



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 1862/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED NO

10/6/2025
DATE

[Signature]
SIGNATURE

In the matter between:

EMMANUEL NHLANHLA HLATSHWAYO

Applicant

and

THE MINISTER OF POLICE

First Respondent

NATIONAL DIRECTOR:

NATIONAL PROSECUTING AUTHORITY

Second Respondent

JUDGMENT

WARREN AJ

Introduction

- [1] The applicant seeks condonation for the late delivery of a statutory notice in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”).

Background

- [2] The applicant instituted proceedings against the Ministers of Safety and Security and National Director; National Prosecuting Authority for damages arising from his arrest and subsequent prosecution in 2017. He claims that his arrest was unlawful and that his prosecution was malicious. In his particulars of claim, the applicant avers that he was arrested on 31 January 2017 and detained without bail until 6 August 2017. He further pleads that the charges against him were ultimately withdrawn unconditionally on 10 October 2017.
- [3] Summons was served on the first respondent on 27 January 2020 and on the second respondent on 28 January 2020.
- [4] The State denies that it acted unlawfully or maliciously. In its answering affidavit to the application for condonation, the second respondent asserts that the applicant was acquitted following trial proceedings, not that the charges were withdrawn.
- [5] On 22 November 2019, the applicant delivered a notice in terms of Section 3 of the Act. The respondents argued that this notice was served out of time and declined to condone the delay, prompting the present application for condonation. Although both respondents filed a notice of intention to oppose the application, only the second respondent filed an answering affidavit. In his founding affidavit to the condonation application, the applicant explained the delay in serving notice in terms of Section 3 of the Act. He stated that he had decided to spend some time

to recover from the trauma of his arrest and detention, describing this period as a “self-imposed hiatus” during which he contemplated a way forward.

[6] He further stated that he initially approached Legal Aid and was informed that Legal Aid did not litigate against the State. He was advised that his best recourse was to engage attorneys. During the latter part of 2019, he approached Oni Attorneys, who advised him of the six-month notice requirement under the Act. The applicant was unaware of this requirement and cited his lack of legal training as a contributing factor to the delay. He also emphasized that he was in detention for six months and was therefore unable to serve the notice during that time. The further delay was as a result of his “*self-imposed hiatus and sourcing of viable options for recourse*”.

[7] In her answering affidavit, the second respondent contended that the cause of action against it arose on 6 October 2017, when the applicant was acquitted. She noted that more than two years had passed before the applicant delivered the required notice and submitted that, had the applicant genuinely aggrieved and suffered damages as alleged, he would have sought assistance promptly. The second respondent further argued that she had suffered unreasonable prejudice due to the delay and contended that the applicant had poor prospects of success on the merits. Attached to her affidavit were witness statements from the docket, in support of the second respondent’s contention that the prosecution of the applicant had not been malicious.

[8] The applicant did not file a replying affidavit.

Legal Framework

[9] Section 3 of the Act stipulates that:

(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 written notice of intention to institute legal proceedings; or

(b) the organ of state has consented in writing to the institution of such proceedings—

(i) without such notice; or

(ii) upon receipt of a non-compliant notice.

(2) *A notice must—*

(a) be served within six months from the date on which the debt became due; and

(b) briefly set out—

(i) the facts giving rise to the debt; and

(ii) such particulars as are within the creditor's knowledge.

[10] Section 3 (4) provides as follows:

(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.'*

Issue to be determined

- [11] It is common cause that the applicant's claim had not prescribed at the time the summons was served and that notice was in fact delivered.
- [12] With regard to the requirement of *good cause* existing for the failure to deliver the notice timeously, Heher JA in *Madinda v Minister of Safety and Security*¹ stated:

"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 therefor².

"Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide 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. Strong merits may mitigate

¹ (153/2007) [2008] ZASCA 34 (28 March 2008) at para 10

² Supra at paragraph 10

fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration. The learned judge a quo misdirected himself in ignoring them³.

- [13] This Court is accordingly tasked with determining whether the court is satisfied that good cause exists to explain the delay of the applicant in delivering the notice.
- [14] This exercise includes a consideration of the explanation for the delay; the applicant's bona fides; the prospects of success in the underlying claim; and any contribution by others to the delay.
- [15] The applicant attributes the delay to a period of recovery of the trauma of his arrest and detention following his detention and the time taken to "*plot his way forward*". However, his affidavit lacks specificity. He does not disclose when he first

³ supra paragraph 12

approached Legal Aid or how much time elapsed before engaging his current attorneys. He does not detail any proactive steps taken to either investigate or prosecute his claim and appeared to have laid supine for more than two years. His vague reference to a "*self-imposed hiatus*", which lasted for approximately 2 years, does not constitute a sufficient explanation.

[16] It is evident that no other party contributed to the delay, and the applicant himself took no proactive steps for over two years. His conduct suggests a lack of urgency or seriousness in pursuing his claim. The absence of any detailed explanation or documentation in support of his version undermines his bona fides.

[17] In *Sello v Minister of Police N.O. and another*⁴, it was affirmed that:

*"It is expected of an applicant to set out fully the explanation for the entire period of delay, and such explanation must be reasonable."*⁵

[18] The applicant has failed in this regard.

[19] Moreover, the applicant has not addressed the merits of his claim beyond stating that the charges were unconditionally withdrawn. He did not respond to the second respondent's statement that he was acquitted after trial. During argument, it was suggested on behalf of the applicant that it was irrelevant as to whether the applicant was acquitted, discharged or the charges withdrawn. I disagree with the applicant. The second respondent further attached copies of witnesses' statements attached to her affidavit. The applicant did not file a reply to the second respondent's answering affidavit nor deal with the merits as advanced by the second respondent. This failure to engage with the second respondent's affidavit is significant.

⁴ (89077/16) [2022] ZAGPPHC 233 (13 April 2022)

⁵ Supra at 24

For the Applicants:

Instructed by:

Advocate Snethemba Vobi

Oni Attorneys

For the Respondent:

Instructed by:

Advocate Elizabeth Chabalala

The State Attorney

Date of argument:

4 June 2025

Date of delivery of judgment:

10 June 2025

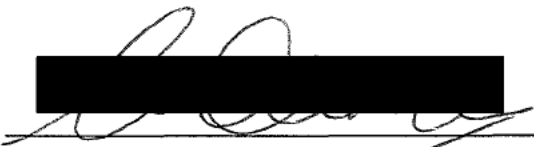
[20] Additionally, the SCA in *The National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*⁶, made clear that the reasonableness of a prosecution must be assessed based on the information available at the time of the decision to prosecute—not the outcome. The second respondent provided this contextual information; the applicant did not respond at all.

[21] In the circumstances, this Court finds that the applicant has not established good cause as required by Section 3(4)(b) of the Act. As all three requirements must be met, it is unnecessary to make a determination on the issue of the unreasonableness of prejudice caused to the organ of state.

Order

The following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the second respondents costs.


[REDACTED]
K WARREN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DISCLAIMER: This judgment was prepared and authored by Warren AJ and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 10 June 2025.

⁶ (194/2023) [2024] ZASCA 85; 2024 (2) SACR 331 (SCA)

For the Applicants:

Instructed by:

Advocate Snethemba Vobi

Oni Attorneys

For the Respondent:

Instructed by:

Advocate Elizabeth Chabalala

The State Attorney

Date of argument:

4 June 2025

Date of delivery of judgment:

10 June 2025