

INSURANCE OF POLITICALLY MOTIVATED RISKS INCLUDING TERRORISM: THE CASE OF SOUTH AFRICA

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ABSTRACT

By world standards, South Africa's experience with insurance of politically motivated risks, including terrorism, qualifies it as a leader in the area. In the late 1970s, the volatile political climate of the apartheid era forced the private insurance market to establish the South African Special Risks Insurance Association (Sasria), backed by the government, to insure damage caused by politically motivated acts, including terrorism. Since then, Sasria has developed into a key strategic institution. Yet academic literature on insurance of politically-motivated risks, riot, strike and terrorism in South Africa is sparse, despite its increasing significance in a world where terrorism is on the increase. This article attempts to fill this literature gap by firstly tracing the developments leading to the formation of Sasria, then examining the evolution of Sasria to where it is today.

Keywords: Sasria, insurance against political riot, risk, terrorism, South Africa

JEL codes: L3, L5, L8, N2, N8

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Introduction

As is clear from what follows, there are few countries in the world whose experience in the insurance of damage caused by politically motivated acts, including terrorism, can rival that of South Africa. The last two decades of the apartheid era were characterized by confrontation, mass protests, civil disobedience, strikes and politically motivated acts of sabotage. A specialist insurer, the South African Special Risks Insurance Association (Sasria) was formed in 1979 to provide insurance cover for losses caused by these events. Since then, Sasria has become the sole provider of politically and non-politically-motivated damage insurance in South Africa. Sasria has had a monopoly for 35 years. Its model has been used as a reference by other countries in developing their own schemes for insuring against terrorism, in particular.

After the events of 11 September 2001 in New York, USA, the risk of terrorism grew worldwide and many countries formed schemes to insure against terrorism (Pietzana 2003: 101–102; Merkin & Kullmann 2006: 3; Mabasa 2009: 5). A majority of the schemes formed before and after 2001 took the form of terrorism risk pools, but a significant number of them had features adopted from Sasria. Notable among these are: Australia's Re-Insurance Pool Corporation (ARPC) (2003); Austria's *Osterreichischer Versicherungspool zur Deckung von Terrorrisiken* (2002); Belgium's Terrorism Re-Insurance and Insurance Pool (TRIP) (2007); France's *Gestion de L'Assurance et de la Reassurance de Risques Attentats et Actes de Terrorisme* (GAREAT) (2002); Germany's *Extremus Versicherungs AG* (2002); Indonesia's Consortium for Terrorism and Sabotage Risks (2001); the Namibia Special Risks Insurance Association (NASRIA) (1988); the Netherlands' Dutch Terrorism Risk Reinsurance Company (NHT) (2003); Sri Lanka's Strikes, Riots and Civil Commotion Pool (SRCC) (1987); the United Kingdom's Pool Re (1993); and the United States of America's Terrorism Insurance Act (TRIA) (2002). One of the few countries whose terrorism insurance scheme predates Sasria is Spain whose *Consortio de Compensacion' de Seguros* (CCS) scheme was established in 1941. Few countries, notably Namibia (1988), Sri Lanka (1987), Spain (1941) and the United Kingdom (1993) had insurance schemes for terrorism before 2001 (Mabasa 2009: 5). South Africa is therefore one of the pioneering countries in the handling of politically motivated damage and terrorism through the insurance mechanism.

Soon after the September 11 attacks, academic literature on insurance of terrorism increased significantly. For example, Gron and Sykes (2002) examine the role of government in insurance markets with a specific focus on terrorism. Similarly, Thomas and Russell (2008) discuss the support government can provide in the area of insurance of terrorism. Garoupa, Klick and Parisi (2006) discuss terrorism from a legal and economic perspective while Arandan and Van Munster (2008) analyse the politics in America of insuring terrorism after 11 September 2001. In addition, there are a number of reports that have been published in the 2000s which review terrorism insurance in various countries. Notable among these are

the OECD (2005) and Airmic (2013).² Interestingly, both reports contain a section on Sasria which further illustrates the influence that South Africa's experience exerts on the global discourse on terrorism insurance.

By contrast, academic literature in South Africa on insurance of terrorism and Sasria is sparse and old. Atkins (1979) analyses the political riot cover provided by Sasria while Hyman (1981a; 1981b) examines practical issues which arose from the co-existence of conventional and Sasria cover. Both these contributions were written in the early years of Sasria's existence and do not explain the reasons behind the formation of Sasria. The Sasria policy contains a reverse onus of proof clause and, in the case of doubt, it is assumed the loss is politically-motivated. However, Hyman (1981a: 24) argued that because of the evidential onus, this could produce a gap with each insurer pointing to the other. The insurance market was aware of this gap and undertook that if a valid claim was made, either the conventional insurer or Sasria would cover the loss. However, in practice, this undertaking was largely ignored as it was not included in the actual policy wording of either policy, hence it was of little value.

Limited attempts to provide some background to the formation of Sasria have been made by Monti (2005); Merkin and Kullmann (2006) as well as Mabasa (2009). However, none of these contributions provide a comprehensive analysis of the developments leading to the formation of Sasria and how it has evolved over the years. This article attempts to fill this gap by tracing the political and legal developments which led to the formation of Sasria and the changes which have taken place over the years to explain where Sasria is today. Archival and Government Parliamentary debates in Hansard as well as interviews³ of people involved in the formative stages of Sasria were used to write this article. The article is divided into three parts. It starts with a brief discussion of the history of Sasria. The article then proceeds to examine Sasria's business model and concludes with a discussion of the scope of insurance cover provided under Sasria policies and how this has evolved since 1979.

2 The Airmic Report reviews terrorism insurance arrangement in 10 countries – Australia, Austria, Belgium, France, Germany, the Netherlands, South Africa, Spain, the United Kingdom and the USA, while the OECD Report reviews terrorism risk insurance in OECD countries.

3 Transcripts of all interviews conducted in the development of this article are available from the authors on request. Mr Gallimore was instrumental in the formation of Sasria. At the time he was a board member of SAIA and a member of the two man committee appointed by SAIA to make recommendations on how to provide insurance to cover politically motivated risks. In the years following the formation of Sasria he was a leading authority in the industry on Sasria. He was also a consultant in the formation of Nasria. Mr Maitland was a leading insurance broker who, while working for Bowrings, was involved in developing the commercial assets all risks policy and developing the riot, strike and malicious damage (RSMD) cover prior to the formation of Sasria. While at Bowrings he played a leading role in developing and implementing Sasria. He later left Bowring, then FirstBowring, and joined Price Forbes working with Mr Don Gallimore. Masondo is the current CEO of Sasria. Mr Taylor is the retired CEO of FNB Insurance Brokers involved in placing the reinsurance of riot, strike and malicious damage (RSMD) cover as well as reinsurance of Sasria.

History and formation of Sasria

The formation of Sasria was precipitated by the volatile political environment prevailing in South Africa during the 1970s. Although political grievances against the apartheid government were multiple, it was the discontent with the education system which triggered the students' riots in Soweto on 16 June 1976. Inequalities in the education system were formalized by the Bantu Education (subsequently renamed the Black Education) Act 47 of 1953, whose provisions were meant to ensure that the education received by black students remained inferior to that of their white counterparts.⁴ The situation deteriorated further with the compulsory introduction of Afrikaans in black schools and matters came to a head on 16 June 1976 when black students rioted in Soweto. The riots resulted in significant loss of life and extensive property damage. On 2 July 1976, the South African government appointed a Commission of Inquiry headed by Justice Petrus Malan Cillie, the then Judge President of the Transvaal Provincial Division of the Supreme Court, to investigate the riots. According to the Republic of South Africa's Report (1980: 522) the official death toll from the riots was 575. Additionally, property damage losses were unprecedented in terms of magnitude, topping R15 m in the case of the then newly established West Rand Administration Board alone. By 1976 standards, this was a significant amount.

Before the formation of Sasria, commercial insurers had started to offer insurance cover for property damage in terms of the Riot, Strike and Malicious Damage (RSMD) extension which was included in the fire and assets policy (Strydom 1998: 3; Maitland 2015). Corporate clients, in particular, needed this cover and the RSMD extension was the insurance industry's response to meet this demand. As a consequence of the destruction of property, the Soweto Riots left insurers facing huge property damage claims. The RSMD extension provided very limited cover and was not intended to cover losses from widespread insurrection. An immediate question arose: whether the claims from the riots were indeed covered under the RSMD extension (Gallimore 2015; Maitland 2015; Taylor 2015). Insurers repudiated the claims lodged with them, holding that it was never their intention to cover widespread politically motivated claims. One claimant sought summary judgment against an insurer in the case of *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk* 1978 (1) SA 170 which, predictably, was dismissed.⁵ The critical issue was, were the riots isolated events or widespread, and hence politically motivated. The insurers, influenced by their reinsurance treaties which also refused to cover these losses, maintained it was not their intention to cover damage caused by politically motivated persons (Strydom 1998: 5; see also 'Underwriting political risk'). This case confirmed the unsuitability of the RSMD extension to deal with the problem. Moreover, it was

4 The principal architect of this law was the then Minister of Native Affairs Dr Hendrik Verwoerd. See Lapping (1987).

5 For more detail on this case refer to the Appendix.

apparent that the Soweto riot type of losses would increase and thus cover provided by the RSMD extension would not solve the problem. Indeed, widespread civil unrest became a characteristic after 1976. Industrial clients became concerned that they had no cover. Commercial insurers, with no reinsurance cover, were of the view that providing political cover in terms of the RSMD extension could seriously undermine their viability (Gallimore 2015; Maitland 2015; Taylor 2015). Apart from widespread politically motivated riots, protests and strikes, South Africa also experienced an increase in incidences of other more focused events, such as sabotage, bomb blasts and even mortar attacks.⁶

Of particular concern to commercial insurers was the difficulty of characterizing these losses for purposes of demarcating the limits of the cover then available. Although it was generally accepted that insurers were not prepared to offer protection against politically motivated damage, distinguishing between politically motivated and non-politically motivated losses was a major challenge which resulted in many disputes, some of which filtered into the courts for adjudication (*Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk* 1978 (1) SA at 170–171; Monti 2005: 279). This placed insurers in an unenviable position in view of their expressed intention not to cover widespread politically motivated losses (Monti 2005: 277). It meant that the insurer that wanted to deny responsibility for these claims had the onus to prove that they were politically motivated. Discharging this burden of proof was anything but easy, and some insurers decided to pay claims for damage arising from the riots but indicated they would clarify their exclusion to more clearly express their intentions (Gallimore 2015; ‘Special risk insurance’).

As the highly politicized socioeconomic environment worsened, it became clear to insurers that the line between politically motivated and non-politically motivated damage was becoming increasingly blurred. The prospect of paying large claims similar to those from the Soweto Riots in future, forced commercial insurers to declare that it was never their intention to provide insurance for politically motivated riots, malicious damage and acts of terrorism or politically motivated sabotage (Monti 2005: 277; Gallimore 2015; Taylor 2015). Yet such a declaration on its own was not enough as long as the problem of distinguishing politically motivated claims from non-political ones remained. For most insurers, a long-lasting solution lay in clearly excluding these risks altogether. Furthermore, international reinsurers with whom insurers share financial responsibility for most risks they accept, made it clear that it was never their intention to provide cover for politically motivated acts (Strydom 1998: 5; Gallimore 2015; Taylor 2015). Without reinsurance support, few insurers were prepared to write riot, strike and malicious damage risks for their net accounts especially in the prevailing socio-political environment.

6 For example: during the construction phase of South Africa’s nuclear power station, Koeberg, limpet mines were detonated causing significant delays in the commissioning of the power station.

In the aftermath of the Soweto riots, the private insurance market realized the mortal impact that politically motivated risks and terrorism could have on the South African economy (Gallimore 2015). No insurer was prepared to insure politically motivated risks and for good reason, as the risk was deemed too high. The question of who actually initiated the process that led to the formation of Sasria is contested. According to Gallimore (2015), the South African Insurance Association (SAIA) – the trade association representing all short-term insurers in South Africa – appointed a two-man committee to investigate a solution to insuring political risks and held discussions with South Africa’s direct insurers (Pietzana 2003: 102; Monti 2005: 278; Mabasa 2009: 8; Gallimore 2015). However, according to the OECD Report (2005: 146), it was the South African government which approached SAIA and opened discussions on the issue of insurance for political riot and strike.⁷ Eventually it was decided that a separate entity to insure these risks should be formed (Hansard 1979: col. 1574) which was to operate on the basis of a risk pool. Risk pools are commonly used worldwide to cover complex high value risks, such as nuclear and environmental risks. Essentially, each participating insurer would commit a fixed amount of risk capital to the pool by way of a guarantee. This process culminated in the formation of Sasria. Damage caused by politically motivated risks was to be clearly excluded from fire and assets policies and cover for the excluded risks was to be provided by the new special purpose insurer, Sasria, by way of a coupon policy.

The prevailing view was that compensation for damage caused by politically motivated persons was fundamentally a problem of the Government (Gallimore 2015; Maitland 2015). Reinsurers had indicated they were unwilling to offer insurance cover for this risk and without reinsurance, direct insurers could not offer the cover either. Thus the South African government was approached to act as ‘reinsurer’ of last resort to Sasria⁸ should the pool be exhausted (Hansard 1978: col. 9130–31; Strydom 1998: 6; Monti 2005: 278; Taylor 2015). Legislative changes were necessary to formalize this arrangement and henceforth the formation of Sasria was backed by a series of legislative interventions starting in 1978 when the Finance Act 94 of 1978 was amended⁹ to make the government the reinsurer of last resort in respect of Sasria liabilities (Hansard 1979: col. 1310). Both government and members of SAIA agreed to be stakeholders in Sasria which was established on 25 January 1979. Its mandate was to provide insurance against specifically defined risks, namely politically motivated damage, political riot

7 This view is disputed by Gallimore (2015) who maintained during an interview with the authors that discussions within SAIA to find a solution for political riot and strike started before the 1976 Soweto Riots and the government was not involved at that stage.

8 It is important to note that the government did not actually enter into a reinsurance contract. The government was thus never a reinsurer in the normal technical sense. Government provided a guarantee if money was needed when all other sources had been exhausted. Therefore calling the government a ‘reinsurer’ of last resort is merely an expression reflecting this position.

9 Section 6(1)(a) of the Finance Act 94 of 1978.

including acts of terrorism. Membership of Sasria was not compulsory, but all SAIA members automatically became members of Sasria (Scott 1998: 1). All SAIA members were willing to join as it was the best solution the insurers themselves had created to deal with politically motivated risks. All fire and asset policies would henceforth contain the SAIA exclusion, excluding politically motivated risks. Consequently, if an insurer chose not to join Sasria, they would have lost a great deal of non-Sasria business (Gallimore 2015; Maitland 2015; Taylor 2015). Sasria cover would then be provided in terms of the Sasria coupon attached to the underlying fire or asset policy. The Sasria coupon covered the risks excluded by the SAIA exclusion so there was no duplication of cover between Sasria and SAIA members. At the time no scheme of this nature existed elsewhere in Sub-Saharan Africa, making South Africa a pioneer of political riot, strike and terrorism insurance on the continent (Mabasa 2009: 10).

Sasria was formed as a body corporate in terms of Section 21 of the then South African Companies' Act 61 of 1973. Section 21 companies are not for gain and Sasria was therefore unable to distribute any profits made (Hansard 1979: col. 1311). Companies created in terms of Section 21 are those that provide services deemed to be in the public interest and have no shareholders, but have participating members instead. Sasria was specifically exempted from paying tax from inception, a privilege it enjoyed until January 1997 (Strydom 1998: 6).

Initially, Sasria did not provide business interruption cover, which covers standing charges and loss of profits. Sasria covered material damage only. The omission was a matter of considerable concern in the market and quickly led to the formation of alternative markets with major industrial clients seeking business interruption cover in the international market ('Riot cover: unfortunate timing'; 'Riot insurance'; 'Riot insurance: Seeking alternatives'; 'Sasria: Cover costs attacked'; 'Insurance: Lloyd's feeling left out'). Consequently, the issue of Sasria providing business interruption insurance was considered, but the government understandably was not prepared to cover private sector loss of profits. It was agreed in 1984 to provide business interruption cover but only for standing charges¹⁰ and once again parliament was approached. This cover was provided from 1985 onwards (Hansard, 1984: col. 574, 10595). To limit Sasria's liability and disruption of the private insurance market, the government insisted that a R100 m limit per insured be imposed (Hansard 1984: col. 574–575, 10671–10673) and additional cover, if required, could be secured in the alternative markets which had evolved to cover loss of profits ('Sasria: New rules'; 'Sasria: Diving for cover'). Even before this business interruption cover was separately provided, some cover existed, such as for loss of rent, as it already formed part of the standard underlying fire policy and was thus covered by Sasria (Section 6(2)(d)(i) Finance Act 94 of 1978; Atkins 1979: 200; Gallimore 2015).¹¹

10 See 'Sasria: Outlawing the competition'.

11 See 'Riot insurance: Fear index rises'; 'Insuring against riots'; 'Sasria calling for council'.

From inception until 1984 member insurers provided a combined guarantee of R5 m ('Riot insurance well armed'; Strydom 1998: 7, Monti 2005: 278) with the government acting as reinsurer of last resort on an unlimited liability basis. After several years of operation, Sasria established a track record and it was clear that insuring clearly defined politically motivated risks was indeed possible and profitable. Reinsurers, who initially had been reluctant to cover these risks, began to show an interest in providing the cover ('Sasria: reinsuring success'; Maitland 2015; Taylor 2015). However, with the potentially large-scale exposure to property as a result of political risks, international reinsurers would only provide reinsurance up to a fixed capped amount. In 1984, Sasria started to buy reinsurance from the international market as an additional layer of protection.¹² The exact date when Sasria started to operate with international reinsurance is unclear. While statistics in the 41st Annual Report of the Registrar of Insurance clearly show that Sasria operated with reinsurance purchased outside of the Republic in 1984, an internal document prepared by M.P. Strydom (the Managing Director of Sasria at the time) states that Sasria 'arranged international reinsurance coverage on a per risk excess of loss basis' (Strydom 1998: 8) from 1989. This statement can be reconciled with the Annual Report of the Registrar of Insurance if the reinsurance bought by Sasria in 1984 was of a different type to the excess of loss the company started to buy in 1989. Thereafter, the government continued as reinsurer of last resort on an unlimited liability basis until 1998 when the government guarantee was limited to R1bn ('Sasria privatization delayed'; OECD 2005: 284). With reinsurance cover and Sasria's increasing reserves, the limited government guarantee became less relevant and the arrangement of government acting as reinsurer of last resort ended in 2007 (Masondo 2015).

The omission by Sasria to provide business interruption cover as well as the success of Sasria resulted in the development of alternative markets which were then in direct competition with Sasria for political risks. Limited political cover could be purchased, for example, via Lloyd's of London, an alternative market some were attempting to develop for large industrial clients (Maitland 2015). By 1984, this competition was proving problematic for Sasria¹³ as expressed in parliament:

what has happened in the short experience that Sasria has had is that many of the large potential clients of Sasria seeking this sort of cover have tended to bypass Sasria and gone elsewhere. Many of them have gone to very big overseas underwriters where they have been able to obtain better and more competitive terms. This has undoubtedly been a setback for Sasria which is trying to build up adequate reserves for the future. (Hansard 1984: col. 10671)

As a result of these concerns, parliament granted Sasria a monopoly to provide this cover up to a limit. However, there were crucial differences in approach between the

12 41st Annual Report of the Registrar of Insurance (1984), p. 40.

13 See 'Special risk insurance'.

two markets. In the case of the alternative markets, such as Lloyd's, political riot and other related risks were treated the same as any other risks. Underwriters would assess each insurance proposal, rate it accordingly and accept or reject it on its merits and, in terms of the standard 30-day cancellation clause (Strydom 1998: 21), cover could be cancelled if the perceived political environment deteriorated beyond the risk tolerance level of the insurer. By contrast, Sasria has no right to either refuse to provide cover for which an application for insurance has been received or to cancel cover (Atkins 1979: 199). Sasria charged a flat rate, which is referred to as objective rating. Any person in South Africa who applies for Sasria cover is entitled to be insured subject to the pre-condition that such person must have an underlying assets policy issued by a commercial insurer who is a member of SAIA. In view of this difference, Sasria faced a clear and real danger of being burdened by risks that its competitors would have declined to accept. It was therefore decided, in 1984, with effect from 1 January 1985, to grant Sasria a monopoly to insure risks it had been formed to cover ('Sasria: outlawing the competition'). To achieve this, the Finance Act 94 of 1978 was amended in 1984¹⁴ to include a provision to the effect that Sasria was the only insurer in South Africa allowed to transact insurance policies covering political riot, strike and terrorism, granting it a first right of refusal. By this amendment, it was argued that a strategic asset was being created: 'we are trying to build up a strategically important indigenous industry to serve the community at large' (Hansard 1984: col. 575). Sasria acquired exclusive rights to write political riot and other related risks. This position endures today (Mabasa 2009: 11; Masondo 2015).¹⁵ Insurance in the first instance has to be offered to Sasria. If Sasria does not wish to insure the risk, it has two choices, namely refuse the risk in its entirety (and only after refusal could alternative markets provide cover),¹⁶ or insure up to R100 m and allow the policyholder to approach alternative market for cover in excess of the R100 m (Hansard 1984: cols 10596, 10672).

The problem of distinguishing between politically and non-politically motivated acts remained and, as a result, disputes between Sasria and commercial insurers often arose. The practical solution was to extend the scope of cover offered by Sasria to include non-political events such as riot, public disorder, student protests, damage caused by fans at sporting events, civil protests over

14 In terms of Section 16(1)(b) of the Finance Act 113 of 1984 amending Section 6 of the Finance Act 94 of 1978.

15 According to Kay (1995), a firm is said to have a strategic asset if it enjoys an advantage that other firms more or less similarly placed do not enjoy. Strategic assets are used by governments worldwide to protect industries deemed to be of critical national importance, such as, commercial aviation, energy and telecommunications. A firm holding a strategic asset can enjoy a competitive advantage over other firms in the market e.g. a strategic asset can enable a firm to accumulate wealth at an accelerated rate than would otherwise be possible. The huge reserves that Sasria was able to build between 1979 and 1997 must therefore be viewed in this light.

16 Hansard 1984: col. 10596; s 4(b) of the Reinsurance of Material Damages and Losses Act 56 of 1989.

service delivery and price increases as well as damage caused by labour-related strikes among other social events ('Sasria: Extending the cover'). This again required a change in the legislation to make Sasria the sole insurer of both political and non-political risks. Accordingly, the Finance Act 1978 was further amended in January 1987, to facilitate the transfer of non-political riot, strike and public disorder to Sasria. Insurance for malicious damage continued to be provided by commercial insurers ('Sasria: Premiums up again'; 'Sasria: Getting it right'; Strydom 1998: 8). Over the years, parliament had dealt piecemeal with Sasria and it was decided to consolidate the legislation. The Reinsurance of Material Damages and Losses Act 56 of 1989 was enacted to replace and consolidate all Sasria statutory provisions from the Finance Act of 1978 which authorized government, through the Minister of Finance, to contract with commercial insurers as reinsurer in respect of risks covered by Sasria (Strydom 1998: 8). In addition, the Act also stipulated perils in respect of which government could be liable to commercial insurers in its capacity as reinsurer. In terms of this Act, Sasria was to insure specific and defined events only.¹⁷ Since commercial insurers had stopped providing any form of riot and strike cover in 1987, no distinction is made in the Act between political and non-political riot, strike, public disorder and civil commotion. The Act also extended Sasria cover to events such as industrial action and lockouts (Hansard 1987: col. 862). The Finance Act 1978 was repealed by the Finance Acts Consolidation Act 78 of 1992 and all Sasria provisions in that Act were replaced by the Reinsurance of Damages and Losses Act 56 of 1989.

As an insurance company, Sasria is also registered in terms of the Short-term Insurance Act 53 of 1998. Members authorized to participate in Sasria were short-term insurance companies registered in the Republic of South Africa that transacted specifically fire insurance and other insurances covering damage to assets. This requirement was premised on the understanding that Sasria cover would complement assets cover offered by commercial insurers.

In 1998, the South African government advised SAIA in its capacity as a representative for all Sasria members that it was considering nationalizing Sasria. This would enable it to attach the accumulated reserves, estimated at the time to be R10bn, to be transferred to the government. It was argued in support of this move that 'because of the Government's provision of unlimited reinsurance cover

17 (a) acts whether on behalf of any body, person or group of persons aimed at overthrowing or influencing any State or government or any authority provincial or tribal by force of by means of fear, terrorism or violence;

(b) any act calculated or directed to cause loss or damage in furtherance of any political objective or cause, or to bring about social or economic change, or in protest against any State or government, or any provincial, local or tribal authority, or for purposes of frightening the public or any section thereof;

(c) riot, strike or public disorder; or any act or activity which is calculated or directed to bring about a riot, strike or public disorder;

(d) damage caused by acts of any lawful authority in an attempt to control, prevent, suppress or in any other way while dealing with any occurrence referred to in (a), (b) or (c) above.

and the granting of both monopoly and tax-exempt status, the surplus funds are due to Government' (Hansard 1998: cols 7999, 8002). The excess reserves of Sasria were therefore seen by the government as 'state property' (Hansard 1998: col. 8002). However, cynics saw this as simply an excuse by government to tap into the large cash surplus which Sasria had accumulated up to that point ('Government may tap'). The Sasria board of directors and the short term insurance industry initially resisted the idea of nationalization (Hansard 1998: cols 8006, 8011; Strydom 1998). Consensus could not be reached and when it became clear that Sasria would be nationalized regardless, consideration was given to oppose this measure in the courts on constitutional grounds ('Insurers to oppose Government's plan'; 'Government bid'; 'Way clear for Govt'). However, in the end, it was decided not to oppose the government's proposal and Sasria was duly nationalized in terms of the Conversion of Sasria Act, 134 of 1998. It has been argued that this Act for all intents and purposes is a Sasria Bill of Attainder (Vivian 2010).

The Act had three specific purposes. First, it sought to convert Sasria into a public proprietary company with the State as the sole shareholder. The original intention was to strip Sasria of its reserves and then sell the shell back to the industry (Hansard 1998: col. 8006). After the reserves were stripped, no interest was shown in its re-purchase and it was decided that the government would run Sasria as a state-owned enterprise (SOE) for a period of five years and then reconsider the matter ('Private sector rejects Sasria'; 'Insurers happy'). After the lapse of five years, the future of Sasria was never reconsidered and Sasria operates today as a SOE and it is intended to continue as such (Masondo, 2015). Sasria remains very profitable and it is in any event in the interests of the government to retain it as such. Second, the Act intended to create a flexible framework within which future restructuring of Sasria could be undertaken. Lastly, the Act also sought to ensure a restructuring of the government's role in the short term insurance industry with regard to special risks, as well as to provide for optimum exposure reduction measures.

After its conversion, Sasria share's capital consisted of one share with a nominal value of R1 held by the State.¹⁸ Shortly after the takeover a payment of a dividend of approximately R10bn was made. This was used to reduce State debt (Hansard 1998: cols 8004, 8006).¹⁹ The conversion of Sasria into a Limited Company led to other changes. One of these was a change of the name of the new company from Sasria to Sasria SOE Ltd. Sasria SOE Ltd thereafter reported directly to the Minister of State Owned Enterprises. Another change was the withdrawal of the unlimited liability of government as a reinsurer of last resort and in its place was a Government Guarantee on Sasria's claims limited to R1bn (Hansard 1998: cols 7998–7999). Lastly, s 10 of the Conversion of Sasria Act 134 of 1998 authorized the repeal of the Reinsurance of Material Damages and Losses Act 56 of 1989 with effect from

18 Section 5 of the Conversion of Sasria Act 134 of 1998; Hansard 1998: col. 7999.

19 Section 7(3)(b) of the Conversion of Sasria Act 134 of 1998.

a date to be determined by the Minister. The Act did not specify a time limit for the determination of the repeal (Hansard 1998: col. 8010). A date has, as yet, not been announced and consequently the Reinsurance of Material Damages and Losses Act 56 of 1989 remains in force allowing Sasria to retain its monopoly. Despite Sasria's transformation to a limited liability company, the Conversion of Sasria Act 134 of 1998 exempted it from complying with certain provisions of the Companies Act 61 of 1973, notably Sections 66, 190 and 344(d).²⁰ These related to liability of members of a company where membership falls below the statutory minimum of seven (Section 66); quorum for meetings (Section 190); and winding up by the court if membership falls below seven (Section 344(d)). Being a company with only the State as a member, means these provisions clearly cannot apply to Sasria.

Sasria business model

Typically short term insurers contract with policyholders directly or through intermediaries (PricewaterhouseCoopers 2010: 7). In many respects, Sasria is anything but a typical insurer. To begin with, Sasria cannot reject an application for insurance and it also cannot cancel a policy once it has been issued. Furthermore, the company has no direct dealings with its clients. It deals with short-term insurers, although it contracts with the insured. Sasria has agency agreements with short term insurance companies registered in South Africa (their agents in this regard) in terms of which cover is provided by way of a coupon policy issued in conjunction with the underlying insurer's policy. The underlying conventional property cover is a condition precedent to Sasria cover. All conventional asset policies include standard SAIA exclusions which exclude political risks which are then covered by the Sasria coupon. In addition, policy administration and collection of premiums from policyholders are handled by Sasria agents. Collected premiums are then remitted to Sasria in terms of the existing agreements. In return, agents are remunerated for the work done by way of commission which is based on the premium collected. Similarly, claims are submitted to Sasria through the underlying insurer, but Sasria processes these claims in-house. There is a good reason why Sasria outsources most of its operational functions except claims. From a strategic viewpoint, the reputation of any insurer is influenced by its claims handling processes and procedures (Bernard et al. 1997: 200). Outsourcing this function may not be ideal for that reason. Accordingly, Sasria has its own fully-fledged claims department which deals with claims investigation, claims adjustment and payment. Sasria agents have no authority to deal with these matters. Since most of its functions are carried out by the underlying insurer, its staff complement is exceptionally small, relative to its asset value.

The business model used by Sasria dispenses with two fundamental and closely connected functions performed by conventional insurers. This, in turn, has a direct impact on operational costs. One of these functions is underwriting which includes

20 The Companies Act 61 of 1973 was replaced by the Companies Act 71 of 2008.

risk rating. Underwriting involves gathering risk information and processing it for purposes of arriving at a decision whether the risk is acceptable or not, the premium to be charged, as well as the terms to be included in the insurance contract (Harrington & Niehaus 2003: 141). The efficiency with which this process is undertaken not only determines the quality of an insurer's business portfolio but also its margins of profitability. Since premium rates charged by Sasria are homogenous for specific classes of insurance, underwriting is virtually unnecessary. The premium is thus flat rated. Additionally, risk information disclosures that typically characterize underwriting in conventional insurance are, in principle, irrelevant for purposes of Sasria coverage. However, this does not apply to the underlying policy. A precondition for Sasria cover is that there must be an underlying fire or assets policy in place covering conventional perils in the case of non-motor policies. Consequently, a Sasria policy is derivative in nature because its validity depends on the existence of a valid underlying conventional assets or motor policy. It therefore follows that if, for some reason, the underlying policy is invalid then the Sasria policy will also be invalid.²¹ A second fundamental function which impacts on costs performed by conventional insurers which is of little relevance to Sasria is maintaining a database of clients. Conventional insurers maintain a database of their clients for purposes of policy renewals, monitoring their claims experience and marketing (PricewaterhouseCoopers 2010: 23). Personal information of the insured is of material significance to conventional insurers because it helps them monitor the possible existence of moral hazard (Skipper 1998: 38). With regards to Sasria policies, the identity and personal idiosyncrasies of the insured are immaterial because Sasria does not really need to know who has bought insurance from them unless there is a claim. Therefore, a Sasria policy covering a particular class of business such as domestic property, or motor vehicles will have the same terms and conditions regardless of which conventional insurer or agent has issued the policy. Similarly, the primary rates are also the same regardless of who the insured is and where the policy was purchased.

Given its operational structure the cost advantage enjoyed by Sasria compared to other insurers is clear. In addition to claim payments, revenue collected by an insurance company must be sufficient to cover two additional cost components, namely: commissions and management or administration expenses. Although claims and commissions account for the greater proportion of an insurer's costs, the good thing about these is that they can be linked to specific individual policies and are therefore easier to control (Diacon 1990: 139). Management expenses by contrast are not policy-specific and are therefore more difficult to control. These three cost components – claims, commissions and management expenses – can be separately measured in relation to net premium. Insurers ideally want to keep costs within a certain margin relative to net premium. A common measure of an insurer's expense margin is the expense ratio which is derived by expressing

21 Refer to Appendix: *Van Zyl and Maritz NNO and Others v South African Special Risks Insurance Association and Others* 1995 (2) SA 33.

Table 1: Sasria's loss ratio and accumulated reserves for the period 1979–1997

Registrar of Insurance annual report	Year	Earned Premium Income (R'000)	Claims incurred (R'000)	Loss ratio (%)	Reserves (R'000) [A - L]**
36th	1979	7,627	0	0.000	6,217
37th	1980	32,585	2,262	6.942	32,022
38th	1981	51,186	1,198	2.340	70,672
39th	1982	64,633	5,215	8.069	97,047
40th	1983	66,200	5,752	8.689	118,238
41st	1984	97,108	31,432	32.368	142,758
42nd	1985	134,077	44,530	33.212	176,911
Appendix to 42nd	1986*	224,706	74,745	33.263	282,429
43rd	1988	395,702	13,900	3.513	676,774
44th	1989	489,228	14,548	2.974	818,532
45th	1990	501,085	129,918	25.927	1,125,004
46th	1991	407,248	20,494	5.032	1,446,216
47th	1992	420,676	109,715	26.081	3,664,829
48th	1993	399,992	153,041	38.261	5,026,620
49th	1994	504,760	256,053	50.728	5,800,617
50th	1995	547,048	54,960	10.047	7,372,602
51st	1996	356,512	17,780	4.987	8,384,665
52nd	1997	235,397	41,652	17.694	9,073,492

* These figures represent both the 1986 and the 1987 year.

** Reserves = Assets less liabilities.

Note: Compiled from the Registrar of Insurance Annual Reports 1979–97.

commissions and expenses paid by the insurer as a percentage of the net premium written. Because most of the administrative work associated with Sasria policies is carried out by its agents who are then remunerated for their work by way of fixed commission, a cost component that is hardest to measure and allocate is translated into a fairly stable and predictable variable.

Apart from the management expense ratio, Sasria's loss ratios over the past decade have also been relatively low in comparison with those of conventional South African short term insurers. The claims or loss ratio measures the relationship between claims incurred and net premium earned. This ratio has the greatest influence on an insurer's underwriting result. [Table 1](#) together with [Figure 1](#) shows annual loss ratios of Sasria from 1979 to 1997. [Table 1](#) also demonstrates the accumulated reserves over the same period.

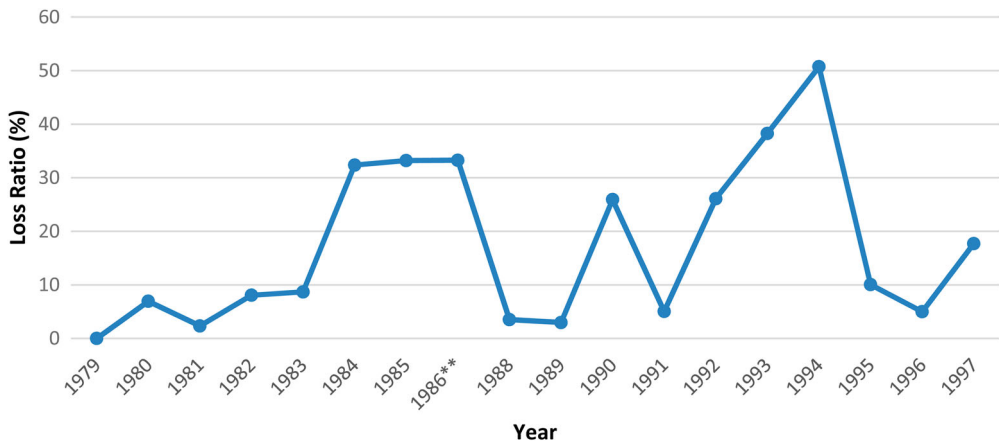


Figure 1: Sasria's loss ratios from 1979 until 1997

Note: Compiled from the Registrar of Insurance Annual Reports 1979–97.

Since Sasria initially had no reserves other than the R5 m risk pool commitment by the members and no claims history, rating was a problem. To overcome this rating problem, the initial Sasria rates were closely related to the fire rate at the time. This was considered to be exceptionally high but necessary to build-up reserves ('Riot Insurance: Fear index rises'; Gallimore 2015; Maitland 2015; Taylor 2015). As a result, Sasria grew its reserves very quickly over a short period of time. It was argued that solvency concerns for a new start up insurer such as Sasria motivated the need for the initial high rates (Hansard 1979: cols 1311–1312; Hansard 1984: cols 10672–10673). Over the years with claims proving to be low judged by the loss ratio, the rate was reduced (Gallimore 2015).

Three additional specific features of Sasria in its early years also helped it accumulate a large surplus fund by the end of 1997. One is the tax exemption status it enjoyed from inception. Second, as a Section 21 company, Sasria was not allowed to distribute any surplus either to the government or participating members in terms of Section 21(1)(d) of the Companies Act 61 of 1973. Surpluses were thus retained. Third, in 1984, Sasria was given a monopoly right of first refusal for the first R100 m of cover, compelling policyholders to exclusively make use of Sasria (Hansard 1984: cols 10596, 10673). 'We [government] are trying to assist Sasria in this way [by giving Sasria a monopoly up to R100 m] to build up adequate reserves in a very risky field' (Hansard 1984: col. 10672). These three features, coupled with the initial high premium rates and low claims experience, enabled Sasria to rapidly accumulate reserves (Hansard 1998: col. 7997; Merkin & Kullmann 2006: 123) which grew over the 19-year period from R6,217,000 in 1979 to R9,073,492,000 in 1997. By 1998, the reserves were approximately R10bn (Hansard 1998: col. 8004). By the mid-1990s, Sasria had become the largest short-term insurer on the African continent in terms of

assets. As a result of the high premiums (plus investment income) and growth in reserves the government was never called upon to assist Sasria as a reinsurer of last resort. There is no record of the government ever having to make a contribution to a claim.

Sasria experienced three periods of heavy claims around the mid-1980s²² (nationwide unrest: Magubane 1986), in 1990 (inter alia riots in Ciskei: see ‘Sasria suffers’) and again in the period leading up to the 1994 national elections. The reserves were never severely depleted to cause any concern as the losses were comfortably absorbed and the reserves kept on increasing. After the historic 1994 elections, the view developed that political risks in South Africa had decreased considerably and hence the need for the substantial reserve had diminished (Hansard 1998: col. 8002). It is therefore not surprising that the government nationalized Sasria and attached these accumulated reserves. It is apparent that the business model run by Sasria coupled with its monopoly for certain types of risk gives it a significant advantage.

As pointed out earlier, Sasria initially charged exceptionally high rates because of a lack of reserves and no claims history (Gallimore 2015; Maitland 2015; Taylor 2015). However, this has now substantially changed and the current objective of Sasria is to provide cover for damage caused by persons who are politically motivated, riot strike and terrorism as cheaply and accessibly as possible to all that need it.

Before 1984, Sasria policyholders were protected by five levels of security in the event of a claim. The first security was the earned premium which in any insurance arrangement is the primary level of security for policyholders. Second, there was the investment income earned from the provisions and reserves. Accumulated reserves represented the third layer of security for policyholders and the fourth layer of security was provided by Sasria members (i.e. short-term insurers) in the form of an aggregate limit of R5 m committed to the risk pool. The fifth and final level of security was the South African government operating as a stop loss reinsurer of last resort to an unlimited amount but with a limit per insured. In 1984, Sasria engaged international reinsurers and was successful in securing reinsurance cover on a per-risk excess of loss basis from 1989 (‘Sasria: Reinsuring success’; Strydom 1998: 8). Under this type of reinsurance, the reinsurer pays losses up to a specified limit on each policy reinsured which exceed a pre-set amount called a deductible. In 1989, soon after reinsurance support was secured, the aggregate line of R5 m committed by Sasria members was scrapped as it had become meaningless and trivial in comparison to the reserves (Strydom 1998: 8). Today Sasria policyholder security levels have changed significantly from the pre-1984 era. They comprise: earned premium; recoveries from reinsurers; investment income and accumulated reserves. The government guarantee of R1bn was removed in 2007. Currently, Sasria buys reinsurance in the open market and the actual levels

22 See ‘Sasria facing the rioters’; ‘Sasria: Righting the rates’; ‘Sasria: Counting costs’.

are assessed based on actuarial modelling (Masondo 2015). These security levels are similar to those of any other short term insurer. In practice, Sasria claims have always been paid from earned premiums, investment income and reinsurance recoveries.

The South African insurance market, as it currently stands, handles two types of claims. Either a claim is a conventional insurance claim for which the relevant short-term insurer(s) is/are responsible or it is a Sasria claim. Ideally, there should be no grey area or gap between the two claim types, where the insured purchases Sasria cover. What Sasria covers is the subject of a standard SAIA exception incorporated into all short-term assets insurance policies sold by conventional insurers. However, complications are still possible, especially where there is a dispute between the conventional insurer and Sasria regarding the characterization of a claim. Disputes of this nature are resolved with the assistance of the reverse onus of proof included in the SAIA exception. The essence of this reverse onus of proof is that if a conventional insurer rejects a claim alleging that it is politically motivated and is therefore covered by Sasria, the onus of proving the contrary lies with the policyholder (Merkin & Kullmann 2006: 121). A long established principle of law on insurance contracts is that it is the insurer who has the onus of proving that a loss is excluded by the policy (Ivamy 1986). The reverse onus of proof instead makes it the responsibility of the insured not only to prove that the claim is covered but also that it is not excluded.²³

Scope of cover provided under Sasria policies

Over the years, the scope of cover provided by Sasria has widened significantly. At inception, Sasria cover was restricted to specific political events, notably political riot, strike, political sabotage and terrorism. Presence of a political motive was a critical distinguishing factor between Sasria and conventional insurance in the early years. The practical difficulties in distinguishing between political and non-political events led to Sasria cover being extended to include political and non-political riot and strike (Hansard 1987: cols 856–857, 864). Today, Sasria insures the following main perils: political and non-political riot, strike, public disorder, civil commotion, labour disturbances and terrorism. With effect from 1 March 1985, Sasria provided limited consequential loss insurance which was restricted to standing charges only ('Sasria: New look'). However, Sasria does not insure war risks and acts of terrorism in which nuclear, chemical and biological agents are involved. Sasria perils are added to short term insurances covering property notably; contractors' all risks, fire, money, marine, and motor

23 For a discussion on case law relating to Sasria and the reverse onus of proof refer to *Joossob Investments (Pty) Ltd v Maritime & General Insurance Co. Ltd* (1990) 3 SA 373 in the Appendix.

(automobiles). No other insurer in South Africa is authorized to insure risks covered by Sasria unless Sasria is unable to provide the insurance in which case it has to give formal permission authorizing other insurers to insure the risk.

Typically, losses covered by Sasria arise from specific social and political events. These losses usually affect many policyholders at once. For instance, damage from a riot²⁴ or strike invariably extends beyond the assets of those against whom the participants have a grievance. In order to cap losses, Sasria policies incorporate an annual aggregate loss limit. For example, commercial entities with subsidiaries can buy Sasria cover up to a loss limit of R1.5bn any one calendar year. Additionally, they can also opt to carry part of their losses in one of two ways. One is through a deductible which can range from R1 m to R10 m. In return, the insured gets a corresponding magnitude premium discount (Gallimore 2015). Another but less conventional way an entity can bear part of the losses it incurs, is through a co-insurance arrangement with Sasria. Under this arrangement an insured can co-insure anything between 20 and 50% of the sum insured against a corresponding proportional reduction in premium. An insured who desires protection in excess of the loss limit cap is not precluded from buying top-up cover locally or offshore. However, Sasria policies specify South Africa as the geographical territory in which insured property must be located for the policy to respond.

Conclusion

The purpose of this article was to give a historical analysis of the political and legal developments which led to the establishment of Sasria and the changes this institution has undergone over the years. Sasria emerged from the volatile political climate which existed during the final days of the apartheid era to insure specifically political riot, strike and terrorism. Since then the company has undergone significant changes in terms of structure and risks insured. Its evolution was supported by a series of legislative interventions which also changed the complexion of the local insurance industry. During this process, the claims profile of the company also changed significantly. In the 1980s going into the 1990s, most losses paid by Sasria were of a political nature. However, since 1994, there has been a gradual shift and today, socioeconomic events, such as, strikes and service delivery protests, now account for a larger proportion of losses paid by Sasria.

Sasria's business fortunes are intrinsically linked to the social and political environment prevailing in the country at any given time. Before 1994, most of its

24 A 'riot' peril has been the subject of litigation both locally and internationally (Evans 1975: 429). Refer to the case of *Sasria Ltd. v Elwyn Investments (Pty) Ltd* Transvaal Provincial Division Case Number A370/93 (30 May 1994) in the Appendix1 for further detail.

claims had a political dimension. Notable examples include the March 1990 coup-triggered riots in the then independent homeland of Ciskei, and the March 1994 riots in Bophuthatswana, another independent homeland. Today, the majority of claims the company faces have a predominantly socioeconomic dimension. Labour strikes and service delivery protests now account for the bulk of Sasria claims (Masondo 2015). According to Sasria's 2012 Annual Report, there was a 135% increase in the number of claims filed in that year compared to the previous year and the company attributes this to an increase in labour and service delivery protests.²⁵ From 2006, strikes started to emerge as the largest source of Sasria claims. This shift is a reflection of the new imperatives now confronting South Africa. With inequality, low capacity to deliver social services and poverty (all of which are projected to remain major challenges in South Africa for the foreseeable future), this trend is set to continue. Invariably, most of the strikes seen in recent years have been accompanied by violence with human fatalities in some cases. A well-known case is the Marikana strike on 16 August 2012 in which 34 people died and nearly 100 others were injured. This and other strikes in the mining sector have caused other economic losses to the country which are difficult to quantify.²⁶

The current thinking within the ruling African National Congress and its alliance partners appears to favour more direct State involvement in the economic and social spheres and this augurs well for the preservation of Sasria's strategic asset. However, even though it is unlikely that Sasria's strategic asset will be eroded in any way or form for the foreseeable future, the company cannot take this for granted. It must continue to work towards making government realize that the current model serves the interests of all concerned better than all other alternatives. The company can achieve this by leveraging itself as a key role player in managing some of the risks faced by foreign investors wishing to invest in South Africa.

In recent years, politically motivated events, especially terrorist attacks, appear to be increasing in Sub-Saharan Africa against a background of limited capacity across the continent to insure these events. For an organization in Sasria's position, this development could be viewed as an opportunity to expand into the largely untapped African continent. But terrorism is a complex phenomenon; it is difficult to define and its causes are multiple. Failed states, weak governments, unstable political environments, corruption, poverty and

25 According to the South African Department of Labour Annual Industrial Action Report for 2012, there was a significant increase in the number of labour strikes in 2012 compared to the years 2008–11. In 2012 a total of 99 labour strikes were recorded compared to 67 in 2011, 74 in 2010, 51 in 2009 and 57 in 2008.

26 For instance, international rating agencies Fitch, Standard and Poor, and Moody's downgraded South Africa's credit rating after the Marikana incident. Moody's and Standard and Poor specifically cited growing tensions after the violent strikes in the mining sector as one of the main reasons for their decision.

unemployment are some of the potential causes of terrorism and political upheaval. The African continent shares these problems with other parts of the world. Any attempt to insure terrorism offshore is a risky proposition which must therefore be approached with caution. While it is important for Sasria to share its extensive experience and knowledge with the rest of the continent and take advantage of new opportunities, it must be clear on the best way to achieve this. Given the complexity of terrorism and its underlying causes, Sasria should rather continue to focus on the domestic market in so far as insurance provision is concerned and restrict any involvement in Africa to provision of technical assistance and capacity building. This option may not pay handsomely compared to providing insurance cover but as William Shakespeare wrote in *Macbeth*: 'To be thus is nothing but to be safely thus'.

DISCLOSURE STATEMENT

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APPENDIX

IMPORTANT COURT RULINGS IN SASRIA'S HISTORY

Case name	Case details
<i>Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk</i> 1978 (1) SA 160	The courts found the losses from the 1976 riots problematic to characterize. A claim was brought in terms of an insurance policy which, inter alia, excluded loss directly or indirectly caused by civil insurrection or uprising. A central issue the court had to decide was causation. In this regard, the court pointed out that in such circumstances the insurer can only avoid liability if it provides facts supporting a conclusion that the loss was caused by civil insurrection or uprising and in the absence of such evidence, it cannot be taken as fact that a particular loss was so caused simply because the insurer alleged so. Similar reasoning was also applied to cases where insurers sought to avoid liability on grounds that a loss was caused by politically motivated acts.
<i>Joossub Investments (Pty) Ltd v Maritime & General Insurance Co. Ltd</i> (1990) 3 SA 373	As is often the case, anything that purports to change normal legal principles is subjected to closer judicial scrutiny. The reverse onus of proof is no exception. Both English and South African courts have dealt with the meaning and practical application of this concept. Validity of the reverse onus of proof clause was confirmed by the Privy Council in the English case of <i>Levy v Assicurazioni Generali</i> (1940) 3 All ER 427. In <i>Spinneys 1948 (Ltd) and others v Royal Insurance Company Limited</i> (1980) 1 LILR 406, the application of the reverse onus of proof was clarified. The court held that an insurer seeking to rely on the reverse onus of proof clause cannot invoke it by merely making bare allegations that a claim is excluded. Instead, the insurer must present a <i>prima facie</i> case from which it can reasonably be inferred that given the contextual factors surrounding the claim, an excepted peril directly or indirectly caused the loss.

(Continued)

APPENDIX (Continued)

Case name	Case details
	This reasoning was followed in the South African case of <i>Joossob Investments</i> which involved the reverse onus of proof in the context of Sasria perils contained in the standard SAIA exclusions. Citing cases such as <i>Levy</i> and <i>Spinneys</i> , the court held that only when an insurer has presented an arguable case that the loss is excepted can the reverse onus of proof be operational. In contemporary South Africa however, Sasria and conventional insurance claims are easily distinguishable in the majority of cases because both political and non-political riot and strike are now covered exclusively by Sasria, unlike in the early years.

Sasria Ltd. v Elwyn Investments (Pty) Ltd Transvaal
Provincial Division Case Number
A370/93 (30 May 1994)

Several of the perils which Sasria insures have been the subject of litigation locally and internationally (Evans 1975: 429). Of these, the word 'riot' has arguably been the most problematic. In *Sasria Ltd. v Elwyn Investments (Pty) Ltd* Transvaal Provincial Division Case Number A370/93 (30 May 1994), a local court was asked to determine what constitutes a riot. The court categorically rejected the approach which ascribes a legal meaning to the word 'riot'. Instead the court opted for a construction derived from the ordinary meaning of the word but acknowledged that such ordinary meaning could be so wide as to distort what the parties may have intended when the insurance contract was concluded. English law on the other hand has for a long time provided a legal meaning to the word 'riot'. Two old cases can be used for illustrative purposes. In *Field and Others v The Receiver of Metropolitan Police* (1907) 2 KB 853 at 860 Phillimore J laid out five elements necessary for a riot to be constituted, namely: (1) there must be at least three persons participating in the act; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them; and (5) force or violence used or displayed in such a manner as to alarm at least one person of reasonable firmness and courage. This approach was confirmed in *London and Lancashire Fire Insurance Company Ltd v Bolands* (1924) AC 826 where the House of Lords said approaching riot cases without a definition of the term is impractical. Today the word 'riot' is statutorily defined in Britain under Section 1 of the Public Order Act 1986. In terms of this Act, a riot shall be said to exist if the following elements are met: (1) 12 or more persons who together use or threaten unlawful violence for a common purpose and their conduct taken together is such as would cause a person of reasonable firmness present at the scene to fear for his or her safety; (2) it is not necessary that that the 12 or more people use or threaten unlawful violence simultaneously; (3) the common purpose may be inferred from the conduct of those involved; (4) no person of reasonable firmness need actually be or likely to be present at the scene; and (5) a riot may be committed in private or public areas.

(Continued)

APPENDIX (Continued)

Case name	Case details
<p><i>Van Zyl and Maritz NNO and Others v South African Special Risks Insurance Association and Others</i> 1995 (2) SA 33</p>	<p>A Sasria policy is derivative in nature because its validity depends on the availability of a valid underlying conventional assets or motor policy. This raises a crucial question: Even though the insurance law doctrine of disclosure clearly cannot strictly apply to Sasria policies, can lack of disclosure invalidate Sasria cover? Failure to disclose material facts can invalidate the underlying conventional policy. If this happens, does it also invalidate the Sasria policy by default? This question came before the court in <i>Van Zyl and Maritz NNO and Others v South African Special Risks Insurance Association and Others</i> 1995 (2) SA 33 where non-disclosure of certain financial and non-financial information of a material nature by the insured invalidated the conventional underlying policy (Havenga, 1995, 110).</p>
	<p>Nevertheless the insured attempted to recover from Sasria on the grounds that the loss was politically motivated. Sasria denied liability holding that non-disclosure by the insured to the conventional insurer invalidated the conventional policy and thus the pre-condition that there be an underlying policy was not met, hence, so the argument went, there was no Sasria cover either. The insured sued and the court held that if the underlying assets policy is invalid for whatever reason, this automatically affects the validity of the Sasria cover. Since Sasria cover is preconditioned on existence of an underlying conventional policy, if the underlying policy is invalid then the Sasria policy which is derivative in nature also becomes invalid. This approach was frowned upon by the market since it appeared as if Sasria was trying to avoid liability for material non-disclosures via a backdoor.</p>