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DISPUTE RESOLUTION **ALERT**

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Businesses across most landscapes have suffered immensely due to the impact of COVID-19 (Coronavirus). Business insurance appears to be no exception. In a ground-breaking decision, the Western Cape High Court in the case of *Café Chameleon v Guardrisk Insurance Company Ltd* (WCHC, Case no. 5736/2020, 26 June 2020) ruled against an insurer for payment of damages arising from a business interruption policy extension due to the COVID-19 pandemic.

In this case, Café Chameleon CC (Café Chameleon) took out an insurance policy with Guardrisk Insurance Company Ltd (Guardrisk) in terms of which Guardrisk indemnified Café Chameleon pursuant to a business insurance policy extension for business interruption occasioned by "*human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them*" if such contagious disease is reported within a 50 kilometre radius of Café Chameleon's premises.

Following the pronunciation of the lockdown regulations, for the duration of the lockdown, initially being from 26 March 2020 to 16 April 2020, every person was confined to his or her residence unless strictly for the purpose of performing an essential service or obtaining an essential good or service. Therefore, Café Chameleon, operating as a restaurant could not operate during this lockdown period.

The initial lockdown period was thereafter extended albeit with fewer restrictions, under lockdown level 4, in terms of which restaurants were permitted to sell hot cooked food, only for home delivery. Café Chameleon argued that prior to the COVID-19 pandemic, an estimated 5% of its turnover was generated by food

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Business interruption insurance: But for COVID-19 / But for the lockdown regulations?*...continued*

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deliveries as it is primarily a sit-down restaurant, therefore, notwithstanding the authorisation to sell hot cooked food for home delivery, Café Chameleon was unable to trade or receive customers under lockdown level 4; resulting in significant business interruption.

In light of this business interruption, Café Chameleon sought to claim under the business interruption policy extension; the claim to which Guardrisk did not timeously respond. Guardrisk argued that it was still waiting for more information from Café Chameleon and it would be premature to accept liability or reject Café Chameleon's claim. Café Chameleon argued that it was under financial distress and should Guardrisk not respond in time, there was an imminent danger that the policy would cease as Café Chameleon would be liquidated. Therefore, as it would be premature to determine the quantification of Guardrisk's liability, Café Chameleon applied for a declaratory order with regard to Guardrisk's antecedent liability under the policy.

Pursuant to a financial evaluation by a loss adjuster, Guardrisk argued that in terms of the business policy extension, Café Chameleon must prove that there was the existence of a COVID-19 incident within a 50km radius and that the loss suffered must be due to this incident. Further, and more importantly, it was argued that the loss suffered by Café Chameleon was in fact due to the lockdown regulations and was not related to the individual COVID-19 incidents themselves. Guardrisk contended that the policy extension requirements were not satisfied in circumstances where there was a generalised or national occurrence of COVID-19; nor if there was a general concern that COVID-19 may be present within the area.

The court disagreed with Guardrisk in this regard. The court held that in interpreting the business policy contract, the interpretation must be sensible and not have an "*un-business-like*" result and that these factors should be considered holistically. Considering this, the court held that it was clear that COVID-19 is a notifiable disease. Regardless of the fact that the by-laws of the City of Cape Town do not require notification of a notifiable or communicable disease, the clause could not sensibly be interpreted to exclude such reporting to the National Government.

In order to determine Guardrisk's antecedent liability under the policy, the court held that the subsequent question to be answered is whether COVID-19 as a notifiable disease caused or materially contributed to the lockdown regulations. Should this question be answered positively, it must then be questioned whether the lockdown is linked to the harm suffered by Café Chameleon; sufficiently closely or directly for legal liability to arise. The court answered both questions in the affirmative.

The court applied the "*but for...*" test in answering the above questions. It was held by the court that but for the COVID-19 outbreak, the interruption to Café Chameleon's business would not have occurred as the lockdown regulations would not have been promulgated. Due to the magnitude and severity of the COVID-19 outbreak, a National State

Business interruption insurance: But for COVID-19 / But for the lockdown regulations?*...continued*

It was accepted by the court that there is a clear nexus between the COVID-19 outbreak, and the regulatory regime that interrupted Café Chameleon's business.

of Disaster was declared. This resulted in the publication of the lockdown regulations which led to the closure of Café Chameleon. It was therefore accepted by the court that there is a clear nexus between the COVID-19 outbreak, and the regulatory regime that interrupted Café Chameleon's business.

Finally, the court rejected Guardrisk's submissions that it must be excused from honouring a contractual obligation based on the fact that a declaratory order of this nature would create a precedent which would destabilise the insurance industry as it would open the flood-gates for claims of this nature and such businesses would unexpectedly incur greater debt than had been expected.

Depending on the circumstances of each case, the court has effectively opened the floodgates for insurance claims under business interruption policy extensions; which is ground-breaking for businesses severely affected by this pandemic and are insured for such interruptions. The prospects of success when claiming under a business interruption policy will of course be determined by the actual wording of the business interruption policy.

Eugene Bester and Nomlayo Mabhena

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Electoral Reform: Individually or collectively you can stand

In simpler terms, the Constitutional Court had to decide whether we, as individuals, can run for national or provincial office.

On 15 June 2020, the Constitutional Court handed down an important judgment which is likely to fundamentally alter the electoral system in South Africa.

In the matter of *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [202] ZACC 11, the Constitutional Court was called upon to determine whether the Electoral Act was unconstitutional to the extent that it allowed individuals to be elected to the National Assembly and Provincial Legislatures only through membership of political parties. In simpler terms, the Constitutional Court had to decide whether we, as individuals, can run for national or provincial office.

This appeal emanated from a judgment of the Western Cape High Court Division, Cape Town pertaining to an urgent application brought by the applicants' in late 2018 contending that the Electoral Act was unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office conferred by section 19(3(b) of the Constitution. In addition thereto, it was contended that the Electoral Act infringes upon the right to freedom of association enshrined in section 18 of the Constitution. The *court a quo* dismissed the application on the rationale that nowhere in section 19(3)(b) of the Constitution does it expressly provide for independent candidates to stand for public office. Moreover, it held that section 1(d), 46(1)(a) and 105(1)(a) of the Constitution properly interpreted were irreconcilable with the interpretation contended by the applicants.

Section 19 of the Constitution

In a split decision, the majority judgment, written by Madlanga J, upheld the appeal and set aside the order of the High Court. The majority judgment acknowledged that section 19(3)(b) is part of a group of closely related rights deliberately clustered together by the Constitution. As such, it was important for the court to consider the entirety of section 19 in its interpretation. The majority held that section 19 interpreted holistically was clear that citizens were afforded political choices not limited to those listed in section 19(1) (which relate specifically to exercising electoral rights through political parties). It further held that an interpretation of section 19(3) which forced adult citizens to exercise their rights through political parties only was undesirable as it resulted in an internal contradiction within the section which ought to be avoided. The majority was concerned that the restrictive interpretation contended by the respondents' would not only result in a contradiction but would not give the citizenry the broadest possible protection under section 19.

In a concurring judgment, Jafta J emphasized that in interpreting section 19, regard should be had to its historical context and that its language should be interpreted purposively to give citizens the fullest protection afforded by the section. The concurring judgment, went on to find that:

- section 19(3) draws a distinction between citizens by conferring rights upon only adult citizens in consonance with the value of universal adult suffrage in section 1(d);

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Electoral Reform: Individually or collectively you can stand...*continued*

The dissenting judgment held that properly interpreted the right to stand and hold elective office in terms of section 19(3)(b) is an individual right to represent the people in a multi-party system through the medium of political parties that results, in general, in proportional representation.

- the plain language in section 19(3) reserved the right to stand for public office which entails contesting elections for adult South Africans. The words *"every adult citizen"* at the opening of section 19(3) demonstrate that each adult South African is the bearer of the right to stand for public office and if elected, to hold office; and
- section 19(3)(b) must be construed in the same way as section 19(3)(a) is read and understood. It cannot be gainsaid that the right to vote which is conferred in similar terms is exercised by voters as individuals, without the need to add words like *"as individuals"*, whilst individuals are required to exercise their right to contest elections and hold office through political parties.

Whereas, in a lone dissenting judgment, Froneman J held that the interpretation of section 19 preferred by the majority and concurring judgments was flawed for not having proper regard to the constitutionally required electoral framework (designed by Parliament, who has the constitutional competency to do so) within which the *"right to stand for and if elected, to hold office"* must be exercised. Further that a contextual interpretation of section 19 requires consideration of foundational values and the constitutional norms governing the electoral system in order to determine its proper role and meaning within our system of democratic governance. The dissenting judgment held that properly interpreted the right to stand and hold elective office in terms of section 19(3)(b) is an individual right to represent the people in a multi-party system through the medium of political parties that results, in general, in proportional representation.

Section 18 of the Constitution

Moving on from the section 19 analysis, the majority judgment considered whether the interpretation contended by the respondents led to a denial of citizens freedom of association as enshrined in section 18. In considering the content of section 18, the majority noted that the right encompassed both a positive and negative element. Following thereon, the court considered the purpose of the right to freedom of association and its treatment in international and foreign law as empowered by section 39(1)(b) & (c) of the Constitution, and concluded that both elements of the right were protected. It follows that section 18 empowers citizens to choose to associate, dissociate and most importantly not associate at all. A restraint of any of these choices is tantamount to a negation of the right. As such, a restricted interpretation of section 19(3)(b) must be rejected as it limits the right to freedom of association and infringes on the right to human dignity.

Constitutional indicators towards a multi-party system?

However, this was not about to be the end of the matter as the respondents had suggested that a party proportional representation system was indicated by a number of other provisions in the Constitution

In relation to submissions regarding items 6(3)(a) and 11(1)(aa) of Schedule 6 of the Constitution. The majority held that as indicated by the heading, Schedule 6 provided for a transitional arrangement. Any continued employment of an exclusive party proportional representation system can no longer be sourced from these sections, since

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The majority held that the founding values mean no more than that South Africa can never be a one-party state. They say nothing about the exclusivity of multi-party representation.

the provisions had no life beyond the transitional period they regulated. If a party proportional representation system was to apply beyond the transitional period, it would have to be in terms of constitutionally compliant legislation envisaged in section 46(1)(a) and 105(1)(a) of the Constitution, in the present case the Electoral Act.

Dealing with the submissions that the founding values enshrined in section 1(d) do not support the applicants' case. The majority held that the founding values mean no more than that South Africa can never be a one-party state. They say nothing about the exclusivity of multi-party representation. This dissenting judgment differed with this conclusion, holding it was not shown that the Constitution prescribed something other than political parties in its fundament multi-party system of democratic government.

The respondents' further placed reliance on section 46(1)(a) and 105(1)(a) of the Constitution. These sections require that the electoral system be prescribed by national legislation. It was submitted that, if Parliament was denuded from its power to prescribe an exclusive party proportional representation system, it would be left with very little under the power conferred on it by these sections. The majority dismissed this submission and held that these sections by no means gave Parliament carte blanche. The electoral system prescribed by Parliament still has to be constitutionally valid.

Although, the sections invoked by the respondents' had some measure of support. The court held that none come anywhere near indicating sufficiently that the Constitution requires an exclusive party proportional representation system.

Despite not being argued before the court, the majority held that section 157(2)(a) of the Constitution offered more support to the respondents' interpretation than the other provisions. Section 157(2)(a) of the Constitution, confers powers to Parliament to enact legislation that prescribes a system of proportional representation that is exclusively based on party lists, for election to a Municipal Council. Having considered the written submissions, the majority held that section 157(2)(a) entails a discrete and narrow limitation on the rights protected by section 18 and 19, but only in the local government sphere. As such it did not create an internal contradiction between its provisions and those of sections 18 and 19.

In reaching the above conclusion, the majority considered the background of section 157(2)(a). During the negotiations preceding our democracy, the issues affecting municipalities were specifically identified as unique and requiring special attention, as such, negotiations of the structure to be adopted for municipalities were conducted separately. It is apparent that the framers of the Constitution may have seen a need in light of the complexities at local government to introduce a discrete, internal limit applicable only to the system of election of members of Municipal Councils. With this in mind, the majority accepted that section 157(2)(a) does not contradict section 19(3)(b).

In conclusion, the majority held that insofar as the Electoral Act makes it impossible for individuals to stand for political office without political party membership that amounted to a limitation of the rights in section 19(3)(b) of the

Electoral Reform: Individually or collectively you can stand...*continued*

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Constitution. The question was thus whether the limitation was reasonable and justifiable in section 36(1) of the Constitution. In response thereto, the court held that there was no reason to hold that the limitation was reasonable and justified as the respondents had failed to offer any complying justification. Accordingly, insofar as the Electoral Act makes it impossible for candidates to stand for political office without allegiance to a political party, it is unconstitutional.

Suspension and conclusion

To avoid the unwarranted disruption which could be caused by retrospective application of its order, the majority judgment held that the declaration of invalidity would take effect from the date of the judgment, albeit suspended for 24 months to allow Parliament to consider an appropriate system that would allow for individuals to participate in national government elections.

This judgment is likely to result in a major renovation of our electoral system. The reason is that the current system cannot simply be amended by Parliament to allow for individuals to run for a single seat in the National and Provincial legislatures. This is because proportional representation in the national and provincial legislatures is a fundamental principle of our young democracy. We illustrate by way of an example: if, come the next general elections, there are 20 million registered voters; and a popular individual running for office obtains a mandate from two million voters, it cannot be possible that despite securing 10 percent of registered voters, the individual is given only one seat in which ever legislature she or he ran for. Such an outcome would be grossly unfair and disenfranchising towards the voters. This is not a novel possibility, as the second applicant in this matter was a representative and leader of the Korana nation, a section of the Khoi and San people; and if she were to run for office and only obtain one seat it would make a mockery of the rights of the Korana nation to have their proportional voices heard in the national and provincial legislatures.

So it is clear that it is by no means an easy fix for Parliament, and to ensure compliance with the Constitutional Court judgment a lot of participation and consultation with the electorate will be needed in order to reach a workable system by the time the next elections roll around.

Nevertheless, whatever system is adopted, we can expect to see a rise in the number of names on the ballot paper by 2024.

Jackwell Feris, Imraan Abdullah and Mayson Petla

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