THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 153/07

In the matter between

THEMBELA MADINDA **APPELLANT**

and

MINISTER OF SAFETY AND SECURITY OF THE REPUBLIC OF SOUTH AFRICA **RESPONDENT**

Coram: NAVSA, MTHIYANE AND HEHER JJA

Heard: 18 MARCH 2008
Delivered: 28 MARCH 2008
Summary: Prescription – limitation of actions – Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ss 3(1) and (2) – legal proceedings against SAPS – failure to give notice of intention to institute such proceedings within 6 months of date when debt became due – application for condonation under s 4 – 'good cause' and 'absence of unreasonable prejudice' – additional delays unrelated to failure to give timeous notice.

Neutral citation: This judgment may be referred to as Madinda v Minister of Safety and Security (153/2007) [2008] ZASCA 34 (28 March 2008).

HEHER JA

HEHER JA:

[1] The appellant is an unemployed woman, aged 32 years, who resides in Grahamstown. In July 2006 she applied to the High Court for an order in terms of s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. She sought condonation of her failure to serve a notice of intention to bring legal proceedings against the respondent Minister within the period specified in s 3(2)(a) of the Act. The Minister opposed the application.

[2] The legislation is relatively recent and has not been the subject of much judicial consideration. Section 3 may conveniently be quoted in full:

‘ (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 proceeding[s]—

(i) without such notice; or

(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.'

[3] On 26 October 2006 Van der Byl AJ refused the application with costs. He found that the appellant had not shown good cause for not giving notice timeously. Nor, it appears, was the learned judge persuaded that SAPS was not unreasonably prejudiced by the failure. A substantial part of the delay could only be explained by what he described as 'complete disinterest in the conduct of her case' and her consequent failure to maintain contact with her attorney from May 2005 until 7 July 2006.

[4] The learned judge refused an application for leave to appeal. This Court, however, granted the appellant such leave.

[5] The appellant's intended cause of action was a claim for damages arising from unlawful arrest, detention and assault allegedly perpetrated on her by unidentified members of the SAPS during the night of Saturday, 11 September 2004. The period of six months afforded a plaintiff by s 3(2)(a) of the Act would, in the absence of factors relevant by reason of s 3(3)(a), probably have ended at midnight on 11 March

2005. The statutory notice was sent from Grahamstown to the National Commissioner in Pretoria by registered post on 19 August 2005. Receipt was acknowledged (and rejected as not complying with the requirements of s 3(2)(a) of the Act) in a letter dated 31 October 2005. Section 4(1) of the Act requires such a notice to be served on the organ by delivering it by hand or by sending it by certified mail or (subject to s 4(2)) by sending it by electronic mail or transmitting it by facsimile. Section 7 of the Interpretation Act 33 of 1957 provides that

'Where any law authorises or requires any document to be served by post, whether the expression "serve", or "give", or "send", or any other expression is used, then unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, preparing, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

I shall assume for present purposes, there being no evidence to the contrary, that there is no material difference between registered and certified post. If one allows one week for delivery of post sent from Grahamstown to Pretoria, ie by 26 August 2005, the notice was about 5½ months outside the prescribed time.

[6] Section 3(4)(b) circumscribes a court's power to grant condonation by requiring that it be satisfied that

i) the debt has not been extinguished by prescription;

ii) good cause exists for the failure by the creditor, ie to serve the statutory notice according to s 3(2)(a) or to serve a notice that complies with the prescriptions of s 3(2)(b); and

iii) the organ of state was not unreasonably prejudiced by the failure.

[7] The Act is an omnibus statute which as the preamble states is intended 'to regulate the prescription and harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in

respect of the recovery of debt'. Thus, it brings together and rationalises under one statutory umbrella provisions which were previously scattered through many statutes. (These are identified in the schedule of laws amended and repealed.) The relevant repealed provision in this case was s 57 of the South African Police Services Act, 68 of 1995. That, in turn, was the successor to other provisions limiting actions against the SAPS which have, from time to time, received consideration by the courts. Such provisions have been held to be in favour of the police who should accordingly, in so far as the language permits, receive the protection offered by the section without imposing an unnecessarily heavy burden on a plaintiff: *Minister van Wet en Orde v Hendricks* 1987 (3) SA 657 (A) at 662E-663G. See also *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 497H-498C; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 9. Previously, s 57(5) of the 1995 Act permitted a court to dispense with an equivalent notice of intention to commence proceedings 'where the interests of justice so require', as to which see *Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 155B-C. Before 1995 there was no power of condonation, a situation deemed to be unconstitutional in relation to analogous limitation provisions under the Defence Act 44 of 1957 in *Mohlomi's* case.

[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.

[10] The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I-228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.

[11] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) Schreiner JA said (at 352H-353A):

'The meaning of "good cause" in the present sub-rule, like that of the practically synonymous expression "sufficient cause" which was considered by this Court in *Cairn's Executors v Gaarn*, 1912 A.D. 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.'

Although this passage relates to a different legislative context (viz Rule 46(5) of the Magistrates' Courts rules) I am of the view that it holds good for the interpretation of s 3(4)(b)(ii).

[12] 'Good cause' usually comprehends the prospects of success on the merits of a case, for obvious reasons: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765D-E. But, as counsel for the respondent stressed, whether that is the case must depend on the terms of the statute in which it is found. In s 3(4)(b)(ii), there is a

specific link created between the delay and the 'good cause'. According to counsel's submission, no matter how strong an applicant's case on the merits that consideration cannot be causally tied to the reasons for the delay; the effect is that the merits can be taken into account only if and when the court has been satisfied and comes to exercising the discretion to condone. I do not agree. 'Good cause for the delay' is not simply a mechanical matter of cause and effect. 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. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b), *viz* the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration. The learned judge *a quo* misdirected himself in ignoring them.

[13] The relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.

[14] 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. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. This is a distinction which the learned judge did not draw or maintain and I think he was wrong not to do so.

[15] Absence of prejudice has often been regarded as an element of good cause in the context of earlier legislation. It was, no doubt, also an element in determining where the interests of justice lay in the terms of s 57 of Act 68 of 1995. But in this Act the legislature has deemed it appropriate to treat absence of *unreasonable* prejudice as a specific factor of which an applicant must satisfy the court. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice.

[16] The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters, as to which see eg *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G.

[17] Approaching the matter according to the structure as I have explained it the

present case resolves itself without difficulty according to its own facts.

[18] As to good cause─

18.1 the appellant set up a *prima facie* case of assault, unlawful arrest and unlawful detention (which perhaps overlaps with kidnapping) against the policemen involved. Although the strength of the case is not decisive, an examination of all the statements from the docket taken at face value leaves serious questions unexplained about how and when the appellant could have sustained her injuries other than during the time which she spent in the police vehicle alone with sgt Kebe and const Gabriel. On this basis I would evaluate the *prima facie* case against the policemen concerned as strong. Her fundamental right is to have her oral evidence and that of her supporting witnesses evaluated in a fair trial against any admissible opposing testimony that the defence can produce.

18.2 A factor which is to be considered is that she used the first available opportunity to assert her determination to see justice done when, on her return home on the night of 11 September 2004 and despite her parlous physical condition, she wrote on a piece of paper that the police had assaulted her, enabling her sister to lay a complaint on her behalf.

18.3 The matter was obviously of importance to her. During the morning of 12 September two police officers arrived with her sister. After her admission to hospital a police photographer took photographs of her injured face. She stated on oath that she believed the steps taken on her behalf and by the police would lead to the State investigating and following up her complaint and claiming damages for her. The learned judge *a quo* was dismissive of such a belief:

'[I]t is in my view unimaginable that any member of the public, no matter his or her illiteracy or social handicap (of which, incidentally, no information is offered in her founding affidavit), can ever be under the impression that the police would claim damages on her behalf'.

I do not share that view. Ignorance, inexperience, naivete, and simple lack of intelligence, individually or in any combination, could it seems to me, conduce to a

reasonable belief that, once a complaint has been laid, the State, with the resources at its disposal, and as what she described in her reply as 'the primary agent for the protection and enforcement of . . . legal rights', will follow it up; cf *Mugwena*'s case, above, at 155H-156E. Indeed there is a provision in the Criminal Procedure Act (s 300(1)) which enables a court to make a compensatory order having the effect of a civil judgment, so that her belief finds some basis in law as well.

18.4 The appellant was unaware of the requirement of notice until she approached an attorney during May 2005, some two months after the statutory period expired. She was first led to seek help because she saw no apparent progress in the investigation of her claim. It is significant that her initial reaction was to visit her local police station to find out what was happening. There she was advised that the police only investigate complaints with a view to criminal prosecution and that if she wanted to claim damages she should consult an attorney immediately. She followed that advice. The overall impression that her affidavit creates is that, despite a long initial period of physical debility, she at all times harboured a genuine grievance which she pursued according to a limited comprehension of what was necessary in order to enforce her legal rights. The fact that, from her final discharge from hospital in December 2004 until early May 2005, she waited in ill-founded anticipation and inactivity for some progress in the matter, even if it be a matter for mild disapprobation, is not sufficient to negate her genuine intention to pursue her claim.

18.5 All in all it seems to me that prospects of success and her explanation for the initial delay both tend in favour of the appellant.

18.6 The learned judge held against the applicant the delay between May 2005 and the sending of the notice in August. The uncontested events are as follows:

(a) During May attorney Dullabh was told of appellant's desire to claim damages from the police. She asked him to ascertain what was going on with the investigation.

(b) Dullabh told her that notice of a civil claim had to be given within 6 months and that it might be necessary to apply to court, but he needed to obtain a copy of the

investigation docket and the appellant's medical records in order to assess the merits and the amount of the claim.

(c) In July 2005, when Dullabh received these, he called the appellant to a consultation. He told her a decision had been taken in April 2005 not to prosecute the officers involved, but that he assessed the prospects of success in a civil action against the state as reasonable.

(d) The appellant informed Dullabh that she was still experiencing difficulties with her jaw and pain in chewing. He told her that, in due course, further medical examinations would be necessary.

(e) The appellant instructed Dullabh to send the statutory notice. As we know that was only sent on 19 August. There is no explanation for the delay of about a month and a half in this regard.

[19] The summary in the preceding paragraph shows that the appellant consulted an attorney as soon as could reasonably be expected, given her misconception, and, having done so, reacted expeditiously and in good faith on his advice. Mr Dullabh furnished a rational explanation to her for not immediately sending the notice (that someone else might have acted first and sought information afterwards does not render it less rational), an explanation which she could not have been expected to debate with him. Prudence before embarking on a process which may lead to heavy costs in litigation is to be commended unless the consequences of delay are likely to damage one's client's prospects. I do not think Mr Dullabh had reason to think that he would be criticised for being careful. The unexplained period (which must lie in the peculiar knowledge of her attorney) is not of such a degree of seriousness as to shipwreck her otherwise sound reliance on good cause.

[20] It is also true that, although her attorney received the rejection of the notice in the middle of October 2005, the appellant did not commence proceedings for

condonation until July 2006. As I have earlier pointed out, unexplained delay which relates to the period after the notice was *de facto* given will ordinarily relate not to the establishment of good cause but to condonation. The learned judge erred in his approach in this regard. Nor do I think that such delay can fairly be ascribed to disinterest on the appellant's part.

[21] The third leg of s 3(4)(b) required the appellant to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice, an aspect which the judgment of the court *a quo* blurs) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.

[22] The approach of the court *a quo* in this regard was inconsistent. Early in his judgment the learned judge noted that 'it was not seriously contended on behalf of the respondent that the SAPS was prejudiced by the applicant's delay'. Despite this he concluded that the question of prejudice was not a requirement which could be ignored 'in the circumstances of this matter'. He relied in this regard on a passage in *CIR v Pick 'n Pay Wholesalers (Pty) Ltd* 1987(3) SA 453 (A) at 469F-G:

'Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent

information. One is aware too that there can occur a process of unconscious reconstruction.'

But that passage dealt with the fallibility of human recollection in giving evidence long after the event. The case before the judge related to statutory notice of the cause of action. The appellant had the same rights as any other litigant in relation to when she issued summons in the matter: she had to do so before her claim prescribed and the action once instituted would be subject to the usual hazards of litigation including systemic and other delays. Reliance on delay in bringing an action to trial was thus irrelevant to the appellant's default. Likewise, the learned judge's reliance on *Hartman's* case, above, at 497F-498A was misplaced. Further evidence of such confusion appears from the following statement in the judgment:

'Although the investigation in this matter seems to have been completed on 19 October 2004 when a so-called "*warning statement*" had been taken from the second of the police officials who was allegedly involved in the alleged unlawful arrest and assault of the Applicant, it does not necessarily mean that the Respondent it is and will not be prejudiced by any delay to give the prescribed notice *and to timeously institute the intended action*.' [Emphasis added]

[23] The learned judge continued:

'In this regard one should have regard to the difficulties which are experienced when witnesses are confronted with the contents of their police statements (*S v Govender and Others* 2006 (1) SACR 322 (E)) since, inter alia, police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable (*S v Xaba* 1983 (3) SA 717 (A) at 730B-C) and the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness's evidence in court (*S v Bruiners en'n Ander* 1998 (2) SACR 432 (SE) at 437h). There is accordingly no assurance that the fallibility of human memory after the elapse of time will, especially if one bears in mind that police officers are in the course of various policing duties involved in arrests of thousands of persons, fade when the finer details of a particular incident that occurred two or more years earlier are canvassed in in-depth questioning.'

However, reference to the inadequacy of police statements hardly seems appropriate when a court is confronted by an application for condonation for failure to file the

statutory notice within six months, and the evidence shows that all statements were procured timeously and were directed to ascertaining whether the complaint was well-founded.

[24] In summary, the learned judge misdirected himself both as to the existence of unreasonable prejudice and as to its relevance in the context of the application before him. In argument before us counsel for the respondent did not contend otherwise.

[25] Approaching the question anew, unaffected by the misdirections, I am persuaded that the appellant achieved the standard set in relation to s 3(4)(b)(iii). The facts of the matter before the learned judge were the following:

1. The assault was reported to the police on the night of the alleged happening;
2. On 13 September 2004 one Yamiso, a friend of the complainant who was in her company until her 'arrest', made an affidavit.
3. A confirming affidavit was taken from a policeman, sgt Ngqele (to whom Yamiso reported the complaint) on 13 September.
4. On 13 September the appellant was photographed in the Settlers Hospital by a police inspector as part of the investigation into the complaint and he made a statement concerning his observations on 29 September.
5. On 15 September a sworn statement was taken from an eyewitness to certain of the events, Ms Sipokazi Moni, who had also been in the company of the complainant until the latter's 'arrest'.
6. There is also the first page of a statement by the appellant which, although bearing no date, seems to have been written by the same person who took Moni's statement on 15 September.
7. A warning statement was taken from one of the two 'suspects', const Gabriel, on 19 October in which he set out his participation in the events in some detail.
8. There is the first page (undated) of a statement made by the second 'suspect', sgt Kebe, containing a version which purports to excludes the possibility of the

complainant having suffered the injuries while in police custody. It would appear from the numbering on this document (A8) that it was probably made at some time before the statement of Bergh (A9).

9. An affidavit was obtained from an alleged independent eyewitness, Mr Eugene Bergh, on 8 April 2005. (It appears from the docket that it was on the strength of this statement that the prosecutor declined to prosecute.) In it he denies seeing any assault by const Gabriel or sgt Kebe up to the complainant's removal in the police vehicle. What of course is significant in that regard is the necessary inference that the complainant's serious injuries were most probably sustained after she was taken away, a matter which, in itself, one might have thought, justified a prosecution.

[26] In regard to the foregoing one may fairly infer that by no later than 8 April 2005 the applicant's complaint had been fully investigated and statements taken from all persons whom the investigating officer regarded as material. Taking all the circumstances into account it is clear that the learned judge should have been satisfied that the SAPS was not unreasonably prejudiced by the failure to serve the notice timeously.

[27] The question then arises as to whether condonation should have been granted. We are by reason of the misdirections entitled to reconsider this question.

[28] By October 2005 the Commissioner had taken an unequivocal stand against recognizing the notice. But it is clear that the applicant's attorney did not leave the matter there, since on 12 January 2006 the State Attorney wrote tersely to him

'We regret to advise that our instructions from client are to consider the provisions of section 3(2)(a) of Act 40 of 2002.'

Having regard to the provisions of s 3(1)(b) Mr Dullabh was certainly justified in asking that the State abandon reliance on s 3(2)(a). But when he received that reply it

must have been clear that all hope of concession was past. It was the delay thereafter until July 2006 which he should have explained but did not. Applications for condonation should in general be brought as soon after the default as possible. Thereby possible further prejudice to the other party and misconception as to the intentions and bona fides of the applicant can be lessened. A delay in making the application should be fully explained. The failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his or her legal advisers without lessening the force of the application. I think that the latter is the correct attitude to take in the present matter in relation to the evaluation of whether condonation should be granted. Under the present statutory dispensation there is no time limitation on the institution of action and the appellant had until September 2007 (when her claim would have prescribed) to issue summons. The matter was clearly very much alive during the first half of 2006 and the State had no reason to think otherwise. Nor has the respondent suggested that it was prejudiced or misled by the additional delay.

[29] One is now in a position to assess the combined weight to be attributed to the three elements of s 3(4)(b)(i) (ii) and (iii) which were established, in the context of the discretion to grant or refuse condonation. Given the absence of unreasonable prejudice to the SAPS from the equation and the persuasive, though not flawless, reliance on good cause, no court exercising a discretion unaffected by the misdirections which tainted the assessment of the trial judge, would have deprived the appellant of the opportunity to have her claim tested according to the dictates of law and justice. Condonation should therefore have been granted. It follows that the appeal must succeed.

[30] Moreover, the refusal of the Commissioner and the State Attorney to accede to the request to forego reliance on s 3(2)(a) of the Act and the respondent's opposition

to the application were not only unwarranted but also unreasonable. The respondent should therefore pay the costs occasioned by the application. It was common cause between the parties that the matter was of sufficient magnitude to warrant the attentions of senior and junior counsel.

[31] The following order is made:

1. The appeal is upheld with costs including the costs consequent upon the employment of two counsel.

2. The order of the court *a quo* is set aside and replaced with the following:

'(a) Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 within the period laid down in section 3(2)(a) of the Act.

(b) The respondent is to pay the costs of the application including the costs consequent upon the employment of two counsel'.

J A HEHER
JUDGE OF APPEAL

NAVSA JA)Concur
MTHIYANE JA)