The State's Duty to Disclose Information in Bail Applications: The Supreme Court of Appeal (Seemingly) Backtracks –

Minister of Police v Nontsele [2025] 1 All SA 44 (SCA)

1 Introduction

The purpose of bail is to ensure that accused persons attend their trial while they are not in detention. Incarceration of an accused before they have been convicted is not meant to be penal. It is for this reason that section 35(1) of the Constitution of the Republic of South Africa, 1996, entrenches the right of everyone who is arrested to be considered for release on bail if it is in the interests of justice. This right also echoes at least two other fundamental rights guaranteed in the Bill of Rights: the right to freedom and security of the person and the right to be presumed innocent until proved guilty (ss 12 and 35(3)(*h*) of the Constitution, respectively). The right to bail is geared towards preventing anticipatory punishment. In the period before the promulgation of both the 1993 and 1996 Constitutions, the accused person, as the applicant, bore the onus of showing that they should be released on bail. This was held to be in line with the general practice in litigation that the one who alleges must prove (Van der Berg *Bail: A Practitioner's Guide* 3ed (2012) 79; Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) 137; Cowling "The Incidence and Nature of an Onus in Bail Applications" 2002 15(2) *SACJ* 176 177; Mokoena *A Guide to Bail Applications* 2ed (2018) 37–38). Some commentators are, correctly, critical of this approach to bail applications (see Van der Berg *Bail: A Practitioner's Guide* 79; Cowling 2002 *SACJ* 178; De Villiers "Problematic Aspects with Regard to Bail Under South African Law: Reverse Onus Provisions and the Admission of the Evidence of the Applicant for Bail at the Later Criminal Trial Revisited" 2015 43(1) *International Journal of Law Crime and Justice* 17 22). However, in practice, bail applications in less serious crimes follow an informal procedure. For example, the legal representative would proffer a statement from the bar placing before the court the circumstances of the accused without an affidavit from the accused person (Van der Berg *Bail: A Practitioner's Guide* 64). It is incongruent to speak of the onus being on the accused in bail application proceedings. This is because the accused person is presumed innocent and therefore their arrest and incarceration infringe on their right to liberty and therefore must be justified by the State (Cowling 2002 *SACJ* 178, Van der Berg *Bail: A Practitioner's Guide* 79; Bursey "Bail-Time for Return to Sanity" 1999-09 *De Rebus* 33 34). In *Minister of Law and Order v Hurley*

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(1986 (3) SA 568 (A) 589), the court, writing in the context of unlawful arrest, held that arrest constitutes a grave infringement of the individual's right to freedom and therefore the arrestor bore the onus to prove that the arrest was justified.

Before the amendments to section 60 of the Criminal Procedure Act (51 of 1977) (CPA) in 1995 and 1997, the Act did not prescribe who bore the onus in bail applications. However, there was general acceptance that the burden lay with the accused. In the interim, courts vacillated between whether the State or the accused bore the onus in bail proceedings (Van der Berg *Bail: A Practitioner's Guide* 80–84; Steytler *Constitutional Criminal Procedure* 137–139). This question has, however, been laid to rest by the Constitutional Court in the case of *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* (1999 (2) SACR 51 (CC) par 60ff), at least insofar as serious offences are in issue. In terms of this judgment, the applicant bears the onus in relation to offences listed in Schedules 5 or 6 of the CPA (see ss 60(11)(*a*) and (*b*)). Despite this, bail proceedings remain inquisitorial, and the presiding officer must play an active role to ensure that all the relevant information is placed before the court that determines the question of bail (s 60(3) of the CPA). Our highest courts have on several occasions held that failure by the State to disclose all the information relevant to whether or not the court should grant or refuse bail to the accused is unlawful and claimable as a delict (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Mahlangu v Minister of Police* 2021 (2) SACR 595 (CC); *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA); *Woji v Minister of Police* (2015 (1) SACR 409 (SCA); *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA)). Despite the accused bearing the onus to prove that they qualify to be released on bail in relation to offences listed in Schedules 5 or 6 of the CPA, the State has the obligation to disclose to the court all information that may have an impact on the court's decision to release the accused on bail (*Carmichele v Minister of Safety and Security supra* par 74; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) par 15; *Minister of Justice and Constitutional Development v X supra* par 27, 36).

The disclosure of information by the State is meant to ameliorate the difficulty brought about by the fact that, at this stage, applicants for bail are oblivious of the substance of the criminal case they have to meet. The issue of the State's duty to disclose information known to it in a bail application raised its head again in the case of *Minister of Police v Nontsele* ([2025] 1 All SA 44 (SCA)). Although both the Constitutional Court and the Supreme Court of Appeal (SCA) have held that the State has the duty to disclose all information relevant to the determination of bail, even where such information is favourable to the applicant, the majority judgment of the SCA seems to have departed from this salutary rule in this case. The requirement that the State disclose the information relevant to bail to the court is understandable because, during a bail application, the applicant is generally not entitled to disclosure of the docket (see s 60(14) of the CPA). In a recent case, the court has held that the applicant is generally not entitled to the statements in the police docket for purposes of bail, including the statement made by the applicant (*Deputy Director of Public Prosecutions v Olivier*

ZALMPPHC (unreported) 2024-04-11 case no P12/2024 par 24). In light of the above, this note seeks to analyse critically the case of *Minister of Police v Nontsele* (*supra*) and illustrate that the approach adopted by the majority judgment is flawed and would negate the right to be released from detention where the interests of justice permit, as guaranteed in the Constitution and in fact would encourage the police and the prosecutors to approach bail applications in a lackadaisical manner to the detriment of arrestees. The mere fact that the applicant bears the onus to prove that there are exceptional circumstances and that it is in the interests of justice for the accused person to be released on bail should not relieve the State of its obligation to apprise the court of the relevant factors that may affect the court's determination of bail. The State failed to do this in this case. Although the claim was for unlawful arrest, detention and malicious prosecution, this note is limited to the question of unlawful arrest and detention. This note first considers the facts of the case and the evidence that was led at the civil trial; thereafter, it considers the court *a quo's* decision as well as both the minority and majority judgments of the SCA. This is followed by an analysis of the case and conclusions.

2 Facts of the case and evidence led at the civil trial

The plaintiff (Mr Nontsele) sued the Minister of Police (the Minister) and the National Director of Public Prosecutions (NDPP) for wrongful arrest, detention and malicious prosecution. The State alleged that Mr Nontsele committed the offence of rape, which took the form of gang rape, on 7 December 2013, and he was arrested on 8 December 2013. Mr Nontsele made his first appearance at a magistrates' court on 10 December 2013. It is not clear whether the question of bail was entertained on this occasion. However, what is clear is that at this stage the State had all the information on which the charge of rape was based, or, put differently, on which a bail application could be opposed. All the statements and information relating to the case had been obtained (*Nontsele v Minister of Police* (unreported) 2021-08-12 case no 643/2016 par 37–39). On 3 February 2014, Mr Nontsele appeared in court and applied for bail, which was opposed by the State and ultimately refused by the court on 6 February 2014 (*Nontsele v Minister of Police supra* par 12. Although the court recorded that bail was refused on 04 February 2015 (par 12), this is an error; the correct date is 06 February 2014 (see par 2 (par 12 of plaintiff's particulars of claim at page 4 of the judgment), 41 and 60). The respondent remained in custody until 19 May 2015.

At the bail hearing, the investigating officer, Sergeant Njotini, was not present. Instead, her colleague, Mr Badboy Xolani, was called by the public prosecutor, Ms Maarman, to give evidence as though he was the investigating officer. However, it turned out that Mr Xolani had no knowledge of the facts of the case at hand. The case was rolled over to the following day for the investigating officer. The investigating officer was still absent. Then the matter was postponed to 6 February 2014 (*Minister of Police v*

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Nontsele supra par 16). On 6 February 2014, Sergeant Silwana (the High Court identifies his rank as Captain) gave evidence in place of the investigating officer, Sergeant Njotini. Sergeant Silwana testified that what he was told by Sergeant Njotini was the basis for the opposition to the release of Mr Nontsele on bail. These included, among others, that the members of the community were enraged and would harm the accused; that an eyewitness had been threatened by Mr Nontsele and his co-accused; and that the complainant had been very drunk on the day of the incident and therefore was not in a position to consent to have sexual intercourse (*Nontsele v Minister of Police supra* par 20). However, it became apparent that Sergeant Silwana was not the investigating officer, and had been informed on the morning of the hearing that he should stand in on behalf of Sergeant Njotini; he had not read the docket (*Nontsele v Minister of Police supra* par 20–21; *Minister of Police v Nontsele supra* par 16).

At the civil trial for the claim for unlawful arrest and detention of Mr Nontsele, Sergeant Njotini testified that on 8 December 2013, she received a docket in this matter containing the complainant's and witness statements and a J88 form with findings that were consistent with a sexual offence. Sergeant Njotini then proceeded to the complainant's home, where she found a group of people who were angry because of what had happened to the complainant (*Nontsele v Minister of Police supra* par 22). She left to look for the suspects, and when she arrived at Mr Nontsele's homestead, she found members of the community there. When she arrived there, she asked Mr Nontsele to accompany her to the police station. This is because, according to Sergeant Njotini, members of the community were furious and wanted to attack the suspects (*Nontsele v Minister of Police supra* par 23). She then took the suspects to the police station and returned to the complainant's home, where she met the complainant and the witness who had observed the alleged rape (Sindiswa), who confirmed what was contained in their statements (*Nontsele v Minister of Police supra* par 24–25).

She returned to the police station and interviewed the suspects. At the police station, Mr Nontsele informed Sergeant Njotini that he had consensual sexual intercourse with the complainant. Given Sergeant Njotini's view that the complainant was drunk at the time, she concluded that the complainant was in no position to give consent. It was only at this stage that she decided to arrest Mr Nontsele (*Nontsele v Minister of Police supra* par 25). The initial removal of Mr Nontsele from his homestead was for his own safety, as there was a group of people baying for his blood (*Nontsele v Minister of Police supra* par 4, 23 and 51). Mr Nontsele was then charged on 9 December 2013, and he elected to make a warning statement that he had sexual intercourse with the complainant consensually. Mr Nontsele refuted Sergeant Njotini's evidence (*Nontsele v Minister of Police supra* par 51). The court, however, preferred the evidence of Sergeant Njotini to that of Mr Nontsele (*Nontsele v Minister of Police supra* par 53).

The high-water mark of Sindiswa's statement in relation to Mr Nontsele's involvement in the rape was that she had seen Mr Nontsele exiting the room in which one Konono was raping the complainant. Mr Nontsele was naked

from the waist up (*Nontsele v Minister of Police supra* par 24–25). Sergeant Njotini confirmed that Sindiswa's statement did not confirm that she saw Mr Nontsele having sexual intercourse with the complainant. It also transpired during the civil trial that Sergeant Njotini held the view that she had no duty to interrogate the strength of the case, nor did she have a duty to disclose the strength and weakness of the State's case to the prosecutor or the court for purposes of bail proceedings (*Nontsele v Minister of Police supra* par 27, 35).

On behalf of the NDPP, two witnesses were called. Ms Maarman was of the view that, as Mr Nontsele had not been arrested by the officials of the NDPP, the NDPP could not be held liable for Mr Nontsele's unlawful arrest and detention. She testified that after perusing the docket, she was satisfied that the statements in the docket disclosed an offence of rape (*Nontsele v Minister of Police supra* par 37). She reiterated the evidence of Sergeant Njotini as the basis for having enrolled the matter. She said the fact that Mr Nontsele's admission of the sexual encounter with the complainant may eventually be found to be inadmissible at trial was of no moment in her decision to enrol the matter (*Nontsele v Minister of Police supra* par 39; see *Woji v Minister of Police supra* par 10). Ms Maarman testified that as Mr Nontsele was charged with a Schedule 6 offence, he bore the onus to prove that exceptional circumstances existed for his release on bail (*Nontsele v Minister of Police supra* par 39; see s 60(11)(*a*) of the CPA).

She further testified that Mr Nontsele and his co-applicants at the bail hearing put up affidavits without putting forward their versions or defences. Ms Maarman further testified that if bail applicants are legally represented, they have a duty to allege that the case against them is weak and disclose the basis of their defence. She did not have a duty to disclose the weaknesses of the State's case unless the court enquired about it. She testified that she did not tell the court that the complainant did not know what had happened to her because the case against Mr Nontsele was based on circumstantial evidence (*Nontsele v Minister of Police supra* par 39). Furthermore, Mr Nontsele did not testify that he had an alternative address where he could reside pending the finalisation of the case, and in view of the anger of the members of the community, it was prudent for the State to oppose his release on bail (*Nontsele v Minister of Police supra* par 42). However, Mr Buso, the second NDPP's witness, conceded the strength or otherwise of the state's case should have been disclosed at the "earliest opportunity in the case" (*Nontsele v Minister of Police supra* par 40).

3 The High Court judgment

Mr Nontsele instituted a claim for unlawful arrest and detention at the High Court. Although there were weaknesses on the basis of which Sergeant Njotini formed the reasonable suspicion that Mr Nontsele had committed the alleged offence, the court accepted that there were grounds to effect Mr Nontsele's arrest. It should be recalled that the high-water mark of Sergeant Njotini's reasonable suspicion rested on the statement from and consultation with Sindiswa. However, Sindiswa's evidence on its own fell

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short of establishing a reasonable suspicion, in that she did not directly implicate Mr Nontsele (*Nontsele v Minister of Police supra* par 50). Sergeant Njotini testified that she had removed Mr Nontsele from his homestead because there was a group of people baying for his blood (*Nontsele v Minister of Police supra* par 23). At this stage, Sergeant Njotini, in essence, testified that she was not arresting Mr Nontsele. In other words, she had not yet formed a reasonable suspicion that Mr Nontsele was involved in the commission of the alleged offence (*Nontsele v Minister of Police supra* par 23–24). Had that been the case, she certainly would have arrested Mr Nontsele on the spot. It was only after interviewing Sindiswa and Mr Nontsele himself that she formed the suspicion that an offence had been committed and thus arrested Mr Nontsele (*Nontsele v Minister of Police supra* par 25).

The test for determining whether a reasonable suspicion exists that an accused has committed an offence is objective. The question is whether a reasonable police officer in the position of the arresting officer, armed with the same information, would reach the same conclusion (*Woji v Minister of Police supra* par 8; *Mabona v Minister of Law and Order* [1988] 3 All SA 408 (SE) 410). A reasonable police official will assess the information at their disposal, and where that information can be checked, a reasonable police officer will check it before deciding to arrest (*Mabona v Minister of Law and Order supra* 411). However, sight should not be lost of the fact that the standard that the arresting officer must meet to effect a lawful arrest is not the same as the standard attributable to prosecutors when deciding to prosecute – that is, whether a *prima facie* case exists to institute criminal proceedings (*Powell NO v Van der Merwe* 2005 (5) SA 62 (SCA) par 37; *Vitshima v Minister of Police* ZAECPEHC (unreported) 2024-04-30 case no 2496/2020 par 25; *Mabona v Minister of Law and Order supra* 411). The standard is reasonable suspicion. Suspicion occurs at the beginning of the investigation. In *Biyela v Minister of Police* (2023 (1) SACR 235 (SCA) par 34–35), the SCA explained what reasonable suspicion entails:

> "The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.
>
> What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence." (see also *Woji v Minister of Police supra* par 8; *Powell NO v Van der Merwe supra* par 36–37; *Minister of Safety and Security v Tyokwana supra* par 11)

The SCA concluded that in the event a police official harbours a reasonable suspicion, they do not have an obligation to arrest but have a discretion on whether to arrest (*Biyela v Minister of Police supra* par 36; see also *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA)). In relation to offences referred to in Schedule 1 of the CPA, this statement is correct. One of the allegations in Mr Nontsele's particulars of claim was that Sergeant

Njotini had failed to investigate a less drastic method to bring him to court (*Nontsele v Minister of Police supra* par 2, par 10.7–10.10 of the particulars of claim) in line with the precedent cited above. However, in relation to those offences that are also listed in Schedules 5 or 6 of the CPA, the arresting officer does not have the discretion. Once an arresting officer has established reasonable grounds that a Schedule 5 or a Schedule 6 offence has been committed, the arresting officer is obliged to arrest. Section 50(1)(*c*) read with section 60(11) of the CPA mandates a police officer to arrest and detain an accused who is suspected of having committed a Schedule 5 or 6 offence until such person appears in court. An arrest for a Schedule 5 or 6 offence is akin to an arrest on a warrant (see *Groves NO v Minister of Police* 2024 (1) SACR 286 (CC)). This is so because only a court may order the release of such a person on bail after that person has applied to be released on bail. It thus follows that Sergeant Njotini had no discretion whether or not to arrest but had the duty to arrest Mr Nontsele once she had established a reasonable suspicion that he had committed the alleged offence.

The court's finding in relation to the initial period was based on the fact that it was satisfied with the level of circumstantial evidence on which Sergeant Njotini based her decision to arrest. The court concluded that despite the weaknesses of individual pieces of evidence, considering the mosaic of all the evidence before her, Sergeant Njotini's suspicion that Mr Nontsele committed the alleged offence was reasonable. Sergeant Njotini had confirmed that she initially held the view that the case was weak. This, however, changed after her interview with Sindiswa (*Nontsele v Minister of Police supra* par 50). As already indicated, in her statement, Sergeant Njotini did not allege that Sindiswa had said that she saw Mr Nontsele having sexual intercourse with the complainant (*Nontsele v Minister of Police supra* par 30). Sergeant Njotini's suspicions were, nevertheless, hardened after her interview with Mr Nontsele. It should be recalled that Sergeant Njotini testified that she only decided to arrest Mr Nontsele after she had interviewed the then suspect (Mr Nontsele) (*Nontsele v Minister of Police supra* par 25).

In relation to the second period (that is, the period after the first appearance in court), the court found that the detention was unlawful. The court relied on the cases of *Carmichele v Minister of Safety and Security* (CC) (*supra* par 72–74) and *Minister of Justice and Constitutional Development v X* (*supra* par 18, 21, 29 and 36) for its conclusion (*Nontsele v Minister of Police supra* par 61–70). The court concluded that the test changes as soon as there is a consideration of whether the arrested person must remain in detention or be released on bail (*Nontsele v Minister of Police supra* par 60). Although ultimately it is within the discretion of the court to decide on this issue, the public prosecutors have duties to fulfil in this regard (*Nontsele v Minister of Police supra* par 61, quoting *Carmichele v Minister of Safety and Security supra* par 72). In this case, the prosecution failed in its duties during the bail application (*Nontsele v Minister of Police supra* par 62). The court thus found the conduct of the defendants to be unlawful (*Nontsele v Minister of Police supra* par 70). Although it is not clear

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on what basis the Minister of Police was held to be liable, one may infer that the basis of the liability was the failure of the police to inform the court that the case against Mr Nontsele was weak (*Nontsele v Minister of Police supra* par 70).

4 SCA minority judgment

The minority judgment of the SCA would have upheld the High Court's decision. It is apposite to mention that Mr Nontsele did not counter-appeal the decision that the initial arrest and detention were unlawful. Therefore, this question did not exercise the mind of the court. The minority noted that Mr Nontsele had indicated that he did not want to make a statement and wanted a lawyer to represent him. The minority held that because the statement was exculpatory, reliance on it could not justify his detention (*Minister of Police v Nontsele supra* par 18). At bail proceedings, the prosecutor who dealt with the matter merely indicated that the offence was a Schedule 6 offence and the State was opposing bail. She failed to inform the court of the weaknesses in the State's case; this was a dereliction of duty (*Minister of Police v Nontsele supra* par 22). It is noteworthy that Ms Maarman held the view that she did not have the responsibility to apprise the court of the weaknesses of the State's case (*Minister of Police v Nontsele supra* par 26).

The minority were critical of the reliance by respondents on Mr Nontsele's statement as justification for his further detention. The statement is exculpatory, and Mr Nontsele had indicated that he did not want to make the statement in the absence of an attorney (*Minister of Police v Nontsele supra* par 18). This meant that it was very unlikely that the statement, even if it had been inculpatory, would have been admitted in court. In relation to Sindiswa's statement, the minority held that it was tenuous evidence to justify the arrest. The mere fact that Mr Nontsele was without clothes on his upper body meant nothing. The minority based this conclusion on the basis that there were many people at the ceremony who were dancing and drinking traditional beer (*Minister of Police v Nontsele supra* par 19). Of significance in this regard is that neither Sindiswa nor the complainant's grandmother (the High Court made no mention of the complainant's grandmother) placed Mr Nontsele at the scene of the rape incident. Instead, both of them claim that they found one Mdike (presumably Konono) raping the complainant (*Minister of Police v Nontsele supra* par 20).

The minority judgment is very critical of both Sergeant Njotini's and Ms Maarman's stance that once a person is charged with a Schedule 6 offence, it automatically follows that bail must be opposed. Failure to apprise the court of the weaknesses in the State's case, even where the State opposes bail, is a disregard of their obligations (*Minister of Police v Nontsele supra* par 22, 24, 26, 28, 29, 31). The magistrate should have been made aware of the defects in the State's case (*Minister of Police v Nontsele supra* par 30). The minority are very critical of the fact that Mr Nontsele spent a long time in detention in light of the available evidence and characterised the conduct of the officials of the Minister as displaying "a cavalier attitude" (*Minister of Police v Nontsele supra* par 33).

5 SCA majority judgment

The majority dismissed the claim mainly on the basis that, in his pleadings, Mr Nontsele's claim was based on malicious detention as opposed to unlawful detention (*Minister of Police v Nontsele supra* par 35–36). Mr Nontsele's case was not that the appellants owed him a duty of care, but that they unlawfully extended his detention after the arrest. His case was that the refusal of his release on bail was malicious (*Minister of Police v Nontsele supra* par 36). The crux of the majority judgment was that Mr Nontsele had failed to prove the requirements for malicious deprivation of freedom (see *Minister of Police v Nontsele supra* par 37–40). However, the majority held that even if Mr Nontsele's case was decided on the basis that the appellants owed him a duty of care, he still had failed to prove his case (*Minister of Police v Nontsele supra* par 41). The majority found that it was not clear whose actions (whether those of Sergeant Njotini or Ms Maarman) had led to the decision of the magistrate to further detain Mr Nontsele beyond 06 February 2014. The majority held that the High Court found the wrongful conduct of Sergeant Njotini to be her failure to disclose the results of the DNA as soon as they came to her knowledge (*Minister of Police v Nontsele supra* par 41). The majority concluded that, despite the fact that the DNA results were inconclusive, there was other evidence implicating Mr Nontsele (*Minister of Police v Nontsele supra* par 43). Two factors, in particular, seem to have weighed with the majority in coming to its conclusion. The first is that the complainant told Sergeant Njotini that Mr Nontsele made a call to the complainant's mother using the complainant's cellular phone, which was stolen on the night of the incident (*Minister of Police v Nontsele supra* par 44). Secondly, the majority relied on Sindiswa's evidence that Mr Nontsele exited the room where Konono was found having sexual intercourse with the complainant (*Minister of Police v Nontsele supra* par 45). The majority held that there was "substantially more information that implicated Mr Nontsele" (*Minister of Police v Nontsele supra* par 46).

6 Analysis

As already indicated, the High Court dismissed the claim for unlawful arrest up to 6 February 2014. However, there is one disconcerting aspect about the judgment of the High Court in this regard. It relates to the arrest and detention of Mr Nontsele from 8 December 2013 until 6 February 2014. Sergeant Njotini testified that when she took Mr Nontsele from his homestead, she was not arresting him but taking him for safety because the crowd was baying for his blood (*Nontsele v Minister of Police supra* par 4 and 23). She took him to the police station, and she went to "verify" the statements made by Sindiswa and the complainant. It is clear (or at least implicit) from her evidence that she intended to interview Mr Nontsele after her visit to Sindiswa and the complainant, which she ultimately did (*Nontsele v Minister of Police supra* par 24). The probabilities are that at that stage,

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Mr Nontsele was arrested and detained, or at the very least, his freedom of movement was restrained. Logic dictates that Sergeant Njotini expected to find the suspects at the police station when she returned from verifying the complainant's and Sindiswa's statements. It would seem obvious that even if Mr Nontsele was not locked in the cell, he could not leave the police station without breaking the law (see *Van der Zee v Minister of Police* ZALMPPHC (unreported) 2025-02-20 case no 36/2019 par 54; *R v Mazema* 1948 (2) SA 152 (E) 153–154). In other words, Mr Nontsele's freedom of movement was restricted as he was under police control. His constitutional right to dignity and freedom of movement was violated (see ss 10 and 12(1) of the Constitution). The evidence of Sergeant Njotini on this score does not accord with the facts and probabilities and therefore should have been rejected. The effect of an arrest, in terms of section 39(3) of the CPA, is that the arrestee must be confined in lawful custody and remain detained until discharged or released. The question whether Mr Nontsele was arrested and detained is an objective one (see Du Toit, De Jager, Paizes, St Quintin Skeen and Van der Merwe "Arrest" (31 July 2024 Revision Service 73) *Commentary on the Criminal Procedure Act* 5-44D-1). The court had failed to explore this aspect. However, the probabilities are that Mr Nontsele had been arrested and detained.

There is no provision in the CPA that allows a peace officer to detain a suspect while she confirms the evidence provided to them. To the contrary, in *Mabona v Minister of Law and Order* (*supra* 410), the court held that investigations must be conducted prior to an arrest (cf *Nontsele v Minister of Police supra* par 24–25). Section 41 of the CPA empowers a police officer to request a person whom the police officer reasonably suspects of having committed (or attempted to commit) an offence, or who, in the opinion of the police officer, may be able to give evidence in relation to the commission of an offence, to provide their name and address. If such a person fails to provide the information, the police officer may arrest them without a warrant. The plea of the Minister is revealing in this regard. The High Court paraphrased the plea as follows:

> "The plaintiff was arrested in order to have access to his clothes and search for evidence, without him knowing, he was suspected of being part of the people who committed rape." (*Nontsele v Minister of Police supra* par 5)

This paragraph undermines the evidence of Sergeant Njotini that when she removed Mr Nontsele from his homestead, she did so for his safety. This affirms that at the time of the arrest, Sergeant Njotini had not yet entertained a reasonable suspicion that Mr Nontsele had committed the crime of rape. He was arrested first and only later did she (Sergeant Njotini) embark on her investigation. This is contrary to the counsel in *Mabona v Minister of Law and Order (supra* 410–411). In relation to Sindiswa's evidence, Sergeant Njotini jumped the gun; that evidence was open to many variables. Even if Sindiswa is correct that Mr Nontsele came from the room where Konono was raping the complainant, Mr Nontsele could have exited because he found the two in action. Thus, Sergeant Njotini should have eliminated those possibilities before the arrest, as they are not far-fetched. Reasonable suspicion means, as the SCA observed in *Biyela v Minister of Police* (*supra*

par 34), that there should be a sound basis upon which such suspicion is based. It must be "more than a hunch". Given the circumstances in which the alleged offence took place, the way in which Mr Nontsele was implicated left much to be desired. There were a lot of unanswered imponderables that rendered the suspicion by Sergeant Njotini unreasonable.

Thus, the arrest and the entire period of arrest were unlawful. The High Court found that failure by the respondents to apprise the magistrate of the weaknesses of the State case was reason to conclude that the detention had been unlawful; this accords with the jurisprudence of both the SCA and the Constitutional Court, and therefore the minority would have been correct to dismiss the appeal. In *Woji v Minister of Police* (*supra* par 3), the SCA held that the strength or weakness of the State's case is a factor to be considered by the court in the determination of a bail application.

The majority, on the other hand, held that the trial court dealt with a case that was not before it. It should be remembered that the majority held that Mr Nontsele's claim was based on malicious detention (*Minister of Police v Nontsele supra* par 35–39). However, the majority approached Mr Nontsele's pleadings with a magnifying glass and thus failed to capture the essence of those pleadings. In the context of exception applications, our courts have held that pleadings must be read as a whole and not as one paragraph in isolation from the rest (see, for instance, *Telematrix (Pty) Ltd v Advertising Standards Authority of South Africa* 2006 (1) SA 461 (SCA) par 10). This principle must apply generally, not only in exceptions. For it would not make sense for the court to find that a pleading is not excusable and then find that very point problematic at trial. Although it is correct that Mr Nontsele's particulars of claim allege that the officials of the defendants opposed the granting of bail to Mr Nontsele "maliciously and in concert", this must be read against other paragraphs in Mr Nontsele's particulars of claim. Numerous paragraphs belie the fact that Mr Nontsele predicated his claim on malicious detention. For instance, in paragraph 11.1 of the particulars of claim, Mr Nontsele claims that the police officials and the state prosecutors "owed the plaintiff a duty of care", which they had neglected by failing "to assess the strength of the State's case against the plaintiff and to determine whether there existed a *prima facie* case against the plaintiff" (see *Nontsele v Minister of Police supra* par 2).

Furthermore, at paragraph 11.5 of the particulars of claim, Mr Nontsele alleges that the officials of the respondents failed

> "to place before the court during the process of all court appearances and remands, and whilst determining the issue of bail in respect of the plaintiff, all relevant information including information as to the strength and weaknesses of the state's case against the plaintiff, and information in the plaintiff's favour relating to the complete lack of evidence, alternatively, insufficient evidence against the plaintiff which would be highly relevant to the granting of bail and the continued prosecution of the plaintiff". (*Minister of Police v Nontsele supra* par 2)

The majority held that even if Mr Nontsele's claim was based on the correct cause of action, he had failed to prove his case "against the Minister". The

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majority lamented that Mr Nontsele had failed to establish who among the employees of the Minister and the NDPP caused his further detention (*Minister of Police v Nontsele supra* par 41). The majority held that the NDPP was found liable for Ms Maarman's failure to advise the magistrate about the weakness of the case, while the Minister was found responsible for the failure by Sergeant Njotini to inform the court about the results of the DNA tests (*Minister of Police v Nontsele supra* par 41). The DNA results were negative (*Nontsele v Minister of Police supra* par 46). The concern that the court *a quo* found both the Minister and the NDPP liable is of no moment. First, the finding that the Minister was found liable because of Sergeant Njotini's failure to inform the court about the DNA results is misplaced. It is clear that the court *a quo* found the conduct of the officials of both the Minister and the NDPP to be unlawful from 6 February 2014 (*Nontsele v Minister of Police supra* par 70). Had the court's finding on unlawfulness of the detention been based on Sergeant Njotini's failure to disclose the DNA results, liability against the Minister would have commenced from the date the DNA results became available – that is, 14 March 2014. That the Minister is also held liable for the failure to advise the court of the weakness of the case is made plain by the following finding by the court *a quo*:

> "In my view, in the *circumstances* of the present case, a reasonable magistrate armed with all that relevant information would most probably not have remanded the plaintiff in custody on 6 February 2014 and even more so, after the DNA results came forth". (*Nontsele v Minister of Police supra* par 70, emphasis added)

In *Woji v Minister of Police* (*supra* par 28), the SCA held that failure by the police to advise the court of factors relevant to the consideration of whether an arrestee should be released on bail amounted to a failure to discharge the public-law duty entrusted to them. Such failure was actionable in private law. It is trite that the mere fact that the further detention was sanctioned by the court is not a defence under such circumstances (*Carmichele v Minister of Safety and Security supra* par 72; *Woji v Minister of Police supra* par 25; *Minister of Safety and Security v Tyokwana supra* par 32).

Secondly, it is not unusual in our law for more than one defendant to be held responsible for the wrongful consequence that has befallen the plaintiff (see s 2(1) of the Apportionment of Damages Act 24 of 1956; *Minister of Police v Underwriters at Lloyds of London* ZASCA (unreported) 2021-06-08 case no 1212/19 par 27). *Carmichele v Minister of Safety and Security (CC)* (*supra* par 61ff) makes it plain that it is not foreign to our law to hold both the police and prosecution liable for harmful circumstances emanating from the same facts. This is so because in our law, a single unlawful action is capable of giving rise to more than one cause of action (see Rule 10(3) of the Uniform Rules of Court GN R48 of 1965 in *GG* 999 of 1965-01-12). Failure by the police to place before the court all the information they had in their possession or knowledge during their testimony in the bail application was sufficient to find the Minister liable. Even if the majority was convinced that the Minister should not have been liable, it does not translate to the NDPP being blameless as well. Ms Maarman failed to appreciate that, as the officer of the court, she had the duty to act "judiciously" and have regard to the

rights of the people charged with the alleged commission of an offence (Mokoena *A Guide to Bail Applications* 49). De Villiers is blunter in asserting that "the prosecution, with access to the resources and machinery of the State, must take care that justice is done" (De Villiers 2015 *International Journal of Law Crime and Justice* 24). In terms of the National Prosecuting Authority Policy Directive, a prosecutor has the duty, among others, to present the facts of the case to the court fairly. This means disclosing even the information that is adverse to the State's case (see clause 6 of the National Prosecuting Authority Prosecution Policy (June 2013) (copy with the author)). Thus, failure by Ms Maarman to inform the court of the information in her possession was also actionable. It is noteworthy that the duty to provide information to the magistrate is not clear cut. In some cases, the police may mislead the prosecutor who ultimately conveys the incorrect information to the presiding officer (*Mahlangu v Minister of Police supra* par 2, 6, 37; *Minister of Safety and Security v Tyokwana supra* par 39) and in other cases, despite the prosecutor's knowledge of the facts, they may fail to convey them to the court (see *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC)*;* for critique of that judgment, see Msaule "Throwing the Unlawful Detention Jurisprudence into Turmoil: A Critique of *De Klerk v Minister of Police* 2020 1 SACR 1 (CC)" (2021) 24(1) *PER* 1). In this case, the employees of both respondents harboured the belief that, where an accused faces a Schedule 6 offence, bail must be refused, whatever the circumstances. They both believed that it was not their responsibility to apprise the court of the strength or weakness of the State's case. Although the decision whether or not to oppose bail ultimately rests with the public prosecutor, the views of the investigating officer are not insignificant in this regard (see *Verwey v S* WLD (unreported) 2006-01-30 case no A796/05 par 11). Based on the above, the two respondents are in the same basket, unless the contrary is proved (see *Minister of Justice and Constitutional Development v X supra* par 18). It is not far-fetched nor is it unreasonable on the basis of this case to conclude that the further detention was caused by the unlawful conduct of the officials of the respondents in failing to inform the court of the true status of the case, as they are duty-bound to do (see *Minister of Justice and Constitutional Development v X supra* par 22).

Another misapprehension by the majority is that the wrongful conduct by the police was the failure to inform the court of the results of the DNA test (*Minister of Police v Nontsele supra* par 41). This partially explains the majority's difficulty in appreciating why both defendants were found liable by the High Court. However, this was not the basis on which the court *a quo* based its decision. The court *a quo* found the detention of Mr Nontsele from 6 February 2014 to be unlawful, and the DNA results became available only on 14 March 2014. Failure by the respondents' officials to draw to the attention of the court the results of the DNA test only exacerbated the already unlawful conduct (*Minister of Police v Nontsele supra* par 70). Had that not been so, the court would have proclaimed the period of the unlawful detention of Mr Nontsele against the Minister of Police from the date the DNA results became available, but that was not the case. In *Mahlangu v Minister of Police* (*supra* par 40), relying on *Botha v Minister of Safety and*

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Security, January v Minister of Safety and Security (2012 (1) SACR 305 (ECP)), the Constitutional Court held that the police official investigating a case is under an obligation to inform the prosecutor of any change in status that would affect the release of the arrested person on bail. The majority judgment is mistaken in holding that even without DNA evidence, there was evidence implicating Mr Nontsele in the commission of the alleged offence. This is exacerbated by the fact that the DNA results were negative (see *Minister of Police v Nontsele supra* par 43; *Nontsele v Minister of Police* supra par 46). The majority of the SCA attempts to distinguish the present case from the other cases (that held that the state officials have a duty to advise the court of the evidence that may impact the magistrate's exercise of discretion whether to grant bail) are without basis. The majority hold that failure by the state functionaries to communicate to the court the information relevant for the determination of bail will not in all instances support a claim for damages. A failure to inform the court of relevant information must be causally linked to the harm suffered by the applicant (*Minister of Police v Nontsele supra* par 43). It is clear in this case that had the state functionaries informed the court of the defects in the case, the court would probably have released Mr Nontsele on bail. The evidence relied upon by the State was so weak and it is common cause that the strength or weakness of the State's case is the factor to be taken into account in the determination of bail applications (*Woji v Minister of Police supra* par 3).

7 Conclusions

This contribution has discussed the duty of the state functionaries to advise the court of the information available to it in bail applications, whether or not that information is favourable to the accused. As bail applications are inquisitorial, the court must be provided with all the relevant information to ensure it makes a decision on whether or not to release an accused on bail. In terms of section 60(2)(*c*), a court may require the accused or prosecution to place evidence in matters that are in dispute between the parties. This position has been confirmed by the highest courts in this country. In the case of *Minister of Police v Nontsele,* the majority of the SCA judgment seems to depart from this rule. The second aspect that has been addressed in this contribution is the manner in which the High Court approached the question of unlawful arrest and detention before Mr Nontsele was denied bail by the court *a quo.* It is contended in this discussion that at the time Sergeant Njotini arrested Mr Nontsele, she had not formed a reasonable suspicion, and therefore her arrest of Mr Nontsele was unlawful and the Minister ought to have been held liable for the entire period of Mr Nontsele's detention.

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