



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A29/2025

In the matter between

TLHORISO JOHNY TETSOANA

APPELLANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND RESPONDENT

Neutral citation: *Tetsoana v Minister of Police and Another* (A29/2025) [2026] ZAFSHC 90 (10 March 2026)

Coram: DAFFUE *et* GREYLING–COETZER JJ, *et* MUVANGUA AJ

Heard: 30 January 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 10 March 2026 at 12h00.

Summary: Appeal – reinstatement of the appeal – condonation – rule 49 of the Uniform Rules of Court – legal principles re-stated – insufficient reasons for delay.

ORDER

The appeal is dismissed with costs, inclusive of the costs of counsel on scale B.

JUDGMENT

Muvangua AJ (Daffue *et* Greyling–Coetzer JJ concurring)

Introduction

[1] Before us served two matters:

- (a) an application for the reinstatement of an appeal; and
- (b) an appeal against an order by this court (per Mgudlwa AJ), which was handed down on 10 September 2024, dismissing the appellant's claim for damages.

The first and second respondents opposed both the reinstatement application and the appeal. Each of these matters is considered in turn below, starting with the reinstatement application.

The reinstatement application

[2] In relation to the reinstatement application, the appellant seeks the following orders:

- (a) condonation of the late service and filing of the appeal record;
- (b) condonation of the late service and filing of the application for an appeal date, and notice of set down; and
- (c) the reinstatement of the appeal, in accordance with rule 49(6)(b) of the Uniform Rules of Court.

[3] The facts giving rise to the reinstatement application are these: the appellant was granted leave to appeal to the full bench of this Court on 30 January 2025 and delivered

his notice of appeal within the prescribed time-period, on 10 February 2025. Rules 49(6)(a)¹ and (7)(a) of the Uniform Rules of Court require an appellant to apply for a hearing date and to file the appeal record, within 60 days from the date of filing of the notice of appeal, failing which, the appeal is deemed to have lapsed. This means that the appellant had until about 13 May 2025 to apply for a hearing date and file the appeal record. He did not, and the appeal lapsed.

[4] The appellant filed the record on 29 May 2025 and applied for a hearing date only on 7 July 2025. He was allocated a hearing date by the registrar of this court on 8 July 2025 and served the notice of set down on the same date. The hearing date was set for 30 January 2026.

[5] The appellant filed the reinstatement application on 2 December 2025 – nearly seven months after filing the appeal record, and six months after allocation of the hearing date. The founding affidavit in support of the application for reinstatement was deposed to by the appellant's attorney of record, Mr Van Wyk, and without a confirmatory affidavit by the appellant himself.

Reasons for the delay

[6] Mr Van Wyk explains in his founding affidavit that he manages his files through a daily diarising system. In terms of that system, he records the date on which a file must be attended to. On the relevant date, the file is then drawn and placed on his desk. Regrettably, Mr Van Wyk does not identify the person responsible for drawing and placing files on his desk.

[7] He alleges further that during the period of March 2025 to 23 April 2025, the file in this matter was mis-diarised due to the heavy trial loads and professional commitments. The result was that this file was not attended to by him. On 4 February 2025, he requested Gauteng Transcribers to provide a quotation for the transcription of the trial proceedings in the court *a quo*. The quotation was received on 28 February 2025 and was paid over a month later, on 11 April 2025.

¹ The rule reads as follows: 'Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal. . . . If no such application is made . . . the appeal . . . shall be deemed to have lapsed. . . '

[8] His office requested a status update from the transcribers on 29 April 2025, and received the transcribed appeal record on 1 May 2025. The record comprised 372 pages. Mr Van Wyk says that upon receipt of the record, he 'proceeded to compile the appeal bundles as required in terms of the Rules of Court'.² Mr Van Wyk says that he attended to the preparation of the record of appeal, which required dividing the documents into three bundles of no more than 100 pages each, and handed them to the local correspondent attorneys in Bloemfontein, Jacobs Fourie Inc on 14 May 2025 for service and filing. It is not clear from this explanation whether compiling the record is a different process from dividing it into bundles.

[9] About two weeks later, on 28 May 2025, Mr Van Wyk enquired from his local correspondent attorneys whether the record was served and filed. It would appear that the record was only filed after Mr Van Wyk's query, on 29 May 2025.

[10] Mr Van Wyk alleges further that he was involved in extensive workload and the associated responsibilities in numerous trials and litigation in Pretoria, Bloemfontein, Newcastle and Durban, during April and May 2025. This resulted in the matter falling outside the time periods stipulated by rule 49 of the Uniform Rules of Court.

[11] On 28 January 2026, an answering affidavit to the reinstatement application was filed on behalf of the first and second respondents. In it, they raise as a point *in limine*, that Mr Van Wyk was not authorised to prosecute the appeal on behalf the appellant.

[12] They also allege that the appellant did not comply with the provisions of rule 49(13)(a)³ of the Uniform Rules of Court, in that he did not enter good and sufficient security for the respondents' costs. This sub-rule should also be read with rule 49(13)(b). The respondents allege that the appellant provided R2000 as security for costs, which was too little too late and therefore prejudicial to them. The nub of the prejudice for the respondents is that the appellant's failure to comply with the timelines in rule 49 deprived them of the opportunity to object to the appellant's entered security for costs.

² In terms of rule 49(7)(a), '... the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent.'

³ Rule 49(13)(a) reads as follows: 'Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.'

Did Mr Van Wyk have authority to act on behalf of the appellant?

[13] In terms of rule 7(2) of the Uniform Rules of Court, the registrar shall not set down an appeal at the instance of an attorney, unless that attorney has filed (together with the application for a hearing date) a power of attorney authorising the appeal.

[14] Included in the appeal record is a document titled 'Special Power of Attorney', in terms of which the appellant is purported to have given special power of attorney to Mr Van Wyk to lodge and prosecute the appeal against Mgudlwa AJ's decision on his behalf, as well as to take all steps necessary to finalise such appeal. On the face of it, the document was executed in Pretoria on 10 April 2025 and signed by a witness. It was, however, not signed by the appellant.

[15] This issue was raised with Mr Zietsman, who appeared on behalf of the appellant. Mr Zietsman conceded that without the appellant's signature, there was no proper power of attorney executed and that ought to have been the end of the matter. That concession was well made, but I deal with the totality of the matter anyway insofar as another court may find that the appellant is properly before the court and has provided sufficient reasons for the delay.

Legal principles on condonation and assessment of reasons for the delay

[16] The legal principles pertaining to condonation applications are settled in law. Courts⁴ have repeatedly observed that condonation is not an entitlement, but an indulgence granted at the court's discretion. The overriding enquiry is whether excusing non-compliance would be in the interest of justice. That assessment is inherently flexible and fact-sensitive – it requires consideration of all relevant facts and circumstances. A party seeking condonation must show good cause, which entails providing a *comprehensive* and reasonable explanation for the failure to comply with the prescribed time limits.

⁴ See for example, *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC) (*Brummer*); *Mankayi Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); *Mphephu-Ramabulana and Another v Mphephu and Others* [2021] ZACC 43; 2022 (1) BCLR 20 (CC) (*Mphephu-Ramabulana*); *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); *Mphati and Another v Minister of Police* [2022] ZAFSHC 39 (7 March 2022).

[17] Over time, courts have articulated a set of interrelated considerations that inform this enquiry.⁵ These include the nature of the relief sought; the length of the delay and the reasons advanced for it; the significance of the issues to be determined; the impact of the delay on the administration of justice and on other litigants; and the applicant's prospects of success on the merits, should condonation be granted. None of these factors is individually decisive; they must be evaluated cumulatively in a balanced and holistic manner.⁶

[18] The Constitutional Court⁷ has recognised that an inordinate delay, coupled with an inadequate explanation, may justify the outright refusal of condonation. At the same time, it has cautioned that lateness and a deficient explanation are not invariably fatal, as other considerations may nonetheless tip the interests of justice in favour of granting the indulgence. However, the burden to place before the court a full, detailed and accurate account of the reasons for the delay, including the relevant dates, its duration, and the effect of any impediments encountered, rests squarely on the applicant. Broad or vague assertions will not suffice. Importantly, once aware of the non-compliance, the applicant must act without undue delay in seeking condonation, and any further lapse in bringing the application must itself be satisfactorily explained.⁸

[19] The reasons provided by Mr Van Wyk fall short of this standard on a number of counts. First, the explanation provided is skeletal. It rests on a general assertion that the matter was 'mis-diarised' and that Mr Van Wyk was engaged in other trials and professional commitments. It does not meaningfully engage with the full factual matrix necessary to enable the court to determine whether, in all the circumstances, the interests of justice favour excusing the non-compliance. For example, Mr Van Wyk does not explain *how* the matter came to be 'mis-diarised' in any concrete way, he does not say what date should have been diarised, or what date was diarised instead or if the matter was not diarised at all.

⁵ *Brummer* para 3.

⁶ *Mphaphu-Ramabulana* para 38.

⁷ *Ibid.*

⁸ Footnote 4: *Mphati and Another v Minister of Police* para 10.

[20] Secondly, Mr Van Wyk refers to 'numerous trials and litigations' in April and May 2025 across Pretoria, Bloemfontein, Newcastle and Durban, but gives no particulars. For example, he does not provide case names, dates, court rolls, set-down dates, or why those engagements made compliance impossible (as opposed to inconvenient). Even if this Court was to accept the assertion that Mr Van Wyk was busy during March and April 2025, there is no account for the intervals that matter for rule 49 compliance with any particularity. For instance, he does not say what steps were taken, on which dates, by whom, and why nothing occurred when the deadlines were looming. Instead, the explanation provided leaps from general diary practice to transcript procurement and then to compilation of the appeal record. This kind of scant explanation prevents an assessment of whether the default was reasonable, avoidable, or persistent.

[21] Thirdly, there is no explanation at all, for why the condonation application was not brought promptly once non-compliance was discovered. Mr Van Wyk does not clearly state when he became aware of the non-compliance with the timelines in rule 49, what steps were taken immediately thereafter, and why the condonation application was not instituted sooner. The absence of this detail further undermines the demonstration of good cause.

[22] In sum, viewed through the prism of the applicable legal principles, the explanation proffered on behalf of the appellant is scant, lacking in specificity and candour, and does not discharge the appellant's burden to place before the court a full and satisfactory account capable of justifying the indulgence sought. It is so that strong prospects of success may counterbalance a weak explanation. The evaluation of prospects of success requires an assessment of the merits.

Merits of the appeal

[23] The appellant was arrested on 3 December 2020 by members of the South African Police Service (SAPS) on a charge of rape of a 15-year-old minor. He appeared in court on 4 December 2020 for a bail hearing, which was opposed by the prosecution. The matter was postponed and he was remanded in custody until 10 December 2020, when he was released on R500 bail.

[24] Prosecution for the rape charge continued for several months, until 11 August 2021, when the second respondent declined to prosecute and the charge was withdrawn. On the back of that, the appellant instituted a delictual claim against the respondents in this Court on 23 March 2022. In it, he sought R400 000 in damages for unlawful arrest and detention; and R1 000 000 in damages for malicious prosecution.

[25] With regard to the arrest and detention, the appellant's case was that he was arrested in circumstances where there were no reasonable grounds to justify deprivation of his liberty. He alleged further that the arresting officer did not properly exercise his discretion and did not consider less intrusive measures. In relation to the malicious prosecution claim, the appellant alleged that the prosecution was instituted and pursued without reasonable and probable cause and with malice, resulting in continued infringement of his dignity and freedom.

[26] The respondents admitted the arrest and detention but maintained that these were lawful and justified in terms of s 40(1)(b)⁹ of the Criminal Procedure Act 51 of 1977. That provision permits a peace officer to arrest any person without a warrant, if that peace officer reasonably suspects that the person committed an offence listed in Schedule 1, save for the offence of escaping from lawful custody. On the back of this, the respondents argued that the arresting officer entertained a reasonable suspicion that the appellant had committed a Schedule 1 offence. However, they denied any improper exercise of discretion.

[27] In respect of the malicious prosecution claim, the respondents denied the absence of reasonable and probable cause and also that the prosecution was actuated by malice. They maintained that the prosecution was based on *prima facie* evidence that was gathered during the investigation.

[28] In the premises, the issues before the court *a quo* were: (i) whether the appellant had established the unlawfulness of his arrest and detention; (ii) whether the prosecution

⁹ The section reads as follows: 'A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'.

met the requirements of malicious prosecution; and (iii) if liability were established, the appropriate quantum of damages.

[29] In respect of the first issue, the court *a quo* found that the appellant had not established the unlawfulness of his arrest and detention. That court accepted that the arrest was effected in terms of section 40(1)(b) of the Criminal Procedure Act and approached the enquiry on the basis of whether the arresting officer entertained a reasonable suspicion and exercised the discretion to arrest in a rational and objective manner. The court *a quo* was satisfied, on the evidence before it, (which included the complainant's statement and the identification process), that the threshold for reasonable suspicion had been met and that the arresting officer acted within the bounds of the statutory power. It thus concluded that the respondents had discharged the onus of justifying the arrest and detention on a balance of probabilities.

[30] In respect of the second issue, the court *a quo* held that the appellant had failed to establish the essential elements required to sustain a claim for malicious prosecution. It reiterated that the appellant bore the onus to prove that the prosecution was instituted without reasonable and probable cause and was actuated by malice. The court *a quo* found no sufficient evidential basis to conclude that the prosecutor acted with *animus iniuriandi* or in the absence of reasonable grounds. On the contrary, it regarded the prosecutor's conduct as falling within the legitimate exercise of prosecutorial discretion on the material then available. The subsequent withdrawal of the charge and the delays in the proceedings were not, in the court's view, indicative of malice or a lack of reasonable and probable cause.

[31] In light of these findings on liability, the issue of quantum did not arise for determination. Both claims were dismissed with costs on a party-and-party scale.

Proceedings before this Court

[32] It was common cause between the parties that the appellant was 27 years old when he was arrested on an allegation of rape. He was a Child and Youth Care Worker at Thabo Mofutsanyane Secure Centre in Phuthaditjhaba under the Department of Social Development. It was also common cause between the parties that the complainant was a minor – she was a 15-year-old girl who was a juvenile detainee at Thabo Mofutsanyane

Secure Centre in Phuthaditjhaba. It was further common cause that the appellant was arrested without a warrant on an allegation of rape arising from information received by a social worker at the Centre where he worked.

[33] The appellant argued that the court *a quo*'s finding that the arresting officer exercised his discretion in accordance with s 40(1)(b) of the Criminal Procedure Act was not correct. In amplification, it was argued that the arresting officer mechanically relied on the complainant's A1 statement and operated under the mistaken belief that in rape matters, he had no discretion and was obliged to arrest. Because the officer believed he was compelled to arrest (so it was argued), he did not properly weigh the circumstances, alternatives to arrest, or the constitutional principle that arrest is a measure of last resort. The appellant argued further that the arresting officer did not obtain his account or version of events before effecting the arrest, and further that nothing prevented the officer from obtaining his version or consulting a prosecutor before arresting him.

[34] The appellant's contentions are divorced from the factual context and are not borne out by the record. The evidence before the court *a quo* was that the arresting officer, Mr Molefe, considered the A1 statement and thereafter actively sought out the appellant in order to obtain his version. The appellant was afforded an opportunity to respond to the allegations but declined to do so, indicating that he would present his version in court. In the circumstances, all that Mr Molefe was left with was a reasonable suspicion that the accused committed a Schedule 1 offence, based on the A1 statement.

[35] In *Raduvha v Minister of Safety and Security*,¹⁰ the Constitutional Court cautioned that:

'Section 40(1) of the CPA states that a police officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion.' (Own emphasis.)

¹⁰ *Raduvha v Minister of Safety and Security* [2016] ZACC 24; 2016 (10) BCLR 1326 para 42 (*Raduvha*).

[36] In light of this, any statement by Mr Molefe that he had 'no discretion' to arrest must be assessed within the factual context that prevailed at the time. Considered in context, it does not establish that Mr Molefe failed to exercise a discretion; rather, it reflects his assessment, at that stage, that the jurisdictional requirements for arrest were satisfied and that arrest was warranted. In the circumstances, the decision to arrest was reasonable and fell within the bounds of a lawful exercise of discretion.¹¹

[37] With respect to the further detention issue, the appellant's case was that the Control Prosecutor considered only the A1 statement in deciding to charge under section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and to oppose bail. He argued further that the request for a seven-day remand in custody was based on enquiries that were not related to legitimate bail considerations, and that this resulted in continued detention (from 4 to 10 December 2020) without proper justification.

[38] As we discern from the record, the postponement on 4 December 2020 was made by the court, in order for a formal bail application to be brought. At any rate, it was not disputed that the appellant was legally represented at his first appearance, on 4 December 2020. There was no reason on the record, or provided to us, to explain why his legal representative did not approach a court on an urgent basis to secure the appellant's release on bail.

[39] On the malicious prosecution claim, the appellant argued that the prosecution was malicious because the State lacked reasonable and probable cause from the outset. He argued further that a proper reading of the A1 statement did not establish sexual penetration without consent, and therefore section 3 (rape) was inapplicable. At most, so the argument continued, the facts might have supported an offence of statutory rape under section 15, but this was not taken into account. It was argued that the minor child gave consent, on the basis that the appellant would assist her with her case.

[40] The appellant argued further that the control prosecutor failed to apply his mind to the contents of the docket, and persisted instead, with a Schedule 6 charge without

¹¹ *Mawu and Another v Minister of Police* [2014] ZAWCHC 76; 2015 (2) SACR 14 (WCC) para 31; *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) paras 33-35; and *Raduvha* fn 10.

justification, and only much later consulted the complainant, at which stage he allegedly became aware of credibility concerns. From these features, the appellant invites the inference that the prosecution lacked reasonable and probable cause and that malice should be inferred.

[41] We do not agree with this contention. When the decision to prosecute was taken, all that was available at the time was the statement from the complainant, who was a minor. The control prosecutor ultimately declined to prosecute after consultation with the complainant. It might be so that the prosecutor did not provide explicit reasons for the withdrawal of the charge, but objective documents in the record show that: (a) the complainant filed a subsequent statement which conflicted with the first statement and (b) she did not wish to continue with the case.

[42] To sustain such a claim, the appellant (*qua* plaintiff) needed to show that¹²:

- (a) the defendant set the law in motion by instigating or instituting proceedings;
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice (*animus iniuriandi*); and
- (d) the prosecution was terminated in the plaintiff's favour.

None of the factors relied on by the appellant establish all the elements required for a claim of malicious prosecution.

Conclusion

[43] The appellant has failed, at the threshold, to place before this court a full and satisfactory explanation for his non-compliance with the peremptory time limits in rule 49. The explanation advanced is scant, lacking in specificity, and does not demonstrate good cause. Moreover, the absence of a properly executed power of attorney is fatal to the reinstatement application. The same applies to the failure to file good and sufficient security in terms of rule 49(13). In these circumstances, the indulgence of condonation cannot be granted.

[44] Even if one were to assume in the appellant's favour that condonation ought to be considered alongside the merits, the appeal would, in any event, not succeed. The court

¹² *Tetsoana v Minister of Police and Another* [2024] ZAFSHC 287; *Seyolala v Minister of Police and Another* 2024 JDR 3822 (LP); *Ntjinga v Minister of Police and Another* 2024 JDR 1993 (GP).

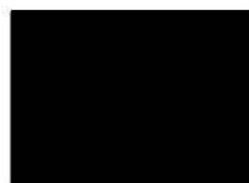
a quo correctly found that the jurisdictional requirements for arrest in terms of s 40(1)(b) were present, that the arresting officer acted within the bounds of a lawful discretion, and that the respondents discharged the onus of justifying the arrest and detention. The further detention resulted from a judicial postponement for purposes of a formal bail application, and no basis has been laid for attributing unlawfulness to the prosecution. Nor has the appellant established the absence of reasonable and probable cause or the presence of malice necessary to sustain a claim for malicious prosecution.

[45] Accordingly, whether approached on procedural or substantive grounds, the appeal cannot be upheld.

Order

[46] In the result, the following order is made:

The appeal is dismissed with costs, inclusive of the costs of counsel on scale B.



 **N MUVANGUA**
ACTING JUDGE OF THE HIGH COURT

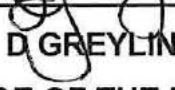
I agree.



JP DAFFUE
JUDGE OF THE HIGH COURT

I agree.



 **D GREYLING-COETZER**
JUDGE OF THE HIGH COURT

Appearances

For the Appellant:	C Zietsman
Instructed by:	Loubser Van Wyk Inc c/o Jacobs Fourie Attorneys
For the Respondents:	RJ Nkhahle (the heads of argument having been drafted by VM Morobane)
Instructed by:	The State Attorney Bloemfontein