



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Case number no: 20111/2012

In the matter between:

DEPARTMENT OF INFRASTRUCTURE, WESTERN CAPE

Appellant

and

CHRISTIAN JACOBUS VAN STADEN

Respondent

Coram : Nziweni, J

Heard : 3 September 2026

Delivered : 11 September 2026 (electronically)

ORDER

Application for condonation and leave to appeal dismissed with costs on Scale C.

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction

[1] On 4 June 2026, judgment in this matter was delivered electronically, holding the applicant liable for the respondent's proven or agreed damages arising from leg injuries sustained when his motorcycle struck a pothole.

[2] The applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of this Division, against the whole of the judgment and the order as to costs. The respondent vigorously opposes this application.

[3] To the extent necessary, the applicant also applies for condonation for its non-compliance with Uniform Rule 49(1)(b), on the sole basis that its grounds for appeal were fully embodied within its supporting founding affidavit.

[4] At the commencement of the hearing, it was agreed that both the application for condonation and the application for leave to appeal would be heard simultaneously. The applicant also seeks an order directing that the new grounds of opposition, raised for the first time in the respondent's heads of argument dated 19 August 2026, be dismissed or disregarded. Alternatively, the applicant requests leave to deliver supplementary heads of argument strictly confined to addressing those specific grounds.

The Condonation Application

[5] The leading authority on the application of Uniform Rule 49(1)(b) is *Songono v Minister of Law and Order* 1996 (4) SA 384 (E). It is trite that the grounds of appeal must be set out clearly, succinctly, and in unambiguous terms within a notice of application for leave to appeal. As established in *Songono*, this requirement ensures that the Court and the respondent are fully informed of the case the applicant seeks to make out, and which the respondent must meet. To this end, litigants must carefully avoid unnecessary elaboration.

[6] The founding affidavit filed in support of this application stands in stark contrast to these requirements. Spanning an extraordinary 88 pages and 234 paragraphs, it is an elephantine pleading that epitomises extreme prolixity. Masking a full-scale legal

argument inside a sprawling narrative rather than framing precise, concise grounds of appeal renders the application structurally and fatally flawed. To mechanically traverse every paragraph would be an exercise in futility and an unwarranted drain on judicial resources.

[7] Insofar as the character of the affidavit is concerned, Mr Botha, respondent's counsel, aptly and perfectly describes it as performing several different functions simultaneously. He further submits that it purports to identify the grounds of appeal; it reargues the evidence; it criticises the Court's evaluation of evidence; it advances competing factual inferences; it develops legal submissions; and, at numerous points, it effectively answers the reasons given in the judgment.

[8] The deponent to the founding affidavit states that the judgment is appealable on four nominal grounds, namely:

- 8.1 That the respondent failed to discharge the onus of proving, on a balance of probabilities, that the pothole was the factual or legal cause of the collision;
- 8.2 That the respondent failed to discharge the onus of proving wrongfulness and negligence regarding the applicant's duty of care to maintain the MR347;
- 8.3 That the Court failed to make a finding on, or alternatively failed to uphold, the applicant's plea of contributory negligence under the Apportionment of Damages Act 34 of 1956; and
- 8.4 That the punitive costs order made against the applicant is formally defective, excessive in its scale, and unjustified by the facts.

[9] Although the applicant purports to limit itself to these four distinct grounds, its extensive elaboration on each point is further fragmented into a maze of sub-topics. The structural volume alone is telling: the elaboration on ground one spans 53 pages, ground two comprises 24 pages, the third ground takes up six pages, and the fourth ground finishes with four pages.

[10] This bare delineation of four grounds is legally insufficient because the applicant fails to specify how or why this Court erred. Instead, the applicant's approach improperly expects the Court to look beyond the nominal grounds and mine a

voluminous affidavit to uncover the underlying legal basis of the alleged errors. Such an approach is entirely untenable. It forces this Court to sift through a dense, narrative to speculate on the underlying legal points, compromising the structural integrity of the application and constituting a clear abuse of the court process.

[11] Nothing in this matter justifies such prolixity, not even the length of the main judgment. The founding affidavit does not assist the Court; it obscures the real issues, frustrates the procedural rights of the respondent, and wastes valuable judicial resources. An application for leave to appeal is a focused procedural step meant to succinctly isolate specific errors of law or fact. It does not invite a prolix narrative that compels the Court to search through an expansive text to discern a grain of legal merit

[12] The applicant's grounds completely fail to comply with the standards of clarity required by Uniform Rule 49(1)(b). The first ground is disorganised and disjointed from the outset. Under the guise of framing a ground of appeal, the applicant sets out a confusing factual narrative, stating:

"The applicant's version based on the version that no pothole had been in the vicinity of the accident, was that the respondent's motorcycle tyre burst for an unknown reason, that he lost control of his motorcycle and collided with a traffic signpost. Importantly, it must be highlighted that after applicant's witness testified to seeing a pothole at the accident scene, Applicant conceded the presence of the pothole but maintained its position that the pothole did not cause an accident."

[13] This is a narrative argument recounting a trial concession, not a succinct ground of appeal. It typifies the undisciplined nature of the applicant's paperwork. Throughout the affidavit, the deponent continuously resorts to the phrase "the applicant submits," rendering the affidavit an impermissible head of argument rather than a concise notice of appeal.

[14] Similarly, in paragraphs 217 and 218 of the affidavit, the deponent contends that the Court failed to evaluate whether the respondent's prior knowledge of the road should have elevated his vigilance, debating the standard of lookout expected of an experienced motorcyclist traveling at 80 km/h on a road near the end of its design life.

Instead of isolating a distinct error of law or fact, these paragraphs function as loose, conversational commentary on the trial evidence.

[15] This fundamental procedural defect undermines the entire application. The applicant's Notice of Application for Leave to Appeal is completely devoid of substantive grounds. Instead, the applicant has impermissibly relegated its entire case to a sprawling narrative. The applicant is seeking to re-argue the trial under the guise of an appeal; however, a mere stubborn disagreement with a court's factual or credibility findings does not establish a material misdirection.

[16] From the foregoing, it follows that the applicant's failure to isolate clear, succinct, and distinct grounds of appeal constitutes a fatal irregularity. This Court must consider whether such non-compliance is capable of condonation.

[17] The applicant's approach to condonation, however, further illustrates a profound misapprehension of appellate procedure. In its application for condonation, the applicant impermissibly requests this Court to condone its non-compliance "to the extent that any such non-compliance is found to exist."

[18] This conditional, blanket formulation is legally untenable. Condonation is an indulgence, not a right. As was correctly argued on the respondent's behalf, condonation requires a candid admission of a specific procedural breach, accompanied by a full and satisfactory explanation under oath. A litigant cannot seek condonation in the air or on a purely hypothetical basis while simultaneously refusing to acknowledge their own procedural failures. By adopting this evasive stance, the applicant has failed to lay any proper basis for an indulgence; one simply cannot explain away a default that one denies exists. Consequently, there is an absolute absence of a valid explanation before this Court, and the applicant's catch-all request must be rejected.

[19] There is, therefore, no proper basis before this Court to grant an indulgence in the face of so flagrant a disregard for the rules of pleading. I am in agreement with the respondent that this procedural invalidity is determinative, and the application must be dismissed on this basis alone.

[20] In the result, the condonation application is dismissed with costs. The leave to file supplementary papers is also refused.

[21] Lest I be in error regarding the procedural defects and the refusal of condonation, I proceed to consider for the sake of completeness whether the applicant has demonstrated any reasonable prospects of success on the merits of the appeal.

Reasonable Prospects to succeed

Causation

[22] The applicant states that the leave to appeal application in respect of causation is directed at paragraphs 152-182 of the main judgment.

[23] The applicant submits that another court would reach a different conclusion on the causation finding, asserting broadly that this Court committed various 'inconsistencies, appealable errors, and erroneous legal principles' between paragraphs 152 and 182 of the main judgment.

[24] The applicant further contends that this Court should have applied the technique formulated in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*. Under the circumstances of this case, the applicant's argument, that an alleged failure to establish factual causation can be cured or re-evaluated through the prism of a witness credibility test, is legally flawed and conceptually misdirected.

[25] The applicant also asserts that the Court failed to evaluate a material variance between the respondent's extra-curial police statements and his viva voce testimony in court on 14 November 2023. In his testimony, the respondent stated that he could not recall whether the warning statement was read back to him. Under these circumstances, the police statements cannot simply be treated as previous inconsistent statements to strike down his credibility.

[26] The applicant's relentless focus on perceived inconsistencies within the respondent's accident report or police statement is entirely misplaced. When the evidence is viewed holistically, nothing turns on these minor discrepancies. An omission of granular details regarding the pothole from a statement taken in the immediate aftermath of a severe, traumatising accident does not detract from the reliability of the respondent's viva voce testimony, nor does it override the objective physical and expert evidence that was served before this Court.

[27] Similarly, the applicant's attempt to impeach the respondent's credibility based on omissions within that same police warning statement is procedurally and legally unsustainable. The respondent testified unequivocally that he could not recall whether the warning statement was ever read back to him prior to signature. Under the specific circumstances of this case, marked by the respondent's severe trauma and immediate physical shock following the collision, the applicant failed to establish the necessary evidentiary foundation to prove that the statement was read back, verified, and deliberately adopted by him. It is a settled principle of our law of evidence that a prior statement cannot be used to discredit a witness unless its accuracy and adoption are conclusively established. Consequently, the applicant's persistent reliance on this document as a backdoor to manufacture a ground of appeal is fundamentally flawed.

[28] In addition, the evaluation of evidence dictates that a trial court must evaluate evidence holistically as a mosaic, rather than treating individual statements in isolation. The plaintiff's oral testimony did not stand alone; it aligned perfectly with the independent eyewitness who arrived at the scene and the objective expert engineering reports detailing the crash dynamics and the exact dimensions of the pothole. The police statement was entirely contradicted by this vast body of objective, independent physical evidence.

[29] The applicant's alternative contention that this Court erred by failing to apportion damages based on the respondent's alleged contributory negligence is legally unsustainable. As established in the main judgment, a dangerous road defect that remains camouflaged to a motorist operating under normal traffic conditions constitutes a 'hidden trap'. When an ordinary driver is suddenly confronted with such an invisible and imminent hazard, the law invokes the doctrine of sudden emergency.

Surely, a driver trapped in a split-second crisis created entirely by neglect cannot be deemed blameworthy merely because they failed to see or take optimal evasive action to avoid the impact.

[30] In the present matter, the objective realities of the road surface gave rise to an identical situation of sudden emergency. The respondent was operating the motorcycle within the lawful parameters of the road when the hidden defect triggered an instantaneous tyre deflation. The applicant cannot systematically neglect its proactive maintenance obligations, leave a severe hazard exposed for a prolonged duration, and then opportunistically demand that a blameless motorist display mystical reflexes to see and escape the consequences of the omission. Consequently, because the emergency was born solely out of the applicant's omission, this Court did not misdirect itself in dismissing the claim for apportionment. In the circumstances of this matter, this ground of appeal is entirely meritless.

[31] The applicant further challenges the acceptance of the severe jolt version; finding that the severe jolt felt by the respondent was never challenged during cross examination; challenges the court's non engagement with the respondent's version as to the location of the jolt; that the court misdirected itself regarding Mr Craig's concession as to the severity of the jolt; that the court misdirected itself in the objective finding for the severe jolt; that the court misdirected itself in accepting Mr Du Preez testimony; the court did not address the wheel diameter error conceded by Mr Du Preez; the reliance placed upon the tyre rubber residue on the pothole exit face as conclusive proof that the respondent's motorcycle, when dropped into the pothole is fundamentally flawed; misdirected in the tyre burst and acoustic finding; misdirected regarding the probative value of Mr Lourens Steytler's evidence on causation.

[32] The applicant contends that this Court conflated credibility with probative value in the application of Mr Steytler's evidence; Mr Steytler's evidence was incorrectly accepted by the Court as part of that evidence. The court failed to evaluate the directional value of Mr Steytler's evidence as he was travelling in the opposite direction to the respondent; Mr Steytler's evidence in respect of distance does not correlate with Mr Craig's testimony that it would have taken five seconds to travel from the pothole to the intersection; the court failed to consider that Mr Steytler's inference about the

pothole was formed after the event from the respondent's vague statement that "he either hit something or drove over something in the road" and Steytler's own prior knowledge; the court failed to evaluate the point that the respondent's words to Mr Steytler were deliberately vague and did not mention or identify the pothole; the court failed to consider that Mr Steytler arrived at his conclusion by deduction, not observation; the court failed to consider that Mr Steytler expressly conceded that he is not an accident reconstruction expert, and that the applicant's counsel correctly characterised his deduction as "just your opinion".

[33] Although the court treated Mr Steytler's credibility as a witness as enhancing his causation evidence, that was an incorrect approach because credibility goes to whether a witness is telling the truth about what they observed, not to whether their inferences are correct; the court failed to evaluate Mr Steytler's evidence that the Respondent had hit a pothole further up the road; the court did not address a material difference between the applicant's affidavit and his viva voce evidence regarding the motorcycle trajectory and the motorcycle orientation after hitting the pothole; the court failed to address Mr Craig's friction evidence on the post-accident trajectory /stop; the court in the causation analysis, failed to evaluate crucial evidence given by Ms Nigrin that she found no scrape marks, skid marks, or any sign of vehicle contact at or near the pothole; the court misdirected itself in selectively applying Ms Nigrini's contemporaneous examination of the accident scene; the court used the failure of maintenance personnel to detect the pothole as a basis for finding that the pothole was imperceptible even to trained observers, the applicant further submits that Ms Nigrini evidence stands as powerful parallel as a traffic officer.

[34] It is further stated in the applicant's affidavit that "here was a trained traffic officer, attending the scene specifically to identify points of contact and impact, who performed a deliberate sweep of pothole area and found nothing. Accordingly, if this serves to corroborate the imperceptibility finding in respect of the maintenance personnel failures, then the applicant submits that the same logic it should equally have corroborated the absence -of-contact finding under causation." According to the applicant, this Court used the same category of professional failure in opposite directions; on the other hand, to support the imperceptibility finding to excuse respondent's failure to observe the pothole; and on the other hand, to disregard the

absence of accident-related marks as supporting the instantaneous deflation inference; the court made no findings on Mr Craig's evidence about the complete absence of abrasion marks on the motorcycle's front rim, which would be consistent with the rim scraping evidence; the court was inconsistent in the probative evaluation of Mr Craig's evidence; the court failed to deal with inconsistencies in the oral and documentary evidence.

[35] The second ground raised by the applicant is that the court erred in finding that the respondent that the respondent discharged the onus of proving , on balance of probabilities, that the applicant was negligent in its duty of care; the applicant contended that this court relied on a hearsay chain of alleged complaints from Haygrove employees, relayed through Ms Rina Bryson (respondent's lay witness) to various intermediaries, and unnamed official at the municipality; applicant asserts that the court misdirection emanates from accepting the hearsay evidence without qualification. The court incorrectly found that it is disingenuous for applicant to maintain that the pothole would have been repaired had a formal report been received; the applicant contends that it appears that this court appears to have resolved the constructive notice by reference to a single, materially incomplete logbook entry, which post dates the accident; the court's reasoning in addressing the separate question of whether the respondent ought to have seen the pothole, that trained personnel, specifically tasked and equipped to identify road defects, failed to spot the pothole over several months and that it would accordingly be logically untenable to expect an ordinary motorist to have easily seen and avoided it- sits in direct tension with the court's separate conclusion, for purposes of the wrongfulness and negligent enquiry, that the very same trained person ought to have detected the pothole through the exercise of ordinary diligence.

[36] The applicant asserts that the internal contradiction between the pothole was camouflaged for excusing respondent and the finding that the inspectors should have found it, thereby establishing constructive notice, constitutes a fundamental misdirection in the negligence analysis; court misdirected itself in the application of McIntosh and Bakkerud cases; the court misdirected itself regarding legal duty owed in respect of warning signs; misdirected itself regarding foreseeability; misdirected itself regarding negligence finding; misdirected itself regarding contributory

negligence of the respondent; misdirected itself regarding the cost order on the attorney and client scale.

[37] As far as the placement of warning signs is concerned, in the main judgment, this Court explicitly ruled that, under the specific circumstances of this matter, the failure to erect warning signs constituted an actionable breach of the duty of care. This finding reinforces the trite principle that courts do not evaluate omissions in a vacuum. Instead, the determination of negligence relies heavily on circumstantial witness testimony regarding the road's history, the protracted timeframe the defect was left exposed, and the physical characteristics that rendered it a hidden trap. Because these surrounding facts established that the department had constructive notice of the hazard, the failure to deploy cautionary signage became the definitive, negligent omission that directly caused the plaintiff's harm.

[38] In the founding affidavit, the applicant subjects the main judgment to a hyper-critical, piecemeal dissection, microscopically challenging every factual inference, ranging from the mechanical forces of the 'severe jolt' to the directional movements of the witnesses. This approach is legally untenable. It is now established that, an application for leave to appeal is not an open invitation to isolate separate strands of what is, ultimately, a solid mosaic of proof.

[39] The applicant's contention that an internal contradiction exists because this Court found the pothole was 'camouflaged' to an ordinary motorist, while simultaneously finding that the applicant's inspectors ought to have detected it, rests on a profound legal misconception. The positive duty of care imposed on a public roads authority under *McIntosh* case, mandates systemic, proactive diligence to maintain safe infrastructure. Constructive notice is established by the prolonged duration and immense physical dimensions of a hazard. Conversely, whether a defect constitutes a 'hidden trap' to a reasonable driver operating a vehicle under normal traffic conditions is an entirely separate, fact-specific inquiry.

[40] Similarly, the applicant's contention that this Court improperly relied on a hearsay chain of complaints regarding the road conditions is legally and factually flawed. The applicant mistakenly presupposes that the finding of constructive notice was anchored

solely upon the statements referenced by Ms Bryson. This submission ignores the principle that the strength of a case relies not on isolated, segregated facts, but on the cumulative weight of the evidence viewed in its totality. By dissecting the respondent's case into fragmented components, the applicant fails to appreciate the evidentiary record as a collective whole.

[41] For instance, the evidence in this matter demonstrates that a hazardous pothole was left unattended over a significant duration of time. The applicant's fixation on Ms Bryson's references to specific complaints entirely misses the mark. It fails to recognise that constructive notice derives from the objective, aggregate reality of a prolonged hazard, irrespective of how individual items of reportage are classified. Ultimately, the total weight of the objective facts establishes that the authority ought to have known of the danger, regardless of the technical labels attached to individual complaints.

[42] Similarly, the applicant attempts to exploit the evidence of its own witness, Ms Nigrini, who testified that she did not observe surface scrape marks on the roadway immediately after the incident. By implication, the applicant suggests that if scraping existed, Ms Nigrini ought to have seen it. This contention relies on entirely faulty logic. The mere fact that a witness failed to observe a specific physical mark does not establish that such a mark did not exist, nor does it override the objective, cumulative evidence accepted by this Court. Ms Nigrini's negative observation simply cannot displace that structural reality.

[43] Furthermore, when the evidence is viewed holistically, the objective engineering parameters, the physical tyre residue, and the consecutive timelines provided by the witnesses point inexorably to the conclusion that the applicant's wrongful omission caused the collision. The applicant's highly granular dissatisfaction does not reveal a single material misdirection; it merely confirms a stubborn disagreement with the Court's final order. Consequently, these grounds carry no reasonable prospects of success on appeal.

[44] Lastly, witness testimony is not an all-or-nothing proposition. This Court properly exercised its judicial discretion to accept his *viva voce*, which was overwhelmingly reinforced by the objective and independent physical evidence.

[45] In respect of all the grounds raised by the applicant, it is evident that the applicant is engaging in what amounts to a meticulous, nitpicking exercise directed at a holistic mosaic of evidence. Instead of demonstrating any fundamental or pervasive misdirection that would vitiate the Court's findings, the application focuses microscopically on minor details and isolated facets of the testimony. For instance, this Court did not rely on Mr Steytler as a reconstruction expert; rather, it utilised his immediate timeline and direct observations as components of a cumulative mosaic of proof. A lay witness does not need to be qualified as an expert to provide highly probative circumstantial evidence. Similarly, the applicant attempts to isolate Mr Jansen's sensory observations concerning the sound of the impact, failing to view his testimony as another vital component of the broader evidentiary mosaic.

[46] It is a well-established principle that an application for leave to appeal is not an open invitation for unsuccessful litigants to subject an adverse judgment to a hyper-critical, piecemeal analysis. By focusing on peripheral inconsistencies rather than the holistic mosaic of the evidence, the applicant misses the wood for the trees. Such granular dissatisfaction does not establish any reasonable prospects of success on appeal; it merely illustrates a stubborn disagreement with the court's final order.

[47] The fact that a litigant disagrees with the manner in which the evidence was evaluated by the Court does not give the litigant a right to dictate how that evaluation should have been conducted. Put differently, it is a well-established principle that a party's subjective dissatisfaction with the Court's evidentiary findings does not establish a misdirection on the part of the trial judge.

[48] A gleaning of the pertinent facts in the applicant's affidavit makes it abundantly clear that the applicant's challenge to this Court's evaluation of the evidence amounts to nothing more than a preference for an alternative conclusion, failing to establish any material misdirection. Credibility assessments fall squarely within the domain of the trier of fact and do not depend on the subjective whims of a litigant. Consequently, it

remains the sole duty of the Court to evaluate and determine witness credibility. In this regard, the applicant has failed to meet the threshold for leave to appeal, seeking instead to treat the application as a mere second bite at the cherry.

[49] Regarding the punitive cost order, the reason for granting such an order are fully dealt with in the main judgment.

[50] An application for leave to appeal exists to afford a deserving litigant a chance to be heard by an appellate court if there are reasonable prospects of success or if there is some other compelling reason for the appeal to be heard. This procedure was never intended to provide a disappointed litigant with a back-door means of obtaining a factual rehearing. Permitting the applicant to proceed to the appellate court under these circumstances would reward them for flouting the Rules of Court, effectively granting an impermissible rehearing.

[51] From the foregoing, the application falls to be dismissed. In the result I make the following order:

51.1 Application for condonation and leave to appeal dismissed with costs on Scale C.


CN NZIWENI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Appellant : Advocate D Pillay

Instructed by : The State Attorney, Cape Town

Counsel for Respondent : Advocate P Botha SC

Instructed by : Lombard & Kriek Inc.