

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No. 1396/2014

Heard on: 08/03/2019

Delivered on: 29/03/2019

In the matter between:

ANDREW SIPHO PIENAAR

PLAINTIFF/APPLICANT

and

THE MINISTER OF POLICE

DEFENDANT/RESPONDENT

JUDGMENT

MAMOSEBO J

- [1] The applicant, Mr Andrew Pienaar, is seeking condonation for the late filing of the Notice of intended legal proceedings to be given to an organ of state in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act ¹(the Act). The respondent, the Minister of Police, has filed an application for the striking out of paras 5.2 to 5.13 of

¹ Act 40 of 2002.

the applicant's replying affidavit in the condonation application. Both applications were heard simultaneously.

- [2] The issues to be considered are whether condonation should be granted or the matter has prescribed as contended by the respondent and whether or not the paragraphs in the replying affidavit should be struck out.
- [3] The applicant was arrested by the members of the South African Police Services (SAPS) on 17 August 2004 and detained in the Kimberley police cells with his first court appearance on 19 August 2004. He was detained until 28 August 2004 whereafter he was granted bail. He stood trial until 04 February 2014 when he was acquitted on all charges. He issued summons on 15 August 2014 which was served on the respondent on 16 September 2014. He claims damages for the unlawful arrest and detention, contumelia and pain and suffering to the total amount of R50 000 000.00 (Fifty Million Rand).
- [4] The respondent raised two special pleas filed on 30 March 2015. First, that the claim has prescribed and second, that the applicant has failed to comply with s 3 of the Act. In the answering affidavit the respondent's contention was that not only has the applicant's claim prescribed but the applicant has no prospects of success which he has failed to deal with in his founding affidavit. He also challenged the applicant's failure to furnish good reasons for his delay to serve the notice within the prescribed timeframe and urged the Court to deny him condonation.
- [5] The respondent filed the application to strike out the impugned paragraphs in the replying affidavit on 18 August 2018 contending that they introduced new issues not canvassed in the founding affidavit.

Removal of the matter from the roll or postponement of the matter

[6] At the inception of the proceedings, Mr Mongala, for the applicant, who did not prepare the heads of argument, submitted that the matter be removed from the roll because prescription had to be dealt with separately before condonation could be argued. He further submitted that the set down to argue prescription was the responsibility of the respondent and that the matter was not ripe to be heard. Counsel's submissions ignored the provisions of s 3(4) (a) and (b) of the Act. The applicant was obliged to deal with the requirements as outlined in s 3(4)(b) to the satisfaction of the Court. Having afforded Mr Visagie, for the respondent, an opportunity to comment on the application for the matter to be removed from the roll, which he opposed, I refused the application. It was the applicant who set down the application for condonation and the respondent was entitled to an outcome.

[7] In *Take and Save Trading CC and Others v Standard Bank of SA LTD*² Harms JA remarked:

“One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.”

² 2004(4) SA 1 (SCA) at 4G – 5B

- [8] Having been unsuccessful with the removal from the roll, counsel for the applicant applied for a postponement. Mokgoro J in *National Police Service Union and Others v Minister of Safety and Security and Others* cautioned:

“[4] The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.”

Having heard both parties I was of the view that the reasons advanced are not persuasive and refused a postponement.

Striking out of paragraphs 5.2 – 5.13 of the replying affidavit of the applicant

- [9] Mr Mongala, for the applicant, gave the excuse that he was unaware of the application to strike out until he was shown the papers by Mr Visagie just before the matter was argued. According to him, the striking out application did not form part of his brief. This is surprising because the notice of set down for the application to strike out was served on Magoma Attorneys, the correspondent attorneys in Kimberley on behalf of the instructing attorneys, Moleko Ratau Attorneys, on 20 February 2018 at 10:59 and was filed on the same day. Further, on 23 February

2018 Stanton AJ granted an order by agreement that the main application and the application to strike out be postponed to 18 May 2018 on the opposed roll and costs be costs in the application. Mr Mogoma was in Court when this application was argued before me. Needless to say more.

[10] These are the impugned paragraphs sought to be struck out by the respondent 5.2 – 5.13:

“5.1 I deny the contents of the allegations herein contained and respondent is put to the proof thereof.

5.2 I submit that I am 90% blind and my condition was aggravated as a result of the criminal case instituted against me. (See annexure “MA1”herein attached).

5.3 The respondent’s employees came and arrested me (a semi blind person) without proper[ly] assessing the success of their case for an armed robbery case.

5.4 I submit that had the employees of the respondent properly investigated the case before arresting me they could have seen that I could not have been able to commit the crime of armed robbery against a complainant in Kimberley.

5.5 I further submit that due to the financial constraints and my precarious health I had to wait until the criminal case was concluded and I was found not guilty by the Regional Court presiding officer only on the 6th February 2014. Ten (10) years after I was charged with the said offence and no evidence was led incriminating me.

5.6 The person who committed the crime pleaded guilty and was sentenced to about 15 years during the process after separation of the trials. The State would not withdraw the charges against me but continued until I was acquitted of the charge of armed robbery.

5.7 The formal letter of demand was addressed to the respondent on 14 April 2014 and confirmation of receipt thereof was acknowledged by the respondent on the 16 April 2014. (See Annexure “MA2”herein attached).

5.8 The respondent’s national office advised in the letter that the demand letter will be forwarded to the province in whose jurisdiction the cause of action arose. I submit that from the 6th February 2014 up to the 16th September 2014 when

the respondent's office in Kimberley received my letter of demand, such demand had long been made against the principal office in Pretoria.

5.9 With regards to the merits of the case, I submit that it was the testimony of the complainant who testified that prior to him being robbed a certain person telephoned him from a public phone booth in Eldorado Park and the said person demanded that the complainant must pay him the amount of two million.

5.10 After the telephone conversation the complainant made a reverse call to the public telephone and a woman answered the phone. The woman described to the complainant the person who made the phone call and when the complainant was robbed he testified that he concluded that the robbers were sent to rob him by me.

5.11 I was not arrested at the scene of crime, I was picked up by members of the police force at Southgate mall and I was incarcerated for about three weeks before I could be granted bail.

5.12 From 2004 until 6th February 2014 I had to travel from Alexander to Kimberley at my own expense.

5.13 I am a lay person almost blind and elderly, I could not have known before the case was finalised that I was supposed to institute action against the respondent."

Counsel submitted that the aforementioned paragraphs were furnished to clarify facts or substantiate averments in the founding affidavit.

[11] Mr Visagie relied on *Titty's Bar and Bottle Store (Pty) Ltd v A.B.C. Garage (Pty) Ltd and Others*³ where the following remarks were made:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court."

The founding affidavit dealt with the background information including the arrest and detention periods. It was only at para 8 of the founding affidavit where the following purports to deal with the reasons and explanation for the late notice:

³ 1974 (4) SA 362 (T) at 368H

“I submit that I only instituted a formal notice to respondent on the 14th day of April 2014 after I consulted with my attorney of record the reason being that I did not have financial means to bring the action on an earlier time as I was attending the trial and which was only finalised on the 14th day of April 2014 and where I was found not guilty.”

[12] Rule 6(15)⁴ stipulates that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

[13] The applicant did raise new issues in reply. What exacerbates matters is that he did not embrace the opportunity to oppose the application for the striking out. It came before me unopposed. A case must be made out in the founding affidavit. Regard being had to the quoted paragraphs, they do raise new evidence and stand to be struck out.

Condonation

[14] Section 3(1)(a) of the Act stipulates:

3 Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless -

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute legal proceedings in question.”

(2) A notice must –

⁴ Uniform Rules of Court

- (a) Within six months from the date on which the debt became due, be served on the organ of state in accordance with s 4(1); and*
- (b) Briefly set out –*
 - (i) The facts giving rise to the debt; and*
 - (ii) Such particulars of such debt as are within knowledge of the creditor*
- (5)(b) Despite paragraph (a), any process by which any legal proceedings contemplated in section 3 (1) are instituted and in which the –*
 - (ii) Minister for Safety and Security is the defendant or respondent, may be served on –*
 - (aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995); or*
 - (bb) the Provincial Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995, of the province in which the cause of action arose.”*

[15] The applicant, legally assisted by his attorney, Mr CM Leballo of CM Leballo Attorneys, filed a notice addressed to the office of the Minister of South African Police dated 14 April 2014 which was sent by registered mail. The Act requires the notice to be served on the organ of state within six months of the debt becoming due. The alleged unlawful arrest and detention took place on 17 August 2004 and the notice was served almost ten years later. In his founding affidavit the applicant cited as his reason for serving the notice on the respondent on 14 April 2014 as lacking financial means; attending trial; and ignorance of the requirement to file the notice within six months of his arrest.

[16] In the minutes of the pre-trial conference held on 31 March 2017 attended by Mr Michael Mokobi of Moleko Ratau Attorneys, for the applicant, and Mr P Visagie from the Office of the State Attorney, for the respondent, the special plea for non-compliance with s 3 of the Act was raised and the parties agreed that the application for condonation for the non-compliance ought to be heard first. That being the case Mr Mongala submitted that there was no need for a condonation application because the notice dated 14 April 2014 was within the prescribed six months period.

[17] In *Uitenhage Transitional Local Council v South African Revenue Service*⁵ the Supreme Court of Appeal stated:

“One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

See also *Commissioner For Inland Revenue v Burger*⁶

[18] Section 3(4) stipulates:

“(a) If an organ of state relies on a creditor’s failure to serve a notice in terms of subsection (2)(a), the creditor must apply to a court having jurisdiction for condonation of such failure,

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) the debt has not been extinguished by prescription;

⁵ 2004 (1) SA 292 (SCA) para 6

⁶ 1956 (4) SA 446 (A) at 449G - H

(ii) good cause exists for the failure by the creditor; and
 (iii) the organ of state was not unreasonably prejudiced by the failure.”
 (Own emphasis added). These requirements are conjunctive and must be established by the applicant in the condonation application.

[19] It is common cause that the applicant’s intended cause of action was a claim for damages arising from the applicant’s arrest and detention. This is a claim that aims to recover a debt as defined in s 1 of the Act⁷ and that although the respondent is cited as the Minister of Police the action is aimed at an organ of state.

Debt extinguished by prescription

[20] Counsel for the applicant made the submission that the papers have not dealt with prescription because it was dependent upon the respondent bringing an application for prescription. This submission has not taken into consideration s 3(4)(b)(i). For the Court to be satisfied that condonation may be granted, it must be convinced that the claim has not prescribed. It will serve no purpose if the claim is extinguished by prescription and condonation is nevertheless granted.

[21] The Supreme Court of Appeal in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*⁸ made these insightful remarks:

“[13] In considering whether condonation was rightly granted it is instructive to bear in mind why notices of the kind contemplated in s 3 of the Act have been insisted on by the legislature. Statutory requirements of notice have long been familiar features of

⁷ “debt means any debt arising from any cause of action –

(a) Which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any –

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) For which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date.

⁸ 2010 (4) SA 109 (SCA) at 113 para 13

South Africa's legal landscape. The conventional explanation for demanding prior notification of intention to sue organs of State, is that, 'with its extensive activities and large staff which tends to shift it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them'. From time to time there have been judicial pronouncements about how such provisions restrict the rights of its potential litigants. However, their legitimacy and constitutionality is not in issue."

- [22] As pointed out, the applicant issued his Notice to the on 14 April 2014. The statutory requirement is that the notice must be served on the organ of state within six months from the date on which the debt became due. The Notice must briefly set out the facts giving rise to the debt⁹ and such particulars of the debt as are within the knowledge of the creditor¹⁰. Mr Visagie argued that the debt became due when the applicant was arrested, that is, from 17 August 2004 and imputes that the applicant knew at that time that the arrest and its subsequent detention were unlawful.
- [23] Counsel for the applicant on the other hand submitted that the debt became due only after the applicant's acquittal by the regional court on 04 February 2014; that because the applicant is not only claiming for the unlawful arrest and detention but for damages consequent upon the wrongful actions until his acquittal. It was in fact unnecessary for the applicant to have brought the condonation application, the argument went.

⁹ Section 3(2)(b)(i)

¹⁰ Section 3(2)(b)(ii)

[24] It is crucial for this Court to determine whether prescription started to run on 17 August 2004 or on 04 February 2014. Section 12 of the Prescription Act¹¹ is relevant and reads:

“12 When prescription begins to run –

- (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A 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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

[25] Nothing in the papers demonstrates that the applicant was wilfully prevented from coming to know about the existence of the debt. He evidently enjoyed legal representation early in his criminal trial. Legal advice was therefore at hand. The applicant certainly knew the debtor and the facts from which the debt arose. All that was argued was that he had to wait for his acquittal in order to incorporate the delictual claim of pain and suffering. The facts from which the debt arise are facts which the creditor would need to prove in order to establish the liability of a debtor. See *Mtokonya v Minister of Police*¹² and *Links v MEC for Health, Northern Cape*¹³. This requirement does not, in anyway, require a creditor to have knowledge of the law or legal opinion or conclusions or even the availability in law of a remedy.

¹¹ Act 68 of 1969

¹² [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) at

¹³ [2016] ZACC 10; 2016 (4) SA 414 (CC)

[26] Moseneke J, as he then was, in an unreported judgment *Eskom v Bojanala Platinum District Municipality*¹⁴ are relevant:

“[16] In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant’s subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises.”

[27] The position is summed up succinctly by the Supreme Court of Appeal in *Minister of Finance v Gore N.O.*¹⁵ where the following was said:

“[17] This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights...”

It is therefore my view that the facts from which the debt arose for the prescriptive period to start running was upon the arrest, or shortly thereafter, of the applicant, which is when the first known harm became due and payable. It was not necessary to wait for the knowledge of the relevant legal conclusions or the termination of legal proceedings.

¹⁴ 2003 JDR 0498 (T) at para 16. Also quoted by Saner in his book: “Prescription in SA Law”(Issue 23 3 – 98)

¹⁵ 2007 (1) SA 111 (SCA) at para 17

Does good cause exist for the failure by the creditor

[28] On 17 August 2004 the applicant was aware that he was arrested by the members of the South African Police Services (SAPS). That fact is clear from his para 5 of the founding affidavit to the condonation application which in part reads:

“...I was arrested on the 17th day of August 2004 by the members of the South African Police Services whose full names and rank are currently to me unknown, whilst acting within the course and scope of their employment with the defendant on [a] charge of robbery with aggravating circumstances and who were acting on instructions and acting in their capacity as employees of the respondent.”

[29] The only reasons that appear in the applicant’s founding affidavit, as stated earlier are found at para 8, namely that he lacked financial means and was attending to trial. The Constitutional Court in *Food and Allied Workers’ Union obo Gaoshubelwe v Pieman’s Pantry (Pty) Limited*¹⁶ pronounced:

“[144] The starting point in the interpretative exercise that section 16(1) of the Prescription Act contemplates is to properly recognise that its interpretation must occur against the backdrop of the Constitution and the values it seeks to advance. This being the case, this Court, in *Mohlomi*¹⁷, recognised that time periods in general restrict the right of access to courts. It has also expressed itself decisively to the effect that the timeous resolution of disputes, which time periods seek to engender, enhances the quality of adjudication that must ultimately be the outcome of the assertion of a right of access to courts.”

[30] Importantly, the Act does not define ‘good cause’. In *Silber v Ozen Wholesalers (Pty) Ltd*¹⁸ the Court remarked:

“The meaning of ‘good cause’ in the present sub-rule, like that of the practically synonymous expression ‘sufficient cause’ which was considered by this Court in

¹⁶ [2018] ZACC 7 at para 144

¹⁷ *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at paras 11 -12

¹⁸ 1954 (2) SA 345 (A) at 352H – 353A

Cairn's Executors v Gaarn, 1912 A.D.181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.”

[31] Prudently, it would have assisted the applicant to have dealt with the prospects of success in his application. Heher JA in *Madinda v Minister of Safety and Security*¹⁹ made the following remarks:

“[10] The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I – 228F and cases there cited. ‘Good cause’ looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons or parties to the delay and the applicant’s responsibility therefore.”

[32] Good cause as pointed out in *Madida*²⁰ is also linked to the failure to act timeously. This failure has a bearing on the discretion which is exercised by the court in determining whether or not to grant condonation. The explanation proffered by the applicant in the matter before me is inadequate and does not enable the Court to appreciate the inordinate delay of ten years. Regard being had to the provisions of s3(3)(a), it cannot be a valid excuse that the applicant’s attorneys lacked the requisite

¹⁹ 2008 (4) SA 312 (SCA) at 316E (para 10)

²⁰ Page 317 para 14

knowledge to advice on of the relevant organ of state following an alleged unlawful arrest. The onus lay on the applicant to show good cause for the wanton delay which he has lamentably failed to do. In *Saloojee and Another NNO v Minister of Community Development*²¹ the Appellate Division stated that there comes a time when it becomes obvious even to a lay person that there is a protracted delay, he cannot sit passively by without directing a reminder or enquiry to his legal representative about the case. It will be difficult to justify granting condonation unless there are strong prospects of success. In the case before me prospects of success have not been addressed.

The organ of state was not unreasonably prejudiced

[33] The onus to show the absence of prejudice lies with the applicant. As pointed out in *Madinda*²² dealing with good cause and absence of unreasonable prejudice separately may be intended to strike a balance between the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice.

[34] The applicant has failed to deal with the requirement of prejudice in his papers. Mr Visagie submitted that the respondent stands to be prejudiced by the effluxion of time since the arrest. The conclusion by Zondo J, as he then was, in *Mtokonya*²³ is enlightening where the following was said: "[84] In conclusion I can do no better than repeat what this Court said in *Mdeyide* about the vital importance of prescription. In that case, this Court said:

‘This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about

²¹ 1965 (2) SA 135 (A) at 141E -H

²² Page 318B (para 15)

²³ At para 84

prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.’

Already, creditors have enough time to institute proceedings under the Prescription Act. The minimum period is three years. There is no need to stretch the extinctive period to more than three years as a norm.”

- [35] As prescribed in s 3(4)(b) the Court can only grant condonation once it is satisfied that the three requirements have been met. The contention that the six month period started running from February 2014 lacks merit and is rejected. I therefore find that the applicant’s debt arose in August 2004 and granting him condonation for the late filing of a Notice which was filed ten years later will not serve the interests of justice. By the time summons was issued on 15 August 2014 the claim had long prescribed. I agree with the submissions made on behalf of the respondent that there will be unreasonable prejudice to the respondent.

Costs

- [36] There is no reason why costs should not follow suit.

- [37] In the result, I make the following order:

1. The application for condonation for the applicant’s failure to serve the Notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, within the period laid down in s 3(2)(a) of the Act is dismissed with costs.

2. The respondent's application to strike out paras 5.2 to 5.13 of the applicant's replying affidavit is granted with costs.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicant:

Adv JK Mongala

Instructed by:

Moleko Ratau Attorneys

c/o Magoma Attorneys

For the respondent:

Mr P Visagie

Justice Centre, Kimberley