net". This is not the nature of insurance, which is instead a contractual arrangement between two consenting parties. The SCA case of Café Chameleon did not endorse this erroneous line of thought, and correctly reiterated that insurance contracts are contracts "like any other" and that insurance is a contract of indemnity, and it should therefore be interpreted "reasonably and fairly to this end".

The case was taken on appeal only in relation to the indemnity period in 2021 (http://www.saflii.org/za/cases/ZASCA/2021/141.pdf). The appeal court upheld this judgment and dismissed the appeal.

Appeal judgment from 2021

Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another

[2021] ZASCA 141; [2022] 1 All SA 376 (SCA) (October 7, 2021)

The Supreme Court of Appeal looked at the issue of the indemnity period. The court held that the indemnity period applicable to the relevant non-damage business interruption extension of the policy was 18 months and not three months as contended for by the insurer. The judgment is fact specific and turns on the policy wording and structure.

Given that the policies were admittedly difficult to navigate and assuming at best for the insurer that there was, according to the judgment, a meaningful degree of uncertainty concerning the indemnity periods, the conclusion "might be reached that on that aspect the policies are ambiguous". In that context the court said that the contra *proferentem* rule would be applied to interpret the policy against the insurer. It was therefore not necessary to engage in a debate as to whether the indemnity period was a limitation or not and should be restrictively interpreted.

Grassy Knoll Trading 78 CC t/a Fat Cactus and Another v Guardrisk Insurance Company Limited

[2020] ZAWCHC 168 (November 20, 2020)

This case dealt with similar issues to the other business interruption cases and also concluded that it must have been within the contemplation of the parties that the interruption to business would be occasioned not only by the occurrence of a notifiable disease, but also by the government response to that occurrence.

The court referred to the *Ma-Africa case* and the FCA test case in deciding that the pandemic and the resultant government response could be seen as a "composite peril" and that, once the government response is seen as part of the insured peril, the causation issues "largely answer themselves". The court said that whether the government response is to be part of the causal matrix or to be subsumed into the insured peril is a matter for a higher court to consider (which was done in the *Café Chameleon* SCA case).

The court recognised that the radius requirement cannot be disregarded. The insured argued for the radius to be read as a qualifier, where the clause covers business interruption caused by notifiable disease wherever it occurs, as long as there has also been an occurrence of the disease within the 50km radius. Even though the court found the insurer's argument compelling (that this construction would lead to unbusinesslike results), it was bound by the decision of *Ma-Afrika* unless it could distinguish this case, which it could not. The decisions in *Ma-Afrika, Café Chameleon* and the *FCA case* were all found to be consistent and therefore binding.

The court noted that two clauses in the FCA case were distinguishable, because they defined the insured perils as "events" and therefore indicated that "what is being insured is matters occurring at a particular time, in a particular place and in a particular way". In a case where the policy was worded this way, there is a stronger case for the argument that cover only attaches if the insured could show that the cases of COVID-19 within the specified radius, as opposed to anywhere else, caused the business interruption.

Accepting that government measures, which caused the business interruption, were part of the insured peril, the court granted relief to the insured and ordered payment by the insurer.

Interfax (Pty) Ltd and Another v Old Mutual Insure Limited

[2020] ZAWCHC 166 (November 25, 2020)

The applicant in this case is a retailer for luxury travel goods, whose business was affected by the lockdown.

The insurer's main argument was that, although the disease is widespread, there must be a local occurrence of the disease that causes the business interruption and the loss for cover to be granted. The insurer argued that the loss must be "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". The insured responded that there was no justification for restricting the policy so that no cover would be afforded if there was a national response, as long as the 50km radius was included in the response. Therefore the debate in this case revolved around a local versus national government response to the disease.

The court quoted extensively from the *FCA judgment* and concluded that the clause requires the disease to make a local appearance (therefore there must have been a case of COVID-19 within the 50km radius) and then the requirement is that the authorities, whether local or national, would respond with restrictions to curb the disease. The national response does not have to exclusively regulate the local area defined in the policy, for there to be cover. The court found that the parties envisaged that there could be a national response because the clause 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. "Even though the court's approach rendered the debate on causation unnecessary, the court considered some of the issues on causation because the parties had raised extensive arguments relating to causation. In looking at the "but for" test, most of these business interruption judgments grappled with what the proper counterfactual would be: do we need to consider the position but for the pandemic, or but for the local occurrence of the disease? The insurer's argument that there needed to be a direct connection between a local case of COVID-19 and the business interruption was not accepted. The court said that nothing in the policy required the government response to be aimed at local cases only, for cover to be triggered.

The insured's claim succeeded.

Litigation funding is not insurance

De Bruyn v Steinhoff International Holdings N.V. and Others

[2020] ZAGPJHC 145 (June 26, 2020)

Keywords litigation funding, adverse costs insurance

This was a certification application by a potential class of people claiming against the Steinhoff group of companies for losses related to their investments in the company. The group companies' share prices fell dramatically after controversy into irregularities in their accounting was disclosed. Criminal and regulatory investigations followed. The losses suffered by investors were considerable.

This was the first shareholder class action brought for certification in South Africa. The application for certification of the class was based on the argument that individual shareholders would not be able to bring claims individually, because their claims (though important to each individual) were too modest to justify complex litigation required to succeed in this type of claim.

The application for certification failed.

The court discussed funding of the litigation by third party funders, in relation to insurance arrangements.

The litigation was to be funded by a company specialising in the funding of class actions. The firm would pay the costs of the litigation and indemnify the class representative against an adverse costs order, taking on the risk in return for 25 per cent of the class wide recovery. One of the funders would procure adverse costs insurance as well (from a foreign insurer).

The defendant argued that the agreement between the funder and the applicant was a contract of insurance in terms of which the funder provides indemnity insurance in return for a premium (the percentage of the award). If this were the case, the funding agreement would be unlawful because the funder is not a licensed insurer.

The court did not accept this argument because a contingent undertaking to make a payment is not an obligation to pay a premium in terms of insurance law. The central feature of the agreement is entitlement to a percentage of the award, in consideration for funding the class action. The indemnification of the applicant is an ancillary feature of the agreement to fund the litigation on risk for a return.

Insurance policies for theft

Rodel Financial Services (Pty) Ltd v Legal Practitioners Fidelity Fund

[2020] ZAGPJHC 238 (October 7, 2020)

Keywords trust money, theft, attorney's fidelity fund

The applicant sought to recover trust money stolen by an attorney. The applicant approached the Legal Practitioners Fidelity Fund but made very little effort to recover from the attorney first.

There are four requirements for recovery from the Fidelity Fund: the recipient of the funds is an attorney, the funds have been deposited into the attorney's trust account in connection with attorney services, the attorney stole the money, and the claimant has made proper endeavours to recover the funds from the attorney. If the applicant has not made these efforts, then they must show that they could not reasonably have recovered from the person liable.

In this case, the applicant went straight for the fund without attempting to recover anything from the attorney. The Fidelity Fund is not a conventional insurer and does not provide indemnity insurance against an insured's own negligence. How the fund pays out is limited by its founding statute. All of the statutory conditions must be met before the fund can compensate the claimant, and this cannot be equated with "simply filing a claim against a private insurance company".

The application against the fund was dismissed.

Anabella Resources CC v Genric Insurance Company Limited

[2020] ZAGPJHC 163 (July 2, 2020)

Keywords theft, armed robbery

The insured traded gold, cash and diamonds at its business premises. The insured's financial manager was abducted and was forced to instruct the insured's general manager to remove valuables from the safe and to give them to a person who would arrive in their parking lot. The financial manager had effective control of the property because even though he was not on the premises where the theft occurred, he was able to remotely instruct his general manager (via text message) to remove valuables from the safe. The thieves knew the operating procedure of the insured because this type of instruction from the financial manager to the general manager had happened in similar ways before, for customers. Therefore, the instructions did not seem strange, and were carried out. The theft only became apparent to the insured after the financial manager was released.

The policy did not contain a definition of armed robbery and the definition of theft and hijacking required 'actual lawful control' by the insured or its employees of the seized property at the time of the seizure.

The force and threats applied to the financial manager were done off the premises. The actions on the premises were carried out under the assumption that they were lawful. The insurer therefore argued that the theft had not occurred on the premises.

The court had to consider whether the indemnifiable events had to all take place at the premises from which the property was removed and from a person in actual control of the property at the time of removal of the property from the premises.

When interpreting a policy, consideration has to be given to the context, purpose and language of the policy including the meaning of all the words used in the contract, and whether the meaning is clear or ambiguous.

The court held that for the purposes of robbery, force may be exercised remotely, away from the place where the goods are removed. The robbery can occur at two places. The place where the violence occurs and the place where the taking of the property occurs.

The theft and hijacking definition did not require that the force occur at the premises where the seizing of the goods occurred. It was sufficient if the force occurred at a location remote from where the taking of the property occurred.

That interpretation is also consistent with the common law definitions of robbery. It is sufficient that the insured is in effective or lawful control of the property, even if remotely.

The indemnifiable event in the policy wording did not require that force against an employee occur at the premises where the property was secured or from where it was removed.

The decision is unsurprising on the wording of the policy.

While the court commenced its judgment by saying that the words of the contract were clear, ascertainable and without ambiguity, the court in conclusion said that the obligation lies with the insurer as the author of the contract to give certainty to the risks it wishes to exclude and absent that certainty, the provisions of the policy will be construed in favour of the insured in accordance with the contra *proferentem* rule. The court did not say what was ambiguous about the wording or why reference to the rule was necessary to make its' findings. It was not. It had also been common cause at the trial that the wording was clear and unambiguous.

In a long line of authority, our courts have made it clear that the *contra proferentem* rule only applies where there is genuine ambiguity which cannot otherwise be resolved by applying the ordinary principles of construction. The rule should not be relied on to create ambiguity where there is none.

Brokers and agents

African Independent Brokers (Pty) Ltd v Coetzee and Others

[2020] ZALCJHB 62 (March 13, 2020)

Keywords labour dispute, restraint of trade, broker

A short-term insurance brokerage sought to enforce a restraint of trade against two of its former employees, who were now employed by other brokerage firms.

A party seeking to enforce a restraint of trade must prove the existence of the restraint clause, as well as, a breach of its' terms. The respondent must prove that the restraint is so unreasonable that it should be unenforceable. In considering the enforceability of a restraint of trade clause, the court will consider the extent of the proprietary information sought to be protected, whether the respondents will infringe those interests and whether the restraint is necessary to protect those interests. This will be weighed against the interests of the respondents to be economically active and productive.

Trade connections of a business such as customers, potential customers, suppliers and other forms of goodwill, are usually protected. Confidential information such as trade secrets, that is, information that would be valuable to a competitor if disclosed, is also a protectable proprietary interest.

A tender by the respondents, undertaking not to divulge confidential information if they are permitted, contrary to the restraint, to take up employment with a competitor, is not sufficient to defeat the restraint clause.

The respondents were a manager and a team leader for the applicant. They were responsible for introducing insurance managers and dealerships to the applicant and had to build and maintain relationships with these managers and dealers. However, there was no evidence that any particular finance and insurance manager has ceased giving leads to the applicant or followed the individual respondents. In light of the facts, any trade connections worthy of protection were not strong. The respondent did have access to confidential information which, if disclosed, could prejudice the applicant. The court was concerned by his downplaying of this confidential knowledge.

The restraint period was 24 months, but the applicant

agreed that a period of 12 months would be sufficient to protect its interests.

The respondents could be employed in other areas of the brokerage field (that is, their expertise would allow them to work in other brokerages, unrelated to motor insurance). Therefore their right to be economically active would not be affected by the restraint. Other than the restraint, there was no less restrictive way to protect the confidential information.

A sufficient case was made out to justify the restraint of the first respondent.

The applicant showed a clear right and an injury actually committed as far as the use of its confidential information was concerned.

The restraint was found to be unnecessarily wide, and therefore it was limited by the court, precluding the first respondent from working for entities that directly or indirectly compete with the business of the applicant.

The restraint against the second respondent was not upheld, since it could not be shown that she had access to confidential information or trade connections that could prejudice the applicant.

Anderson Insurance Underwriting Managers CC FSP No. 339695 v The Only Professional Modern Autobody CC t/a Modern Collision Repair Centre

[2020] ZAMPMHC 17 (June 11, 2020)

Keywords agency, underwriting manager, binder agreement

A motor repair shop claimed against an underwriting manager for money allegedly due and payable for services rendered in repairing motor vehicles covered by the insurer with which the underwriting manager had a binder agreement.

The underwriting manager raised several defences, which were sent to the plaintiff in a letter to its attorneys. The plaintiff obtained summary judgment in the Magistrate's Court. Judgment was granted, and the underwriting manager appealed.

The appeal court found that there were many irregularities with the summary judgment and therefore set it aside.

The court considered the defence that the underwriting manager was acting as agent for its principal, an insurer, which had been liquidated by the time of this trial. The plaintiff had been aware of this fact and the fact that the underwriting manager did not bind itself as surety for the insurer's obligations to the insurer's service providers. This defence was found to be compelling, especially in light of section 48A of the Short-term Insurance Act, which deals with binder agreements stating that the insurer remains "liable for any claims relating to policies included in the agreement, including any claims that may arise because of the failure of that other person to comply with the agreement". This is a triable defence and therefore summary judgment should not have been granted against the underwriting manager. The court noted that the issue of joinder (joining the insurer or in this case its liquidator, to the proceedings) would come into play too.

Subrogation and third-party notices

University of the Free State v Du Toit

[2020] ZAFSHC 145 (June 30, 2020)

Keywords subrogation, right to sue

Du Toit was in a motor vehicle accident with an employee of the University of the Free State (UFC). She claimed for damages to her vehicle and was granted a favourable judgment. The UFC appealed.

UFC argued that the claim was brought by the insurer, in Du Toit's name, after it had settled her claim. However the policy was in Du Toit's husband's name. The UFC therefore alleged that there was no contractual relationship between Du Toit and the insurer, and that the insurer therefore had no locus standi to institute action in Du Toit's name. They argued that a contractual relationship between Du Toit and the insurer was necessary for subrogation to take place, because the insurer steps into the shoes of the insured.

The UFC argued that the action should have been brought in the husband's name or that the claim should have been ceded, by Du Toit as owner of the vehicle, to the insurer, and that the cession had to be proved. The court rejected this argument.

The court reiterated that it is an established principle that the insurer has the right to sue in the name of the insured.

The court found that the insurer was fully aware that Du Toit was the registered owner of the vehicle, and agreed to include that vehicle in the policy taken out by her husband. That was a private contractual relationship between Du Toit, her husband and the insurer. It was in terms of this contractual arrangement that the insurer settled the claim for damage to the vehicle. There was no duty on Du Toit to disclose the insurance contract or its consequences, to the UFC. Du Toit, as owner of the vehicle, had the right "in any event, to have the claim instituted in her name, on the understanding that any amount recovered from the third party would be paid to the insurance company, as is normally the case when subrogation applies".

The insurer would not have settled the claim and paid the costs of litigation if this were not the arrangement.

The court went further and quoted case law to the effect that the insurer's involvement in the litigation is not relevant to the cause of action and need not even be pleaded – it is not a fact that sustains a cause of action and is "merely a collateral fact".

Eckard and Another v Outsurance Insurance Company Limited and Others

[2020] ZAGPPHC 392 (July 30, 2020)

Keywords foefie slide, indemnity, third party notice, material non-disclosure, notification, time-bars, prescription, liability policy

A minor child fell from a foefie slide at the applicant's adventure centre (which includes a camping site for school learners) and she became a paraplegic.

The parents of the minor child sued the applicant, and the applicant filed a third-party notice, attempting to join its public liability insurers to the litigation, seeking an indemnity or contribution for any amount it is found liable for.

The insurer alleged that the contractual time-bar had expired because the policy obliged the insured to claim compensation within 90 days from the date of the occurrence of the incident. If the claim is rejected, the insured has to institute proceedings within 90 days of the rejection.

The court referred to the SCA judgment of *Magic Eye Trading 77 CC v Santam Limited*, which held that "a claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established". The contractual time-bar clause does not allow for a "general disclaimer of future claims at a stage when a precise claim in a fixed amount has not and cannot be made by the insured".

The court therefore held that until the insured's liability is decided, it has a contingent claim against the insurer and therefore the contractual time-bar period had not begun to run yet.

The court had to determine whether the insured had a *prima facie* case on the merits. The insurer alleged that the insured had failed to inform it of a previous incident that had occurred at the premises, and therefore they were not liable to indemnify the insured due to a material

non-disclosure. It was found that the previous incident had been investigated and there had been no chance of a claim emerging from it. Further, the insurer was aware of the incident, even though it had not been formally reported, yet continued to cover the insured on the same terms, indicating that the non-disclosure (if it was one) was not material. The policy was therefore in force and a *prima facie* claim for indemnity had been made.

The court allowed the insured to serve a third party notice on the insurer, joining it to the litigation.

Competition law

Discovery Ltd and Others v Liberty Group Ltd

[2020] ZAGPJHC 67; [2020] 2 All SA 819 (GJ); 2020 (4) SA 160 (GJ) (April 15, 2020)

Keywords Vitality, wellness plan, unlawful competition. trademark infringement, interdict

Discovery Life offers a life insurance policy that is linked to its wellness program, Discovery Vitality. Policyholders earn cash back on their premiums, depending on their Vitality status. The status depends on how many wellness points they have accumulated, and begins with a default Blue status, moving through the ranks to Bronze, Silver, Gold and Diamond status.

Liberty Life does not have a wellness program, but it offers a policy in which policyholders can receive cash back on their premiums related to external wellness plans that they are members. The two external wellness programs recognised by Liberty Life are Discovery Vitality and Momentum Multiply. The Liberty Life wellness bonus (cash back) is linked to the policyholder's status on their external wellness program, that is, the higher the status, the higher the cash back.

Discovery argued that Liberty has unlawfully linked its insurance offering to Discovery's Vitality program, and in doing so, has infringed its' trademark. The second claim is for the unlawful and unfair use of the Vitality program, its reputation and the "back-office" that it entails (that is, all the behind the scenes operations and know-how required in maintaining the Vitality program) and that this results in unlawful competition.

Discovery sought an interdict to prevent the alleged unlawful use of its trademarks, and asked that the inquiry into the damages they suffered be postponed.

Based on the facts, particularly the way that Liberty characterises its' links to the Vitality program in its' documents, the court concluded that the reasonable customer would not get the impression that Liberty is the source of the Vitality program. It is clear that the Liberty wellness bonus is separate from the Vitality wellness plan. The Vitality plan is used as one potential calculator of the Liberty wellness bonus. The use of the mark was not confusing. The correct balance between Discovery as trademark owner and Liberty as competitor has been achieved and the public "should not be unnecessarily hindered in their freedom of commercial choice when it comes to available insurance policy products". The complaint of trademark infringement therefore failed.

The argument that Liberty used Discovery's trademarks to trade off their well-known reputation also failed. Liberty has its' own considerable reputation and its' products bear its' trademarks conspicuously. The court noted that advantage through the use of another's trademark is not automatically an infringement – no evidence was led to prove that the use of the mark led to Discovery's detriment. The use of the mark was within the ambit of fair practice because it was used as a description and the trade mark was used "in a non-trade mark manner".

It was common cause that Liberty Life and Discovery Life are trade competitors, but Liberty is not a competitor of Vitality. The court did not accept that Discovery Life, the Discovery Group, and Discovery Vitality should be seen as one economic unit – each company is a distinct legal entity. A Vitality member's Vitality status is their personal information which they can choose to make publicly available – it does not fall within Vitality's confidential information.

Foschini Retail Group Proprietary Limited v The assets and business conducted by Edcon Limited

[2020] ZACT 38 (October 22, 2020)

Keywords distribution of policies by retailers, insurance licence

The Foschini Group sought permission from the Competition Commission to acquire one of Edcon's subsidiaries, the Jet Division.

Both the Foschini Group and the Jet Division sell clothing, accessories and a number of other products, including insurance products. The commission had to decide whether the transaction would affect competition in the clothing and apparel markets, as well as the insurance market.

In relation to insurance, the commission noted that neither the Jet Division nor the Foschini Group have insurance licences. The Jet Division and the Foschini Group are two of many distribution channels used by insurers. Insurers also offer their products through other types of retailers, brokers, and direct sales to customers. Other retailers also offer, on behalf of insurance companies, similar non-life and life insurance products.

Therefore, the transaction is unlikely to result in the substantial prevention or lessening of competition in the insurance market. Competition would also not be affected in the other identified markets, and the transaction was therefore allowed to proceed.

Spouses' entitlement to annuity benefits

C M v E M

[2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (May 5, 2020)

Keywords annuity, divorce, accrual, joint estate, vesting

The nature of an annuity was discussed in the context of divorce proceedings.

The plaintiff wife argued that her defendant ex-husband's annuities formed part of the husband's estate for the purposes of calculating accrual on their divorce.

The defendant argued that the insurer owned the capital, or held it in trust, and therefore it could not form part of the husband's estate. These arguments were not accepted by the court.

The relationship between the defendant husband and the insurer is contractual and he has a clear right to the investment returns yielded by his capital investment, in the form of an annuity.

The annuity income is an asset that can be valued and must form part of the husband's estate for the purposes of calculating accrual.

The court gave an example to illustrate the point – if the annuity were not part of the spouse's estate:

> "A married person who had accumulated R100 million before a divorce could invest the whole amount in a living annuity. This would bear the untenable result of denuding his estate to the detriment of his spouse because the value of his estate for purposes of calculating accrual would diminish by that sum."

There was also nothing in the contract between the defendant and the insurer indicating that ownership of the funds would vest in the insurer.

The court held that the value of the defendant's right to future annuity payments is an asset in his estate for the purposes of calculating the accrual in his estate.

Overpay of benefit

Van Niekerk v Liberty Group Limited

[2020] ZASCA 65 (June 15, 2020)

Keywords overpayment of benefit, cession, unjustified enrichment, life insurance

The appellant, Mr van Niekerk, was the beneficiary of a life insurance policy, which he took out on the life of his mother.

He ceded R470 000 of that policy to his brother, as security for a debt. The cession was noted on the policy by the insurer, Liberty. Mr van Niekerk claimed the full benefit after his mother's death, and the full amount was paid to him, despite the cession still being in force, and the debt to his brother being unpaid.

When payment was made, Liberty was unaware that the cessionary was still owed, due a system error which resulted in Liberty not being able to locate the cession documents at the time of the insured death. The error was discovered when the cessionary made enquiries, and Liberty paid R470 000 to the cessionary. Thereafter they claimed the overpayment back from Mr van Niekerk, who refused to repay the overpaid amount. Liberty sued for unjustified enrichment.

Mr van Niekerk alleged that Liberty caused its own impoverishment by overpaying the amount due to him when it had no obligation to do so, and that the cession lapsed when they paid the full benefit to him. He also claimed to be the owner of the full amount and entitled to the full benefit.

The court noted that a cession in security is seen as a pledge to the cessionary, while the cedent retains the 'bare dominium' or what is known as a 'reversionary interest' against the principal debtor (in this case, Liberty). The right to payment of R470 000 is retained by the cessionary until the debt has been paid. Mr van Niekerk was not entitled to the amount.

The court then had to decide whether Liberty met the requirement of an unjustified enrichment action that the payment must have been made in the *bona fide* and reasonable, but mistaken, belief that the debt was owing, and the mistake must be excusable.

The question is whether the payer's conduct is so slack that it does not, in the court's view, deserve the protection of the law.

The court has to make a value judgment based on the conduct of the parties in the circumstances, including the debtor's culpability in their ignorance in relation to the payment.

There was a degree of slackness on Liberty's part, but their system error was also excusable because it was found that the actions of Mr van Niekerk directly contributed to the decision to pay him the full benefit of the policy. The evidence showed that Mr van Niekerk knew the full amount was not due to him but, in claiming the full benefit, he declared that what was stated in the claim form was true, and that he had not withheld any material fact from Liberty.

Mr van Niekerk was ordered to repay the overpaid amount to Liberty.

Financial services tribunal - Fais debarment

The tribunal decision in Mothei v Advicecube (FSP35/20) sets out the statutory and regulatory basis for debarment proceedings under section 14(2) of the FAIS Act and reminds us of the existence of the Guidance Note 1 of 2019 on the debarment process.

The decision emphasises the distinction between the debarment process and any disciplinary proceedings relating to the contract of employment governed by the Labour Relations Act.

Debarment proceedings themselves are governed by the right to lawful, reasonable and procedurally fair administrative action in the Bill of Rights and the right to a fair public hearing, which is fundamental to a just and credible legal order.

The person accused of lacking honesty and integrity, contravening the FAIS Act or failing to meet fit and proper requirements must be informed of the purpose of the hearing and the charges levelled against them and they must be given an opportunity to respond to the allegations with sufficient time to prepare for the hearing.

In this case the debarment was set aside for lack of due and fair process and remitted back to the former employer for reconsideration in a proper manner.

Donald Dinnie, Director
October 2022

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