



APPLICATION FOR CONDONATION IN TERMS OF THE INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT, ACT 40 OF 2002

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It often happens that an attorney is approached by a client to institute a claim for damages against an organ of state. Claims for damages instituted against certain organs of state must, amongst others, adhere to the provisions contained in the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 (“the Act”).

The Act came into operation on 28 November 2002, and one of the purposes of the Act is 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. In essence the Act requires a party, the creditor, to give proper notice before instituting legal proceedings against certain organs of state for the recovery of a debt.

What is a notice?

The Act defines a notice as a notice contemplated in section 3(1)(a) of the Act. Section 3(1)(a) of the Act stipulates that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state notice in writing of its intention to institute

legal proceedings. Section 3(2)(a) of the Act further stipulates that the notice must, **within six months from the date on which the debt became due**, be served on the organ of state.

In practice it often happens that the six month period set out in section 3(2)(a) of the Act had already lapsed at the time the attorney is instructed to institute a claim for damages against the organ of state. This has the effect of the attorney not being able to give proper notice of his/her intention to institute proceedings. Fortunately, section 3(4) of the Act makes provision for instances where proper notice was not given. Section 3(4)(a) of the Act stipulates that a creditor may, in instances where the organ of state relies on the creditor's failure to serve a notice in terms of section 3(2)(a), apply to a court having jurisdiction for condonation of such failure. It is good practice to bring the condonation application in instances where the attorney did not comply with the notice period and has no written consent from the organ of state to proceed with the legal proceedings.

What must be proved to succeed with the condonation application?

Section 3(4)(b) of the Act stipulates that the court may grant such application if the court is satisfied that:

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the creditor's failure to give proper notice; and
- (iii) the organ of state was not unreasonably prejudiced by the failure to give proper notice.

The application is brought by Notice of Motion and Founding Affidavit together with annexures thereto. The facts and circumstances for non-compliance with the notice in each case may be unique. However, the Applicant must endeavour to set out and prove in the Founding Affidavit that (a) the debt has not been extinguished by prescription, (b) good cause exists for the creditor's failure to give proper notice, and (c) that the organ of state was not unreasonably prejudiced by the failure to give the proper notice.

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