



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable
Case No: 17526/2022

In the matter between:

**DE ZALZE WINELANDS GOLD ESTATE
HOME-OWNERS ASSOCIATION**

Applicant/ Plaintiff

And

STELLENBOSCH MUNICIPALITY

Respondent/ Defendant

Neutral citation:

Coram : Mgengwana; AJ

Heard : 11 February 2026

Delivered : 20 March 2026

Summary: Condonation Application – Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – Section 3(4) - Failure to comply with section 3(4)(b)(i) and (ii).

Judgment handed down: This judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 20 March 2026.

ORDER

1. The condonation application is granted with no order as to costs.

JUDGMENT

MGENGWANA, AJ

Introduction

[1] This is an application made by the Applicant in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”) wherein the Applicant seeks an order from this Court condoning its failure to comply with section 3(1)(a) read with section 3(2)(a) of the Act. These provisions require any party that has intentions to institute legal proceedings against an organ of State to serve a notice of its intention to do so within a period of six months from the date on which the debt became due. The application is opposed by the Respondent.

Chronological background to the application for condonation

[2] On 25 October 2019, the Applicant allegedly sustained damages because of torrential downpours which hit, inter alia, the Stellenbosch area.

[3] On 19 November 2019, the insurance loss adjusters (“Proloss”) hired by the insurers of the Applicant, Bryte Insurance Company Limited (“Bryte”), furnished Bryte with a preliminary report. This report indicated that a claim of approximately R500 000.00 had been intimated by the Applicant following the storm damage. The report also indicated that the Respondent should be held responsible for the damages sustained by the Applicant in the incident of 25 October 2019.

[4] On 19 September 2020, the Applicant’s attorneys drafted section 3(2)(a) of the Act notice to the Respondent wherein they made it very clear that the notice is in respect of an incident that took place on 25 October 2019.

This notice was out of time by nearly five months as it should have been served on the Respondent no later than the 24th day of April 2020.

[5] On 18 October 2022, the Applicant issued Combined Summons which was served on the Respondent on 19 October 2022. Defendant's Plea and Special Plea which raised the issue of non-compliance with the provisions of section 3(1)(a) read with section 3(2)(a) of the Act was served on the Applicant on 19 July 2024.

[6] The Applicant served its condonation application on Respondent's correspondent attorneys on 18 March 2025, and the Respondent deposed to an Answering Affidavit on 26 April 2025. It is, however, not clear from the record when was same served and filed. What is known is that the Answering Affidavit of the Respondent raised two points in limine and which are as follows:

[6.1] That the deponent to the Founding Affidavit has no authority to depose thereto.

[6.2] That the averments contained in the Founding Affidavit of the Applicant and which sought to give an explanation with regard to the late filing of the section 3(1)(a) read with section 3(2)(a) notice constitutes inadmissible hearsay evidence.

The Replying Affidavit of the Applicant was served on the Respondent on 1 July 2025.

Issues for determination

[7] From this Court's reading of the papers filed, it is apparent that this Court is called upon to make a determination on the following:

[7.1] Whether the Applicant has shown, in its application, that good cause exists for its failure to serve on the Respondent a notice as required by section 3(1) in accordance with section 3(2) of the Act.

[7.2] Whether the Applicant has shown, in its application, that the First Respondent was not unreasonably prejudiced by the failure.

In other words, this Court is called upon to determine whether the Applicant has successfully surmounted the legal hurdles placed by section 3(4)(b)(ii) and (iii) of the Act. In order to make such a determination, this Court is required to lay bare and discuss the legal principles regulating condonation applications made in terms of section 3(4)(b) of the Act.

Points in limine

[8] Before dealing with the condonation application, this Court deems it prudent to first deal with the points in limine raised by the Respondent. The first point in limine raised by the Respondent, as apparent from paragraph 5 of its Answering Affidavit, is that the deponent of the Applicant's Founding Affidavit in the condonation application is not duly authorised to depose to such affidavit. From the Court's reading of paragraph 5, the Respondent does

not take issue with Applicant's attorney's authority to act on behalf of the Applicant herein, its only contention is Lindy Manamela's authority to depose to the Founding Affidavit.

[9] Streicher JA held as follows in *Ganes and Another v Telecom Namibia Ltd* regarding deponent's authority to depose to an affidavit:

"[19] ... In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised."¹ (See also Erasmus Superior Court Practice Second Edition at D1-54)

[10] The Court's understanding of the case cited above is that the Applicant's attorney herein does not have to possess a separate authority to depose to an affidavit, proof that she has been authorised to act on behalf of

¹ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)

the Applicant is enough. Therefore, Respondent's first point in limine must fail.

[11] The Second point in limine raised by the Respondent is that the averments made in the Founding Affidavit, more specifically at paragraphs 8, 9 and 10 thereof, constitute inadmissible hearsay evidence. It is notable that when Applicant's attorney attempted to deny the truthfulness of this averment, she repeated that the information was "conveyed" to her as the legal representative of the Applicant. There is, therefore, no dispute that she placed reliance on hearsay evidence when making the averments contained at paragraphs 8, 9 and 10 of her founding affidavit. What the Court now needs to determine is whether this evidence is admissible or not.

[12] The general rule about hearsay evidence is that it is inadmissible, but there are certain circumstances in which it may be admissible. In the unreported judgment of the Gauteng Local Division, Thompson AJ held as follows in *Masazie Logistics (Pty) Ltd v Show Pao Fan* with regards to the admission of hearsay evidence in motion proceedings:

"[11] A proper motivation must be set out in an affidavit by the party relying on the hearsay evidence, having regard to the requirements set out in Section 3(1) of the General Law of Evidence Amendment Act 45 of 1988 (Hearsay Act), why the interests of justice permit the admission of hearsay.

[12] Prior to the enactment of the Hearsay Act, it was incumbent on a party seeking the admission of hearsay evidence to, inter alia, assert that the deponent believes the hearsay to be correct and furnish the grounds for such belief. I can find nothing in Section 3(1) of the Hearsay Act that this requirement has been abandoned. As a matter of fact, Section 3(1)(c)(vii) of the Hearsay Act enjoins the court to have regard to any other factor which, in the opinion of the court, should be taken into account. I am of the view that a deponent who seeks to have hearsay evidence admitted must, at least, in terms of this section state that the hearsay evidence is believed to be true and set out the grounds upon which such belief is founded."

[13] Theron J also held as follows in *Galp v Tansley, N.O. and Another*:

"But one important point emerging from the cases which I have enumerated in the preceding paragraph is this, viz., that our Courts have consistently refused to countenance the admission as evidence -for any purpose whatever -of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e., save where the deponent (or affirmer) has not only revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief."²

[14] What is clear from the authorities cited above is that the deponent who seeks to rely on hearsay evidence in his or her affidavit has to lay a foundation first, i.e. he or she needs to state that the hearsay evidence he or she seeks to rely on is believed to be true, set out the grounds upon which such belief rests,

² 1966 (4) SA 555 (C)- 559H

set out the grounds upon which such hearsay evidence should be admitted and thereafter request the court to admit same.

[15] In the application at hand, none of what is contained in the preceding paragraph has been embarked upon, therefore, the second point in limine should succeed. Having made this finding, this Court therefore orders that paragraphs 8, 9 and 10 of the founding affidavit deposed to by Ms. Lindy Manamela on 20 January 2025 be struck out.

Legal principles applicable to Condonation Applications made in terms of the Act

[16] Section 3(4) of the Act reads 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.”³

[17] In dissecting the meaning of ‘good cause’ Heher JA in *Madinda v Minister of Safety and Security*⁴, a unanimous decision of the Supreme Court of Appeal, cited the following passage by Schreiner JA in *Silber v Ozen Wholesalers (Pty) Ltd*⁵:

“The meaning of “good cause” in the present sub-rule, like that of the practically synonymous expression “sufficient cause” which was considered by this Court in *Cairn’s Executors v Gaan* 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes 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.”

“Although this passage relates to a different legislative context (viz rule 46(5) of the magistrates’ court rules), I am of the view that it holds good for the interpretation of s 3(4)(b)(ii). “Good cause” usually comprehends the prospects of success on the merits of the case, for obvious reasons:..”⁶

[18] In elaboration, in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*⁷, *Majiedt AJ (as he then was)* elaborated as follows :

“[11] As can be seen, s 3(4)(b) circumscribes a court’s power by requiring that it be satisfied that: (i) the debt has not been extinguished by prescription; (ii) good cause

³ Section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

⁴ 2008 (4) SA 312 (SCA) par [11]

⁵ 1954 (2) SA 345 (A) at 352H-353A

⁶ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (A) at 316J – 317A

⁷ 2010 (4) SA 109 (SCA)

exists for the failure by the creditor, i.e. to serve the statutory notice according to s 3(2)(a) or to serve a notice that complies with the prescripts of s 3(2)(b); and (iii) the organ of State was not unreasonably prejudiced by the failure. These requirements are conjunctive and must be established by the applicant for condonation.”

[19] In *Rossouw v Blignaut and Wessels and Another*⁸, a very recent reportable judgment of the Supreme Court of Appeal, Makgoka JA, writing for the majority, re-iterated the position regarding condonation applications in terms of section 3(4) of the Act, as follows:

“[55] As to the element of good cause, it entails, among other things, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, any contribution by other persons or parties to the delay and the applicant’s responsibility therefor, and prospects of success in the proposed action.”

[20] On the issue of prospects of success, the applicant in a condonation application is not expected at this stage to satisfy the Court on a balance of probabilities that her action would succeed⁹. A *prima facie* case and a *bona fide* intention in the sense of seeking an opportunity to have the matter tried would suffice.¹⁰ At this stage, the Court of appeal should not seek to critique applicant’s evidence as if it were a trial court.¹¹

[21] Furthermore, the majority judgment in *Rossouw*, said the following when dealing with the issue of unreasonable prejudice:

“[71] The Full Court did not consider this factor at all, since, seemingly, on its view, the applicant had failed to explain the delay between 2017 and 2018. In my view, the Full Court proceeded from the wrong premise in this regard and misdirected itself

⁸ [2025] ZASCA at par [55] – judgment was delivered on 7 October 2025

⁹ *Rossouw*, par [65]

¹⁰ *Ibid*, par [65]

¹¹ *Ibid*, par [68]

as a result. The three jurisdictional factors in s 3(1)(a) should be considered in a balanced approach. None of them should, a priori, be eliminated from the equation simply because the other is weak. As pointed out in *Madinda*, prospects of success on the merits could mitigate fault.”¹²

[22] At paragraph [82] of *Rossouw*, Makgoka JA further emphasized that:

“[82] Furthermore, this Court pointed out in *Madinda* that although the onus to the absence of unreasonable prejudice rests on the applicant, whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Thus, ‘a court should be slow to assume prejudice for which the respondent itself does not lay a basis. What this Court cautioned against is precisely what the high court and the Full Court did. The MEC laid no basis for her assertion that the late delivery of the statutory notice would not cause the department any unreasonable prejudice. Despite this, the two courts below assumed the presence of such prejudice in the MEC’s favour. They erred in this regard.”

Principal submissions

[23] During argument, both Applicant’s and Respondent’s counsel were *ad idem* that this application has not been adversely impacted upon by section 3(4)(b)(i) of the Act in that Applicant’s claim herein has not been extinguished by prescription.

[24] They were also *ad idem* with regards to the following:

(a) That the requirements of section 3(4)(b) are conjunctive.

¹² Ibid par 71

(b) That the phrase “if [the court] is satisfied” sets the standard which is not proof by balance of probabilities, but rather the overall impression the facts make on a court that approaches the matter with fairness.

(c) That in general terms, the interests of justice play an important role in condonation applications.

(d) That the discretion afforded to the court under section 3(4)(b) is not a narrow one.

[25] There is also a *concursum animorum* between the respective counsels that in enquiring whether good cause exists, our courts have developed a flexible approach and examined factors that affect the fairness of granting relief to an applicant and the proper administration of justice. Such factors include reasons for the delay, sufficiency of the explanation offered, prospects of success in the proposed action, applicant’s bona fides, and any contribution by other persons or parties to the delay and applicant’s responsibility therefor.

[26] It should be remembered that as a result of the striking out of paragraphs 8, 9 and 10 of the Applicant’s Founding Affidavit, there is currently no explanation for the delay in serving notice in terms of section 3(1)(a) read with section 3(2) of the Act by the Applicant. However, the Applicant has submitted that the degree of non-compliance with section 3(2)(a) is not inordinate as it is a mere four months period or close to five months at most.

[27] The prospects of success are a highly contested terrain between the parties.

(a) Applicant submits that the prospects of succeeding in the main action are strong or at least reasonable. De Zalze's case is that the water damage to the property occurred because of an existing storm water channel put in place, alternatively erected by the Municipality, and that the storm water was deliberately channeled to the property by the Municipality. That prior to the incident, De Zalze corresponded with the Municipality regarding the issues with the storm water channel, as set out in annexure "A2" to De Zalze's particulars of claim. That the Proloss report, included as annexure "A3" to De Zalze's particulars of claim, indicates a *prima facie* case at least based on the Municipality's failure to adequately maintain the stormwater channel, leading to blockages and subsequent overflow directly onto De Zalze's property. Although the Municipality denies De Zalze having strong prospects and alleges that any damage was a result of De Zalze's own negligence, this is unsustainable.

(b) Respondent disputes Applicant's claim based on negligence and causation. Respondent goes further to submit that Applicant's claim is based on hearsay driven allegations and is very thin on factual foundation objectively speaking. Respondent also submits that there are material disputes of fact which render any "strong prospects of success" assertions speculative at best as the probabilities in disputed issues is likely to favour the Respondent. Respondent goes on to submit that the Applicant has not demonstrated "strong" prospects, at best, the merits are uncertain and contested. While the law provides that strong merits may mitigate procedural non-compliance, weak or uncertain merits cannot do so. In this case where there is no explanation for the delay,

the absence of clearly strong prospects weighs heavily against a finding of good cause in favour of the Applicant.

[28] In addition to the alleged hopeless case of the Applicant, the Respondent also lamented the fact that the Applicant waited more than two years before issuing summons on 18 October 2022 with no explanation as to why summons were only issued on the eve of prescription. More importantly, for the present application, the Municipality filed its plea, including the special plea of non-compliance with section 3 on 19 July 2024. Yet, the Applicant only launched the condonation application approximately eight months later, with no explanation for this additional delay.

[29] The Municipality takes further issue with De Zalze issuing summons more than two years after the notice was sent. The explanation for this is that De Zalze continued attempting to engage further with the Municipality during such time, addressing written correspondence as well as trying to contact the Municipality's representatives telephonically throughout. The Municipality failed to provide any response.

[30] As for the complaint about the delay in launching the condonation application, the explanation is that after the Municipality's plea was served on De Zalze on 1 August 2024 (seven months after the amended particulars of claim were served in December 2023), Mokgohloa Attorneys awaited specific instructions from Bryte regarding De Zalze's next legal steps. Mokgohloa Attorneys acts on a contingency fee basis in this matter, meaning it cannot cover legal counsel fees and disbursements and such costs are covered directly by Bryte. It was especially important therefore to await Bryte's instructions before proceeding. Certain internal organisational changes at Bryte between

September and November 2024 also delayed the process, including new claim handlers and management responsible for authorising legal instructions. These required a period for transition which delayed Mokgohloa Attorneys receiving instructions to proceed with launching this application. De Zalze's legal representatives then prepared this application during November and December 2024. Due to payment delays for the courier service, Mokohloa Attorneys were only able to dispatch the documents from their offices in Johannesburg to their correspondent attorneys in Cape Town towards the end of February 2025 and have the application issued in March 2025. The delay of seven months between August 2024 and March 2025 was not inordinate. If one considers such delay as a factor, it would need to be done as part of the Court's 'overall impression' approach, including the context that the Municipality itself demonstrated laxness in delaying to file its plea by over six months.

[31] Regarding unreasonable prejudice, the Applicant submitted that there is no basis laid by the Respondent to conclude that it has been unreasonably prejudiced by Applicant's failure to serve the notice timeously. Even if condonation is granted, Applicant will still need to make out a case in the main action and prove its claim, and the Respondent will not be prevented from defending the matter.

[32] The Respondent responded to the above by submitting that it has suffered inherent prejudice as it could not do early investigation and preservation of evidence. A notice served roughly ten months after the incident (and well after the expiry of the six-month period) undermines purpose. The subsequent delays compound the prejudice as memories fade, personnel change, records become harder to locate, and the infrastructure

itself may change over time. The submission made by the Respondent and which is to the effect that it would have enjoyed the protection of its insurance policy if the statutory notice had been delivered within the six-month period shall be ignored by this Court as the answering affidavit deposed to by Garaldene Lezette Mettler on 26 April 2025 contains no such averment. This issue was only raised in the Respondent's Heads of Argument.

Discussion and findings

[33] The following are not in dispute in this matter:

(a) The Applicant failed to deliver to the Respondent a notice drafted in accordance with the terms of section 3(2)(b) within a period of six months from the date on which the debt became due hence this condonation application.

(b) The Applicant's reasons for the delay are not on record as they had been struck out as they were made up entirely of inadmissible hearsay evidence.

(c) That the notice delivered by the Applicant on 19 September 2020 was nearly five months out of time based on the cause of action that arose on 25 October 2019. The notice itself makes it clear that it is in respect of an incident that took place on 25 October 2019.

[34] Having found that the degree of lateness of the notice is nearly five months and that no explanation for the delay is on record, the Court has to

make a finding on whether the Applicant has any prospects of success in the main action. As previously stated in this judgment, prospects of success in a condonation application, the Applicant is not expected to persuade the Court, on a balance of probabilities, that it will succeed with its main action. All that it has to show the Court is that it has a *prima facie* case and that it has a *bona fide* intention of having it tried. This Court is therefore satisfied that the Applicant has surmounted this hurdle in that this Court does not believe that the Applicant has a hopeless case. It might have a difficult case in its hands but that does not translate to a hopeless case.

[35] Having made the above finding, then this Court has to make a determination on whether the Respondent will suffer unreasonable prejudice should condonation be granted. It must be said that the Respondent did not set out any tangible prejudice that will be suffered by itself should condonation be granted. It only stated in general terms that memories do fade, that personnel do change, that records do become harder to locate and that the infrastructure itself may change over time however, the Respondent did not link the foregoing factors to itself.

[36] The Respondent had raised serious concerns with the delay of two years between the delivery of the notice as required by the Act and the issuing of summons; and the delay between the service of the special plea and the institution of these condonation proceedings. The Applicant gave a detailed and corroborated explanation for the delay in the aforementioned respect, and this Court has been satisfied by the explanation itself.

[37] Therefore, while being very much aware of the fact that there is no explanation on record for the delay in delivering the notice, this Court is

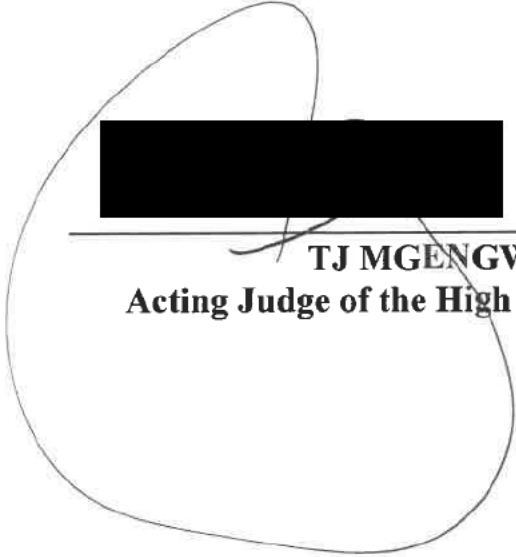
however of the view that the five-month delay in having same delivered is not inordinate. This Court has already found that the Applicant has prospects of success with its main action and that there is no unreasonable prejudice likely to be suffered by the Respondent should condonation be granted. This Court is also satisfied that the Applicant has been able to give a detailed explanation for the other delays complained of by the Respondent.

[38] Having considered all of the above factors in conjunction, this Court therefore finds that Applicant's condonation application should succeed.

Order

[34] In the result, I would grant the following order:

[34.1] The condonation application is granted with no order as to costs.



TJ MGENGWANA
Acting Judge of the High Court

APPEARANCES:

For the plaintiff: G. Loubser

Instructed by: Mokgohloa Attorneys Inc.

For the defendant: A. Montzinger

Instructed by: VKZ Inc.