



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 26 February 2026

Signature: 

CASE NO: A33/2020

In the matter between:

MALESELA FRANS MOSUWE

Appellant

And

MINISTER OF POLICE

First Respondent

MINISTER OF CORRECTIONAL SERVICES

Second Respondent

JUDGMENT

NYATHI J (with Mngibisa-Thusi et Millar JJ concurring)

INTRODUCTION

[1] This is an appeal against two judgments of the court a quo (per Mabuse J), namely:

The judgment of 11 August 2021, refusing the appellant's application for condonation in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"), and

The judgment of 23 October 2023, refusing the appellant's application for condonation for late filing of an application for leave to appeal in terms of Rule 49(1)(b).

[2] The Supreme Court of Appeal ("the SCA"), on 7 February 2024, granted the appellant leave to appeal to the Full Court. The effect of that order is that this Court must now consider the appeal on its merits.

[3] For the reasons that follow, the appeal succeeds.

FACTUAL BACKGROUND

[4] The essential facts are not in dispute. The appellant was:

Arrested in July 2003 in Polokwane,

Convicted in January 2004,

Sentenced to 7 years' imprisonment,

Released on parole in April 2007, and

Ultimately acquitted on appeal on 6 October 2008.

[5] The appellant received the result of his successful appeal only on 6 October 2008, when he was discharged from any further parole supervision.

[6] A notice in terms of section 3(1) of the Act was served in December 2009, and summons was issued in March 2011.

[7] The question is whether the court a quo was correct to conclude that:

The appellant's claim prescribed in July 2006,

The s 3 notice was unreasonably late,

The cause of action arose in July 2003, and

No good cause existed under section 3(4)(b) to grant condonation.

[8] In relation to the 2023 judgment, the question is whether the appellant's explanation for the late filing of the Rule 49(1)(b) application ought to have been accepted, and whether prospects of success existed.

THE ISSUES

[9] The appeal raises three central issues:

When did the debt become "due" for purposes of both the Act and the Prescription Act?

Did good cause exist for condonation under section 3(4) of the Act?

Did the court *a quo* misdirect itself in refusing condonation under Rule 49(1)(b)?

ANALYSIS

1. When did the debt become due?

(a) The court a quo's approach

[10] The court a quo held that the appellant's cause of action arose in July 2003, when the arrest occurred, and that prescription began to run immediately. This finding formed the foundation of both judgments.

[11] This approach is inconsistent with binding authority, constitutional principle, and the factual matrix of this case.

(b) Knowledge necessary to make a debt "due"

[12] The Constitutional Court has consistently held that prescription does not begin to run until a litigant is in a position:

To appreciate the facts and law giving rise to a complete cause of action, and

To enforce the right in law.

See Links v MEC for Health, Northern Cape 2016 (4) SA 414 (CC);

Truter v Deyssel 2006 (4) SA 168 (SCA);

Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA).

[13] It is well-established that knowledge of legal conclusions—including unlawfulness—is required before prescription begins to run where:

The unlawfulness is **not immediately apparent**, or

The wrongful conduct is ascertained only later, through appeal or expert advice.

[14] Here, the appellant was convicted and imprisoned. He could not know that his arrest, detention, prosecution and conviction were legally wrongful until his conviction was set aside on 6 October 2008.

[15] The State cannot contend that a person under conviction must somehow litigate against the State while his conviction remains intact.

[16] Therefore, the appellant's debt became due no earlier than 6 October 2008, when he obtained knowledge that:

- i. His arrest and detention were indeed wrongful,
- ii. His conviction was based on misidentification,
- iii. The criminal justice process had failed him.

(c) Precedents supporting this approach

The appellant's argument is fortified by:

Sello Thabang v Minister of Police (Gauteng Division, 13 April 2022)

Phasani v City of Tshwane (2022 ZAGPPHC 940)

Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC)

Le Roux v Coetzee 2024 (4) SA 1 (CC)

These cases recognise:

- a. The need to avoid piecemeal litigation,
- b. That constitutional rights to access to courts (s 34) require flexibility,
- c. That the interests of justice may delay the commencement of prescription,
- d. That a cause of action may accrue only after exoneration or finalisation of the criminal process.

Finding

[17] The court a quo erred in finding that the cause of action arose in July 2003.

It arose only when the appellant's conviction was set aside on 6 October 2008.

2. Condonation under s 3(4) of the Act

Section 3(4)(b) requires:

- i. The debt must not have prescribed
- ii. Good cause must exist
- iii. No unreasonable prejudice to the organ of state

(a) Prescription

[18] Once the correct "due date" is applied (6 October 2008), prescription:

- i. Would expire only in October 2011;
- ii. Summons issued on 25 March 2011 was in time;

- iii. The debt had not prescribed when s 3 notice was served (Dec 2009).

(b) Good cause

[19] Good cause involves a "wide discretion".

The appellant:

- a. Was incarcerated or on parole supervision until October 2008,
- b. Had limited legal knowledge,
- c. Acted promptly once informed of his acquittal,
- d. Consulted attorneys in 2009, and
- e. Served a section 3 notice soon thereafter.

[20] The delay was neither extensive nor intentional. The court *a quo*'s characterisation of the delay as "six years" was factually and legally incorrect.

(c) Prejudice

[21] The respondents did not file an answering affidavit and did not contend that they were unreasonably prejudiced.

[22] On the evidence, no prejudice is established.

Finding

[23] The requirements of section 3(4)(b) were met.

The refusal of condonation by the court *a quo* must be set aside.

3. Condonation under Rule 49(1)(b)

[24] The court *a quo* adopted an excessively punitive approach to the conduct of the appellant's legal representatives.

[25] Delays attributable to attorneys, while regrettable, should not lightly extinguish a litigant's access to justice. The Constitutional Court has repeatedly warned against closing the doors of court where the interests of justice favour adjudication on the merits.

See:

MEC for Economic Affairs v Kruizenga 2010 (4) SA 122 (SCA)

Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC)

[26] The appellant:

- i. Was blameless for the delay;
- ii. Consistently instructed his attorneys to pursue the appeal;
- iii. Comes to court with substantial prospects of success on the merits.

[27] The court a quo's approach was overly rigid, overly critical of counsel, and failed to consider the merits or the constitutional implications of shutting the appellant out of court.

CONCLUSION

[28] The appeal against both judgments must therefore succeed.

[29] The appellant has demonstrated:

A legally sustainable interpretation of when the debt became due;

Compelling grounds for condonation under both section 3(4) and Rule 49;

Real prospects of success in the underlying claim.

ORDER

The following order is made:

1. The appeal is upheld with costs.
2. The judgments of the court a quo dated 11 August 2021 and 23 October 2023 are set aside and replaced with the following:
 - 2.1 Condonation is granted for the appellant's non-compliance with section 3(1) and section 3(2) of Act 40 of 2002.
 - 2.2 Condonation is granted for the late filing of the application for leave to appeal under Rule 49(1)(b).
 - 2.3 The appellant is granted leave to pursue his action against the respondents under case number 18229/2011, with all pleadings filed deemed properly before the court.

2.4 The respondents shall pay the costs of the applications for condonation and the appeal, jointly and severally, the one paying the other to be absolved.



J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

I agree



N.P. MNGQIBISA-THUSI

Judge of the High Court

Gauteng Division, Pretoria

I agree



A.P. Millar

Judge of the High Court

Gauteng, Division, Pretoria

Date of Judgment: 26 February 2026

On behalf of the Applicant: Adv. Moela

Applicant's attorneys: Makhafola & Verster Inc. Attorneys, Pretoria

On behalf of the Respondent: No Appearance

Respondent's attorneys: State Attorney, Pretoria

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 26 February 2026.