



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 904/2021

Not Reportable

In the matter between:

KEALEBOGA KELVIN MOLEFE

APPLICANT

And

MINISTER OF POLICE

FIRST RESPONDENT

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

SECOND RESPONDENT

Coram: Reddy J

Heard: 29 June 2026

Delivered: This judgment was electronically circulated to the parties' legal representatives by e-mail and released on SAFLII and uploaded to Caselines. The date and time of hand down are deemed to be 16h00 on 29 June 2026.

Summary: Condonation – s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – claim for unlawful arrest and detention accrues, at the latest, on release on bail, and is distinct from a claim for malicious prosecution, which only accrues on favourable termination of the prosecution – notice six to seven weeks late in respect of the former claim – good cause shown, being a legal position reasonably held on advice though later overtaken by binding authority, and to be distinguished from mere ignorance of the law – no unreasonable prejudice shown – condonation granted in respect of the First Respondent, and, in so far as necessary, in respect of the Second Respondent – costs in the cause.

JUDGMENT

REDDY J

Introduction

[1] Before this court sits an application for condonation brought by the applicant, Kealeboga Kelvin Molefe (Molefe). It is predicated in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act¹ (the Act), against the first respondent, the Minister of Police (the Minister), and the second respondent, the National Director of Public Prosecutions (the National Director). Molefe's application arises from a special plea raised by the Minister and the National Director to the effect that Molefe failed to comply with the notice provisions of s 3 of the Act. The special plea is founded

¹Act 40 of 2002

on two legs. First as to the timing of the notice served on the Minister and second as to the absence of any proven notice on the National Director. The Minister and the National Director oppose the application.

- [2] On 24 February 2026, the action was enrolled for trial before this Court but could not proceed, the Minister and the National Director being adamant that the special plea had not been met and that a substantive condonation application was required. Accordingly, I directed that this application serve before me, virtually, on 23 March 2026. On the latter date, I postponed the matter to 27 March 2026 for heads of argument, filed on that date by Advocate Scholtz for Molefe and Advocate Mologadi for the Minister and the National Director.

The sequence of affidavits

- [3] The complete application comprised of the following. A founding affidavit deposed to by Molefe. The answering affidavit was deposed to by Lieutenant Colonel O.G. Marumo of the SAPS North West Provincial Office, expressly on behalf of the Minister alone. No replying affidavit was filed, there being, on Molefe's instructions, nothing further to add. The matter falls to be decided on these papers.

The factual background

- [4] Molefe was arrested on 6 January 2020 on suspicion of arson and murder, and was released on bail on 30 March 2020. On 2 October 2020 Molefe was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977.

- [5] It is common cause that a notice in terms of s 3(1) of the Act, addressed to the Minister, was posted on 11 November 2020 and received by the National Commissioner's office on 17 November 2020, acknowledged in writing by Captain J.S. de Swardt on 12 December 2020. The Minister pleads that, were any cause of action to lie against him, notice ought to have been served by 29 September 2020.
- [6] Insofar as the National Director is concerned, the special plea goes further, asserting that no notice was ever given to him at all, rendering the action against him premature in its entirety. Molefe asserts that an identical notice was posted to the National Director on the same date, but plainly admits he cannot produce proof of posting, this having allegedly been lost by his erstwhile attorney during an office relocation in 2021.

The parties' submissions

Molefe's

- [7] Advocate Scholtz contended that Molefe's claim for unlawful arrest and detention, like his claim for malicious prosecution, ought to be treated as a continuing wrong, accruing only upon his discharge on 2 October 2020. Advocate Scholtz reasons that since the quantum of his detention could not be assessed until its duration was known, the notice served on 11 and 17 November 2020 was on this footing timeous in every respect.

- [8] Advocate Scholtz advances that this approach finds support in *Makhwelo v Minister of Safety and Security*², *Mothobi Albert Tlake v The Minister of Police and Another*³ and *Mashaba⁴ v Minister of Police* and that, in any event, the Minister and the National Director had identified no prejudice flowing from the delay. That being so, Advocate Scholtz posits that such condonation, if needed at all, ought readily to be granted with costs against the Minister and National Director.

The Minister and National Director

- [9] Advocate Mologadi, on behalf of the Minister and the National Director, submitted that the cause of action for unlawful arrest and detention is complete upon deprivation of liberty, or at the latest upon release on bail. Advocate Mologadi contended that the claim for unlawful arrest and detention must be treated as separate and distinct from a subsequent claim for malicious prosecution, relying on the central separation of claims recognized in *Mmabasothe Christinah Olesitse N.O. v Minister of Police*⁵. On this basis, he argued that the once-and-for-all rule prevents a plaintiff from treating separate causes of action as a single, unfolding wrong to justify the late service of a statutory notice.
- [10] Advocate Mologadi opined that Molefe's notice was accordingly late by some six to seven weeks; that no notice whatsoever was given to the National

² *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) para 55-62

³ *Mothobi Albert Tlake v The Minister of Police and Another*³ (377/2014) [2017] ZAFSHC 178 (20 October 2017) para 9.

⁴ *Mashaba v Minister of Police* (54940/2012) [2023] ZAGPPHC 2023 (18 December 2023) paras 17-20

⁵ *Mmabasothe Christinah Olesitse N.O. v Minister of Police*⁵ [2023] ZACC 35; 2024 (2) BCLR 238 (CC)

Director, rendering the action against him premature. Importantly, Advocate Mologadi claimed that Molefe's explanation lacked candour and *bona fides*. Significantly Advocate Mologadi contended that as Molefe's prospects of success being weak given the reasonable suspicion underlying his arrest and the *prima facie* case underlying his prosecution, condonation ought to be refused with costs.

Legal principles

- [11] Section 3(1) of the Act bars proceedings against an organ of state absent written notice of intention to sue, or its consent to proceed without, or upon, non-compliant notice. Section 3(2)(a) of the Act requires that notice be served within six months of the date the debt became due.
- [12] In instances where the organ of state relies on a failure to serve notice as required, s 3(4) (a) of the Act permits an application for condonation of such failure. The language of these provisions is broad enough to cover both late notice and notice not proven to have been given at all. Section 3(4)(b) of the Act empowers the court to grant condonation if the tripartite factors are satisfied. These are that (i) the debt has not prescribed; (ii) good cause exists for the failure; and (iii) the organ of state was not unreasonably prejudiced. These requirements are conjunctive in their application.
- [13] Good cause requires more than a routine recitation of the delay. Our law requires a full and reasonable explanation covering the entire period of non-compliance, weighed together with the prospects of success and the *bona fides*

of the application,⁶ holistically, in determining whether condonation accords with the interests of justice.⁷

- [14] In sum, condonation will be granted only where the debt has not prescribed, good cause is shown for the relevant failure, and the organ of state has not been unreasonably prejudiced thereby. It is to the application of these requirements, and to the anterior question of when Molefe's claims became due, that I now turn.
- [15] A debt is due once the creditor has acquired a complete cause of action,⁸ that is, once the creditor has knowledge of the minimum facts necessary to institute action.⁹ Importantly, the wrongful deprivation of liberty constitutes a completed cause of action from the moment it occurs, and a plaintiff need not appreciate the conduct's unlawfulness for the debt to become due.¹⁰
- [16] Precedential authority, commencing with *Makhwelo v Minister of Safety and Security*¹¹ and followed in *Tlake*¹² and *Mashaba*¹³, had previously treated unlawful arrest and detention as part of a continuing wrong that only concluded upon the finalization of the criminal proceedings. However, in *Olesitse*¹⁴, the apex Court clarified the proper boundaries of these delicts. The Constitutional Court confirmed that unlawful arrest and detention and malicious prosecution constitute two entirely separate and distinct causes of

⁶ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 12.

⁷ *Madinda* supra para 12.

⁸ *Trater and Another v Deysel* 2006 (4) SA 168 (SCA) para 16.

⁹ *Minister of Finance v Gore* NO 2007 (1) SA 111 (SCA) para 17.

¹⁰ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

¹¹ *Makhwelo* op cit fn 2.

¹² *Tlake* op cit fn 3.

¹³ *Mashaba* op cit fn 4.

¹⁴ *Olesitse* op cit fn 5.

action. Crucially, the apex Court held that the common law once and for all rule applies strictly to a single cause of action; it does not bar a litigant from pursuing separate claims independently, nor does it require a litigant to delay an already accrued claim for unlawful arrest merely because a separate claim for malicious prosecution might arise at a later date.

- [17] Conclusively, applying the clear distinction upheld in *Olesitse*, Molefe's claim against the Minister for unlawful arrest and detention accrued, at the latest, upon his release on bail on 30 March 2020. The six-month statutory period for this specific cause of action accordingly expired on 30 September 2020. The notice, served on 17 November 2020, was late by some six to seven weeks, and condonation is required.
- [18] The claim for malicious prosecution, by contrast, only became due on 2 October 2020, the date of discharge, the six-month period expiring on 2 April 2021. The notice, served on 17 November 2020, was comfortably timeous in that respect, as the Minister and the National Director correctly concede.

The position of the National Director

- [19] Insofar as the special plea contends that no notice whatsoever was given to the National Director, a difficulty arises, since this concerns not the date of accrual but whether the precondition in s 3(1)(a) was met at all. Molefe's explanation, that proof of posting was lost by his erstwhile attorney, is at best flimsy. If that had been the final word, this Court would have had real difficulty accepting, on a preponderance of probability, that notice was served on the National Director.

[20] To this end, Advocate Scholtz postulated that the answering affidavit is deposed to expressly, and only, on behalf of the Minister, such that the bare assertion in the special plea has never been placed on oath. In my assessment final relief on motion ordinarily favours the respondent's version where a genuine dispute of fact arises, applying the well-known approach in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁵, but that approach presupposes such a dispute properly raised on the papers. The National Director has simply not engaged on oath with Molefe's sworn assertion, and I am not minded agreeing that a genuine dispute arises for resolution in his favour.

[21] In any event, adopting the most benevolent approach to the National Director, that no notice was served upon him at all, condonation should be granted. To my mind, this is predicated on the following. The explanation, though flimsy, is not contrived, and is consistent with Molefe's good faith engagement with his notice obligations generally. Moreover, no prejudice has been shown; and the National Director's interests coincide substantially with the Minister's, both having had every opportunity to investigate the claim since the action was instituted in 2021.

¹⁵*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

Application of the conjunctive requirements

Prescription

[22] The action was instituted well within the three-year prescriptive period calculated from 30 March 2020. There is no suggestion of prescription, and this requirement is satisfied for both claims.

Good cause

[23] Molefe's explanation for the delay in serving notice on the unlawful arrest and detention claim is not that he was personally ignorant of the law, which would not avail him, but that a considered legal position was adopted on his behalf and maintained consistently, from his reply to the special plea filed on 13 March 2024 to the present, namely that his cause of action only arose upon discharge. That position, though ultimately incorrect, was neither contrived nor unreasonable when taken, finding support in *Makhwelo*¹⁶, *Tlake*¹⁷ and *Mashaba*¹⁸ until settled against it by the Constitutional Court in *Olesitse*¹⁹.

[24] A legal position taken on advice, honestly and consistently maintained, and reasonable when adopted notwithstanding that it was later overtaken by binding authority, is capable of constituting good cause. As I see it, this is to be distinguished from mere ignorance of the law, which would not constitute good cause. The same consideration, reinforced by the fact that it was only

¹⁶ Op cit fn 2.

¹⁷ Op cit fn 3.

¹⁸ Op cit fn 4.

¹⁹ Op cit fn 5.

upon the matter being called for trial on 24 February 2026 that this Court directed a substantive application be brought, adequately explains the delay in launching this application itself, of which the Minister and the National Director complain.

Prejudice

[25] Neither the Minister nor the National Director has identified any prejudice with specificity flowing from the delay, beyond the commonplace incidents and costs of opposing litigation. There is no suggestion properly grounded that either's ability to investigate the claim was compromised. In my view neither has been unreasonably prejudiced.

Prospects of success

[26] The Minister and the National Director contend that Molefe's prospects are weak, the arrest having been founded on reasonable suspicion and the prosecution on a prima facie case. These are matters for trial, not for determination on the limited material before me in this interlocutory application. It suffices that the claims are not so manifestly unsustainable as to warrant refusal of condonation on that ground alone.

Conclusion

[27] Weighing these matters holistically, I am satisfied that it is in the interests of justice that condonation be granted: in respect of the Minister, for the late service of notice on the unlawful arrest and detention claim; and, to the extent

necessary, in respect of the National Director, for any failure to prove service of notice. The debt has not prescribed in either instance; good cause has been shown; and neither has suffered unreasonable prejudice.

Costs

[28] As to costs, there is no reason to deviate from the ordinary approach that costs of an interlocutory application of this nature, occasioned by a special plea raised in the bona fide exercise of the Minister and the National Director's rights, should be costs in the cause, the question of liability remaining for trial.

Order

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

1. The Applicant's failure to serve a notice in terms of s 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, within the period prescribed by s 3(2)(a) of the Act, in respect of his claim against the First Respondent for unlawful arrest and detention, is condoned.
2. In so far as it may be necessary, any failure by the Applicant to serve a notice in terms of s 3(1) of the Act on the Second Respondent is condoned.
3. The Applicant is granted leave to proceed with the legal proceedings under the above case number against the First and Second Respondents.

4. When set down for trial, the action is to serve before Reddy J.
5. The costs of this application shall be costs in the cause.



REDDY J
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances

For Molefe: Advocate H.J. Scholtz
Instructed by: MPM Molefe & Associates Attorneys, Mahikeng

For the Minister and the National Director: Advocate Mologadi
Instructed by: The State Attorney, Mahikeng