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| Reportable:                        | NO |
| Circulate to Judges:               | NO |
| Circulate to Magistrates:          | NO |
| Circulate to Regional Magistrates: | NO |



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

Case No: 3319/2023

In the matter between:

**MOTLHABI BONGANI**

Plaintiff

and

**MINISTER OF POLICE**

1<sup>st</sup> Defendant

**NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS**

2<sup>nd</sup> Defendant

**CORAM:** HENDRICKS JP

**Heard:** 29 May 2026

**Delivered:** This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are set for 16h00 on 03 July 2026.

**Summary:**

Condonation- Application made in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 –

Prescription – claim extinguished through the running of prescription – Applicant to blame for the inordinately long delay – Application dismissed with costs on a party and party basis on Scale B, to be taxed.

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## ORDER

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- (i) Condonation for the late filing of the first and second respondents' answering affidavit is granted.
  - (ii) The applicants' application for condonation for the late filing of the statutory letters of demand in terms of section 3 of Act 40 of 2002, is dismissed.
  - (iii) The applicant is ordered to pay the costs of this application on a party-and-party basis on Scale B, to be taxed.
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## JUDGMENT

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### HENDRICKS JP

- [1] This is an application for condonation for the late filing of notices of intended legal proceedings as contemplated in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act')<sup>1</sup>. The facts leading to the aforementioned

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<sup>1</sup> Section (3) states:

**"Notice of intended legal proceedings to be given to organ of state**

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
- (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
  - (i) without such notice; or

application can be succinctly summarized as follows; the applicant was arrested by members of the South African Police Service (SAPS) on 29 January 2016 for housebreaking and detained. He was not admitted to bail. On 07 October 2020, he was released upon the withdrawal of the matter by the prosecution, since the complainant had passed on.

- [2] On 08 June 2023, the applicant's attorney served notices in terms of section 3 on the National and Provincial Commissioners of SAPS and on the National Prosecuting Authority (NPA) on 24 October 2023. On 19 December 2023, the applicant issued summons and served it on the State Attorney's Office on 09 February 2024. On 7 March 2024, the respondents filed a notice of intention to defend. On 09 April 2024 the respondents served the applicant with a special plea of non-compliance with the dictates of section 3 of the Act and

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- (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A notice must—
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and
  - (b) briefly set out—
    - (i) the facts giving rise to the debt; and
    - (ii) such particulars of such debt as are within the knowledge of the creditor.
- (3) For purposes of subsection (2)(a)—
- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
  - (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.
- (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.
  - (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 for the failure by the creditor; and
    - (iii) the organ of state was not unreasonably prejudiced by the failure.
  - (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

a plea-over. This was filed with the Office of the Registrar of this Court on 10 April 2024. On 28 June 2024 the applicant filed the aforementioned notice for condonation for the late filing of the notices of intended legal proceedings against the respondents as Organ of State. On 19 July 2024 the respondents filed their answering affidavit with the Office of the Registrar and served on the applicant's attorneys of record on 30 July 2024, which is a day out of time. Counsel representing the applicant did not take issue with this and conceded that the late filing of the answering affidavit of the respondents a day out of time, may be condoned. Condonation for the late filing of the respondents' answering affidavit should therefore be granted.

- [3] It is prudent to repeat in relevant parts the contents of the applicant's founding affidavits for his application for condonation for the late filing of the notices in compliance with section 3 of the Act. As background, he makes it common cause that he was arrested on 29 January 2016 for housebreaking, which he states was unlawful and without a warrant of arrest, by members of the first respondent (Minister of Police) acting within the scope of their employment. He protested his innocence upon his arrest and stated: 'At all material times I informed the arresting officer that I did not commit any offence'.

He was denied bail and detained until 07 October 2020 when he was released, as the matter was withdrawn on 06 October 2020.

- [4] The following is stated verbatim in paragraph 9 of his affidavit:

**'9. REASON FOR LATE DELIVERY OF NOTICE**

- 9.1 I am advised that my notice was served 6 years after my arrest. Respectfully so, I was only released from custody on the 07<sup>th</sup> day of October 2020. The matter was withdrawn when I was not present at court on the 6th day of October 2020 and thereafter released the day after the matter was withdrawn.
- 9.2 I am a lay person and have no knowledge of the laws of South Africa, specifically laws regulating the institution of legal proceedings against certain organs of state.
- 9.3 As a result thereof, I never had any intention of instituting proceedings for wrongful arrest and detention while I was in custody. I confirm that I could not provide instructions to my attorney of the record for the reasons I will provide herein.
- 9.4 I was only informed during 06 October 2022 by my attorney of record that I was wrongfully and unlawfully arrested and detained. As a result, I have a claim against the Respondents. I confirm that we agreed to further consultation as time did not allow us to fully discuss the merits of my case with my attorney.
- 9.5 To which I instructed my attorney, Mr. Tsotelo Petros Ntsamai, around October 2022 to institute legal action against the Respondents. I confirm that I had a further telephonic consultation with my attorney around the 23rd day of January 2023.
- 9.6 It was only during my consultation that I was informed that I have failed to comply with the Act. A confirmatory affidavit of my attorney is attached hereto as annexure "A".
- 9.7 Under the circumstances, and in light of what I have stated above, I humbly submit that I did not willfully cause the late delivery of my intention to institute legal proceedings.
- 9.8 I could therefore only send the statutory notice after the finalization of the matter.'

[5] He also stated in paragraph 6.4 of the affidavit:

'Although the required notices were duly delivered, same was however served approximately a year out of time.'

[6] In paragraph 10 of the same document the following appears:

*'10.1 I therefore respectfully state that my notice was served a year later. However, the matter had not prescribed. It is only that same was served after a period of six months.'*

*10.2 Be that as it may, the Respondents have raised a special plea of non-compliance with peremptory provisions of section 3 (2) (a) of Act 40 of 2002. I therefore seek an order declaring that my statutory notice of demand complies with the provisions of Act supra alternatively, in as far as it may be necessary, I seek condonation for the late filing of my statutory notice.'*

He submitted that the respondents shall suffer no prejudice should condonation for the late delivery of the section 3 notices be granted.

[7] Section 3(1)(a)-(b)(i) of the Act states specifically that:

*'No legal proceedings for the recovery of a debt may be instituted against an organ of state unless – (a) the creditor has given the organ of state in question notice in writing of his or her intention to institute the legal proceedings in question; or (b) the organ of state in question has consented in writing to the institution of that legal proceedings – (i) without such notice'.*

Section 3(1)(b) supra, does not find application in this matter. Insofar as the notice mentioned in section 3(1)(a) is concerned, subsection (2) requires that the notice **must** be served within six months from the date of which the debt became due on the Organ of State concerned. In *Truter v Deyssel*, it was indicated that:

*'the creditor acquires a complete cause of action for the recovery of the debt, . . . when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'*<sup>2</sup>, in other words, the debt becomes due when

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<sup>2</sup> *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) para 16.

the creditor has knowledge of the identity of the Organ of State and of the facts giving rise to the debt.

- [8] It is the contention on behalf of the respondents that the said notices were served after a passage of seven years since 29 January 2016. This contention is based on the fact that the applicant knew that he was arrested by members of the SAPS and even protested his innocence when he was so arrested. Furthermore, he stated in his founding affidavit that the SAPS members acted within the cause and scope of their employment with the first respondent, being the Minister of Police. So, as at the time of his arrest, he knew what the facts were giving rise to the debt and the particulars of the relevant Organ of State.
- [9] At best for the applicant, in accordance with the content of his founding affidavit, he knew that according to him, he was unlawfully arrested and detained until he was released on 07 October 2020, after the matter was withdrawn on 06 October 2020. So, on his own version he was aware of the cause of the debt and who the relevant Organs of State were. He stated quite categorically that: 'I never had any intention of instituting proceedings for my wrongful arrest and detention while I was in custody.' Once again, despite this knowledge, when he was released on 07 October 2020, he did not institute any legal action against the respondents. To add to this, he also let another considerable length of time lapse and only consulted an attorney '*during October 2022*', some two years later, who informed him that he was wrongfully and unlawfully arrested and detained. No action was taken by either himself or his attorney. Instead, another three months passed before he consulted again

with his attorney; this time telephonically on 23 January 2023. Once again, no immediate action was taken. As alluded to earlier, it was only on 08 June 2023 and 24 October 2023 that notices were sent, to the first and second respondents respectively; some four months and 16 days for the first notice and some nine months later in respect of the second notice. This is contrary to what he proffered by stating that:

‘Although the required notices were duly delivered, same was however served approximately a year out of time’ and ‘I therefore respectfully state my notice was served a year late’. . . . ‘However, the matter had not prescribed. It is only that same was served after a period of six months’.

I am holding a different view.

- [10] The submissions by the applicant also do not conform with the statutory requirements laid down by section 3 (4)(b) of the Act, which determines that the court having jurisdiction for condonation, **may** grant an application for condonation if it is satisfied that (a) a debt has not been extinguished by prescription; (b) good cause exists for the failure by the creditor; (c) no unreasonable prejudice caused by the failure. Before dealing with the prescripts of this section, it is worth mentioning that the respondents as defendants filed an amended plea with the Office of the Registrar of this Court on 02 July 2025, after it was served on the applicants’ attorneys of record on 01 July 2025. No replication was filed to this amended plea and neither was any objection raised. In the amended plea, a special plea of prescription in terms of the provisions of the Prescription Act 68 of 1969 was pleaded. This court can therefore deal with prescription in terms of both aforementioned acts.

[11] It is quite apposite to state that the founding affidavit of the applicant contains very scanty information for the inordinately long periods of delay. The applicant failed dismally to explain in minute detail the cause of the delay. Averments and references are made in a by-the-way manner. The applicant does not take this Court into his confidence to explain in detail the cause of the lengthy delays. No detailed account and justifiable reasons are advanced for the delays and why the section 3 notices were not timeously served. There is therefore no good cause shown by the applicant as the creditor for his failure to serve the section 3 notices timeously. The periods of delays, since his arrest on 29 January 2016; after his release on 07 October 2020; his first consultation during October 2022; his second telephonic consultation on 23 January 2023; the first section 3 notice on 08 June 2023; and the second section 3 notice on 24 October 2023; are inadequately explained and lack good cause for the failure of the applicant in explaining the delay.

[12] To reiterate, insofar as the extinguishing of the debt by prescription is concerned, the applicant was arrested on 29 January 2016, when his cause of action arose, of which he was aware. He said he told the members of SAPS that he was innocent. He was not admitted to bail. According to him, he was wrongfully and unlawfully detained until his release on 07 October 2020. Whilst he was detained, he never had any intention of instituting proceedings for wrongful arrest and detention. After his release, he waited for two years before he consulted his attorney. Summons was only issued on 19 December 2023. Without any stretch of the imagination, the claim of the appellant has been extinguished by prescription. The principle *Ignorantia juris non excusat* (ignorance of the law is no excuse) is

not a blanket rule that can be relied upon as a defence. *Madinda v Minister of Safety and Security*<sup>3</sup> emphasised that it is the court that must decide whether the applicant had established good cause for the delay,

‘The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously.’

It further accentuated the statutory aspect of fault by the applicant by highlighting that:

‘One other factor in connection with ‘good cause’ in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms’<sup>4</sup>

Consequently, it is manifest that even the most favorable interpretation of the period that has lapsed cannot favour the applicant.

- [13] Once again, the cause of action arose on 29 January 2016 when he was arrested, wrongfully and unlawfully as he claimed. A three-year period for the running of prescription ended on 28 January 2019. On his own version he was released on 07 October 2020. Even if one calculates to the advantage of the applicant from his release on 07 October 2020, the three-year prescription period would run until 06 October 2023. Summons which stays the running or interrupts prescription was only issued on 19 December 2023, which simply means that the claim had prescribed. In terms of both section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of

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<sup>3</sup> *Madinda v Minister of Safety and Security, Republic of South Africa* [2008] ZASCA 34; 2008 (4) SA 312 SCA para 12.

<sup>4</sup> *Madinda* Ibid para 14.

State Act 40 of 2002 and sections 11(d)<sup>5</sup> and 12(1)<sup>6</sup> of the Prescription Act 68 of 1969, the applicant's claim is extinguished through prescription.

In amplification of the above, *Khanya v The Minister of Police* also referred to section 11(d) of the act as the foundational legal prescript for civil debt prescribing three years after the debt becomes due and to section 12(1) as the legal prescript that the debt must be immediately payable<sup>7</sup>.

Whether on each of the aforementioned acts individually or whether in terms of both read conjunctively, the applicant's claim has been extinguished through prescription. Section 12(1) of the Prescription Act is dispositive of this matter.

- [14] Insofar as costs are concerned, it should follow the result and be awarded in favour of the respondents, as the successful litigants. Counsel for the respondents submitted that costs should be awarded *de bonis propriis* against the attorney of record, as the claim prescribed in his hands. I am holding a different view. The information contained in the founding affidavit is very scant. There is no detailed information with regard to the instructions given. It is even uncertain whether during the first consultation with his attorney during October 2022, did he give a mandate and clear instructions to his attorney to institute a legal action. This uncertainty is exacerbated by the fact that a follow-up telephonic conversation needed to be held 'around the 23<sup>rd</sup> day of January 2023'. I am not

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<sup>5</sup> Section 11 (d) of the Prescription Act 68 of 1969 – 'save where an Act of Parliament provides otherwise, three years in respect of any other debt'.

<sup>6</sup> Section 12 (1) *ibid* – 'Subject to the provisions of subsections (2), (3)... prescription shall commence to run as soon as the debt is due.'

<sup>7</sup> *Khanya v The Minister of Police* [2019] ZAFSHC 81 paras 7-8.

convinced that the applicant's attorney of record is solely to blame for the delay, alternatively that he was negligent in causing the applicants' claim to prescribe.

- [15] The applicant himself states under oath that he never had any intention of instituting legal proceedings for wrongful arrest and detention while he was detained. As alluded to earlier, two years had passed after his release during which he did not institute any legal proceedings. Even after his first consultation with his attorney in which he was advised that he may have a claim for wrongful arrest and detention around October 2022, he did not pursue his cause of action. Only 'around January 2023' did he revert and had a follow-up telephonic conversation with his attorney. To reiterate, once more, there are long periods of time lapse that are unexplained. This cannot solely be laid at the door of the applicant's attorney. There is a stage beyond which a litigant cannot hide behind his attorney for causing the delay. This is one such matter where the applicant has himself to blame for the inordinately long delay of his claim, which became extinguished through the running of the prescription.

### **Order**

- [16] Resultantly, the following order is made:

- (i) Condonation for the late filing of the first and second respondents' answering affidavit is granted.
- (ii) The applicants' application for condonation for the late filing of the statutory letters of demand in terms of section 3 of Act 40 of 2002, is dismissed.

- (iii) The applicant is ordered to pay the costs of this application on a party-and-party basis on Scale B, to be taxed.



**R D HENDRICKS**  
**JUDGE PRESIDENT**  
**NORTH WEST DIVISION, MAHIKENG**

## **APPEARANCES**

**For the Plaintiff:**

**Instructed by:**

Adv. Ramaili SC

Ntsamai Attorneys, Mahikeng

**For the Defendants:**

**Instructed by:**

Adv. Lekwape

State Attorney, Mahikeng