Business Interruption Insurance And Covid 19

Business Interruption Insurance is cover provided in order to replaces business income lost due to a disaster. This could range from floods, fires, earthquakes or even volcanic eruptions. This type of cover is aimed at providing cover for unfortunate inevitable incidents that affect or interrupt the running of a business.

Notice must be taken to the fact that the insurer is only obligated to pay if the insured actually sustained a loss as a result of the interruption. The amount that will be recouped by the business will not exceed the limit stated in the policy.

On the upside, these contracts cover a vast majourity of expenses to be incurred by the business. Firstly, a policy will often provide reimbursement for profits that would have been earned had the event not occurred. Fixed costs are also covered, these include operating expenses and other expenses incurred in the ordinary running of the business.

In the event that the company is required to seek a temporary location to operate, this is provided for under most insurance policies. Business interruption insurance will provide reimbursement for reasonable expenses, that are beyond the fixed costs, that allow the business to continue operating while the business gets back on solid footing.

In the wake of a business interruption event, a company will often need to replace machinery and retrain personnel on how to use the new machinery. Business interruption insurance may cover these costs.

Another phenomenal feature in the interruption insurance contract is that more often than not, the contract speaks to coverage of loan payments. As it is common cause that some companies seek capital from a bank to start up, these loans may hang over the business for months or even years. The interruption insurance covers these loans during times of hardships.

The main aim of interruption insurance is to ease the blow or the impact interruption may have on the company as a result of a natural disaster. It acts as a cushion for instances that are beyond the employer's control and tries to keep the business afloat during these times and until it recovers. For example, the coverage of wages and taxes. This not only helps the company retain its employees but in most instances, companies are still expected to pay taxes. This alleviates the company from any penalties they might face in so far as the taxman is concerned.

On the contrary, interruption insurance contracts do not cover broken items resulting from a covered event or loss, such as glass. Undocumented income that's not listed on your business' financial records will also not be covered. Utilities are also not covered.

The most alarming shortcoming of the interruption contract is that it does not make way for pandemics, viruses, or communicable diseases. In 2020, an era in which Covid-19

has taken the world by storm and has vastly affected companies all across the world, it is disheartening to note that there is no provision for this in the interruption clause.

Another problematic area about the interruption insurance policy is that Botswana is not known for being challenged with a lot of natural disasters as opposed to countries such as Australia which experienced fires early this year. As such, Batswana are reluctant to engage in this type of insurance as they see it as less important.

Business Interruption Insurance could never be more relevant than today with the wake of the new Covid-19 that has affected every person across the globe. With the rise of the pandemic, various companies were forced to shut down by their governments as a result of mandatory lockdowns and the implementation of curfews.

The original stance of the business interruption policy was that it did not provide cover for pandemics and viral outbreaks however the recent case of ***Café Chameleon v Guadrisk Insurance Company Ltd Case No 5736/2020*** has since brought a different opinion to this issue.

In the aforesaid case, the Applicant runs a restaurant whilst Respondent is an insurance provider, both parties have bound themselves to an agreement which states that the Respondent will provide the Applicant with insurance cover for the restaurant whilst the Applicant pays a monthly fee for such cover. In this instance, the Applicant approached the courts and sought an order which would mandate the Respondent to cover the business for the loss the restaurant incurred as a result of the interruptions caused by the Covid-19 pandemic. The Applicant further prayed for the Respondent to make interim payments to the business to survive the Covid-19 interruptions.

The Applicant simply stated that prior to Covid-19, it's restaurant was fully operational and no interruptions were present however, since the birth of the virus, the restaurant was subsequently closed as a result of the national lockdown in South Africa. The Applicant avers that this interruption has since caused a slump in its income and as such it is asking for money from the insurer in order for it to fill the gaps in which the virus has caused in its business.

The Respondent's refusal to adhere to the Applicant's request was based off the fact that it was of the opinion that the Applicant's loss was not insured under the policy and that there was no causal link between the lockdown regulations which occurred in South Africa as a result of the Covid-19 pandemic and the Infectious Disease Extension clause in their policy.

The Respondent argues that there were various types of insurance that were available to the Applicant which would have covered it for losses it may have suffered as a result of the national lockdown of South Africa but the Applicant, in not opting for such cover, made a conscious decision to forfeit such cover. The Respondent further contends that if the insured are simply to be indemnified within their policies for Covid-19 losses they

may have suffered, without applying the terms of the policies, it may have potential to destabilise the global insurance market.

In tackling this issue, the court had to assess whether the claim made by the Applicant falls within the insurance clause. In this particular policy, there was a clause that provided for notifiable diseases occurring within a radius of 50 kilometers of the premises of the restaurant. In the policy it was stated that “Notifiable Disease shall mean illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.”

In light of the definition set above, the court affirmed that the Covid-19 virus fell within that definition as the virus is a respiratory disease caused by a novel respiratory pathogen. Furthermore, the Respondent contended the fact that no officer of “competent authority” had declared an outbreak but rather Surveillance Regulations were made by the Minister of Health who, the Respondent submitted, was not an officer. The courts in quashing this submission stated that the National Government, acting through the World Health Organisation (WHO) and the Minister of Health were sufficient to be regarded as “local authority”.

The courts stated that it was inconceivable to expect an ordinary person who has no knowledge of the insurance industry to have an insight of the industry when entering into an insurance contract. With that, it was stated that Covid-19 fell within the ambit of “human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them.”

Generally, the insurer’s duty to perform is based off of there being a certain danger or hazard which causes a certain consequence such as a loss. In order for one to claim form an insurance company, they ought to establish that there is a link between the damage or harm suffered and the consequence or loss to the business. The issues the courts were then faced with were two-legged, firstly the issue was whether the Covid-19, as a notifiable disease, caused or materially contributed to the “Lockdown Regulations” that give rise to the Applicant’s claim herein if the answer to this is affirmative then the second enquiry becomes whether the conduct is linked to the harm closely or directly for legal liability to ensure?

In addressing the above, the Applicant was able to prove that less the Covid-19 outbreak, the interruption to the restaurant would have not occurred. The Applicant indicated that the Covid-19 outbreak resulted in a national lockdown in South Africa which in turn meant that the restaurant could not operate due to the lockdown and as such it suffered loss. When dealing with causation, one must enquire whether there was a novus actus interveniens which would break the chain of causation. Put differently, whether there had been a new factor that occurred would interfere with the outcome of the consequence.

In this regard, the Applicant was able to establish that indeed there had not been an interruption between the lockdown implemented as a result of the Covid-19 regulations and the loss of business at the restaurant as such the Respondent was held to be liable to indemnify the Applicant in terms of the Business Interruption Insurance Policy for loss suffered as a result of the Covid-19 outbreak. The Respondent was ordered to make payments for such losses as the Applicant's business had indeed been interrupted.

This judgment has given business owners a glimmer of hope during the atrocious pandemic. However, the same cannot be said for other parts of the world. In the ongoing case of The Financial Conduct Authority v Arch Insurance (UK) Limited and Others FL-2020-000018, in which the claimant is challenging the insurer's rejection for financial support due to the recent pandemic, the defendant states that pandemics are not included in their contract and as such submits that the claimant has no basis.

Some are of the view that the standard business interruption policy only applies when the business sustains direct physical loss or damage, such as a fire and that business interruption can also apply when a nearby business sustains direct physical loss or damage and a civil authority like the government closes all businesses as a result. Viruses do not actually break anything. The virus, as opposed to a fire or broken windows from wind damage, leaves no visible imprint.

However, there are businesses which have an insurance policy that covers government-ordered closure under the civil authority ingress clause. This clause takes cognizance of the fact that government mandated closures impact the company's financial standing and as such the insurance bears the cost.

It is essential to note that the insurance relationship between the insurer and the insured is a relationship based on utmost good faith and the insurer owe the insured a duty to not only act with care and diligence when execute its mandate owed to the insured but also the insurer ought to divulge all material terms pertinent to concluding the insurance contract. This was stated in the case of ***Lenaerts v J S N Motors (Pty) Ltd and Another 2001(4) SA 1100*** where the Plaintiff bought a motor vehicle from JSN Motors (Pty) Ltd. The sale executive effected the sale and presented the Plaintiff with the proposal form for insurance. The Plaintiff in completing the form, assumed that the sales executive was acting for and on behalf of the insurance broker. The Plaintiff drove his car to Zambia and it was subsequently damaged whilst in Zambia, only then did he realize that the insurance policy covered a territorial area which excluded Zambia. The court ruled that the Plaintiff ought to receive cover for the damaged car and stated that it is the insurer's duty to ensure that the insured has fully understood the terms of their policy and that they need not act with malice.