IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 8265/2021

In the matter between:

CRAIG BUTTON **PLAINTIFF**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR TRANSPORT & PUBLIC WORKS **1ST DEFENDANT**
PREMIER OF THE WESTERN CAPE **2ND DEFENDANT**
GARDEN ROUTE DISTRICT MUNICIPALITY **3RD DEFENDANT**

Neutral citation: *Craig Button v The Member of the Executive Council for Transport and Public Works & Others* (Case no: 8265/21) [2026] ZAWCHC (4 June 2026)

Coram: **MAYOSI AJ**

Heard: 25 May 2026

Delivered: 4 June 2026

Summary: Application for leave to appeal against the whole judgment handed down on liability only, in a claim for damages arising from personal injury.

ORDER

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1. The application for leave to appeal is dismissed.
2. Costs, including the costs of counsel, shall be borne by the first and second defendants jointly and severally the one paying the other to be absolved, on Scale B.

JUDGMENT

Mayosi J:

Introduction

[1] The first and second defendants seek leave to appeal against the whole judgment of this Court dated 2 April 2026, wherein they and the third defendant were found to be responsible, jointly and severally the one or the other paying the other or others to be absolved, for 90% of such damages as the plaintiff may prove to have sustained in an incident that occurred on 14 February 2020. The plaintiff fell off his bicycle whilst cycling on a cycle path that was constructed by the defendants, and is owned, controlled and maintained by them. The trial proceeded only on the issue of liability.

[2] References to the defendants hereinafter mean the first and second defendants only, as the third defendant is not a party to this application for leave to appeal.

[3] The notice of application for leave to appeal (**the notice**) does not clearly and succinctly set out the grounds upon which leave to appeal is sought. Instead, the notice consists of 29 paragraphs following on from each other without differentiation and/or distinction so as to determine the discrete issues of complaint that the defendants have with the judgment. At the hearing of this application, counsel for the defendants distilled 8 grounds of appeal from the 29 paragraphs, on the basis of which it is argued that the court a *quo* erred and misdirected itself and that there are reasonable prospects of another coming to a different conclusion. Furthermore, the defendants assert that there are other compelling reasons for the appeal to be heard.

[4] Before addressing those grounds, the now trite legal principles relevant to this application are summarised below.

Relevant legal principles

[5] Section 17 of the Superior Courts Act 10 of 2013 provides as follows in section 17(1)(a)(i) and (ii) thereof:

> '17(1)(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -
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> (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

[6] In a series of judgments since **Mont Chevaux Trust**[1] in 2014, it is now clear that[2]:

[a] the bar for granting leave to appeal has been raised by the inclusion of the word "would", as opposed to the previous formulation of "could", as well as by the word "only" in section 17(1);

[b] the word "would" now imposes a more stringent and vigorous threshold before leave should be granted; and

[c] the test now also means that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] In **MEC for Health, Eastern Cape v Mkhitha and Another**[3] the Supreme Court of Appeal held that an applicant for leave to appeal now faces a more stringent test when it stated that:

> '[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)*(a)* of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.
>
> [17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility

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[1] Mont Chevaux Trust v Goosen 2014 JDR 2325 (LCC), at para 6: "It is clear that the threshold for granting leave to appeal against judgment of a High Court has bene raised by the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion….The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[2] See Erasmus Superior Court Practice RS7, 2025, D105-D106

[3] (1221/2015) [2016] ZASCA 25 November 2016

of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[8] As regards what other compelling reasons for the grant of leave to appeal might be, they would include the fact that the decision sought to be appealed against involves an important question of law; that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard; the existence of differing interpretations, concretized in two judgments, of another judgment; the interplay between subject-matter jurisdiction, principles of private international law and the principle of effectiveness in relation to claims rooted in statute and extra-territorial statutes; and that the appeal would raise a point of statutory interpretation.[4]

[9] I turn to consider the defendants' grounds of appeal, with reference to the paragraphs in the notice where it is said that these grounds appear.

Ground one (paras 1 to 6)

[10] According to the defendants, the court a *quo* erred and misdirected itself when it found, in paragraph 53 of the judgment, that the defendants had not engaged with the plaintiff's case both in their pleadings and in the evidence.

[11] This finding was preceded by the court a *quo*'s characterisation of the case which the plaintiff had called the defendants to answer as being the plaintiff's claim that: (a) the defendants had a legal duty to take steps to ensure the safety of cyclists like himself that were using the cycle path; (b) the defendants failed to take

[4] See Erasmus supra at RS6, 2025, D-108

such steps in circumstances where harm of the nature that befell the plaintiff was foreseeable; and (c) the defendants should consequently be found to have been negligent and liable for his damages. It is *this* case, which was pleaded and supported by evidence, that the defendants failed to meet. In my opinion there are no reasonable prospects of another court finding that the defendants met this case.

[12] The defendants' submission that this was not the case pleaded by the plaintiff is incorrect. The submission is not supported by the pleadings as well as concessions made by the defendants.

[13] In the particulars of claim, the plaintiff alleged that, *inter alia*, the defendants were negligent in that they failed to warn members of the public of the fact that there was a drop of approximately 6.2 meters from the side of the pavement adjacent to the road, to the culvert below. During argument of this application Mr Titus conceded that the defendants did not respond at all to this specific averment in their plea, save for a generalised denial. In the face of this concession, I see no basis upon which another court will find that the defendants had pleaded to this crucial aspect of the plaintiff's case, when the defendants themselves agree with the court a *quo* that they did not.

[14] As for the defendants' evidence, the court a *quo* found that it demonstrated no differentiation in their approach to safety between the safety needs of pedestrians and those of cyclists using the path, especially when regard was had to the fact that a culvert existed at the point where the incident occurred. This culvert was concealed by vegetation and therefore its existence was not known to cyclists using the path, which triggered a legal duty for the defendants to have warned users of the path, including cyclists like the plaintiff, of its existence.

[15] The defendants' failure, in their evidence in the trial, to engage with the question of the safety of cyclists is demonstrated even in how this aspect is couched in the notice. The extremely brief summary of the defendants' evidence in regard to this aspect[5] makes no mention whatsoever of cyclists. This is how the defendants approached the case, which involved injuries allegedly suffered by a cyclist whilst using their cycle path. The evidence tendered by the defendants' own witnesses was to the effect that they saw no reason to differentiate between cyclists and pedestrian users of the path.

Ground two (paras 7 to 10)

[16] In paragraph [52] of its judgment the court a *quo* recorded that at the conclusion of the evidence the parties agreed that the issues for determination in the case had crystallised to: (a) the adequacy of the handrail for cyclists using the path; and (b) whether or not the culvert constituted a concealed hazard.

[17] The complaint under this ground of appeal is that the court a *quo* erred and misdirected itself in proceeding on the basis that the issue stated in (b) above was an issue for determination in the case because, as the argument goes, the issue of the concealed hazard was not pleaded in the particulars of claim.

[18] First of all, the defendants themselves agreed during trial that, after all the evidence had been heard, the issues in the case had narrowed to those two issues only. Not only was this not disputed by the defendants; it was expressly agreed to be the case. Second, the plaintiff alleged in the particulars of claim that the

[5] In paragraph 5 of the defendants' notice of application for leave to appeal.

defendants failed to warn members of the public of the fact that there was a culvert adjacent to the path, and it was the evidence of the plaintiff that the duty to warn arose because the culvert was concealed. The question of whether or not the failure to warn was reasonable became a pertinent issue in the trial given that the culvert was concealed from the view of users of the path, which included in this particular case cyclists.

[19] In any event, it was not necessary for the plaintiff to use the specific phrase "concealed hazard" in his particulars because the words set out in the particulars describing the failures of the defendant encompassed their obligations in relation to a disguised 6.2m drop adjacent to the path that led to the culvert below. In addition, the question was thoroughly canvassed in evidence and there can be no charge that the defendants were prejudiced in their conduct of the case because the specific phrase was not used in the pleadings.

[20] There are no reasonable prospects of another court finding that the plaintiff departed from his pleadings and relied on a new issue that was not part of the case that the defendants were called to answer. Furthermore, in the circumstances of this case including the conduct of the trial, there are no compelling reasons why another court should decide whether or not the question of a concealed hazard was one of the issues for determination in the case. It self-evidently was.

Grounds three and four (paras 11 to 16), and six (para 24)

[21] These grounds of appeal relate to the evidence of Mr Andre van Blommenstein.

[22] In this regard the first error and misdirection that is said to have been committed by the court a *quo* was in relying on the evidence of Mr Van Blommenstein regarding how the plaintiff came to fall off his bicycle given that the former did not see the event. The complaint seems to be that by relying on his evidence as being the most probable trigger for the fall, the court a *quo* elevated Mr Van Blommenstein to the level of an expert on that score.

[23] There is no basis for this complaint, in circumstances where the court a *quo* stated in terms in its judgment that Mr Van Blommenstein was a factual witness.

[24] The evidence of Mr Van Blommenstein, who had not seen the fall, was that based on his own experience as a rider - how he himself had fallen – and the manner in which the bike was found (with its front wheel wedged in the grass) it was more probable that the plaintiff came to an abrupt halt which caused him to be propelled forward over the handlebars with momentum, and then to fall into the culvert. There was no objection to this evidence, or the nature of it. His evidence established probable factual causation, which was sufficient for the plaintiff to succeed on this element of the delict at issue. Given that our law allows for a flexible approach in determining factual causation (**Lee v Minister of Correctional Services**[6]), in my opinion there are no reasonable prospects that another court will find that the court a *quo*'s reliance on the factual evidence of Mr Van Blommenstein was wrong.

[25] The second error and misdirection by the court a *quo* in relation to Mr Van Blommenstein's evidence is said to be the court's acceptance of the evidence to the effect that the cycle path took a slight downhill before the handrail, causing

[6] 2013 (2) SA 144 (CC), para 43

cyclists to pick up speed at that point. It is said that this is not supported by the photographs that were admitted as evidence before the court, which show that the path is flat at that point with no downhill.

[26] First, the evidence of Mr Van Blommenstein regarding the sloping path was not challenged at all by any of the defendants. It was in fact elicited by Mr Titus for the defendants during his cross-examination of Mr Van Blommenstein, and Mr Titus did not disturb that evidence.

[27] Second, there was no evidence led in the trial to the effect the photographs now relied on in this application show a flat path. In attacking the court a *quo*'s reliance on the undisputed evidence of Mr Van Blommenstein, the defendants seek to introduce and rely on matters that were not placed before the trial court. This is self-evidently impermissible.

[28] In my opinion there are no reasonable prospects of an appeal court will interfere with the court a *quo* on this score.

Grounds five (paras 17 to 23) and seven (para 25)

[29] According to the defendants, the court a *quo* erred and misdirected itself in finding that the width of the handrail was inadequate and did not serve its purpose without the plaintiff having tendered measurements as to what constituted an adequate width.

[30] The plaintiff did not have to tender measurements as to what constituted an adequate handrail, because there was a plethora of evidence from both the

plaintiff's witnesses and the defendants' own witnesses that: (a) the hand rail was not high enough. In fact the height of the handrail did not comply with the defendant's own specifications and the requirements by which they considered themselves bound; (b) the hand rail was not wide enough to effectively protect cyclists; (c) the defendants' maintenance programme was limited only to ensuring that no vegetation encroached on the path and did not include warning cyclists of the existence of the culvert; and (d) there were no signs warning users, who included cyclists, of the existence of the culvert.

[31] What emerged from the evidence was the obvious fact that cyclists use the path differently from pedestrians. Even excluding any references to the document mentioned in paragraph 56 of the judgment, to which the court a *quo* referred merely to demonstrate a point that was already proven by the evidence led, the handrail fell short. In order to succeed the plaintiff was required to show that the existing hand rail was inadequate, and to lead evidence that established this on a balance of probabilities. He succeeded in doing so.

[32] The question of what measurements (in terms of width and height) constitute an adequate and effective adequate handrail is a matter that is distinctly within the knowledge and expertise of the defendants' engineers, some of whom gave evidence at the trial.

Ground eight (paras 26 to 29)

[33] It is said under this ground that the court a *quo* erred and misdirected itself in applying the principles set out in **Butters**[7] because the facts of that case are distinguishable from those in the present case.

[34] First of all, it is rarely the case that the facts of any one case are identical to those of another. If Butters established any principle, it is that each case must be assessed on its own facts and no two cases are possessed of exactly the same facts. Even so, however, the facts in Butters are not only analogous to those of this case, but they raised the same legal questions as arise here.

[35] Secondly, as it clear from its judgment the court a *quo* was relying largely on the binding legal authority of the principles in Butters rather than a finding that the facts were exactly the same.

[36] This ground of appeal is accordingly without merit.

Conclusion

[37] I am of the opinion that an appeal would have no reasonable prospects of success and furthermore that there is no other compelling reason why the appeal should be heard.

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[7] City of Cape Town v Butters 1996 (1) SA 473 (C)

[38] In the circumstances, the following order is made.

[a] The application for leave to appeal is dismissed.

[b] Costs, including the costs of counsel, shall be borne by the first and second defendants jointly and severally the one paying the other to be absolved, on Scale B.

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N MAYOSI
JUDGE OF THE HIGH COURT

Appearances

For plaintiff:	Adv R.D.E Gordon, Cape Town
Instructed by:	Sohn & Wood Attorneys
For first and second defendants:	Adv Madoda Titus, Cape Town
Instructed by:	The State Attorney, Cape Town
For third defendant:	Adv L Matsiela, Sandton Chambers
Instructed by:	Clyde & Co