

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30404/2021

(1) REPORTABLE: <b>YES / NO</b>
(2) OF INTEREST TO OTHER JUDGES: <b>YES/NO</b>
(3) REVISED: <b>YES/NO</b>
<b>14 June 2023</b> _____
DATE SIGNATURE
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In the matter between:

**AIG SOUTH AFRICA LTD**

Applicant

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

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**JUDGMENT**

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Mia, J

- [1] AIG seeks leave to appeal against the whole judgment and orders I handed down on 20 February 2023 and for an order that the costs of this application be costs in the appeal. 43 Air School, PTC and JOC launched application proceedings against AIG seeking declaratory relief that AIG was obliged to indemnify them under an insurance policy for business interruption losses following the announcement of the Covid-19 pandemic and the Government's action in declaring a national lockdown in response thereto.
- [2] The applicant has raised several grounds, as indicated in the application for leave to appeal. Of note is the consideration that one of the issues the applicants seek clarity on is the issue of joint and composite insurance, on which there is not much guidance. Counsel referred to two new foreign decisions that were not available when the matter was argued. There was an indication that there are still a number of matters related in the commercial field and related to insurance which require guidance and precedents, and a referral to the Supreme Court of Appeal on this point would be helpful. The respondents' heads of argument were silent on this issue. However, the compelling submissions made by counsel for the applicant on the issues required to be referred to the Supreme Court of Appeal, persuaded counsel for the respondent, who elected not to make any submissions on the merits and agreed that the matter be referred to the Supreme Court of Appeal.
- [3] In determining whether leave is granted, Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted where the Judge is of the opinion that the appeal would have a reasonable prospect of success before another Court.
- [4] Having heard Counsel for the respondent and having considered the heads of argument of both the applicant and the respondent herein, I am of the view that there is a reasonable prospect that another court would come to a different conclusion on the issues raised by the applicant.
- [5] A key factor to be considered is the issue of reliance on the policy being a "joint policy" or a "composite policy" and on the interrelatedness being misplaced. This issue is essential to the parties and is an issue that may guide other

parties. It, therefore, highlights the need for leave to be granted where there is some other compelling reason why the appeal should be heard. In this instance, counsel submitted that irrespective of the merits, leave to appeal ought to be granted on the basis of section 17(1)(b) because the issues raised in this matter are novel and are of broad and general interest, and potentially also of application, to the whole of the South African insurance industry.<sup>1</sup> There is consensus on this aspect.

[6] Due to the importance of the issue to insurers and insureds alike, and the novelty of the issue, the applicants argued that leave to appeal be granted to the Supreme Court of Appeal in accordance with section 17(6)(a) of the Superior Courts Act. The section provides:

“ (6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct the appeal be heard by a full court of that Division unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,”

[7] I am satisfied that the matter involves a question relating to the interpretation of insurance contracts which has been featured more prominently recently and may continue to do so.

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<sup>1</sup> As construed in *Guardrisk Insurance Co v Café Chameleon 2021 (2) SA 323 (SCA)*, which treated the occurrence of a case of Covid-19 within the radial area as a threshold requirement and then defined the insured risk as including both that occurrence and the government's reaction to it.

[8] Having considered the papers filed of record in this matter and having heard counsel, it is ordered that:

- 1 The applicant (respondent in the main application) is granted leave to appeal against the whole of the judgment and orders of this Court dated 20 February 2023.
- 2 Leave to appeal is granted to the Supreme Court of Appeal.
- 3 The costs of this application for leave to appeal shall be costs in the appeal.

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**SC MIA**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

For the Applicant:

Adv I.P Green SC and R Ismael  
instructed by Webber Wentzel

For the Respondents:

Adv K.J Van Huyssteen  
instructed by Fluxmans Inc

Heard: 14 June 2023

Delivered: 14 June 2023