THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1234/2023

In the matter between:

MARTHA JOHANNA PETRONELLA ROSSOUW **APPLICANT**

and

BLIGNAUT & WESSELS **FIRST RESPONDENT**

MEC: POLICE, ROADS AND TRANSPORT
FOR THE PROVINCE OF THE FREE STATE **SECOND RESPONDENT**

Neutral citation: *Rossouw v Blignaut & Wessels and Another* (1234/23) [2025] ZASCA 146 (07 October 2025)

Coram: MAKGOKA, MBATHA and WEINER JJA and VALLY and MODIBA AJJA

Heard: 08 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 07 October 2025.

Summary: Civil Procedure – Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 – condonation application in terms of s 3(4) – whether good cause and absence of prejudice established.

ORDER

On appeal from: Free State Division of the High Court, (Mhlambi, Loubser and Chesiwe JJ sitting as court of appeal):

1 The applicant's application for special leave is granted.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the Full Court of the Free State Division of the High Court is set aside and replaced with the following order:

'1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the High Court is set aside and replaced with the following:

"1 Condonation is granted for the applicant's failure to serve the notice contemplated in s 31)*(a)* of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 within the period laid down in s 3(2)*(a)* of the Act.

2 The second respondent is ordered to pay the costs of the application."'

JUDGMENT

Modiba AJA (Vally AJA concurring):

[1] The applicant, Martha Johanna Petronella Rossouw (Ms Rossouw) seeks special leave to appeal against the dismissal of her appeal by the Free State Division of the High Court (the Full Court). In issue is whether she established good cause for condonation for the late filing of a statutory notice in terms of s 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002[1] (the notice). And whether the first respondent, the Member of the

[1] Section 3 in relevant parts provides:
'(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

Executive Council for Police, Roads and Transport, Free State Province (the MEC) will not be unreasonably prejudiced by Ms Rossouw's delay in delivering the notice. She brings the application in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the SC Act). The application has been referred for oral argument in terms of s 17(2)*(d)* of the SC Act. The parties were directed to be prepared, if called upon to do so, to address the Court on the merits of the appeal. The MEC opposes the application.

[2] Ms Rossouw faces a higher test than the existence of reasonable prospects of success to engage this Court's appeal jurisdiction. She contended that there are special circumstances that warrant her being granted special leave to appeal against the Full Court's order. The MEC contended that the application falls to be dismissed because Ms Rossouw fails to meet the test in *Cook v Morrison and Another* (*Cook*) [2] where this Court said the following concerning the test for special leave to appeal:

'The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of

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(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

(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) …

(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.'

[2] *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA).

success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list…'[3]

[3] Ms Rossouw brought the condonation application in an action instituted against the MEC for the loss of support arising from the death of her husband and the biological father of her two minor children, Marthinus Lucas Rossouw (the deceased). Section 3(1)*(a)* requires a written notice to be delivered to an organ of state before legal proceedings for the recovery of debt are instituted. In terms of s 3(2), the notice should be delivered within six months of the debt falling due. The debt fell due on 30 May 2011 when the deceased passed away. The notice ought to have been delivered by 29 November 2011. Ms Rossouw's erstwhile attorneys Blignaut & Wessels failed to deliver it. Her current attorneys only delivered the notice on 13 December 2018. Hence, they sought condonation for delivering the notice out of time.

[4] In the action, Ms Rossouw alleged that on 29 May 2011, at approximately 20h00, the deceased was driving a motor vehicle in which he was involved in a collision. He sustained severe bodily injuries, resulting in his death. Together with her minor children, Ms Rossouw was dependent on the deceased prior to his demise. Three weeks after his death, she instructed Blignaut & Wessels to institute an action for damages for loss of support. She regularly followed up on the progress with her action. She also assisted with obtaining the docket and inquest report when Blignaut & Wessels's personnel were struggling to obtain these documents. In 2017, a representative of Blignaut & Wessels informed her that her claim had prescribed but, the children's claim could still be pursued. It transpired that Blignaut & Wessels had proceeded incorrectly against the Road Accident Fund (the RAF).

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[3] Ibid at para 8. See also *Savannah Country Estate Homeowners Association v Zero Plus Trading 194 (Pty) Ltd and Others* (773/2022) [2024] ZASCA 40 para 18 referencing *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561C-F.

[5] She subsequently instructed her current attorneys who informed her that the MEC is responsible for the maintenance and repair of roads in the Free State; the state of disrepair of the road was the direct cause of the collision; therefore, the MEC was the correct entity to sue in respect of the minor children's claim. They also advised her that she would need to comply with s 3(2) by delivering the notice. The notice, dated 13 December 2018, was subsequently dispatched to the Head: Police, Roads and Transport, Bloemfontein by registered mail. Summons instituting the action against the MEC was issued on 23 April 2019 and served on the MEC on 7 May 2019.

[6] The MEC raised a special plea, alleging non-compliance with s 3(2), prompting Ms Rossouw to apply for condonation for failure to deliver the s 3(2) notice within the prescribed period. In terms of s 3(4), the Court may condone non-compliance with s 3(2) if the requirements for such condonation are met. Undoubtedly, the condonation application has grave consequences for the minor children as it is dispositive of their loss of support action.

[7] In the high court, Ms Rossouw, contended that she advanced sufficient grounds for her failure to file the notice timeously and her claim had prospects of success. She always intended to hold those who were liable for her husband's death accountable. She blamed Blignaut & Wessels, for pursuing the incorrect party as a result of which they failed to deliver the notice. She had constantly followed up with them on the progress of her claim and assisted where required. As a result of their negligent handling of her case in pursuing the wrong party and allowing her personal claim to prescribe, she terminated their mandate and in 2017, instructed her current attorneys.

[8] Regarding the prospects of success, Ms Rossouw contended that the MEC failed in her duty to maintain the road in a proper state of repair. When she visited

the scene shortly after the collision occurred, she observed potholes on the road. There were no signs warning motorists of the presence of potholes. She contended that the potholes caused the deceased to lose control of his motor vehicle as a result of which it overturned. She relied on the expert report, police sketch plan, accident report, witness statement, inquest report and photographs of the scene of the accident.

[9] Ms Rossouw also contended that the MEC had put up no countervailing evidence to rebut her contention that she would not suffer unreasonable prejudice if condonation was granted. She submitted that the alleged prejudice is based on speculative grounds that witnesses may not remember the incident or no longer be available and road maintenance records may also no longer be available. She further contended that the road's maintenance records which will show that the road was repaired immediately after the collision are in her possession. And potholes were visible on the police accident report which was compiled immediately after the collision occurred.

[10] The MEC contended that Ms Rossouw failed to make out a proper case for condonation in that she had not shown good cause for the delay in filing the notice and had no prospects of success. The MEC stated that s 3(2) contemplates strict compliance. The notice was served on her seven years and seven months after the prescribed period. The MEC further contended that Ms Rossouw's explanation for the delay in failing to serve the notice timeously was unreasonable. Having instructed attorneys within three weeks of the deceased's death, she cannot rely on lack of knowledge of legal proceedings.

[11] In addition, the MEC contended that Ms Rossouw relied on inadmissible hearsay and opinion evidence which is not confirmed by a witness in a confirmatory affidavit. The MEC submitted that she stood to suffer great

prejudice if condonation was granted. Ms Rossouw had 'an uneven seven-year start' against her which impeded her from properly investigating the cause of the accident. The department is a large institution with a staff complement that changes with time, its records are not always available, thus, issuing the notice timeously allows her to conduct necessary investigations. When all these factors are considered conjunctively, Ms Rossouw has failed to make out a proper case for condonation to be granted.

[12] The high court rejected Ms Rossouw's explanation for the delay in delivering the notice. It held that her explanation was scant and the delay was extreme. It found that Ms Rossouw was aware of her right to institute a claim for loss of support, hence, she instructed attorneys to institute the claim three weeks after the incident. Although she followed up from time to time and assisted, when necessary, she lay supine for six years until she was advised in 2017 that her claim had prescribed. A further delay of more than one year after she instructed her current attorneys until December 2018 when the notice was delivered, is unexplained.

[13] The high court also found that Ms Rossouw had no prospects of success. Her version of how the collision occurred would not be sustained by her inadmissible hearsay and opinion evidence and was inconsistent with the statement of the only eyewitness Mr Jeremiah Motloung (Mr Motloung). Further, the inquest report and police sketch plan do not address the cause of the accident. It further found that although Ms Rossouw's laxity in prosecuting her action should not be visited on the minor children, condoning a delayed claim which lacks merit will not serve the minor children's best interests. Although the MEC must set out the basis for the unreasonable prejudice she stands to suffer if condonation is granted as they are within her personal knowledge, Ms Rossouw bears the onus to establish the absence of unreasonable prejudice. Given that the

delay in serving the notice was extreme and that there was no case for the MEC to answer to, the high court expressed, putting her to her defence would result in unreasonable prejudice.

[14] Before the Full Court, Ms Rossouw took issue with all the findings of the High Court, contending that they were erroneous. She also criticised the high court for placing too much emphasis on the lack of prospects of success in the action. She argued that the dismissal of the condonation application would effectively deny the children justice. Persisting with the contentions she advanced in the high court, the MEC argued that the high court's findings were correct and the appeal ought to be dismissed.

[15] The Full Court only addressed the high court findings it considered debatable or contentious. Nothing turns on this as an appeal lies against the order and not the reasons for it. It found that Ms Rossouw had failed to explain the delay of more than a year after she instructed her current attorneys. The same applies to the further delay of four months after the MEC filed her plea on 19 September 2019 until the condonation application was instituted on 30 January 2020. It based its reasons on *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* (*CJ Rance*)[4] where this Court held that an application for condonation must be brought as soon as the party requiring it realises that it is required and on *Van Wyk v Unitas Hospital*[5] where the Constitutional Court confirmed the principle that the explanation for the delay must cover the entire period of the delay.

[16] In this Court, Ms Rossouw raised several issues with the Full Court judgment. First, she contended that it ought to have distinguished between the

[4] *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA) para 39.
[5] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.

pre-notice period and the post-notice period. According to her, s 3(4) only applies to the former period. The latter period only has a bearing on the court's overall discretion to grant condonation. Second, it erred in finding that there are no prospects of success on the merits as the MEC had put up no countervailing evidence to rebut her contention that she has good prospects of success. Third, the Full Court incorrectly applied the principles regarding whether good cause had been shown as it failed to mitigate the insufficient explanation for the delay against her prospects. By this omission, it failed to act in the best interests of the minor children. Last, since the MEC recorded no real prejudice for the delayed delivery of the notice, but relied on speculative grounds, the Full Court ought to have found that she stood to suffer no prejudice if condonation was granted.

[17] The MEC contended that Ms Rossouw repeated the same arguments that she raised in the high court and the Full Court and failed to establish special circumstances that warrant special leave. The MEC sought the dismissal of the application.

[18] I now turn to consider whether Ms Rossouw meets the test for special leave to appeal. For reasons I set out below, she fails to meet the test in *Cook*. The applicable legal principles are well established. She does not raise a substantial point of law. Her prospects of success in the appeal are not so strong that a refusal of leave would result in a manifest denial of justice. Although the matter is of great importance to the parties as it relates to the minor children's loss of support claim, this is insufficient to disturb the order of the Full Court when regard is had to all the factors that bear on the interests of justice in granting condonation.

[19] There are three requirements in s 3(4)*(b)*. The first requirement is that the debt has not prescribed. The second requirement is good cause for the delay in delivering the notice. The third is that the organ of state must not be unreasonably

prejudiced by the delay in delivering the notice. The court must be satisfied that all three requirements have been met. It exercises its discretion to grant condonation following the established principles. The guiding principles are set out in *Madinda v Minister of Safety and Security* (*Madinda*),[6] where this Court held that:

'… "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 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.'

[20] I now discuss the requirements in s 3(4)*(b)* in turn. The first requirement is not in issue, as the minor children's claim has not prescribed. The second requirement relates to the applicant's right to have the merits of her case tried by a court of law. It ought to be considered with the third requirement in a balanced manner because granting condonation when there are no prospects of success, even if the explanation for the delay is reasonable, would not adversely affect Ms Rossouw's right to fully ventilate the merits when she would not be able to establish her case at the trial. In such a case, even when the MEC is not prejudiced by the delay, the interests of justice may be best served by refusing condonation. However, where the prospects of success are strong, even if the explanation for the delay is unreasonable, and the MEC may be unreasonably prejudiced by the delay, the interests of justice may be best served by granting condonation.[7]

[21] In terms of s 3(2)*(a)*, the notice must be served on the debtor within six months of the debt falling due (the pre-notice period). This is the period between 30 May 2011 and 29 November 2011. The period between 30 November 2011

[6] *Madinda v Minister of Safety and Security* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) para 10.
[7] Ibid para 16.

after expiry of the prescribed six months period and 13 December 2018 when the notice was served constitutes the post-notice period. Two questions arise in determining whether Ms Rossouw has provided a reasonable explanation for the delay in delivering the notice. The first is whether failing to issue the notice timeously because an incorrect party had been identified as the debtor constitutes a reasonable explanation for the purpose of s 3(4)*(b)*(ii). The second is whether Ms Rossouw should be absolved from her attorneys' lapses in failing to deliver the notice timeously.

[22] Ms Rossouw's instructions to Blignaut & Wessels was that they must recover damages from any party who is liable for her husband's death, thus entrusting the identification of such a party to them. By exercising their professional skill and diligence in executing Ms Rossouw's instructions, Blignaut & Wessels ought to have identified the correct party to sue. They identified the wrong party, as a result of which they failed to deliver the notice. Therefore, the notice was not delivered during the prescribed six months due to their ineptitude in executing Ms Rossouw's instructions. No blame should be imputed on Ms Rossouw for Blignaut & Wessels' failure to deliver the notice during the pre-notice period. However, for reasons set out below, she does not escape blame because a substantial period of the delay in delivering the notice was not explained.

[23] Blignaut & Wessels were so inept in executing Ms Rossouw's instructions that her personal claim prescribed in their hands on 29 November 2014. She alleged that Blignaut & Wessels only advised her of the prescription on an undisclosed date in 2017, prompting her to terminate their mandate and to instruct her current attorneys. Her version that she followed up regularly with Blignaut & Wessels on the progress with her claim is scant. Apart from stating that she

assisted with obtaining documents, she has provided no details of the progress updates that she received from Blignaut & Wessels.

[24] It is unclear what would have prompted Blignaut & Wessels to inform her of the prescription only in 2017. Either they simply neglected to inform her earlier or she did not make any contact with them between 2014 and 2017. Notwithstanding that Ms Rossouw is a lay person, this is a long time for a litigant to passively accept undisclosed progress updates from an attorney. In the absence of details of the progress updates she received from Blignaut & Wessels, there is no basis on which to determine whether the delay for the entire post-notice period should solely be attributed to them.

[25] In addition, Ms Rossouw failed to disclose the date on which she terminated Blignaut & Wessels's mandate and instructed her current attorneys. She only specified the year in which she took these steps. This further masks her own culpability, if any, for the delay in having her claim prosecuted.

[26] Her current attorneys advised her of the s 3(2) requirement on an undisclosed date in 2017. Yet, it took them more than a year after she had instructed them to have the notice delivered. She has offered no explanation for this delay. She also does not state that she followed up with them to enquire whether they had delivered the notice. Having been informed of the requirement to deliver the notice, she ought to have displayed greater concern about any further delay in the prosecution of her action, and to have followed up with them more regularly to ensure that they have acted on the advice that they gave her.

[27] Her current attorneys also do not explain why it took so long to deliver the notice and to bring the application for condonation without any further delay. All these factors render the present facts distinguishable from procedural lapses by

an attorney in *Regal v African Superslate (Pty) Ltd (Regal)*[8], for which the court may exercise its discretion to excuse a party. I am not persuaded that Ms Rossouw should be absolved for her attorneys' lapses under these circumstances. As this Court held in *Saloojee and Another v Minister of Community Development*[9] (*Saloojee*), if a litigant seeks absolution from her attorneys' lapses, she should set out sufficient basis for it. Ms Rossouw has failed to do so. It is necessary that I quote the relevant paragraph in *Saloojee:*

'In *Regal v African Superslate (Pty.) Ltd* ... at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant*, who was himself in no way to blame,* from relief. *I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney.* There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. *To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity.* In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. *The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. ... A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney ... and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In*

[8] *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) (*Regal*).
[9] *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A) (*Saloojee*).

these circumstances I would find it difficult to justify condonation unless there are strong prospects of success.'[10] (Citations omitted and emphasis added.)

[28] Ms Rossouw has failed to furnish reasons why she should not be blamed for the unexplained delays set out above. Blignaut & Wessels' ineptitude in executing her instructions and the delays in having her current attorneys deliver the notice could have been ameliorated by her own diligence in requiring them to account to her.

[29] The delays did not only end there. Her current attorneys also failed to bring an application for condonation as soon as possible. The MEC filed the special plea on 19 September 2019, triggering the need for condonation. Ms Rossouw only applied for condonation on 30 January 2020. She furnished no explanation for this further delay. Again, in this instance, she established no basis for the Full Court to exercise its discretion in her favour. Her current attorneys have not filed an affidavit taking responsibility for this further delay. The Full Court correctly found on the authority of *CJ Rance,* that Ms Rossouw failed to apply for condonation as soon as she became aware that it was required. For all the above reasons, I must find that Ms Rossouw's explanation is unreasonable and the delay in delivering the notice is extreme.

[30] As for her prospects of success, it has to be said that the *prima facie* case she has put up is too bare to allow for a conclusion that they are strong. As argued on behalf of the MEC, the mere presence of potholes on the road, which is the high-water mark of her case on the merits, does not mean that they caused the collision. She was not an eyewitness. Her opinion as to the cause of the collision is inadmissible. The engineer's report lacks rectitude because: he did not investigate the collision; he compiled his report over one day, seven years after

[10] *Saloojee* at 141A-H.

the collision occurred; he relied on Ms Rossouw's version, notwithstanding that she is not an eyewitness; and he failed to consider Mr Motloung's different version even though he is an eye witness and he (the engineer) had his statement when he compiled his report. He also relied on the sketch plan drawn by police officers and on photographs. These documents merely depict potholes on the road. The photographs also reflect the absence of warning signs. The inquest report is silent as to the deceased's cause of death and concludes that no person is found to be responsible for it. On this weak evidence, it cannot be said that Ms Rossouw will establish the causal link between the alleged negligent conduct of the MEC, even if she only has to show a one-percent negligence on the part of the MEC. Such a conclusion on the facts she relies upon would be speculative at best.

[31] The MEC correctly pointed out that other questions are likely to arise during the trial that may only be answered by the deceased; such as whether it was safe for him to overtake three cars; at what speed he drove; whether the deceased's motor vehicle hit the pothole(s) and how deep the pothole(s) were. Answers to these questions do not lie in Ms Rossouw's personal knowledge.

[32] Ms Rossouw's reliance on *Mugwena and Another v Minister of Safety and Security*[11] (*Mugwena*) is also unsustainable, as that case is distinguishable on the facts. In *Mugwena*, the delay in serving the notice was not inordinate, the explanation for the delay was reasonable and satisfactory and the appellant enjoyed prospects of success. Therefore, the Full Court's conclusion that Ms Rossouw lacks prospects of success was correctly made.

[11] *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA); [2006] 2 All SA 126 (SCA).

[33] The Full Court's finding in respect of the best interests of the children is consistent with the Constitutional Court's dictum in *AB and Another v Pridwin Preparatory School and Others*[12] where the Court said:

'The fact that a child's best interests are paramount does not mean that those interests are superior to, and will trump, all other fundamental rights. Otherwise taken literally, it would cover every field of human endeavour that has some direct or indirect impact on children, as indeed the Supreme Court of Appeal sought to reason, and it could even be rendered empty rhetoric. The import of the principle was eloquently articulated in *S v M*, where this court held: "The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."'

[34] Granting condonation in an action that lacks prospects of success is not in the best interests of the minor children. On the authority in *Pridwin*, the duty of courts to consider the interests of minor children in terms of s 28 of the Constitution does not, without more, imply that in all cases where they are time barred from proceeding to trial, condonation should be granted simply because the matter involves minor children. As I have found above, Ms Rossouw has failed to make out a case for condonation in terms of s 3(4). Given that she lacks prospects of success and even if the MEC would not be prejudiced, refusing condonation does not, without more, adversely affect the minor children's right to fully ventilate the merits at the trial.

[35] What remains, is whether Ms Rossouw raised a substantial issue of law that merits this Court's consideration. She raised none. This Court could consider such a point *mero motu* if it arises on the papers. Concerning the court's powers

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[12] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC) 2020 (5) SA 327 (CC) para 70 (*Pridwin*).

to do so, in *CUSA v Tao Ying Metal Industries and Others*[13], the Constitutional Court stated as follows:

'[W]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith.'

[36] This Court did not raise any substantial point of law *mero motu* and as such, did not invite the parties to address it thereon. Ordinarily, non-suiting the minor children due to Ms Rossouw's failure to comply with prescribed procures may implicate their right of access to courts in terms of s 34 of the Constitution. However, Ms Rossouw is not impugning the constitutionality of s 3(4). No case is made out that the minor children's rights in terms of s 34 of the Constitution are adversely affected by refusing condonation. In any event, their s 34 rights are not absolute. They could well be limited in terms of s 36 of the Constitution. But, this is not the case the MEC was called upon to meet.

[37] Neither did Ms Rossouw request this Court to interpret s 3(4) to promote the minor children's right in terms of s 34 of the Constitution. No controversy as to the meaning of s 3(4) arises from the papers. Ms Rossouw only took issue with its application by the Full Court. Therefore, there is no basis for this Court to resort to its powers in terms of s 39(2) of the Constitution to interpret s 3(4) to promote the children's rights in terms of s 34. Under these circumstances, it is not for this Court to delve into issues relating to the minor children's rights in terms of s 34 *mero motu* especially when the parties had not been requested to address the court on them.

[38] I have had the benefit of reading and considering the second judgment penned by my brother Makgoka JA. For reasons that appear above, I do not agree

[13] *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC).

with the findings and order made in the second judgment. Therefore, had I commanded the majority, I would have made the following order:
The application for special leave is dismissed with costs including those of two counsel.

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LT MODIBA
ACTING JUDGE OF APPEAL

Makgoka JA (Mbatha and Weiner JJA concurring):

[39] I have read the judgment prepared by my colleague, Modiba AJA (the first judgment). I disagree with its order and the reasoning underpinning it. In my view, the application for special leave should be granted and the appeal should be upheld.

[40] The applicant's application relates to the condonation she sought for her late delivery of a statutory notice under s 3(1)(*a*) of the Act. Section 3(1)*(a)* states that no legal proceedings to recover a debt may be initiated against an organ of state unless the claimant has provided the organ of state with written notice of their intention to commence such proceedings. Section 3(2) of the Act provides for such to be delivered within six months from the date the debt becomes due. As the department is an organ of state, the applicant was required to deliver the notice to the MEC, as the provincial executive of the Department of Police, Roads and Transport, Free State Province. The department is responsible for, among other things, the repair and maintenance of roads in the province.

[41] The 'debt' in this case allegedly became due by the department on 30 May 2011, when the applicant's husband, Mr Marthinus Lucas Rossouw (the deceased), died following injuries sustained in a motor vehicle accident on 29 May 2011. At the time of the deceased's death, the parties had two minor children aged four years, and six months, respectively. From the date of the deceased's death, the six-month period for delivering the statutory notice expired on 29 November 2011. The required notice was only delivered to the department on 13 December 2018.

In the high court

[42] Subsequent to the delivery of the statutory notice, the applicant served a summons on the MEC on 7 May 2019, claiming damages from the MEC on behalf of her two minor children for loss of support following the deceased's death. The claim was based on the allegation that the road where the accident occurred was in poor condition, with an uneven surface and potholes. She alleged that the department was negligent in failing to maintain the road, which negligence caused the accident in which the deceased was injured and subsequently died. On these grounds, the applicant sought to hold the MEC liable for her minor children's loss of support due to her husband's death.

[43] On 19 September 2019, the MEC raised a special plea that the applicant had failed to serve the notice timeously in terms of s 3(1)*(a)* of the Act. In the plea on the merits, the MEC admitted that the department was the organ of state responsible for maintaining the roads. Apart from that, the MEC's plea on the merits constituted a bare denial of the averments made by the applicant in her particulars of claim.

[44] On 30 January 2020, four months after the MEC had delivered her plea, the applicant served the MEC with an application for condonation of the late

service of the notice. The condonation application is governed by s 3(4)*(b)*, which sets out three jurisdictional factors for a court to consider when exercising its discretion whether to grant condonation: (a) the debt has not prescribed; (b) good cause exists for the failure; and (c) there is no unreasonable prejudice to the organ of state.

[45] It is necessary to set out the pleadings in some detail in the condonation application. In her founding affidavit, the applicant stated the following: Shortly after the deceased's death, she instructed Blignaut & Wessels, a firm of attorneys (the first respondent), to initiate proceedings for loss of support both in her personal capacity and as mother and natural guardian of the minor children. She later visited the scene of the incident with her attorney, where she observed potholes on the road. She also saw the department's employees repairing the potholes. She entrusted everything to the first respondent to prosecute her and the minor children's claims for loss of support.

[46] 'During the second half of 2017', the first respondent informed her that it had erroneously identified the RAF as the party liable for her and the minor children's claims for loss of support, instead of the department. The first respondent advised the applicant that her claim against the department had prescribed, but that of the minor children had not. Upon being informed of this, the applicant terminated the first respondent's mandate. The applicant has issued a summons against the first respondent for professional negligence, and the first respondent is cited in that context. She instructed her current attorneys of record, who advised her that: (a) the entity liable for her children's loss of support was the department; and (b) a notice in terms of s 3(1)*(a)* was required to be served on the department. As mentioned, the latter notice was served on the department on 13 December 2018.

[47] About the unreasonable prejudice to the department, the applicant argued that the late delivery of her notice had not caused any unreasonable prejudice to the department. She provided four reasons for this claim. First, in her plea on the merits, the MEC made a bald denial. Second, the department either possessed or was expected to keep records of the inspection and maintenance of the roads. Therefore, it would have documentary evidence available. She claimed this was supported by the fact that she and her first attorney observed the department's employees repairing the potholes shortly after the accident involving the deceased. Such a record should exist. Third, the accident was reported to the South African Police Service (SAPS), and a police report was available to the department. Finally, there was an inquest report regarding the deceased's death.

[48] In response, the MEC pointed out that the applicant had delivered the notice more than seven years after the accident and issued a summons almost eight years after the accident. These, the MEC asserted, placed the department at great prejudice, as with the effluxion of time, vital documentary evidence which could have been used in defending the current proceedings may have been misplaced or destroyed. The relevant officials who may have known about the alleged events, if they did in fact occur, may no longer be in the employ of the department, and those who remain, if any, most likely have faded memories.

The judgment of the high court

[49] The high court held that the applicant had not provided an adequate explanation for two periods of delay. The first period, spanning six years, is when she instructed the first respondent in 2011 and when she was informed in 2017 that her claim had prescribed. The second period is between 2017, when she instructed her current attorneys, and December 2018, when the notice in terms of s 3(1)*(a)* was delivered to the department.

[50] The high court concluded that the delay was 'extreme' and not adequately explained. Regarding the prospects of success, the high court concluded that they were very weak, as: (a) there was not sufficient evidence to show that the bad state of the road caused the accident; and (b) the applicant did not witness the accident. As regards the absence of unreasonable prejudice to the department, the high court found that the applicant had not set out the grounds upon which it could be said that the MEC was not unreasonably prejudiced by the failure to serve the notice timeously. The high court also considered the interests of the minor children, but concluded that, given the unexplained delays and the lack of prospects of success, the children's rights were not decisive.

[51] For these reasons, the high court dismissed the applicant's condonation application with costs. It subsequently dismissed her application for leave to appeal. However, this Court granted the applicant leave to appeal to the Full Court.

In the Full Court

[52] Unlike the high court, the Full Court did not consider the delay in the first period. It did not comment on the applicant's explanation as to how that delay came about. Instead, the Full Court focused on the second period. It endorsed the high court's finding that the applicant had failed to furnish an explanation for the delay for that period. The Full Court also considered the applicant's unexplained delay of four months in launching the condonation application after the MEC had delivered her special plea.

[53] The Full Court expressed doubt on the correctness of some of the findings by the high court on the applicant's prospects of success. It observed that '[h]aving regard to what the [applicant] has set out in her founding affidavit, I am of the view that the [high court's] findings, or at least one or two of them, could

be labelled debatable or contentious'. Except for these remarks, the Full Court did not express a view as to whether the applicant had established reasonable prospects of success. Save for noting the high court's conclusion in that regard, the Full Court did not consider whether the late delivery of the statutory notice resulted in unreasonable prejudice to the department.

In this Court

[54] The applicant persisted in her assertions that condonation should have been granted. On the other hand, the MEC supported the judgment of the Full Court. It is common cause that the first requirement is met, as the children's claim has not prescribed. Therefore, the question was whether 'good cause' existed, and whether the department would suffer unreasonable prejudice should condonation be granted. I consider these, in turn.

Good cause

[55] As to the element of good cause, it entails, among other things, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, any contribution by other persons or parties to the delay and the applicant's responsibility therefor, and prospects of success in the proposed action.[14] I deal in turn with two of these elements, namely, reasons for the delay and prospects of success.

The reasons for the delay

[56] The relevant delay period for which the applicant had to furnish an explanation is between 29 November 2011 (when the statutory notice was due) and 13 December 2018 (when the statutory notice was delivered). It is undisputed that the applicant had instructed the first respondent approximately three weeks after the deceased's death, to do what was necessary to claim for loss of support.

[14] *Madinda* op cit fn 6 above, para 10.

The statutory notice was not delivered, as the attorneys had identified the wrong party (the RAF) to sue.

[57] Thus, even if the applicant had contacted the attorney constantly seeking to be updated on progress, nothing would have prompted the attorneys to deliver the statutory notice, as their focus was, ill-advisedly, on the RAF. Her claim eventually prescribed in the hands of the first respondent, hence the professional negligence claim against it. The high court blamed her for her unexplained 'inactivity' for six years. This is not warranted on the facts of the case. No wilfulness can be attributed to the applicant. All blame for the delay between 29 November 2011 and 2017 should lie squarely on the doorstep of the first respondent.

[58] I now consider the subsequent delay, between 2017, when the applicant terminated the first respondent's mandate and instructed her current attorneys, and when the latter delivered the notice on 13 December 2018. Once the attorneys advised her that the cause of action was against the MEC, it seems that she left all in the hands of the attorneys. It was incumbent upon them to deliver the statutory notice. The reason they did not deliver it immediately after receiving the applicant's instructions is not explained in the papers. But the reason must lie in the peculiar knowledge of the attorneys.[15]

[59] This raises the question of the extent to which a litigant can rely on the lapse of their legal representatives for non-compliance with procedural steps. As this Court pointed out in *Saloojee*,[16] there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. However, the court made an important caveat:

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[15] *Madinda* para 19.
[16] *Saloojee* fn 9.

'A litigant . . . who knows . . . that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If . . . the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney . . .'[17]

[60] In this regard, the Court contrasted such a passive litigant with that in *Regal*,[18] where it was concluded that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. In my view, the facts of the present case fall outside the purview of the caveat in *Saloojee*. Most importantly, there is no suggestion that the applicant was responsible for the delay. It would have been ideal for the attorney to have explained the delay in a confirmatory affidavit.

[61] What remains, though, is that the failure to deliver the statutory notice timeously cannot reasonably be attributed to the applicant. The position would have been entirely different had the applicant delayed in instructing attorneys. It is therefore difficult to imagine what else she could have done to have the statutory notice delivered earlier than it was. I therefore conclude that the applicant had given an adequate explanation, albeit not entirely satisfactory, as to how the delay in delivering the statutory notice came about.

Prospects of success

[62] The relevant factors as to whether the applicant has reasonable prospects of success must be assessed in the light of the pleadings and the material that the applicant seeks to rely on to prove her case. As mentioned, the applicant alleges

[17] Saloojee fn 9 at 141E-G.
[18] *Regal* fn 8.

that the cause of the accident was the poor, uneven state of the road, in particular, the presence of potholes and the absence of any warning signs to road users.

[63] In support of these allegations, the applicant relies on the police report, which includes photographs and a sketch plan of the scene of the accident. The photographs and sketch-plan show several potholes on the right-hand side of the road where the deceased's vehicle veered off the road. In addition, the applicant attached a report by an engineer who investigated the cause of the accident. The report included photographs of the road, taken by the applicant shortly after the accident. Those photographs clearly show the potholes and uneven surface of the road on the right-hand side. There are no warning signs visible in the photographs. The engineer proffers an opinion in his report that the accident was caused by potholes, resulting from the failure of the department to maintain the road properly, and the absence of warning signs.

[64] The applicant does not, at this stage, have to convince the court that she would definitely be successful in the envisaged trial. But this is how the high court treated the evidence she intends to adduce. For example, the high court said that the applicant did not see how the accident occurred, as the deceased was travelling alone. Further, that she is not an accident reconstruction expert, and therefore, her 'opinion as to the cause of the accident was preposterous'. As to the eyewitness' statement in the police report, the high court said that the eyewitness made no mention of potholes on the road in his statement. Instead, the high court said, he stated that the deceased overtook several vehicles at a high speed, lost control of the vehicle, and it overturned. Turning to the expert's report, the high court said that it was of no value as it was compiled seven years after the incident. It also questioned the admissibility of the photographs, which were part of the expert's report, as 'it is not known where and when the photographs were taken'.

[65] As the high court itself pointed out, the applicant is not expected at this stage to satisfy the court on a balance of probabilities that her action would succeed. A prima facie case and a bona fide intention in the sense of seeking an opportunity to have the matter tried would suffice. Despite this, the high court did the opposite. It subjected the applicant's evidentiary material to the scrutiny of a trial court. The following conclusion by the high court demonstrates that:

'[T]here is no evidence that an investigation has been carried out to substantiate a causal link between the alleged or imputed negligence of the [MEC] and the ultimate collision which resulted in the demise of the deceased. There is no case for [the MEC] to answer to, …it can therefore not be said that [the MEC] is not unreasonably prejudiced by the failure to serve the notice timeously.'

[66] The high court erred in this regard. The views expressed in the quoted passage would generally be expressed at the end of a trial, or where absolution from the instance is sought at the close of a plaintiff's case. Not at this stage, where, as here, condonation for the late delivery of a statutory notice is sought. Apart from the misdirection, parts of the high court's criticism of the evidence contained factual inaccuracies. I mention two. First, the high court said that the eyewitness mentioned in his statement that the deceased was driving at a high speed. There is no mention of this in the eyewitness' statement.

[67] The other factual inaccuracy is the statement that 'it is not known where and when the photographs were taken'. It is common cause that some of the photographs attached to the expert's report were taken by the applicant shortly after the accident when she visited the scene with her first attorney. Besides, it is not for the court at this stage to question the admissibility of the photographs the applicant intends to use. That is for the trial court to apply the provisions of Rule

36(10) of the Uniform Rules of Court,[19] which governs procedures for admitting photographs, among other things.

[68] In all circumstances, the high court materially misdirected itself by critiquing the applicant's evidence as if it were a trial court. The standard to be satisfied in terms of s 3(4)*(b)* is not on a balance of probabilities but instead on 'the overall impression made on a court which brings a fair mind to the facts' advanced by the parties.[20] The Full Court erred in endorsing the high court's misdirection.

[69] There is another reason why the high court's conclusions on the prospects of success do not bear scrutiny. It failed to consider that for the children's claim to succeed, they need to establish only one per cent negligence on the part of the department. Considering what seems to be common cause about the uneven state of the road, the presence of potholes, and the absence of warning signs about these, it is not inconceivable that a court could find that one per cent negligence on the part of the department.

[70] Having regard to a conspectus of the above, I conclude that the high court erred in finding that the applicant had not established reasonable prospects of success. As mentioned, the Full Court expressed doubt about the correctness of the high court's conclusions about the lack of reasonable prospects. As I have demonstrated, that observation was well made. The applicant has established such prospects.

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[19] Rule 36(10)*(a)* reads:
'No person shall, save with the leave of the court or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless such person shall not more than 60 days after the close of pleadings have delivered a notice stating an intention to do so, offering inspection of such plan, diagram, model or photograph and requiring the party receiving notice to admit the same within 10 days after receipt of the notice.'
[20] *Madinda* para 8.

Unreasonable prejudice

[71] The Full Court did not consider this factor at all, since, seemingly, on its view, the applicant had failed to explain the delay between 2017 and 2018. In my view, the Full Court proceeded from the wrong premise in this regard and misdirected itself as a result. The three jurisdictional factors in s 3(1)*(a)* should be considered in a balanced approach. None of them should, *a priori*, be eliminated from the equation simply because the other is weak. As pointed out in *Madinda*, prospects of success on the merits could mitigate fault.[21]

[72] To its credit, the high court considered all three factors, despite its finding that there was no adequate explanation for the whole seven years. However, it erred in holding that the applicant had not set out the grounds upon which she concluded that the department is not unreasonably prejudiced by the failure to serve the notice timeously. She did so by relying on the evidentiary material, which consisted of a police report, the inquest report, and the maintenance reports that the department ought to have kept. Moreover, the police report contained an eyewitness statement.

[73] In response, the MEC asserted that with the effluxion of time, 'vital documentary evidence', which 'could' have been used in defending the current proceedings, 'may' have been misplaced or destroyed. The relevant officials who may 'have had knowledge of the alleged events,' if they did in fact occur, 'may' no longer be in the employ of the department, and those who remain, if any, 'most likely have faded memories'.

[74] I make three broad observations about the MEC's response. First, she does not meaningfully engage with the applicant's assertions. Instead, she is content with general and speculative statements which have no bearing on the specific

[21] Ibid para 12.

allegations made by the applicant. The MEC speculates about prejudice as she uses 'could' and 'may'. The prejudice envisaged in s 3(4) of the Act must be real or actual, not speculative. The provision recognises that there is inherent prejudice in any delay. But not any prejudice is sufficient in the context of s 3(4).

[75] The provision requires 'unreasonable prejudice'. To demonstrate this, in *Premier, Western Cape v Lakay* [22] (*Lakay*) the organ of state relied on the fact that due to effluxion of time, the reports relating to the respondent had become illegible over time. Not even this fact was considered sufficient for this Court to consider it to constitute 'unreasonable prejudice'. What is more, the prejudice must relate to the latest date on which the statutory notice was due, in this case, 29 November 2011.[23] The MEC makes no attempt to address this.

[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.

[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 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 had faded. This is a simple exercise

[22] *Premier, Western Cape Provincial Government NO v Lakay* [2011] ZASCA 224; 2012 (2) SA 1 (SCA); [2012] 1 All SA 465 (SCA) (*Lakay*) para 23.
[23] Ibid.

that could have been undertaken, and its results could have been placed before the court to rebut the applicant's assertions of the absence of unreasonable prejudice.

[78] Second, the MEC's assertion about the possible loss of documentary evidence is not borne out by the facts. As mentioned, a police report was compiled by a Warrant Officer of the SAPS's Local Criminal Record Centre after the accident was reported to the SAPS. The police report contains the sketch plan, the photos and a statement of an eyewitness to the accident. The police report is thus available to the department.

[79] Furthermore, there is an inquest report in respect of the deceased's death, in which it is concluded that the death of the deceased cannot be attributed to any person's fault. Lastly, as the applicant asserted, the department must have kept records of the maintenance of the road. The MEC's response to this assertion is rather curious. Instead of directly dealing with this assertion, by either admitting or denying the reports alluded to by the applicant, the MEC said that the applicant's assertions 'constitute unsubstantiated hearsay evidence and stand to be struck off . . .'. This is startling, to say the least.

[80] Most importantly, the police report contains a statement by an eyewitness in which he states that the deceased overtook three motor vehicles travelling in the same direction. In the process, he lost control of his vehicle, which then overturned on the right-hand side of the road and crashed into a telephone pole. Both the eyewitness and the Warrant Officer who compiled the police report should be available to testify. One would have expected a diligent organ of state to have interviewed at least the eyewitness to test his memory of the accident.

[81] Third, the MEC's bare denial in her plea, without asserting any version, means that at the trial, the applicant would bear both the onus and the burden of proof.[24] No unreasonable prejudice can accrue to the department in the circumstances where its defence is a bare denial. I will explain why. If, for example, the MEC's version was that it had properly maintained the road and kept the records, but those were destroyed as a matter of its practice after six years, it could claim that it would suffer unreasonable prejudice in mounting that defence in a trial. By electing to assert no version, it follows that whatever evidence the applicant would present during the trial would occasion no prejudice of whatever nature to the department.

[82] Furthermore, this Court pointed out in *Madinda* that although the onus to establish the absence of unreasonable prejudice rests on the applicant, whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Thus, 'a court should be slow to assume prejudice for which the respondent itself does not lay a basis.'[25] What this Court cautioned against is precisely what the high court and the Full Court did. The MEC laid no basis for her assertion that the late delivery of the statutory notice would not cause the department any unreasonable prejudice. Despite this, the two courts below assumed the presence of such prejudice in the MEC's favour. They erred in this regard.

[83] As I see it, the documentary evidentiary material and the oral evidence of the available witnesses, alluded to above, should be sufficient for the department to mount whatever defence it wishes to, against the applicant's claim. I therefore conclude that there is no unreasonable prejudice to the department because of the failure to deliver the statutory notice timeously.

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[24] *Pillay v Krishna and Another* 1946 AD 946 at 952-953.
[25] *Madinda* para 21.

Constitutional rights

[84] Two constitutional rights are implicated, namely, ss 28 and 34 of the Constitution.[26] Section 28(2) entrenches the paramountcy of children's rights in every matter concerning them. As the Constitutional Court explained in *Pridwin*:[27]

'Section 28(2) requires that appropriate weight be given to a child's best interests as the consideration to which the law attaches the "highest value" and that the interests of children be given due consideration when different interests are being considered in order to reach a decision. In engaging in this consideration, appropriate weight must be given to the best interests of the child. Section 28 must be interpreted in a manner that promotes the foundational values of human dignity, equality and freedom.'[28]

[85] Section 39(1)*(b)* of the Constitution enjoins us to consider international law. In this regard, the rights of children are recognised in the United Nations Convention on the Rights of the Child (1989) (the Convention), which South Africa has ratified as part of its international human rights commitments.[29] Article 3(1) thereof provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a 'primary consideration'.

[86] The effect of s 28(2) of the Constitution and the Convention is that, in cases such as the present, a court should give sufficient independent and informed attention to the interests of the children, in particular, the impact of a decision on them.[30] This is because, as the Constitutional Court emphasised in *Pridwin*, 'children are individual right-bearers and not "mere extensions of [their] parents,

[26] Constitution of the Republic of South Africa, 1996.
[27] *Pridwin* op cit fn 12 above.
[28] Ibid para 138.
[29] South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC) (1989) on 16 June 1995.
[30] *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 33.

umbilically destined to sink or swim with them"'.[31] In the present case, the question that should have occupied the mind of the high court is this: Is it in the children's interests to deny them the right to have their loss of income claim determined by a court of law, based on procedural failings of others?

[87] The high court made a fleeting reference to the interests of children as follows:

'I [am] alive to the fact that the real creditors in this matter are the minor children, the innocent third party in these proceedings. The children's best interests are of paramount importance in every matter concerning children. The laxity of the applicant in prosecuting the children's claim should not be visited on the children. However, taking into consideration the facts of this case and the case law to be applied it will not serve the best interests of the children to condone a delayed claim which has no merit.'[32] (Citation omitted.)

[88] The high court tied up the children's interests to the applicant and treated them not as 'individual right-bearers' but as 'mere extensions of the applicant'. It therefore non-suited the applicant (and by extension the children) on the basis that their claim had no merit. I have demonstrated that that conclusion is not sustainable.

[89] The other right is enshrined in s 34 of the Constitution, which guarantees everyone the right of access to courts and to have their disputes decided in a fair public hearing. A time-bar provision like s 3(1)*(a)* of the Act is a limitation of this right. It therefore inherently implicates the right guaranteed in s 34 of the Constitution, and arises by default in all instances where the provision is in issue. About the s 34 right, the Constitutional Court recently made the following

[31] *Pridwin* para 234.
[32] Para 33 of the high court judgment, reported sub nomine: *Rossouw v MEC Police, Roads and Transport for the Province of the Free State* [2020] ZAFSHC 179.

observation, albeit in the context of prescription, in *Le Roux and Another v Johannes G Coetzee and Seuns and Another*:[33]

'The proposition that a claim, otherwise valid in law and even one that is unassailable, may be extinguished if not asserted within the time provided by the law, is unsettling. It is unsettling, as its effect is to negate the substance of the right conferred by s 34 of the Constitution "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".'[34]

[90] This is a trenchant observation. What it entails is that in every case where a court considers any provision that limits the right of access to courts, such as s 3(1)*(a)* of the Act, it should anxiously reflect on this right and endeavour, to the extent possible, to vindicate, rather than negate, it. Indeed, a survey of the jurisprudence of this Court and the Constitutional Court reveals an elastic and liberal approach to vindicate this right.[35]

[91] A weakness in the reasoning of both the high court and the Full Court is that neither reflected on this right at all. Had that been done, it would have led to the conclusion that, in the circumstances of this case, the children's right to have their claim for loss of support determined by a court should be vindicated.

[92] In my view, the inadequate consideration of the children's rights, coupled with their neglect of the right to access the courts, led both courts below to incorrect conclusions. They failed to give due regard to the constitutional

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[33] *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) (*Le Roux*).
[34] Ibid para 29.
[35] In this Court, see for example, *Mugwena*; *Madinda*; *Lakay*; *NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government* [2021] ZASCA 184; *MEC for Education, KwaZulu Natal v Shange* [2012] ZASCA 98; 2012 (5) SA 313 (SCA); *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA). Contrast: *eThekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel* [2021] ZASCA 96; *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA). It is significant that the latter two cases concerned companies, and not natural persons. For the Constitutional Court, see: *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC); *Le Roux* and the authorities there cited; *Olesitse N O v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC).

imperatives articulated by the Constitutional Court. It behoves this Court to correct this, to avoid an injustice.

[93] Having regard to all of the above considerations, I conclude that the applicant has thus satisfied all three jurisdictional factors of s 3(4)(*b*) of the Act.

Delay in launching the condonation application

[94] What remains is to briefly address the unexplained four-month delay in launching the condonation application. What we do know is that during the relevant period, the applicant had already instructed her current attorneys. The reasoning I adopted about the delay between 2017 and December 2018 applies with equal force to this delay. Furthermore, considering all the factors mentioned above, particularly that there would be no unreasonable prejudice caused to the MEC by this delay, it should be condoned.

Special leave

[95] Lastly, I consider whether the applicant should be granted special leave. This partly resolves itself since I have already established that the applicant has reasonable prospects of success. However, this is not sufficient when seeking special leave. To obtain special leave from this Court, an applicant must, in addition to showing reasonable prospects of success on appeal, demonstrate special circumstances justifying such leave. Although not an exhaustive list, special circumstances may include that the appeal raises a specific point of law, or that the prospects of success are so strong that refusing leave could result in denial of justice, or that the matter is significant to the public or the parties.[36]

[96] There is no doubt that this is a matter of immense importance to the minor children, represented by the applicant. They have lost financial support due to the

[36] *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA); [2019] 3 All SA 673 (SCA) para 8.

death of their father. They must be given an opportunity to have their case against the MEC decided in a fair and public hearing. In all circumstances, the applicant should be granted special leave, and the appeal should be upheld. The matter must proceed to trial.

Costs

[97] There remains the issue of costs. In *Lakay*[37] this Court alluded to the general approach that, in applications for condonation for non-observance of court procedure, a successful litigant pays the costs as they were obliged to seek the court's indulgence for failure to comply with court procedures. This is so unless the opposition was unreasonable. However, this Court pointed out that an application for condonation under the Act is for permission to enforce a right, and has nothing to do with non-observance of court procedure. Viewed in that light, 'there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result'.[38] Costs should therefore follow the cause.

Order

[98] I therefore make the following order:

1 The applicant's application for special leave to appeal is granted.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the Full Court of the Free State Division of the High Court is set aside and replaced with the following order:

'1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

"1 Condonation is granted for the applicant's failure to serve the notice contemplated in s 3(1)*(a)* of the Institution of Legal Proceedings against

[37] *Lakay* op cit fn 22, para 25.
[38] Ibid para 25.

certain Organs of State Act 40 of 2002 within the period laid down in s 3(2)*(a)* of the Act.

2 The second respondent is ordered to pay the costs of the application.”’

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T MAKGOKA

JUDGE OF APPEAL

Appearances

For applicant: N Snellenburg SC (with G S Janse Van Rensburg)

Instructed by: Rosendorff Reitz Barry, Bloemfontein

For respondents: B S Mene SC (with K Nhlapo-Merabe SC)

Instructed by: State Attorney, Bloemfontein.