

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2023-032993

[1] Reportable:	YES / NO
[2] Circulate to Judges:	YES / NO
Signature	Date: 15/08/2025
	

In the matter between:

MOSES ANDRIES THUBAKGALE

Applicant

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

MINISTER OF POLICE

Second Respondent

JUDGMENT

Introduction

[1] The Applicant, plaintiff in the main action, seeks condonation for his late service on the Respondents of the notice of his intention to institute legal proceedings as provided for in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 2002, Act No. 4 of 2002 ("the Act")

[2] Both Respondents are Organs of State as defined in the Act. In their respective pleas to the Applicant's particulars of claim, they have both raised special pleas, firstly of prescription and secondly, that of non-compliance with the notice requirements provided for in the Act. It is these special pleas that triggered the launching of this application.

[3] First Respondent is opposing the application on the grounds that I will deal with later hereunder. Second Respondent did not file any opposing papers.

FACTUAL BACKGROUND

[4] The Applicant, together with an accomplice, was arrested by Police Officials of the First Respondent **20 April 2020** on charges of Unlawful Possession of Ammunition, as well as Explosives. He was thereafter

detained at the Atteridgeville Police Station. He appeared in court on several occasions and then released on bail. It is common cause that later, charges against him were provisionally withdrawn.

[5] On **28 March 2023**, Applicant, through his attorney of record, sent via registered post three (3) Section 3 Notices in terms of the Act. These were addressed to:

(i) "The National Police Commissioner

(ii) The Provincial Commissioner Gauteng

iii) City of Tshwane Metropolitan Municipality."

[6] On **06 April 2023** applicant issued summons against the Respondents claiming delictual damages based on what he alleges, was his unlawful arrest and detention. These were served on the First Respondent on **11 April 2023** and on the Second Respondent on **5 May 2023**.

[7] First and Second Respondents filed their pleas on **22 and 21 June 2023** respectively. In their respective pleas, both Respondents raised special pleas firstly of prescription, and secondly that of non-compliance with the provisions of Section 3 of the Act.

[8] This application was launched on **26 August 2023**. First Respondent opposed the application and filed its answering affidavit on **13 October 2023**. Second Respondent did not file any opposing papers.

ISSUES FOR DETERMINATION

[9] The main issue for determination is whether the Applicant has discharged its onus of proving and establishing all three (3) jurisdictional requirements set out in section 3 of the Act against each of the Respondents, namely:

- (i) That the debt has not been extinguished by prescription.
- (ii) Good cause exists, for his failure to comply with the provisions of the Act.
- (iii) The Organs of State were not unreasonably prejudiced by his failure to comply.

PARTIES' SUBMISSIONS

Applicant

[10] In his submissions, Counsel for the Applicant contended that the applicant has met and satisfied all the jurisdictional requirements provided for in Section 3 of the Act.

[11] He submitted that in the first place, the matter has not prescribed. As regards the delay, he pointed out that the Applicant is a layman and was not aware of the procedural requirements provided for in the Act and most importantly, the required notice in terms of section 3 of the Act. It was only after his consultation on **28 March 2023** with his attorney of record that he became aware.

[12] He went on to submit that the Applicant has also demonstrated that he has reasonable prospects of success on the merits, should the application be granted.

[13] Lastly, he argued that Respondents will not be prejudiced in any way, by the granting of the condonation application. This is because the granting thereof does not amount to final determination of the issues between the parties. Respondents will still have an opportunity to present their cases and defend the claims against them, in a trial.

First Respondent

[14] Counsel for the First Respondent submitted that the Applicant has failed to prove or satisfy the requirements of section 3 of the Act. While he conceded that the debt has not prescribed, the other two jurisdictional requirements namely good cause and absence of prejudice on the part of the First Respondent have not been proved.

[15] As regard the delay, he submitted that the Applicant has failed to give a satisfactory explanation of the delay of about two and half years. The allegation that he is a layman and did not know about the required notice should be rejected. This is because soon after his arrest he had access to legal advice and services as he was legally represented throughout his appearances in court.

[16] Applicant has further failed to demonstrate that he has prospects of success in the main action. More specifically, he has failed to set out in his affidavits on what basis he alleges his arrest was unlawful. He has failed to even deal with this requirement in his founding affidavit. The only reason why he had failed to do so, is because he has no such prospects.

[17] He pointed out that the First Respondent has been prejudiced by the long delay. It has been difficult to locate the file and also, investigate the matter as evidence and witnesses become unavailable with the passage of time.

[18] Lastly, he argued that the Applicant's application is totally flawed and does not comply with the provisions of Act pertaining to an application for condonation in that:

(i) In his notice of motion Applicant does not seek or apply for condonation. Instead, relief sought therein is specifically:

"1. That the Applicant be granted leave for the late service of the notice to institute legal action against the First and Second Respondents."

(ii) Secondly, the notice was sent to "CITY OF TSHWANE METROPOLITAN MUNICIPALITY". In this regard, the Act provides specifically that the notice must be delivered to the "City Manager". For this reason, the Applicant has failed to comply with the provisions of the Act, in this way rendering the notice defective.

THE LEGAL POSITION AND ANALYSIS

[19] Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 2002 (Act No. 40 of 2002) ("the Act") provides as far as is necessary that:

"(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."

[20] The jurisdictional requirements are conjunctive and must be proved and established by the Applicant. In other words, the Applicant bears the onus of proving each of the three requirements. The standard of prove required is the general “overall impression made on the facts set out by the parties in their papers.”

[21] This legal position was summarised in **Minister of Agriculture and Land Affairs v C J Rance: 2010 (4) SA 109 (SCA)** where the following was said:

“[33] In terms of s 3(4)(b) a court may grant condonation if it ‘is satisfied’ that the three requirements set out therein have been met. In practical terms this means the ‘overall impression’ made on a court by the facts set out by the parties.”

(At paragraph 33)

[22] The position is that even if all these three requirements are met and satisfied, this is not the end of the enquiry. In such a case, the court is left with a discretion to either grant or refuse the application for condonation. Such a discretion is to be exercised judicially taking into account the interests of justice in a general sense.

[23] In **Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)** the following was said:

“16. The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters.”

(At paragraph 16)

The Legal Position of the Second Respondent

[24] Second Respondent has not filed any opposing papers. This does not however, relieve the Applicant of discharging the onus that rests on him of proving or making a proper case against each of the Respondents, including specifically Second Respondent.

[25] This is particularly important because Second Respondent has filed a plea and therein raised two special pleas to which I have already referred. In essence, both special pleas form part of the issues for determination in this application, and are therefore also relevant and applicable in relation to Second Respondent.

PRESCRIPTION

[26] Initially, First Respondent did in its answering affidavit raise the issue of prescription. However, at the hearing of the matter, this point in *limine* was abandoned and it became common cause between the parties that the applicant's claim as against it has not prescribed. This means therefore that as against the First Respondent, the Applicant has crossed the first hurdle.

[27] However, as against the Second Respondent, the legal position is completely different. It is common cause that the Applicant's action arose on **20 April 2020** being the date on which he was arrested and then detained. Summons were issued on **6 April 2023** and served on the Second Respondent on **5 May 2023**. This is a period well in excess of three (3) years calculated from the date on which the cause of action arose.

[28] Where a claim has prescribed, the application has to fail. In such a case, the court does not have a discretion it can exercise. In other words, the court is not empowered to resuscitate a prescribed claim. It follows that as against the Second Respondent, this is the end of the enquiry and the application must therefore fail.

GOOD CAUSE

[29] Over the years, courts have refrained from formulating a closed list of factors constituting an exact definition of good cause. Each case will therefore depend on its own facts and merits. Be that as it may, for

the purpose of adjudication of this matter and based on authorities, good cause will include the following factors;

- (i) The degree, extent, and length of the delay.
- (ii) The explanation for the delay.
- (iii) The sufficiency and/or reasonableness of such an explanation.
- (iv) Applicant's prospects of success on the merits of the delictual claim.
- (v) The balancing act- Prejudice or otherwise on the part of the First Respondent if condonation is granted weighed against prejudice that the Applicant will suffer if condonation is not granted.

[30] In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) the court held:

"The meaning of "good cause"... should not lightly be made the subject of further definition... It is enough for present purpose to say that the defendant must at least furnish an explanation of his default sufficiently full

to enable the court to understand how it really came about, and to assess his conduct and motives.”

(At 352 H -353 A)

[31] In Rance (Supra) the court held:

“[36] Good cause within the meaning of contained in S 3 (4) (B) (ii) has not been defined, but may include a number of factors which will vary from case to case on differencing facts.”

[At paragraph 36]

THE DEGREE AND LENGTH OF THE DELAY

[32] It is common cause that on the facts, Applicant’s debt became due on **20 April 2020**, being the day on which he was arrested. On calculation, the six (6) month period provided for in Section 3 of the Act expired on **20 October 2020**. The notice was only sent by registered post to *“Tshwane Metropolitan Municipality”* on **28 March 2023**. It follows therefore that the extent of the delay is a period of approximately two and half years.

[33] In Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) the court held:

"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..."

(At paragraph 22)

[34] Similarly in Rance (Supra) the court held:

"An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable."

(At paragraph 35)

THE EXPLANATION FOR THE DELAY, SUFFICIENCY AND REASONABLENESS THEREOF

[35] In his founding affidavit, Applicant states that he was not aware of the provisions of section 3 of the Act, that is, that he has to deliver a written notice to the Respondents within a period of six (6) months calculated from the day on which the debt became due. He explains the delay as follows:

"6. I submit that I was not aware of the six (6) month period, in which I was to notify the Respondent in writing of my intention to institute legal proceedings."

[36] It is common cause that soon after his arrest Applicant obtained and had services of a legal representative of his own choice. He therefore throughout had access to legal services, advice and answers to all legal questions regarding his arrest. This includes but not limited to legal advice and answers to all legal questions he may have pertaining to his arrest, as well as legal consequences and recourse flowing from his arrest and or detention, which according to him was unlawful. Simple logic dictates that all of these will also include the procedural issues pertaining to enforcement of the claim he may have, and also applicable time periods.

[37] In Saloojee and Another. NNO v Minister of Community Development 1965 (2) SA 135 (A) it was held:

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

[38] I am aware that the Applicant does not necessarily put blame on any of his attorneys whether previous or current. As I have pointed out, he had access to legal services throughout, specifically relating to his arrest. He has always stated that, according to him, his arrest was

unlawful. It was therefore throughout upon him to fully enquire from his attorney what his legal recourse is, the rights he may have, how any of such right is to be enforced, the procedure, time limits, and so on. There is no evidence presented to suggest that Applicant was prevented and or could not obtain such advice.

[39] As I have pointed out, Applicant throughout entertained the belief that his arrest was unlawful. He knew the identity of the arresting officers, namely that they are police officers attached to the First Respondent. He also had knowledge, information including all the facts and circumstances under which his arrest and subsequent detention took place. Despite all of these, Applicant has failed to explain why he had to wait for a period of two and a half years to lodge his claim.

[40] Taking into account all of the above, I have no difficulty in finding that Applicant has failed to give a reasonable explanation for his undue delay which extends over a period of two and half years.

PROSPECTS OF SUCCESS

[41] No doubt prospects of success is a very important factor and plays a significant role in the determination of good cause. The importance of this factor is brought about by the fact that strong prospects of success will in a general sense, compensate for an

unexplained period of delay. Equally so, lack of prospects of success renders whatever explanation for delay, pointless.

[42] In Rance (Supra) the SCA in relation to this requirement stated:

"The prospects of success of the intended claim play a significant role-, since strong merits may mitigate fault; lack of merits render mitigation pointless. The court must be placed in a position to make an assessment on the merits in order to balance that factor the cause of the delay as explained by the applicant."

[43] It is important to mention that in his founding affidavit, the Applicant does not mention or state facts that demonstrate that he has prospects of success on the merits. This is despite the fact that he bears the onus to do so. All that he states is in his replying affidavit and is to the following effect:

"...There is prospects that I will be successful on merits as per advice from my attorneys of record..."

[44] On the other hand, the First Respondent has gone at length to demonstrate that Applicant has no prospects of success. Its version is contained in an answering affidavit deposed to by Mr Lesiba Daniel Molekoa attached to which is police case docket No: Atteridgeville CAS 128/04/2020. This docket contains statements deposed to by arresting officers. In a nutshell, First Respondent's version justifying the arrest is set out in the arresting officers statements, and the answering affidavit as follows:

“...the applicant was found in possession of ammunition and explosives and furthermore he attempted to resist arrest.”

[45] As I have pointed out, the Applicant who bears the onus of proof, has not made any attempt to show or demonstrate in what respect he alleges his arrest was unlawful. He has failed to give a version that contradicts that of the First Respondent, regarding the lawfulness or otherwise his arrest. Surely, his prospect of success is closely linked to the justification of the officers in arresting him meaning in short, the lawfulness or otherwise of his arrest.

[46] I understand the version of the First Respondent to be that Applicant was found in possession of prohibited items, meaning, he was caught in the act of committing a crime in the presence of police officers attached to the First Respondent. Arrest under such circumstances will in terms of section 40 (1) (a) of the Criminal Procedure Act 51 of 1977 (“the CPA”) legally justified.

[47] Taking into account all of the above, I am satisfied that again, the Applicant has dismally failed to show or demonstrate that he has any prospects of success on the merits of his claim.

PREJUDICE TO THE ORGAN OF STATE

[48] The Applicant bears the onus of proving absence of prejudice on the part of the Organ of State. In *Rance (Supra) Majiedt AJA* (as he then was) put the legal position as follows:

"38. Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice. The DLA serves as a good example in the present case as to why this requirement must be met. It has a large staff component dealing with many matters relating to the vast tracts of land it administers on behalf of the State. It plainly requires adequate time to sift, analyse, prioritise and decide on matters before entering into litigation."

(At paragraph 38)

[49] In its answering affidavit, First Respondent has in some detail set out and explained the considerable prejudice it has suffered as a result of the delay by the Applicant. On the other hand, the Applicant, who bears the onus of proving absence of prejudice, concedes that there has been undue delay. He however, try to downplay the onus he bears by simply stating:

"... Though the delay was or is still lengthy, the Respondent will not be prejudiced in any way, as this application itself does not conclude on the merits and quantum in my claim."

[50] It is abundantly clear from the superficial statement that the applicant has once again failed to prove absence of prejudice on the part of the First Respondent. Applicant bears the onus of doing so and has therefore failed to discharge this onus.

[51] The Applicant's failure should be seen and considered against the very purpose for which the Act was enacted, and more specifically, the intention of the legislature and the purpose of section 3 of the Act. All organs of state operate on public funds. The purpose of the notice is to afford ample opportunity to an organ of state to investigate each claim against it. Having done so, to then be in a position to consider all costs implications, options available to it in a responsible and informed manner, before involving itself in lengthy and expensive litigation.

[52] In **Mohlomi v Minister of Defence 1977 (1) SA 124 (CC)** the Constitutional Court reaffirmed the purpose of the Act as follows:

" The Constitutional purpose for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and long staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider the responsible and to decide, before getting embroiled in litigation at public expenses whether it enough to accept, reject or endeavour to settle them."

CONCLUSION

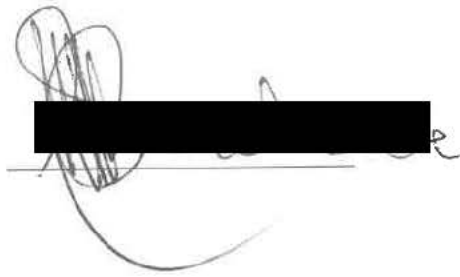
[53] Applicant has failed to show and satisfy the jurisdictional requirements for condonation provided for in section 3 and 4 of the Act, and in particular good cause as well as absence of prejudice on the part of the Respondents. It follows that the application has to fail.

ORDER

Consequently, I make the following order.

[1] The application for condonation is dismissed with costs.

[2] Such costs shall include costs consequent upon employment of Senior Counsel.



SS MAAKANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION,

PRETORIA

DATE HEARD : 14 May 2025

DATE OF JUDGMENT : 15 August 2025

APPEARANCE

For the : Adv V. Sihawu

Applicant

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For the : Adv D. Mills SC

Respondent

Instructed by : Prinsloo Incorporated

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