



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal

**DATE** 28 September 2022

**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment.*

*Zurich Insurance Company South Africa Ltd v Gauteng Provincial Government*  
(734/2021) [2022] ZASCA 127 (28 September 2022)

### **MEDIA STATEMENT**

The Supreme Court of Appeal (SCA) today dismissed the appeal of the Zurich Insurance Company South Africa Ltd (Zurich) against the Gauteng Provincial Government (the provincial government). The appeal concerned whether Zurich was liable, in terms of a contract of insurance (the policy), to indemnify the provincial government, as an insured, in respect of damage that had been caused during the construction of tunnels for the Gautrain Rapid Rail System (the Gautrain).

The Gauteng Local Division of the High Court, Johannesburg (the trial court), had found that Zurich was liable to indemnify the provincial government for the damage to the tunnels and that it was liable to pay whatever damages were proved in due course. When it granted leave to appeal to the SCA, it limited that leave to three grounds, namely whether the provincial government's claim against Zurich had prescribed; whether the rock mass surrounding the void of the tunnels was part of the insured property, it being accepted that the damage was caused to the surrounding

rock mass; and whether the order, which envisaged a two stage process for the finalisation of the claim, was enforceable.

Because of the limited grounds of appeal, the damage to the rock mass was not in dispute. When the tunnels were designed, provision was made for the pre-grouting of the rock mass as the excavation process progressed. In the construction process, however, pre-grouting was inexplicably not done. The provincial government suspected that damage had been caused to the tunnels because of the excessive ingress of water into the tunnels. In due course, an international expert in rock mechanics was able to identify the damage as increased permeability in the rock mass surrounding the tunnel voids due to the failure to per-grout the tunnels.

By the time this expert had ascertained that there was indeed damage to the tunnels, more than three years had elapsed since the completion of their construction. Zurich pleaded as a result that the provincial government's claim against it had prescribed. The SCA upheld the finding of the trial court that the claim had not prescribed. In order for prescription to start running, the provincial government had to have knowledge of the damage, in order to complete its cause of action. It had suspected that there may have been damage and had reported its suspicions to Zurich, but the assessors sent to inspect the tunnels had found no damage. It was only when the expert alerted the province to the damage that he, through his expert knowledge had been able to identify, that the provincial government could be said to have had knowledge of the damage, and thus a complete cause of action. As summons was issued well within three years of the acquisition of this knowledge, the claim had not prescribed.

The second point on appeal was whether the rock mass surrounding the void of the tunnels was part of the property insured in terms of the policy. This required an interpretation of the policy, as well as of the term 'tunnel'. It was clear from the policy that damage to the tunnels were covered. The court considered the dictionary definition of the word 'tunnel'. It was 'an artificial passage, as built through hills or under a building'. This definition, the court said, of necessity included the floor, roof and sides of the passage, which comprised the surrounding rock mass through which the tunnel was excavated. This understanding of the word was also consistent with what was meant by a tunnel in civil engineering terms. The rock mass surrounding the void of a tunnel was considered to be an essential component of a tunnel because of its load-bearing capacity, and crucial for the stability of a tunnel. Without the surrounding rock

mass, there can be no tunnel. On this basis, the SCA, again upholding the reasoning of the trial court, held that the rock mass surrounding the tunnels was part of the property insured in terms of the policy.

The third point was that the two-stage order was defective and unenforceable as it did not finally dispose of the merits of the dispute. This argument, the SCA held was erroneous. The trial court had found that Zurich was liable to indemnify the provincial government. In the second stage of the process contemplated by the order, the quantum of the claim was to be determined, and in that process limitations of liability and exclusions, as contained in the policy, had to be taken into account. Understood in this way there was nothing ambiguous about the order issued by the trial court, and it was enforceable.

The appeal was accordingly dismissed with costs, including the costs of two counsel, on all three grounds.