REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 049721-2024

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

28 MAY 2026 [redacted]

DATE SIGNATURE

In the matter between:

LETLHOGONOLO MAFAFO Applicant

And

MINISTER OF POLICE First Respondent

NATIONAL PROSECUTING AUTHORITY Second Respondent

JUDGMENT

MVUBU, AJ

Introduction

[1] The Plaintiff (**Mafafo**) has instituted legal proceedings as set out and defined in the Combined Summons issued out of this Court under the abovementioned case number. The process was issued on 07 May 2024. It is in respect of alleged

conduct that occurred on 17 May 2021 or 02 December 2021 and conduct that arose on 22 September 2022.

[2] It is common cause that the action is against the Defendants as defined in the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and ergo, notice was required to be delivered to the Defendants before the proceedings were instituted and within the legislative period of 6 (six) months.

[3] It is common cause that the notice was only given on 15 August 2023. The Defendants object to the proceedings citing that the Plaintiff was required to delivered the notice earlier than 15 August 2023 – according to the Defendants the Plaintiff is approximately 440 days late. Further to that, the Defendants argue that the late delivery of the notice cannot be condoned because the action was brought outside the 3 (three) year prescription period.

[4] In this application, then, this Court is invited to determine whether the late delivery of the section 3(2) notice in terms of the Institution of Legal Proceedings against Certain Organs of State Act (**the Act**) may be condoned.

Legal principles governing condonation

[5] It is trite that the requirements for an applicant seeking condonation are set out in section 3(4) of the Act. The section provides that a court may grant an application 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.

[6] The requirements have been dealt with and explained in numerous court decisions and I need not reinvent the wheel. In summary of the legal position, the Supreme Court of Appeal has established the analysis as

> *"[8] The phrase 'if [the court] is satisfied' in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg Die Afrikaanse Pers Beperk v Neser 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context.*
>
> *[9] The first requirement speaks for itself: the court must be satisfied that the applicant relies on an extant cause of action. That this is so in the present instance has never been in dispute."*[1]

[7] A court need not embark on more than the requisites stated by the Supreme Court of Appeal. I turn to the facts in the present application measured against the applicable legal requirements. I do so in turn.

Claims have not prescribed

[8] In the instituted proceedings, the Plaintiff claims damages from the Minister of Police – the First Defendant – for an alleged unlawful arrest and resultant detention. It is alleged that the Plaintiff was arrested on 17 May 2021 and his detention ended on 02 December 2021.

[9] It is common cause that the Plaintiff was in custody until his admission to bail on 02 December 2021. That is, the Plaintiff could not have brought the action before 02 December 2021 because the detention element was not determined. In

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[1] ***Madinda v Minister of Safety and Security, Republic of South Africa*** (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008) (***Madinda***).

argument, both Mr Mudau (for the Plaintiff) and Mr Mgxesha (for the Defendants) submitted that it would be remiss to expect the Plaintiff to institute proceedings while in custody and that, at best, the cause of action (or debt) against the First Defendant only arose on 02 December 2021.

[10] In the result, the claim would have to have been brought (instituted) on or before 01 December 2024. On a stricter analysis, even if the debt is said to have arisen on 17 May 2021 (date of arrest), the claim would have to have been instituted on or before 16 May 2024.

[11] On either construction, the fact that the proceedings were instituted on 07 May 2024 means that the proceedings were instituted within the time period and ergo the cause of action is extant.

[12] That is, evidently, the claim against the First Defendant was instituted within 3 (three) years and thus has not prescribed. That captures the first, second and fourth claims.

[13] The third claim is against the National Prosecuting Authority, ostensibly for malicious prosecution. It is common cause that the prosecution failed on 22 September 2022 when the Plaintiff was acquitted. Similarly, this claim (too) has not prescribed as it was launched within the 3 (three) period.

The Plaintiff has demonstrated good cause

[14] As far as the second requirement is concerned, an applicant for condonation in terms of section 3(4) of the Act, a court must decide whether the applicant has produced acceptable reasons for nullifying, in whole or at least a substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously.

[15] It is trite that strong merits may mitigate fault and whereas no merits may render mitigation pointless. In this regard, the Supreme Court of Appeal found that there are two main elements:

15.1. Rights to have the merits of his case tried by a court; and

15.2. The right of the organ of state not to be unduly prejudiced by the delay beyond the statutorily prescribed limit for giving of notice.[2]

[16] At paragraph 4.3 of the Applicant's Supplementary Founding Affidavit, the following is recorded:

> *"Applicant in this case did not properly comply with Section 3 of Act 40 of 2002 as the Notice was served on the* ***FIRST AND SECOND RESPONDENTS*** *which was served 143 days late from the date of acquittal."*

[17] Poignantly, separate notices were sent and delivered to the Respondents and each said notice read the same as follows:

> *"1. We act on behalf of Mr LETLHOGONOLO MAFAFO, our client / the claimant.*
> *2. You are hereby given notice that the claimant intends instituting action against you for recovery of damages as a result of the unlawful arrest and detention by members of South African police (sic) service (sic).*
> *3. On or about 17th of May 2021, the claimant was unlawfully arrested around Dobsonville mall by members of South African police (sic) service (sic) whose full particulars are unknown to the claimant.*
> *4. The claimant was arrested on the charges of theft out (sic) of motor vehicle without any evidence linking him to the offense. See the attached copy of Notice of Rights dated 17th of May 2021.*

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[2] See ***Madinda*** para 12.

5. Subsequent to his arrest the claimant was detained at Dobsonville Police Station for a period of one (1) day.

6. On the 18th of May 2021, the claimant was taken to the Roodepoort Magistrate (sic) Court further detained in court holding cells from 9am where he was denied bail around 1pm and later transferred to Krugersdorp correctional center for awaiting bail at approximately 3pm

6.1 On or about 21st December 2021 at Roodepoort Magistrate (sic) Court the claimant was granted bail of R1000 (One thousand rand (sic)). The claimant was detained for a period of 8 months.

6.2 The claimant was further prosecuted until 19th September 2022.

7. At all material times the arresting officers were acting within the course and scope of their employment with the Minister of police (sic). Therefore the minister (sic) of police (sic) is vicariously liable for wrongful act of his employees.

8. Both his arrest and detention were unlawful and wrongful as a result our client suffered damages being deprivation of liberty, humiliation, loss of income, inconvenience and discomfort and pain and suffering to the value of R12 000 000 (Twelve million rand (sic)

9. It is our instruction to demand from you as we hereby do payment in sum of R12 000 000 for unlawful arrest and detention within 60 days failing which summons will be issued without further notice."

[18] While the eventual Combined Summons contain claims pertaining to damage of reputation and wrongful/or Malicious Prosecution, nothing of the sort is mentioned in the notice. That is, the notices do not disclose a case for Malicious Prosecution.

[19] Simply, there is no notice given to the Second Respondent. There being no notice, there can be no condonation. Put differently, the notice delivered to the Second Respondent pertains to a claim for unlawful arrest and detention that was

to be instituted against the Minister of Police (the First Respondent) not the Second Respondent. Besides, there can – with respect – be no allegation that the Second Respondent caused the arrest. A cause of action along those lines would stand to fail and have no merit at all.

[20] It follows, there is no notice delivered to the Second Respondent that warrants condonation. Alternatively, the notice purportedly delivered to the Second Respondent is so defective that it stands to be rejected as it does not disclose any cause of action – let alone a debt – against the Second Respondent. There are no merits, at all evidenced by the defective notice delivered and given to the Second Respondent. Accordingly, condonation in respect of the late delivery of the defective notice (better expressed as a failure to give notice), cannot be condoned.

[21] As pertains to the First Defendant. We know that the Applicant was admitted on bail in December 2021. That date marked the completion of the claim against the First Respondent – as clearly evidenced by the notice. The Applicant offers no explanation, whatsoever, for the period December 2021 to September 2022. That is, a period of 9 (nine) months has gone without any explanation.

[22] Even accepting that the Applicant needed the docket to ascertain the merits of his claim for unlawful arrest and detention, it would seem that paragraph 6.2 of the Particulars of Claim betray any access to the docket. The said paragraph (much like the quoted paragraph 3 of the notice) do not disclose the arrestor's details because they are unknown. If the Applicant had the docket, one would expect them to obtain the details of the said arresting officer therefrom.

[23] For ease of reference, paragraph 6.2 of the Particulars of Claim reads:

> *"6.2 Plaintiff was arrested by the SAPS in the course of performing their duty whose further particulars are unknown to the Plaintiff on*

charges of theft out (sic) of motor vehicle without any evidence linking the Plaintiff to the commission of the offense."

[24] As correctly submitted by counsel for the Respondents, despite using the attempts to obtain the docket as reason for the delay, at no point did the Applicant suggest that he ultimately received the docket. The Applicant does not mention when, if at all, the docket was received.

[25] In any event, I have mentioned that the case against the Minister of Police (First Respondent) crystalised in December 2021 when the Applicant was released from custody. The detention element being complete. No docket was required in order for the Applicant to appreciate the relevant facts – he already knew those facts.

[26] Compounding matters for the Applicant is that he instructed attorneys as at November 2022. Still the notice was only dispatched on 15 August 2023. No explanation – perhaps satisfactory explanation – is given regarding why the attorneys could not draw the notice immediately or soon thereafter of taking instructions. Paragraph 1 of the Power of Attorney records the mandate as:

"1. Ascertain whether I am entitled to recover damages for unlawful arrest and detention by the South African Police Service."

[27] What is of further curiosity is paragraph 7.3 of the Founding Affidavit in the application for condonation. It is reads thusly:

"7.3 On or about 1st December 2022, Applicant's attorneys applied for the docket (Case No 220/05/2021) at Dobsonville police (sic) station (sic) under my name. On the 4th of April 2023 Dobsonville Police station (sic) informed Applicant's attorneys that the docket was transferred to Roodepoort police (sic) station (sic). See annexure marked ***"LM1"and "LM2""***

[28] The said LM1 encloses the Applicant's Notice of Rights – a document that evidences the fact of an arrest. It is also apparent the Notice of Rights when, where, and for what reason the Applicant was arrested. No explanation is provided by the Applicant to pontify how it is he could not send the notice, at least to the First Respondent. In any event, the same notice was sent to both Respondents, to the Second Respondent as well.

[29] I am not persuaded by the explanation that the Applicant first sought to ascertain the details and information relating to his potential claim against the Second Respondent. The Applicant added, that he did not wish to send the notices piecemeal and ergo, the delay. Yet, the notices contained not a word about the malicious prosecution or any other claim, for that matter, besides the unlawful arrest and detention claim.

[30] The explanation offered by the Applicant is poor that it stands to be rejected outright. It is accordingly rejected.

[31] That being the position, the second requirement is not met and ends the analysis. It follows, this Court need not deal with the question of prejudice.

[32] Even if I am wrong and was required to consider the question of prejudice, no case was made by the Applicant. In this regard, this is what was stated by the Applicant, as far as prejudice is concerned:

> *"9 **PREJUDICE***
>
> *9.1 There will be no prejudice on the part of the Respondent as this matter has not yet prescribed for litigation and reasons for such late-compliance with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act is justifiable having regard to Applicant circumstances.*
>
> *9.2 It would only be the Applicant that would suffer immense prejudice if the present application were to be refused."*

[33] That is inadequate in assisting a court to evaluate the prejudice attended to both parties. Making matters worse, even as it relates to the prospects of success, no case was made.

[34] In the result, the Applicant has failed to make out a case warranting condonation for his failure to comply with section 3 of the Act.

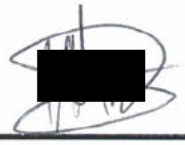
Costs

[35] The ordinary rule is that costs follow the course. I find no reason to deviate therefrom.

Order

[36] In the result, I make the following order:

36.1. The Applicant's application for condonation is dismissed with costs on scale A.



K. MVUBU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Court Online/CaseLines. The date for hand-down is deemed to be 28 May 2026.

Date of Hearing:	25 May 2026
Date of Judgement:	28 May 2026
For the Applicant:	Adv. RV. Mudau
Instructed by:	FC Nwanezi Agbugba Attorneys Inc.

For the Respondents:	Adv. M. Mgxashe
Instructed by:	The State Attorney, Johannesburg