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

Case number: 5421/2023

In the matter between:

THE COLLECTION AT D'ARIA (PTY) LTD Plaintiff

and

CROSS POINT BROKERS (PTY) LTD Defendant

and

SANTAM LTD Third party

Case number: 5422/2023

And in the matter between:

THE COPPER CLUB EATERY TYGER WATERFRONT (PTY) LTD Plaintiff

and

CROSS POINT BROKERS (PTY) LTD Defendant

and

SANTAM LTD Third party

Coram: Van Zyl, AJ

Heard on: 28 October 2025, final submissions made on 4 November 2025

Judgment: : 24 February 2026

Summary: Interpretation – insurance policy – claims-made policy concluded

between defendant and third party – alleged negligent conduct occurred in 2019 but claim only made and notified to third party during period of 2021 policy – 2021 policy containing Covid-19 liability exclusion – 2021 policy the operative one – defendant not entitled to indemnification from third party

---

ORDER

Under case number 5421/2023:

1. The defendant's interlocutory application for the variation of the separation order dated 19 February 2025 is granted, and that order is varied by the introduction in paragraph 3.1 thereof, immediately after the words "*paragraphs 22 to 24, inclusive*", of the bracketed words "*(but excluding paragraph 24.11)*".

2. Each party shall pay its own costs incurred as a result of the interlocutory application.

3. The separated issue is determined in the third party's favour, and the defendant's claim against the third party for indemnification is dismissed.

4. The defendant shall pay the third party's costs in relation to the third party proceedings, including counsel's fees taxed on Scale C.

Under case number 5422/2023:

5. The defendant's interlocutory application for the variation of the separation order dated 19 February 2025 is granted, and that order is varied by the introduction in paragraph 3.1 thereof, immediately after the words "*paragraphs 22 to 24, inclusive*", of the bracketed words "*(but excluding paragraph 24.11)*".

6. Each party shall pay its costs incurred as a result of the interlocutory application.

7. The separated issue is determined in the third party's favour, and the defendant's claim against the third party for indemnification is dismissed.

8. The defendant shall pay the third party's costs in relation to the third party proceedings, including counsel's fees taxed on Scale C.

JUDGMENT

VAN ZYL, AJ:

Introduction

1. In each of the two actions serving before this court a separated issue has been identified[1] for determination as between the defendant and the third party. These separated issues are identical, and the matters were therefore heard together. The question is whether the defendant is indemnified by the third party in respect of each of the plaintiffs' claims against the defendant, in terms of the defendant's professional indemnity insurance policy with the third party.

2. The relevant facts are largely common cause. The defendant conducts the business of a financial service provider as contemplated in the Financial Advisory and Intermediary Services Act 37 of 2002. It is an insurance intermediary (or broker), which assists its clients in entering into short-term insurance policies with product suppliers.

3. The plaintiff in each of the actions operates a restaurant business, and is a

---

[1] By way of a court order dated 19 February 2025.

client of the defendant's. The third party is the defendant's professional indemnity insurer under professional indemnity agreements concluded between the defendant and the third party concluded in, respectively, 2020 and 2021. As will be discussed in due course, the principal question, having regard to the nature of the policies, is whether the 2020 policy or the 2021 policy is the operative one in relation to the defendant's claim for indemnification against, in turn, the plaintiffs' claims against the defendant.

The origin of the proceedings in the two actions

4. It is common cause that the defendant and each of the plaintiffs concluded an oral mandate in September 2016, in terms of which the plaintiffs appointed the defendant as their insurance intermediary. On 4 June 2019 the defendant, acting under such mandate, procured commercial insurance policies on the plaintiffs' behalf with Renasa Insurance Company Ltd, for the period 4 June 2019 to 1 June 2020 ("the Renasa policy").

5. The Renasa policy did not include a so-called extended business interruption clause. This type of clause was considered in the matter of *Cafe Chameleon* CC *v Guardrisk Insurance* Co *Ltd*,[2] and in the appeal from that judgment in *Guardrisk Insurance* Co *Ltd v Cafe Chameleon* CC.[3] The extended business interruption clause in those matters read as follows:

> **"*Infectious Diseases / Pollution / Shark Attack / Additional Interruption Extension***
> *Loss as insured by this Section resulting in interruption or interference with the Business due to:*
> *…*
> *(e) notifiable Disease occurring within a radius of 50 kilometres of the Premises*
> *…*
> ***Special Provisions***
> *(a) Notifiable Disease shall mean illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, but excluding Human Immune*

---

2 [2020] 4 All SA 41 (WCC).
3 2021 (2) SA 323 (SCA).

Virus (HIV}, Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition."

6. Although there are variations in the different policies within this sphere, the quoted extended business interruption clause is typical of the clause which was not included in the Renasa policy.[4]

7. As a result of the Covid-19 pandemic, a disease which became notorious at the beginning of 2020, and the official "lockdown" measures which were imposed in South Africa to combat the disease,[5] many businesses, including restaurant businesses such as those of the plaintiffs, were for a considerable period of time prohibited from trading inside their business premises, and thus suffered substantial revenue losses. Amid the pandemic, and as a result of widespread litigation arising therefrom, Renasa produced and distributed a general information brochure essentially to explain that its policies did not contain an extended business interruption clause, and that its clients were thus not indemnified against losses suffered as a result of the pandemic. The defendant forwarded a copy of that brochure to the plaintiffs on 9 June 2020. This followed a telephonic conversation between each of the plaintiffs and the defendant in which the defendant informed the plaintiffs that their commercial insurer was not in a position to indemnify them for Covid-19-related losses.

8. On 1 June 2020 the third party gave notice to policyholders and other relevant persons, including the defendant, of the variation of the standard wording of its insurance policies (including professional indemnity insurance policies such as the one concluded between the defendant and the third party) by the introduction thereto, with effect from 1 September 2020, of an exclusion clause which excluded the obligation to afford indemnification in respect of "*any claim, loss, liability, damage, cost, expense, judgment or award of any kind whatsoever which is or is alleged to be directly or indirectly*

---

4 The third party was one of the insurers in South Africa which did include an extended business interruption clause in certain of its commercial policies. The clause as it appeared in those policies is partially quoted in para 33 of the majority judgment in *Ma-Afrika Hotels (Pty) Ltd and another v Santam* [2021] 1 All SA 195 (WCC).

5 See, for example, the discussion in *Guardrisk Insurance* Co *Ltd v Cafe Chameleon CC supra* paras 5-9.

caused by, based upon, contributed to, arising from or is in any way, directly or indirectly, related to" Covid-19.

9. On 17 December 2020 the Supreme Court of Appeal (SCA) held in *Guardrisk* that insurers were obliged to indemnify their insured under an extended business interruption clause for losses suffered by them as a result of official measures taken to combat the Covid-19 pandemic.[6] However, because the Renasa policy did not contain an extended business interruption clause, the plaintiffs did not enjoy such right of indemnification in respect of their losses.

10. On 19 and 20 January 2021 the plaintiffs complained via email to the defendant about the fact that the defendant had on 4 June 2019, instead of procuring for each of the plaintiffs a commercial insurance policy which contained an extended business interruption clause, procured the Renasa policy which did not contain an extended business interruption clause. The plaintiffs informed the defendant that they had suffered losses as a result of the pandemic, and expressed concern about their lack of insurance cover for those losses. This complaint, ultimately framed as a breach by the defendant of the plaintiffs' mandate to it, was subsequently embodied in the particulars of claim in each of the main actions for damages instituted by the plaintiffs against the defendant.

11. The defendant challenged the plaintiffs' complaints for reasons ultimately set out in its pleas in the main actions. In summary, the defendant adopted the stance that as on 4 June 2019 no reasonable insurance intermediary could have foreseen the impending Covid-19 pandemic and its consequences, and of the law as it ultimately came to be expounded in *Guardrisk*.

12. The plaintiffs cancelled their Renasa policies on 8 February 2021, and caused letters of demand to be sent to the defendant on 30 June 2021. The defendant forwarded the demand to the third party's underwriter[7] on 1 July

---

6 *Guardrisk* affirmed the conclusion that had been reached on 17 November 2020 in *Ma-Afrika Hotels (Pty) Ltd and another v Santam supra.*

7 SHA Risk Specialists (Pty) Ltd.

2021. The defendant's claim for indemnification was repudiated by the third party, via its underwriter, on 13 September 2021.

13. The plaintiffs instituted the main actions against the defendant during March 2023. The defendant joined the third party to each of the actions during June 2023, on the basis that it was obliged to indemnify the defendant against the plaintiffs' claims. The third party disputes its liability to indemnify the defendant, and it is this issue that has been separated and falls for determination at this stage. The defendant asserts a contingent right to claim indemnification from the third party, effectively as an application for declaratory relief.[8]

The issues for determination

14. Various issues arise for present purposes.

15. The first issue is whether the defendant's claim for indemnification by the third party is excluded under an exclusion clause in the 2021 policy entitled "Covid-19 / Infectious Disease Exclusion", or whether the 2020 policy, which does not have the exclusion clause, is the operative one.

16. The second issue is whether the defendant complied with certain disclosure and reporting obligation to the third party under either of the policies and, if not, whether the third party was on that account entitled to repudiate the defendant's claim for indemnification.

17. The third issue, which arises if this court finds that the third party is liable to indemnify the defendant, is what the limit is of the indemnity to which the defendant is entitled.

18. The principal issue is essentially whether the 2020 or the 2021 policy (or both) is applicable. This essentially turns on the following aspects:

---

8 *Magic Eye Trading* 77 CC *t/a Titanic Trucking and another v Santam Ltd and another* 2022 (6) SA 120 (SCA) paras 20-22.

18.1 The distinction between claims-made insurance policies and loss-occurrence policies. This distinction is important to demonstrate whether the defendant should be successful or non-suited in both actions as against the third party. Once the nature of the relevant policy has been identified, the rest of the puzzle falls logically into place. In the present matter, the nature of the policies is not common cause.

18.2 The relevance of the defendant's reliance on the retroactive (or retrospective) date of cover in the policies.

18.3 The defendant's argument to the effect that the period of insurance for the 2021 policy (1 September 2020 to 31 August 2021) includes the period of insurance of the 2020 policy (1 September 2019 to 31 August 2020).

The professional indemnity relationship between the defendant and the third party

The 2020 policy

19. The defendant and the third party concluded this professional indemnity insurance agreement on 1 September 2019. The agreement consisted of a policy schedule (or certificate of insurance) and a general policy wording. According to the 2020 policy schedule, the period of insurance under the policy was from 1 September 2019 to 31 August 2020, and the retroactive date of cover was 1 September 2008. The limit of cover was a total of R7 million, comprised of damages, expenses, and costs, including defence costs.

20. Section A of the 2020 policy wording is titled "Professional Indemnity". It provided cover under certain insuring clauses, *inter alia* as follows:

"*We will indemnify You:*

1. *Legal Liability*

   Against all sums that You become legally liable to pay as compensatory damages including Claimant's costs for any Claim first made against You during the Period of Insurance as a result of any negli-gent act, negligent error, negligent omission or negligent breach of contract committed by You or by any consultant, sub-contractor or agent for whose acts of omissions You are liable in connection with the performance of any Professional Business Activity.

2. *Defence Costs*

   For all Defence Costs."

21. The insured event stipulated in the 2020 policy wording was any "*negligent act, negligent error, negligent omission or negligent breach of contract committed*" by the defendant. It is common cause that the insured event which occurred in the present matters was the defendant's conduct on 4 June 2019 in procuring for the plaintiffs the Renasa policy, which did not contain an extended business interruption clause, in alleged breach of the plaintiffs' mandates to the defendant.

The 2021 policy

22. On 21 July 2020 the defendant completed a professional indemnity insurance renewal application, with a view to renewing the 2020 policy. On the renewal form the defendant indicated that it was unaware of any circumstances that could give rise to a claim for indemnification under the policy with the third party. The renewal application culminated in the conclusion of the 2021 policy, consisting of a policy schedule and general policy wording. According to the 2021 policy schedule, the period of insurance under the policy was from 1 September 2020 to 31 August 2021. The retroactive date remained 1 September 2008, and the limit of cover was R8 million (inclusive of all damages, costs and expenses, including defence costs).

23. Again, section A of the 2021 policy wording is entitled "Professional

Indemnity", containing the same insuring clauses as the 2020 policy. The 2021 policy wording contained, however, an exclusion clause entitled "Covid 19 / Infectious Disease Exclusion". That was the provision of which the third party had given notice to stakeholders (including the defendant) on 1 June 2020.

24. The exclusion clause appears as clause 7 under the heading "General Exceptions" in section A of the 2021 policy wording, as follows:

> *"Notwithstanding anything to the contrary in this Policy, this Policy does not provide any indemnity whatsoever for any claim, loss, liability, damage, cost, expense, judgement or award of any kind whatsoever which is or is alleged to be directly or indirectly caused by, based upon, contributed to, arising from or is in any way directly or indirectly related to:*
>
> 1. *Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or any variant or mutation of such Virus; and/or*
> 2. *Coronavirus disease (COVID-19) or any variant or mutation of such disease; and/or*
> 3. *Any Infectious or Communicable Disease (whether asymptomatic or not), virus, bacterium, parasite and/or microorganism; and/or*
> 4. *Any epidemic, pandemic or health emergency declared or classified as such by the World Health Organization or any national, regional or local governmental authority; and/or*
> 5. *Any fear or threat of 1, 2, 3, or 4 above, whether actual or perceived.*
>
> *For the purposes of this exclusion an Infectious or Communicable Disease 's any infection or disease which can be transmitted by means of any substance or agent from any organism to another organism where:*
>
> a. *the substance or agent includes, but is not limited to, a virus, bacterium, parasite or other organism or any variant or mutation thereof, whether deemed living or not, and*
> b. *the method of transmission, whether direct or indirect, includes but is not limited to, airborne transmission, bodily fluid transmission, transmission from or to any surface or object, solid, liquid or gas or between organisms, and*

> *c.* *the infection, disease, substance or agent can cause or threaten damage to human health or human welfare or can cause or threaten damage to, deterioration of, loss of value of, marketability of or loss of use of any property.*
>
> *If the Insurers allege that, by reason of this exclusion, this Policy does not provide any indemnity, the burden of proving the contrary shall rest upon the Insured."*

25. The defendant emphasises the definition of "period of insurance" under the 2021 policy, namely: "*Period of insurance* [means] *The period shown in the Schedule and*[9] *any other period for which We have accepted Your premium*".

26. The defendant argues that this definition means that, independently of the retrospective date of indemnity cover stated in the 2021 policy schedule, the period of insurance under the 2021 policy included in the period of insurance stated in the 2020 policy schedule (19 September 2019 to 31 August 2020). This is because, so the defendant contends, it had paid the premium due both under the 2021 and the 2020 policy. I shall return to this aspect in due course.

Is the 2020 policy or the 2021 policy the applicable one?

The defendant's arguments

27. As indicated, the insured event in respect of which the defendant seeks indemnification from the third party occurred on 4 June 2019, a few months prior to the commencement date (1 September 2019) of the 2020 policy. The defendant, in taking onto account the retroactive date under the policy, argues that the period of insurance under the policy ran from 1 September 2008 to 31 August 2020. The defendant contends that, on this basis, it acquired a right under the 2020 policy to be indemnified by the third party against any liability incurred by it as a result of the insured event.

---

9 Defendant's emphasis.

28. The defendant accepts that the third party's correlative obligation to indemnify the defendant could only arise when a claim was actually made against the defendant for damages suffered by a claimant as a result of the insured event. It (the defendant) contends that it had properly discharged its notification obligation to the third party in respect of that claim when it forwarded the letter of demand to the third party's underwriter on 1 July 2021.

29. The defendant argues that, had the plaintiffs made their claims against the defendant for losses suffered as a result of the insured event and the defendant had reported that claim to the third party before the end of the period of insurance under the 2020 policy (31 August 2020), there would have been no suggestion that the third party might repudiate its liability to indemnify the defendant. The argument goes, however, that the plaintiffs could not before 31 August 2020 have made a claim against the defendant, because the *Guardrisk* judgment in the SCA was only delivered on 17 December 2021, and it was only at that point conclusively established that insurers were obliged to compensate their insured under an extended business interruption clause. Thus, the plaintiffs did not suffer loss before 31 August 2020 as a result of the insured event, and they could not allege before 31 August 2020 that the defendant was liable to them for losses suffered as a result of the insured event.

30. In relation to the 2021 policy, the defendant argues that the insured event stipulated in the 2021 policy wording was the defendant's act on 4 June 2019 in procuring for the plaintiffs the Renasa policy, which did not contain an extended business interruption clause. The defendant says that the insured event still occurred during the period of insurance under the 2021 policy (1 September 2008 to 31 August 2021, on the defendant's version). The defendant had, for the reasons stated earlier, already acquired a right under the 2020 policy to be indemnified by the third party against any liability incurred by it as a result of that insured event. Therefore, so the argument goes, the defendant has a right to indemnification under the 2021

policy too (despite the existence of the exclusion clause), because the period of insurance under the 2021 policy included in the period of insurance stated in the 2020 policy schedule (19 September 2019 to 31 August 2020).

31. This is a creative argument, but it does not reflect the correct nature of the policies, and it elevates the retroactive date to something that it is not. I turn to discuss these aspects.

The defendant's interlocutory application in relation to the nature of the policies

32. As indicated, the nature of the professional indemnity insurance policy (whether the 2020 or the 2021 policy) is not common cause between the defendant and the third party. The third party maintains that it is a so-called claims-made policy. The defendant says that it is not.

33. The order separating the issues, which were granted on 19 February 2025, was done by agreement between the parties. In terms of paragraph 3.1 of the order, the separated issue was to be decided on the common cause facts set out in paragraphs 22 to 24 of the founding affidavit in the separation application (the third party was the applicant in that application), together with such further facts, if any, upon which the parties agreed or which the court could take judicial notice of. The parties did not agree on any other facts.

34. The defendant subsequently realised that it had overlooked a mistake in the founding affidavit in relation to what the common cause facts entailed. It happened as follows: in the third party's pleas to the defendant's third party notices and annexures, the third party alleged that "*the insurance contract between the defendant and the third party is a claims made policy in terms of clause 2(b) under Claims Conditions of the policy*". The defendant did not initially replicate to the third party's plea and thus, in terms of Rule 25(2), the allegation was deemed to have been denied. In a replication later delivered the allegation is not specifically addressed and,

thus, deemed to be denied.

35. In September 2024 the third party delivered a document styled "Third Party's List of Admissions". One of the admissions sought was whether the defendant admitted that "*the insurance contract between the defendant and the third party is a claims made policy in terms of clause 2(b) under Claims Conditions of the policy.*" In its response, delivered in October 2024, the defendant replied that:

> "*17.1 The policy between the defendant and the third party provided that the third party would indemnify it against all sums that it would become legally liable to pay as compensatory damages (including costs) for any claim first made against it during the period of insurance as a result of any negligent act, error, omission or breach of contract by itself, its consultant, sub-contractor or agent, in the performance of any professional business activity.*
>
> *17.2 Save as aforesaid the admission sought in this paragraph is not made.*"

36. The defendant thus merely paraphrased an extract from the policy wording forming part of each of the policies. The defendant clearly declined to admit that the policy is a "*claims made policy in terms of clause 2(b) under Claims Conditions of the policy*", as postulated by the third party in its request for admissions.

37. The separation application followed. In paragraph 24.11 of its founding affidavit in the separation application, after reference in paragraphs 22 and 23, respectively, to the admissions sought by the third party and the defendant's response thereto, the third party stated that it was common cause between the parties that "*the basis of indemnification in terms of the 2020 and 2021 policy is claims made*". This allegation was clearly incorrect. I accept that the mistake was innocently made, resulting from a *bona fide* but careless misreading of the defendant's response to the request for admissions.

38. The defendant agreed that it would be appropriate to separate the issues, as contemplated in the separation application. Accordingly, the defendant's

attorney did not have instructions to oppose the application, and did not scrutinise the founding affidavit in the application as closely as he should have done. Most of the facts relevant to the dispute between the defendant and the third party were indeed common cause, and the defendant's attorney assumed that the third party had correctly set them out in its founding affidavit. He did not then notice the allegation made in paragraph 24.11 of the founding affidavit, towards the end of the third party's list of common cause facts.

39. The separation order was granted by consent on the basis as set out in the founding affidavit, including the erroneous allegation in paragraph 24.11. The mistake was discovered later, when the parties unsuccessfully attempted to establish a statement of agreed facts.

40. As the third party did not subsequently consent to the variation of the order in this respect, the defendant launched the interlocutory application, which was heard together with argument on the separated issue. The third party opposed the application essentially on the basis that the defendant was not entitled to withdraw an admission, and delivered an answering affidavit. During argument, however, the opposition was not too vigorously pursued, probably because there was a realisation that both parties had had a hand in the state of affairs. There was no dispute that the separation order was itself an interlocutory order, and that this court has the competence to reconsider such order and to vary the separation order on good cause shown.

41. In the circumstances, to achieve a proper ventilation of the issues, I am inclined to grant the defendant's application for the variation of the separation order. The matter was in any event argued on the basis of the order as varied. The variation would (and did) not preclude the third party from submitting that the 2020 policy and the 2021 policy are claims-made policies, but merely compelled it to sustain any such submission, and to establish the consequences thereof, with reference to the schedules and policy wording.

The difference between claims-made policies and loss-occurring policies

42. This is a pivotal aspect. In repudiating the defendant's claim, the third party accepted that the 2021 policy was the operational one, and stated its views as follows:

> "*6.1 The policy [i.e., the 2021 policy] excludes all claims directly or indirectly related to Covid-19. This claim arises from or is directly or indirectly related to Covid-19. It is of no moment [that] when the claim arose against the insured or the period during which the claimant suffered Covid-19 losses or that the claimant's loss arose before the Covid-19 exclusion was introduced to this Policy. The Covid-19 exclusion is an absolute exclusion, meaning it excludes all claims, costs and expenses related to Covid-19 whenever and howsoever arising.*
>
> *6.2 This is a 'claims made' Policy and therefore the Policy period which responds to the claim is the Policy that is active (in force) when the claim is made against the Insured and when the Insured reports the claim to Insurers. Stated differently, the Policy period prior to 1 September 2020 (containing no Covid-19 exclusion) has lapsed or expired and the only Policy which may respond to the claim is the Policy which is active when the Insured reports a claim to Insurers. It follows then that the Policy which took effect from 1 September 2020 (containing the Covid-19 exclusion) finds application to the current claim for indemnification.*
>
> *6.3 In the result, this Policy cannot indemnify any claim related to Covid- 19*."

43. Professional indemnity insurance policies can (apart from other delineations and limitations) be structured on either a claims-made basis or a loss-occurring basis.[10]

44. A claims-made policy, simply put, provides coverage based on when a claim is made (and usually notified) to the insurer, rather than when the underlying alleged unprofessional or negligent act or omission occurred.[11] In other words, the policy must be active at the time the claim is made for coverage to apply. If a claim is brought against the insured during the

---

10 See the discussion in Reinecke *et al South African Insurance Law* (LexisNexis, 2013) at pp540-544, in particular paras 25.37, 25.47 and 25.48.

11 See the discussion on terms to this effect in Reinecke *et al General Principles of Insurance Law* (LexisNexis, 2002) at paras 316-318.

policy period, the claim will be covered subject to the policy's terms, even if the alleged negligent act took place years prior (provided it occurred after any retroactive date).

45. If the policy has expired or lapsed by the time a claim is lodged, no cover is available, even for acts that occurred while a previous policy was in force. Claims-made policies often include provisions requiring prompt notification of claims or even potential claims during the policy period.

46. In the present matter, a claim is defined in both of the policies as a "*demand by a Claimant (including their costs) for compensation or damages or the assertion of a right or rights against"* the insured. In *Van Immerzeel and another v Santam Ltd*[12] the SCA held that the word "claim" must be given its ordinary meaning. The phrase "claims made" indicates that there has been a communication by the client (the plaintiffs in the present matters) to the insured (the defendant) of some discontent which will, or may, result in a remedy expected from the insured. In other words, there has been a communication by a third party such as the plaintiffs to the defendant about a right to some relief because of conduct by the defendant, as described in and covered under the policies.

47. Loss-occurrence policies, on the other hand, link coverage to the timing of the conduct or event that gives rise to the claim. Coverage is determined by when the incident occurred, and not by when the claim is notified or submitted. If the wrongful act or loss-causing event occurred during the policy period, an occurrence-based policy will cover the claim even if the claim is made years after the policy has expired. The policy in force at the time of the incident is therefore the one that will respond to any future claim arising from that incident.

48. Unlike claims-made policies, occurrence-based (or loss-occurrence) policies do not require a retroactive date. The period of insurance itself defines the

---

12 2006 (3) SA 349 (SCA) paras 12-13, and 22.

window of covered events. These policies also typically lack the stringent "notice of claim within a specified period" requirements of claims-made policies, even though timely notice of the occurrence is usually still required as a condition. The insurer's exposure is essentially "locked in" at the time of the occurrence, in that the insurer remains on risk for claims brought even long after the expiry of the policy's term.

49. The defendant, in emphasising the date when the insured event occurred (4 June 2019), suggests that the 2020 and 2021 policies are of the loss-occurrence type. It criticises the third party for characterising the policies as claims-made policies and, so the defendant argues, ascribing contractual terms to the policies based on such characterisation. In other words, the third party "reverse engineers" terms of the policies from the character ascribed by it to the policies. The defendant contends that this approach is impermissible. The third party must find the terms upon which it relies in the policy wording as it stands, and not in anything that is inferred or deduced from the asserted character of a "claims made" policy. There is no term in the policy wording and the policy schedule of either policy which describes it as a "claims made" policy, or which defines that concept.

50. The defendant contends that there is no term in the 2020 policy wording and the 2020 policy schedule which provides that the policy will not respond in respect of an insured event which occurs during the period insurance of the 2020 policy but only results in a claim against the insured after that period of insurance has expired. Concomitantly, there is no term in the 2021 policy wording and the 2021 policy schedule which provides that the 2021 policy will not respond in respect of an insured event which occurred during the period of insurance of the prior 2020 policy (and gave rise thereunder to a right of indemnification), but which results in a claim made against the insured only after the period of insurance of the prior 2020 policy has expired. The only pertinent condition in the 2021 policy wording is that a claim arising from an insured event must be "first made" during the period of insurance of the 2021 policy - and that condition was complied with when the plaintiff's claim against the defendant was made during the period 1 September 2008 to 1 August

2021.

51. The defendant seeks support for its argument in the wording of the policies, as follows:

51.1 As indicated above, independently of the retrospective date of indemnity cover stated in the 2021 policy schedule (which the defendant says envisaged a period of insurance from 1 September 2008 to 31 August 2021), the period of insurance under the 2021 policy by definition included in the period of insurance of the 2020 policy (19 September 2019 to 31 August 2020). Thus, the 2021 policy itself referenced the 2020 policy.

51.2 In both policies, clause 5 in section B of the introductory part of the policy wording, under the heading "Limits of Indemnity", provides that: "*Regardless of the number of premiums paid for the renewal or replacement of this insurance, where more than one period of insurance applies to any claim the Limits of Indemnity shall not aggregate from one period of insurance to the next"*.

51.3 Clause 5, so the argument goes, plainly envisages that "this insurance" may be renewed or replaced from time to time, and precludes the aggregation of prescribed limits of indemnity from one period of insurance to the next. If, as the third party contends, it was not possible for the 2020 policy to respond to a claim first made during the period of insurance of the 2021 policy, but that the policies were discrete, clause 5 would have been unnecessary and purposeless in the 2021 policy.

51.4 There is a similar provision in clause 4 in section B of both policies, under the heading "Limits of Indemnity", which provides that: "*Renewal of this policy from year to year will not have the effect of increasing the limit of indemnity applicable to each year or of accumulating the limit of indemnity from year to year.*"

51.5 Clause 4 envisages that "this policy" may be renewed or replaced from year to year, and precludes the accumulation of prescribed limits of indemnity from one year to the next. If, as the third party contends, it was not possible for the 2020 policy to respond to a claim first made during the period of insurance of the 2021 policy, but that the policies were wholly discrete, clause 4 would have been unnecessary and purposeless in the 2021 policy.

52. Thus, the defendant submits, the court should find that the third party is obliged to indemnity the defendant against its alleged liability to the plaintiffs by reason of the insured event which occurred on 4 June 2019, during the period of insurance both of the 2020 policy and of the 2021 policy.

53. The defendant argues further that the third party's contrary view, that the defendant's claim for indemnification must be assessed with reference to the 2021 policy wording because the plaintiffs' claims against the defendant were first made during the period of insurance of the 2021 policy, entails that the defendant's right to indemnification which (on the defendant's argument) arose and vested under the 2020 policy wording, will be retrospectively extinguished by the exclusion clause in the 2021 policy wording, which did not exist when that right arose and vested.

54. The defendant says that that is not a commercially sensible or businesslike outcome but is, in its assertion of the retrospective operation of the exclusion clause, legally repugnant. Although the 2020 policy and the 2021 policy were discrete instruments they were, and were understood by both the defendant and the third party to be, components of a continuing course of indemnification insurance between them. There is no suggestion that when it renewed the 2020 policy the defendant believed that any vested right to indemnification thereunder was incapable of being enforced after the period of insurance thereunder had expired, and it is therefore impossible to suggest that the defendant waived or abandoned the vested right to indemnification.

55. The defendant's argument ignores, however, the contract made between it and the third party. Its reliance on clauses in the policies acknowledging the possibility and consequences of renewal does not assist it. Issues of waiver or abandonment, or the "retrospective extinguishing" of claims, do not come into the picture. The third party says that the policies are of the claims-made kind. Thus, irrespective of when the plaintiffs' claims against the defendant arose (as long as it happened after the retroactive date), the date when the defendant notified the third party of the claim against it determines which policy applies.

56. It is necessary to consider the policy wording, context, and purpose. The applicable principles of interpretation are, in brief, that words must be given their ordinary meaning, unless doing so would result in an absurdity. Provisions must be interpreted contextually, purposively and as far as reasonably possible in conformity with the Constitution,[13] and a sensible interpretation should be preferred to an insensible one. Courts must guard against inserting what they think a reasonable, sensible or businesslike outcome would be, because that trespasses from interpretation into legislation.[14]

57. In *Centriq Insurance Company Limited v Oosthuizen and another*[15] the SCA explained that:

> *"Insurance 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.*
>
> *But because insurance contracts have a risk-transferring purpose containing particular provisions, regard must be had to how the courts approach their interpretation specifically.*

---

13 *Minister of Water and Sanitation and others v Lotter NO and Two Similar Cases* 2023 (4) SA 434 (CC) para 19.

14 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) para 48.

15 2019 (3) SA 387 (SCA) paras 17-18. Emphasis supplied.

Thus, 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. In the event of real ambiguity the doctrine of interpretation, contra proferentem, applies and the policy is also generally construed against the insurer who frames the policy and inserts the exclusion. But, like other aides to the interpretation of contracts of this nature, the doctrine must not be applied mechanically, for exclusion clauses, like other contractual clauses, must be construed in accordance with their language, context and purpose with a view to achieving a commercially sensible result."

58. In the present matter, the policy wording (which are essentially identical for both policies, except for the exclusion clause in the 2021 policy) defines a claim as the "*demand by a Claimant (including their costs) for compensation or damages or the assertion of a right or rights against You*".

59. The "Claims Conditions" stipulate the following:

"The following Claims Conditions apply to this Policy:

…

2. You must give written notice to Us as soon as reasonably possible of:-

a) any Claim being made against You (or of any specific event or circumstance which may give rise to a Claim being made against You

…

and which forms the subject of indemnity under this Policy and shall give all such additional information as We require. Every claim, writ, summons or process and all documents relating to the Claim, event or circumstance shall be forwarded to Us immediately when they are received by You.

If You notify us during the Period of Insurance of any event or circumstance which We accept may give rise to a Claim being made against You, then such Claim shall for the purpose of this Policy be treated as having been first made against You during the Period of Insurance.

This Policy will allow You the opportunity to notify Us of Claims made against You or events or circumstances that may give rise to Claims being made against You for up to 30 days after expiry of this insurance provided that You first became aware of the Claim or circumstances prior to expiry.[16]

16 Emphasis supplied.

3. *It is condition precedent to Your right to indemnity under this Policy that you shall notify Us immediately upon becoming aware of any Claims or circumstances that may give rise to a Claim (not having been disclosed to Us) during the period/s between:-*

   a) *the date of the proposal; and*

   b) *the inception and/or renewal hereof; or*

   c) *the date We are placed on risk."*

60. Under "What is covered (Insuring Clauses)" the following is included:

"We will indemnify You:

1. *Legal liability*

   Against all sums that You become legally liable to pay as compensatory damages including Claimants costs <u>for any claim first made against You during the Period of Insurance</u>[17] as a result of any negligent act, negligent error, negligent omission or negligent breach of contract committed by You or any consultant, sub-contractor or agent for whose acts You are liable in connection with the performance of any Professional Business Activity."

61. Notably, under the heading "What is not covered" appears, amongst others, "*any loss or claim … arising out of any circumstance or event which has been notified under any insurance which was in force prior to the Period of Insurance or which was known or should have been know to You prior to the Period of Insurance which might reasonably have been expected to produce a Claim"*.[18]

62. The "Period of Insurance" is stated in the respective policy schedules as being from 1 September 2019 to 31 August 2020 (for the 2020 policy), and from 1 September 2020 to 31 August 2021 (for the 2021 policy). There can thus be no doubt in relation to the meaning of the phrase "Period of Insurance" where it appears in the policy wording. The defendant's

---

17 Emphasis supplied. The same applies to the loss of documents: the insured is indemnified against "*any Claim first made against You and notified in writing to Us during the Period of Insurance*".

18 See the discussion in Merkin (ed) *Colinvaux's Law of Insurance* (Sweet & Maxwell, 8ed, 2006) at p686: "*A claims-made policy will exclude claims made against the assured during some earlier policy, and in some cases the exclusion will extend to claims arising out of circumstances which could have been notified under an earlier policy*". See also Leigh-Jones (ed) *MacGillivray on Insurance Law* (Sweet & Maxwell, 11ed) at p929.

reliance on the definition of "period of insurance" under the 2021 policy, namely "*Period of insurance* [means] *The period shown in the Schedule and any other period for which We have accepted Your premium*" does not assist it, because the reference to "any other period" must be considered within the context of the existing 2021 policy. The definition does not serve to extend the period of insurance under the 2021 policy to cover all previous (lapsed) policies for which premiums had, over the preceding years, been paid. That would be absurd.

63. It is not seriously disputed that the defendant's renewal of its agreement with the third party in July 2020 created a new contract in the form of the 2021 policy.[19] It was not merely an extension of the 2020 policy. Material terms were altered, including the premium payable and the insertion of additional exclusionary provisions. The legal effect of renewal is well-established: renewal gives rise to a new contract, even where the terms are identical. There is nothing in the 2021 policy that supports the defendant's argument that any "vested" rights to indemnification (in the sense of conduct that could be considered an insured event) under the 2020 policy would be carried over into the 2021 policy's period of insurance. In any event, it is common cause that the defendant did not notify the third party of any claim against it in 2020. On a claims-made basis, then, no claim to indemnification vested even under the 2020 policy.

64. As a matter of interpretation, I agree with counsel for the third party that a consideration of the policy wording in the present matter indicates that both the 2020 and 2021 policies are claims-made policies. Accordingly, the policy applicable to claims made during the period 1 September 2020 to 31 August 2021 was the 2021 policy, not the 2020 one.

65. The date of the insured event (the negligent act or omission by the insured) is thus irrelevant for present purposes except insofar as it relates to the retroactive date, which I shall deal with further below. The irrelevance of

---

19 See *Southern Insurance Association Ltd v Cooper* 1954 (2) SA 354 (A) at 360G-361A.

the negligent conduct was illustrated in *Van Immerzeel* in that the SCA did not address it at all in dealing with the question of whether the appellant's claim for indemnity was covered by an earlier policy or the policy that was active when the claim was made.

The period of insurance of the 2021 policy

66. I return to clause 7 of the 2021 policy – the exclusion clause. In *Centriq,* the SCA articulated the principles for interpreting exclusion clauses as follows:

> *"[20] … [T]here may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction This result may be achieved not only by the (application) of the contra proferentem approach but also the approach that ... in the case of ambiguity, the Court may opt for the more commercially sensible construction ... .'*
> *[21] The consequence of adopting a business-like or commercially sensible construction of an insurance policy is that the literal meaning of words read in their context may have to yield to a fair and sensible application where they are likely 'to produce an unrealistic and generally unanticipated result', which is at odds with the purpose of the policy. But a word of caution is warranted: courts are not entitled, simply because the policy appears to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permits. For, if that is what the insured contracted for that is what he is entitled to, and no more. It is not for the courts to construe exclusions in favour of the insured simply because it considers them to be unfair or unreasonable."*[20]

67. *Centriq* is distinguishable from the present case in that, amongst other aspects, there is no ambiguity in the exclusion clause in the present matter. In *Centriq,* the SCA emphasised that the language of the policy was obscure, failing to demonstrate an intention to contract out of the insured's core business activities. The SCA held that " ... *if Centriq sought to achieve this type of exclusion, it should have done so with much clearer language. Instead, it chose obscure language. It bears the onus to bring itself within the exclusion, and cannot now complain if it is unable to do*

---

20 *Centriq supra* paras 20-21. Emphasis supplied.

so."[21]

68. By contrast, clause 7 of the 2021 policy (quoted earlier) is drafted in clear language. The defendant did not challenge it. It is beyond dispute that all claims made against the defendant emanating directly or indirectly from COVID-19 losses are excluded from cover under the 2021 policy.

69. There is thus an elephant in the room for the defendant: the defendant concedes that if the 2021 policy is applicable (assessed solely with reference to the 2021 policy wording) then the Covid-19 exclusion clause is applicable, and the defendant is not entitled to indemnification. This is, on the plain wording of the policy, correct. It is common cause that the plaintiffs' claims were first made against the defendant on 30 June 2021. The defendant notified the third party of the claims on 1 July 2021. The claims were made during the 2021 policy's period of insurance, and the defendant appreciates the difficulty that confronts it in this respect.

70. To overcome this hurdle the defendant contends that the 2021 policy's period of insurance stretches from 1 September 2019 (instead of 1 September 2020) to 31 August 2021, having regard to the definition of "period of insurance" in the 2021 policy. I have referred to this earlier in this judgment. This argument is thus not that the 2020 policy is applicable, but rather that the 2021 policy is applicable because its period of insurance includes the period of insurance of the 2020 policy.

71. I have already found that the policy is a claims-made one. On the common cause fact that the claims were only made on 30 June 2021, extending the insurance period to earlier than 1 September 2020 is of no assistance to the defendant's case.

72. There may have been an argument as advanced in *Van Immerzeel*[22] if the defendant had notified the third party prior to 1 September 2020 (and thus

---

21 *Centriq supra* para 32.

22 *Van Immerzeel supra* paras 15-17, and 22.

during the period of insurance of the 2020 policy) of circumstances likely to give rise to a loss or claim. In such a case, by virtue of Claims Condition 2 of the 2020 policy, namely that where any circumstance is notified during the period of insurance of the 2020 policy (1 September 2019 to 31 August 2020), and full particulars are supplied of the circumstances including the dates and persons involved and the reasons for anticipating a claim, any later claim arising out of the circumstances so notified will be deemed to have been first made at the date of notification. If, therefore, the defendant had notified the third party prior to 1 September 2020 that the plaintiffs were unhappy about not being covered for Covid-19, the defendant could have relied on Claim Condition 2 to assert that the claim (made on 30 June 2021) was first made under the 2020 policy.

73. In *Van Immerzeel*, the appellant (the insured) notified the respondent (the insurer) of circumstances in 1991 that could give rise to a claim when it received a notice from the client of a potential claim. The policy in place at the time was the 1991 policy, which contained a similar clause to Claim Condition 2 in the 2020 and 2021 policies in the present matter). The client only made the claim in 1993 and at the time the 1993 policy was in place. The 1993 policy had more beneficial cover than the 1991 policy and the appellant sought to rely on the 1993 policy for its entitlement to indemnification, whereas the respondent sought to enforce the 1991 policy based on the notification of a potential claim in 1991.

74. The SCA held that the appellant was entitled to indemnification under both the 1991 policy and the 1993 policy. The appellant was entitled to indemnification under the 1991 policy by virtue of the deeming provision in Claim Condition 2 (which deemed the notification of circumstances to constitute claim first made under the 1991 policy even though the claim was only actually made later in 1993 when the 1993 policy was applicable). The appellant was further entitled to indemnification under the 1993 policy because that is when the claim was made by the client against the appellant and when the appellant notified the respondent of the claim.

75. This argument is, however, not available to the defendant in the present matter because it did not notify the third party of any circumstances which could give rise to a claim during the 2020 policy's period of insurance.

The retroactive (or retrospective) date of cover

76. Once it is accepted that the policies are claims-made policies, that the claims were made (by the plaintiffs against the defendant) on 30 June 2021, and that the defendant notified the third party of the claims on 1 July 2021, it must be accepted that the 2021 policy is applicable. It cannot be argued that on a claims-made basis the 2020 policy is applicable.

77. As indicated, the defendant nevertheless places reliance on the retroactive date of cover for the proposition that it is entitled to indemnification for the plaintiffs' claims because the alleged negligent conduct occurred during a period covered by the retroactive dates of cover referred to in each of the policies. The defendant effectively argues that "*the period of insurance in respect of which the defendant enjoyed professional indemnity insurance cover under the 2020 policy was from 1 September 2008*" onwards. It argues, likewise, that because the 2021 policy schedule provides that the retroactive date of cover is 1 September 2008, the period of insurance in respect of which the defendant enjoyed professional indemnity insurance cover under the 2021 policy was from 1 September 2008 to 31 August 2021.

78. This argument is only partially correct. Professional indemnity insurance policies of the claims-made kind introduce two key temporal concepts: the period of insurance, and the retroactive (or retrospective) date of cover. The period of insurance (also called the policy period) is the span of time during which the policy is active and can respond to claims. It typically runs from the policy's start or inception date up to its termination or expiry date as stated in the policy schedule. In a claims-made policy, the policy must be in force at the time a claim or incident is notified for coverage to apply. As discussed earlier, the insurer will only cover claims first made (and

notified) during the active policy period.

79. The retroactive date is simply the earliest date in the past from which the insured's alleged unprofessional or negligent activities are covered under the policy.[23] Any act, error or omission that occurred before this date is not covered under the policy. Essentially, the retroactive date serves as a historic cutoff: the policy will only cover claims arising from conduct on or after that date. In the present matters, any negligent act committed by the defendant from 1 September 2008 onwards will be covered, subject to the policy terms, in particular in relation to the making of a claim.

80. In practical terms, since the allegedly negligent conduct occurred in June 2019, the defendant is entitled to submit a claim. However, the claim must be made (notified) during the period of an active policy. The active policy in the present case was the 2021 policy because on the defendant's own version the claim was made on 30 June 2021 and notified to the third party on 1 July 2021.

81. In the circumstances, the retroactive date of cover does not give the defendant cover outside of the active policy period if it (the defendant) did not submit a claim during the active policy period. The defendant accordingly misstates the period of cover as "1 September 2008 to 31 August 2020" or “1 September 2008 to 31 August 2021”. On the face of both policies, the period of insurance is explicitly and unambiguously stated. The retroactive date of 1 September 2008 does not extend the period of insurance. It merely permits claims during the operative period of the relevant policy to be indemnified even if they arise from conduct dating back to 2008, and provided that the provisions of the policy regarding the notification of claims are complied with.

---

[23] See, for example, *McCarthy Contractors (Pty) Ltd v Aegis Insurance Company Ltd* [1993] ZASCA 199 (1 December 1993) at p4: “*In addition, provision was made for what was called "the “retroactive date" and this was 1 November 1985. The importance of that date was that in terms of an exclusionary clause in the policy the underwriters were not liable in respect of the performance of any of the insured's professional activities prior to such date. Consequently, even if the sort of negligence referred to in the policy occurred prior to the insured period it could nonetheless lead to liability on the part of the underwriters if it occurred on or after the retroactive date*”.

The defendant's duty of notification under the policies

82. The third party argues that the defendant had knowledge of the possibility of a claim or claims against it at the latest upon receipt of email correspondence from the plaintiffs during the period 19 to 22 January 2021. The plaintiffs' cancellation of their Renasa policies on 8 February 2021 was a further indication of the plaintiffs' intentions.[24]

83. The defendant's version is that the plaintiffs' claims were first made on their behalf by Simpsons Attorneys, in a letter of demand sent to the defendant on 30 June 2021, and which the defendant forwarded to the third party's underwriter on 1 July 2021. It is incontrovertible on either party's version that the plaintiffs' claim against the defendant was first made during the period of insurance under the 2021 policy.

84. In light of the finding that the policies were claims-made policies, and that the operative policy is the 2021 policy which excludes the defendant's claim for indemnification, it is not strictly necessary to consider whether the defendant timeously complied with its obligation to notify the third party of the plaintiffs' claims under either of the policies. I nevertheless do so briefly.

85. The questions for consideration are the following: If the 2020 policy is the applicable one, is the defendant in breach of clauses 2(a) and 3 of the 2020 policy, entitling the third party to repudiate the defendant's claim on that basis? If, on the other hand, the 2021 policy is applicable, is the defendant in breach of clauses 2(a) and 3 of the 2021 policy, entitling the third party to repudiate the defendant's claim on that basis?

86. Section 53(1) of the Short-Term Insurance Act 53 of 1998, titled "Misrepresentation and failure to disclose material information", provides:

---

[24] See the discussion in *Thompson v Federated Timbers and others* [2010] ZAKZDHC 72 (8 December 2010) paras 17-18.

"(1)(a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) -

(i) the policy shall not be invalidated;

(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short- term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk."[25]

87. In *Regent Insurance Company Ltd v King's Property Development (Pty) Ltd*[26] the SCA confirmed that section 53(1), like the common law, adopts an objective test for both misrepresentation and non-disclosure. The SCA reaffirmed that *"the test for inducement remains subjective - was the particular insurer induced by the failure to disclose* a *material fact to issue the policy?"*[27]

88. In both of the policies in the present matter, the policy schedule, in bold type, provides that *"(t)his certificate is issued according to all information supplied on the proposal form ...".* In the proposal form for the renewal of the 2020 policy, the defendant was asked, *inter alia, "(a)re you currently aware of any circumstances that may give rise to* a *claim?".* The defendant responded by selecting "no", and accepted the proposal by signing it on 21 July 2020.

---

25 Emphasis supplied.

26 2015 (3) SA 85 (SCA) para 23.

27 *Regent Insurance supra* para 27: "*... once materiality has been established, the insured is likely to face an uphill struggle in trying to demonstrate that his non-disclosure or misrepresentation bearing this stamp had no effect…"*

89. Before the declaration section, the proposal form drew the defendant's attention to the following provision:

> *"It is essential that every Proposer or Insured when seeking* a *quotation to take out or renew any Insurance discloses to the prospective Underwriters all material facts and information (including all material circumstances) which might influence the judgment of an Underwriter in deciding whether to accept the risk and on what terms. The obligation to provide this information continues up until the time that there Is* a *completed contract of insurance. Failure to do so entitles the Underwriters, if they so wish, to avoid the contract of insurance from inception and so enables them to repudiate liability thereunder. If you have any doubt as to what constitutes* a *material fact or circumstance please do not hesitate to* ask *for advice."*

90. The policy wording, under "A. General Conditions - Applicable to All Sections", provides that "*(t)his Policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure by or on behalf of the Insured in any particular which is material to this insurance*".

91. Under "B. Limits of Indemnity", the policy wording provides that "*(l)imits of Indemnity are inclusive of all damages, claimants' costs, costs and expenses (including defence costs) incurred by or on behalf of the Insured and all other indemnity. The limits of indemnity are in excess of the Deductible*".

92. In the section of the policy wording dealing with “Professional Indemnity”, the insured is cautioned to *"(p)lease take time to read all these documents to make sure that the cover meets Your needs and that You understand the terms, exclusions and conditions. If there is anything You do not understand or You need to change please contact Your insurance adviser immediately”.*

93. The policy wording further cautions that "*(t)his Policy will be voidable if You or anyone acting for You fails to disclose, misrepresents or misdescribes any material fact*". Under “Reasonable Precautions”, the policy wording states that *"You must: ... use due diligence and ensure that all reasonable and practicable steps are taken to avoid or diminish any liability”.*

94. Under the sub-heading "Claims Conditions", the policy document states:

> *"2. You must give written notice to Us as soon as reasonably possible of:-*
> *a) any Claim being made against You (or of any specific event or circumstance which may give rise to a Claim being made against You…*
>
> *3. It is condition precedent to Your right to indemnity under this Policy that you shall notify Us immediately upon becoming aware of any Claims or circumstances that may give rise to a Claim (not having been disclosed to Us) during the period/s between:-*
> *d) the date of the proposal; and*
> *e) the inception and/or renewal hereof; or*
> *f) the date We are placed on risk."*

95. The essence of these clauses is that, once the defendant becomes aware of any events or circumstances that might give rise to a claim against it, it is obliged to notify the third party immediately or as soon as reasonably possible. Did it do so? The *onus* rests upon the third party to establish on a balance of probabilities that the defendant breached its obligations as alleged.[28]

96. It is common cause that on 9 June 2020 the defendant informed the plaintiffs that their commercial insurer, Renasa, was not in a position to indemnify the plaintiff for the loss it suffered as a result of business interruption due to the Covid-19 pandemic. On 19 and 20 January 2021 the plaintiffs transmitted emails to the defendant, in which the plaintiffs informed the defendant that they had suffered losses as result of the adverse impact of the pandemic on its business operations, and expressed concern that their insurance coverage was insufficient to address those losses. In these emails the plaintiffs made statements such as the following:

> *"As you know the lockdowns (sic) have crushed my businesses and I can barely remain open."*

---

[28] *Resisto Fairy (Pty) Ltd v Auto Protection Insurance* Co *Ltd* 1963(1) SA 632 (A) at 643G-645C.

"Why is it that you never placed my restaurant insurance with hospitality specific policies? I have never said no to the most comprehensive cover and if you had I would have been covered now for my losses."

"… please tell me why I wasn't pleased with the hospitality package? if you had placed me there I would have been covered. Will Renasa settle my loss of income claims? Can we submit to them?"

"Jaco I have always said to you that I want to be covered when I suffer any loss hence me ensuring everything I own always. I have lost 18 million in GP so far. I have had to put 4.5 million into my businesses to stay open. I find it hard to believe that I am not correctly insured. My friends in the trade are being paid out."

97. I agree with the submission by counsel for the third party that these communications leave no room for doubt as to the possibility of claims to come. As early as 9 June 2020 (within the period of insurance of the 2020 policy, and before the renewal proposal in July 2020), circumstances had arisen which could give rise to a claim being made against the defendant. By 20 January 2021 (within the period of insurance of the 2021 policy) the situation was quite clear. The plaintiffs indicated that they regarded themselves as inadequately covered, while competitors in the same industry were successfully receiving payouts. This must have served as a forewarning to the defendant of an impending claim against it.

98. The obligations in clauses 2(a) and 3 of the policy wording, whether that of the 2020 policy or the 2021 policy, were therefore triggered. It is common cause that the defendant did not notify the third party of any of these circumstances and communications prior to 1 July 2021, when it sent the plaintiffs' letters of demand to the third party's underwriter.

99. *Reinecke et al*[29] observe that *"[l]iability policies as* a *rule require the insured to notify the insurer of particular facts. What exactly requires notification depends on the wording of the particular policy and, generality,*

---

29 *South African Insurance Law* (LexisNexis, 2013) at para 25.46.

on the type of liability insurance. The purpose of the notification is to alert the insurer to the possibility of an (action against the insured and a *consequent) action against itself, so that it may take steps to mitigate the insured's loss (liability) and, with it its liability to pay him an indemnity for it".*

100. The defendant says that on 21 July 2020, when it renewed its policy with the third party, the law in relation to the operation of an extended business interruption clause was in a state of flux. Major insurers, including the third party itself, asserted in ongoing litigation that an extended business interruption clause did not yield business interruption cover in respect of losses caused by the Covid-19 pandemic. It was thus impossible for the defendant to suppose or predict that the SCA's judgment in *Guardrisk* would ultimately lay down that an extended business interruption clause did indeed yield such cover. Accordingly, the defendant could not on 21 July 2020 have been aware of any circumstances that might give rise to a claim against it.

101. It seems to me, however, that precisely because of the ongoing litigation on issues directly pertinent to the plaintiffs' and the defendant's situation, the defendant must have been acutely aware that it was at risk of a claim. It should have alerted the third party of this risk – by all accounts both the defendant and the third party were awaiting the final word from the SCA. The fact that the plaintiffs in their email correspondence did not directly assert a claim against the defendant is neither here nor there, because the accusatory tone of the email correspondence (admittedly also addressing other aspects such as the cost of the cover obtained by the defendant) speaks for itself. The defendant ought to have understood the correspondence as conveying that the plaintiffs might claim damages from it.

102. The defendant must therefore have realised that a storm was brewing, at least by January 2021 when the plaintiffs expressed their incredulity at not being covered. Its failure to notify the third party of what was going on constituted a breach of the policy, and that the breach was material

because both clause 2(a) and clause 3 were material to allowing the third party to mitigate any possible claims it might subsequently have had to face. By withholding notification, the defendant deprived the third party an opportunity to mitigate against its potential loss.

103. The third party points out that this approach was followed in *Thompson v Federated Timbers and others*[30] where a similar notification clause had been breached. The court held that *"(t)he reason is that what had to be reported was the event that might give rise to the claim against Zurich and that event was Mr Thompson's alleged fall*." The court explained[31] why the breach of these clauses, in the form of non-notification, has severe consequences on the third party:

> *"The purpose of* a *clause such* as *this is to enable the insurer to investigate the event under the most favourable circumstances and to take immediate steps to mitigate the loss. It can interview witnesses, inspect the scene of the accident, assess the cause of the accident and determine whether or not any liability is likely to attach in consequence of the incident. That in turn may enable it to resolve the claim quickly and at minimal cost. Delay may be seriously prejudicial. In particular, the insurer, with its broader experience, may have a better understanding of what type of claim may arise from* a *particular accident. Thus in the present case where Mr Judkins contemplated the possibility of* a *claim by Federated Timbers the insurer would no doubt have contemplated the possibility of* a *direct claim by Mr Thompson. That could have led them to contact Mr Thompson's attorneys at an early stage and compromise the claim. It is clear that the failure to notify Zurich in 2008 of Mr Thompson's alleged accident had within it the seeds of prejudice to Zurich's interests."*

104. This reasoning is apposite in the present matter. The breach of either or both clauses 2(a) and 3 is material and renders the policy void. Compliance with these clauses was in any event a condition precedent for any claim for indemnity under either of the policies, or at least a material obligatory term of the policies:[32]

---

30 *Thompson supra* para 22.
31 At para 24.
32 *Napier NO v Van Schalkwyk* 2004 (3) SA 425 (W) at 436G-437B.

"There has been judicial debate as to whether a condition such as condition 3 constitutes a condition precedent or is merely a material obligatory term of the policy. More recent authority clearly favours the latter approach. … Whichever approach is adopted, it seems to me that condition 3 is clear and unequivocal in its meaning and effect. It provides in terms that a failure to furnish notification of the loss in writing within 24 hours is to hold the consequence that the indemnification to which the insured might otherwise have been entitled is to be treated as forfeited. In short, a breach by the omission to furnish the prescribed notification will result in the appellant being absolved from its obligation to indemnify the insured… It is of course true, as was pointed out by the learned Judge a quo, that the condition was imposed for the benefit of the appellant and that the failure by the respondent to provide it with written notification of the loss within the prescribed time-frame occasioned no prejudice to it whatsoever, whether in relation to its ability to investigate the claim or to make a decision thereon. This consideration does not in my judgment impact on the appellant's right to refuse the claim, for it is now settled law that it is entitled to invoke the benefit conferred upon it by a condition such as condition 3, irrespective of whether it has suffered any prejudice as a result of any non-adherence thereto."

105. If, therefore, I had found that the defendant had a claim for indemnification under either policy, I would have held that the third party would have been entitled to repudiate the claim on the basis of the defendant's breach of the notification clauses.

The limit of indemnity

106. In light of the findings set out above, it is not necessary to consider the third question that the parties posed for determination, which was the limit of the indemnity to which the defendant would have been entitled if it had a right to indemnification under either policy. I have earlier referred to the monetary limits imposed under the respective policies.

Costs

107. It would be fair for each party to bear its own costs incurred as a result of the defendant's interlocutory application. As I have indicated, the erroneous inclusion in the separation order of a fact that was not common cause is to be laid at both parties' door. It is a pity that the error could not earlier have been

rectified by agreement, thus saving the costs incurred in launching and opposing the application.

108. There is no reason for costs not to follow the event as far as the separated issue is concerned. This would include all costs incurred by the third party after the delivery of the third party notices. The parties were agreed that counsel's fees should be taxed on Scale C. I agree that that is an appropriate scale given the issues involved, including the interpretation of the policies, and the importance of the matter to the parties.

Order

109. In the premises, I make the following orders:

Under case number 5421/2023:

1. The defendant's interlocutory application for the variation of the separation order dated 19 February 2025 is granted, and that order is varied by the introduction in paragraph 3.1 thereof, immediately after the words "*paragraphs 22 to 24, inclusive*", of the bracketed words "*(but excluding paragraph 24.11)*".

2. Each party shall pay its own costs incurred as a result of the interlocutory application.

3. The separated issue is determined in the third party's favour, and the defendant's claim against the third party for indemnification is dismissed.

4. The defendant shall pay the third party's costs in relation to the third party proceedings, including counsel's fees taxed on Scale C.

Under case number 5422/2023:

5. The defendant's interlocutory application for the variation of the separation order dated 19 February 2025 is granted, and that order is varied by the introduction in paragraph 3.1 thereof, immediately after the words "*paragraphs 22 to 24, inclusive*", of the bracketed words "*(but excluding paragraph 24.11)*".

6. Each party shall pay its own costs incurred as a result of the interlocutory application.

7. The separated issue is determined in the third party's favour, and the defendant's claim against the third party for indemnification is dismissed.

8. The defendant shall pay the third party's costs in relation to the third party proceedings, including counsel's fees taxed on Scale C.

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

For the plaintiff:	No appearance.
For the defendant:	Mr T. M. Tyler
Instructed by:	Visagie Vos Inc.
For the third party:	Ms L. Segeels-Ngube
Instructed by:	Eversheds Sutherland (South Africa) Inc.