THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 640/2023

In the matter between:

AIG SOUTH AFRICA LIMITED	**APPELLANT**
and	
43 AIR SCHOOL HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
43 AIR SCHOOL (PTY) LTD	**SECOND RESPONDENT**
PTC AVIATION (PTY) LTD	**THIRD RESPONDENT**
JET ORIENTATION CENTRE (PTY) LTD	**FOURTH RESPONDENT**

Neutral Citation: *AIG South Africa Limited v 43 Air School Holdings (Pty) Ltd and Others* (640/2023) [2024] ZASCA 97 (13 June 2024)

Coram: DAMBUZA, MOKGOHLOA, and MATOJANE JJA and COPPIN and TOLMAY AJJA

Heard: 9 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 13 June 2024.

Summary: Insurance law – interpretation of insurance policy – policy providing cover for loss resulting from interruption of business due to notifiable disease occurring within 25 km of business premises of the insured – multiple insured – whether claimant insured – whether cover joint or composite – whether insurer had

to be given notification of claim in terms of the contract – proof of the insured peril and causation.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mia J, sitting as court of first instance):

1. The appeal in respect of the order of the high court insofar as it relates to the third claim of the second respondent and in respect of the claims of the third and fourth respondents succeeds.
2. The appeal in respect of the first and second claims of the second respondent is dismissed.
3. The parties are to bear their own costs of the appeal.
4. The order of the high court is amended to read as follows:

   '1. The respondent is liable to compensate the second applicant in respect of its two claims for business interruption submitted, respectively, on 19 May 2020 for the period 26 April 2020 to 30 April 2020, and on 9 June 2020 for the period 1 May 2020 to 31 May 2020.

   2. The respondent is directed to engage the second applicant meaningfully for the purpose of quantifying the monetary value of the claims referred to in paragraph 1.

   3. The application is otherwise dismissed and each party is to bear its own costs.'

JUDGMENT

Coppin AJA (Dambuza, Mokgohloa and Matojane JJA and Tolmay AJA concurring):

Introduction

[1] This appeal is about the liability of the appellant AIG South Africa Limited (AIG) to the respondents under a policy of insurance cover (the policy) for alleged business interruption brought about by the outbreak of the COVID-19 pandemic (Covid-19). The four respondents, 43 Air Holdings (Pty) Ltd (43 Air Holding), 43 Air School (Pty) Ltd (43 Air School), PTC Aviation (Pty) Ltd (PTC), and Jet Orientation

Centre (Pty) Ltd (JOC) refer to themselves as entities that are ‘part of the 43 Air school Group’.

[2] On 1 July 2020 and 23 March 2021, AIG informed the second respondent (43 Air School) of its repudiation of two claims which had been submitted by 43 Air School to AIG in terms of the policy. These claims had been submitted by 43 Air School, respectively, on 19 May 2020 in respect of business interruption it alleged it experienced for the period 26 April 2020 to 30 April 2020 and on 9 June 2020 for business interruption it alleged it experienced for the period 1 May 2020 to 31 May 2020 (the first and second claims of 43 Air School). In substantiation of those claims 43 Air School had alleged that AIG’s liability under the policy for the business interruption had been triggered by the outbreak of Covid-19 within 25 km of its business premises in Port Alfred in the Eastern Cape.

[3] AIG alleged that 43 Air School in respect of its first and second claims had not proved a causal connection between the outbreak of Covid -19 within a 25 km radius, as envisaged in the policy, and its loss. In response to that repudiation by AIG, the respondents, including 43 Air School, brought an application in the Gauteng Division of the High Court, Johannesburg (the high court) for an order: (a) declaring that AIG was liable to compensate 43 Air School, the third respondent (PTC) and the fourth respondent (JOC), respectively, for business interruption in terms of the policy, for the period 27 March 2020 to 31 May 2020; (b) directing AIG to engage 43 Air School, PTC and JOC ‘meaningfully for the purpose of quantifying the monetary value’ of their respective claims, ie as detailed in the application, in respect of business interruption for the period 27 March 2020 to 31 May 2020; and (c) directing AIG to pay the costs of the application.

[4] In the application, 43 Air School not only sought to hold AIG liable for its first and second claims, it also sought to hold AIG liable for a third claim. This claim relates to the period after an outbreak of Covid-19 within 25 km of the business premises of 43 Air School’s subsidiary, 43 Advanced, in Lanseria and within 25 km of the business premises of PTC and JOC in Gqeberha (43 Air School’s third claim). PTC and JOC sought to hold AIG liable for their respective claims due to the outbreak of the disease within 25 kms of their business premises in Gqeberha.

[5] The application was opposed by AIG and after argument the high court granted an order in the terms sought by the respondents. This is an appeal with the leave of the high court against the whole of its order in the application.

[6] AIG denies liability for the first and second claims of 43 Air School, contending that 43 Air School provided no evidence that triggered its liability under the policy. And, as an adjunct to that defence, AIG alleges that the nature of those claims had changed when they were incorporated in the application, because 43 Air School now also seeks to hold AIG liable under the policy based on the outbreak of Covid-19 in Gqeberha and Lanseria. The latter is based on its contention that the policy was a joint one in respect of 43 Air School, PTC and JOC. AIG denies that the policy was joint and contends that it was composite. AIG further contends that the third claim of 43 Air School is bad in law because it is clearly based on the respondents' erroneous contention that the policy is a joint one, and because 43 Air School did not comply with the reporting clause in the policy in respect of the third claim.

[7] AIG's defences to the claim of PTC are essentially the following: (a) PTC is not an insured under the policy; and (b) PTC has not complied with the reporting clause in the policy. The defence of AIG to JOC's claim is merely confined to the fact that JOC did not comply with the reporting clause in the policy.

[8] Determining AIG's liability for the claims of necessity involves the interpretation of the relevant clauses of the policy in their proper context. The same principles that apply to the interpretation of contracts also apply to the interpretation of insurance contracts and they are trite. Recently those principles have been restated by this Court in *Centrique Insurance Company Ltd v Oosthuizen and Another*[1] *(Centrique)* as follows:

'…Insurance contracts are contracts like any other and must be construed by having regard to the 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

[1] *Centrique Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 11; 2019 (3) SA 387 (SCA) para 17. See also *Guardrisk Insurance Company Limited v Café Chameleon CC* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA); 2021 (2) SA 323 (SCA) paras 12-13. In this judgment the decision of the high court in that matter is referred to either by its reported name, or as '*Café Chameleon'*.

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…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 ….'(Footnotes omitted.)

[9] Regarding the second part of the above quotation from *Centrique* - the parties in this matter have specifically agreed in clause 21 of the policy that '[t]he *contra proferentem* rule does not apply to the interpretation of this [p]olicy'. Notwithstanding such an exclusion, the court, when interpreting the policy, is to opt for a commercially sensible, or businesslike construction in the case of an ambiguity.[2]

Background facts

[10] The first respondent, 43 Air School Holdings (Pty) Ltd (Holdings), holds hundred percent of the shares in 43 Air School. The latter is described by the respondents in their founding papers in the application as the main operating entity of the '43 Air School Group' which is said to consist of Holdings, 43 Air School, PTC and JOC. The place of business of, respectively, PTC and that of JOC seems to be at the same address in Gqeberha (but there is no indication that they share facilities). Those premises are owned by Green Gecko Trading (Pty) Ltd, an entity which has not been cited as a party in these proceedings, but which is wholly owned by Holdings. Fifty percent of the shares in PTC, at the time of the application, was held by Holdings and the balance was held by a trust which is not cited in these proceedings. Previously, the 50% held by Holdings vested in an entity, National Airways Corporation (Pty) Ltd (NAC), which is also not cited in these proceedings. It is not stated when exactly Holdings acquired the shares in PTC from NAC. The respondents aver that PTC and 43 Air School hold the shares in JOC in equal proportions.

[2] *Centrique* (fn1) paras 18-21.

[11] It is not in issue that 43 Air School, at its premises in Port Alfred, in addition to other courses and training, provides basic pilot and a traffic control training to candidates from the Port Alfred aerodrome. The candidates are from the private, general, communal, airline and military sectors. PTC operates as an exclusive pilot preparation service to candidates from 43 Air School and provides Boeing 737NG and Airbus A320 flight training for newly qualified commercial pilots from the Gqeberha premises. JOC owns and provides flight simulators for lease at the Gqeberha premises. Some of these simulators are utilised by 43 Air School at its Lanseria premises, where it operates as 43 Advanced, but the simulators are used primarily by PTC in Gqeberha for the training of pilots.

The policy

[12] For many years AIG was the insurer of the NAC and 43 Air School and, in terms of the policy wording, also the insurer of their respective 'subsidiary companies, managed, controlled, member companies, joint venture, sports, social and recreational clubs and societies and any other persons or entities for which they have the authority to insure, jointly or severally, each for their respective rights and interests'. The policy was arranged through a broker, Marsh. The insurance was on an annual basis and the periods of insurance ran from 1 July to 30 June of each respective year. The insurance for the year 1 July 2019 to 30 June 2020 was renewed through Marsh but the details of the insured as they appeared on policies for the previous years were not altered or amended. On 3 April 2020 Marsh confirmed in writing to 43 Air School that the insured were those entities as described in the first sentence of this paragraph. It further informed the insured, inter alia, that the property insured was 'assets – R275 499 804', that the business interruption cover was in the amount of 'R66 443 230' and that the insurance was in place for the period '1 July 2019 to 24:00 local Standard time on 30 June 2020 at locations where the Insured is situated.'

[13] The policy itself indemnified the insured against all the risks stipulated in the policy. The general operative clause of the policy states: 'In consideration of payment of the premium by or on behalf of the Insured, the Insurer agrees to indemnify or compensate the Insured by payment or, where applicable, at the option of the Insurer, by replacement, reinstatement or repair, in respect of Defined Events provided for in terms of this Policy

occurring (unless otherwise stated herein) during the Period of Insurance up to the applicable Limits of Liability as stated herein.
Unless otherwise stated herein, Specific Exclusions, Conditions and provisions shall override General Exclusions, Conditions and provisions. Any endorsement stated in the Specification shall override the specific Policy section to which it relates.'

[14] 'Business interruption' cover, which is dealt with in section C of the policy, is provided for interruptions to the business of the insured caused by a defined, or extended defined, event that occurs during the period of insurance. The basis of the indemnity in respect of business interruption is stipulated to be 'gross profit' which, according to the policy 'is limited to (a) reduction in turnover; and (b) increase in [the] cost of working, less any sum saved during the indemnity'. Certain of the terms in the definition of gross profit are defined in the policy. The term, 'turnover' is defined as 'the money paid or payable to the insured for goods sold and delivered and for services rendered in the cause of the business'. And 'indemnity' is defined as 'the period beginning with the occurrence of the defined event and ending when the results of the business cease to be affected in consequence of the defined event but not exceeding the number of months stated in the specification.'

[15] The 'extended defined event' in terms of the policy includes (amongst others) the following which is relevant for present purposes: '…[the] outbreak of infectious or Contagious disease within a radius of 25 km of the Premises'. In the same clause in the policy the 'disease' referred to is defined as follows: '"Infectious or Contagious Disease" shall mean any human infectious or human contagious illness or disease which a competent authority has stipulated shall be notified to them or has caused a competent authority to declare a notifiable medical condition to exist or impose quarantine regulations or restrict access to any place.' The term 'premises' is defined in the policy as 'any premises used for the purpose of the Business', and the term 'Business' is defined as 'any activity of the Insured'.

[16] The following is common cause: that the extended defined event applies in respect of Covid-19; that it was a notifiable disease; that at the beginning of 2020 it became apparent that this potentially fatal and highly infectious disease was spreading and affecting people worldwide; that on 11 March 2020 the World Health Organisation (WHO) declared Covid-19 a pandemic. It is also not in issue that with

effect from midnight of 26 March 2020 to midnight of 16 April 2020 South African citizens were placed under national lockdown by the South African government, when the Minister of Co-operative Governance and Traditional Affairs issued regulations on 25 March 2020 under Government Notice R398, in terms of s 27(2) of the Disaster Management Act 57 of 2002, to that effect. On 26 March 2020 Government Notice R419 was published in terms of which certain of those regulations were amended. Amended Regulation 11B(1)(b) provided that:

'During lockdown, all businesses and other entities shall cease operations except for any business or entity involved in the manufacturing, supply or provision of an essential good or service, save when operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence.'

[17] It is also not in dispute that on 29 April 2020 Government Notice R480 was published in Government Gazette 43258 in terms of which the period of the lockdown was stated to be from midnight on 26 March to 30 April 2020. The movement of persons was also restricted during this period and the country's national borders were opened for limited purposes. It is not in dispute that on 30 May 2020 Government Notice 615 was published which had the effect of ameliorating this dire situation. Amongst others, aviation training organisations were allowed to provide virtual and contact training to pilot students that were in South Africa, albeit subject to the other Covid-19 regulations and directions. The period from 26 March 2020 to 30 April 2020 is referred to in this judgment as 'the national lockdown.'

[18] It is also not in issue that an outbreak of Covid-19 occurred within a radius of 25 km of the business address of PTC and of JOC in Gqeberha on 21 March 2020, and within a radius of 25 km of the Port Alfred business premises of 43 Air School on 25 April 2020. Further, it is not disputed that 43 Air School, in respect of its third claim, and PTC and JOC in respect of their claims, have not complied with the general and specific reporting clauses in the policy.

The Issues

[19] Against the background of those facts, the issues arising from the respondents' claims and AIG's defences thereto, will be considered in turn. The

issues are the following: (a) whether the policy (ie in respect of business interruption) was joint or composite? (this relates to the claims of 43 Air School, PTC and JOC); (b) whether the respondents had to comply with the reporting clauses in the policy before bringing the application and before rendering AIG liable under the policy (this relates to the claims of 43 Air School, PTC and JOC); (c) whether PTC was insured under the policy; and (d) whether 43 Air School, in respect of its first and second claims, had proved that it ought to be indemnified for its loss, ie that its loss in respect of those claims was causally connected to the extended defined event as contemplated in the policy.

Joint or composite policy/cover

[20] In support of the claims of 43 Air School, it was contended for the first time by Mr Musson in the replying affidavit filed in the application on behalf of all the respondents that the policy was a joint one, essentially covering all the entities in the '43 Air School Group'. This group, according to Mr Musson, included 43 Air School, PTC and JOC. It was also contended in that regard that accordingly the outbreak of Covid-19 in Gqeberha on 21 March 2020, and the outbreak at Lanseria on 27 March 2020, constituted the extended defined event as envisaged in the policy and triggered AIG's liability under the policy for business interruption cover in respect of all the claimants within the 43 Air School Group.

[21] In contending that the policy was a joint one (ie as opposed to a composite policy) 43 Air School essentially relies on the following: (i) its version of the interrelationship between itself, PTC and JOC at 'corporate and operational levels'; (ii) the definition of the term 'insured' in the policy; (iii) the definition of the term 'business' in the policy and its assertion that the respondents were part of a group, '43 Air School Group'; (iv) the fact that the cover for business interruption in the policy is stated to be in a globular amount of R 66 443 230 and that no distinction is made between the different insured entities in respect of the amount of cover; and (v) the fact that the premium payable under the policy was also expressed as a globular amount of R 59 600 plus VAT for all insured , ie, and not split as per insured.

[22] According to the argument of 43 Air School: 'When one bears in mind that the assets are combined under the umbrella of 43 Air School it is both logical and businesslike to conclude that response under the policy could be triggered by infections or contagious disease within a radius of 25 km of just one of the premises used for the business as this

had the effect of giving rise to a lockdown of all the business activities at all the premises.' Thus, according to this argument, the outbreak within 25 km of the business premises in Lanseria or Gqeberha was sufficient to trigger AIG's liability in respect of the claims of 43 Air school (and by extension, that of PTC and JOC).

[23] According to AIG, the policy was a composite one in respect of the business interruption, because the gross profit was the basis of the insurance and the gross profit of each of the entities was separate and distinct. While one entity had an interest in its own gross profit, that same interest was not shared by the other entities. The interest of each entity in that gross profit, was at best, separate and different or diverse.

[24] Determining whether a policy is joint, or composite is a matter of its interpretation and of the nature of the interest(s) of the insured.[3] The definition of 'insured' in the policy may indicate whether it is one or the other, but not necessarily so. It may be necessary to consider other clauses or provisions in the policy that could indicate its nature. It is accepted that where a policy covers more than one insured, it may either be joint (which effectively means that there is only one policy), or composite (which means that there is in fact a bundle of policies contained in one document).

[25] In *Arnould* [4] the difference between joint and composite policies is described as follows:

'Generally, where two or more interests are insured under the same policy, the policy will be construed as a composite insurance, insuring each person interested severally in respect of his own interest. There can only be a joint insurance in the strict sense when the assureds have a joint interest in the insured property, as where they are joint owners. If the policy is joint, each assured must be joined in any proceedings, and defences arising from the conduct of any of them are available against them all. Payment to one joint assured operates as a good discharge under the policy.'

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[3] *General Accident Fire and Life Assurance Corporation, Limited, and another v Midland Bank, Limited and others* [1940] 2 KB 388 at 404-407.

[4] Gilman et al *Arnould: Law of Marine Insurance and Average* 20th ed (2021) at para 11-31. See also R M Merkin *Colinvaux's Law of Insurance* 13th ed (2022) at paras 15-00 and 15-012; and E J MacGillivray *MacGillivray on Insurance Law* 15th ed (2014) at para 1-203.

[26] It is also pointed out in *MacGillivray*,[5] with reference to the decision in *Samuel Ltd v Dumas*,[6] that 'there cannot be a joint insurance policy unless the interests of the several persons who are interested in the subject-matter are joint interests, so that they are exposed to the same risks and will suffer a joint loss by the occurrence of an insured peril.'

[27] The position in English law is that the question whether an insurance policy is joint, or composite, is a matter of construction, but if the words used are capable of either meaning they are to be construed according to the nature of the interest concerned.[7] The same would apply in South African law. In *Gordon & Getz*,[8] the subject is dealt with under the topic of 'Divisibility' and the position is stated as follows: ' Where the interests of several persons are covered by the same policy, and the question arises whether by the act of one the rights of all are to be affected, it must be considered whether the contract is entire in respect of all or may be construed as a separate insurance for each, It has been held that an insurance in one policy for the owners of a ship is not divisible, and the illegal act of one, without the knowledge of the others , avoids the entire contract as if all had concurred. The rule is the same in all cases where the persons for whose benefit the insurance is made, have a joint or common interest in the subject-matter insured.'

[28] The high court did not make an unequivocal finding that the policy in question was either composite or joint. But it found that even though the definition of the term 'insured' in the policy contained wording commonly used to identify a composite policy, namely, the words: 'they have authority to ensure jointly and severally each for their respective rights or interests', the 'event which impacted the one facility has an impact on the other facilities as well' and that AIG did not dispute the version of the respondents 'regarding the losses suffered or that the business interruption of one facility did not impact the other.'

[29] The high court opted for what it termed 'a common-sense approach', which it held it derived from *Guardrisk*,[9] namely, that the respondents were entitled to relief

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[5] *MacGillivray* para 1-202.
[6] *Samuel Ltd v Dumas* 1924 A. C 431 at 445.
[7] See *Midland Bank* (fn3) and *New Hampshire Insurance Co. and Others v MGN Ltd and Others* [1997] L.R.L.R 24.
[8] D M Davis *Gordon & Getz: The South African Law of Insurance* 4 ed (1993) at 142.
[9] *Guardrisk Insurance Company Limited v Café Chameleon CC* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA); 2021 (2) SA 323 (SCA).

‘especially [since] they shared the same facilities to conduct training and for support and ongoing or secondary training’. This latter finding was clearly incorrect as there was no evidence of any of the respondents ‘sharing the same facilities’. But also, because the approach did not consider the fact that the subject-matter of the insurance cover (ie for business interruption) was gross profit as defined in the policy. There was no evidence that the respondents had or shared a common gross profit, or that they had a joint and common interest in each other’s gross profit.

[30] The definition of ‘insured’ in the policy is not helpful in determining whether the cover in question was joint or composite, but it does indicate that there were multiple insureds and that some of the insurance might have been joint and other insurance separate or composite. In that definition only two of the insured are identified by name, namely, NAC and 43 Air School. The other insured in terms of the policy are those whom the two named entities (respectively) ‘have the authority to insure’ ie those whom they are mandated to insure. According to the definition, these may include their respective subsidiaries, member companies managed or controlled by them, joint venture partners, social and recreational clubs, and societies (and any other persons or entities) whom they are authorised to insure. The nature of the insurance may either be joint, or several, in terms of which each of the insureds are covered in respect of their respective rights and interests.

[31] The authorities referred to above, confirm that the mere fact that there are several persons or entities insured under one policy does not make that policy one of joint insurance. Whether it is a joint insurance policy depends on the interests of those persons or entities. If their interest in the subject matter of the insurance is joint, in the sense that they are exposed to the same risk and will suffer the same loss on occurrence of the peril insured against, that may be indicative of the policy being joint. However, where their interests are different, even though it is in respect of the same subject-matter, the policy would not be a joint one, but composite, which is intended to insure each of the insured separately in respect of its own interests.

[32] The fact that they may share facilities or have an interrelationship at operational level, or the fact that the maximum cover is a singular globular amount or that the premium is payable in a singular globular amount, does not mean that the

policy is a joint one.[10] The nature of the interest in the subject matter is the decisive determinant.

[33] In this instance, the subject matter of the business interruption insurance is the gross profit of the insured entity. If the different entities do not have the same, or a common interest in each other's 'gross profit', but have separate or different interest in that regard, the policy in respect of business interruption cannot be joint but is composite. AIG contends that 43 Air School, PTC and JOC do not have a joint interest, in the sense discussed, in each other's gross profit, but, at best, have different interests in that regard. The fact that each of these entities has brought its own claim in respect of its own interest, and that the claim was not a joint one, underscores the conclusion that the business interruption insurance cover, in respect of each of them, was not joint, but composite. The 'breach of conditions' term of the policy appears to confirm this. It provides: 'The Conditions of this policy shall apply individually to each insured entity and not collectively to them so that any breach shall prejudice only the Insured entity to which the breach applies.'

The reporting obligation

[34] The first general condition of the policy, insofar as is relevant to these proceedings, provides as follows:

'1. Reporting of Claims

a) On the happening of any event which may result in a claim under this Policy the Insured shall, (subject to the provisions of any Claims Preparation Costs or similar extension) at their own expense [:]

i) give notice thereof to the Insurer as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured;

ii) …

iii) As soon as practicable after the event submit to the Insurer full details in writing of any claim;

iv) give the Insurer such proofs, information and sworn declarations as the Insurer may require and forward to the Insurer immediately any notice of claim or any communication, writ, summons or other legal process issued or commenced against the Insured in connection with the event giving rise to the claim …'

[10] See, inter alia, *Corbin & King Ltd & Ors v AXA Insurance UK Plc (Rev1)* [2022] EWHC 409 (Comm) (25 February 2022) paras 237-243.

[35] The second specific condition of the policy, under the heading 'Claims', provides as follows:

'On the happening of any Defined Event in consequence of which a claim may be made under this section the Insured shall, in addition to complying with General Condition 1 – Reporting of Claims and General Condition 2 – Insurer's Rights, with due diligence do and concur in doing and permit to be done all the things that may be reasonably practicable to minimise or check any interruption of or interference with the Business or to avoid or diminish the loss and in the event of a claim being made under this Section, shall at their own expense (subject to the provisions of General Extension 1 – Claims Preparation Costs) deliver to the Insurer in writing a statement setting forth particulars of their claim together with details of all other Insurance covering the loss or any part of it or consequential loss of any kind resulting therefrom. *No claim under this Section shall be payable unless the terms of the Specific Condition have been complied with and in the event of non-compliance therewith in any respect, any payment on account of the claim already made shall be repaid to the Insurer forthwith.*' (Emphasis added.)

[36] The respondents have advanced various reasons in an attempt to justify their failure to comply with those conditions, namely: (a) that even though timeous notice of 43 Air School's first and second claims had been given, those claims had been rejected 'in principle' without any evidence that they had been investigated by AIG; (b) the rejection of those claims 'evinced a clear intention on the part of [AIG], not to honour its obligations under the policy'; (c) the terms of the policy do not expressly require that notice of the claim be given before the institution of litigation; and (e) in instances where defendants have attempted to resist a claim on the basis that no notice or demand had preceded the issue of summons, it has been consistently held by the courts that the summons or application is in itself a demand,[11] ie implying that the service of the application in this matter was compliance with the reporting obligations referred to above.

[37] It is not clear why the high court did not deal with this issue of reporting and the implications thereof. Those conditions are clear concerning the obligations of an insured intending to claim under the policy. In the latter part of the specific condition,

[11] Reliance was placed on the decisions, inter alia, in *Standard Bank of South Africa v Hand* 2012 (3) SA 319 (GSJ) para 22 and *Mettle Development Finance One (Pty) Ltd v Calgro M3 Developments (Pty) Ltd* (A5005/2014, 40945/2011) [2015] ZAGPJHC 161 (6 July 2015).

which is emphasised above, it is unequivocally stated that AIG would not be liable for payment under the policy unless and until that condition had been complied with. It is a 'condition precedent' to the liability of the insurer in the sense that a failure to comply with it suspends AIG's liability under the policy.[12]

[38] In *Russel Loveday NO v Collins Submarine Pipelines*,[13] this Court held as follows: 'In *Norris v Legal and General Assurance Society Ltd and Another* 1962 (4) SA 743 (C), a case referred to earlier in this judgment, Watermeyer, J., discussed the approach of our Courts and the Courts in England to the problem of deciding whether a condition is a condition precedent or not. He observed (at p. 748) that the trend of the decisions in South Africa is to regard conditions in insurance policies relating to the giving of notice to the insurers as conditions precedent, but concluded, as mentioned earlier in this judgement, that in the ultimate result the problem is one of arriving at the intention of the parties from the terms of the contract considered as a whole.

Condition C does not say explicitly, nor by clear implication from its terms, that non- compliance will be visited with the penalty of forfeiture. One would expect that, if an insurer intends to protect himself by incorporating a provision which will have that effect, he would do so in clear terms ….'

[39] The general and specific conditions in the policy and quoted earlier are explicit as to the requirements of the insurer and the duties of the insured. It contains clear and precise directions, and the specific condition spells out in unequivocal terms what the consequences would be if they are not complied with. It provides that in such circumstances the claim is not payable, and any payment made on a claim in respect of which there has been no compliance is to be returned to the insurer (AIG).

[40] The fact that AIG in principle rejected the first two claims of 43 Air School does not mean that 43 Air School, in respect of its third claim, or the other insureds who wanted to claim under the policy, did not have to comply with the reporting conditions in respect of their claims. There is no allegation in the founding papers of the application brought by the respondents that AIG had repudiated the policy. The

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[12] 12(1) *Lawsa* 2 ed para 377; *Norris v Legal and General Assurance Society Ltd and Another* 1962 (4) SA 743 (C) at 745 and *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 148-149.

[13] *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 148.

rejection of a claim brought under the policy is not necessarily a repudiation of the policy itself. It is further a matter of common sense that notice of the claim ought to be given to an insurer before an insured resorts to an enforcement of the claim through litigation. The conditions require reporting 'on the happening of the event', this implies prompt reporting and does not allow for a reporting only after the insured has resorted to litigation to enforce the claim. And lastly, the reporting requirement is not the equivalent of a demand. Usually, a demand follows once all conditions precedent in a contract or transaction have been met. The reporting requirement, on the other hand, is a condition precedent for AIG's liability in terms of the policy. The service of the application, whilst essential, cannot qualify as such. Another point to add is that when 43 Air School reported its first and second claims to AIG it did not report, or purport to report its third claim, or the claims of PTC and JOC as well.

Is PTC an insured under the policy?

[41] In its answering affidavit, AIG denies that Holdings and PTC were insured under the policy and refers to the fact that the insured are identified and described in the policy as follows: 'National Airways Corporation (Pty) Ltd and 43 Air School (Pty) Ltd and subsidiary companies, managed, controlled, member companies, joint ventures sports, social and recreational clubs and societies and any other persons or entities for which they have the authority to ensure, jointly or severally, each for their own respective rights and interests'. AIG contends that on the facts alleged in the founding affidavit of the respondents, neither Holdings, nor PTC fall within that description of the 'insured' and that, according to Mr Shaun Musson, who deposed to the founding affidavit, and an organogram that is annexed to that affidavit, PTC is a subsidiary of Holdings.

[42] AIG also refers to the fact that in the founding affidavit Mr Musson, who described himself, as a 'director' of each of the respondents, states, inter-alia, the following: that 50% of the shares in PTC are held by Holdings and the balance by a trust; that the reason NAC is referred to in the policy is because it was the holder, until 30 June 2019, of 100% of the shares in 43 Air School; that a management buyout occurred which resulted in Holdings acquiring 100% of the shareholding of 43 Air School; that despite Marsh being fully aware of this fact, when the policy was

eventually issued the old name of NAC remained on the policy even though their position, as holder of the shares in (inter alia) PTC, had been assumed by Holdings.

[43] And AIG points out that although Mr Musson tried to create the impression that Marsh was to amend the policy to reflect the position after Holdings allegedly bought the NAC share in 43 Air School, there was never an attempt made to amend the policy to reflect Holdings as an insured. It is clear from the papers that even though AIG dealt with Marsh, and the latter with 43 Air School, concerning the renewal of the policy, there was no instruction to change the names of the insured on the policy. On the contrary, the ultimate instruction conveyed to AIG seems to have been to leave the names of the insured on the policy as they appeared all along.

[44] It is not disputed that on 28 June 2019, Ms Mbilase of Marsh addressed an email to Ms Wide, a senior underwriter at AIG, in which she informed Ms Wide that NAC will be selling its interest in 43 Air School and that a split of the policies was envisaged if that occurred. Ms Mbilase wanted confirmation that AIG would keep NAC and 43 Air School covered pending the renewal of the policy. On 26 July 2019 Ms Mbilase again wrote to Ms Wide and to Mr Govindasami of AIG's underwriting department stating the following: 'We were trying to separate the policies now at renewal to avoid disruption when the deal finally goes through, NAC hasn't actually disposed of their interest in 43 Air School yet. We would like to therefore renew the regional NAC policy inclusive of 43 Air School per previous terms received and then issue a mid-term cancellation once we have sorted out these issues. We have already had two extensions of cover (which we are now essentially treating as one extension) and a renewal of the policy as opposed to another extension will take some of this pressure off while we get sorted on the individual quotes.'

[45] On 31 July 2019 Ms Mbilase addressed a further email to Ms Wide and Mr Govindasami, attaching the policy slip for policy renewal for both NAC and 43 Air School. And on 10 September 2019 Ms Wide signed the placing slip on which the insured continued to be described as in the past. The 'insured' were still reflected as in the description of the term 'insured' in the policy, which is quoted earlier in this judgement. Significantly, NAC still appeared as an insured and no mention is made of Holdings. On 17 October 2019 the policy wording was sent by Marsh to Ms Wide for signature and she signed it on 30 October 2019. The 'insured' were still described

as before. No cancellation of variation was submitted in which Holdings was named or substituted as an insured, and that remained the status quo.

[46] AIG's averment that Holdings was not an insured under the policy was not challenged by the respondents in the replying affidavit. The case made out by the respondents in the founding affidavit was that NAC held 100% of the shares in 43 Air School until 30 June 2019, when Holdings is alleged to have acquired those shares. But that statement made by Mr Musson, as a deponent to that affidavit, is contradicted by the emails exchanged between Ms Mbilase of Marsh and Ms Wide of AIG, which confirm that the acquisition by Holdings had still not taken place by 31 July 2019. The policy itself, was eventually renewed at the end of October 2019 with NAC still appearing as an insured on the policy, and with no mention of Holdings.

[47] The respondents did not, as they were obliged to, state exactly and unequivocally when Holdings acquired the shareholding of NAC in PTC or in 43 Air School. The motivation for that is not clear, but what appears from the papers is that such a change in shareholding did occur at some time. PTC became a subsidiary of Holdings, which on the respondent's own admission, was not an insured under the policy.

[48] The contention on behalf of the respondents, in support of their argument that PTC was an insured, namely, that PTC had been paid out under the policy in respect of a claim made in October 2019 in respect of an alleged loss suffered when items were stolen from a motor-vehicle after its locks had been jammed, is of no assistance to them. Because, at the time that happened PTC might still have been an insured as a subsidiary of NAC, or it might have been paid in error. The onus was clearly on the respondents, or more particularly, PTC, to disprove that fact in these proceedings. And it has not.

Causation

[49] A letter from AIG (presumably to Marsh) dated 1 July 2020, regarding notification of a possible claim which 43 Air School had sent to AIG on 6 May 2020, gives insight into AIG's interpretation of the policy concerning the issue of causation and its liability. The letter states, inter alia, the following:

‘1. We refer to the notification of a possible claim sent to us by the insured on 6 May 2020.

2. As you are aware, Renier Kruger Lloyd Warwick International South Africa (Pty) Ltd was appointed by us to investigate the insured’s claim.

3. We have considered the claim in its current form and the information provided. At this stage, we are of the view that the insured has not made out the claim within the ambit of the Policy.

4. The insured must prove loss as a result of an interruption of or interference with its business in consequence of an outbreak of COVID-19 within a 25 km radius of the premises insured.

5. On the information provided, the insured’s aviation School in Port Alfred was closed from 27 March 2020 when the national lockdown became effective and the insured’s loss has been calculated from 26 April 2020 which is stated in its claim as being the “*trigger event date*” and is the date upon which the first positive case of COVID-19 was confirmed in the Ndlambe district of Port Alfred. We understand that other than this isolated case there have been no other reports of confirmed cases in or around Port Alfred.

6. Your client’s loss which has been calculated from 26 April 2020, after the commencement of the National Lockdown, is stated as having been suffered as a result of “*lockdown legislation in place*”.

7. The policy does not insure business interruption and loss in consequence of Government Regulation or the National Lockdown.

8. The Financial Services Conduct Authority, in its communication dated 18 June 2020, accepts that the National Lockdown is not a trigger for a valid business interruption claim and that the interruption of the insured’s business must be proved to have been due to the occurrence of COVID-19 within the required radius.

9. We have yet to be provided with evidence to prove that the insurance business closed in consequence of the outbreak of COVID-19 within a 25 km radius of the aviation school.

10. On the information provided, the outbreak of the disease occurred after the insured’s business was closed and the loss appears to have been suffered in consequence of the National Lockdown which is not covered by the policy.

11. As currently stated, your client’s claim does not meet the requirements for cover under the infectious or contagious disease extension.

12. That being said, we are happy to consider any additional information provided.

13. The insurers rights under the policy and in law remain reserved.’

[50] In response to that letter, 43 Air School requested AIG to reconsider its claims in light of the (then) 'recent' court decisions. Seemingly, reference was being made to the decisions of the Western Cape high court in *Café Chameleon*[14] and *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited (Ma-Afrika)*,[15] and possibly the decision of the Queen's Bench Division (QB) in *Financial Conduct Authority v Arch Insurance (UK) Ltd and others (FCA)*.[16]

[51] In *Café Chameleon* the Western Cape high court dealt with similar insurance cover, where a similar argument was advanced. There it held that the insurer was liable to indemnify the claimant for its loss from a stipulated date, arising from the interruption of its business due to the national lockdown brought about by Covid-19. Having rejected a similar argument as that of AIG in this matter, that court, essentially, held that it was fallacious to argue that the claimant's loss was caused by the regulatory response to Covid-19 and not by the outbreak of Covid-19 within the agreed radius. Particularly, because Covid-19 was the very reason for the regulatory intervention. It also held that the government's response was part of the insured peril and was covered by the policy in that matter.

[52] In *Ma-Afrika* the Western Cape high court dealt with a similar argument as was raised in *Café Chameleon* and in this case. There, the insured also tried to avoid liability for business interruption, arguing that the loss was due to the interruption having been brought about by the national lockdown and not due to the local outbreak of the disease. Having analysed the policy and the developments in the law and having been persuaded, inter-alia, by the QB decision in the *FCA* matter, that court rejected the argument of the insurer and essentially held as follows:

'We are in agreement with the conclusion in *FCA* that construing the policy in a composite was undoubtedly the proper starting point. Insurance is intended to serve as a social safety net to cover financially devastating losses and compensate injured parties. This is precisely the safety net required as a result of the unprecedented Covid-19 pandemic. The policy does not state that the infectious disease must be limited to a local outbreak only, or that the local authority response must be exclusively due to such outbreak only, and no other, or that the

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[14] Reported as *Café Chameleon CC v Guardrisk Insurance Company Ltd [2020] ZAWCHC 86 (26 June 2020)*. The decision of this Court in that matter is referred to herein as *Guardrisk.*

[15] *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited* [2020] ZAWCHC 160; [2021] 1 All SA 195 (WCC).

[16] *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2020] EWHC 2448 (Comm).

policy does not respond with the disease and the response is broad and national. It therefore appears that notwithstanding the fact that the nature of the policy and the specific provisions in the extensions are essentially local in nature, it cannot be said that the nationwide or global events were not contemplated or insured. We are in agreement with the conclusion reached in *FCA* at para 104 that: "They must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak and would be most likely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.''

We therefore conclude that Covid-19 and government response to Covid-19 are an [inseparable] part of the same insured peril. The breakout of a notifiable disease, whether reported to a local or national authority always comes with the risk of a government response and make the government response part of the insured peril of notifiable diseases. We are satisfied that both factual and legal causation are established in respect of the trigger event referred to in the policy. We accordingly conclude that the national response to the Covid- 19 disease that has a local occurrence is sufficient to satisfy the policy. Had it not been for Covid-19 and the government's response, the applicants' business would not have been interrupted and they would not have suffered the loss. In our view the applicants' losses are exactly what they had insured themselves against.'

[53] The high court in *Ma-Afrika* accordingly declared that the insurer was liable to indemnify the insured in terms of the business interruption section of the policy (in that matter) for such loss that the insured was able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19, occurring within a radius of 40 km of the insured's premises on or about the stipulated date. The insurer sought to appeal against the whole of that order but by the time the *Ma-Afrika* matter came on appeal before this Court[17], the *Guardrisk* decision had been handed down by this Court on 20 December 2020. Seemingly, persuaded by that decision the insurer in *Ma-Afrika* did not proceed with its appeal against the whole order and confined its appeal to the high court's order relating to the indemnity period[18].

[17] This Court's decision is reported as *Santam Limited v Ma-Afrika Hotels (Pty) Ltd & another* [2021] ZASCA 141; [2022] 1 ALL SA 376 (SCA).
[18] Ibid para 2.

[54] In *Guardrisk* this Court basically confirmed what had been held in that matter by the high court and what had been held by the high court in *Ma-Afrika* regarding the issue of the insured peril and causation. In *Guardrisk* the main findings by this Court were: that a notifiable disease usually requires a government response and this meant that the response was part of the insured peril,[19] that nothing in the language of the policy in that case supported the interpretation favoured by the insured, namely, that the policy covers only a response to a localised outbreak and not to a countrywide one,[20] and that the insured risk was Covid-19 and government's response to it and that, but for the event – Covid-19 and the response – the business would not have been interrupted, making the outbreak within the stipulated radius the factual cause of the business interruption.[21]

[55] Surprisingly, in its letter of repudiation dated 23 March 2021 AIG, inter-alia, still maintained the following:

'7. If one has regard to the judgments of our courts in the abovementioned cases, and that of the Supreme Court in the appeal of the FCA test case in the UK, an outbreak of Covid- 19 within the 25 km radius of the Insured's premises must precede the restrictions imposed by the government. In response to the Covid 19 pandemic in order for the Insured to be covered for the effects of the restrictions.

8. The Insured is unable to establish an outbreak of Covid-19 within a 25 km radius of its premises prior to the commencement of the national lockdown.

9. In the circumstances, the Insured is not entitled to be indemnified under the Policy for loss in consequence of Covid-19 unless it can prove a causal connection between the outbreak of Covid-19 within the radius and its loss, outside of the national lockdown. In other words, the Insured would have to prove that it would have suffered the loss had the national lockdown not occurred.

10. The Insured's claim is rejected, and AIG denies be liable to indemnify the Insured under the Policy.'

[56] The English authority referred to in that letter by AIG is the decision of the English Supreme Court in the *FCA* matter.[22] The matter first came before the QB and then went on appeal to the Supreme Court where some of what had been out in

[19] *Guardrisk* (above) para 19-20.
[20] Ibid para 32.
[21] Ibid para 45.
[22] Reported as *Financial Conduct Authority v Arch Insurance (UK) Ltd and others (Hiscox Action Group intervening)* [2021] UKSC 1.

the court of first instance was overturned and some confirmed by the majority. In that matter the court dealt with the wording of the policies of several insurers, none of which were the same. In *Guardrisk* this Court referred to the decision of the QB and particularly to the findings relating to the position of one of the insured in that matter, namely, Argenta.[23] As this Court cautioned in *Guardrisk,* those decisions must be referred to with caution.[24] They were not only decided on a set of agreed facts concerning different policies with different wording but did not deal with wording that is the same as in this matter.

[57] In any event, the point raised by AIG is the same, or remarkably similar, to a point raised by the insurer in *Guardrisk*. There the insurer argued that the policy did not cover 'loss following the close of the premises as a result of a government order'. It also argued that there was no causal link between the defined event there (a Covid- 19 outbreak within a 50 km radius) and the interruption of the insured's business, because the interruption was a consequence of the national lockdown and not the local occurrence of the disease.[25] That submission was rejected by this Court. It held that what lied 'at the heart of the interpretation question' was whether the infectious disease clause in that matter covered the government's response to Covid-19[26]. It further held that the parties there would have appreciated the fact that a notifiable disease would require a government response and that they must therefore be assumed to have understood and agreed that the 'business interruption' referred to in the infectious disease clause in that matter, might result from a public health response to the occurrence of the infectious disease.[27]

[58] This Court held in *Guardrisk* that it is precisely because certain notifiable diseases have the potential to spread that they may require government action nationally, or provincially, or locally to prevent the spread[28]. And further, that the government response in that case was integral to the insured peril, namely, the outbreak of infectious disease within the radius and that the government response may come before or after that localised outbreak. Thus, the government response

[23] See *Guardrisk* (fn 1) paras 52-57.
[24] Ibid para 58.
[25] Ibid para 14.
[26] Ibid para 17.
[27] Ibid para 19.
[28] Ibid para 18.

and the outbreak had to be regarded as 'part and parcel' of the insured peril. Also of significance, this Court accepted there that 'because it is part of the insured peril, the government's response is covered, not because it is *caused* by what was insured against; it is covered because it *is* what is insured against'[29]. Therefore, this court held in *Guardrisk* that the contention of the insurer there, that the policy in that matter did not indemnify business interruption due to closure following a government order, had to fail.

[59] Having found that the government's response to Covid-19 and that insured's consequent loss are covered by the policy, this Court in *Guardrisk* expressed the view that that conclusion rendered the question of causation superfluous.[30] But it, nevertheless, proceeded to consider the question of causation. Having found that the local occurrence of Covid-19 and the government's national lockdown was the factual cause of the insured's loss it went on to consider the question of legal causation. It concluded as follows regarding that issue: 'Once we accept …that the government's response through the imposition of the lockdown, was both a proximate cause, or as the high court found, sufficiently closely connected to the business interruption and consequent loss, the conclusion that legal causation was proved, follows inevitably.'[31]

[60] Turning to the facts of this case, this is not really a causation issue as AIG would have it, but an interpretation issue. If the extended event (or disease) clause is properly interpreted, there is no problem with causation. It seems fallacious to contend that the very disease that was responsible for the government's response (ie the national lockdown), is not the cause of the business interruption which brings about the loss that the insured is seeking indemnity for. The government response was necessitated by the disease itself. These events or causes are integrated or 'inextricably connected'. However, the insurer's liability is only triggered when the disease breaks out within the agreed radius. It is only from that point on that the insured is covered for losses and additional expenses incurred because of the business interruption caused by the contemplated disease. The factual and legal, or

[29] Ibid para 21.
[30] Ibid para 34.
[31] Ibid para 51.

proximate causation is established in respect of the trigger event referred to in the policy.[32]

[61] The national response to Covid-19 and the outbreak within the radius of 43 Air School's business premises in Port Alfred was sufficient to satisfy the requirement in the policy. If it had not been for Covid-19 and the Government's response, the business of 43 Air School would not have been interrupted and 43 Air School would not have suffered the loss. The losses of 43 Air School as per its first and second claims are exactly the kind of losses it intended to insure itself against under the policy. It has proved that the risk it was insured against has occurred and it has brought those claims 'within the four corners of the promise made to [it].'[33]

Summation

43 Air School's Claims

[62] In light of the issues considered thus far, the third claim of 43 Air School must fail because it is based squarely on an incorrect assumption that the policy was a joint one. In any event, another reason why the third claim must fail is because there was no compliance with the reporting conditions under the policy in respect of that claim.

[63] Counsel for AIG argued that the character of the first and second claims of 43 Air School had changed because since they were incorporated into the application, because of 43 Air School's assumption that the policy was a joint one. And, secondly, and in any event, 43 Air School has not proved, in respect of those claims, that it was entitled to be indemnified under the policy, because it has not shown a causal connection between the outbreak of Covid-19 within the 25 km radius of its premises and its loss.

[64] The first argument lacks merit because 43 Air School never abandoned its reliance on the fact that there was an outbreak of Covid-19 within 25 km of its Port Alfred business premises on 25 April 2020. Even though those claims are embodied in the application, they are fundamentally still based on that fact, although 43 Air

[32] As contemplated in eg *Napier v Collet* 1995 (3) SA 140 (A) at 144.
[33] *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) at 334.

School, relying on its erroneous view that the policy was joint, sought to bolster them by also relying on the fact that there was an outbreak of Covid-19 within 25 km of the Gqeberha premises on 21 March 2020. The second argument has no merit for the reasons stated above.

PTC and JOC's claims

[65] PTC's claim must fail because it has not proved that it was an insured under the policy, including for business interruption cover, and because it did not report the claim as required under the reporting conditions of the policy. The claim of JOC must also fail because its claim was also not reported as required in terms of the policy.

Conclusion

[66] AIG has been shown to be liable for the first and second claims of 43 Air School but has not been shown to be liable in respect of 43 Air School's third claim and the claims of PTC and JOC. I am of the view that this does not justify a costs order in the appellant's favour and that a more appropriate order would be for the parties to bear their own costs.

[67] In the result, the following order is made:

1. The appeal in respect of the order of the high court insofar as it relates to the third claim of the second respondent and in respect of the claims of the third and fourth respondents succeeds.
2. The appeal in respect of the first and second claims of the second respondent is dismissed.
3. The parties are to bear their own costs of the appeal.
4. The order of the high court is amended to read as follows:
   '1. The respondent is liable to compensate the second applicant in respect of its two claims for business interruption submitted, respectively, on 19 May 2020 for the period 26 April 2020 to 30 April 2020, and on 9 June 2020 for the period 1 May 2020 to 31 May 2020.
   2. The respondent is directed to engage the second applicant meaningfully for the purpose of quantifying the monetary value of the claims referred to in paragraph 1.

3. The application is otherwise dismissed, and each party is to bear its own costs.’

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ACTING JUDGE OF APPEAL

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