

CONTINGENT BUSINESS INTERRUPTION

CBI EXPLAINER SERIES

WHY IS SANTAM APPEALING THE JUDGMENT?

The decision to appeal was not taken lightly and was made only after a detailed analysis of the judgment and after consultation with our international reinsurers. In summary, the following factors, taken together, led to the decision to appeal:

- Santam believes the High Court erred in its judgment regarding causation and the insured peril, the Trends Clause and the indemnity period:
 - Both the main and concurring judgments identify the insurers' argument as being to the effect that the policy only provides cover if the disease outbreak is confined to the local radius – that is, that there must be Covid-19 in the local radius and nowhere else – and then rejecting that argument. That was not Santam's argument in the Ma-Afrika proceedings. The issue is whether **the insured peril** is confined to the local outbreak and whether cover is in consequence confined to the consequences of the local outbreak, whether or not there is disease elsewhere.
 - The Court's interpretation reflects a conclusion that the Infectious Disease extension was intended to provide general pandemic cover in the event that the disease had manifested locally, and regardless of whether the local occurrences had any causative role at all. This is not the interpretation of the clause, which in plain language provides for cover for losses resulting from the local occurrence of the disease.
 - Lifting possible government reaction generally into the insured peril despite the absence of reference to it in the wording, fundamentally changes the focus, so that cover then extends to government reactions associated with the disease generally, divorced from the local occurrence.
 - With respect to the indemnity period, a memorandum is expressly included in the schedule that states "*NOTE: Extensions under the Section are limited to an Indemnity Period of 3 months.*" The words of the Memorandum in their ordinary language apply to all extensions to the Business Interruption Cover. The Infectious Disease extension is in its own terms expressly an extension. Even if it were right to describe it as "embedded", it would not change its character as an extension. The primary insuring clause for Business Interruption expressly covers only interruption consequent upon physical loss or damage. All of the provisions for cover for non-damage events, including infectious disease, are plainly extensions to that operative clause.
- These differences of interpretation of policy wording as stated above are substantive and follow arguments raised not just in South Africa but in several jurisdictions, including the UK, US and Australia.
- The Ma-Afrika ruling makes specific references to Café Chameleon vs Guardrisk judgments and FCA judgments in the UK. All of these judgments have been taken on appeal, with decisions expected late in 2020 or early 2021.
- Reinsurers regard a ruling by a country's highest court as determinative and require such a ruling before considering a claim. In the case of South Africa, this will be a ruling by the Supreme Court of Appeal (or if further appealed by any party, the Constitutional Court) and a similar appeal process is being followed in the UK.



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Ultimately, the absolute scale of the CBI matter to the insurance industry and the precedents at stake are the reasons for the need for legal certainty. Such legal certainty is critical not only for current claims but also for future policy wordings and access to ongoing international reinsurance capacity.

While waiting for the legal process to be concluded, Santam paid out more than R1 billion in interim relief to assist nearly 2 500 small and medium-sized businesses in the hospitality, leisure and non-essential retail services with CBI cover in their policies. These payments will be considered advance payments against any finally determined claims, in the event that the courts ultimately rule in favour of the policyholders. Should the courts rule in favour of Santam, the amounts paid will be considered relief payments and will not be recovered from policyholders.

We commit to pursuing an expedited appeal process to ensure we speedily bring this matter to finality.

