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## FURTHER UPDATE ON COVID-19 RELATED BUSINESS INTERRUPTION CLAIMS

### AFRIKAANS VERSION WILL FOLLOW LATER

Dear Intermediary

Your ongoing engagement with us and your clients during these extraordinary times is greatly valued. The media pressure related to Contingent Business Interruption claims is unprecedented, as is so much else about COVID-19. While there are no easy answers, we do want to continue to address the frequently asked questions we are receiving and update you with regard to our upcoming court case on 1 September. We know you value communication and transparency.

### What are Santam's key arguments in its recently filed affidavit relating to the 1 September court case?

We include a link to the filed court affidavit [here](#). The construction of the policy is tested against four issues. These are the insured event, causation, the application of the Trends clause and the indemnity period.

#### Insured event

The relevant part of the disease extension makes it plain that, in order for the extension to respond, there must be interruption of, or interference with, the business **due to** a notifiable disease within a radius of 40 kilometres (or as stated on the schedule) from the insured premises.

#### Causation

It is clear from the wording of the policy that what was contemplated were events at the business premises or sufficiently close to the premises so as to be considered the proximate cause of any impact on the business. The phrase "*due to*" requires that a real and close causal connection between the event and the

interruption must be established. Proximate cause requires both factual causation, i.e. that loss would not have occurred but for the occurrence of the insured peril; and legal causation, in that it must not be too remote. Factual causation involves a hypothetical enquiry as to what would have happened had the insured event not occurred. There is the mental elimination of the insured event, and the question is whether or not the loss would have ensued. Legal causation requires a determination of whether there is a sufficiently close connection between the insured event and the loss suffered.

### **Application of the Trends clause**

The Business Interruption wording contains a Trends clause. This clause provides for adjustment as may be necessary to provide for the trend of the business and for variations or other circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred. In this way the loss is adjusted to reflect the business despite the occurrence of the insured event. The Trends clause requires that a “but for” test be applied to the adjustments made according to the trend of the business. The insured event is specifically a local event, namely the outbreak of a notifiable disease within a 40 kilometre radius that is the proximate cause of the loss. The national lockdown was not declared in response to any specific outbreak of the disease within a 40 kilometre radius of the insured premises. It follows that a counterfactual scenario in which the insured event (the local outbreak) does not occur, does not extinguish the worldwide spread of the virus, the declaration of the national disaster and therefore the national lockdown. It is inconceivable that if the two instances of infection relied on by the applicants (in this pending court case) had not occurred, but everything else had, a national lockdown would not in any event have been imposed. The interruption of the applicants’ business would still have occurred. Insurance cover is therefore limited in respect of loss of revenue to the amount by which the revenue during the indemnity period will fall short of the standard revenue as a result of the insured event. The standard revenue is subject to the adjustment under the Trends clause. The adjustment has to provide for variations or other circumstances affecting the business, either before or after the insured event, or which would have affected the business had the insured event not occurred. This means the adjustment must take account of the government’s response, the national lockdown and the restrictions imposed by regulation.

### **The indemnity period**

The indemnity period begins with the commencement of the damage and ends not later than the number of months stated in the schedule during which the performance of the business was affected as a result of the damage.

**Does the recent ruling made against Guardrisk (Café Chameleon CC vs Guardrisk Insurance Company Limited) provide any precedent for Santam?**

No. Not all policy wordings are the same, which influences precedence. Judge Le Grange noted in his judgment that each case must be “decided upon its facts and the law” and his ruling does not open “the floodgates of liability”. In his finding, Judge Le Grange applied the “but for” test to assert that without the prevalence of COVID-19, there would not have been a national lockdown, therefore the national lockdown forms part of the proximate cause. The “but for” test as per our supporting affidavit requires the question to be framed in respect of the specific instance of disease at the premises, requires the Trends clause to apply and that legal causality be proven. It is our contention that a national lockdown would not be implemented for an outbreak within a specific area and that by application of the Trends clause, irrespective of an incidence of disease around a specific premise, all revenue would be impacted. As a result, claims resulting from an interruption due to the national lockdown are not covered. In our view the national lockdown is not a direct consequence of any specific insured event or a response thereto. It was a pre-emptive measure to prevent and delay the spread of the virus.

**Is it true that Santam could just have paid these CBI claims?**

Santam has a very strong claims-paying track record. The company applies sound principles in pricing and underwriting and further purchases reinsurance to protect against catastrophe events that are covered by its policy wordings. Our capital comfortably exceeds the minimum regulated solvency requirements. Santam is capable of paying all claims that fall within its policy wordings. However, we cannot, nor could any individual corporate or industry, stand good for the economic losses caused by a national lockdown. As an insurer, our responsibility is to indemnify our clients only against insured losses and not broader economic losses resulting from the national lockdown.

**What is your reaction to the press release issued by the FSCA on 9 July?**

We have noted the FSCA statement issued on 18 June and their further statement issued on 09 July 2020. We have requested an urgent meeting with the FSCA to discuss the view they have now adopted in their most recent statement.

To access previous questions addressed in respect of our response to CBI claims please [click here](#).

As always, we value your feedback and engagement. Thank you for the invaluable role you play as intermediaries during this time.

Keep safe

**Andrew Coutts**

**Head: Intermediated Business**

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