IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE: 20 May 2026

SIGNATURE:..[redacted]

Case No. 2023- 048835

In the matter between:

MXENGE, THANDEKA **APPLICANT**

And

MINISTER: DEPARTMENT OF WOMEN, YOUTH AND PEOPLE WITH DISABILITIES **FIRST RESPONDENT**

DIRECTOR GENERAL: DEPARTMENT OF WOMEN, YOUTH AND PEOPLE WITH DISABILITIES **SECOND RESPONDENT**

MINISTER: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **THIRD RESPONDENT**

DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — **FOURTH RESPONDENT**

Coram: Millar J

Heard on: 7 May 2026

Delivered: 20 May 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 20 May 2026.

JUDGMENT

MILLAR J

[1] This is an application for condonation for the late filing of a notice in terms of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act (ILPACOSA).[1] When actions for damages are instituted against certain organs of state, it is necessary as a precondition to the issuing of summons that a notice of the intention to institute legal proceedings be delivered within 6 (six) months[2] from the date when the debt became due.

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1 40 of 2002.

2 Section 3(2)(a).

[2] This date, when the debt became due, in the present case where the applicant has brought an action for damages arising out of the malicious prosecution of disciplinary proceedings is the date upon which the proceedings in question were concluded in her favour.[3]

[3] The facts in this application are largely common cause and are these. The applicant was dismissed by the second respondent, the Department with whom she was employed on 9 July 2018. The dismissal was disputed and subsequently referred to arbitration which was decided in favour of the applicant. The decision of the arbitrator was dated 30 September 2019. It was communicated to the parties on 4 October 2019.

[4] In the ordinary course, the date on which the debt would be said to have become due, is 4 October 2019 and applying the ordinary rules of calculation, being exclusive of the first day and inclusive of the last day,[4] the last day upon which the claim could be enforced by the service of legal process, was 4 October 2022.

[5] Based on this timeline, the notice to be delivered in terms of ILPACOSA was to be delivered by 4 April 2020. A notice in terms of section 3(1)(a) was delivered on 13 October 2021, just over 2 (two) years after the applicant was notified of the arbitration award and 18 months later than it ought to have been.

[6] Section 3(4)(a) of ILPACOSA, provides that:

> *"4(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.*

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3 *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA).

4 Interpretation Act 33 of 1957.

> (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 by the failure of the creditor; and*
> (iii) *The organ of state was not unreasonably prejudiced by the failure."*

[7] In the present application, the second respondent was aware of the cause of action and was party to the proceedings that gave rise to it. Accordingly, the question of prejudice referred to in section 3(4)(b)(iii) is not in issue. What is in issue, is whether or not the debt has prescribed (section 3(4)(b)(i)) and whether or not there is good cause on the part of the applicant for not complying timeously with the delivery of the notice (section 3(4)(b)(ii)).

[8] The summons in this matter was issued on 4 October 2022 and served on 6 October 2022, outside of the 3-year period referred to in section 12(1)[5] read together with section 11(d)[6] of the Prescription Act.[7] Section 15(1) of the Prescription Act provides that the running of prescription shall, save where there has been an acknowledgment of liability, be: *"interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."* (my underlining).

[9] In the present matter, on a plain reading of the Prescription Act and the ordinary rules of interpretation and calculation of the time period, the summons was not served timeously, the claim became prescribed and for that reason alone, condonation for the late delivery of the section 3(1) notice in October 2021 ought to be refused.

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5 *"Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due."*

6 The section provides that the period of prescription, *"save where an Act of Parliament provides otherwise, 3 years in respect of any other debt."*

7 68 of 1969.

[10] It bears mention that the applicant did not address at all in the application the reason for the delay in the delivery beyond the 6-month period. The notice delivered on 13 October 2021 was sent under cover of a letter by an attorney acting for the applicant. When the summons was issued, this was done by a different firm of attorneys. The application is silent on when the respective firms were instructed. In both the letter of 13 October 2021 and the subsequent summons, the date upon which the debt became due as 4 October 2019 is clearly and unequivocally stated.

[11] The availability of professional legal advice by no less than 2 firms of attorneys before the expiry of the three-year period is a factor which cannot be overlooked. There is no explanation on the papers about when the firms were instructed and what transpired during the period running up to 4 October 2022 – at least insofar as the period from 13 October 2021 until then is concerned. The applicant simply makes no compelling case to satisfy the requirement of good cause.

[12] However, even though the applicant has failed to establish good cause for the delay in delivering the notice in terms of ILPACOSA, the applicant contends that the claim is still enforceable as it has not become prescribed.

[13] It was argued that the debt did not become due on 4 October 2019 when she was notified of the arbitrator's award. She contends that the debt only became due on 13 November 2019 when the first respondent (the Minister) informed her that she accepted the award, and she was then allowed entry into her old office. Between 21 October 2019 and 13 November 2019, the applicant had returned to work but was dissatisfied with the fact that she could not return to her original office and was excluded from attendance at certain meetings.

[14] It is not in dispute that she returned as ordered by the arbitrator or that the award was never taken on appeal. There is nothing before the court to suggest that the

Minister ever told the applicant that she would not comply with the award and reinstatement of the applicant.

[15] The arbitrator found that the decision to charge and subject the applicant to a disciplinary process had been a "travesty" and that she had been unfairly dismissed. This is clearly set out in the decision received on 4 October 2019.The arbitrator also ordered that the applicant be permitted to return to work on 21 October 2019 and that all outstanding payments due to her be made.

[16] The applicant seems to accept that the debt became due on 4 October 2019 but contends that her cause of action only became complete on 13 November 2019 when the Minister told her that she would accept the decision of the arbitrator.

[17] Upon this interpretation, the time period for the filing of the section 3(1) notice would have started on 14 November 2019 and expired on 13 May 2020. This would have the effect of decreasing the time period for which condonation in respect of which late delivery of the notice was required (and shortening the period for which an explanation for the delay needed to be proferred) but also extending the last date for the service of process to 13 November 2019. On this basis, the fact that the summons was issued on 4 October 2022 and served on 6 October 2022 would have been of no moment insofar as it would have occurred timeously in terms of section 15(1) of the Prescription Act.

[18] In *Holden v Assmang Ltd,*[8](Assmang) a case in which the appellant had instituted a claim for malicious prosecution arising out of disciplinary proceedings, it was held that:

> *"[17] A debt is due, owing and payable within the meaning of s12(1) of the Prescription Act when the creditor acquires a complete cause of action for*

[8] 2021 (6) SA 345 (SCA) at paras [17] and [18].

the recovery of the debt. What this means is that the entire set of facts which the creditor must prove in order to succeed with his/her claim against the debtor must be in place. In other words, when everything has happened which would have entitled the creditor to institute action and to pursue his/her claim.

[18] I conclude from the aforegoing it is clear that the appellant's cause of action only arose and prescription only started to run when the HPCSA notified the appellant that the respondent's complaint against her had been dismissed. This was on 13 November 2009. It was only then that the appellant would have been able to establish the fourth and final requirement for an action for malicious prosecution. It follows that as at the date of summons, the claim or debt had not prescribed."

[19] In the *Assmang* case, the appellant had been informed on 13 November 2009 that the complaint against her had been dismissed and her summons had been issued and served on 6 August 2012 within the 3-year period referred to in section 11 of the Prescription Act. In the present case, the summons was served outside the 3-year period, from the date on which the applicant was notified by the arbitrator of his award. The question is whether the Minister's acceptance of the award, was necessary for that award to be of any effect?

[20] From the time the award was made and the parties notified of it, no steps were taken on the part of the Minister or the second respondent to repudiate the award or to have it set aside. The fact that neither the Minister nor the second respondent were particularly co-operative with the applicant in acquiescing to her requests after 21 October 2021does not detract from the fact that the arbitral award once made was binding and was implemented.

[21] The contention on the part of the applicant that the date on which the debt became due is 13 November 2019, is self-serving and is simply not borne out by the facts.

[22] The applicant, cognizant of the difficulty faced by her, has brought a constitutional challenge to section 15(1) of the Prescription Act. The challenge is brought on the basis that requiring that the process to interrupt prescription actually be served on the debtor within the 3-year period constituted a limitation of various constitutional rights.

[23] In *Brummer v Minister for Social Development and Others*[9] the Constitutional Court held the following:

> *"This court has on at least four occasions considered the constitutionality of time-bar provisions, as these provisions are sometimes called. On three of those occasions, the court considered statutory provisions containing a time limit and, in the fourth case, it considered a clause in an insurance contract containing a time bar.*
>
> *The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The 'enquiry turns wholly on estimations of degree'. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster,*

[9] 2009 (6) SA 323 (CC) at para [51]-[52].

a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive."

[24] In *Rademeyer v Ferreira*[10] the Constitutional Court stated the law as it currently stands as follows:

> *"First, a simplified, sweeping synopsis of, I dare say, the well-stablished law. Prescription of a debt starts running as soon as the debt becomes due, or when knowledge of the debt becoming due can reasonably be expected of the creditor. Prescription is judicially interrupted when process initiating a lawsuit for recovery of that particular debt is issued and served on the debtor."*

[25] In the present case, the debt became due when the arbitrator's award came to the attention of the applicant. Following *Assmang*, the debt became due on that day particularly having regard to the fact that there was no attempt to take the matter further on the part of the Department. Had there been a further legal proceeding which suspended the operation of the award the position may have been different.

[26] The subjective view of the Minister is simply not a prerequisite for the validity of the award and could not on its own delay the date upon which the debt became due – what if the Minister had never said anything? Of course, this would not and could not mean that the running of prescription was delayed indefinitely.

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[10] 2025 (2) SA 1 (CC) at para [59].

[27] Accepting that the prescription started running on 5 October 2019 and was completed on 4 October 2022, the question of whether the time period of three years constitutes an unjustifiable limitation insofar as issue and service of process is concerned arises. The applicant was represented by attorneys at least from 13 October 2021 and on 4 October 2022. There is nothing in the papers before this court to indicate why, the applicant with professional representation was unable to ensure that the summons was served on the same day it was issued. Without any factual basis upon which the inability to comply with the law as it stands, in circumstances where compliance was clearly within the power of the applicant does not without more sustain a constitutional challenge. Constitutional challenges are not brought to correct either willful or negligent oversight on the part of a particular litigant or their representatives.

[28] For the reasons set out above I find that condonation for the late filing of the section 3 notice is to be refused. In summary, while there may have been no prejudice to the respondents as a result of the late delivery of the notice, the applicant has failed to demonstrate that her claim did not become prescribed in consequence of the late service of process and furthermore that no good cause was shown for the delivery of the notice some 18 months out of time.

[29] It was argued that because a constitutional issue was raised, should I refuse the application there should be no order for costs. I disagree. Costs should follow the result and that is the order I intend to make.

[30] It is ordered:

[30.1] The application for condonation for the late delivery of the applicants notice in terms of section 3(1) of Act 40 of 2002 is refused.

[30.2] The applicant is ordered to pay the costs of the respondent on the scale as between party and party, Scale B.

[redacted]

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	7 MAY 2026
JUDGMENT DELIVERED ON:	20 MAY 2026
COUNSEL FOR THE APPLICANT:	ADV. SD MBEKI
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