



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 255/2021

In the matter between:

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

APPELLANT

and

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

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another (255/2021)*
[2021] ZASCA 141 (7 October 2021)

Coram: NAVSA ADP and MBHA, MAKGOKA, GORVEN and MABINDLA-
BOQWANA JJA

Heard: 27 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 October 2021.

Summary: Interpretation of insurance contract – whether agreed indemnity period is 18 months or three months for infectious diseases cover – principles restated.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Goliath DJP and Cloete and Mantame JJ sitting as court of first instance): judgment reported *sub nom Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited* [2021] 1 All SA 195 (WCC).

The appeal is dismissed with costs including costs occasioned by the employment of three counsel.

JUDGMENT

Navsa ADP and Mabindla-Boqwana JA (Mbha, Makgoka and Gorven JJA concurring)

[1] This appeal concerns the applicable indemnity period in relation to business interruption losses under insurance policies. It involves claims by two companies based on the outbreak of the Covid-19 pandemic. In terms of the policies, infectious disease indemnity cover was provided by the appellant, Santam Limited (Santam), to the two respondents, Ma-Afrika Hotels (Pty) Ltd (Ma-Afrika) and The Stellenbosch Kitchen (Pty) Ltd (the Kitchen), to cover losses by business entities through which they conducted businesses. During June 2020, Ma-Afrika and the Kitchen approached the Western Cape Division of the High Court, Cape Town (the high court) on an urgent basis seeking a declaratory order against Santam, *inter alia*, in the following terms:

'2. Declaring that [Santam] is liable to indemnify [Ma-Afrika] in terms of the Business Interruption section of a policy of insurance number HLU0000-01259 issued in respect of the [Ma-Afrika's] Best Western Cape Suites Hotel and the Village Cafe, for such loss that [Ma-Afrika] is able to prove to have suffered as a result of loss of revenue

- occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 11 March 2020;
3. Declaring that [Santam] is liable to indemnify [Ma-Afrika] in terms of the Business Interruption section of a policy of insurance number HLU0000-01301 issued in respect of [Ma-Afrika's] Coopmanshuijs Boutique Hotel & Spa, for such loss that [Ma-Afrika] is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;
 4. Declaring that [Santam] is liable to indemnify [Ma-Afrika] in terms of the Business Interruption section of a policy of insurance number HLU0000-01291 issued in respect of [Ma-Afrika's] Rivierbos Guest House, for such loss that [Ma-Afrika] is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;
 5. Declaring that [Santam] is liable to indemnify [the Kitchen] in terms of the Business Interruption section of a policy of insurance number HLU0000-07179 issued in respect of [the Kitchen's] The Stellenbosch Kitchen, for such loss that [the Kitchen] is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;
 6. Declaring that the indemnity period for the loss described in paragraphs 2 to 5 above is 18 months;
 7. Declaring that [Santam] is liable to indemnify [Ma-Afrika] in terms of the Business Interruption section of a policy of insurance number HLU0000-01303 issued in respect of the [Ma-Afrika's] The Stellenbosch Hotel for the full duration of the indemnity period of 18 months and not to limit the indemnity period from 15 to 27 March 2020, for such loss that [Ma-Afrika] is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020.'

[2] The high court granted the relief sought and ordered Santam to pay Ma-Afrika and the Kitchen's costs, including the costs of three counsel, on the scale as between party and party, as taxed or agreed, as well as the reserved costs. Initially, Santam sought leave to appeal in the high court against the whole judgment and order, but after this Court's judgment in *Guardrisk Insurance Company v Café Chameleon*

(*Guardrisk*)¹ was handed down in December 2020, Santam confined its application for leave to appeal to those parts of the judgment and orders that relate to the indemnity period.

[3] In *Guardrisk*, in respect of a similar policy, this Court held that the insured was indemnified in relation to the outbreak of Covid-19. Thus, the issue before us is whether, as contended by Santam, the indemnity cover is for three months or, as contended on behalf of Ma-Afrika and the Kitchen, the indemnity cover extends to 18 months, as ordered by the high court in paras 6 and 7 of the notice of motion.

[4] The appeal is before us with the leave of the high court. The background is set out hereafter. The question before us is limited to a consideration of the period during which, according to the policy, the indemnity operates. However, for context, and a better appreciation of how the present dispute arose, we deal briefly with the dispute concerning the question of whether Ma-Afrika and the Kitchen were indemnified in relation to the events in question and the high court's conclusions in that regard.

[5] Ma-Afrika operates hotels and businesses in the Western Cape, namely, Best Western Cape Suites Hotel, the Village Café, Best Western Cape International Inc, Best Western Cape International Licensing Inc, situated in Zonnebloem, Coopmanshuijs Boutique Hotel and Spa in Stellenbosch, Rivierbos Guest House in Stellenbosch, and the Stellenbosch Hotel in Stellenbosch. The Kitchen is a restaurant that operates on the premises of the Stellenbosch Hotel.

[6] At the time of the outbreak of the Covid-19 pandemic in South Africa, during March 2020, Ma-Afrika held four insurance policies with business interruption cover provided by Santam and the Kitchen held one. In terms of the policies, Ma-Afrika and the Kitchen were indemnified for loss of revenue. The four policies held by Ma-Afrika relate to the business entities referred to above. The combined total of business interruption cover for loss of revenue under the four policies was R105 482 456. The Kitchen was covered for loss of revenue in the amount of R16 947 368. The insurable

¹ *Guardrisk Insurance Company v Café Chameleon* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA); 2021 (2) SA 323 (SCA).

event in terms of the policy was the outbreak of a 'notifiable disease' at or within a 40 km radius of each of the aforesaid establishments.

[7] On or about 11 March 2020, in the view of Ma-Afrika and the Kitchen, an insurable event catered for by the policies they held with Santam occurred, a notifiable disease in the form of Covid-19, within a 40 km radius of each of them. Consequently, on 1 April 2020, they lodged a claim. An exchange of correspondence followed between the parties, with Ma-Afrika and the Kitchen, through their attorneys, finally sending Santam a letter of demand, insisting that they were entitled to be indemnified in relation to a full period of 18 months, which they contended was the period catered for by the policy.

[8] This elicited a response from Santam, notifying Ma-Afrika and the Kitchen that four of the five claims for business interruption losses had been rejected, with only the claim in respect of the Stellenbosch Hotel being accepted, and only for the period 15 to 27 March 2020, due to the outbreak at that establishment, causing revenue losses only for that period. The remaining four claims were rejected outright by Santam on the basis that none of the losses claimed were caused by the notifiable disease occurring within a 40 km radius of the premises. Santam contended further that the losses suffered were because of a government lockdown and general concern or fear instead of a local outbreak of the notifiable disease.

[9] This prompted Ma-Afrika and the Kitchen to approach the high court for the relief set out at para 1 of this judgment. As can be seen, Ma-Afrika and the Kitchen sought a declaration that the indemnity period for the loss of revenue claim was 18 months.

[10] It is by now well-known that the Covid-19 pandemic has claimed the lives of millions of people worldwide. Governments throughout the world have taken measures to curb its effects. Our government, on 15 March 2020, responded by declaring a National State of Disaster in terms of s 27(1) of the Disaster Management Act 57 of 2002, with the responsible Minister, on 18 March 2020, promulgating regulations in terms of the Act. The National State of Disaster has since been extended from time to

time, and the regulations promulgated in terms thereof have also undergone modifications to deal with prevailing conditions. In the main, the regulations contain measures designed to contain the spread of Covid-19 by curtailing movement and social interaction.

[11] In their founding affidavit Ma-Afrika and the Kitchen provided the factual basis for their claims as follows:

- ‘43. The insured peril or insurable event covered by the policy has taken place. Insofar as [Ma-Afrika’s] claim in respect of the Best Western Cape Suites Hotel is concerned (which is in Zonnebloem, a suburb of Cape Town), the insurable event occurred on 11 March 2020 when it was widely reported in the media that a patient living in Cape Town, who had returned from Europe two days before, had been diagnosed with COVID-19. This was the first person in the Western Cape to contract the virus. A copy of the report that appeared on the website businesslive.co.za on 11 March 2020 is annexed hereto as **"FA15"**.
44. Regarding the four other claims where the business premises are all in Stellenbosch, the insurable event occurred when it was confirmed on 16 March 2020 that the first positive case of COVID-19 was diagnosed at Tygerberg Hospital. The applicants’ attorneys of record received confirmation of this fact in an email sent on 3 June 2020 by Ms Laticia Pienaar, the Principal Communications Officer at Tygerberg Hospital, a copy of which is annexed hereto as **"FA16"**.
45. Tygerberg Hospital is within the 40 kilometre radius of the business premises in Stellenbosch.’

[12] In relation to the contention by Santam that the losses were caused by the lockdown regulations and not on account of the occurrence of the event insured against, Ma-Afrika and the Kitchen stated the following:

- ‘53. The national lockdown is a direct consequence of the insurable event. The lockdown was a response to the occurrence of the Notifiable Disease.
54. Without the occurrence of the Notifiable Disease, there would have been no lockdown. The occurrence of the Notifiable Disease was the single dominant and determining causative fact from which the applicants’ loss flowed. Put another way, the occurrence of the Notifiable Disease was never too remote either in time or operation to be excluded as the proximate cause of the loss. Its efficacy and operation were never

interrupted or displaced by another cause such as lockdown. The Notifiable Disease was indispensable.

55. It is the applicants' case that the language of the policy and its purpose is entirely consistent with the above approach. If the respondent wished to exclude certain instances of the range of governmental reactions to the occurrence of the Notifiable Disease, it could have done so. It did not and it cannot read them in now.'

[13] Santam opposed the application for declaratory relief sought by Ma-Afrika and the Kitchen. The following are the material parts of Santam's affidavit filed in opposition to the relief sought:

'11 [Santam's] case, in summary is that:

- 11.1 the applicants have failed to establish that the insured events that they rely on – namely the reported cases of COVID-19 in Cape Town and at Tygerberg Hospital on 11 and 16 March 2020 – were the proximate cause (or dominant or effective cause) of the interruption to their business and loss of revenue. They have failed to establish either factual or legal causation;
- 11.2 the proximate cause of the interruption to the applicants' business, and any loss of revenue that may have been suffered, was not the local cases of COVID-19 but the national lockdown imposed in the light of the global pandemic. The global spread of the COVID-19 pandemic led to the South African government taking steps to deal with it, including declaring a national state of disaster and thereafter ordering what is referred to as a national lockdown from 23h59 on 26 March 2020;
- 11.3 the applicants have not established that they have suffered any loss of revenue, as contemplated by the policy, in consequence of the insured event. The policy also limits the loss of revenue to the amount by which the revenue in the indemnity period falls short of the standard revenue, as adjusted in terms of what is referred to as a trends clause in the policy. The steps taken by the South African government and the national lockdown in particular, meant that the applicants were prohibited by law from conducting their business. This had the consequence, applying the relevant provisions of the policy, that the applicants are not entitled to an indemnity under the policy for a loss of revenue.'

[14] In respect of the claim for loss of revenue, Santam stated the following:

‘The applicants do not seek the payment of any monetary amount at this stage. The loss of revenue is something they will still have to establish. The court is therefore being asked in these proceedings to determine whether the insured event was the proximate cause of an as yet unquantified loss. The question of causation also arises in relation to the quantification of any loss the applicants may seek to prove in the future. The relief sought by the applicants can only be granted if the Court finds, in respect of the declaratory relief sought, that the facts relied upon by the applicants were the proximate cause of their loss.’

[15] Additionally, Santam went on to state that Ma-Afrika and the Kitchen had not proved that the local events relied on by them, the two infections in Cape Town and at Tygerberg Hospital, caused the interruption of their business and loss of revenue. They reiterated that:

‘The cause of any loss is the global and national events caused by the rapid worldwide spread of COVID-19 and what followed from that.’

[16] Santam was also adamant that Ma-Afrika and the Kitchen deliberately chose not to take extended insurance cover, as provided for by the policy, in relation to cancellation of bookings, which formed a substantial part of their claims for loss of revenue and that their claims were thus unwarranted.

[17] Furthermore, and importantly for present purposes, Santam relied on an indemnity period clause in the policy. According to Santam, the policy defines an indemnity period as commencing with the damage as contemplated, which results in the loss and ends ‘not later than the number of months thereafter stated in the Schedule during which the result of the business shall be affected in consequence of the Damage’. It follows, so Santam contended, that the proximate cause of the damage determines whether there is an indemnity *and* its duration. Santam submitted further, that the maximum period of the indemnity in terms of a ‘memorandum’ to the business interruption section of the policy records that ‘extensions’ to the policy are limited to three months. This applied, so Santam said, because infectious disease cover is an ‘extension’ to the business interruption cover and therefore subject to the ‘memorandum’. If Santam were to be held liable for business interruption losses, it insisted that the policy limited liability to a maximum of three months.

[18] The dispute was adjudicated in the high court by a panel of three judges (Goliath DJP and Cloete and Mantame JJ). They were unanimous on the result reflected in the order, set out at the commencement of this judgment, but Cloete J provided separate reasons for reaching that conclusion.

[19] The first judgment (Goliath DJP with Mantame J concurring), recognised that the central issue that the court was called upon to decide was the interpretation and wording of the material parts of the policy dealing with infectious diseases. It reasoned that the purpose of the policy was to provide protection in the event of an insured's business being interrupted due to the outbreak of an infectious disease. It accepted that the introduction of the Disaster Management Regulations was an official government response to the countrywide threat posed by Covid-19, which in terms of the regulations under the National Health Act 61 of 2003, was a notifiable disease. Goliath DJP concluded as follows:

'It therefore, appears to be a logical conclusion that the only textual – and purposeful – interpretation of the clause is that the insured peril covers Covid-19 and the government's response to Covid-19.'

[20] Goliath DJP rejected Santam's contention that Ma-Afrika and the Kitchen had failed to prove factual causation. She considered whether the peril insured against was the proximate cause of the loss suffered by them. Santam had argued that even if one had imagined away the local occurrence, namely, the outbreak of Covid-19, within a 40 km radius of any of the establishments, the national lockdown would still have occurred, and their businesses would have been affected. Thus, so the argument went, the businesses were interrupted by the governmental action rather than the local outbreak, which was what was insured against.

[21] The first judgment had regard to the three categories of policy wording. First, infectious diseases clauses, where a notifiable disease had occurred in the vicinity, or within a given radius of the premises, comprising words similar or identical to those in the policies presently under scrutiny. Second, 'hybrid' clauses, which refer to restrictions imposed on the relevant premises and to the occurrence or manifestation of a notifiable disease. Third, 'denial of access' clauses, where there has been a

prevention or hindrance to, or use of, the premises in consequence of restrictions imposed by a public authority.

[22] The *ratio* of the first judgment in relation to the interpretation of the relevant clauses, with reference to a foreign judgment, *The Financial Conduct Authority v Arch Insurance (UK) Limited and Others (Hospitality Insurance Group Action and Another Intervening) (FCA)*,² is set out hereunder:

‘[74] We are in agreement with the conclusion in FCA that construing the policy in a composite was undoubtedly the proper starting point. Insurance is intended to serve as a social safety net to cover financially devastating losses and compensate injured parties. This is precisely the safety net required as a result of the unprecedented Covid-19 pandemic. The policy does not state that the infectious disease must be limited to a local outbreak only, or that the local authority response must be exclusively due to such local outbreak only, and no other, or that the policy does not respond where the disease and the response is broad and national. It therefore appears that notwithstanding the fact that the nature of the policy and the specific provisions in the extensions are essentially local in nature, it cannot be said that the nationwide or global events were not contemplated or insured. We are in agreement with the conclusion reached in FCA at para 104 that:

“They must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak and would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.”

[75] We therefore conclude that the Covid-19 and government response to Covid-19 are inseparably part of the same insured peril. The breakout of a notifiable disease, whether reported to a local or national authority always comes with the risk of a government response, and make the government response part of the insured peril of notifiable diseases. We are satisfied that both factual and legal causation are established in respect of the trigger event referred to in the policy. We accordingly conclude that the national response to the Covid-19 disease that has a local occurrence is sufficient to satisfy the policy. Had it not been for Covid-19 and the government’s response, the applicants’ business would not have been interrupted and they would not have suffered their loss. In our view the applicants’ losses are exactly what they had insured themselves against.’

²*The Financial Conduct Authority v Arch Insurance (UK) Limited and Others (Hospitality Insurance Group Action and Another Intervening)* [2020] EWHC 2448 (Comm).

[23] The first judgment then turned to deal with the indemnity periods provided for in the policy. As shown above, Ma-Afrika and the Kitchen had sought a declaration that the period of indemnity was 18 months. In the business interruption section of the policy, 'indemnity period' is defined as '[t]he period beginning with the commencement of the Damage and ending not later than the number of months thereafter stated in the Schedule during which the results of the business shall be affected in consequence of the Damage'. In the first part of the Schedule for business interruption cover, the 'indemnity period' is listed as '18 MONTHS'. The first judgment considered this to be a deliberate emphasis.

[24] Santam had submitted that the indemnity period, if operative, was three months. It contended that the 18 months referred to in the preceding paragraph did not relate to the event in question. In the words of the first judgment, Santam 'focused on a "Memorandum" tucked away at the end of the Schedule . . .' which is in fine print and reads as follows: 'Extensions under the Section are limited to an Indemnity Period of 3 Months'.

[25] The *ratio* of the first judgment on this issue is set out as follows:

'[87] It is evident that the infectious disease clause is not one of the twenty-six items listed under the "Extensions and Clauses" heading in the Schedule. Some of these items, like "Loss of Tourist Attraction" and "Loss of Aesthetic Attraction" expressly record an indemnity period of three months. Others do not, like the "Bush Fire" extension. It appears that the residual three month period may be applicable to these listed extensions. It could be reasonably concluded that the residual indemnity period does not apply to the infectious disease clause because it is not a listed extension. Instead, it comes as a standard feature of the business interruption section.

[88] Santam contends for a narrow interpretation of the indemnity period. Ultimately, as written, the policy is "capable of both a broader and narrower meaning it is that which is favourable to the insured . . . which must be employed." The broader meaning is, of course, the eighteen-month indemnity period.

[89] In the face of the eighteen month stipulation, Santam's insistence on a three-month limit to the clause essentially amounts to a limitation on a clearly expressed obligation to indemnify. It must, accordingly, be restrictively interpreted. As the Supreme Court of Appeal recently held,

“any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer’s duty to spell out clearly the specific risks it wishes to exclude.”³
 [90] It is clear that there is an obvious ambiguity between the two indemnity periods. In the circumstances the *contra proferentum* principle should be invoked. Consequently, the ambiguity must be resolved against Santam. If Santam wanted to limit the indemnity period for infectious diseases to three months in this contract that it drafted, it could simply have added the clause to the long list of specific extensions. We therefore declare that the indemnity period in respect of the infectious disease extension clause is eighteen (18) months.’

[26] In the second judgment, Cloete J considered that it was the case for Ma-Afrika and the Kitchen that the trigger event, in terms of the policy, was the occurrence of a notifiable disease within the localised radial limit and it was an integral component of the government’s national response, and that the response must therefore constitute part of the peril insured against. Against that, she considered Santam’s contention that it was only the local occurrence that was the peril insured against, and not the government response. She preferred the approach of Ma-Afrika and the Kitchen.

[27] In respect of causation, Cloete J concluded as follows:

‘I thus conclude that in the present case the local occurrences of Covid-19 within the 40 kilometre radial limit and the government’s response to the presence of the disease in South Africa (including those local occurrences, on my reasoning) are inseparably part of the same insured peril; that but for the presence of those local occurrences (which of themselves were part of a broader health risk) the business interruption would not have occurred; and that the insured peril was the proximate cause of the business interruption and any consequent loss’

[28] In relation to the indemnity period, the second judgment, in addition to considering the provisions in the Schedule dealt with in the first judgment, had regard

³ This footnote is repeated here as it appears in the high court judgment: *Centriq Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 11; 2019 (3) SA 387 (SCA)] para 18; See also *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd* [2007] ZASCA 174; 2008 (3) SA 425 (SCA) para 7 (“[A]n exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify”). This is a pedigreed rule of interpretation: see *Norwich Union Fire Insurance Society Ltd. v SA Toilet Requisite Co Ltd* (“It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract”).

to item 3 thereof, where reference is made to an indemnity period in the context of limitation of cover for loss of revenue and increase in cost of working in consequence of the 'Damage' suffered by an insured. The formula provided ends as follows:

' . . . provided that the amount payable shall be proportionately reduced if the sum insured in respect of revenue is less than the revenue rentals where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual revenue rentals where the maximum indemnity period exceeds 12 months.'

[29] Considering item 3 of the Schedule, the second judgment went on to state the following:

'(a) Item 3 thus implicitly contemplates that the maximum indemnity period may exceed 12 months. It also draws no distinction between "main" cover for loss of revenue and increase in cost of working due to business interruption and the infectious diseases clause extension, whereas the listed extensions in the "Schedule" limit the indemnity period, almost without exception, to a maximum of 3 months.

(b) A related feature is that the insured is not given the option to take the extension of infectious diseases cover when regard is had to the plain wording of the "Schedule" read in light of the business interruption section of the policy as a whole. This cover instead appears to be embedded in the policy itself or put differently, in the main business interruption cover with its accompanying indemnity period of 18 months.'

[30] That then is the background to, and the context within which, the present appeal is to be decided. The parties' submissions before the high court and before us, and the high court's considerations and conclusions will become clearer later in this judgment when we reproduce in precise form the relevant Schedules and applicable parts of the policy.

[31] We pause, briefly, to record the core findings of this Court in *Guardrisk*.⁴ This Court held that a notifiable disease usually required a government response, and this entailed that the response was part of the insured peril.⁵ The Court went on to find that

⁴ *Guardrisk Insurance Company v Café Chameleon* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA); 2021 (2) SA 323 (SCA).

⁵ *Ibid* paras 19-20.



nothing in the language of the policy supported the interpretation favoured by the insurer, namely, that the policy covered only a response to a local outbreak and not a countrywide one.⁶ The Court went on to hold that the insured risk was Covid-19 and government's response to it, and but for the event – Covid-19 and the response – the business would not have been interrupted, making the outbreak within the stipulated radius the factual cause of the business interruption.⁷

[32] In heads of argument in this Court, counsel on behalf of Ma-Afrika and the Kitchen accused Santam of duplicity in that Santam, in its application for leave to appeal, had stated that the matter was one of national significance as it had industry-wide implications, whilst, at the same time, adopting a contrary posture in a public posting, where it claimed that this applied only to the Ma-Afrika policy and that each case depended on its own facts and the particulars of each policy. Furthermore, counsel criticised Santam, essentially, as being obstructive and unjustifiably resisting the claims. First, by insisting that it would pay out claims only in the event of an insured being able to prove loss in relation to a particular case or cases of Covid-19 within the prescribed geographical radius. Second, it relied on government's official response to Covid-19 to reject claims and was adamant that losses due to lockdown were excluded under the policy. As stated earlier, after this Court's judgment in *Guardrisk*, Santam was constrained to limit its appeal to the indemnity period, contending for a shorter period of indemnification, which is the issue to be confronted in this appeal. The present appeal was described by counsel for Ma-Afrika and the Kitchen as Santam's last stand. We shall, in the paragraphs that follow, examine closely the relevant parts of the policy, consider the parties' submissions, and determine whether this description is justified.

[33] It must be stated at the outset, as we will demonstrate in the paragraphs that follow, that this is not an easy policy to navigate. Counsel for Santam conceded as much. We reproduce immediately hereunder, the first page of the policy document of one of the five policies in question, which are all identical.

⁶ Ibid para 32.

⁷ Ibid para 45.

	
POLICY SCHEDULE	
Company:	SANTAM LIMITED
Administrators:	Hospitality and Leisure, a division of Santam Limited
Policy No:	HLU0000-01259
Office:	02 Cape Town
Broker:	00195 INTASURE (PTY) LTD WESTERN CAPE FSP Licence No: 13995
The Insured:	MA-AFRIKA HOTELS (PTY) LTD T/A BEST WESTERN CAPE SUITES HOTEL; THE VILLAGE CAFE; BEST WESTERN INTERNATIONAL, INC. and B-W INTERNATIONAL LICENSING, INC. (PROPERTY NUMBER 75023)
Postal Address:	PO BOX 890 STELLENBOSCH 7599
Territorial Limits:	All premises as stated in each section owned or occupied or used by the insured for the purposes of the Business, all situated in the Republic of South Africa, Namibia, Swaziland, Botswana, Lesotho, Zimbabwe, Mozambique and Malawi.
The Business:	HOTELIERS, RESTAURANTS AND RELATED ACTIVITIES
Policy Inception Date:	1/02/2011
Period of Insurance:	(a) From 1/07/2019 to 30/06/2020 (both dates inclusive). (b) This policy is renewable on a MONTHLY basis.
Anniversary Date:	1/07/2020
SIGNED at BEDFORDVIEW on 7 May 2020.	
	
On behalf of the Company	
Hospitality and Leisure, a division of Santam Limited P O Box 696, Bedfordview, 2008 Tel No: 0861 726 526 e-mail: brokers@handl.co.za Reg No: 1918/001680/06 VAT No: 4440102095 FSP No: 3416	

Date Printed: 07/05/2020 10:28 AM Policy No: HLU0000-01259
 MA-AFRIKA HOTELS (PTY) LTD T/A BEST WESTERN CAPE SUITES HOTEL; THE VILLAGE

GRAIL

[34] As can be seen from the first page, this is specialised hospitality and leisure insurance. Santam is identified as the insurer and Ma-Afrika as the insured.

[35] The page of the policy document that follows immediately thereafter is reproduced hereunder:

SCA Case No. 255/2021
 (WCC Case No. 6499/2020)
 (Record of Application - Page 25)

ANNEX "FA1" - Schedule to Policy No. HLU0000-01259 prepared
 by Hospitality and Leisure Insurance: a division of Santam Ltd in
 respect of Ma-Afrika Hotels (Pty) Ltd t/a Best Western Cape
 Suites Hotel and The Village Café signed on 7 May 2020

Policy No:	HLU0000-01259		
Insured:	MA-AFRIKA HOTELS (PTY) LTD T/A BEST WESTERN CAPE SUITES HOTEL; THE VILLAGE CAFE; BEST WESTERN INTERNATIONAL, INC. and B-W INTERNATIONAL LICENSING, INC. (PROPERTY NUMBER 75023)		
Policy Sections In Force	Additional Premium	Monthly/Renewal Premium	Refund Premium
Fire	0.00	3,121.12	0.00
Business Interruption	0.00	3,137.30	0.00
Theft	0.00	87.43	0.00
Money	0.00	139.21	0.00
Accidental Damage	0.00	25.22	0.00
Public Liability - Claims Made	0.00	206.27	0.00
Motor	0.00	2,316.59	0.00
Claims Preparation Costs	0.00	0.00	0.00
Extended Public Liability (SHA)	0.00	85.75	0.00
Extended Motor Liability (SHA)	0.00	84.06	0.00
Total Premium	0.00	9,202.95	0.00
(VAT included in premium)	0.00	1,200.38	0.00
(Commission included)	0.00	1,666.83	0.00
Fees			
Broker Fee	0.00	0.00	0.00
(VAT included in fees)	0.00	0.00	0.00
SASRIA			
(VAT included in SASRIA)	0.00	526.91	0.00
(Commission Included)	0.00	68.73	0.00
	0.00	78.82	0.00
TOTAL	0.00	9,729.86	0.00
Endorsement Details			
POLICY SCHEDULE COVID 19 EXCLUSION			
<p>(1) In terms of a ruling issued by SARS, this document together with proof of payment of premium constitutes an alternative to a tax invoice, debit note or credit note as contemplated in sections 20 (7) and 21(5) of the VAT Act respectively. SANTAM LIMITED, Reg No: 1918/01680/06, VAT No: 4440102095.</p> <p>(2) All sums insured and premiums are inclusive of VAT at 15%. First Amounts Payable (Excess amounts or Deductibles) are not subject to VAT.</p> <p>(3) Policy wordings are attached only in respect of those sections shown as insured in this index.</p> <ul style="list-style-type: none"> - At first issue of this policy (or any section thereof) please check to ensure that all pages of all included sections are contained in this document. - At renewal or revision, policy wordings will not be re-issued. This schedule will be updated and re-issued as necessary together with any section schedule, which may have changes. - Wherever endorsements appear on any schedule page these shall be subject otherwise to the Terms, Exceptions and Conditions of the Policy. <p><u>THIS PREMIUM NOTIFICATION IS A SUMMARY OF ALL TRANSACTIONS FOR THE MONTH OF MAY 2020 AND SUPERCEDES ANY PREVIOUS INVOICES FOR THIS MONTH.</u></p>			

[36] One sees from this page that the 'Policy Sections in Force' are those listed in the first block. Related premiums are listed alongside each. They are 'Fire, Business Interruption, Theft, Money, Accidental Damage, Public Liability – Claims Made, Motor,

Claims Preparation Costs, Extended Public Liability (SHA), and Extended Motor Liability (SHA)'. This is followed by Schedules that relate to each of these Policy Sections, including the 'Business Interruption' Schedule. The endorsement that appears under the totals for the premiums indicating that there is Covid-19 exclusion was not part of the policy at the time of the insured event.

[37] Crucially, for present purposes, in the Business Interruption Schedule, the categories of loss or indemnity that an insured can choose insurance cover for, should a peril materialise, are listed under eight items. We shall, for convenience, refer to this Schedule as the Main Schedule. The Main Schedule is set out hereunder in the exact form as it appears in the Policy. 'Loss of Revenue', as will be seen, is catered for and has the sum insured stipulated alongside it.

Business Interruption			
End	Details	Item	Sum Insured
24	Premises		
24	1 CNR DE VILLIERS AND CONSTITUTION STREETS, ZONNEBLOEM, CAPE TOWN		
24	Item 1 Gross profit (Difference basis)		
24	Item 2 Gross rentals		
24	Item 3 Revenue	3	R55,482,456
24	Item 4 Additional increase in cost of working	4	R2,017,544
24	Item 5 Wages (Number of weeks basis) Number of weeks		
24	Item 6 Fines and Penalties for breach of contract		
24	Item 8 Cancellation of Bookings		
24	Claims Preparation Costs		
24	Indemnity Period : 18 MONTHS		
Definitions		Included	
24	Uninsured costs (difference basis) : PURCHASES LESS DISCOUNTS ALLOWED, DISCOUNTS RECEIVED & BAD DEBTS	No	
24	Insured standing charges (addition basis)	No	
Extensions and Clauses			
24	Suppliers/Subcontractors (specified) : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Suppliers/Subcontractors (unspecified) : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Prevention of access - Extended cover : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	R28,500,000
24	Prevention of access (Insured Premises) : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Customers (specified) : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	R3,836,250
24	Public Utilities - insured perils : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Public Telecommunications Suppliers - insured perils : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Public Telecommunications Suppliers - extended cover : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	R28,500,000
24	Public Utilities : Extended cover	Yes	R28,500,000
24	Accidental damage (subject to a combined Business Interruption/Accidental damage limit as specified in the Accidental Damage section) : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	R100,000
24	Loss of Tourist Attraction : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Description of attraction/s		
24	Description of attraction/s : 24 Hour Time Excess / 3 Month Indemnity Period		
24	Loss of Aesthetic Attraction : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Loss of Key Tenant : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Description of Key Tenant		
24	Description of Key Tenant : 24 Hour Time Excess / 3 Month Indemnity Period		
24	Removal of Fallen Trees	Yes	R5,000
24	Bush Fire / Loss of game extension : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Loss of Liquor Licence extension : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Ventilation Failure Extension : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Auxiliary Power Failure extension : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Rail, Road and Air Service extension : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	
24	Franchise Fee Clause : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Franchisor Extension : 24 Hour Time Excess / 3 Month Indemnity Period	No	
24	Evacuation Costs : 24 Hour Time Excess / 3 Month Indemnity Period	Yes	R10,000
24	FIRST AMOUNTS PAYABLE		
24	MEMORANDUM		
	NOTE: Extensions under the Section are limited to an Indemnity Period of 3 Months.		

[38] The reader's attention is drawn to the words that appear at the end of the first large block of the Main Schedule: 'Indemnity Period: 18 MONTHS'. That should be contrasted with what appears under the title 'MEMORANDUM', at the end of the Schedule, where an '... Indemnity Period of 3 Months' is set out. The bold heading to the second large block of the table, namely, 'Extensions and Clauses' is also of significance. It is important to note that alongside every item, but two, in the second large block, under the heading 'Extensions and Clauses' a '3 Month Indemnity Period' is stipulated. The two excluded items are 'Public Utilities: Extended cover' and 'Removal of Fallen Trees'.

[39] What follows at the end of all the Schedules related to the Policy Sections in force, is what Santam refers to as a 'Premium Summary', which are effectively a repeat of what is contained in each Schedule, except that it includes columns in relation to each Schedule providing for a 'Rate', a 'Premium' and 'SASRIA'. The premiums to be paid by an insured in respect of Business Interruption Cover, in relation to the categories of loss set out within the second large block in the Main Schedule under "Extensions and Losses", are listed in that 'Premium Summary'.

[40] After the Premium Summary, the policy wording in relation to each of the Policy Sections in Force appears. The Business Interruption Section policy wording commences with 'DEFINED EVENTS' giving rise to loss, set out with reference to other sections of the policy, including under (vi), a wider category of '[a]ny other material damage insurance covering the interest of the insured but only in respect of perils insured under the fire section thereof'. As will become apparent later, this part of the policy is central to Santam's submissions that the indemnity period is three months and not 18 months as contended by Ma-Afrika and the Kitchen. For ease of reference, we reproduce hereunder that part of the policy:

The 'SPECIFIC CONDITIONS' that appear immediately after the 'DEFINED EVENTS',



BUSINESS INTERRUPTION

DEFINED EVENTS

Loss following interruption of the business in consequence of damage occurring during the period of insurance at the premises in respect of which payment has been made or liability admitted under:

- (i) Defined events 1,2,3,4,5,6,7 and 8 of the fire section of this Policy
- (ii) The buildings combined section of this Policy
- (iii) The office contents section of this Policy
- (iv) The theft section of this Policy
- (v) The goods in transit section of this Policy
- (vi) Any other material damage insurance covering the interest of the Insured but only in respect of perils insured under the fire section thereof (hereinafter termed Damage)

SPECIFIC CONDITIONS

1. The insurance under this section shall cease if the business is wound up or carried on by a liquidator or judicial manager or is permanently discontinued, except with the written agreement of the Company.
2. On the happening of any Damage in consequence of which a claim may be made under this section the Insured shall, in addition to complying with general conditions 6 and 7, with due diligence do and concur in doing and permit to be done all things which may be reasonably practicable to minimise or check any interruption of or interference with the business or to avoid or diminish the loss and in the event of a claim being made under this section shall, not later than thirty days after the expiry of the indemnity period, or within such further time as the Company may in writing allow, at their own expense deliver to the Company in writing a statement setting forth particulars of their claim together with details of all other insurance covering the loss or any part of it or consequential loss of any kind resulting therefrom. No claim under this section shall be payable unless the terms of this specific condition have been complied with and in the event of non-compliance therewith in any respect any payment on account of the claim already made shall be repaid to the Company forthwith.

Item 1 Gross Profit (Difference Basis)

The insurance under this item is limited to loss of gross profit due to:

- (a) Reduction in turnover and
- (b) Increase in cost of working

And the amount payable as indemnity hereunder shall be

- (a) in respect of reduction in turnover the sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period shall in consequence of the Damage fall short of the standard turnover
- (b) in respect of increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover which but for that expenditure would have taken place during the indemnity period in consequence of the Damage, but not exceeding the sum produced by applying the rate of gross profit to the amount of the reduction thereby avoided

Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the Damage, provided that the amount payable shall be proportionately reduced if the sum insured in respect of gross profit is less than the sum produced by applying the rate of gross profit to the annual turnover where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual turnover where the maximum indemnity period exceeds 12 months.

Item 1 Gross Profit (Additions Basis)

The insurance under this item is limited to loss of gross profit due to

- (a) Reduction in turnover and
- (b) Increase in cost of working

And the amount payable as indemnity hereunder shall be

- (a) in respect of reduction in turnover the sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period shall in consequence of the damage fall short of the standard turnover
- (b) In respect of increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover which but for that expenditure would have taken place during the indemnity period in consequence of the Damage, but not exceeding the sum produced by applying the rate of gross profit to the amount of the reduction thereby avoided

Less any sum saved during the indemnity period in respect of such of the Insured standing charges as may cease or be reduced in consequence of the Damage provided that the amount payable shall be proportionately reduced if the sum insured in respect of gross profit is less than the sum produced by applying the rate of gross profit to the annual turnover where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual turnover where the maximum indemnity period exceeds 12 months.

Memorandum

If any standing charges of the business are not insured under this section, then in computing the amount recoverable hereunder as increase in cost of working that proportion only of the additional expenditure shall be brought into account which the sum of the net profit and the insured standing charges bears to the sum of the net profit and all the standing charges.

Item 2 Gross Rentals

The insurance under this item is limited to

- (a) Loss of gross rentals and
- (b) Increase in cost of working

And the amount payable as indemnity hereunder shall be:

- (a) In respect of loss of gross rentals the amount by which the gross rentals during the indemnity period shall in consequence of the Damage fall short of the standard gross rentals.

relate to the headings of loss listed in the first large block of the Main Schedule, from item 1 to item 8. Loss of Revenue is catered for under Item 3 which reads as follows:

'BUSINESS INTERRUPTION

...

Item 3 Revenue

The insurance under this item is limited to

- (a) Loss of revenue and
- (b) Increase in cost of working

And the amount payable as indemnity hereunder shall be

- (a) In respect of loss of revenue the amount by which the revenue during the indemnity period shall in consequence of the Damage fall short of the standard revenue
- (b) In respect of increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of revenue which but for that expenditure, would have taken place during the indemnity period in consequence of the Damage, but not exceeding the amount of loss of revenue thereby avoided

Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of revenue as may cease or be reduced in consequence of the Damage, provided that the amount payable shall be proportionately reduced if the sum insured in respect of revenue is less than the revenue rentals where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual revenue rentals where the maximum indemnity period exceeds 12 months.'

[41] As can be seen from the last line of that part of the policy immediately preceding this paragraph, reference is made to instances where the indemnity period might exceed 12 months. That same concluding line appears in relation to other categories of loss, such as gross rentals and gross profits, under items 2 and 3.

[42] Items 4, 5, 6, 7 and 8 relate to loss or indemnity in respect of the following categories:

Item 4: Additional increase in Cost of Working;

Item 5: Wages (Number of Weeks Basis);

Item 6: Fines and Penalties for Breach of Contract;

Item 7: Loss of Use (Levies); and

Item 8: Cancellation of bookings (If stated in the Schedule to be included).

Following on item 8 (Cancellation of bookings), the heading 'Definitions' appears, ostensibly relating back to the listed categories of loss in Items 1 to 8, such as revenue, gross profits, etc. Under that heading the following definition of 'indemnity period' appears:

'The period beginning with the commencement of the Damage and ending not later than the number of months thereafter *stated in the Schedule* during which the results of the business shall be affected in consequence of the Damage.' (Our emphasis.)

[43] In relation to further items of loss that appear under the heading 'Extensions and Clauses' in the Main Schedule, reproduced under para 37 above, within the second large block, such as 'Loss of Tourist Attraction' and 'Loss of Aesthetic Attraction', the policy in another part of the Business Interruption section, refers to the indemnity period as follows:

'Loss of Tourist Attraction Extension (If stated in the Schedule to be included)

Loss as insured by this Section resulting in interruption or interference with the Business due to prevention of access or damage to the specified tourist attraction stated in the Schedule. The indemnity period in respect of this extension shall not exceed 3 months.

Loss of Aesthetic Attraction (If stated in the Schedule to be included)

Loss as insured by this Section resulting in interruption or interference with the Business due to prevention of access or damage to the specified aesthetic attraction stated in the Schedule. The indemnity period in respect of the extension shall not exceed 3 months.'

[44] Still under 'Extensions and Clauses', certain other perils, against which insurance cover is provided, are listed:

'BUSINESS INTERRUPTION

...

Infectious Diseases/Pollution/Shark and Animal Attack Extension

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

- (a) Murder or suicide occurring at the Premises
- (b) Notifiable Disease occurring at the Premises or attributable to food or drink supplied from the Premises
- (c) Closure of the Premises due to defective sanitation, vermin or pests on the order of the competent local authority
- (d) Notifiable Disease occurring within a radius of 40 kilometres of the Premises
- (e) Witness call and/or jury service by the Insured or any of the insured's directors, partners or employees
- (f) Chemical or oil pollution of beaches, rivers or waterways within 40 kilometres of the Premises

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

Special Provisions

- (a) “Notifiable Disease” shall mean illness sustained by any person resulting from
- (i) Food or drink poisoning, or
 - (ii) Any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them
- Excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.’

[45] Those are the most significant parts of the policy, against which the issue to be addressed in this appeal are to be decided. We shall, however, in the discussion that ensues refer to other parts of the policy wording and to other Schedules within the Business Interruption section.

[46] We now turn to the interpretation of the policy and the Schedules. The approach in interpreting insurance contracts was recently restated by this Court in *Centriq Insurance Company Ltd v Oosthuizen and Another (Centriq)*, where the Court held: ‘[I]nsurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.’⁸

[47] Santam’s contention that the indemnity period is limited to three months, primarily rests on the Defined Events clause of the policy, set out at para 40 above in the Business Interruption section of the Policy, and on the interpretation of the words ‘Extension under the Section’ under ‘MEMORANDUM’, appearing at the end of the Schedule reproduced in para 37 above, and to the ‘Extensions and Clauses’ part of the Business Interruption Section of the Policy.

⁸ *Centriq Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 11; 2019 (3) SA 387 (SCA) para 17.

[48] The submissions on behalf of Santam on how the policy should be construed are, for reasons that will become clear later, best dealt with by reference to the relevant parts of Santam's heads of argument, which we reproduce hereafter, including for convenience, the restatement in the submissions, of what appears at para 40 above. Santam contends that:

7. The main cover under the Business Interruption Section of the Policies is for:
- “Defined Events**
- Loss following interruption of the business in consequence of damage occurring during the period of insurance at the premises in respect of which payment has been made or liability admitted under:
- (i) Defined events 1,2,3,4,5,6,7, and 8 of the fire section of this Policy
 - (ii) The buildings combined sections of this Policy
 - (iii) The office contents section of this Policy
 - (iv) The theft section of this Policy
 - (v) The goods in transit section of this Policy
 - (vi) Any other material damage insurance covering the interest of the Insured but only in respect of perils insured under the fire section thereof (hereinafter termed Damage)”.
8. Notwithstanding the fact that the words “hereinafter termed Damage” appear in brackets as part of sub-clause (vi) and on a strict grammatical construction would apply only to that sub-clause, it is plain that when read in context they must refer to all of the Defined Events. If they did not, the business interruption insurance for events (i) to (v) would not work, because the quantification provisions depend upon there having been “Damage”. “Damage” therefore means loss following on business interruption in consequence of any one of the Defined Events.
9. Business interruption insurance is designed to cover losses (including a loss of profits or revenue) consequent upon a peril insured against, such as fire or other catastrophe. In older phraseology it was referred to as consequential loss insurance. An ordinary insurance policy covering property would provide cover only against physical damage and not against other financial losses.
10. This is reflected in the main business interruption wording of the Policies. The Defined Events reflect a traditional formulation. Damage is defined with reference to *actual damage* to the insured property by one of the insured perils listed. The consequential business interruption cover is therefore triggered by physical damage to the insured's premises by a listed peril.
11. The Business Interruption wording defines the indemnity period as follows:

“Indemnity period – The period beginning with the commencement of the Damage and ending not later than the number of months thereafter stated in the schedule during which the results of the business shall be affected in consequence of the Damage.”

12. The reference to “the schedule” is to the Business Interruption Schedule at p29. This schedule identifies two different indemnity periods – 18 months for the main business interruption cover and 3 months for the cover provided by all extensions.

13. In this case, none of the Defined Events have occurred and there has been no physical damage at Ma-Afrika’s premises. Ma-Afrika did not therefore seek to be indemnified under the main Business Interruption Section of the Policies. Ma-Afrika’s right to an indemnity is under the Infectious Disease Extension. The extensions provide non-damage cover because, unlike the main business interruption cover, they do not require physical damage to the insured’s property.

14. The Policy makes it clear that the indemnity period for the ‘Defined Events’ in the main part of the Business Interruption Section is 18 months, whereas the indemnity period for all extensions to that cover (without exception) is 3 months:

14.1. The general insuring clause reads as follows (with our emphasis):

“Subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by or on behalf of the Insured and receipt thereof by or on behalf of the Company, the Company specified in the Schedule agrees to indemnify or compensate the Insured by payment or, at the option of the Company, by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance and as otherwise provided under the within sections up to the sums insured, limits of indemnity, compensation and other amounts specified”

14.2. The leading part of the Schedule, lists the sections that are in force, including “Business Interruption”, and then provides that

“Policy wordings are attached only in respect of those sections shown as insured in this index” (emphasis added).

...

14.4. The Schedule includes the Business Interruption Schedule, which records in items 3 and 4 the main basis of cover (Revenue and Additional increase in cost of working). The more detailed provisions of these two items are to be found in the main business interruption wording.

14.5. The Business Interruption Schedule states an indemnity period of “18 MONTHS” which is the indemnity period applicable to the main business interruption cover. Then

follow two definitions . . . a list of extensions and clauses; and the deductible (none specific to this Section). This is then immediately followed by the Memorandum:

“MEMORANDUM”

NOTE: Extensions under the Section are limited to an Indemnity Period of 3 Months”

14.6. The Memorandum is not, as the High Court found, “tucked away at the end of the Schedule in fine print”. It is part of a single-page Business Interruption Schedule, which sets out details of the cover in a similar way and with the same prominence.

14.7. The Memorandum refers in terms to extensions under “the Section”. The capitalisation makes entirely clear that this is a reference to the Business Interruption Section of the Policy.

14.8. Memoranda are commonly used throughout the policy Schedule reflecting the scope of the cover and other provisions; for example, the limit of claim preparation costs, extending cover in certain instances, or limiting in others.

14.9. The Infectious Disease Extension . . . extends the insurance to provide cover for “Loss as insured by this Section resulting in interruption or interference with the Business due to . . . Notifiable Disease occurring within a radius of 40 kilometres of the Premises . . .” The effect of the introductory word is to include business interruption loss of that kind within what is insured by this section – and therefore into the concept of “Damage”.

14.10 The Infectious Disease Extension is in both form and substance an extension. The indemnity period for the Infectious Disease Extension is therefore that stated in the Schedule, which is plainly “an Indemnity Period of 3 Months”. (The italicised parts are our emphasis)

[49] It is, in our view, hardly possible to imagine a more tortured, convoluted and intricate an approach to the reading of the policy. It appears to us to be a desperate re-running by Santam of the submissions, accepted by courts in some foreign jurisdictions, especially in the United States of America – discussed in the judgment of the high court⁹ – that claims for business interruption losses due to Covid-19 must fail for lack of proof of ‘physical damage’, on the basis that that is what standard business interruption cover traditionally contemplated. That issue was put to rest in *Guardrisk*, which held the insurer in that case liable for the business interruption losses due to the outbreak of the pandemic, extending to and including government’s

⁹ At paras 51 *et seq.*

response. It will be recalled that in the high court and in *Guardrisk*, an attempt was made to restrict that part of the policy in regard to a notifiable disease to an occurrence that occurred physically at the premises or within a radius restrictively interpreted. That failed.

[50] It is clear, in our view, whatever the erstwhile 'traditional approach' might have been in relation to providing insurance cover, insurers have in the past provided cover against the peril of a notifiable disease. Since the outbreak of the pandemic, not unsurprisingly, given its duration and the resulting devastation, they appear no longer to offer and provide such cover.

[51] The convoluted reading of the policy and its Schedules proposed by Santam also seeks to overcome the apparent irreconcilable contradiction between the indemnity period of 18 MONTHS at the end of the first large block of the Schedule in para 37, with the three-month period at the end of it. We shall, in the paragraphs that follow demonstrate the fallacy of Santam's approach.

[52] We are firmly of the view that in interpreting the policy, the starting point is to look to see, from the Schedule on the second page of the policy, which 'Policy Sections' were in force. They included a 'Business Interruption Section'. The next step is to consider the perils which might result in business interruption, in respect of which the insured would enjoy insurance cover. The perils, indisputably, included notifiable infectious diseases.

[53] One would proceed from that point to consider for which losses, flowing from business interruption due to a notifiable infectious disease, Ma-Afrika and the Kitchen would receive insurance cover. In that exercise, one would proceed to the Main Schedule. The first large block on that page indicates clearly that loss of 'Revenue' and the 'Additional increase in cost of working' that ensued from that *and* other perils would be covered. That, from the policy wording, is what the insured sought and what Santam provided cover for. Ma-Afrika and the Kitchen or any other business entity, looking at what appeared at the end of that first large block of the Main Schedule,

would be comforted to see that indemnity in relation to those losses would extend for a period of 18 months. It is as simple as that.

[54] Under 'Extensions and Clauses', within the second large block on that Schedule, there is a further menu or laundry-list, of which an insured might select extended cover in relation to other forms of loss, flowing from business interruption, due to any of the listed perils that might ensue. Twenty-four extensions are listed. From this block, Ma-Afrika and the Kitchen chose 13 out of 24 extensions. This part of the Schedule also lists the 'Sum Insured' next to some of those items indicated with a 'Yes'. For some of the items no sum insured is indicated. For instance, there is an amount of R5000 allocated to 'Removal of fallen trees', whilst no sum insured appears for the item, 'Loss of Liquor Licence extension'.

[55] Importantly, the Premium Summary Schedule referred to earlier, provides details of the sum insured, alongside categories of loss, as well as the associated premiums. So, one would see, against 'Loss of Revenue and 'Additional increase in cost of working', a repeat of the sums insured that appear in that part of the Schedule reproduced in para 37 above, and alongside each of those two items a premium is stipulated.

[56] For most of the 24 extensions in the Main Schedule, a premium is calculated. While a 'notifiable infectious disease' is peculiarly located under 'Extensions and Clauses' in the policy wording, perhaps due to the erstwhile 'traditional approach' to extending insurance cover only in relation to physical damage, as alluded to by Santam, the insurance industry has evolved and where it is located must be seen in that light. In the present formulation of the Policy, it is not an 'extension' to the categories of loss set out in the first large block of the Main Schedule. That the Policy itself has not evolved and has not been refined to make for easy reading is due to no fault on the part of the insured. It is significant that 'a notifiable disease' does not appear on the list in the Premium Schedule. It is a peril and not a category of loss. Once again, it is as simple as that.

[57] We now turn our focus to the significance of the stipulated '3-month' indemnity period in various parts of the policy. Alongside each of the listed 'extensions' in the second large block in the Main Schedule, appearing in para 37 above, there is an inscription '3 Months Indemnity Period', except for two items, namely, 'Public Utilities: Extended cover' and 'Removal of fallen trees'. The compelling conclusion is that each of the listed items are those to be selected from, and those indicated by a 'Yes', were agreed by the contracting parties as 'extended cover' for business interruption losses, but with indemnity for a shorter duration, which explains why the trouble was taken to list the shorter indemnity period next to each item. It also explains the additional premiums in the Schedule referred to above.

[58] In the policy wording, as set out in para 43 above, under 'Loss of Tourist Attraction Extension (if stated in the Schedule to be included)' and 'Loss of Aesthetic Attraction Extension (if stated in the Schedule to be included)' a statement is made that '[t]he indemnity period in respect of this extension shall not exceed 3 months'. Further down, under 'Surrounding Property/Loss of Key Tenant extension (if stated in the Schedule to be included)', a 3-month indemnity period is also specified by inclusion of these words '[n]otwithstanding the indemnity period reflected in the Schedule, the indemnity period in respect of this extension shall not exceed 3 months'. Against that, it is notable that in the policy wording in relation to Loss of Revenue, as pointed out in para 40 above, the possibility of an 18-month indemnity is envisaged. And as pointed out in para 41 above, so too, in relation to Items 1 and 2, namely, 'Gross Profit' and 'Gross Rentals'.

[59] This takes us to the meaning of the expression 'under the Section' appearing below the second large block of the Business Interruption section of the Main Schedule. The word 'section' is not defined in the policy. Counsel for Santam submitted that 'under the Section', where it appears at the end of the Main Schedule could only mean 'under the Business Interruption section' in the policy, in support of the thesis that in respect of business interruption cover beyond that of physical damage, one was dealing with an 'extension' in respect of which, indemnity cover was limited to 3 months. He further stated that capitalisation (assuming of the word Memorandum) makes this point clear. He also referred to paragraph 3 of the second

page of the Schedule at para 35 above, where the following is stated '(3) Policy wordings are attached only in respect of those sections shown as insured in this index.'(Our emphasis.)

[60] The word 'section' appears many times in the policy, both in Schedules and policy wording, and is not as consistently applied as Santam's counsel contends. While it may primarily refer to the 'Policy Sections in Force', it is not always used in that sense in all instances in the Schedules and the policy. Context becomes important in understanding its meaning. Counsel for Ma-Afrika and the Kitchen referred to use of 'this section' in the second block of the Theft Section in the Schedule where it is mentioned that 'this section will only be effective on the following provisions . . . ' In that block 'section', refers to 'Guest/Customer theft Extension' and not to the overall 'Theft Section'. Other examples where use of 'this section' may not be referring to the 'main section' but to sub-topics are in the Fire section. In paragraphs such as 'Kitchen Extraction Maintenance', 'Thatch Roof Penetration', 'Bush Clearance Standard' and others, a statement is made 'Cover provided by this section...'. There is no inherent magic to the capitalisation. The '18 MONTHS' at the foot of the first large block of the Schedule is capitalised, arguably to emphasise that it would be the indemnity period in relation to the list immediately above it.

[61] Having regard to the analysis of the text, the context, as well as the purpose of the policy and the Schedule, the words 'under the Section' should be understood to refer to the 'Extensions and Clauses' section within the second large block of the Schedule. Our conclusions on the interpretation of the policies is not only cohesive, but makes business sense, in contrast to the contorted approach advanced on behalf of Santam. In our view the indemnity period in relation to claims for loss of revenue due to business interruption ineluctably is 18 months.

[62] Given that the policies are admittedly difficult to navigate, and assuming, at best for Santam, that there is a meaningful degree of uncertainty concerning the indemnity periods, a conclusion might be reached that on that aspect the policies are ambiguous. Of course, that for obvious reasons is a conclusion that Santam is loath to concede because the long-standing *contra proferentem* rule will apply against it and the

interpretation advanced on behalf of Ma-Afrika and the Kitchen must triumph. Against the conclusions set out above, we do not need to engage in the further debate of whether the indemnity period is a limitation and therefore should be restrictively applied. It is also not necessary to engage in a discussion concerning Santam's criticism of the description by the high court of insurance policies being a social safety net. Finally, there is force in the argument on behalf of Ma-Afrika and the Kitchen, which essentially is that Santam has twisted and turned and changed tack in order, studiously, to avoid liability. Hopefully that is now at an end. The high court's conclusion that the indemnity period is 18 months cannot be faulted and the appeal must thus fail.

[63] As to costs, both sides engaged at least three counsel. In view of the importance of the issues raised on appeal, it was agreed between the parties that the use of three counsel was justified.

[64] The following order is made:

The appeal is dismissed with costs including costs occasioned by the employment of three counsel.

M S NAVSA
ACTING DEPUTY PRESIDENT

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

For appellant: T Plewman QC (appearing with L A Rose-Innes SC and M Maddison)

Instructed by: Norton Rose Fulbright South Africa Inc., Cape Town
Webbers Attorneys, Bloemfontein

For respondents: J J Gauntlett SC QC (appearing with
M du P Van der Nest SC, G Elliot SC, P Long and
J Mitchell)

Instructed by: Thomson Wilks Inc., Cape Town
Honey Attorneys, Bloemfontein.