

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 24245/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
15 December 2025	
DATE	SIGNATURE

In the matter between

TANKISO MOSEBI

First Applicant

MCHUNU KWAZI MFANILE

Second
Applicant

And

THE MINISTER OF POLICE

First
Respondent

**DIRECTOR FOR
PUBLIC PROSECUTION**

Second
Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 15 December 2025.

JUDGMENT

KEKANA AJ

Introduction

- [1] This is an application brought by the applicants seeking condonation for their late filing of the notice in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act¹ (*the Act*). The third respondent opposes the condonation application and seeks a dismissal thereof with costs.

Background

- [2] The facts can be summarised as follows:

The applicants alleges that they were unlawfully arrested and assaulted by employees of the third respondent on 11 July 2016 and unlawfully remanded in custody for a period of nine months. According to the applicants they were initially of the belief that they were arrested by employees of the first respondent (Ministry of Police), who is also the first defendant in the main action. As result of this incorrect belief, on 10 July 2019 the applicants instituted action for damages arising from amongst others the alleged unlawful arrests and assault against the first respondent and the second respondent (Director for Public Prosecutions) but not the third respondent.

¹ Act 40 of 2002 (the Act).

- [3] According to the applicants it was only later in May 2020, upon perusal of the docket and the enclosed arresting statement that it became aware of the correct identity of the arresting officers that they (arresting officers) were not in the employ of first respondent but rather were in the employ of the third respondent. The applicants then instituted a third-party notice and served it on the third respondent and later served its letter in terms of section 3 of the Act. In retort the third respondent raised a special plea citing non-compliance with the section 3 notice for reasons of it being late and that the organs of state in this matter have not given consent for issuing of summons as they were out of time and the applicants are in contravention of Section 3 of the Act.
- [4] The applicants' section 3 notice was followed by an application to join the third respondent in the action proceedings, the matter which was presided over by my sister Mahalelo J. Mahalelo J ordered that²:

1. *this matter is postponed sine die;*
2. *the applicants are granted leave to bring an application for condonation;*
3. *costs reserved.*

Contentions by the parties

- [5] The applicants argue that the claim has not prescribed, as summons was issued before the matter reached a point of prescription.³ Again, that the applicants only became aware of the correct identity of the arresting officer on 3 May 2020⁴, it was at this stage that the applicants instituted a third-party notice and served it on the third respondent and later served its letter in terms of section 3 of the Act on the third respondent.⁵ Further that the statutory requirement is that the notice must be served on the organs of state within six (6) months from the date in which the debt became due.⁶

² Court order by Mahalelo J.

³ Para 21 of the applicant's written submissions.

⁴ Para 11 of the applicant's written submissions.

⁵ Para 12 of the applicant's written submissions.

⁶ Para 42 of the applicant's written submissions.

- [6] The third respondent contends that the applicants knew the identity of the arresting officers in October 2016⁷, even if it can be according to the applicants, in February 2020, the applicants' claims against the third respondent have become prescribed. The third respondent further contends that the applicants' have not shown good cause for their inexplicable failure to timeously notify the third respondent of the intention to institute proceedings against it and their subsequent failure to timeously bring an application for condonation. Also, that the joinder application did not interrupt prescription.

Legal principle and analysis.

- [7] Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act (the Act) states 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 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 legal proceedings without such notice.

(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."

- [8] Section 3(4) of the Act states that:

⁷ Para 15 of the respondent's head of argument.

(1) “A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile...”

[9] **Madinda v Minister of Safety and Security** is a cornerstone case where the Supreme Court of Appeal (SCA) clarified the standard for condonation under the Act 40 of 2002.⁸ The powers of the court were cemented in that according to section 3(4)(b) the court may grant an application for condonation 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.*

[10] All three requirements as set out in section 3(4) (b) must be met as they apply conjunctively.⁹ The crisp issues for determination are whether the applicant’s claim had prescribed, subserviently whether the applicant has shown good cause for their failure to deliver a notice to the organ of state responsible for the cause of action within the time prescribed in the Act.

[11] Prescription begins to run from the moment the debt becomes due. A debt is "due" when:

“The creditor has knowledge of the identity of the debtor, and

The creditor has knowledge of the facts from which the debt arises (i.e., the creditor is aware of all the facts necessary to institute a claim)”¹⁰

[12] Prescription can also be interrupted by “judicial operation” with formal service of a legal process (e.g. summons). The court does not agree with counsel for the applicants that the issuance of summons (combined summons) on 10 July 2019 against the first and second respondent interrupted prescription of a claim

⁸ Madinda v Minister of Safety and Security 153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008).

⁹ Para 16, *Madinda* Supra.

¹⁰ Sections 12(1), (2) & (3) of the Prescription Act 68 of 1969 (as amended).

against the third respondent. No summons was issued against the third respondent and consequently, the applicants' submission is found wanting.

- [13] The applicants admitted that the police officer who was assisting the first applicant with the laying of the complaint did mention to the applicants or at least the first applicant of the fact that they were not arrested by members of the South African Police Services (SAPS) but by the metro police officers. It would appear to me that it was at stage that it can be said that the applicants had what constitutes "*minimum facts that are necessary to institute action*"¹¹ against the third respondent. The submission by the applicants' counsel of the knowledge not being trusted cannot be sustained. Since the applicants already had a lawyer assisting them, something more could have been done to verify the authenticity of the information if it was not trusted.

- [14] The applicants rely on **Links v Member of the Executive Council, Department of Health, Northern Cape Province**¹² which state that:

"...belief on its own is insufficient. Belief that happens to be true is also insufficient. For there to be knowledge, the belief must be justified".

- [15] The applicants' reliance on this case is misplaced in that from the time of laying a complaint, to be specific in October 2016, the applicants were told that the arresting officers were from the third respondent. Once they were made aware of the arresting officers, the existence of reasonable belief lapsed, and this triggered the commencement of the knowledge of facts. Reasonable belief and knowledge of facts cannot be in one room. Reasonable belief ceases to exist as soon there is now knowledge of facts. The applicants failed to demonstrate or at least show this court what they did with this knowledge. The conclusion by this court is that the applicants had knowledge of who the arresting officers were in October 2016. Since there has not been action against the third respondent the claim against the third respondent has prescribed.

¹¹ Minister of Finance v Gore 2007 (1) SA 111 (SCA) 119J-120A.

¹² [2016] ZACC 10.

[16] It is now appropriate to return to second requirement of whether good cause exists for the failure by the creditor. It has been emphasised that "good cause" under Section 3(4)(b) has two components:

- i) *a reasonable explanation for the delay; and*
- ii) *that it is in the interests of justice to grant condonation¹³.*

[17] Crucially, these factors are not a mere checklist where a strong score in one can compensate for a failure in another. The courts consistently hold that the explanation for the delay and the prospects of success are the two most critical factors, and they must both be addressed satisfactorily.

[18] There has not been any explanation furnished by the applicants for the delay just so to attempt to nullify any culpability on its part. The applicants' submission that they had no knowledge of the creditor cannot be true as it has already been established that in October 2016 the applicants or at least the first applicant was told and made aware that the arresting officers were in the employ of the third respondent. It will appear to this court that the applicants were very careless on how they dealt with this shared information. The applicants' ignorance of this shared information is a serious concern.

[19] The applicants had three years between October 2016 (the date the information was shared) and 2019 July (the date on which the combined summons was issued on the first and second respondents) to ascertain the correctness and accuracy of this shared information but failed to do so. Again, there has not been any attempt by the applicants to give an explanation as to why they took this posture towards this shared information. Assuming, of course without concluding that the applicants did not trust the police officer who shared this information, the applicants did nothing or at least no submissions were made before this court of an attempt by the applicants to establish the veracity thereof.

[20] As regards the interests of justice, it must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is

¹³ *Madinda supra*.

unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite how the applicants may feel about the case and what they allege the applicants may have gone through after the arrest, those alleged merits are illusory because the claim has prescribed. Where a claim has prescribed, the issue of prospects of success is decided conclusively against the applicant, making the granting of condonation impossible.

- [21] The delay in this case is not a short delay, there is no explanation for the delay given by the applicant. This is a fatal flaw at the outset. An application for condonation is, at its heart, a plea for the court's indulgence for a party's own failure to comply with the rules. Without a full, reasonable, and convincing explanation, the court has no basis to grant that indulgence. A party cannot simply ignore this requirement. As was stated by the Constitutional Court in **Van Wyk v Unitas Hospital and Another** that:

...“to grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.”¹⁴

- [22] Assuming though not correct that the applicants only became aware of identity of the third respondent in May 2020, there is still no explanation from the applicants why they only serve the notice on the third respondent in November 2022. More than two years after they had knowledge of the identity of the debtor.
- [23] Even if there is no explanation for the delay or maybe a reasonable explanation the court should still examine prospects of success. In this case matter has prescribed. Once a debt has prescribed, the debtor (third respondent) acquires a complete and absolute defense. Therefore, if the main claim which the applicants are trying to pursue (despite the delay) has indeed prescribed as

¹⁴ Van Wyk v Unitas Hospital and Another (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007).

concluded in this case, there are definitively no prospects of success on the merits. The applicant's case is legally unenforceable.

- [24] The applicants in their heads of argument cites few paragraphs from ***Madinda***, to which this court agrees with, I confine for now to two of those important quotations:

... “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?”

“As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.”¹⁵

- [25] With no prospects of success, it would be irrational and contrary to the administration of justice for a court to grant condonation. Granting condonation would only serve to waste the court's and the other party's time and resources on a case that is doomed to fail.

- [26] In arriving at this conclusion, I have not given much weight to the issue of prejudice. Explanation for the delay and good prospects of success are essential. The absence of both would "ordinarily be fatal," and the question of prejudice would not salvage the application.

- [27] The third respondent makes contentions about the joinder application and how it does not interrupt prescription. To extent that this court agrees with the submissions made and the authorities relied on, this court will not delve much into this aspect as it was not argued by the applicants. The court will in passing note the contentions made by the third respondent and conclude thereon affirmatively.

Conclusion

¹⁵ Para 51 of the applicant's written submissions.

[28] There has not been conduct or action on the part of the applicants to interrupt the prescription. No summons to this day has been issued against the third respondent, the joinder application does not interrupt the prescription, consequently the applicants' claim against the third respondent has prescribed. There are no prospects of success against the applicants have failed to show good cause for the delay and for that reason, the application for condonation for non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, in respect of the third respondent fails.

Costs

[29] The general rule that the costs following the results shall apply.

Order

[30] In the premises, the following order is made:

1. The applicants' application for condonation for non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, in respect of the third respondent, is dismissed.
2. The applicants to pay the third respondent's cost of this application on scale B.



KEKANA ND

Acting Judge of the High Court

APPEARANCES

Counsel for the Applicant

Adv BM Khumalo instructed by **HC Makhubele Inc**

reception@hcmakhubeleinc.co.za

010 880 7267

Counsel for the third respondent

Adv L Segeels-Ncube instructed by **Webber Wentzel**

Sanda.Sithole@webberwentzel.com / Shabalala@webberwentzel.com

011 530 5379/5313

Date of Hearing: 11 November 2025

Date of Judgment: 15 December 2025