



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**CASE NO: 17387/19**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the matter between: -

**SETH WALTER KUTOANE**

**APPLICANT**

And

**MINISTER OF POLICE**

**1<sup>st</sup> RESPONDENT**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**2<sup>nd</sup> RESPONDENT**

**UNIVERSITY OF WITWATERSRAND**

**3<sup>rd</sup> RESPONDENT**

**G4S SOLUTION SA (PTY) LTD**

**4<sup>th</sup> RESPONDENT**

**CONST. LEBOHANG MPOFU**

**5<sup>th</sup> RESPONDENT**

**MR. SKHOSANA**

**6<sup>th</sup> RESPONDENT**

Coram: Lucas J van Tonder AJ

Heard: 12 November 2023

Delivered: **31 May 2024**

**Summary:**

Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – section 3(2) notice requirements – section 3(4) condonation requirements.

When debt regarded as due – facts giving rise to the debt – debtor not preventing creditor from acquiring knowledge – purpose of Act and interpretation of condonation requirements in context.

Criminal proceedings against applicants – piecemeal litigation – reasonable explanation – good cause.

***Introduction:***

[1] This judgement deals with a belated application for condonation by an alleged “*creditor*”,<sup>1</sup> based on section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002, as amended (“*the Act*”). The organs of state are the debtors for purposes of the Act.

[2] Section 3 of the Act repeats the phrase “*the facts giving rise to the debt*” in sections 3(2)(i) and 3(3)(a) as follows:

***“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 the legal proceedings in question; or*

*(b) the organ of state in question has consented in writing to the institution of that legal proceedings—*

*(i) without such notice; or*

*(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).*

***(2) A notice must—***

*(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 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 the knowledge of the creditor.*

***(3) For purposes of subsection (2) (a)—***

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<sup>1</sup> In terms of section 1(1)(i) of the Act, a “*creditor*” means “*a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings...*”. A “*debt*” is narrowly defined in the Act; it is essentially limited to damages claims against an organ of state. This is dealt with in more detail below.

- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and*
- (b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.*
- (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may 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;*
  - (ii) good cause exists for the failure by the creditor; and*
  - (iii) the organ of state was not unreasonably prejudiced by the failure.*
- (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.”*  
(emphasis added).

- [3] The applicant (“Kutuane”) alleges he is creditor because he is a person who has been criminally prosecuted and unlawfully detained, but eventually acquitted after his arrest and detention. The alleged innocent arrest was on 16 May 2016.
- [4] Kutuane seeks condonation for his alleged failure to give notice within six months to an organ of state (as required in section 3(1)(a) of the Act). He does so mid-stream a pending action already instituted against the organs of state. The current relief is sought while the action is pending, by way of Notice of Motion in terms of Uniform Rule 6, dated 29 April 2021, almost three years after the impugned notice.
- [5] The impugned notice given on or about 10 September 2018 relied on the following factual allegations:

*“... [Kutuane was arrested on 16 May 2016 and detained for 747 days] for alleged armed robbery and stood trial from date of arrest until date of acquittal, being 2 July 2018.”*

*“[Kutuane claims payment for] unlawful arrest, detention and further detention, malicious prosecution, past loss of income and future loss of income, future loss of employability, damage to dignity and contumelia.”*

- [6] In broad terms the dispute, like many similar court applications for condonation in terms of the Act, involves the manner in which a court has to be satisfied by a creditor such as Kutuane in order to grant condonation for not giving notice within six months.
- [7] There are three expressly stipulated jurisdictional requirements in section 3(4) of the Act that must be satisfied before a Court may grant condonation for an alleged creditor's failure to comply with the statutory precondition of prior notice to the organ of state, as alleged debtor.
- [8] This judgment, and the principles considered herein, are written with an emphasis on applicants who contend that they suffered damages due to innocently (or for some other reason unlawfully) being arrested, prosecuted and held in detention.
- [9] It is trite that, for condonation to succeed, the court must be satisfied independently in respect of each of the three requirements, without the strength of one requirement compensating for the failure of another to have met the standard required.
- [10] Despite this clarity, diverging judgments exist in relation to granting condonation to such applicants, most likely by virtue of several findings that the court has a wide discretion under the Act on the question of condonation. This judgment considers the specific facts to this matter with reference to whether general principles apply to for a court to apply, aimed at legal certainty.
- [11] The nature of the suggested wide discretion in the context of these particular types of applications involving arrest and detention will be dealt with in more detail below, in order to test the proposition.

- [12] Suffice it to say at the outset that the interrelationship between the requirement of “*reasonable explanation*” as the touchstone of the second “*good cause*” requirement and “*unreasonably prejudiced*” as element of one of the third requirement for condonation, deserve analysis. The “*reasonableness*” of delayed notice may well be tested with reference to the extent of prejudice caused by the alleged “*reasonableness*” of the delay. Notice is aimed, amongst other objectives, to allow the organ of state to terminate or mitigate the debt/damage causing act. The mere fact that condonation is only necessary after six months, does not *per se* make it reasonable if the notice is only two days after the end of the six months. It could often be argued that immediate or prompt notice is more reasonable, and delaying even a few days after the six months period aggravates the unreasonableness. The impression should not be created with potential creditors that conduct during the six-month period is irrelevant to the question of reasonable explanation. The facts of this matter illustrates the need to explain why no notice had been given even for the duration of the six-month period. It would make little sense if legislation is aimed at curtailing litigation against organs of state, only to be constantly subjected to opposing applications for condonation.
- [13] In what follows (i) the parties, (ii) the undisputed facts, (iii) the legal principles, and (iv) the reasoning in support of the ultimate orders made below will be dealt with in some more detail.
- [14] The details listed below are aimed at providing a platform for whatever procedures might follow in this matter after this judgement,<sup>2</sup> albeit that upon evaluation, the essential question in this matter is whether Kutuane has satisfied the court to show

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<sup>2</sup> See *Premier of the Western Cape Provincial Government NO v Lakay* 2012 2 SA 1 (SCA), par 14: “*At this stage I would merely add that if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable.*” It is not clear whether the SCA in *Premier* intended to go as far as holding that each such applicant for condonation under the Act would, as a matter of course, be entitled to leave to appeal due to the nature of the discretion involved. If that were to be the intention, it would invite an argument that it is now open for any failed applicant to, based on *Premier*, contend that because another court would be “*at liberty to decide the same question according to its own view*”, a court *a quo* would have little choice but to grant leave to appeal. Such approach would encourage instead of limit litigation against an organ of state. Each of the three obstacles to condonation, however, has specific elements to be established, some of which are patently not questions that leave room for discretion, as opposed to whether the requisite facts have been established. So, for example, prescription would be fact-dependent, and not a matter of wide discretion. More is said about this below, in particular with reference to the second and third requirements.

“good cause” for his failure to give timeous notice, and if not, it might render an analysis of all other considerations unnecessary.<sup>3</sup>

***The Applicant:***

[15] Kutuane is an adult male businessman and alleges he is an operator of a metered taxi business. He is cited as plaintiff in the main action to which this application relates.

***The Respondents:***

[16] The 1<sup>st</sup> Respondent (1<sup>st</sup> Defendant in the main action) is cited as the Minister of Police, the Honourable General Bheki Cele, in his official capacity as the executive head of the South African Police Service.

[17] The 2<sup>nd</sup> Respondent (2<sup>nd</sup> Defendant in the main action) is cited as the National Director of Public Prosecutions, Adv. Shamila Batohi, in her official capacity as the National Director of Public Prosecutions.

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<sup>3</sup> It is arguable that the element of “good cause” equally involves matters of hard facts in relation to the reasons for the delay, as opposed to a mere wide discretion. It cannot be said that a discretion remains despite the absence of facts on “*how [the default] really happened*” (see *infra*) and when it happened. What if no reasonable explanation is presented by an applicant (i) in the sense of “*whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously*”, (ii) or in the sense 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*”? (Both quotes are from *Madinda v Minister of Safety and Security* 2008 4 SA 317 (SCA) par [11] and [12]). Is a discretion that is eligible for reconsideration involved, if factually the thresholds quoted above had not been met? If these thresholds had factually not been met, there would be nothing to “*mitigate*”, in the words of *Madinda supra*. More consideration will be given to this below in the context of “*innocent*” applicants acquitted in criminal prosecution. Suffice it to say that the courts have narrowed down the requirements for “*reasonable explanation*” in principle, and by way of application to specific facts (thus setting precedent), and significantly the wording of the Act also alludes to the deemed consequences of not “*exercising reasonable care*” in obtaining knowledge of the facts, save where prevented by the conduct of the organ of state. Obtaining the required facts and acting on it must both be with reasonable effort. Emphasis must certainly be placed on the fact that in applications such as the present, the alleged innocence is immediately/promptly within the actual or deemed knowledge of the accused/arrested applicant. The same applies to knowledge of deprived income/other prejudice after each day of detention. If the South African Police made the arrest, and the individual is being prosecuted, knowledge of the organ of state is promptly obtainable by “*exercising reasonable care*” (see section 3(3)(a)). It is in this context that “*the facts giving rise to the debt*” has been emphasized in par [2] above. It almost follows logically that absent proof of prevention by the organ of state, the threshold defined in *Madinda*, is hard to overcome in respect of knowledge of the facts. What remains is an explanation why it was not followed through with a notice immediately after, or at worst even before the end of six months after arrest.

- [18] The 3<sup>rd</sup> Respondent (3<sup>rd</sup> Defendant in the main action) is cited as the University of Witwatersrand, a Higher Education Institution, established in terms of the Higher Education Act 101 of 1997.
- [19] The 4<sup>th</sup> Respondent (4<sup>th</sup> Defendant in the main action) is cited as G4S Secure Solutions (Pty) Ltd, a private security company registered in terms of the Companies Act 61 of 1973, as amended.
- [20] The 5<sup>th</sup> Respondent (5<sup>th</sup> Defendant in the main action) is cited as Lebohani Mpofu, in his personal and official capacity as a member of the South African Police Service, an adult male person and currently employed as a Police Officer within the South African Police Service and stationed at Hillbrow Police Station, Johannesburg.
- [21] The 6<sup>th</sup> Respondent (6<sup>th</sup> Defendant in the main action) is cited as Mr. Skhosana, an adult male person, employed by the 4<sup>th</sup> Respondent as security manager, posted and managing security and access control at the 3<sup>rd</sup> Respondent's campuses.

***Factual background:***

- [22] The factual analysis below is based on Kutuane's version in the papers filed. The iteration thereof is not intended to be a finding on the correctness thereof. For purposes of this judgment, the facts are merely assumed to be correct, until finally determined in the pending action.
- [23] On 16 May 2016, at about 10h00, at Wits Medical School, St Andrews entrance, Kutuane was allegedly arrested without reason, detained and further detained.
- [24] At the time of the alleged wrongful, unlawful arrest, detention and further detention, the Respondents alleged that Kutuane had committed an offence of armed robbery with aggravating circumstances, or as an accomplice thereto. Kutuane was taken to Hillbrow Police Station, where he was further detained at its holding cells.
- [25] Subsequent to the alleged unlawful, wrongful arrest, detention and further detention, Kutuane was charged with the alleged robbery with aggravating circumstances and as being an accomplice, under Case Number 432/05/2016, OB 816/05/2016, SAP

14224/05/2016 and Notice in terms of Section 35 of Act 108 of 1996<sup>4</sup> with serial number R1236734.

- [26] Kutuane first appeared at court on 18 May 2016, when the case was postponed for an identity parade.
- [27] Kutuane alleges that on his first court appearance, the 5<sup>th</sup> Respondent provided members of the 2<sup>nd</sup> Respondent with false and incorrect information to the effect that the 5<sup>th</sup> Respondent had attended to the address provided by Kutuane. However, Kutuane contends that such information was false and incorrect to the extent that the 5<sup>th</sup> Respondent never attended to the premises, because Kutuane's wife had been waiting for the 5<sup>th</sup> Respondent, but he never arrived. This false information resulted in Kutuane being detained beyond the initial 48 hours.
- [28] The 5<sup>th</sup> Respondent then requested that Kutuane be further detained for a further period of seven days in order for the 5<sup>th</sup> Respondent to continue with further investigation. The court granted the 5<sup>th</sup> Respondent postponement for further investigation.
- [29] After a period of seven days, Kutuane appeared before court for a bail application.
- [30] Initially, the 5<sup>th</sup> Respondent did not oppose bail. However, prior to the hearing the 5<sup>th</sup> Respondent deposed to an affidavit opposing bail on the basis that Kutuane was involved in vehicle theft, albeit that Kutuane had never been charged for such a crime.
- [31] On the day of the bail hearing, the 5<sup>th</sup> Respondent requested a further postponement in order to further investigate the charge of theft of a motor vehicle and to attend to the panel beater who had allegedly lent Kutuane a courtesy car, whilst he was allegedly busy repairing Kutuane's car.
- [32] Kutuane had given the 5<sup>th</sup> Respondent the physical address of the panel beater and the registration of Kutuane's vehicle, and on his return from the panel beater, the 5<sup>th</sup> Respondent informed Kutuane that he had taken a picture of Kutuane's car. However,

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<sup>4</sup> The reference to Act 108 of 1996 is the now replaced reference to "The Constitution of the Republic of South Africa". A formal "Notice" is not required in terms of Section 35 of the Constitution.

such information was allegedly never tendered and/or placed before the court during Kutuane's bail application. Kutuane alleges that such information would have resulted in bail being granted.

- [33] Kutuane alleges that bail was denied on the strength of false information provided by the 5<sup>th</sup> Respondent to members of the 2<sup>nd</sup> Respondent.
- [34] Kutuane alleges he was remanded in custody due to members of the 2<sup>nd</sup> and 5<sup>th</sup> Respondents' persistent opposition to bail without any justifiable reasons, and Kutuane alleges he was denied his constitutional right to freedom in terms of section 21 of Act 108 of 1996 [*sic*].
- [35] On 6 June 2016, Kutuane appeared for another bail application. During the hearing the 5<sup>th</sup> Respondent informed the court that he was opposing bail on the basis that the vehicle driven by Kutuane was stolen, for which, as aforesaid, still no charge had been made against Kutuane.
- [36] On 10 June 2016, on the strength of the 5<sup>th</sup> Respondent's false, incorrect, and misleading evidence and/or alternatively, based on evidence presented before the court, Kutuane was again denied bail.
- [37] On 15 September 2016, Kutuane again applied for bail, during which he was represented by a certain Mr. Mashinini. On which day, the Honourable L van der Schyff refused bail and remanded Kutuane in custody until 28 September 2016.
- [38] On 28 September 2016, the matter was further postponed and Kutuane was again remanded in custody.
- [39] Before the commencement of trial, Kutuane engaged the services of another attorney, a Mr. Leischer, to represent him during the upcoming criminal trial.
- [40] On 5 May 2017, the matter proceeded to trial, but was postponed to September 2017.
- [41] On 7 September 2017, the matter proceeded to trial, but was postponed to 8 September 2017.

- [42] On 21 December 2017, Kutuane again approached the court with another bail application on the basis that he had not been charged with vehicle theft.
- [43] Subsequent to the refusal of bail on new facts, Kutuane was again remanded in custody until February 2018, when trial resumed.
- [44] The criminal trial was postponed on several occasions until Kutuane was acquitted on 2 July 2018.

***Kutuane's service of notice in terms of the Act:***

- [45] The analysis below is again based on Kutuane's version on the papers filed. The iteration thereof is not intended to be a finding on the correctness thereof. For purposes of this judgment, the facts are merely assumed to be correct, until finally determined in the action.
- [46] On 28 August 2018, a notice in terms of section 3 of the Act was served on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' offices and/or alternatively on the office of the National Commissioner of the South African Police Service on 10 September 2018, being the Executive Head of the 1<sup>st</sup> Respondent.
- [47] On 26 September 2018, Kutuane's then-attorney received a letter from the Legal Service of the University of Witwatersrand, acknowledging receipt of the letter dated 28 August 2018.
- [48] On 22 October 2018, the 1<sup>st</sup> Respondent acknowledged receipt of Kutuane notice dated 28 August 2018.
- [49] Kutuane alleges that, subsequent to the 1<sup>st</sup> Respondent having received the notice and confirming that it will be addressed to the relevant commander and/or department, the 1<sup>st</sup> Respondent did not raise any issues and did not record that Kutuane's notice was not compliant with the provisions of the Act.

***The anomalous procedural history of the matter:***

- [50] Kutuane ended up issuing summons in the main action only on 16 May 2019, exactly three years after his arrest, and several months after being acquitted. He had deemed knowledge of his failure to give timeous notice, but proceeded without prior application for condonation.
- [51] On 3 June 2019, the 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> Respondents (as organs of state) filed a plea which raised a special plea of non-compliance with the provisions of the Act.
- [52] As aforementioned, Kutuane brought the application only on 29 April 2021, almost two years after the special plea by the organs of state, and almost three years after the belated notice in terms of section 3 of the Act. The effect of the delayed conduct of Kutuane to undermines the objectives of the Act. The reasoning appears to be that once prescription has arguably been interrupted at the eleventh hour, the organs of state should no longer have the benefit intended by the Act, namely, not to have to unearth evidence and witnesses several years down the line. It is hard to reconcile the express and implied objectives of the Act with allowing a creditor to wait until the end of the three-year prescription period to take action in respect of condonation. Once the six-month period has lapsed, the intended creditor should not be allowed, absent explanation, to prejudice the organ of state by not applying asking for or applying for condonation immediately, instead of waiting until close to the three-year prescription period to issue summons, and ad only midstream such action apply for condonation. It is a further consideration relevant to “*reasonable explanation*” and “*unreasonably prejudice*” to the organ of state.
- [53] Although the replying affidavit was delivered promptly on 11 June 2021, this application for condonation was only finally set down for argument during the second week of November 2023. If successful, it is anyone’s guess by when a trial date would be allocated and, after some usual postponements, when the matter will finally be in court.
- [54] As alluded to above, with reference to the objective of the Act, a patent anomaly arises from the difference between the peremptory six-month period in section 3 of the Act, the ultimate date of summons, the condonation application, and the final hearing in the distant future.

- [55] Unless there is proof of prevention by the organ of state of obtaining knowledge of “*the facts giving rise to the debt*”, the irony is patent. One would question the benefit of the notice provision in section 3 if summons can be delayed for yet another 30 months and the ancillary proceedings can be dragged out for years. How does that benefit or protect the organs of state against multiple claims by the millions of citizens potentially being creditors in terms of the Act? If the objective of a prescription period in the Act is aimed at prompt finality of legal disputes against organs of state, the notice provisions appear to merely notify the organ of state of the possibility of litigation which might in fact only follow two and a half years later. The difference in time between notice in terms of the Act and ultimate conclusion of litigation waters down the intended benefit of the Act, and perhaps it emphasises the need for strict compliance with the three grounds to be satisfied for condonation. It does not, however, address the anomaly that despite the need for prompt notice, a creditor can delay the process in a manner evident from the facts of this matter. Perhaps this urgently calls for legislative intervention to provide additional procedural guidance on litigation against an organ of state after timeous notice had been given.
- [56] Due to the allocation of the matter to an acting appointment of senior counsel, the challenges of delayed- or interrupted advocacy obligations, and the December/January *dies non*, delayed the formulation and handing down of this judgment, the substance of which had been formulated by end of February, but required editorial polish. An apology is extended to the parties for the contributory delay.<sup>5</sup>
- [57] Leaving aside the initial delay in relation to the notice in terms of section 3, the procedural chronology of this matter, much like others on the roll during the same week, also accentuated the anomaly between the mandatory strict time frames for prompt

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<sup>5</sup> In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) (2005 (6) BCLR 576; [2005] 1 All SA 326) par 39, Harms JA stated the following:

“*The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that Judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that “justice delayed is justice denied”, will become a mere platitude.*”

exchange of affidavits (exempted only through obligatory application for condonation in terms of Rule 27(3) if not complied with), juxtaposed by the availability and allocation of a hearing date, normally several months down the line.

[58] Although delay in handing down judgment in this matter is a mere fraction of the actual delay (taking into account the court recess), the remarks by Harms JA in footnote 4 above should equally apply to the role/obligations of the judicial process and whatever factors permit parties to occupy space on the judicial parking lot, free of charge, while systemic rust and dust immobilise the legal chariot, thus blocking, delaying or denying (as per the above aphorism) the right of access to the court, adverse to the objectives of section 34 of the Constitution: “34. *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*” Arguably absent or lacking from section 34 are the words “*through a prompt and cost-efficient process*”.

[59] In the sphere of damages claims against an organ of state,<sup>6</sup> section 3 of the Act is aimed at fast-tracking enforcement/resolution of such debts, in addition to the three-year extinctive prescription period applicable to such debts. If notice must be given within six months of knowledge of the “*facts giving rise to the debt*”, it appears anomalous to argue that an attempt at an application for condonation could be delayed for some two years, absent good cause for the latter delay. Presently no mandatory rule applies to the ambit of latter.

[60] The anomaly provokes the expression “*hurry up and wait*”. In the Constitutional Court, Brand AJ (as he then was in that forum) said in *Twee Jonge Gezellen (Pty) Ltd v Land & Agricultural Dev Bank of SA t/a The Land Bank*:<sup>7</sup>

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<sup>6</sup> *Vhembe District Municipality v Stewarts and Lloyds Trading (Booyens) (Pty) Limited and Another* [2014] 3 All SA 675 (SCA) par [16]: “*I accordingly hold, as the High Court did, that as the first respondent's claim is not a damages claim the [Act] does not apply to it.*” (emphasis added).

<sup>7</sup> 2011 (3) SA 1 (CC) (2011 (5) BCLR 505; [2011] ZACC 2).

*“We all know that the pace at which the wheels of civil justice are turning is unacceptably slow.”*

- [61] The Constitutional Court has explained the purpose of provisions similar to the Act in *Mohlomi v Minister of Defence*:<sup>8</sup>

*“Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it.”*

- [62] In a country where citizens complain that almost every sphere of government appears to fall apart, the judicial mainstay of the *trias politica* would be well served to be reminded of the oft quoted extra-judicial statement by Lord Goff of Chieveley in “Commercial Contracts and the Commercial Court” (1984) LMCLQ 382 at 391:

*“[The judiciary is] there to help [litigants], not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.”*

- [63] Albeit that parties are often not innocent when it comes to procedural delay, the absence of similar mandatory time frames for the period after the close of pleadings until the hearing date perhaps deserves some attention.<sup>9</sup>

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<sup>8</sup> 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559; [1996] ZACC 20) par 11.

<sup>9</sup> Compare research in New Zealand by Toy-Cronin, B., Irvine, B., Stewart, K., & Henaghan, M. (2017). *The Wheels of Justice: Understanding the Pace of Civil High Court Cases (Project Report)*. The benefit of judicial intervention through Rule 37A has been emphasised by the full bench of the Mpumalanga High Court in *Hlatshwayo and Another v Road Accident Fund* (324/2019) ZAMPMBHC 2 (24 January 2023). However, a moratorium has been placed in this division since 29 November 2023 on the right to apply under Rule 37A(1)(b) for application of this rule (subject to certain exceptions).

- [64] With borrowed inspiration from the New Zealand research,<sup>10</sup> it is fair to ask why advanced “civilization”, or at least with the benefit of vastly improved technology, the customers of the justice system could still justifiably pronounce the cynicism of Charles Dickens in *Bleak House* (1853) some 170 year later:

*‘This is the Court... which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give – who does not often give – the warning, “Suffer any wrong that can be done you rather than come here!”’*

- [65] Roscoe Pound (1906) in “*The Causes of Popular Dissatisfaction with the Administration of Justice*” wrote:

*“Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.”*

- [66] Academic writing on the two main objectives of any civilized justice system refers to the first objective as the desire of each individual to correct a wrong through dispute resolution as fast as possible, to avoid having to obtain it through force or violence. This must be juxtaposed to the prevailing cynicism in respect of the second theoretical objective of any civilized justice system, namely:

*“Together, these functions [of the judiciary] of private dispute resolution, rule creation, ordering of the capitalist economy, and providing a check on government, are a public good that goes beyond the interests of the individual who calls upon the system.”<sup>11</sup>*

- [67] Although arguably peripheral in most matters, the concerns about the pace of dispute resolution appear to be more pertinent in the context of the Act, sufficiently so to justify

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Toy-Cronin et al supra*, p2.

the remarks above. It is in the interest of justice, commerce, and civilisation at large for disputes to be determined promptly and cost effectively – more so where organs of state is at constant risk to face multiple claims. Meritless applications, or reckless reliance on the prospect of condonation consume the space of other litigation, burdening the courts at the expense of the constitutional touchstone of the right to access to the courts – justice delayed is justice denied. If the court roll becomes congested with condonation applications by criminally accused who regarded themselves innocent from the moment of arrest, the judiciary would act favourably by providing certainty on the prospects of success, as opposed to advocating a sentiment that the discretion is so wide that it invites a “*I will try my luck*” attitude. It is not a vague or theoretical issue. In *Nedbank Ltd v Thobejane & Similar Matters*<sup>12</sup> the full bench held:

*“The consequence is that the court roll in the Gauteng Division, Pretoria, is congested, resulting in matters which legitimately belong to the High Court being edged out and their adjudication delayed. Further, it increases the workload for judges, causing a delay in handing down judgments and the waiting period for dates of hearings. This results in the adage ‘justice delayed is justice denied’ becoming a sad reality in this division.”*

- [68] Although *Nedbank*’s case was in respect of the jurisdictional principle reversed on appeal, the Constitutional Court held the following in *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others*:<sup>13</sup>

*“As the High Court judgment in [Nedbank supra] shows, the problem has become worse. Therefore, although our final decision does not accept that of the High Court, we cannot make light of the real problem that court has highlighted. In the main, that is the problem of clogging up High Court rolls with matters falling within the jurisdiction of the magistrates’ court. Also, as I said when considering whether leave to appeal should be granted, the Gauteng Division and the Eastern Cape Division, another division where the central issue in this matter has been considered, are not outliers. So, we have a huge problem on our hands, a problem which — as the High*

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<sup>12</sup> 2019 (1) SA 594 (GP); [2018] 4 All SA 694 (GP) par 2.

<sup>13</sup> 2023 (3) SA 36 (CC) par 42.

*Court says in this matter — manifests in inordinate delays in the hearing and finalisation of matters in the High Court. That, of course, is a blot on the administration of justice.”*

[69] An active effort to provide legal certainty to prospective innocently accused, arrested and detained individuals would of course assist to alleviate or avoid the blot on the administration of justice.

[70] In what follows below, an attempt will be made to assist with some additional guidelines to provide certainty to similar creditors.

***When a debt is regarded as due in terms of the Act:***

[71] A compliant notice of “*the debt*” hinges on the principle stated in the latter part of section 3(3)(a) of the Act that “*a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge*”.

[72] It is evident from the essence of section 3, that the question of timeous compliance hinges on the moment in time when a “*debt may... be regarded as being due*”, and in turn on proof of the moment of actual or deemed<sup>14</sup> knowledge of “*the facts giving rise to the debt*”, and of the identity of the relevant organ of state as debtor. By when would a creditor with reasonable care have had “*such knowledge*”? The extent of knowledge recorded in the notice is that which has to be tested against “*reasonable care*”. How can an innocently arrested person escape the simple presumption that knowledge of innocence is virtually immediate upon being arrested? Is it not so that, generally speaking, all that remains is an explanation as to why such knowledge could not have been acted on?

[73] If that what is postulated above is correct, then it narrows down the risk embedded in contending for wide discretion that can be tested over and over again. It should serve as a

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<sup>14</sup> The term “*deemed*” is used here in the broad sense, within the meaning of “*must be regarded as having acquired such knowledge*” in the manner stipulated in section 3.

narrow guideline for what has to be alleged and established in order to satisfy a court in respect of the knowledge and prevention features.

***Contentions by Kutuane:***

- [74] Kutuane alleges that it is common cause that the impugned notice was served on the offices of the National Commissioner of the South African Police Service on 10 September 2018, being a period of 68 days after acquittal. This, however, was more than two years after his initial stated indignance at being arrested and detained innocently, which, even if providing different debts or causes of action, are based on the same simple set of facts. The extent of the debt might increase over time, but the initial “*debt*” is immediate.
- [75] Kutuane alleges that immediately after his acquittal, he approached his current attorney to assist him with the institution of the main proceedings against the Respondents.
- [76] Kutuane alleges he could not have instructed his attorneys to proceed to institute any legal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the logical reason that he was still being prosecuted, and in order to avoid piecemeal litigation against the two state entities. Could any of this ever be a reasonable explanation in order to establish good cause?
- [77] Kutuane argues he did not have to give notice within six months after his arrest, namely by latest 15 November 2016, in respect of the wrongful and unlawful arrest, and in the alternative that he could not have been expected, whilst exercising his constitutional right to defend any criminal charge brought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, also to give notice of his intention to institute legal proceedings against the same organs of the state. Is it a matter of either or? Clearly not. The Act requires action in the form of a “*notice*” once the basic facts are known. It does not contemplate the luxury of wait and see if some other, different or better position in relation to the basic facts evolve. One such fact is belief of innocence by applicants such as Kutuane, which stands unrelated to the outcome of any consequential or ancillary legal conclusion thereof.
- [78] Kutuane argues that, if indeed notice ought to have been given as early as 15 November 2016, then his notice would be late for a period of some 23 months.

[79] Kutuane argues that in such event the court should condone the late filing of the notices in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

[80] Kutuane accepted that he had to comply with section 3(4)(a) of the Act, which provides by way of summary of paragraph [2] above, that if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), he had to apply to a court having jurisdiction for condonation of such alleged failure, in his words, to satisfy the court that: -

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exist for the failure by the creditor; and
- (iii) the organ of state was not unreasonably prejudice by the failure.<sup>15</sup>

[81] The essential facts that Kutuane relies upon are that he was arrested on 16 May 2016 and that he was subsequently detained and further detained for a period of 747 days, at the behest of the 5<sup>th</sup> Respondent who lied to the court in stating that the vehicle which was found in Kutuane possession was a stolen vehicle and had been started with hot wiring, being an aversion (in his words), which is in any way contrary to the SAPS13 report, a copy of which he had annexed to his founding affidavit.

[82] Due to circumstances beyond his control, Kutuane alleges he could not launch this application for condonation between 24 March 2020 until date of signature of the affidavit, hence Kutuane requested the Court's indulgence in that respect.

[83] Kutuane submits that the claim against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not prescribe on 15 May 2019, being three years after his arrest, but rather only three years after 2 July 2018, when he was acquitted.

[84] Kutuane also relies on the provisions of the Constitution of the Republic of South Africa,<sup>16</sup> contending that he has a right to a fair trial and to challenge any arrest, detention and further detention, and further that his matter be heard in an open court.

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<sup>15</sup> Section 3(4)(b) of the Act.

<sup>16</sup> Act 108 of 1996 [*sic*]. Specifically section 12(1)(a) and (b) read with sections 35 and 34 of the Constitution, 1996.

- [85] Kutuane argues that he has a constitutional right to defend in the criminal actions instituted against him by an organ of state, in this case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- [86] After sifting through volumes of paper in this matter, the core contention, or “*pith*”<sup>17</sup> of it, is the allegation by Kutuane that he suffered damages after he was (according to him) innocently arrested on 15 May 2016 and detained for 747 days. But he did nothing about it until long after his release, when he gave notice to the organs of state.
- [87] Such notice had to inform the organs of state, as alleged debtor, of “(i) the facts giving rise to [a] debt; and (ii) such particulars of such debt as are within the knowledge of the creditor”<sup>18</sup> in terms of section 3(2)(b) of the Act. Such “*debt*” relates to that “*for which an organ of state is liable for payment of damages*” (emphasis added).
- [88] The wording of 3(2)(b)(ii) indicates that it is not necessary for a creditor to have knowledge of all facts in support of the debt/damages, only such particulars of which the creditor has knowledge – some basic initial knowledge is enough, more about this aspect below. However, the first day of not being able to work, or earn money upon being arrested innocently, is sufficient knowledge of the facts to comply with 3(2)(b)(ii). It is significant though that, contrary to the first leg in section 3(2)(b)(i), the second leg in section 3(2)(b)(ii) (“*such particulars of such debt as are within the knowledge of the creditor*”) is not part of the definition of when a debt becomes “*due*”. This distinction is highly relevant to avoid confusion about the requirement for “*due*”. It requires knowledge of the “*facts*”, not knowledge of “*damages*”.

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<sup>17</sup> There is benefit in often referring to the sentiments expressed in *Schietekat v S* [1999] 1 SA 131 (C) by Slomowitz AJ:

“*I marvel at the flood of learning in which one must sink or swim in order to adjudicate what were once taken to be relatively straightforward matters...*

*It is sufficiently taxing, I find, to have to come to grips with the facts of a case and the principles of our common law to be applied to them. The time has perhaps arrived seriously to question the value of jurisprudential inebriation caused by having to imbibe vast quantities of what are more often than not merely particular instances of general principle. Consequently I begin with an apology for being impelled by circumstance to add to the mountain of authority. I will, I hope, be brief and seek to get to the pith of the problem by burdening my remarks with as little reference to the books as possible.*”

<sup>18</sup> The Act refers elsewhere unnecessarily to “*he or she or it*”, as opposed to simply “*the creditor*”.

[89] As alluded to above, facts similar to this matter provokes the floodgates to be opened for every criminally accused person that ultimately gets acquitted, by waiting until after acquittal before proclaiming that damages resulted from the alleged innocent prosecution, arrest and detention. Proclaimed innocence being the kernel fact in each such case, it stands to reason that such a person has full knowledge of the damage-causing event (“*facts giving rise to the debt*”) shortly after arrest or detention longer than 48 hours (see section 50 to 60 of the Criminal Procedure Act, 51 of 1977). On ordinary probability the “*facts giving rise to the debt*” would be within the knowledge of the innocent criminally accused at an early stage. Those are the same facts that are required to be put forward in the prerequisite notice.

[90] The general, and fact-specific significance of the repeated use in section 3 of the Act of the phrase “*facts giving rise to the debt*” (alluded to herein at the outset), for purposes of bringing and deciding an application for condonation, will be dealt with in more detail below. Suffice it to say, in the context of damages claimed by innocent persons being criminally prosecuted, the repeated phrase assists to simplify the task of an applicant (i) to present facts in support of the due date of the “*debt*”, and (ii) to present facts in support of the “*reasonable explanation*” element of “*good cause*”, all of which the court has to be satisfied of, absent which an application should not be pursued or must fail.

[91] Apart from condonation, Kutuane seeks punitive costs orders against those opposing the condonation application, without any substantiation, other than to provoke opposition.

***Judicial approach to condonation in terms of the Act – general evaluation of the facts:***

[92] The special plea by the organs of state contends that Kutuane, as plaintiff in the action, had failed to give the requisite notice within six months.

[93] Once the essential undisputed facts have been identified, little needs to be said about the irrelevant ancillary matters.<sup>19</sup>

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<sup>19</sup> Cf *Sello v Minister of Police NO and Another* (89077/16) [2022] ZAGPPHC 233 (13 April 2022) par 26 where Sardiwalla J expanded on various principles that did not appear to be relevant to the basis upon which the

- [94] Kutuane alleged in par 5.5 of his founding affidavit that he could not have instructed his attorneys to proceed to institute any legal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the logical reason that he was still being prosecuted, and in order to avoid piecemeal litigation against the two state entities. The latter aspect ignores that the giving of a notice does not constitute litigation, nor does it preclude a subsequent notice or the option to simply not proceed in terms of the notice.
- [95] In their answering affidavits, the opposing Respondents deny the allegations and pointed out that these contentions by Kutuane are entirely unsubstantiated by any fact or legal basis.
- [96] Kutuane's reference to "*piecemeal litigation*" is unrelated to or at the very least does not fully engage with the prevention principle despite the provisions of section 3 of the Act. It appears to be merely relying on alleged convenience or inconvenience.
- [97] The former basis, namely that Kutuane could not have instructed his attorneys, has not been substantiated by any level of detail, but in any event it is contradicted by the undisputed fact that Kutuane had the benefit of legal representation long before his acquittal. It begs the question whether the right to instruct an attorney prior to giving notice of the requisite knowledge would ever be a reasonable explanation, absent facts that establish failed attempts to give a notice without the help of an attorney. If absurdly such reasoning were to be given traction, it could equally serve a plaintiff to escape the effect of prescription or compliance with almost any obligation, by simply resorting to the prior need for legal advice.
- [98] The plethora of decisions on what is required for a reasonable explanation in the context of the Act need not be repeated here. Suffice it to say that it was made clear, in a more general context, as far back as *Silber v Ozen Wholesalers (Pty) Ltd*<sup>20</sup> that "[i]t is enough for present purposes to say that the defendant must at least furnish an explanation of

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judgment ultimately concluded, namely that the notice in terms of section 3 of the Act had been given in time, from which it follows that no condonation was required: "*The applicant, as I have found, submitted the letter within the prescribed six-month period as set out in section 3(2)(a) of the Act and therefore an application condonation in terms of section 3(4)(b) was in fact unnecessary.*"

<sup>20</sup> 1954 (2) SA 345 (A) at 353.

*his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.*” The criticism by the Court of the manner in which the reasonable explanation was furnished in *Silber*’s case is an instructive guideline for a court on how to assess whether a particular applicant has explained enough. It is important though, to consider “*reasonable explanation*” within the specific context of the Act.

[99] More recently, and more directly relevant to the Act, in *Premier v Lakay supra* the Supreme Court of Appeal repeated in similar terms: “*The second question on which a court must be satisfied is that 'good cause' exists for the failure by the creditor to give the notice. The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives*”<sup>21</sup> (emphasis added).

[100] A more definitive example in the context of the Act appears in par [22] of *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*:<sup>22</sup>

“[22] *An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. It amounts to this. During the entire period of approximately eleven months she was considering whether or not to appeal the decision of the Supreme Court of Appeal. During this period she sought advice from a number of individuals whom she has not disclosed. In addition she alleges that she does not have unlimited funds although she admits that this is not a compelling reason for the delay. She has not furnished any explanation as to why it took approximately eleven months for her to decide whether or not to appeal. Nor has she furnished any explanation how she overcame her funding difficulty.*” (emphasis added).

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<sup>21</sup> Par 17.

<sup>22</sup> 2008 (2) SA 472 (CC).

- [101] The extensive quote from *Van Wyk supra* is aimed at pointing to the kind of omissions that would justify a court to dismiss an application on the basis that a “*reasonable explanation*” in the context of the “*good cause*” requirement has not been satisfied.
- [102] The proposed narrower ambit of “*reasonable explanation*” for purposes of the Act has been ventilated in above.
- [103] Still pursuing the objective to provide legal certainty in the context of similar applications, it remains significant that the phrase “*the facts giving rise to [a] debt*” is repeated in two different contexts of section 3 of the Act: (i) it instructs the required contents of the notice to be given, and (ii) it defines when a debt of an organ of state becomes due. In short, the requisite notice must “*set out*” the exact facts required for a debt to become due, being in turn the moment when prescription is deemed to commence, or “*regarded*” as being due. The notice, once given, represents the creditor’s own version of what he is required to know in order to interrupt prescription.
- [104] In cases like the present, the wording in the belated notice ultimately given by the creditor, for which condonation is applied, should serve as major guide to determine if “*good cause*” exists for not having relied on such knowledge earlier or timeously. After all, it is the creditor’s self-proclaimed innocence that constitutes the starting point of the requisite knowledge. Once arrested, all the requisite facts are known. An applicant would have to explain (i) when each aspect of the knowledge first came to it, (ii) that the knowledge in the notice was not available prior to the expiry of the six-month period, and (iii) why it was ultimately only acted upon when the notice was given. The facts from which the debt arises would have had to be concealed or excluded from the applicant’s knowledge for some reason that is explained in detail. On a proper interpretation of the Act, it is arguable that such explanations would be limited to “*the organ of state wilfully prevent[ing] [the creditor] from acquiring such knowledge*”. If not, what purpose does such wording serve? In the context of innocently arrested individuals, logic would dictate that, absent exceptional circumstances, the only remaining alternative reason would have to relate to actual-, physical prevention of giving the notice itself, despite knowledge of the facts from which the debt arises. To widen the nature of the discretion is likely to undo or disregard the consequences of the

deeming provision section 3(3)(a), if not the entire objective of the Act. A wider discretion would result in more litigation, instead of the intended less.

[105] It serves to test the approach analysed above to judgments in similar cases. In par [13] of *Sello supra*, it makes no reference to what actually prevented the giving of a notice until the plaintiff had been released from incarceration or until he consulted with an attorney. Incarceration and lack of consultation with an attorney has little or nothing to do with knowledge of the requisite facts. The mere conclusion of such circumstances in the judgment deprives it of guidance or precedent for the benefit of similar applications. In line with the wording of the Act, knowledge of the facts, not the law (as opposed to ignorance of the Act, to which different principles might apply), must have prevented the creditor/applicant in order for a debt not to become due, and in order to achieve the result that a notice could justifiably be given later once the prevention no longer existed. The “*debt*” in question (in the Act), for purposes of considering prescription, is a “*debt by an organ of state*”. *Sello supra* appears to have omitted consideration of section 3(3)(a) of the Act which, contrary to the Prescription Act 68 of 1969 (“the Prescription Act”), provides an express definition for when a debt by an organ of state becomes “*due*” in the context of the Act. That definition, in turn, logically determines when such a debt of an organ of state is due for purposes of the Prescription Act. Section 12(1) of the Prescription Act reads: “(1) *Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.*” (emphasis added).

[106] Significantly, section 3(3)(a) of the impugned Act in this matter stipulates the due date, with an express definition of “*due*”. Unlike any other debt under the Prescription Act, the Act defines when a debt against an organ of state becomes due. One simply reads section 3 of the Act to know when a debt against an organ of state becomes due. Section 3 narrows down the provisions of “*due*” and adds the obligation to comply with “*reasonable care*”. Where the Act requires “*reasonable care*” to obtain the requisite knowledge, it would be anomalous for a court to water down the express wording of the Act with a discretion that goes wider than “*reasonable care*” and the obligation to act on such knowledge within six months.

- [107] For the reasons detailed below, the use of knowledge of the “*cause of action*” is not within the meaning of the Act, properly interpreted; instead the Act dictates the use of the express wording, namely “*the facts giving rise to [a] debt*” against an organ of state. It refers to the innocent applicant’s perception of the facts that causes damage, as opposed to some legal opinion- or confirmation of it in due course.
- [108] A debt against an organ of state is due when “*the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge [of the facts giving rise to the debt]*”. To determine whether such a debt is due, one should consider the wording in the ultimate impugned notice in terms of the Act in respect of which condonation is sought. The relevant facts giving rise to the debt would appear on the creditor’s own version from the notice itself. It is a simple issue to then determine, with regard to such recorded and notified knowledge, when the debt became due. Decided cases dealing with general principles on when and how a debt becomes due do not assist insofar as they do not have regard to the express provisions of the Act that stipulate when a debt against an organ of state becomes due.
- [109] In another decision that distinguished the *Sello* judgment on the facts, *N.A.M. v MEC for Health, Gauteng Province*,<sup>23</sup> Moultrie AJ held there was “*no allegation that the applicant was not aware of the identity of the respondent and of the facts giving rise to her claim, or that the respondent wilfully prevented her from acquiring such knowledge.*”<sup>24</sup> Again, the simple test is to compare the allegations in the section 3 notice, with reference to the creditor’s own words, to determine when such knowledge was actual, or must be deemed to exist. The *N.A.M.* judgment refers to “*lack of knowledge*” of the notice requirement as a consideration for “*good cause*”. Reliance on “*ignorance of the law*” needs to be dealt with great circumspection, as it is bound to

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<sup>23</sup> [2023] JOL 61930 (GJ).

<sup>24</sup> *Ibid* par 5.

convert strict compliance with the statutory gateway to litigation through prior notice, into a floodgate for collateral litigation upon failure to comply.

[110] As stated above, in the context of the Act providing express definition on when a debt is due, consideration of “*good cause*” with reference to “*when the cause of action arises*” is inappropriate. *Segodi v MEC for the Mpumalanga Department of Health*<sup>25</sup> also refers to “*why he did not serve the notice within six months from the date of the cause of action arising*.”<sup>26</sup> The legislator deliberately referred to facts, not some legal phrase such as “*cause of action*”.

[111] In *Landela v Minister of Safety and Security*<sup>27</sup> the court equally did not rely on *the facts giving rise to the debt*, but instead analysed the particulars of claim that eventually followed, instead of what was recorded in the notice itself, and what could have been recorded. A person that is innocently arrested and deprived of the ability to earn income immediately knows the requisite facts from which a debt arises. The facts required for a notice should lead the enquiry, not the particulars of claim. The nature and extent of the alleged debt is not an essential element of the notice – only “*such particulars of such debt as are within the knowledge of the creditor*” are required. It precludes the right to sit and wait until full or more particulars of the debt is known.

[112] In summary, to simplify these kind of applications for condonation, a creditor and its legal representatives would be well advised to realise that what has/had to be stated in the notice in terms of the Act, may well seriously impede a subsequent argument based on lack of knowledge for purposes of condonation, unless a clear case for prevention can be established. If an organ of state has acted, or failed to act, it is often axiomatic that some form of “*debt*” is instantaneous. Those simple facts justify the giving of a notice and allow the organ of state to act/stop the harm or to mitigate it. Such essential facts in a notice will not improve over time, but the risk of not obtaining condonation will increase.

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<sup>25</sup> 2024 JDR 0032 (MN).

<sup>26</sup> *Ibid* par 29.

<sup>27</sup> 2024 JDR 0031 (MN).

[113] Once the basic facts are known,<sup>28</sup> the need for reliance on prevention in support of a condonation application is expressly prompted by the Act, arguably to the exclusion of any other ground in support of good cause as an essential element to satisfy the court to grant condonation. Ultimately a “*reasonable explanation*” comes down to what has prevented (i) acquiring the knowledge or (ii) the ability to act on the knowledge, despite proof of having exercised reasonable care in obtaining and acting on the simple facts. An applicant must explain that despite “*reasonable care*”, which has to be detailed, it could not have obtained or have acted on the obtained knowledge.

***Facts giving rise to the debt revisited:***

[114] It is undisputed that Kutuane was arrested on 16 May 2016 and detained until 2 July 2018, some 747 days, afterwards being acquitted.

[115] It is not in dispute that notice had to be given by Kutuane in terms of section 3 of the Act: the question being (i) whether the court has been satisfied that the notice was out of time, and if so (ii) whether the court “*may*” condone “*such failure*” to comply.

[116] It serves to revisit wording of impugned notice, which relied on the following factual allegations:

“... [Kutuane was arrested on 16 May 2016 and detained for 747 days] for alleged armed robbery and stood trial from date of arrest until date of acquittal, being 2 July 2018.”

“[Kutuane claims payment for] unlawful arrest, detention and further detention, malicious prosecution, past loss of income and future loss of income, future loss of employability, damage to dignity and contumelia.”

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<sup>28</sup> See *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika* 2001 (1) SA 987 (SCA), par [13]:

“Reeds ten tyde van die opstel van die brief van 22 April 1994 was die eiser op hoogte van die basiese feite [basic facts] waarop hy ‘n eis teen die verweerder kon inklee (*Van Staden v Fourie, supra, te 216B-F*) - weliswaar ‘n eis wat op die oog af karig was, maar nietemin ‘n geldige eis. Menige eiser wat uiteindelik suksesvol was, het sy saak in die verlede bloots aangepak mits dit origens op eie pote kon staan.”

- [117] It follows expressly, without the need for any interpretational debate, that a debt is due on the date of knowledge the facts set out in the notice, being the date when the six-month period commences.
- [118] Kutuane has failed to establish that “*such particulars of such debt as are within the knowledge of the creditor*” only came to his knowledge after his acquittal, or that just cause existed for not acting on such knowledge when, “[*he*] *could have acquired it by exercising reasonable care*”.
- [119] Even if it could be argued that Kutuane did not have to establish and satisfy the court of actual or deemed knowledge, the obligation to satisfy the court of “*just cause*” involves allegations to show when and how he obtained each element of the requisite knowledge required by the Act (or what found its way into the notice) and that once the facts came to his knowledge he did not or could not have acted on such knowledge. In this sense, knowledge of “*the facts giving rise to the debt*” are the very *probantia* under consideration for the “*reasonable explanation*” leg of “*just cause*”. To put it differently, actual or deemed knowledge of “*the facts giving rise to the debt*” invokes the duty on an applicant to satisfy the court that it could not have been obtained earlier than the six-month period, or once obtained it could not have been acted on within six months, and if so, why and how only later.
- [120] In the present matter “*the facts giving rise to the debt*”, detailed in the notice, had been experienced by Kutuane himself from the moment of his arrest, when he (on his version by necessity) was all along innocent and uninvolved in the alleged armed robbery.
- [121] It follows that Kutuane had to give notice long before he was finally acquitted. There is no need to determine the exact date for the commencement and end of the six-month period, save for the fact that by the date of acquittal the period had come and gone.
- [122] The relevant organs of state would be well served by informing as standard procedure each arrested or criminally accused person. The time and expense in litigation such as the present could pay for multiple notices to point to section 3 of the Act at various Police Stations, Magistrate Courts and Correctional Service premises. Added legislation in this regard would assist to achieve the objectives of the Act. In turn it

would alleviate the burden of the courts in having to wrestle through applications such as the present at the expense of other litigants who profess to be equally innocent in relation to its disputes.

- [123] The next question is whether Kutuane has satisfied the court in respect of any of the remainder of the three grounds for condonation. It is trite that if any of the three grounds have not been established, the court has no discretion, power or jurisdiction to grant condonation.

***Prescription of the debt:***

- [124] Kutuane argues that the debt has not been extinguished by prescription, which on his version would only have been on 1 July 2021, three years after his acquittal. The facts recorded in the notice, from which the debt arises, were within his actual or deemed knowledge upon his arrest and in any event at the latest after the first refusal of bail.
- [125] If benefit is given for the 48 hours after the arrest until being charged, and by when Kutuane had not been released, it will be assumed for purposes of this judgment only, that prescription was interrupted with service of summons on 16 May 2019, shortly before the end of the statutory three-year period.

***Has good cause been shown:***

- [126] Kutuane's primary argument is that the cause of action (as he puts it) only arose on 2 July 2018, subsequent to his acquittal and further alternatively as Kutuane had acquired knowledge and details of the debtors and/or further alternatively an organ of state from the date of his acquittal.
- [127] Kutuane relies on the contention that his cause of action only arose upon his acquittal. On this basis Kutuane contends that the notice was given within six months of the cause of action arising.
- [128] Kutuane argues that the court should not rely on an earlier date due to the fact that he had been denied the bail and was incarcerated for the entire period of his prosecution.

[129] In *Minister of Police and Another v Yekiso*,<sup>29</sup> Davis J held:

*“[24] By contrast, in Skom v Minister of Police and others: In Re: Singatha v Minister of Police and another [2014] ZAECHC 6 the court held that the fact of incarceration did not on its own prevent a plaintiff from giving instructions to an attorney to institute proceedings on his behalf. It also emphasised that, on the facts, the plaintiff was legally represented during his criminal trial and had not pleaded that the detention had made it 'difficult to awkward' to instruct an attorney to institute proceedings. To suggest otherwise would merely to have engaged in speculation.”*

[130] It is doubtful that the mere fact of incarceration or access to an attorney would in itself create support good cause, unless it results in absolute prevention. An applicant would have to explain why, because of his innocence, no other means existed to give notice of the facts that deprives him of freedom or income, resulting in loss. Based on the reasoning in the previous section, Kutuane in any event simply failed to explain step by step when he obtained the last element of his requisite knowledge of the debt and why he did not give notice earlier.

[131] It is not merely the period after expiry of the six months that weighs in on the question of good cause or prejudice, but also the reasons for not giving notice prior to the expiry of the six-month period.

***Prejudice to an organ of state:***

[132] Kutuane argues that the Respondent will not suffer any prejudice due to alleged non-compliance with the provisions of the Act, if any. The organ of state was “*prejudiced*” every day after Kutuane had knowledge of his alleged innocent arrest, without giving notice of it. If Kutuane gave notice as contemplated in the Act, the relevant organs of state could have acted there and then to limit the extent of the debt, as opposed to allegedly having created the debt. It is hard to see how this would not be the situation in all similar cases. The sooner the organ of state is notified after the occurrence of the facts, the less the prejudice. As stated above, significantly it is not merely the period after expiry of the six-month period that weighs in on the question of good cause or

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<sup>29</sup> 2019 (2) SA 281 (WCC).

prejudice, but also the reasons for not giving notice prior to the expiry of the six-month period.

[133] Kutuane, instead of providing substance to the absence of prejudice to the organs of state, argues that he will suffer severe prejudice if condonation is refused, as he will not have the opportunity to challenge the lawfulness of the arrest, detention, further detention and malicious prosecution and that the Respondents will get away with their unconstitutional conduct.

[134] Kutuane argues that the Respondents' conduct will be condoned in the event that this application is refused, which could not be in the interest of justice, and that the members of the public will accept that the organs of state will get away with any conduct of injustice.

[135] Kutuane argues that the wrongful, unlawful arrest, detention, further detention and malicious prosecution transgressed his constitutional rights, which the courts have jealously guarded against and as such should be done in this matter.

[136] The absence of prejudice requirement is not based on balance of prejudice or balance of convenience. Kutuane's application is misdirected in this regard.

***Incarceration and delay:***

[137] Kutuane argues that the period of his incarceration should not be considered for purposes of the Act. This is anomalous. In simple terms, Kutuane relies on the perpetration of the very harm about which he did nothing to notify the organ of state about. Again, this would seem to be applicable to all similar applications.

[138] Kutuane submitted that the said period of delay is not inordinate, having regard to the fact that he was incarcerated for the entire period of his criminal trial and that he had to exercise his constitutional rights to defend alleged criminal action instituted by the 1<sup>st</sup> to 6<sup>th</sup> Respondents. It is anomalous for a person to claim about its loss of income while quietly suffering it without complaining through the very statutory provision created for such a complaint. Although the opposite reasoning appears from other decided

cased, it is arguable that the longer an innocently accused person is willing to suffer the prejudice, the less serious its complaint might be in its own perception.

- [139] Kutuane's submission that at all material times he harboured a serious and *bona fide* intention to pursue claim for damages against the Respondents for the injustice suffered as a result of the unlawful conduct, and/or alternatively to ensure that the Respondents are held liable for their actions, and to put a message across that the Respondents are not above the law is a mere sentiment, irrelevant to that of which the court has to be satisfied. His dilatory conduct conveys the opposite.

***Reasonable explanation for the delay and prospects of success:***

- [140] Kutuane accepted that, in terms of the test applied in the matter of *Chetty v Law Society, Transvaal*<sup>30</sup> and *NUM v Council for Mineral Technology*,<sup>31</sup> he had to keep in mind that without a reasonable and acceptable explanation for the delay, the prospects of success are irrelevant and in the absence of prospects of success an application for condonation should be refused.

***Conclusion:***

- [141] Ultimately, the above principles, applied to the undisputed facts in this matter, render a clear result.
- [142] Kutuane accepted the duty to satisfy the court of the three requirements stated in section 3(4)(b) of the Act if his reliance on his acquittal fails.
- [143] A failure to establish any one of the three deprives the court of jurisdiction, and it must result in dismissal of the application.
- [144] Kutuane alleges that he was innocently and unlawfully arrested and detained, and that bail had not been granted to him. It continued repeatedly in an unlawful manner. It resulted in him being detained for 747 days.

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<sup>30</sup> 1965 (2) SA 756 (A) at 765.

<sup>31</sup> [1999] 3 BLLR 209 (LAC), par 10.

- [145] Kutuane relies on the contention that he only had the requisite knowledge of the facts from which the debt arises on the date of his acquittal.
- [146] Kutuane relies on the date of his acquittal in support the second statutory requirement, “*just cause*”.
- [147] Kutuane failed to establish the requirement of “*good cause...for the failure by the creditor...to serve a notice in terms of subsection (2)(a)*” by “*serving on the organ of state in accordance with Section 4(1)*” and “*within six months from the date on which the debt became due*”.
- [148] In terms of Section 3(3)(a) “*a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but the creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care...*”.
- [149] On the Kutuane’s own version “*the facts giving rise to the debt*” were within his knowledge from the moment he got arrested, alternatively when he realised that information relating to his alibi was deliberately being concealed.
- [150] He failed to prove any additional knowledge to that which was required for him to give notice in terms of the Act shortly after his arrest.
- [151] The mere fact that Kutuane was in detention did not in itself prevent him from acting on his knowledge of “*the facts giving rise to the debt*”.
- [152] It serves no purpose to consider and analyse irrelevant legal and factual considerations<sup>32</sup> where patent non-compliance with one of the requirements that the court must be satisfied of has not been established, and patently could never be established.

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<sup>32</sup> Cf *Sello v Minister of Police NO and Another* (89077/16) [2022] ZAGPPHC 233 (13 April 2022). The court expanded on various principles that were not in dispute, evident from the concluding part of the judgment, that the notice in terms of section 3 of the Act had been given in time, from which it follows that no condonation was required.

[153] Kutuane would have had to explain that during the 747 days he had not been able to seek or obtain legal advice, even if the doctrine of ignorance of law had been relied upon and might have served to benefit him. Access to a lawyer was not even alleged to be a prerequisite for compliance with the notice requirements. But if that was a requirement, Kutuane had access to and the benefit of legal representation. He is at liberty to blame his legal representation for not advising him earlier, or for advising him to wait until after his acquittal, if those are the facts.

[154] Kutuane furnished no explanations why the advice he was ultimately able to obtain had not been sought or obtained and followed from the outset.

[155] It stands to reason that had Kutuane taken even the most basic steps to inform the Minister of Police or the National Director of Public Prosecution (through prison staff), that they will be held accountable for him having been arrested and detained innocently, and that those defendants would have been in a position to investigate and act so as to obtain the benefit of the spirit and intent of the Act, even if Kutuane did so as late as six months after his arrest, or after each refusal of bail.

[156] The refusal of bail arguably does not introduce a new set of facts, as opposed to perpetuating the initiating facts, which on its own sufficiently constituted “*facts giving rise to the debt*”, as opposed to waiting to see how the extent thereof grows and comes to an end. The court, however, expresses no final view on the question as to whether the debt has been extinguished based on prescription.

[157] The facts of this matter is a classic example of depriving the relevant organs of state of the opportunity to act upon the alleged facts giving rise to the debt, in order to mitigate or terminate the consequences of state liability, which ultimately draws on the liability on of taxpayers.

[158] The Act is clearly not intended merely to deal with the timeous notice in respect of the ultimate result of liability on the part of a state organ, but to inhibit a burden on state resources, encumbered damage-causing events, of which the officials in power would want to be informed, as soon as possible to mitigate liability and to avoid expenditure in the form of litigation, investigation, and disbursements, where witnesses and

evidence may no longer be readily available. Absent prompt compliance, the state organ is deprived of the opportunity to stop or mitigate or to curtail the costs related to obtaining information and witnesses after the fact at greater expense as time goes by. It could well be argued that a failure to give notice is tantamount to a failure to mitigate. The obligation to mitigate the debt by giving prompt notice is then arguably an element of what constitutes reasonable conduct, in particular the pace at which a notice is given after knowledge of the requisite facts is obtained. The inverse result is “*unreasonably prejudicing*” the organ of state.

[159] It is axiomatic that the failure on part of Kutuane to have notified the organs of state for some 747 (and several weeks thereafter) of the intended legal proceedings, unreasonably prejudiced the said organs of state, if not already a few days after arrest. It is more than likely that a prompt notice with the known facts, at the latest after the first failed bail application, supported by a reference to the alleged alibi, would have caused the organs of state to intervene and to curtail the debt-causing events, in line with the obvious purpose of the Act.

[160] It follows from this ground alone that the court has no jurisdiction to grant leave to institute the legal proceedings in question, Kutuane having failed to satisfy the court in respect of two of the three requirements in subsection 3(4)(b) of the Act.

***Costs:***

[161] Kutuane sought costs on the “*attorney and own client*” scale, not even merely in the event of them opposing it. The approach was factually unfounded and legally unjustified. It prompts a respondent to oppose the matter on that basis alone.

[162] In *Johannesburg City Council v Television & Electrical Distribution (Pty) Ltd*,<sup>33</sup> the court held that “. . . in appropriate circumstances the conduct of a litigant may be adjudged “vexatious” within the extended meaning that has been placed on this term in a number of decisions, that is, when such conduct has resulted in “unnecessary trouble and expense which the other side ought not to bear”. See also *In re: Alluvial Creek Ltd* 1929 CPC 532 at 535, *Phase Electrical Co Ltd v Zinman's Electrical Sales (Pty) Ltd*

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<sup>33</sup> 1997 (1) SA 157 (A) at 177 C – F.

1973 (3) SA 914 (W) at 918H – 919B, and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101G – 102D.

[163] In *Gois t/a Shakespear's Pub v Van Zyl and Others*,<sup>34</sup> the court held as follows:

*“...this court may make a punitive costs order such as costs on an attorney and own client scale where it believes it (is) appropriate to do so. Factors to consider whether or not to grant such punitive costs order include where the conduct of the party is vexatious and amounts to an abuse of legal process, even though there is no intention to be vexatious; evinces a lack of bona fide; and is reckless, malicious and unreasonable.”*

[164] In *Brown v Papadatis and Another NNO*,<sup>35</sup> what Davis J held at 545J-546D is apposite here. The learned Judge said:

*“Mr Khan submits that he was given instructions to so pursue this course of action, but attorneys must surely apply a professional standard in deciding to do this. See the dictum of Innes CJ in Vermaak's Executor v Vermaak's Heirs 1909 TS 679 at 691. Applicants have rights, but the courts are not playthings, to be abused at the convenience of litigants who raise spurious, reckless arguments which jeopardize the integrity of the court, so as to postpone proceedings, when they, as in this case, have clear rights, which can protect any interest or rights which they may have.*

*In my view, this is a case where the court should say: Of course, litigants have rights; of course, courts must fastidiously respect these rights; of energetically as he or she may be able, to protect these rights. But when the boundary is overstepped so grossly in circumstances where there is no legal basis, no precedent, no serious evidential edifice on which to launch such an application (ie even on these vague affidavits could a recusal application ever be brought?),*

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<sup>34</sup> (2003) 24 LJ 2302 (LC).

<sup>35</sup> 2009 (3) SA 542 (C).

*the court should say, you have overstepped the mark and have crossed a bridge in circumstances where an order of costs de bonis propriis must follow.”*

[165] It should be discouraged to provoke an opposing party into litigation merely because of a threat of a punitive costs order. Kutuane’s approach is vexatious in that regard because there was “*no legal basis, no precedent, no serious evidential edifice*” on which to seek such costs order.

***Order:***

[166] The following order is made:

- a. The application is dismissed with costs;
- b. The applicant shall pay the costs of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the attorney and client scale;
- c. The costs shall be taxed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within 90 days, from date of this order;
- d. The costs shall be paid by the applicant within 10 days after taxation.

  
LUCAS J VAN TONDER AJ