

SA ruling on Covid-19 business interruption insurance influences UK regulator

While South Africa's courts and regulators often turn to foreign law for guidance, the roles have been reversed for once. In a test case for Covid-19-related business interruption insurance claims in the United Kingdom (UK), its Financial Conduct Authority (FCA) is being influenced by a recent court judgment in South Africa.



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"Our courts have usually looked to foreign law to assist in their determinations, yet the FCA has in this instance relied upon the South African judgment in the *Café Chameleon* case to aid in its argument," says Christine Rodrigues, partner at leading African law firm Bowmans.

She is referring to the test case involving eight insurers that the FCA is bringing in an attempt to find legal certainty. The insurers had disputed the business interruption claims of SMEs in the UK that had suffered losses amid the Covid-19 pandemic.

In their deliberations, the FCA cited the *Café Chameleon* judgment handed down in the High Court of Cape Town on 26 June 2020, in favour of the restaurant Café Chameleon, whose insurer had rejected its business interruption claim.

Parallels between South Africa and the UK

Rodrigues explains, "In the UK case, a central pillar of the eight insurers' argument is that SMEs' business interruption policy extensions do not cover pandemics, but only local events. They also argue that any loss suffered was caused by matters other than the policy trigger – which had to be a business interruption resulting from the action of a local authority."

In other words, the insurers argue that the existence of the Covid-19 disease nationally, or the countrywide action taken in response to it, does not satisfy the policy trigger.

The insurers also argue that the businesses had not been prevented from accessing the insured premises nor were they interrupted if they could continue operating for any purpose, no matter how limited.

The FCA disagrees, arguing that the insurers were wrong to reject policyholders' claims, and wrong in the way they addressed the causation of insured losses.

It says that the response of the UK Government was, and is, a single body of intervention that had hindered access to, and the use of, business premises; caused closure of, and restrictions on, business premises; and interrupted and interfered with business activities.

Thus, the disease everywhere and the Government and human responses to it were the single proximate cause of the business interruptions.

"What is interesting is that some South African insurers have taken the same view as to why their policies would not cover the loss suffered," says Rodrigues.

"The complexity of determining coverage hinges on the wording issued to a policyholder. Each policy wording needs to be read in its entirety to determine the liability of an insurer. This point was also made in the *Café Chameleon* case where it was argued that the judgement could open the floodgate to insurer liability."

Local versus national

The FCA also addresses the issue of policy provisions requiring the disease to occur within a certain radius or vicinity of the business premises. It points out that the policyholders had several arguments on their side.

For one, they could easily prove the presence of Covid-19 at a certain date, without necessarily proving there was a medically diagnosed case. For another, some policy provisions do not actually require an event to occur only within that vicinity or radius, meaning that wide-area events are covered. Thirdly, certain events were nationwide and automatically occurred within the relevant locales.

The FCA does acknowledge, however, that some of the policy wordings it looked at required 'public bodies' to take some form of action for the policy to offer coverage. Here, it specifically cited the High Court of Cape Town's 26 June 2020 judgment in the *Café Chameleon* case.

"In particular, the South African case is used to provide guidance on the interpretation that it does not matter if it was not a local authority but rather national government that declared Covid-19 a notifiable disease," Rodrigues says.

The *Café Chameleon* case is also cited because it established causation by stating a 'clear nexus' between the Covid-19 outbreak and the regulatory regime that caused the interruption to the insured's business.

Similarities in approaches of SA and UK regulators

Commenting on the parallels between the UK and South Africa on the issue of business interruption claims, Rodrigues

says, "The FCA's reliance on the South African judgment of *Café Chameleon* illustrates how the South African insurance industry is considered, from a regulatory perspective, as an equivalent jurisdiction to the UK.

"It is also clear from the FCA's arguments that the South African regulator [the Financial Sector Conduct Authority (FSCA)] - has taken a similar approach to that of the FCA in its communications."

She concludes, "The FCA test case, as well as *Café Chameleon* case, are also going to test the principles of Treating Customers Fairly."

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