



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs including the costs of three counsel, an appeal against the decision of the Western Cape Division of the High Court of South Africa, Cape Town (the high court).

This appeal concerned the applicable indemnity period in relation to business interruption losses under insurance policies. It involved claims by two companies under insurance policies, based on the outbreak of the Covid-19 pandemic. Although the question before the SCA was limited to a consideration of the period during which, according to the policy, the indemnity operated, the SCA also, in dealing with the background, for context, and a better appreciation of how the present dispute arose, dealt briefly with the dispute concerning the question of whether Ma-Afrika Hotels (Pty) Ltd (Ma-Afrika) and the Stellenbosch Kitchen (Pty) Ltd (the Kitchen) were indemnified in relation to the events in question and the high court's conclusions in that regard.

Ma-Afrika operates hotels and businesses in the Western Cape. The Kitchen is a restaurant that operates on the premises of Ma-Afrika's Stellenbosch Hotel. Ma-Afrika and the Kitchen were the respondents in this matter. At the time of the outbreak of the

Covid-19 pandemic in South Africa, during March 2020, Ma-Afrika held four insurance policies with business interruption cover provided by Santam Limited (Santam) and the Kitchen held one. In terms of the policies, Ma-Afrika and the Kitchen were indemnified for loss of revenue. The insurable event in terms of the policy was the outbreak of a 'notifiable disease' at, or within a 40 km radius of each of the aforesaid establishments.

On or about 11 March 2020, according to Ma-Afrika and the Kitchen, an insurable event catered for by the policies they held with Santam occurred, namely, a notifiable disease in the form of Covid-19, within a 40 km radius of each of them. Consequently, on 1 April 2020, they lodged a claim. This elicited a response from Santam to Ma-Afrika and the Kitchen that four of the five claims for business interruption losses had been rejected, with only the claim in respect of the Stellenbosch Hotel being accepted. That only was for the period 15 to 27 March 2020, due to the outbreak at that establishment, causing revenue losses only for that period.

Santam relied on an indemnity period clause in the policy. According to Santam, the policy defines an indemnity period as commencing with the damage as contemplated, which results in the loss and ends 'not later than the number of months thereafter stated in the schedule during which the result of the business shall be affected in consequence of the Damage'. It followed, so Santam contended, that the proximate cause of the damage determined whether there was an indemnity *and* its duration. Santam submitted further, that the maximum period of the indemnity in terms of a 'memorandum' to the business interruption section of the policy recorded that 'extensions' to the policy are limited to three months. This applied, so Santam said, because infectious disease cover is an 'extension' to the business interruption cover and therefore subject to the 'Memorandum'. Ma-Afrika and the Kitchen contended that the indemnity period was 18 months.

The SCA held that in interpreting the policy, the starting point was to look to see, from the Schedule on the second page of the policy which 'Policy Sections' were in force. They included a 'Business Interruption Section'. The next step was to consider the perils which might result in business interruption, in respect of which the insured would enjoy insurance cover. The perils, indisputably, included notifiable infectious diseases. The SCA held further that one would proceed from that point to consider for which

losses, flowing from business interruption due to a notifiable infectious disease, Ma-Afrika and the Kitchen would receive insurance cover. In that exercise, one would proceed to the Main Schedule. The first large block on that page indicated clearly that loss of 'Revenue' and the 'Additional increase in cost of working' that ensued from that *and* other perils would be covered. That, from the policy wording, is what the insured sought and what Santam provided cover for. Ma-Afrika and the Kitchen or any other business entity, looking at what appeared at the end of that first large block of the Main Schedule, would be comforted to see that indemnity in relation to those losses would extend for a period of 18 months and not three months, as contended by Santam.

Having regard to the analysis of the text, the context, as well as the purpose of the policy and the Schedule, the SCA found, the words 'under the Section' in the Memorandum should be understood to refer to the 'Extensions and Clauses' section within the second large block of the Schedule, and not as contended by Santam . In the Court's view the indemnity period in relation to claims for loss of revenue due to business interruption, ineluctably, was 18 months. In any event, given that the policies were admittedly difficult to navigate, and assuming, at best for Santam, that there was a meaningful degree of uncertainty concerning the indemnity periods, a conclusion might be reached that on that aspect the policies were ambiguous. This meant that the long-standing *contra proferentem* rule would apply against Santam and the interpretation advanced on behalf of Ma-Afrika and the Kitchen would triumph. The high court's decision that the indemnity period was 18 months was thus correct and the appeal had to fail. Finally, the SCA held that there was force in the argument on behalf of Ma-Afrika and the Kitchen, which essentially was that Santam had twisted and turned, and changed tack in order, studiously, to avoid liability. Hopefully, held the SCA, that was now at an end. It accordingly, dismissed Santam's appeal.

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