THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no. 734/2021

In the matter between:

ZURICH INSURANCE COMPANY SOUTH AFRICA LTD **Appellant**

and

GAUTENG PROVINCIAL GOVERNMENT **Respondent**

Neutral citation: *Zurich Insurance Company South Africa Ltd v Gauteng Provincial Government* (Case no. 734/2021) [2022] ZASCA 127 (28 September 2022)

Coram: Ponnan and Plasket JJA and Basson, Weiner and Siwendu AJJA

Heard: 16 August 2022

Delivered: 28 September 2022

Summary: Insurance contract – damage to rock mass when tunnels for Gautrain Rapid Rail System constructed – whether insured's claim had prescribed – whether rock mass surrounding tunnel void part of property insured – whether order declaring insured's right to indemnification, and to be paid such amounts as are later proved, an effective order.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Wepener J sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Plasket JA (Ponnan JA and Basson, Weiner and Siwendu AJJA concurring)

[1] This appeal, against an order made by Wepener J in the Gauteng Local Division of the High Court, Johannesburg (the high court), concerns a claim for the enforcement of a contract of insurance (the policy) concluded by the appellant, the Zurich Insurance Company South Africa Ltd (Zurich) with, inter alia, the respondent, the Gauteng Provincial Government (the province). After the province had discovered what it believed to be damage to parts of the tunnel system in which the Gautrain Rapid Rail System operates, and Zurich had repudiated a claim made in terms of the policy, the province issued summons in which it claimed declaratory relief to the effect that Zurich was obliged to indemnify it in respect of the repair, replacement or making good of the damage to the tunnels, and that it was required to pay the province the amount that it proved in due course in respect of its loss. It also sought costs of suit.

[2] After a lengthy trial, Wepener J issued an order essentially in the terms sought by the province. His order reads as follows:

'1 Subject to all the terms and conditions of the policy, it is declared that the defendant is obliged to indemnify the plaintiff for the cost of replacing and/or repairing and/or making good all damage (as defined in [paragraph 15] of the particulars of claim) to the tunnels from

Rosebank Station to Marlboro Portal as described in [paragraph 11] of the plaintiff's particulars of claim.[1]

2 It is declared that the defendant, on the basis of prayer 1 above, is required to pay to the plaintiff such amount as is proved by the plaintiff as constituting the cost of replacing and/or repairing and/or making good all damage to the tunnels as described in paragraph 15 of the particulars of claim, subject to the limit of indemnity and deductibles as set out in the policy.

3 The defendant is to pay the plaintiff's costs of suit, including the costs occasioned by the employment of two counsel.'

[3] On the application of Zurich, he granted leave to appeal directly to this court. In his judgment, he said that while a large number of grounds had been raised in the notice of appeal, they were 'reduced to three during argument' and that he was of the view that there were only prospects of success on appeal 'on these three issues'. His order reads as follows:

'I consequently grant leave to appeal to the Supreme Court of Appeal on the following issues:

1 Whether the order issued by this court is capable of practical enforcement;

2 Whether the respondent's claim has become prescribed;

3 Whether the rock surrounding the void formed part of the property insured.'

[4] It appeared, on the face of it, that Wepener J may have sought to grant leave to appeal against three of his reasons for upholding the province's claim. It is a foundational procedural principle that an appeal lies against a substantive order of a court rather than against the reasons for its judgment.[2] If it had been Wepener J's intention to grant leave to appeal against his reasons, his order may have been incompetent. The result would then have been that we would have had no jurisdiction to entertain the appeal.[3]

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[1] I have, in the square brackets in paragraph 1 of the order, corrected two patent errors. In its original form, the order transposed paragraphs 11 and 15 of the particulars of claim. Paragraph 11 defined the tunnels that were the subject of the claim, while paragraph 15 set out the damage that the province alleged it had suffered.

[2] *Administrator, Cape and Another v Ntshwaqela and Others* [1989] ZASCA 167; 1990 (1) SA 705 (A) at 715D; *South African Reserve Bank v Khumalo and Another* [2010] ZASCA 53; 2010 (5) SA 449 (SCA) para 4; *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] ZASCA 64; [2012] 4 All SA 149 (SCA) paras 16-17.

[3] *Molteno Bros v South African Railways* 1936 AD 408 at 413.

[5] Both Mr Loxton, for Zurich, and Mr Subel, for the province, submitted that this had not been Wepener J's intention and that, even if he had not expressed himself as clearly as he might have, he had intended to grant leave to appeal against his order but to limit the grounds of appeal. Court orders, like other written instruments, must be interpreted in a unitary, holistic process having regard to the words used, the contextual setting and the apparent intended purpose.[4] This order is to be interpreted within the context of it being trite law that 'leave to appeal may be limited so as to allow only particular grounds of appeal to be advanced'[5] and of the clear indication in paragraphs 1 and 2 of the judgment that Wepener J had applied his mind to the grounds of appeal that had, in his view, reasonable prospects of success.

[6] It is clear in these circumstances that Wepener J intended to grant leave to appeal against the entire order that he had made but that he considered only three of the various grounds advanced by Zurich to have any prospects of success. Understood thus, the order granting leave to appeal is not irregular, with the result that we have jurisdiction to consider and determine this appeal.

The background

[7] The Gautrain is a joint venture between the province and a private entity. In terms of a concession agreement, the province granted to Bombela Concession Company (Pty) Ltd (Bombela) a concession to design, construct, partially finance, operate, maintain and generate income from the Gautrain for the duration of the concession.

[8] The Gautrain runs from Park Station in the central business district of Johannesburg, past a number of stations including Rosebank and the Marlboro Portal, to the Oliver Tambo International Airport, on one line, and to Hatfield in Pretoria, on another. Parts of the rail network are below ground in tunnels, while others are above ground. This matter concerns the construction of tunnels between the stations of

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[4] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-F; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 25.

[5] *Douglas v Douglas* [1995] ZASCA 147; [1996] 2 All SA 1 (A) at 8i-j.

Rosebank and Sandton, on the one hand, and Sandton and the Marlboro Portal, on the other.

[9] The construction that was envisaged was defined in the concession agreement as 'the works', a term that meant all work that was to be undertaken to achieve the objects of the agreement, including the construction of tunnels. In terms of a schedule to the concession agreement, tunnels were to be constructed so that they would comply with specified permissible water-flow limits and were to be sufficiently water-tight to ensure that the long term ambient hydrological conditions around any of the tunnels would not be disturbed.

[10] The parties who were insured in terms of the policy included the province; Bombela (described as the principal); Bombela TKC (Pty) Ltd (described as the contractor) and 'all contractors and sub-contractors of any tier in connection with THE PROJECT'; the 'Material Contractor and Sub contractors of the Material Contractor'; 'Lenders Agent, the Lenders and Security Company'; and consultants, designers, suppliers and advisers 'of any tier', as well as the 'Independent Certifier and others providing goods or services in connection with THE PROJECT'. These broad categories of bodies were defined as 'the insured'. Various aspects of the project were performed by different Bombela-related entities such as Bombela TKC (Pty) Ltd, mentioned above, and Bombela Civils Joint Venture (Pty) Ltd. For the sake of convenience, I shall, in what follows, refer to all of the Bombela entities simply as Bombela, without distinguishing between them.

[11] The purpose of the policy was to indemnify the insured against any damage contemplated by it, and to pay to or indemnify the insured for the full cost of the replacement, repair or making good of the damage. In broad terms, it covered 'the project' which was defined to mean the 'financing, pre-fabrication, design, engineering, procurement, construction, erection, hot testing, commissioning, operation and maintenance' of the Gautrain, 'all associated and ancillary works in connection therewith' and 'any Contract or Agreement written or implied entered into by the INSURED in connection therewith'.[6]

[6] I have added punctuation to enhance readability. I shall do so below whenever I cite the policy.

[12] The ingress of water, when tunnels are constructed below the water table, is always a serious engineering concern. The reason is obvious: the excavation process, especially the drill and blast method used in the construction of the tunnels in question, disturbs the rock mass around the void that is created and renders that rock more permeable. As was explained by Dr Nick Barton, an engineer with significant expertise in rock mechanics and whose evidence was accepted by the high court, damage is caused by an 'increase and extension of the excavation disturbed zone' with the result that 'joint deformation is increased, blast gasses penetrate deeper, over-break may occur, and *inflow is enhanced* due to a general increase in joint apertures, in addition to less well controlled blast-induced fracturing'. Professor Steinar Roald, an eminent civil engineering expert in the field of grouting, whose evidence was also accepted by the high court, explained that a 'tunnel below the ground water table will serve as a *large drainage pipe* that lowers the ground water level'.

[13] It is no longer in dispute in this appeal, in the light of the limited leave to appeal that was granted by the high court, that what was described by Dr Barton and professor Roald is precisely what occurred in the tunnels in issue in this matter. Dr Barton explained the problem thus:

'A tunnel releasing about 250 Olympic swimming pools of water per year (>600 000 000 litres/year) from 20 litres/second out-of-the-tunnels flow over approximately 10 km, therefore drawing down the water table, is obviously an undesirable and environmentally damaging construction. Of particular concern to Gautrain/Province is that the *internal* environment of their rail tunnel, being much wetter and more humid than intended, has prejudiced the life-time and need for maintenance. Unfortunately, the tunnel cannot be "fixed" without great expense and long-term alternative service measures. All this is because the desirable high-pressure *pre-injection* was not performed, even though it was designed. It now can no longer be performed. The "pre" (ahead of the tunnel face) is lost forever.'

[14] When the excavation of a tunnel is planned and designed, mitigation measures are required to prevent the sorts of mishaps described by Dr Barton. He referred to the usual method as high pressure pre-injection, or pre-grouting. This method involves the high pressure spraying of grout as the tunnel is excavated, with the purpose of sealing fissures in the surrounding rock mass created by the stresses placed on it by

the excavation process, particularly the drilling and blasting. Pre-grouting was planned for the construction of the tunnels in question but, in the words of Dr Barton, was 'inexplicably dropped by the contractor'.

[15] If a tunnel has been constructed without pre-grouting having been done, an immense remedial problem is created. Post-grouting is a poor alternative for pre-grouting because it is far less effective, is more difficult to apply and is both more time-consuming and costly. Lining the affected tunnels with cast concrete and membranes would, on the face of it, appear to be a more effective method of repair but practical problems stand in the way of its application. Dr Barton explained that 'as the tunnel is "live", such major remedial work would lead to a massive disruption of passenger services'. In these circumstances, he said, the only feasible remedy may be the construction of new tunnels. But this is a debate for another day.

[16] A number of material facts are common cause. They are, first, that the tunnels did not meet the specifications that had been set as to the maximum permissible levels of water ingress. The second is that the construction of the tunnels is covered by the policy, although what is meant by the term 'tunnel' remains in dispute. The third is that no pre-grouting work was performed in the construction of the tunnels in question. Fourthly, it was accepted by all that the damage in respect of which the province sought to be indemnified occurred as a result of the construction of the tunnels.

[17] It is also not in dispute that payment of the premiums stipulated in the policy were up-to-date. It can also be accepted as settled that proper notice of the claim was given to Zurich by the province.

The issues

[18] I now turn to a consideration of the three issues that require determination in this appeal. The first is whether the province's claim against Zurich had prescribed. The second is whether the rock mass that surrounds the void of the tunnels is part of the property insured. The third is the propriety and effectiveness of the high court's order.

Prescription

[19] In terms of s 11*(d)* of the Prescription Act 68 of 1969, the prescription period in respect of the debt in this case is three years. Section 12(1) provides that, as a general rule, 'prescription shall commence to run as soon as the debt is due'. Section 12(3) states that the debt 'shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises' but includes a proviso that 'a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'. Prescription may be interrupted in various ways including, in terms of s 15(1), 'by the service on the debtor of any process whereby the creditor claims payment of the debt'.

[20] The onus of establishing that a claim has prescribed rests on the party raising prescription – in this case, Zurich. In order to discharge that onus, the onus-bearing party is required to prove the date when prescription began to run and that the other party had the requisite knowledge of the material facts from which the debt arose at that time.[7]

[21] The nature of the knowledge that a party is required to have in order for prescription to start running was set out thus by this court in *Truter and Another v Deysel*:[8]

'For the purposes of the Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

The position was summarized by Cameron and Brand JJA in *Minister of Finance and Others v Gore NO*[9] when they stated that, for purposes of prescription, 'time begins to

[7] *Gericke v Sack* 1978 (1) SA 821 (A) at 827H-828C; *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC) paras 24 and 44.

[8] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16. See too *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H; *MacKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.

[9] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) para 17.

run against the creditor when it has the minimum facts that are necessary to institute action'.

[22] *Gore* also dealt with what was meant by knowledge, on the part of a creditor, of the facts constituting their cause of action. Cameron and Brand JJA held in this respect:[10]

'[18] Rabie certainly did cry fraud soon after 3D-ID lost the tender. But what did he know when he did so? The defendants' argument seems to us to mistake the nature of "knowledge" that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.

[19] It is well established in our law that:

(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction.'

[23] Zurich pleaded that the province's claim against it had prescribed. Construction of one of the tunnels was completed by 4 January 2009, and of the second tunnel by 2 July 2009. If there had been damage caused to them, no further damage could have been caused by the contractors after these dates. The province was, at all times, aware of the identity of the defendant. It was also aware of the facts giving rise to the debt from these dates on, or it ought reasonably to have had this knowledge from these dates on. As a result, Zurich alleged, prescription began to run on 4 January 2009, in the case of the first tunnel, and on 2 July 2009 in the case of the second

[10] Paras 18-19.

tunnel. The claims prescribed three years later, not having been interrupted by the service of summons, which only occurred on 26 February 2015.

[24] The province replicated to the plea of prescription. It simply denied that the claim had prescribed.

[25] Zurich led no evidence in order to establish its defence of prescription. Instead, it relied on an inference that, if damage had been caused, it was the result of the drilling and blasting method of excavation. It also argued that the province must have been aware of the damage that it alleged because it had a support team in place to monitor the construction of the tunnels, and that this team, made up of suitably qualified people, must have observed the damage at the time of the construction.

[26] The province's answer to this was that matters were not that simple. It led the evidence of one witness on the prescription issue. He was Mr David Marx. He was employed to render commercial and dispute management to the Gautrain Management Agency. He is a civil engineer and holds, in addition to a master's degree in civil engineering, a Master of Business Administration degree. He testified about the process that unfolded from when the construction of the tunnels commenced until the service of summons on Zurich. Strong credibility findings in his favour were made by Wepener J and, it seems to me, justifiably so.

[27] As to the first point raised by Zurich, Mr Marx testified that the support team did its work principally by way of desk-top monitoring. There was consequently no specialist on-site oversight by the support team. It is so, however, that the support team had been informed that no pre-grouting had been done. It also understood that the water ingress tolerance specifications that had been agreed to were the 10x10 water inflow specification – a 'local' tolerance not exceeding 10 litres of water per minute per any 10 metres of tunnel – and the 1x1 water inflow specification – a seepage rate for the entire tunnel not exceeding one litre of water per square metre per day.

[28] The problem of excessive water ingress into the tunnels arose at an early stage. The province was aware of the problem, but not of its cause, and had engaged with

Bombela in relation thereto. It adopted a cautious approach and also notified Zurich on a number of occasions that it believed that it may have had a claim in terms of the policy. It was, however, faced with a problem: while the excessive ingress of water could have been caused by any number of factors, it was not able to identify any damage. On each occasion, Zurich's assessors investigated and reported that they had found no sign of damage.

[29] The province had been assured by Bombela that the problem would be remedied. Instead, however, a dispute developed between the province and Bombela about the applicable specifications and whether the tunnels were compliant with the specifications. The dispute was referred for resolution in terms of the concession agreement. The tribunal of first instance, the Dispute Resolution Board (DRB), found on 10 June 2011 that, for the most part, the tunnels were compliant with the 10x10 specification, which was the agreed specification. One section of the tunnels was not compliant with this specification, and it ordered Bombela to perform remedial work on this section.

[30] Once this finding was made, the province was bound by it. Clause 6.4 of Schedule 10 of the concession agreement provided that '[u]nless and until any decision issued by the DRB is overturned in Arbitration in terms of clause 8 of Schedule 10, it shall be binding on the parties'. The result was that if the water ingress was the manifestation of damage, the province had to accept that no damage had occurred because, subject to the remedial work that had been ordered by the DRB, the tunnels had been found to be compliant with the specifications.

[31] The province referred the DRB's decision to arbitration. An arbitration award was made on 23 November 2013. The arbitration panel (retired judges Streicher and Combrinck JJA and Joffe J) found that both the 10x10 and 1x1 specifications were contemplated by the concession agreement and that:

'1.2 The sections of the tunnel Park to E2, Rosebank to Sandton and Sandton to Marlboro fail to comply with the Concession Specifications in that the rate of water infiltration into these sections exceeds the maximum infiltration rate of 1 litre/m^2/day.

1.3 The section of the tunnel Park to E2 fails to comply with the Concession Specifications in that the rate of water infiltration into this section exceeds the maximum infiltration rate permitted at any isolated section of 10 metres namely 10 litres/min/10 metres.'

[32] It was only after the arbitration award was handed down that the province began, once again, to investigate whether there was damage to the tunnels, as contemplated by the policy. In March 2014, it consulted with professor Roald on the issue. He was not able to provide an answer but suggested that the province consult with an expert in rock mechanics, such as Dr Barton. He was duly approached and came to South Africa in April 2014. He attended joint meetings of the province and Bombela. In the words of Mr Marx, he 'shared his damages proposition . . . with Bombela'. The province made Dr Barton available to Bombela because it took the view that Bombela, as one of the insured in terms of the policy and the concessionaire, should initiate the claim if damage could be identified. As it happened, Bombela was reluctant to make a claim, so the province did so itself.

[33] It was only after Dr Barton had explained the concept of excavation disturbance zones (EDZs) that the province realized that indemnifiable damage may have been caused to the tunnels. He explained the effects of tunneling, especially by means of drilling and blasting, in terms of four EDZs. The first, EDZ1, involves the disturbance due to the stress redistribution in the rock mass as a result of the excavation of the void. The second, EDZ2, is the disturbance arising from the deformation of rock joints following the stress redistribution in the rock mass. The third, EDZ3, is the cracking, loosening and enhanced permeability in the rock mass as a result of the penetration of blast gases and shock-loading. The fourth, EDZ4, is the *unnecessary* deeper damage in the form of deepened joint deformation caused by a failure to pre-grout when this is required. He explained the connection between the EDZs as follows:

'Within and beyond the unavoidable disturbances caused by excavation . . . is damage caused by defective design and/or omission of pre-injection. Deformation is inevitably increased, blast gasses are bound to penetrate deeper, more over-break may occur and inflow is unavoidably enhanced, all due to a failure to pre-grout. We can collectively refer to these unwanted and unplanned disturbances as the damage EDZ.'

[34] In May 2014, Dr Barton investigated whether damage in the form of EDZ4 was present in the tunnels. He concluded and expressed the opinion that the failure to pre-grout when blasting had caused EDZ4 damage to the rock mass surrounding the void of the tunnel. And, as Wepener J observed in his judgment, 'EDZ4 is a specialist matter and not, as far as the evidence before me showed, physically detectable during an inspection'.

[35] By letter dated 5 February 2015, the province made a claim against Zurich in terms of the policy. On 25 February 2015, summons was served on Zurich.

[36] In order to have a complete cause of action, the province had to have knowledge that damage to the tunnels had occurred. It is clear from the chronology of events that I have outlined that the province may have suspected for some time that damage to the tunnels had been caused. It could, however, not quite identify the damage or its cause and neither could the assessors when they investigated on the strength of the province's concerns. It was only when Dr Barton alerted them to the possibility of EDZ4 damage, and then confirmed this to be the case, that the requisite knowledge of damage could be attributed to the province. That occurred in about May 2014.

[37] It is necessary to stress the following two points. First, the province acquired actual knowledge of damage in 2014 but it was not possible for it to have had knowledge attributed to it any earlier because of the specialized knowledge and expertise necessary to establish that damage had occurred. Secondly, when Dr Barton deduced that EDZ4 damage had been caused, he established a fact, rather than an inference of negligence or a conclusion of law. Only then could it be said that the province had a 'complete cause of action'.

[38] In the result, prescription began to run in May 2014 and was interrupted by the service of summons in February 2015, some nine months later. Consequently, as far less than three years separated these two events, the province's claim had not prescribed and the court below was correct when it held that the plea of prescription had to fail.

Is the rock mass surrounding the tunnels part of the property insured?

[39] Paragraph 15 of the province's particulars of claim deal with the damage to the property insured. It pleaded that: (a) Bombela, its contractors and sub-contractors 'undertook the design and construction of the tunnels and provided the materials for purposes of doing so'; (b) as a result of 'defective design, plan, specification, material and/or workmanship' they damaged the property insured, 'more particularly the tunnels'; and (c) the damage was caused by 'failing to pre-grout' in order to meet the agreed specifications and consisted of 'an increased and extended "excavation disturbed zone"' that resulted in 'more deeply penetrating joint adjustments and generally increased joint deformation, and thus unnecessarily increased permeability and resulting water inflow, due to an increase in joint apertures'.

[40] The damage was said to be 'in excess of what would normally have been expected if good industry practices' had been adopted in the design and construction of the tunnels; and was attributable to 'a combination of defective design, plan, specification and poor workmanship due, predominantly, to the absence of an adequately planned and executed pre-grouting strategy'.

[41] Zurich's plea to paragraph 15 anticipated its plea of prescription and also denied that 'there was any damage occasioned to any Property Insured as alleged or at all'. It also denied that whatever damage may have been occasioned 'amounts to damage as envisaged in the policy and it denies that any damage was occasioned to PROPERTY INSURED'. In this way, the question whether the rock mass surrounding the tunnels was property insured, as defined in the policy, was raised.

[42] As a result of the limitation of the grounds of appeal by Wepener J, two important issues are no longer in dispute. They are that damage occurred and that the damage was caused to the rock mass that surrounds the tunnels. The correctness or otherwise of Zurich argument that the rock mass is not part of the property insured depends, ultimately, on an interpretation of the policy, and an answer to the question 'what is a tunnel?'.

[43] In *Centriq Insurance Company Ltd v Oosthuizen and Another*,[11] Cachalia JA made the point that while insurance contracts must be interpreted like any other written instrument – having regard to language, context and purpose in a unitary exercise aimed at achieving a commercially sensible result[12] -- their specific purpose activates other considerations too. He stated in this regard:[13]

'But because insurance contracts have a risk-transferring purpose containing particular provisions, regard must be had to how the courts approach their interpretation specifically. Thus, any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer's duty to spell out clearly the specific risks it wishes to exclude. In the event of real ambiguity the doctrine of interpretation, *contra proferentem*, applies and the policy is also generally construed against the insurer who frames the policy and inserts the exclusion. But, like other aids to the interpretation of contracts of this nature, the doctrine must not be applied mechanically, for exclusion clauses, like other contractual clauses, must be construed in accordance with their language, context and purpose with a view to achieving a commercially sensible result.'

He also sounded a word of caution – that 'courts are not entitled, simply because the policy appears to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permits'.[14]

[44] I turn to the policy and its terms. In the preamble to the policy, the insurers, in return for the payment of premiums by the insured, agreed to indemnify them 'against all such DAMAGE or liability as herein provided'. The term 'damage' is defined in the definition clause to mean 'physical DAMAGE', including 'physical loss or physical destruction'.

[45] In the summary that follows the preamble, the project that is the subject of the policy is described as the 'financing, pre-fabrication, design, engineering, procurement, construction, erection, hot-testing, commissioning, operation and maintenance of the Gautrain Rapid Rail Link in the Republic of South Africa and all associated and ancillary works in connection therewith'. In the definitions clause it is

[11] *Centriq Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 11; 2019 (3) SA 387 (SCA).
[12] Para 17.
[13] Para 18.
[14] Para 21.

stated that the project ‘shall be as stated in the Summary and any Contract or Agreement, written or implied, entered into by the INSURED in connection therewith’.

[46] The term ‘PROPERTY INSURED’ has two components. It is defined, in the first place, to mean ‘the permanent and TEMPORARY WORKS including Rolling Stock and materials contained therein and other property used or for use in connection with THE PROJECT including site camps and installations of any kind and free issue materials’, and secondly, to mean tunnel boring machinery. The term ‘TEMPORARY WORKS’ is defined as ‘all things, including access scaffolding erected or constructed for the purpose of making possible the erection or installation of the permanent works and which it is intended shall not pass to the ownership of the Principal’. Although ‘permanent works’ is not defined, it appears to be all works other than temporary works.

[47] The term ‘TUNNEL WORKS’ is also defined. It means ‘works intended to create any sub ground surface, passage, cavern or tunnel, including shafts, however constructed, including cut and cover and station boxes below ground’, but the definition shall not apply ‘to foundation works nor basement levels for above ground surface structures, or fitting out or other similar works’.

[48] The definition of ‘CIVIL WORKS’ is also relevant. This term is defined to mean ‘Tunnel Works (but not their contents), Station Box structures (but not their contents), Buildings (but not their contents), Bridges, Embankments, Cuttings, Foundations and Roads’.

[49] In section 1 of the policy, under a heading ‘MATERIAL DAMAGE’, what was termed an ‘Operative Clause’ reads as follows:

‘Except as hereinbefore excluded, the Insurers will pay to or indemnify the INSURED under this Policy for the full cost of replacing and/or repairing and/or making good DAMAGE to the PROPERTY INSURED howsoever caused occurring during the Period of Insurance.’

[50] Four clauses refer specifically to the tunnel works. One of the deductibles in Section 1 relates to a deductible of R7 100 000 for ‘any one EVENT in respect of DAMAGE to TUNNEL WORKS’. And in the exclusions to Section 1, clause 8 is

devoted in its entirety to exclusions in respect of tunnel works. A final sub-clause of clause 8 makes it clear that tunnel works are part of the property insured. This sub-clause reads:

'In the event of indemnifiable loss or damage the maximum amount payable under this Policy shall be limited to the expenses incurred to reinstate PROPERTY INSURED A to a standard or condition technically equivalent to that which existed immediately before the occurrence of loss or damage but not in excess of the percentage stated below of the original average per-metre construction cost of the immediate damaged area.'

[51] In the memoranda to Section 1, the insurers undertook to pay the 'costs and expenses necessarily and reasonably incurred by THE INSURED in the removal and disposal of debris, detritus and material foreign to THE PROJECT' in respect of tunnel works, subject to an indemnity limit. Similar provisions apply to extra charges such as overtime and night work in respect of tunnel works.

[52] From the above, it seems to me that the policy is intended to give extremely wide cover to the insured. That cover operates in respect of damage to 'the PROPERTY INSURED howsoever caused', subject to various limitations and exclusions. In this scheme, a number of terms that have been defined in the policy, such as 'property insured', 'tunnel works' and 'civil works', tend to overlap: what emerges clearly enough, however, is that tunnel works, being permanent works, fall within the definition of the property insured, and tunnels works specifically include tunnels. Tunnel works are also the subject of specific exclusions and limitations. They would only be subject to those exclusions and limitations if they were part of the property insured.

[53] What the policy does not do, however, is define what is meant by a tunnel. The dictionary definition of a tunnel is 'an artificial underground passage, as built through a hill or under a building . . .'.[15] It can, I believe, be inferred that an underground passage has, of necessity, a floor, a roof and sides and that they comprise the surrounding rock mass through which the passage was excavated.

[15] *Concise Oxford English Dictionary* (12 ed) (2011).

[54] I turn to the evidence of Dr Barton and professor Roald as to what, in civil engineering terms, a tunnel is. I do so because the context within which the policy, and the word 'tunnel' that appears in it, must be interpreted is a massive civil engineering project involving, centrally, the excavation of tunnels through rock. When the word 'tunnel' was used in the policy, it must have been used as a technical, civil engineering term. In circumstances such as this, expert evidence is admissible, and does not offend the parol evidence rule. In *Wides v Davidson*[16] Claasen J held that 'it is a clear principle that oral evidence may be given to prove that a word used in a contract has a special meaning in a particular locality, trade or usage if it was intended that the word was to be used in that special sense'. So too, an expert may explain the meaning of technical terms, but they may not venture their opinion of what they believe the document being interpreted means.[17]

[55] In the executive summary of Dr Barton's expert report he said that, in the light of Zurich's argument, he had to devote 'considerable space' to a 'rock mechanics explanation that the rock mass surrounding the actual cylindrical excavation is very much part of, indeed by far the most essential component, of any and all tunnels in rock masses'. He described Zurich's contrary contention as '*extra-ordinary*' and one which he had never encountered before 'during a long career and hundreds of projects in more than three-dozen countries'.

[56] The reason why the rock mass is such an essential component of a tunnel is because of its load-bearing capacity. The concept that it is a fundamental component of the tunnel is a universally accepted one among tunnel designers throughout the world. The surrounding rock mass is crucial to the stability of tunnels, whether man-made or naturally formed. The rock mass has, Dr Barton said, even been described as the 'principal structural material' involved in the construction of a tunnel, being far stronger than concrete or steel. These materials simply cannot withstand the tremendous loads involved, and which are instead 'distributed through as much as tens of metres of rock mass'.[18]

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[16] *Wides v Davidson* 1959 (4) SA 678 (W) at 681D-E.
[17] *Gentiruco AG v Firestone (SA) (Pty) Ltd* 1972 (1) SA 589 (A) at 617F-618C; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 40.
[18] Dr Barton said that at a depth of 40 metres below surface, 'there are already 100 tons/square meter of vertical rock stress'.

[57] Simply put, without the surrounding rock mass 'with typically a "cylinder thickness" of at least one tunnel diameter, and without its multiple-component response to excavation, thereby allowing the newly excavated tunnel to exist, there can be no tunnel, by simple definition'. As a result, the entire 'tunnel-forming cylinder . . . is the tunnel by default'. This exposition was summarized by Dr Barton as follows: 'A "rock" tunnel cannot exist unless it is surrounded by its own load-bearing "cylinder" of rock, estimated to be at least one tunnel diameter thickness for convenience. This "cylinder" would also be the appropriate volume into which the micro-cements could have penetrated, (say 0 to 10m from the tunnel periphery), if pre-grouting had been performed. The rock blocks and rock joints in this nearest "10m thick cylinder" take an active and necessary part in the stress redistribution, which compensates for removal of the stressed rock from within the newly created tunnel void. The load that immediately builds up in the surrounding rock "cylinder" (in fact it starts to build up also about one diameter ahead of any given tunnel face) allows the formation of the more or less stable tunnel structure. Clearly the surrounding rock is the main element of the insured property.'

[58] I have quoted from Dr Barton's expert report but what he has written therein is consistent with his evidence, which Wepener J accepted without qualification. His opinion that the surrounding rock mass is an indispensable component of a tunnel was supported by professor Roald, whose evidence was also accepted without qualification by Wepener J. Professor Roald made the point that '[t]unnelers around the world have long recognized that the rock mass surrounding a tunnel forms the principal component of the tunnel structure' and that they recognize that even if a tunnel requires a lining, 'the most important component of the structure is the ground/rock surrounding the tunnel'. From this he concluded that 'what constitutes a tunnel is far more than just the (final) tunnel lining'.

[59] In civil engineering terms, then, a tunnel is more than the void left after the excavation process. It includes the natural support for the void, without which there would be no tunnel. A tunnel such as those with which this case is concerned, is therefore a void surrounded by its own load-bearing cylinder of rock of about one tunnel diameter in thickness. The parties, in agreeing to the terms of the policy in relation to a civil engineering project involving, inter alia, the construction of tunnels in

rock, must have had the above concept of a tunnel in mind when they included tunnels as part of 'tunnel works' within the property insured. The contextual evidence of Dr Barton and professor Roald points decisively to this meaning of the term. This too, is a commercially sensible interpretation as it avoids a patent absurdity – the contrary interpretation of only a void being part of the property insured would make no sense at all because, by definition, no damage could ever be caused to a void; and the inclusion of it in the policy, subject to exclusions and limitations, would have been an elaborate act of futility.

[60] I conclude, therefore, that the property insured by the policy includes the rock mass that surrounds the void created by the process of excavation. The result is that the EDZ4 damage caused by the failure to pre-grout the tunnels is indemnifiable in terms of the policy.

The enforceability of the order

[61] I have quoted the order made by Wepener J in paragraph [2] above. It has, apart from costs, two operative parts. Paragraph 1 fixed Zurich's liability by declaring that it was obliged to indemnify the province for the cost of replacing, repairing or making good the damage to the tunnels. The damage referred to was that alleged in paragraph 15 of the particulars of claim, and the tunnels were those referred to in paragraph 11 of the particulars of claim. This declaration of Zurich's liability was made subject to 'all the terms and conditions of the policy'.

[62] In paragraph 2, it was declared 'on the basis of prayer 1 above', that Zurich was obliged to pay the province the amount that it proved to be the cost of remedying the damage to the tunnels but this obligation was made 'subject to the limit of liability and deductibles as set out in the policy'.

[63] Orders like the one made by Wepener J are not unusual in claims of this nature. In *Cape Town Municipality and Another v Allianz Insurance Co Ltd*[19] Howie J explained the rationale and effect of the two-stage process as follows:

[19] *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 313 (C) at 332H-333B.

'Plaintiffs are quite patently not seeking to obtain payment of part of the indemnity now and part later. They are seeking to enforce their rights to the indemnity. If further proceedings are instituted by plaintiffs in due course to exact payment from defendant pursuant to judgment in the present case, such further action will be necessary by reason of the fact that the present action is only concerned with the issue of liability, and the further action will cover elements of plaintiffs' claim not canvassed in the current action. Conversely, those elements of the claim covered in the present matter will be *res judicata* hereafter. But the two actions together will still deal only with one cause of action. Although the relief sought in the present case differs from the relief which will, on the above supposition, be sought in the second action, the precise form of the relief and, if it is monetary relief, the *quantum* thereof, are not elements of the cause of action. For example, if D commits continuing wrongful acts accompanied by fault and thereby causes damages to P's property with consequent patrimonial loss, P's cause of action is fixed irrespective of whether he sues for damages or applies for an interdict.'

[64] And, in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others*[20] Harms DP held that, from a procedural point of view, this two-stage process was acceptable:

'I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases, albeit because of specific legislation, but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice — a power derived from common law and now entrenched in the Constitution (s 173) — I can see no justification for refusing to extend the practice to other cases. The plaintiff may run a risk if it decides to follow this route because of the court's discretion in relation to interest orders. It might find that interest is only to run from the date when the debtor was able to assess the quantum of the claim. Another risk is that a court may conclude that the issues of liability and quantum are so interlinked that it is unable to decide the one without the other.'

In this matter, given the complexity of the issues not only on the merits but also, I would imagine, on the quantification of the damage, it was eminently reasonable for the province to proceed by way of the two stage process.

[65] Zurich's complaint about the order is that, to quote from its heads of argument, it 'does not bring finality to the dispute as it does not leave only the issue of quantum

[20] *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* [2010] ZASCA 105; 2011 (3) SA 570 (SCA) para 13.

to be determined'. It was argued on this basis that the order was the result of an improper exercise of a discretion on the part of Wepener J, was unenforceable as a result and ought to be set aside.

[66] Zurich's attack on the order is premised on the argument that it did not draw a clear distinction between the merits and quantum. This was said to be so in the sense that the declarator in respect of the indemnity in paragraph 1 was made subject to 'all the terms and conditions of the policy'; and that the declaratory order in paragraph 2, to the effect that Zurich was required to pay the amount proved by the province in respect of the damage it suffered, was made subject to 'the limit of liability and deductibles as set out in the policy'.

[67] Even if Zurich's argument was correct that elements of the merits were left undecided that, on its own, would not render the order vague, ambiguous and unenforceable. Whatever issues remain for determination in the second stage of the proceedings are not res judicata.

[68] The order unambiguously gives effect to the high court's finding that the damage to the tunnels alleged by the province fell within the terms of the policy, and that Zurich was, as a result, obliged to indemnify the province. When it did so, it rendered this issue res judicata. It disposed finally of it and left the remaining issues to be determined later. The provisos to paragraphs 1 and 2 of the order do not concern whether Zurich was liable to indemnify the province, but the quantification of the damage that it suffered. They, and paragraph 2 in particular, postulate the second stage of the proceedings concerning proof of the amount that it will cost to remedy the damage, less any relevant exclusions and limits.

[69] This, it would appear, was precisely what Zurich had in mind, when it pleaded in the alternative to there having been no damage to the tunnels, that 'insofar as Plaintiff's claim is in respect of alleged damage to Tunnel Works, its entitlement to indemnification is limited to the cost it has actually incurred to reinstate the damaged property as is provided for in the final paragraph of clause 8 of the EXCLUSION TO SECTION 1 clause'. The second stage of the process envisages the quantification of the province's claim. In so doing, the order sensibly makes provision for exclusions

and limitations specified in the policy to be taken into account, to the extent that they apply.

[70] The order of the high court is clear, unambiguous and enforceable. Zurich's argument to the contrary is untenable.

Conclusion

[71] The three grounds in respect of which leave to appeal was granted have all been decided against Zurich and in favour of the province. The result is that the appeal must fail.

[72] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

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C Plasket

Judge of Appeal

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