IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION-BISHO)

CASE NO:- 1013/2024

In the matter between:

YANGA MDLUDLU	**APPLICANT**
And	
MINISTER OF POLICE	**1ST RESPONDENT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**2ND RESPONDENT**

JUDGMENT

Nkele AJ

INTRODUCTION

[1] As a prologue, it is quite appropriate to state that while ignorance or mistake of the law is cognisable as an excuse in South African law, the threshold is very high. To even be considered, the ignorance that is the

result of gross negligence, recklessness or failure to take basic steps to ascertain legal requirements will not be accepted[1].

[2] When condonation is sought, the main consideration is whether it will be in the interests of justice to grant it. In evaluating this, the court will look at a conspectus of facts including the degree of lateness, the importance of the case, the convenience of the court, the explanation for the delay, prejudice to the other party, the prospects of success and the avoidance of unnecessary delay in the administration of justice[2].

[3] In the replying affidavit the applicant also sought condonation for the late filing of that affidavit. The respondents did not raise any issue about that either in their heads of argument or during argument stage.

FACTUAL BACKGROUND

[4] The applicant instituted an action against the respondents to recover damages arising from his unlawful arrest, detention as well as his malicious prosecution. it is common cause that the applicant was arrested on **27 March 2023** and when he appeared in court on **29 March 2023**, he was charged with rape and bail was denied until the **14th of November 2023** when the charges were withdrawn.

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[1] Oliphant v Jonck (09/21910) [2016] ZAGPJHC 76 30 March 2016.
[2] Menziwa v Ndokwana – Leave to Appeal (20872/2021) ZAWCHC 294 (22 November 2023) paras [3] and [4].

[5] Almost a year later, on the **10th of October 2024**, the applicant consulted his present legal representatives and that culminated into a letter of demand being served upon the respondents on **17 October 2024**.

[6] What then followed is that summons was served upon the respondents and that action is fully defended by the 1st respondent in that a plea justifying the arrest on the basis that the arrest was effected pursuant to reasonable suspicion that the applicant had committed a sexual offence. The 2nd respondent's plea is to the effect that the prosecution was within the bounds of the law and in consideration of the nature of the offence committed, that being a charge of rape.

[7] In addition to the pleas referred to above, a special plea was also filed on behalf of both respondents which is to the effect that the applicant has failed to timeously deliver a statutory notice as contemplated in ***section 3(1)*** of the **Institution Of Legal Proceedings Against Certain Organs Of The State Act**[3]. The applicant then launched this condonation application with a view to address the issue of late delivery of the statutory raised in the special plea by the respondents.

THE PARTIES' CONTENTIONS

THE APPLICANT'S CASE

[8] The applicant, in the condonation application, seeks an order granting him leave to pursue the action for damages he has instituted against the respondents, arising from his unlawful arrest, detention and malicious

[3] Act No. 40 of 2002, *section 3(1)*.

prosecution. He only seeks a costs order against the respondents, in the event of opposition.

[9] In substantiation, he states that at the time that he was released from detention, that is on **14 November 2023**, he did not know that he could institute legal proceedings to recover damages against the respondents. He did not know that he can institute a claim for damages, consequent upon the violation of his rights. Even the Legal Aid Attorneys who represented him during the Criminal Case did not advise him about his right to institute a civil claim. All that he was sure about was that he was innocent and that kept him wondering what evidence there was against him, at the disposal of the police which prompted them to arrest him.

[10] He only consulted his present legal representatives on **10 October 2024** when he was advised that he has a valid cause of action against the respondents, which cause of action is grounded on the constitutional right guaranteeing one's liberty, dignity and good name. He then instructed them to launch the action against the respondents. In pursuance of his instructions, a letter of demand was served upon both respondents on **17 October 2024**. Although the applicant acknowledges that a considerable long period of time elapsed between his release from prison and the institution of the action proceedings, he attributes his failure to timeously serve the mandatory statutory notice to his ignorance and lack of knowledge of what the statute required him to do before instituting a civil claim.

[11] In his Founding Affidavit, the applicant asserts that he has instituted a claim against the respondents and has caused a summons to be served upon them for unlawful deprivation of his liberty as well as malicious prosecution. He is adamant and confident that he has made out a formidable case, and the respondents must answer why he was arrested, detained and maliciously prosecuted. By raising the special plea, the respondents are trying to avoid doing so, as they seek to rely on a technicality.

[12] The applicant further contends that it is only the statutory notice that was served beyond the six (6) months period prescribed in the Act. Summons was served well before the lapse of the three-year prescriptive period, calculated from the date of his initial arrest. The respondents have also filed pleas in which their defences are clearly narrated. Therefore, the applicant contends that no prejudice will be suffered by the respondents if the condonation sought is granted and, if there is any prejudice, such is far outweighed by that which will be suffered by the applicant, if condonation is refused. This is so because the respondents' rights have been protected already in that pleas have been filed.

THE RESPONDENTS' CASE

[13] On the other hand, the respondents vehemently oppose the application, and, in their opposition, they state that the applicant has dismally failed to demonstrate good cause for failure to timeously serve the statutory notice. To expatiate on this proposition the respondents further state that the applicant has always known and maintained his innocence throughout the time that his rights were trampled upon and violated. That should have

made him to desire to seek legal advice immediately after he was released from prison on the **14th of November 2023**. This is so because as at the time, he was aware of the minimum facts that gave rise to the cause of action, which is the core and foundation of his damages claim against the respondents. In any event, the respondents assert, the applicant has failed to narrate the pertinent details of the circumstances that led him to decide to consult his legal representatives only on **10 October 2024**. He has not disclosed when he became aware that his rights have been infringed and violated nor has he been open and candid to the court regarding his level of sophistication, inclusive of his standard of education.

[14] Because the applicant has failed to properly explain and present sufficient facts that give a reasonable explanation of his delay, they dispute that his failure to file the mandatory statutory notice on time was not wilful and deliberate. This is so because the period of delay is excessive and may prejudice the respondents in defending the action, as members who handled the case may not be available to testify or have full recollection of the facts giving rise to the applicant's damages claim.

[15] The respondents further contend, in their opposition, that the applicant's claim is doomed to fail because he was arrested on reasonable suspicion of having committed an offence. So, when he was arrested the members of the 1st respondent reasonably suspected him of having committed the offence he was accused of. And because he had previous convictions, he was not eligible to be released by the respondents on bail and had to apply formally for bail.

[16] Similarly, the members of the 2nd respondents, having perused the docket contents provided by the 1st respondents' members, had a reasonable and probable cause to enrol the matter and prosecute the applicant accordingly.

[17] On that basis, and particularly because the applicant has failed to present facts and reasons that account for the enormous delay to demonstrate that it was bona fide and not wilful and deliberate, he has failed to make out a proper case for the relief sought. The respondents therefore pray for the dismissal of the Condonation Application with costs.

THE APPLICABLE LEGAL PRINCIPLES

[18] It is a well-established principle that the provisions of **Chapter III** of the **Prescription Act**[4] applies to claims against organs of the state. The Act makes no distinction between the debts or claims against the state and other debts about when prescription begins to run, the period of prescription, delay in the completion of prescription as well as its interruption[5]. ***Section 2*** of the Act ratifies and endorses this salient principle. It does so by providing that, subject to the provisions of ***section 3*** and ***subsections (3)*** and ***(4)***, a debt which became due before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or after the fixed date, will be extinguished by prescription as contemplated in Chapter III of the Act[6].

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[4] Prescription Act No. 68 1969, Chapter III
[5] Amler's Precedents of Pleadings 10th Ed page 352
[6] Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) para [12]

[19] The preamble to the Institution of Legal Proceedings Against Certain Organs of the State Act no. 42 of 2002 provides that:

> "*AND RECOGNISING THAT:*
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> *The Prescription Act No 68 of 1969, being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;*
>
> *Some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969.*
>
> *AND BEARING IN MIND THAT:*
>
> *South Africa has moved from a parliamentary sovereign state to a democratic constitutional state;*
>
> *The Bill of rights is the cornerstone of democratic South Africa and that the State must protect, promote and fulfil the rights in the Bill of Rights*"[7].

[20] A creditor who has instituted damages claim against an organ of the state, is perfectly entitled to apply for condonation for either total failure to issue a statutory notice or late filing thereof, if the organ of state concerned relies on that point, even after summons has been served. A court seized with such an application is perfectly entitled to grant such condonation, in a well deserving manner, and if it is satisfied that:

(a) The debt has not been extinguished by prescription;

(b) Good cause exists for the creditor's failure to serve the notice; and,

(c) The organ of the state is not unreasonably prejudiced by the failure.

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[7] Institution Of Legal Proceedings Against Certain Organs Of The State Act No. 40 of 2002.

[21] The Supreme Court of Appeal in interpreting and dealing with the three above stated requirements, in ***Minister of Safety and Security v De Witt*** it held that, where no notice is given by the creditor of his intention to institute legal proceedings against an organ of the state, as required by ***section 3(1) of Act 40 of 2002***, or where the notice is given but defective in some respect, a court may condone the failure to give notice, or the giving of defective notice, after summons or application has been served[8]. That discretion may only be exercised, however, where if the three criteria in ***section 3(4)(b) of Act 40 of 2002***[9] are met, in that the debt has not been extinguished by prescription; that good cause exists for the creditor's failure; and the organ of the state has not been unduly prejudiced[10].

[22] What the authorities have made clear is that the discretion afforded to the court by ***section 3(1) of Act 40 of 2002*** is not a narrow one but a very broad and wide one. The Supreme Court of Appeal in ***Premier of Western Cape v Lakay***, in lucid terms, narrated this principle by stating that the courts are vested with statutory, rather an inherent procedural, discretion when evaluating condonation for non-compliance with the six months' notice requirement in the Institution of Legal Proceedings Against Certain Organs of the State Act[11].

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[8] ***Minister of Safety and Security v De Witt*** 2009 (1) SA 4178 paragraphs [5], [[11] and [11] at 460D-F; 462B-C and 462F.
[9] **Institution Of Legal Proceedings Against Certain Organs Of The State Act No. 40 of 2002,** ***section 3(4)(b)***
[10] Amler's Precedents ibid page 353.
[11] ***Premier of the Western Cape v Lakay*** 2012 (2) SA 1 at para [14].

[23] It is a trite and an established principle that the interests of justice play an important role in condonation applications. In this regard the apex court in ***Van Wyk v Unitas Hospital*** eloquently said:

> "*This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of the case. Factors that are relevant to this enquiry include but not limited to the nature of the relief sought, the extent and the cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success"*[12].

DISCUSSION AND ANALYSIS

[24] To decide whether the applicant has met the three-part condonation test, that is whether he has satisfied the jurisdictional requirements prescribed by *section 3(4) of Act 40 of 2002*, one must have regard to the facts and circumstances of the present matter. The applicant, in other words, must satisfy the court that he has good cause, that no unreasonable prejudice will be suffered by the state and that the claim has not prescribed[13].

[25] As foreshadowed above, the applicant's case is premised on the fact that he was completely oblivious of the statutory requirement to issue and deliver a notice of intended action within six months from the date of the incident, prior to the institution of legal proceedings. He only became

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[12] ***Van Wyk v Unitas Hospital*** 2008 (2) SA 472 (CC) at para [20]; Sv Mencer 2004 (2) SA 598 (CC) para [4]; Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (2)SA 873 (CC) para [3]; Head of Department, Department of Education, Limpopo Province v Settlers Agricultural School and Others 2003 (11) BCLR 1212 (CC) para [11]

[13] Ibid section 3(4) Act 40 of 2002; Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA), Premier of the Western Cape Provincial Government NO v BL [2012] 1 All SA 465 (SCA); 2012 (2) SA 1 (SCA).

aware of such a requirement when he consulted his legal representatives on **10 October 2024**. It is then that he instructed them to do so, and they promptly delivered the notice on **17 October 2024**. What therefore remains for consideration in this regard is whether that explanation is enough to meet or satisfy the threshold of good cause. To exonerate himself from blame he relies on his lack of knowledge of the applicable statutory provision requiring a notice to be delivered to an organ of state, prior to the institution of legal proceedings.

[26] Effectively that defence boils down to what is general known as ignorance of the law. In ***S v Bloem*** the then Appellate Division of the Supreme Court had this to say in explaining what the legal significance of the ignorance of the law excuse is as a defence:

> "*At this stage of our legal development it must be accepted that the cliché that everyone is presumed to know the law has no ground for its existence and that the view that ignorance of the law is no excuse is not legally applicable in the present day concept of mens rea in our law: but the approach that can be expected of a person who, in a modern state, when many facets of the facts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved*"[14].

[27] The Appellate Division, in the Bloem decision, further stated that "*In the interpretation of the definition of statutory offence it is presumed, until the contrary appears, that the legislature did not wish to make an innocent illegal act punishable---. In such a case it must be accepted that, when the state has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the*

[14] S v Bloem 1977 (3) SA 513 (A) at 514E-F.

circumstances, that the accused wishes to rely on a defence that she did not know that the act was unlawful, her defence can succeed if it can be inferred that her act was unlawful; and further, when clap only, and not dolus alone, is required as mens rea, there is also a reasonable possibility that juridically she could not be blamed , i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money of the country. Should there be, on the evidence, i.e. including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have mens rea, in the sense described above, the State would not have proved its case beyond reasonable doubt"[15].

[28] In ***S v Waglines (Pty) Ltd and Another Didcot J***, as he then was, lucidly and eloquently explained the practical implications of the ignorance of the law excuse defence in our law when he said:

> "*Ignorance of or mistake about the law is indeed an excuse cognisable by our courts. The excuse does not always amount, however, to an acceptable one. That the ignorance or mistake must first be both genuine and material goes without saying. Less obviously, but in principle no less necessarily, it has to be reasonable in addition whenever culpa enters the reckoning, whenever that serves as mens rea. It cuts no ice otherwise, since the unlawful act which it explains is then committed through culpa. The question there posed by such a case is whether the person concerned should reasonably have realised that what he is doing or about to do might be unlawful. And the answer depends largely on the care he took or did not take to acquaint himself with the true legal position. The duty to investigate this is clear, to speak generally at all events and not of any area where the law's reach is suspected so little that the possibility of trouble and the consequent need for caution would never occur to a prudent mind. Strong demands are placed, by comparison, on all those engaged in trades, occupations or*

[15] ibid S v Bloem at 515F-H.

activities which are legally regulated and known by then to be. They are expected to learn the rules and obliged to make the effort.

Sometimes, to be sure, the duty to investigate will be performed satisfactorily when advice on the lawfulness or otherwise of the course envisaged is obtained from a source ostensibly qualified to furnish such, and to think it lawful will be reasonable once the assurance has thus been given that it is"[16].

[29] The question that must be answered is whether the applicant, by pleading ignorance of the law, has in fact demonstrated good cause. Respondents' counsel contended strongly that the applicant has not explained what he was doing since his release from prison and has not disclosed whether he is a lay person or not. This, the argument goes, would have enabled the court to determine his level of sophistication. But due to the paucity of information, he has failed to take the court into its confidence in this regard. The respondents' criticism of the lateness or delay in the filing of the statutory notice is centred on his failure to account for what he was doing for the entire period as well as on the fact that he did not divulge facts that reveal his level of sophistication.

[30] What is glaring and apparent is that the applicant made it clear that all along he did not know that he could lodge a claim for damages and all that he had always been adamant about is the fact that he was innocent of the charges preferred against him. It was not until he consulted with his legal representatives on **10 October 2024** that he came to the realisation that he has a claim against the respondents. He then instructed them to immediately dispatch a statutory notice, which they did on **17 October 2024**. That clearly centres, in my view, around the question whether

[16] ***S v Waglines (Pty) Ltd and Another Didcot J*** 1986 (4) SA 1135 at 1145 paras H/I -1146 C/D.

ignorance of law can excuse the applicant in the circumstances of this case.

[31] Confronted with a situation where the applicant was accused of having known about his cause of action upon his arrest, Norma J, as she then was, had this to say:

> "*The first respondent contends that the applicant knew about the cause of action upon her arrest. If one were to follow this reasoning it would mean that there is absolutely no basis upon which people would seek legal advice. Upon each and every arrest the cause of action would arise, and an applicant would be expected to rush to court and institute an action. I see no legal impediment to seeking legal advice. In fact, it is the prudent thing to do because not every arrest that is perceived to be unlawful is actionable. The applicant demonstrated that she was not aware of her rights. Not every individual is* ***au fait*** *with the concept of the arrest. In this instance the applicant demonstrated that she was not even aware that she could have a claim against the Minister as result of the conduct meted out to her and the unlawful search, according to her, to her home*"[17].

[32] The factual circumstances of the Dike case perfectly mirror the present matter, in so far as they relate to ignorance of the law is concerned. Moreover, a considerable time elapsed between the applicant's release from prison and the institution of the damages claim. The time that elapsed amounted to almost eleven months in the Dike case. Accordingly, I find its reasoning persuasive, and I conclude that the applicant in the instant matter has demonstrated good cause.

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[17] **Dike v Minister of Police and Another** (404/2022) [2023] ZAECBHC 15 (18July 2023) para [28].

[33] The second question that needs to be considered relates to the jurisdictional requirement of prescription or otherwise of the applicant's claim against the respondents. Put differently, the question that must now be answered is whether the claim has not been extinguished by prescription. That is one of the jurisdictional requirements that the applicant has to satisfy in an application for condonation for failure to file a statutory notice or late filing thereof. It is trite that condonation cannot be granted where a party's claim has prescribed. This was made crystal clear in ***Premier of Westen Cape v Lakay*** where the Supreme Court said "*If the debt was extinguished by prescription in terms of any of those Acts or the Prescription Act, condonation cannot be granted - for the obvious reason that no purpose would be served by granting condonation for the late giving of a notice in respect of a debt which no longer exists and cannot accordingly be enforced. The purpose of the 2002 Act is not to revive debts that have already prescribed*"[18].

[34] The applicant pertinently addresses the issue of prescription in his founding affidavit where he categorically states that the action was instituted within the three-year prescriptive period. That averment is corroborated by the common cause facts in this matter. As already explained, applicant was arrested on **27 March 2023** and appeared in court on **29 March 2023**. He made several court appearances until the **14th of November 2023** when the charges against him were formally withdrawn and he was released from detention. He then consulted with his legal representatives on the **10th of October 2024**, almost eleven months later. A letter of demand and statutory notice was served upon the respondents on **17 October 2024**. Because the three-year period of prescription, prescribed in the Prescription Act No. 68 of 1969 for the expiry of a debt had not lapsed, I am of the view that the applicant's claim

[18] *Premier, Westen Cape v Lakay* 2012 (2) SA 1 (SCA) para [15].

had not prescribed as at the time he instituted a civil claim against the respondents. The general rule is that a debt prescribes after three years. This is provided for in *section 11* of the Prescription Act as follows:

"*The periods of prescription of debts shall be the following:*

(a) Thirty years in respect of-

(i) Any debt secured by mortgage bond;

(ii) Any judgment debt;

(iii) Any debt in respect of any taxation imposed or levied by or under any law;

(iv) Any debt owed to the state in respect of any share of profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) Fifteen years in respect of any debt owed to the State and arising out of an advanced or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) Six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) *Save where an Act of Parliament provides otherwise, three years in respect of any other debt*"[19].

[35] In my view it is quite glaring and abundantly clear from the common cause facts and the entire factual matrix that the three-year period of prescription had not elapsed when the applicant launched the damages claim against the respondents. Therefore, the applicant has satisfied the requirement that condonation can only be sought if, and only if, the claim has not been extinguished by prescription.

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[19] Ibid Prescription Act, section 11.

[36] The third requirement is that the organ of the State must not be unreasonably prejudiced by the failure to serve the statutory notice. To demonstrate that they will suffer prejudice, the respondents strongly contend that the delay is excessive and the effluxion of time may prejudice them in conducting their defence in that relevant members may not be available to testify and memories may fade such that they may not remember the salient facts relating to the applicant's claim. On the other hand, the applicant asserts that he will suffer irreparable harm and prejudice, which surpasses any prejudice that could be suffered by the respondents, if the condonation application is not granted.

[37] Where an organ of the state alleges that it will suffer prejudice, if the condonation application is granted, it must state the nature and source of such prejudice. The respondents cannot simply speculate and expect to convince the court that they will suffer prejudice. The Supreme Court of Appeal made the following pertinent remarks in ***Rossouw v Bliganaut and Wessels and Another***:

> *"[76] If there was real and unreasonable prejudice, the MEC should easily state its nature and source, especially after the effluxion of time. It is not sufficient for the MEC to merely assert that some unidentified documents may have been misplaced or lost. To rebut the applicant's assertions, the MEC had to identify a specific document or documents that would have been crucial to the department's case but are no longer available due to the delay.*
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> *[77] The same goes for the department's employees. The MEC is content to say that employees who 'may have knowledge' of the alleged facts 'may' no longer be in the department's employ, and those who remain may have faded memories. The MEC does not state this as a fact but as speculation. She does not mention that an investigation was conducted in the department, which established that those employees are no longer employed, or that the*

department interviewed the remaining employees, but their memories have faded. This a simple exercise that could have been undertaken, and it's the absence of unreasonable prejudice"[20].

[38] The reasoning of the Supreme Court of Appeal in the Rossouw judgment is authoritative and applies in the present factual matrix with equal force. This is so because the respondents' assertions about the fading of memories and the unavailability of the members to testify are not based on tangible facts and evidence. As was authoritatively stated in ***Madinda v Minister of Safety and Security***, "*a court should be slow to assume prejudice for which the respondent itself does not lay a basis"*[21]. The court further stated that the approach as to existence of unreasonable prejudice requires a common-sense analysis of the facts, bearing in mind that whether grounds of prejudice exist often lies peculiarly within the knowledge of the respondent[22].

[39] In this matter it is difficult to understand how the prejudice will come about, as the respondents have not fully explained their bare assertion that employees may not be available to testify and they may have faded memories about the applicant's case. The respondents' problem in this regard is even compounded by the fact that they have received summons and have even filed a plea, in which they have narrated their defence to the claim. Surely, they must have consulted with the relevant employees and must have had regard to the relevant documentation when they prepared the plea. It therefore boggles the mind and defies logic when they contend that they will suffer prejudice, in the circumstances. in the

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[20] *Rossouw v Bliganaut and Wessels and Another* 1234/2023) [2025] ZASCA 146; 2026 (2) SA 477 (SCA) (7 October 2025) paras [76] to [77].
[21] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para [21].
[22] Ibid Madina v Minister of Safety and Security.

light of the foregoing, I conclude that no prejudice will be suffered by the respondents if condonation is granted.

[40] Lastly, it is necessary to make a brief comment about the constitutional rights implicated in this matter. Necessarily so because they are important considerations to weigh in the balance when deciding whether to grant or refuse the condonation sought. Two constitutional rights are affected in this case, namely the right to freedom and security of person as well as the right of access to courts. These rights are entrenched in *sections 12 and 34*, respectively, of the Bill of Rights.

[41] Our courts have, from time immemorial, emphasised the importance of the individual's right to liberty. Under the constitutional dispensation the apex court has been loud and vociferous in the protection of the right to liberty. This it did in numerous cases and one example is ***Zealand v Minister of Justice & Constitutional Development*** where the court expressed the position as follows:

> "*This is not something new in our law. It has been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification*"[23]. Quite recently, the Constitutional Court has emphasised this salient principle when it stated that "*It follows that in a claim based on the interference with the constitutional right not to be deprived of one's liberty, all that the plaintiff has to established is that an interference has occurred. Once this has been established the deprivation is unlawful and*

[23] ***Zealand v Minister of Justice & Constitutional Development*** 2008 (4) SA 458 (CC) at para [25].

the defendant bears the onus to prove that there was justification for interference"[24].

[42] In this matter it is not in dispute that the applicant was arrested and detained from **27 March 2023** and that he was only released when the charges against him were withdrawn on **14 November 2023**. All that the respondents do is to justify the applicant's arrest and detention on the basis that it was effected on reasonable suspicion of him having committed a Schedule 1 offence, namely rape. That being the case, the applicant has established that there was interference with his constitutional right to liberty. The onus, as was stated by the Constitutional Court in Zealand and Mahlangu judgments, in such circumstances, rests with the respondents to justify the arrest without a warrant and the detention as well as the prosecution that followed.

[43] This is even more necessary in this case because the charges were withdrawn and the applicant was released from detention. I am therefore of the view that it is imperative that the respondents justify the infringement of the applicant's constitutional right to liberty during trial. That therefore reinforces the applicant's case for condonation to be granted so as to give the respondents an opportunity to justify the interference and infringement of the right entrenched in terms of *section 12* of the **Bill of Rights**[25]. What that means is that the applicant has demonstrated that he has a prima facie case, a triable issue.

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[24] **JE Mahlangu and Another v Minister of Police** 2021 ZACC 10 para [32].
[25] Constitution of the Republic of South Africa No. 108 of 1996; *section 12* Bill of Rights.

[44] The other right that is implicated is entrenched in section 34 of the Constitution, the right of access to courts. That right guarantees everyone the right of access to courts and to have their disputes decided in a fair public hearing. The apex court recently remarked about the implications of that right in ***Le Roux and Another v Johannes G Coetzee and Seuns and Another*** when it said:

> "*The proposition that a claim, otherwise valid in law and even one that is unassailable, may be extinguished if asserted within the time provided by law, is unsettling. It is unsettling, as its effect is to negate the substance of the right conferred by section 34 of the Constitution "to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court, where appropriate, another independent and impartial tribunal or forum"*[26].

[45] *Section 36* of the Constitution makes provision for the limitation of the rights entrenched in the Bill of Rights[27]. It does so when it provides that those rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The factors that the court must take into account, when considering whether to limit a right in terms of *section 36*, are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose ; and less restrictive means to achieve the purpose. Sub-*section (2) of section 36* provides that, except as provided in

[26] ***Le Roux and Another v Johannes G Coetzee and Seuns and Another*** [2023] ZACC 46; 2024 (4) BCLR 522 (CC); 2024 (4) SA 1 (CC) para [29].
[27] Ibid Constitution No. 108 of 1996, section 36.

subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights[28].

[46] Ngcobo J in ***Brummer v Minister for Social Development*** **and Others** explained the meaning and import of the provisions of section 34 of the Constitution as follows:

> "[*49] The High Court found that the 30-day period is 'grossly inadequate to enable an ordinary applicant to approach a court for relief. It was held that the fact that there is an opportunity for condonation matters not, what does matter 'is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity'. It therefore held that section 78(2) constitutes a limitation of the right of access to court which is guaranteed in section 34 and that this limitation is unreasonable and unjustifiable*[29].
>
> *[51] 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, 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*

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[28] Ibid Constitution Act No. 108 of 1996, section 36 (1) and (2).

[29] ***Brummer v Minister for Social Development*** 2009 (6) SA 32 (CC); S.T.C v K.Z.K(069787/2023) [2024] ZAGPJHC 1066 (21 October 2024) para [33].

the power to condone non-compliance with time-bar is not necessarily decisive"[30].

[47] The sentiments expressed in the authorities referred to in the preceding paragraph, as well as the principles enunciated therein, apply with equal force in the present case. I am therefore of the view that it will not be in the interests of justice and fairness to deprive the applicant the right of access to court, in the sense of denying him an opportunity to have his damages case adjudicated upon, in the circumstances.

CONCLUSION

[48] Our jurisprudence is replete with many examples where both the Supreme Court of Appeal and the Constitutional Court have reaffirmed the principle outlined in the ***Mohlomi v Minister of Defence***[31] in which it was clarified that "*good cause*" is a factual inquiry left to the discretion of the court, and that the court in assessing whether the creditor's default can be fully explained and his conduct or motives are understandable, will have regard to the interests of justice.

[49] In this matter, taking into consideration the good prospects of success as well as the Constitutional rights of freedom and security of person and access to courts, I am persuaded to grant the condonation sought by the applicant. I come to that conclusion relying on the authority of ***Rossouw v Blignaut*** and on the fact that no prejudice will be suffered by the respondents if condonation is granted, as they are legal represented and they have filed their pleas. Their rights are therefore fully protected. In

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[30] ***Brummer v Minister for Social Development*** 2009 (6) SA 32 (CC); S.T.C v K.Z.K(069787/2023) [2024] ZAGPJHC 1066 (21 October 2024) para [33].
[31] **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC).

the present case I cannot find any justification to limit the Applicant's rights. I also conclude that, considering all three requirements for a condonation application to succeed conjunctively, it is in the interest of justice to condone the applicant's failure to timeously deliver the statutory notice.

[50] What remains for consideration is a question of costs. The issue of costs is at the discretion of the court and because the applicant sought an indulgence, he is not entitled to costs, even if the condonation application becomes successful.

ORDER:

[51] Accordingly the following order shall issue:

1. **The late filing of the Applicants Replying Affidavit is hereby condoned.**

2. **The applicant's failure to timeously deliver the statutory notice, in compliance with the provisions of *sections 3(2)(a)* and *(b)* of the Institution of Legal Proceedings Against Certain Organs of the State Act No. 40 of 2002, is hereby condoned and leave is granted for him to pursue his claim against the respondent.**

3. **That there shall be no order as to costs.**

T.A. NKELE

ACTING JUDGE OF THE HIGH COURT

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		BHISHO
Matter heard on	:	**21 MAY 2026**
Judgment delivered on	:	**30 JUNE 2026**