

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A60/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 23 March 2026

E van der Schyff

In the matter between:

The Minister of Police

Appellant

and

Thure Mzondile Andries

Respondent

JUDGMENT:

Coram: Van der Schyff J (Millar J et Retief J concurring)

Context

- [1] On 21 October 2022, the Gauteng High Court found in favour of the plaintiff, Mr. Thure. It held the Minister of Police (the Minister) liable for damages flowing from Mr. Thure's unlawful arrest and detention. The court held that the Minister is liable for Mr. Thure's incarceration following his first appearance in court, at which his bail application was denied. It is common cause that Mr. Thure was in jail for two years and one month before the charges against him were withdrawn for lack of evidence,

and he was released. The court *a quo* awarded general damages of R2 million. Following the dismissal of a late application for leave to appeal, the Minister sought special leave from the Supreme Court of Appeal. On 8 September 2023, the SCA granted special leave. The notice of appeal was, however, only filed on 21 February 2024, by which time the appeal had lapsed by operation of law. This court is now seized with an application for condonation to extend the period of twenty days for the filing of the notice of appeal after the receipt of the order from the Registrar of the Supreme Court of Appeal. Although it is not explicitly included in the prayers in the condonation application, the applicant ultimately seeks reinstatement of the appeal. It is trite law that an application for reinstatement can only be granted upon good cause shown.

- [2] Against this background, it is no exaggeration to state that the court was flummoxed when, at the commencement of proceedings, counsel for the applicant sought a postponement from the bar. No substantive postponement application was filed. Counsel submitted that he only received his brief on 13 March 2026, less than a week before the set-down date. The application for postponement was vehemently opposed. Absent any evidence justifying such an indulgence, the application for postponement was summarily dismissed.
- [3] Notwithstanding the failure to file heads of argument in the condonation application, the applicant's counsel was provided with an opportunity to address the court. Constrained by the extreme lateness of his instructions, counsel could do little more than implore the court to entertain the appeal in the interests of justice, citing the substantial quantum of public funds at stake.

The application for condonation

- [4] In the founding affidavit, the applicant's attorney explains that the office of the State Attorney, Bloemfontein, transmitted the SCA's order via email on 20 October 2023. She contends that this correspondence did not come to her attention when she observed the order on the CaseLine's file on 6 February 2024. She contacted her colleague at the Bloemfontein Office, who informed her that the order had been

emailed to her. Upon further investigation, she discovered that the email went “onto a trail of spams emails” (*sic*) on her side. As far as the merits of the appeal are concerned, it was merely stated in the affidavit that the appellant refers to the notice of appeal, as if it were specifically repeated, and submits that it has a prospect of success on appeal, or that arguable points have been raised that need to be fully ventilated.

- [5] The respondent opposes the application, contending that the applicant has failed to demonstrate good cause. The respondent’s attorney highlights the lack of technical evidence regarding the spam filter issue, noting that, since the same national department of justice employs the sender and recipient, their server architecture should, in theory, preclude such an occurrence. The respondent challenged the appellant’s attorney to provide details of any “prior evidence of an occurrence wherein the same incident has taken place, and what was done to resolve the problem. The respondent’s attorney took issue with the fact that no confirmatory affidavit by the other officials to whom the email was sent was filed, nor was there any confirmation that the Bloemfontein Office was subsequently contacted after the order was uploaded to the CaseLine file in February 2024. The respondent highlighted that the appellant did not address the merits of the appeal in the affidavit filed in support of the condonation application.

- [6] The appellants then delivered a replying affidavit. I pause to note that the replying affidavit was not uploaded to the CaseLine’s file. The file is, in any event, in complete disarray, rendering navigation difficult.

- [7] In reply, the appellant’s attorney states: “... the appellant’s condonation application should be approached on the basis that the respondent has in fact not demonstrated any substance, whatsoever, in his opposition.” The misconception that a court will approach a condonation application from the viewpoint that a respondent must demonstrate substance in its opposition shall be revisited in the discussion below.

- [8] Despite having been invited to provide evidence that the email containing the SCA-order landed in the spam section of the appellant’s attorney’s mailbox, no proof was

uploaded. The applicant relied on the SCA-order as sufficient proof of prospects of success in the appeal.

Discussion

[9] The application for condonation was brought on motion. It is well-established that the affidavits filed by parties must contain not only the necessary averments to obtain the relief sought, but also the evidence to substantiate the averments. For this reason, it is not sufficient for an applicant in a condonation application to merely aver that good cause exists for the granting of condonation. The applicant must provide the necessary evidence, the facts and proof thereof where necessary, upon which the court can conclude that good cause indeed exists for the granting of condonation.

[10] In *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) 720E-G, the following well-known principles were established:

“It is well established that in considering applications for condonation the court has a discretion to be exercised judicially upon a consideration of all facts and that in essence it is a question of fairness to both sides. In this inquiry relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus, a slight delay and good explanation may be held to compensate for prospects of success which are strong.”

[11] The Constitutional Court subsequently held in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*¹ that an applicant for condonation

¹ 2008 (2) SA 472 (CC) at 477A-D.

must give a full explanation for the delay, which must not only cover the entire period of the delay but must also be reasonable.

- [12] This court operates on the premise that the parties' attorneys are officers of the court. Consequently, a high premium is placed on their credibility. If an attorney attests under oath that an email landed up in a spam folder, this court accepts it – to do otherwise would affect the functioning of the courts at its core. However, acceptance of an explanation for a delay does not equate to a finding of reasonableness. Other important questions remain unanswered: who was the primary recipient to whom the email from the Bloemfontein office was addressed, as the deponent to the condonation application was merely cc-ed on the email, and what was his or her role in this matter and in the prosecution of the appeal? Why did the attorney not check the spam folder frequently if there was an indication of unread mail in the folder, as there inevitably must have been? What steps were taken between 6 February 2024 and 21 February 2024 when the existence of the SCA-order was noted, and the notice of appeal and condonation application were filed?
- [13] The unanswered questions render the State Attorney's explanation for the delay inadequate. It renders the explanation sparse and lacking in particularity. Whether it will prove to be fatal for the condonation application can only be considered in conjunction with other factors such as prejudice to the opposing party and the latter's interest in the finality of his judgment and the applicant's prospects of success on appeal.
- [14] I find it inexplicable that a party that must establish a *bona fide* intention to proceed with an appeal seeks the postponement of the application on the day the matter is set down to be finally determined, without having filed a substantive postponement application. The applicant seems to approach this litigation in a very lackadaisical manner. From the onset of the proceedings in the court *a quo*, there seems to have been a lack of commitment. The record reflects that discovery was not done adequately. This directly affected the quality of the evidence led on behalf of the Minister and culminated in the court *a quo*'s finding that the arrest was unlawful, a finding not challenged on appeal. The application for leave to appeal was filed late, and condonation was sought; the court *a quo* refused it, and the SCA subsequently

granted it. While again faced with the need to seek condonation for the late filing of the appeal before this court, the applicant did not get its affairs in order and sought a postponement on the day the matter was to be heard.

- [15] This laissez-faire approach is to be weighed against the respondent's interest in the finality of his judgment. The respondent was incarcerated for more than two years after being unlawfully arrested and has been released because of a lack of evidence. In October 2022, he was the successful party in a delictual claim instituted against the Minister and was awarded R2 million for general damages. In March 2026, he is still waiting to benefit from the judgment. The respondent's interest in the finality of his judgment speaks for itself, and the continued uncertainty occasioned by the applicant's failure to prosecute the appeal timeously results in prejudice to the respondent.
- [16] The applicant's prospects of success on appeal have to be considered in light of the judgments handed down by the Constitutional Court in *De Klerk v Minister of Police*² and *Mahlangu v Minister of Police*.³ It weighs heavily that the Minister did not appeal the court *a quo*'s finding that the arrest was unlawful. The Minister seems to be under the misapprehension that it was for Mr. Thure to prove that his continued detention after his first appearance in court, which arose from an unlawful arrest, was attributable to the members of the South African Police. As I read *De Klerk* and *Mahlangu*, the onus to prove that the detention was lawful rests firmly on the police, particularly if the preceding arrest was unlawful. The record reflects that the investigating officer opposed bail. However, he never testified as to what transpired at court that would exonerate the Minister. On this aspect, prospects of success on appeal are slim.
- [17] The Minister also takes issue with the quantum and submitted in the notice of appeal that the court *a quo* erred in making such a substantial award. The assessment of general damages is inherently discretionary. It is trite that a court on appeal can interfere with an award for general damages if the appeal court is of the view that

² 2020 (1) SACR 1 (CC).

³ 2021 (2) SACR 595 (CC).

there was a misdirection or error committed by the court *a quo*, or a striking disparity between what the trial court awarded and what the appeal court considers ought to have been awarded,⁴ or where the trial court's award lacks a sound basis. The mere fact that a court on appeal would grant a lesser award is not enough to interfere with the court *a quo*'s award. The applicant's prospects of success have not been convincingly established.

- [18] If the factors mentioned above are considered holistically, the applicant has failed to provide a full and satisfactory explanation for the delay. The prospects of success for the applicant are, at best, weak. In these circumstances, the interests of justice are not in favour of the granting of condonation.

Costs

- [19] Costs follow success. To indicate the court's displeasure with the way in which the applicant approached this condonation application, a punitive cost order is granted.

ORDER

In the result, the following order is granted:

- 1. The application for condonation is dismissed.**
- 2. The appeal has lapsed and is struck from the roll.**
- 3. The Minister of Police is to pay the costs of suit, including the costs of the appeal on attorney and client scale.**


E van der Schyff
Judge of the High Court

⁴ *Minister of Police v Dlwathi* [2016] JOL 35451 (SCA).

I agree



A Millar

Judge of the High Court

I agree



L Retief

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. If there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date it is uploaded to CaseLines is deemed the date the judgment is handed down.

For the applicant:

Adv. S.K. Lekitima

Instructed by:

State Attorney

For the respondent:

Adv. M. Tjiana

Instructed by:

Makapan Attorneys

Date of the hearing:

18 March 2026

Date of judgment:

23 March 2026