

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG

CASE NO: 085183/23
DOH: 21 November 2024

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: _____
 SIGNATURE	
20 May 2025 DATE	

LEWIS GROUP LIMITED

Applicant

and

EMERALD RISK TRANSFER PROPRIETARY
LIMITED

First Respondent

HOLLARD INSURANCE PROPRIETARY
LIMITED

Second respondent

INTERGRATED INSURANCE ADMINISTRATORS
PROPRIETARY LIMITED

Third Respondent

SANTAM LIMITED

Fourth Respondent

GUARDRISK INSURANCE COMPANY LIMITED

Fifth Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 20 May 2025

JUDGMENT

MALI J

Introduction

- [1] In this counter application, the respondents seek a stay of the proceedings in the main application, in order for the referral of relief sought by the applicant to arbitration.
- [2] The applicant Lewis Group (Lewis) carries on business as a retailer of furniture, home appliances, and other related goods through a number of stores under various names. It has several stores in and outside the borders of South Africa.
- [3] On 29 July 2019 Lewis entered into an insurance Policy agreement for the indemnification against losses with the first respondent, and other

respondents as co-insures. The duration of Policy is from 1 April 2019 to 31 March 2020. In the main application the applicant seeks relief against first and third respondents, and in the alternative against second, fourth and fifth respondents.

- [4] Lewis claimed for loss suffered or to be indemnified in the amount not exceeding **R1, 000, 000 for each store out of its 628 stores** as a result of business interruption due to Covid 19 lockdown. The insurers tendered up to **R1,000 000 for losses sustained by Lewis as a whole.**

Main application

- [5] On 25 August 2023 Lewis instituted the main application seeking an order declaring that the first to third respondents are liable as co- insurers to indemnify the applicant in terms of Specific Extension 7 (f) of the Business Interruption (BI) Section C of the policy, for interruption or interference suffered between 26 March 2020 and at least 18 May 2020 (both days inclusive) in consequence of the outbreak of Covid – 19 within a radius of 20 kilometers of Lewis' premises, in an amount not exceeding R1, 000,000 (plus VAT) for each premises (including its retail stores) at which the requirements of Specific Extension 7 (f) were met.
- [6] Lewis also seeks a declaration that the indemnity period for its loss is 12 months and thus extends beyond 30 March 2020, the end date of policy. Finally Lewis seeks relief to ensure the quantification of its claim, in the event it obtains the declaratory relief, that its claim should be quantified

by reference to further evidence with certain conditions. It is not necessary to detail the conditions in this application.

- [7] On 17 October 2023 the respondents filed the counter application referred to in paragraph 1 of this judgment, to the effect that main application brought by Lewis be stayed pending referral of the relief sought by Lewis in the main application for determination by way of arbitration in terms of clause 9 of the “General Clauses” of the Policy.

Issue/s for adjudication

- [8] This court is called upon to adjudicate the counter-application in the form of stay application. In the event that stay of the main application is successful, Lewis seeks its conditional counter-application in terms of 3 (2) (b) of the Arbitration Act 42 of 1965 (Arbitration Act) to be adjudicated. The conditional counter-application is referred to as such, since its conditional upon the outcome of the stay application. Lewis’s conditional counter-application is that the court must exercise its discretion not to refer the dispute to arbitration.

Counter application

- [9] The respondents seek an order for stay of application. Section 6 of the Arbitration Act provides for Stay of legal proceedings where there is an arbitration agreement. S 6 (1) reads as follows:

“(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the

agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.”

Section 6 (2) provides:

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.”

[10] Clause 9 of the Policy provides for arbitration, as follows:

“ARBITRATION *If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator or arbitrators to be appointed by the parties concerned in accordance with the applicable statutory provisions in force. The making of an award shall be a condition precedent to any right of action against the Insurer to recover such amount in dispute.”*

[11] The submission made on behalf of the respondents is that having admitted the liability , the difference is to the amount to be paid. Lewis' claim comprises the aggregate of different losses at different stores and is submitted as one claim, based on the interruption of one business. It is a claim by one insured, arising from one defined event and results from the same occurrence.

[12] It is further submitted that on a proper construction, Section C of the policy provides for indemnification by the insurers of Lewis for

“interruption of or interference with the Business in consequence of a Defined Event occurring during the Period of Insurance.”

[13] According to the respondents on the proper construction of the Policy, Lewis' claim in terms of the ICD extension is sub limited to R1 Million (R1m) in respect of Lewis's business as a whole. Lewis's claim of R422 907 000m borne out of claiming R1m per store or premises, results in unbusinesslike interpretation.

[14] Furthermore, respondents raise an issue of prescription. Lewis's claim for up to R1m for each of its individual stores constitutes a “debt” as contemplated in Section 11 (d) of the Prescription Act. Lewis' entitlement to the claim arose on 27 March 2020, therefore and Lewis had knowledge of the debt then. It only instituted proceedings on 25 August 2023.

[15] **In Crompton Street Motors cc/ t/a Wallers Garage Service Station v Bright Idea Project 66 (Pty) Ltd t/a All Fuels¹ it is stated:**

“the language of s 6 (2) directs a court acting under that section to stay proceedings where such an application is made unless sufficient countervailing reasons exist for the dispute not to be referred to arbitration. The words ‘ no sufficient reason why the dispute should not be referred to arbitration denote that the standard position is that a stay should be granted upon request. The onus of satisfying the court that the matter should not be referred to

¹ (CCT 19/20) [2021] ZACC 24; 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC) (3 September 2021)

*arbitration and instead heard by the High Court is on the party who instituted legal proceedings. the discretion of the court to refuse arbitration in the circumstances should be exercised judicially, and only when a ‘**very strong case**’ has been made out. This high threshold for refusal is because the party who does not want the matter referred to arbitration ‘is seeking to the deprive the other party of the advantage of arbitration to which the latter is entitled.’”*

[16] From the above, it is plain that the burden to prove that the dispute should not be referred to arbitration lies squarely on Lewis’s shoulders. Lewis’ case is that on a proper construction of the relevant provisions of the policy, the insurers are liable to indemnify Lewis for the loss it has suffered pursuant to the interruption of its business or the business of each of its stores in an amount which does not exceeding R1m plus VAT for each of the stores which meet the requirements for indemnity under Specific Extension 7 f). Therefore, the provisions of the Policy need to be interpreted by the court in order to determine the amount of the indemnity owed to Lewis.

[17] Lewis further submits that its claim is justified by a proper construction of Specific Extension 7 f) as well as the sub-limit having regard to the language, context, and purpose in what is often referred to as the unitary exercise. Section 7 f) deals with Extended damage, therefore covering outbreak of Infectious or Contagious disease within a radius of 20 kilometers of the Premises. One of the relevant clauses pertains to sub-limits and it reads as follows:

“LIMITS OF LIABILITY

"The insurers maximum Limit of Liability under this Policy shall be R300 000 000 (Vat Exclusive) Head office and R100 000 000 Stores and Storage depots each and every Occurrence.

However in respect of the Limit of Liability reflected above and the Sub-Limits described under the headings " Property Damage and Business Interruption combined" and Engineering and Business Interruption combined", the liability of the Insurer shall be limited to the amount stated thereunder and any one Occurrence and shall not accumulate with the separate Property Damage , Engineering or Business Interruption Sub- Limits.

The Limits of Liability and Sub- Limits shall apply :

- i) separately in connection with each and every Occurrence, unless otherwise stated herein;*
- ii) in excess of the Deductible."*

[18] Lewis further submits that the dispute is about a declaratory order, whether the respondents are supposed to indemnify Lewis for one store or more stores. Reference is made to **Interfax (Pty) Ltd and Another v Old Mutual Insure Limited**² (Interfax).

[19] The case of Interfax is distinguishable from the present case in that in Interfax the declaratory order sought pertained to the promulgation and the enforcement of the Regulations made by the Minister in response to the outbreak of the Covid 19 pandemic in South Africa, and the consequent interruption of applicant's businesses constituted a defined event for which insurance cover is provided in terms of the policy.

² (10906/2020) [2020] ZAWCHC 166 (25 November 2020)

- [20] The second declaratory concerned the liability of the respondent for liability for the losses suffered by the applicant, calculated in accordance with the definition of loss of gross profit set out in the policy and subject to a maximum period of 6 months.
- [21] The clear distinction between the two is glaring, first in the present there is no dispute about what is covered by the Policy. ICD extension is covered, meaning that the occurrence arising because of Covid 19 restrictions is not in dispute. Secondly here there are figures on the table from both parties. At the time of hearing of this application both parties had settled the question of the period to be covered, which is 12 months, thus beyond the date of 30 March 2020.
- [22] Also the case of **Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another** (Ma- Afrika) ³ is distinguishable from the present. In Santam the issue pertained to the duration of the period for liability and the multiple heading of claims. Santam had accepted some and rejected some. Lewis' claim is a single claim.
- [23] In this case respondents have accepted that the composite peril of Covid-19 and the lockdown would have existed simultaneously in South Africa from 27 March 2020. They have also accepted that Lewis would have been able to establish that the disease was within the prescribed

³ (255/2021) [2021] ZASCA 141; [2022] 1 All SA 376 (SCA) (7 October 2021)

radius of 20 kilometers of at least in one of its premises. It is accepted that the ICD extension was triggered and that Lewis became entitled to cover.

[24] On behalf of Lewis it is further submitted that a clear distinction between questions of interpretation of its terms, conditions, limitations and exclusions and subsequent questions of quantification of the amount to be paid. Clause 10 of the Policy provides that “ *any dispute concerning the terms, Conditions, limitations and/ or Exclusions contained herein is understood and agreed by both the Insured and the Insurer to be subjected to the courts and law of the Republic of South Africa.*”

[25] The singling out of words “*limitations*” and “ *the courts*” is not permissible in interpreting a contract / document or legislation. In **Centriq Insurance Company Limited v Oosthuizen and Another**⁴ at paragraphs 17 and 18 the following is stated:

“ *Interpreting Insurance contracts* ”

17.....It is therefore necessary to revisit the approach to interpreting insurance contracts. As the learned judge observed, insurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose to 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

⁴ (237/2018) [2019] ZASCA 11; 2019 (3) SA 387 (SCA) (14 March 2019)

the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract."

- [26] The Constitutional Court in **Airports Company South Africa v Big Five Duty Free (Pty) Ltd**⁵, approved as correct the approach, with regard to principles of interpretation adopted by the Supreme Court of Appeal in **Natal Joint v Endumeni Municipality**⁶, which states :

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and

⁵ (CCT257/17) [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) (27 September 2018)

⁶ [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

having regard to the purpose of the provision and the background to the preparation and production of the document."

- [27] In applying the canons of interpretation as prescribed in the cases above, Lewis's contention that disputes involving limits are for the exclusive domain of the courts cannot stand. Furthermore in insurance policies "*Limitations*" may concern what is not covered, depending on context. Herein those problems do not arise, as Business Interruption arising from Covid -19 and lockdown are simultaneously catered for.
- [28] This court is not enjoined to interpret the Policy. Even if Lewis is correct that the issue of difference implicates legal interpretation; from the facts of this case legal interpretation must be the subject for arbitration. In my view, the meandering relating to how Lewis got to the different amount from that tendered by the respondents and whether the number stores can be equated to the number of headings of claims, as in *Ma- Afrika*, falls squarely within the arbitration process.
- [29] This then leaves the issue of prescription which is outside the arbitration clause. Lewis did not refer to any basis that the arbitrator cannot deal with prescription. What weighs strongly with this court is that the parties have contracted to refer disputes regarding differences in amounts payable to arbitration. A party wishing to opt out of arbitration must make a "***very strong case.***"

- [30] The question is whether Lewis has met the threshold as prescribed above. The difference is about the indemnification owed based on the policy provisions to be interpreted by the arbitrator. The issue of how prescription should be handled does not lend itself on its own to a **“very strong case”** on the part of Lewis. Lewis has not made a very strong case to oust the jurisdiction of arbitration. I am satisfied that there is no **strong case as to** why the dispute should not be referred to arbitration in accordance with the agreement.

Conditional Counterapplication

- [31] Lewis 's case is that the court exercises its discretion in terms of Section 3 (2) (b) of the Arbitration Act not to refer the matter to arbitration. In *Mettalurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd*⁷, it was said:

“The question, it seems to me , is whether the respondent has shown good cause, within the meaning of the sub-section.....

Such an onus is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his right in the Courts; and one who has contracted to allow his opponent those advantages will not be readily be absolved from his undertaking”.

- [32] Central to the exercise of discretion to allow a party to opt out of arbitration is sanctity of the contract. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*⁸ it was held:

⁷ 1971 (20 SA 388 (W) 391 D-E

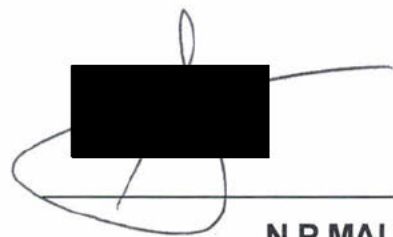
⁸ (CCT223/2014)[2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 Nov 2015)

"[36] The question still remains whether Ms De Lange has advanced good cause to escape the agreement. The Act is not particularly helpful on what could make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out. It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case."

[33] From the above it is apparent that the party wanting to opt out has a huge mountain to climb. Lewis does not allege potential bias on the part of the arbitrator, for example, which is a factor that is mostly considered in avoiding arbitration. There is no good cause shown by Lewis at all. The counter application cannot succeed. In the result I grant the following order:

[34] **ORDER**

1. The main application pending referral of relief sought by the applicant in the main application for determination by way of arbitration is stayed.
2. The applicant's conditional counter application is dismissed.
3. The applicant is ordered to pay costs in respect of both the stay application and the conditional counter application, in each instance including the costs of two counsel, on scale C.

A handwritten signature in black ink, consisting of a large, stylized 'N' and 'M' with a horizontal line extending to the right. A black rectangular box is placed over the middle of the signature.**N P MALI**

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of Hearing: 21 November 2024

Date Judgment reserved: 21 November 2024

Date Judgment delivered: 20 May 2025

Appearances

For the Applicant:

Adv. P Farlam SC

Adv. A Price

Instructed by:

Edward Nathan Sonnebergs Inc

For the respondent:

Adv. JJ Gauntlett SC

Adv. M Maddison

Instructed by:

Clyde & Co Inc.