

DISPUTES

It takes Three to Tango – Causation in South African Insurance Law vis-à-vis COVID-19, Business Interruption, and lockdowns

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Revisiting causation in South African insurance law in light of the national lockdown occasioned by the COVID-19 pandemic, and the effect on business interruption (BI) insurance.

"Common sense is the final arbiter in determining what is the proximate cause of a loss. The choice of the real or effective cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it." – Laws of Insurance, Preston and Colinvault

Worldwide, insurers and policyholders with business interruption (BI) insurance have drawn their weapons. The first salvos have been fired in South Africa in the case of *Café Chameleon v Guardrisk Insurance* in the Western Cape High Court.^[1] The learned Le Grange J, in a judgment delivered near the end of June 2020, found that the insurer was liable for losses resulting from business interruption caused by COVID-19 (being a notifiable disease in terms of the BI policy). It is possible this case may reach the Supreme Court of Appeal or even the Constitutional Court on appeal, given the arguably significant public interest at stake. The Financial Services Conduct Authority has similarly expressed a view that the *"National Lockdown cannot be used by any insurer as grounds to reject a claim. Such conduct goes against the principles of treating customers fairly and breaks down confidence and trust in the insurance sector."*^[2] It is against these developments that this article seeks to consider questions regarding causation in insurance which have been thrust into focus.

By way of background, governments worldwide have almost unanimously implemented lockdowns of varying degrees and for different periods in response to the COVID-19 pandemic. The consequent interruption of businesses operations has impacted businesses severely. Many businesses have sought to mitigate and recover from their losses sustained as a result of the lockdown and the significant business interruption (whether these losses are loss of revenue or profit or increased expenses). One such avenue of relief is business interruption insurance, which certain businesses may have in place. Werksmans has previously advised on BI insurance in general terms.^[3]

BI insurance generally covers losses sustained by businesses (deemed damage) which result from business interruption or interference caused by physical damage to the premises, whether it be damage caused by fire, flood or other miscellaneous perils. BI policies may contain specific extensions, including insured perils such as infectious or contagious diseases, which has recently turned into a hotly-contested battleground between insurers and policyholders.

Businesses, being the BI insurance policyholders, are submitting insurance claims to insurers under the "infectious or contagious diseases" specific extension of their BI insurance policies on the basis that the insurers have indemnified their losses in the policies.

It appears to us, having considered the general response given by insurers in South Africa to policyholders, that many insurers hold a contrary view to the policyholders. Essentially, the insurers' perspective is that the business interruption (as a whole) in South Africa was not caused by the COVID-19 outbreak, but by the lockdown (being a legislative act and therefore distinct from the outbreak). A host of insurers have opted for a narrow interpretation of causation, only accepting claims where a specific confirmed case of COVID-19 has occurred and directly led to business interruption. For example, where an employee tests positive and the business has to suspend operations temporarily to allow for office sanitisation, only the losses sustained on those days will be covered. The practical result is that many insurers are rejecting business interruption claims based on the occurrence of the South Africa government-imposed lockdown, which affected the ability of businesses to operate legally.

This occurrence makes it worth examining afresh how causation, in the insurance law context, is understood and applied by South African courts. Insurance contracts are notoriously esoteric, and the devil is in the detail. The specific wording used in a BI policy and the infectious diseases specific

extension in question must be subjected to interpretation to determine the nature and degree of causation required. The soundness of contentions regarding causation will depend on the proper construction of the clause.^[4] Werksmans legal experts can provide you with specific advice on your BI policy, offering you peace of mind before taking steps.

Causation in insurance contracts in South African law

An insurance contract's purpose is for the insurer to indemnify the insured against losses incurred from insured risks. This principle was aptly stated by Buchanan J in *Malcher & Malcomess v King Williams Town Fire & Marine Insurance & Trust Co* as follows –

"The very essence of the contract of insurance is that it is a contract of indemnity; its sole and exclusive object is to procure for the insured indemnity, in the strictest sense of that word, for any losses he may sustain, through the agency of the risks against the effect of which the underwriter, by the terms of his policy, stands pledged to protect him."

Generally, a determination of whether the contract of insurance insures the loss sustained by the insured party depends principally on whether the loss was caused by a risk/peril that has been insured against. This requires there to be a causal nexus or link between the peril and the loss. Causation may not always be required – if, for example, the insurer is liable in the event of the death of a person resulting from any cause. The test for determining what constitutes a sufficient causal link to establish a claim depends on the intention of the parties as expressed in the insurance contract.

Causation is, by default, determined by the *proximate cause test*, although the parties may choose to alter this in the insurance contract expressly. This test means that the insurer will only be liable if the insured can show that the loss was proximately caused by the peril insured against. The causation question is simple where there is a single cause, but the difficulty arises where there are two or more possible causes, such as the national lockdown and the outbreak of COVID-19.

As in the case of delict and criminal law, causation (the proximate cause test) requires a two-stage analysis:

1. Firstly, the factual causation enquiry, the "but for" test (*causa sine qua non*), entails asking whether the relevant conduct caused or materially contributed to the harm giving rise to the claim.^[5] In the present case, the formulation would be as follows: but for the outbreak of COVID-19, the insured's business would not have been interrupted.
- Secondly, the "remoteness" or legal causation enquiry, asks whether a cause and its consequence are sufficiently or reasonably closely or directly linked, or whether the loss is too remote. The cause (COVID-19), and the result (business interruption) must have a causal connection that is "sufficiently real and close".^[6] The legal rule to be applied is the *causa proxima non remota spectator* (it is the proximate cause and not the remote cause that must be looked into).

It is the interpretation and application of the second leg (the remoteness enquiry) that ultimately will determine whether insurers will be held liable for the business interruption, given that factual causation will be evident in most cases. This is inherently a flexible enquiry depending on the facts of each case where a host of factors play a part in the determination, including reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens* (an independent, intervening cause), legal policy, reasonability, fairness and justice.^[7] It may be that these factors, although finding that the harm is not too remote, result in an unfair imposition of liability and that for this reason legal causation won't be established. Questions of legal policy, such as the "floodgates of liability" for instance, would come into question.

The remoteness enquiry is doubly tricky where there are multiple, intervening, or successive causes for a single consequence. Our courts have, over time, therefore taken a "common sense" approach to causation, and the principles governing the remoteness enquiry in insurance cases reflect this in no small degree, with certain exceptions. A fair and business-like interpretation is to be preferred.

A relevant example of this principle is where an intervening occurrence is merely a direct consequence of an insured peril which occurred earlier, the insurer would be liable. In the case of *Road Accident Fund v Russell*,^[8] the insured party was involved in an accident, later developing severe mental illness which resulted in suicide. The court held that the suicide was not an intervening cause and that the insured party's death was, for the purposes of the life insurance contract, caused by the accident – there was a sufficient causal connection between the death and the accident.

For COVID-19 and business interruption, the questions are this: is there a sufficiently close and real connection between the outbreak of the disease and the interruption of the insured's business; and, was the connection/chain of causation broken by the imposition of the national lockdown? This may be complicated by an insurer's assertion that the imposition of the lockdown preceded the outbreak of COVID-19 in the particular radius stipulated in the specific extension of the BI policy. Questions about the stage at which insurers would be liable comes into play. In this regard, the loss may be attributable as much to the lockdown as to the COVID-19 outbreak in the event that they are held to be concurrent in their operation and continue to operate on the insured's business until loss is caused.^[9]

Le Grange J, in the *Café Chameleon* case, looked at the causation enquiry and made some interesting findings. Concerning factual causation, the learned Judge rejected the insurer's claim that the policyholder failed to demonstrate that its business was interrupted due to the COVID-19 outbreak and not due to the regulatory regime (lockdown), finding that there was factual causation. There was indeed a "*clear nexus between the Covid-19*

outbreak and the regulatory regime that caused the interruption of the... business".^[10] The court dismissed the argument that the lockdown was introduced only to "flatten the curve" and had little to do with the COVID-19 outbreak.

Regarding legal causation, the learned Judge held that the business interruption was not too remote and that it is fair, reasonable and just that the insurer be burdened with the liability of compensating the insured for its losses due to business interruption. The court was not convinced by the arguments presented by the insurer's counsel on floodgates of liability and the potentially detrimental impact an adverse finding against the insurer would have on the insurance industry as a whole. While there may be general concerns, insurance contracts are usually different in wording and ambit, and so a "one size fits all" approach was not appropriate in the context.

On similar facts, different policies may result in different outcomes. There may probably be a host of outcomes for different policyholders, and the principles mentioned above may even further be elucidated.

Conclusion

Given the host of factors at play in determining causation, especially in the legal causation enquiry, it is worth keeping an eye out for how legal arguments develop in the COVID-19 / business interruption scene.

Whether or not there are technical grounds to accept or repudiate claims, it is worth recognising that monetary compensation is not the only thing at stake in these BI claims. Ongoing business and insurer relationships are vital to the health of the South African economy and should be nurtured and maintained for the sake of all. Parties should avoid a case of not seeing the wood for the trees and hopefully engage in honest and good faith engagement concerning these insurance claims, in the recognition that South Africa will only defeat COVID-19 with a united mindset reflective of the spirit of Ubuntu underlying our Constitution.

[1] Case no 5736/2020, judgment delivered on 26 June 2020.

[2] FSCA Press Release dated 9 July 2020.

[3] <https://werksmans.com/legal-updates-and-opinions/covid-19-and-business-interruption-insurance-is-your-business-covered/>; <https://werksmans.com/legal-updates-and-opinions/is-my-business-insured/>.

[4] *Commercial Union Assurance Co of South Africa Ltd v Kwazulu Finance and Investment Corporation and another* [1995] 2 All SA 628 (A) at 630.

[5] *Petropulos and Another v Dias* [2020] ZASCA 53 at 46.

[6] *Wells v Shield Insurance Co Ltd* 1965 3 All SA 132 (C) 870F.

[7] As noted by Corbett CJ in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-765B.

[8] 2001 2 SA 34 (SCA).

[9] *K&S Dry Cleaning Equipment (Pty) Ltd and another v South African Eagle Insurance Co Ltd and another* [2000] JOL 7255 (W).

[10] *Café Chameleon* Para 74.



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