THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 547/2022

In the matter between:

MINISTER OF POLICE **APPELLANT**

and

MABHASO NONTSELE **RESPONDENT**

Neutral citation: *Minister of Police v Nontsele* (547/2022) [2024] ZASCA 137 (11 October 2024)

Coram: DAMBUZA, MAKGOKA and MABINDLA-BOQWANA JJA and TOLMAY and SMITH AJJA

Heard: 24 May 2024

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 11 Octobert2024.

Summary: Appeals – whether the court may consider a cross-appeal in the absence of an application for leave to cross-appeal.

Delict – damages for malicious detention – onus on the plaintiff to prove that deprivation of liberty was without probable cause and was *amino iniuriandi* – no evidence led to prove absence of reasonable and probable cause and intention to injure.

Unlawful detention – police withholding report of negative DNA results in bail application proceedings – withholding of negative DNA test result would not, on its own, justify release of rape accused on bail in this case.

ORDER

On special leave to appeal from: Eastern Cape Division of the High Court, Mthatha (Majiki J, sitting as court of first instance):

1 The cross-appeal is struck from the roll with costs.

2 The appeal is upheld with costs.

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

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Tolmay AJA (Smith AJA concurring):

Introduction

[1] The respondent, Mr Mabhaso Nontsele (Mr Nontsele) instituted action against the appellant, the Minister of Police, (the Minister) and the National Director of Public Prosecutions (the NDPP) for wrongful arrest, detention and malicious prosecution in the Eastern Cape Division of the High Court, Mthatha (the high court). Mr Nontsele was arrested on 8 December 2013 and detained until 19 May 2015, a period of 527 days. He was arrested by Sergeant Portia Badikazi Njotini (Sgt Njotini), who at the time was a constable in the South African Police Service and the investigating officer. He was arrested with a certain Mr Kanono Jackson Mdike (Mr Mdike) and Mr Kwanda Kaba (Mr Kaba) for the rape of Ms Khanyisa Sogiba (the complainant) at a traditional ceremony that took place on 6 December 2013. At the trial, held on 15 July 2015 he was acquitted in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The State conceded that there was no *prima facie* evidence against him, after the evidence of the State witnesses was led.

[2] Mr Nontsele then sued the Minister and the NDPP for damages due to his alleged unlawful arrest, detention and malicious prosecution. He was partially successful in the high court. The court found that he had failed to prove both claims of unlawful arrest or malicious prosecution. The high court however found his detention to have been unlawful from the date of refusal of bail to date of his release. It awarded damages in the amount of R1.6 million.[1]

[3] The Minister applied for leave to appeal which was refused by the high court but granted by this Court on petition to it. Mr Nontsele did not seek leave to cross-appeal, either from the high court or this Court. He, however, filed a Notice of Cross-Appeal on 27 August 2022. The purported cross-appeal is against the high court's findings that neither unlawful arrest nor malicious prosecution had been proven by the respondent.

[4] It is convenient to first dispose of the issue whether a cross-appeal can be entertained in the absence of leave to appeal having been granted. Second, whether the high court was correct in finding that Mr Nontsele was wrongfully detained from the date of the refusal of bail to the date of his release, i e from 6 February 2014 to 19 May 2015.

The purported cross-appeal

[5] Section 16(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) reads as follows:

'16 Appeals generally

(1) Subject to section 15(1), the Constitution and any other law-

[1] *Nontsele v Minister of Police and Another* [2021] ZAECMHC 29 paras 56 and 76.

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.'

Section 17(2)*(a)* of the Superior Courts Act reads as follows:

'(2) *(a)* Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.'

[6] It is clear from these provisions that an application for leave to appeal is anticipated prior to an appeal. Mr Nontsele relied on s 19*(d)* of the Superior Courts Act and argued that this Court may condone the failure to first seek leave to appeal. This section provides that this Court or a Division exercising appeal jurisdiction may, in addition to any other power, inter alia, amend or set aside the decision which is the subject of the appeal and 'render any decision which the circumstances may require'. Condonation was sought on behalf of Mr Nontsele for the failure to seek leave to appeal. The reason given was that it was done to avoid incurring further costs.

[7] Counsel for Mr Nontsele in support of the argument that this Court could entertain the cross-appeal, relied on *Octagon Chartered Accountants v The*

Additional Magistrate, Johannesburg, and Others (*Octagon*).[2] In that matter the plaintiff brought actions against five defendants in the magistrates' court for the recovery of accounting and auditing fees, each amount fell within the monetary jurisdiction of the magistrates' court. The defendants however each instituted a counterclaim for an amount of more than the monetary jurisdiction of the magistrates' court. The magistrate, on application by the defendants, moved the claims and counterclaims to the high court. The plaintiff challenged the removal of the proceedings to the high court in review proceedings. The high court found that the magistrate was not empowered to remove the actions, *inter alia*, because the claims did not exceed the jurisdiction of the magistrates' court. The high court there ordered a stay of the action and removed the counterclaim to the Gauteng Division of the High Court, Johannesburg.

[8] The plaintiff appealed to the full court, only against the decision of the high court to allow the removal of the counterclaims to the Gauteng Division of the High Court, Johannesburg. The full court found that, even though the plaintiff had only appealed a part of the order, the failure to cross-appeal the whole order left the parties in an untenable situation.[3] It found that it was empowered to vary the order of the high court and moved both claims and counterclaims to the high court. The full court relied on s 19(*d*) of the Superior Courts Act to justify its order.

[9] *Octagon* was clearly distinguishable from the matter before us. Although the high court, in the present matter, may theoretically have been wrong in finding that

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[2] *Octagon Chartered Accountants v The Additional Magistrate, Johannesburg, and Others* 2018 (4) SA 498 (GJ).
[3] Ibid para 19 reads as follows:
'The dismissal of the appeal leaves the parties in a wholly impractical and untenable position. The actions (claims and counterclaims) in the magistrates' court have been stayed. The counterclaims have been removed to this court, where they are counterclaims in a vacuum, without claims to which they are counterclaims. That position is as a result of the defendants having elected not to cross-appeal.'

no case was made out for wrongful arrest or malicious prosecution, the order did not leave Mr Nontsele in an untenable situation. The remedy of an application for leave to appeal was available.

[10] In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*,[4] it was expressed as follows:

'Since the decision in *Moch*, the statutory basis for this court's jurisdiction has been superseded by the Superior Courts Act 10 of 2013. It is now to be found in s 16(1)*(a)* of that Act, which provides that an appeal against a decision of the high court as a court of first instance lies "upon leave having been granted . . . either to the Supreme Court of Appeal or to a full court of that Division. . .". Leave to appeal therefore constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute. Section 17 of the Superior Courts Act then proceeds to govern the ways in which the required leave can be obtained. In essence, s 17(2) provides that it may be granted by the court of first instance and, if refused, it may be granted on application to this court.'[5]

[11] An application for leave to appeal is required. Although not a determining factor, seeking leave to cross-appeal, could not have led to a significant increase in costs, considering that it would have been heard simultaneously with the Minister's application for leave to appeal. Without such an application, this Court does not have the jurisdiction to entertain the cross-appeal.

[12] Reliance was placed on *Ex Parte Gaone Jack Siamisang Montshiwa*,[6] which was an application by Mr Montshiwa to be admitted as a legal practitioner, the

[4] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) (*Newlands Surgical Clinic*). See also *DRD Gold Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) para 18.
[5] *Newlands Surgical Clinic* para 13.
[6] *Ex Parte Gaone Jack Siamisang Montshiwa* [2023] ZASCA 19; 2023 JDR 0647 (SCA).

application was refused by two judges sitting as the court of first instance. Mr Monsthiwa applied for leave to appeal and this was heard by a single judge and dismissed. The dismissal of the application for leave to appeal led to a petition to this Court. The application for leave to appeal was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act. The majority found that the applicant need not be sent back to the high court to bring a fresh application for leave to appeal and heard the application for leave to appeal and dismissed it. That matter is distinguishable from the matter before us. In this instance there is no application for leave to appeal before us.

[13] The approach to the Court's power and the applicable limitations of such power was explained as:

'. . . [T]he court's reservoir of power to regulate its process and procedure in the interest of proper administration [of justice] may not be used . . . to appropriate to itself jurisdiction that is not conferred to it by statute or where a statute grants exclusive jurisdiction to another court'.[7]

The result simply is that the condonation sought cannot be granted and the cross-appeal cannot be considered in the absence of an application for leave to appeal.

The detention

[14] The only remaining issue to be determined is whether Mr Nontsele's detention was unlawful and, if it was, from which date. Since the amount of damages awarded was not disputed, nothing needs to be said about the quantum.

[15] Mr Nontsele was arrested on 8 December 2013 and remained in custody in the police cells from that date until 19 May 2015. He was re-arrested by Sgt Njotini the following day and brought to court where he appeared and was warned to appear

[7] Ibid para 27.

on 15 July 2015. He was released on the same day and the trial ultimately took place on 15 July 2015 when he was discharged in terms of s 174 of the CPA.

[16] Mr Nontsele appeared in court for the first time on 3 February 2014, following his arrest on 8 December 2013, when a bail application was brought by his legal representative. Sgt Njotini, as the investigating officer was not present at court. The magistrate inquired about her absence. The matter was rolled over to the next day to ensure her presence at court. On 4 February 2014 the prosecutor, Ms Siphokazi Maarman (Ms Maarman) informed the magistrate that the 'investigating officer' was present and swore in a police officer, Mr Badboy Xolani, who testified but turned out to have absolutely no knowledge of the case before court. The court then insisted that a subpoena for the Commander of the Family and Domestic Violence Unit needs to be prepared. Only at this stage did it transpire that Sgt Njotini was not available as she was attending a course. The matter was again adjourned to 6 February 2014. The record contains no transcript as to what occurred on 6 February 2014. The transcript of the proceedings in the magistrates' court resumes when the trial in the criminal proceedings was concluded on 15 July 2015.

[17] During the trial of the present matter before the high court, (the civil trial) it was confirmed that the bail proceedings were concluded on 6 February 2014. Seeing that the evidence led during the civil trial was available we were able to proceed with the appeal and the parties did not take issue with this defect in the record before us. The evidence led during the civil trial dealt with the bail proceedings and therefore the missing part of the record of the bail proceedings was not fatal to a proper determination of the appeal.[8]

[8] *Schoombee and Another v S* [2016] ZACC 50; 2017 (5) BCLR 572 (CC); 2017 SACR 1 (CC); *S v Chabedi* 2005 (1) SACR 415 (SCA).

[18] To determine whether the detention was lawful, the evidence available during the bail proceedings needs consideration. There was a statement allegedly made by Mr Nontsele to Sgt Njotini on 9 December 2013. This statement stated that he and the complainant had met earlier during the day, on 6 December 2013, and agreed to have sexual intercourse and proceeded to have consensual sexual intercourse the next morning. This statement, importantly, also indicates that Mr Nontsele said that he did not understand the charges against him. The statement furthermore reads that he did not want to make a statement and wanted an attorney to represent him. At the civil trial, Mr Nontsele denied having made the statement and said that he had signed it because he was scared, and Sgt Njotini had told him to do so. The statement is exculpatory and even if Mr Nontsele's version is rejected, this statement cannot on its own justify detention.

[19] In her statement made on 8 December 2013, Sgt Njotini stated that although the case was weak, she had evidence of an eyewitness Ms S Mbuqe (Ms Mbuqe). However, the high-water mark of the evidence against Mr Nontsele was that Ms Mbuqe saw him on the veranda of the house where the rape occurred, without a shirt. During the civil trial, it transpired that the house consisted of several rooms and the veranda led into the kitchen. The evidence indicated that there were many people at the ceremony, and they were dancing and drinking traditional beer.

[20] The complainant, at the criminal trial, testified that she was drunk and went to sleep in the bedroom and was woken up by Ms Sindiswa Mbuqe (Ms Mbuqe) who told her that she had been raped. She then noticed that her panty was torn and wet. Ms Mbuqe said she saw Mr Mdike on top of the complainant. In a statement by the complainant's grandmother, made on 27 December 2013, she said she saw Mr Mdike raping the complainant and tried to stop him. It is noteworthy that Ms

Mbuqe said nothing about the presence of the grandmother. The grandmother's statement also did not place Mr Nontsele on the scene.

[21] Captain Patrick Tembekile Silwana, a colleague of Sgt Njotini, stated in his statement made on 6 February 2014 that there were three reasons why Sgt Njotini opposed bail and those were that the community was angry; the eyewitnesses threatened the accused; and the victim was mentally challenged. The anger of the community was repeatedly confirmed by Sgt Njotini also during her testimony at the civil trial as a justification for Mr Nontsele's detention.

[22] Ms Maarman, the prosecutor, merely stated during the bail proceedings that, seeing that rape is a Schedule 6 offence, in terms of the CPA,[9] it was not in the interests of justice to release Mr Nontsele. She did not point out the weaknesses in the State's case to the magistrate. During her evidence at the civil trial Ms Maarman repeatedly confirmed her view that a Schedule 6 crime justified an opposition to bail. When her evidence is evaluated, it would seem that she regarded the strength of the evidence against an accused as of no consequence at all, when eligibility for bail is considered.

[23] The statement prepared on Mr Nontsele's behalf, for purposes of the bail proceedings, stated that he would plead not guilty and that he had no previous convictions or pending cases against him. He provided an address and said that he has been living there for the last thirty years. He also provided an alternative address in another area where his grandmother resided.

[9] Schedule 6 of the Criminal Procedure Act 51 of 1977.

[24] Sgt Njotini, in her evidence during the civil trial, persisted with her view that it was appropriate to oppose bail. She again emphasised the fact that rape is a Schedule 6 offence, and the onus was accordingly on Mr Nontsele to show exceptional circumstances why he should be released on bail. She stated that Ms Mbuqe saw Mr Nontsele without a shirt and that the J88 medico legal report (J88) indicated rape, although no injuries were observed. She further stated that if she was present at the bail hearing and was aware that Mr Nontsele had an alternative address that would have taken him out of the area where the victim lived, she would not have opposed bail. The failure of both Sgt Njotini and Ms Maarman to consider all the available evidence and the failure to reveal it to the magistrate led to the refusal of bail. Neither of them seemed to have considered the possibility of setting conditions for bail.

[25] Sgt Njotini stated that the DNA evidence was obtained and sent for analysis, and she was made aware that it was available electronically on 14 March 2014. She testified that she telephonically followed up and was told that no semen was detected. She officially received a hard copy of the results on 7 August 2014 and took those to court. She did not go into detail as to what she did exactly to bring the information she obtained telephonically to Ms Maarman's attention. One thing is abundantly clear: she did nothing to ensure that Mr Nontsele and his legal representative were made aware of the information obtained on the phone about the results, prior to officially obtaining them on 7 August 2014. Mr Nontsele's uncontested evidence is that he was taken monthly to court, sometimes even twice a month. In all that time, no one deemed it necessary to reveal to the court that the DNA did not link him to the rape.

[26] Ms Maarman's testimony during the civil trial shows that her main reason for opposing bail was that rape is a Schedule 6 offence. She did not have the docket in her possession, initially, when the bail application was heard. The senior prosecutor, Mr Buso testified that he brought the docket to Ms Maarman. It is not clear from the record whether she perused it at all during the bail proceedings Mr Buso surprisingly did not deem it appropriate to draw her attention to the fact that he had brought the police docket. After receiving the docket, Ms Maarman did not alert the court to the weaknesses in the State's case. When asked about why she failed to do so, she testified that she did not have a duty to do so. Ms Maarman testified that she was of the view that the State had a *prima facie* case, because of Mr Nontsele's statement and the witness statements previously referred to. She also emphasised the importance of the anger of the community and seemed to believe that this justified the decision to oppose bail.

Unlawful Detention

[27] In order to succeed in an action based on unlawful detention, a plaintiff must show that a defendant, or someone acting as his or her agent or employee, deprived him or her unlawfully of his or her liberty. Mr Nontsele was charged with a Schedule 6 offence. Section 60(11)*(a)* of the CPA provides as follows:

'Notwithstanding any provision of this Act, where an accused is charged with an offence –

(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release'.

[28] The result is that the onus is on an accused to adduce evidence that exceptional circumstances exist which permit his release in the interests of justice.[10] In this case, however, the magistrate should have been advised that the evidence against Mr Nontsele was circumstantial; that the statement made by him was exculpatory and suffered from procedural defects; and that he could provide both a permanent and an alternative address. Sgt Njotini testified that she would have confirmed the alternative address, if she was aware of it, and would not have opposed bail. After the police docket had been given to Ms Maarman, she failed to bring this evidence to the attention of the magistrate. In *Carmichele v Minister of Safety and Security,*[11] the following was said in relation to the duty of prosecutors:

'. . . We can do no better in this regard than refer to the following passage which appears in the *United Nations Guidelines on the Role of Prosecutors*:

> "In the performance of their duties, prosecutors shall:
>
> *(a)* . . .
>
> *(b)* Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; . . .."'[12]

[29] This public law duty was confirmed in *Woji v Minister of Police* (*Woji*),[13] where it was reiterated that a police officer also has a duty to place 'all relevant and readily available facts before the magistrate'.[14] Although an unlawful arrest will as a matter of course lead to the detention being unlawful, the fact that the high court found that the arrest was lawful will not automatically lead to the conclusion that the

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[10] *S v Botha and Another* 2002 (2) SA 680 (SCA) para 20; *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 paras 78-79; *Knoop N O and Another v Gupta (Execution)* [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) paras 45-46.

[11] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[12] Ibid para 73.

[13] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) (*Woji*), as confirmed in *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) para 38.

[14] *Woji* para 28.

detention was lawful. The particular facts of the case will determine whether the detention was lawful. The importance and sanctity of personal freedom in our constitutional dispensation cannot be over emphasised. In *Mahlangu and Another v Minister of Police*,[15] the Constitutional Court stressed the importance of a person's right to freedom as part of the foundational rights in our constitutional dispensation.[16] The Constitutional Court expressed itself as follows:

'The unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity, has always been regarded as a particularly grave wrong and a serious inroad into the freedom and rights of a person. In *Thandani,* [it was held that] "the liberty of the individual. . . in a free society should be jealously guarded . . . Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual".'[17] (Footnote omitted.)

Quoting what was held in *Coetzee*, the Constitutional Court continued:

'[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component] . . . [O]ur Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'[18] (Footnote omitted.)

[30] In this matter, the magistrate was not made aware of crucial weaknesses in the State's case during the bail proceedings. Mr Buso was the prosecutor at the criminal trial. During that trial, he conceded that there was no *prima facie* case against Mr Nontsele and expressed his surprise that the matter was even enrolled. To make it worse, the court was not made aware of the fact that the DNA evidence also did not link Mr Nontsele to the crime. There was a duty on the police officer to make

[15] *Mahlangu and Others v Minister of Polic*e [2021] ZACC 10; 2021 (7) BCLR 698 (CC);2021 (2) SACR 595 (CC).
[16] Ibid paras 25-26.
[17] Ibid para 27.
[18] Ibid para 28.

the prosecutor aware of that fact, but neither the prosecutors nor the police officer deemed it necessary to bring this to the attention of the court. There is nothing in the record that clarifies whether either Sgt Njotini or the prosecutor, at any point, considered the evidence or acted thereon.

[31] An analysis of the evidence led by the Minister's witnesses, during the civil trial, reveals that the attitude of the police and the prosecutors was simply that, as this was a Schedule 6 offence, the police officers had no duty to draw the court's attention to the glaring weaknesses in the State's case. This is not the position established by this Court and the Constitutional Court, as explained in the referenced authorities. Another argument raised on behalf of the Minister was that it was Mr Nontsele's duty to bring a further bail application when the DNA results became available. Unless Mr Nontsele and his legal representative were made aware of this fact, they could hardly be expected to have had the necessary facts available to consider such an option. The simple answer is that they were never made aware of the DNA evidence. In any event, such an approach loses sight of the public duty on the police and prosecutors to protect the legitimate interests and rights of the public, which finds its foundation in the rule of law.

[32] I have considered whether the detention might only have become unlawful from the date that the forensic evidence became available. However, after analysing all the evidence, I am of the view that the whole period of detention was unlawful. The case against Mr Nontsele was insufficient to warrant detention. The only evidence available was firsty, none of the statements made by witnesses implicated Mr Nontsele directly. Secondly, this statement was exculpatory and suffered procedural defects. Thirdly, that a young man was seen, without a shirt, on the veranda of a house where the complainant was allegedly raped. This rape occurred

at a traditional ceremony where, on all accounts, many people were gathered, and traditional beer was consumed. So much so that even the victim herself had no knowledge that she had been raped due to her state of intoxication.

[33] Considering all the facts, any potential prejudice to the victim or the community could and should have been addressed by setting appropriate bail conditions. The rule of law requires of the police and prosecuting authority to act with honesty and integrity and to place all relevant evidence before a court of law to enable it to make an informed decision. As heinous a crime as rape is, the principle remains that one is innocent until proven guilty. The deprivation of one's freedom must be carried out with due regard of the importance our Constitution places on personal freedom. The fact that Mr Nontsele remained in custody for 527 days, based on the available evidence, points to a cavalier attitude by the Minister's officers towards the importance of personal freedom. The harm done to any unlawfully detained person's mental and physical well-being is detrimental and the high court cannot be faulted for finding that the detention was unlawful and awarding damages. Considering all the above, I would have struck the cross-appeal from the roll with costs and would have dismissed the appeal with costs.

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R G TOLMAY

ACTING JUDGE OF APPEAL

Dambuza JA (with Makgoka and Mabindla-Boqwana JJA):

[34] I have read the judgment prepared by my sister Tolmay AJA (the first judgment) in this appeal. Regrettably, I am unable to agree with the conclusion she reaches and some of the reasoning leading to the result. I agree that this Court has no jurisdiction to consider an appeal against the dismissal of the claims for unlawful arrest and malicious prosecution which Mr Nontsele's counsel urged us to consider. I also agree with the discussion of the principles relating to wrongful and unlawful detention. My view, however, is that those principles are not applicable in this instance. Even if they applied they would not support Mr Nontsele's claim for damages.

[35] In paragraph 12 of the particulars of claim, Mr Nontsele's claim arising from the extended detention was formulated as follows:

'On the 3rd of February 2014, and at the Lady Frere Magistrate's Court, the members of the South African Police Services, whose names are presently unknown to the Plaintiff, together with the Prosecutor, Ms S MAARMAN, who dealt with the case on that day, opposed the granting of bail to the Plaintiff, and did so maliciously and in concert, well knowing that that no *prima facie* case existed against the Plaintiff at that time or at all.' (Emphasis supplied.)

[36] In essence, Mr Nontsele's case was not that the extended detention was unlawful for breach of a legal duty owed to him. He asserted, specifically, that the opposition to the granting of bail (which resulted in the extended detention, subsequent to 4 February 2014) was malicious. In other words, it was driven by improper motive and/or was without reasonable and probable cause, and resulted from a conspiracy between the police and Ms Maarman.

[37] Malicious deprivation of liberty occurs when lawful restraint is inflicted upon a person's liberty by means of an act of law, unjustifiably, with an intention to injure, and with improper motive.[19] Neethling and Potgieter[20] describe it as follows:

'Unlike wrongful deprivation of liberty, where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant, the conduct in the case of malicious deprivation of liberty takes place *under the guise of a valid judicial process*. The defendant makes improper use of the legal machinery of the state, either through a policeman acting on his own discretion or through a valid warrant, in depriving the plaintiff of his liberty. The actual deprivation of liberty is consequently not carried out by the defendant himself or by his servant or agent, but by the machinery of the state through a valid judicial process.

As a result, the plaintiff will have to prove the following in order to succeed in an action based on malicious deprivation of liberty: that the defendant *instigated* the deprivation of liberty; that the instigation was *without reasonable and probable cause*; and that the defendant acted *animo iniuriandi*. These requirements are similar to those of *malicious prosecution*.'[21] (Emphasis in the original text.)

[38] Consequently, the test of breach of a legal duty, or wrongful conduct, on the part of the police (and the Minister) plays no part in the inquiry into allegations of malicious and collusion driven detention. Mr Nontsele had to prove that Sgt Njotini and Ms Maarman colluded when opposing his application for bail, that they opposed bail without a reasonable and probable cause, and they did so *animo iniuriandi*.

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[19] *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A).

[20] J Neethling and J Potgieter *Law of Delict* 8th ed (2020) at 398-399.

[21] 'Malice' in the context of the *actio iniuriarum*, being *animus iniuriandi*. See *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 5. In *Oletsise N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC) para 60, the Constitutional Court, when drawing a distinction between unlawful arrest and malicious prosecution, said the following:

'. . . [M]alicious prosecution is constituted by: (a) setting the law in motion against a claimant; (b) lack of reasonable and probable cause on the part of the defendant; (c) malice or *animus iniuriandi*; and (d) termination of criminal proceedings in the claimant's favour. As far as the onus is concerned, here, unlike a claim based on unlawful arrest and detention, it rests on the claimant in respect of all the elements of the delict, including that of malice or *animus iniuriandi*.'

[39] Mr Nontsele never tendered evidence to prove the collusion allegation. There was no evidence that any of the police officers involved in this case held discussions with Ms Maarman, aimed at achieving refusal of bail or to secure Mr Nontsele's further detention after 3 or 4 February 2014. Neither did Mr Nontsele show absence of reasonable and improbable cause – that the police never had an honest belief, founded on reasonable grounds, that his further detention was warranted after 4 February 2013 or at any other time. He also never tendered evidence, and no inquiry was made by the high court into whether Mr Nontsele had proved any *animus iniuriandi* on the part of the police

[40] The basis for the claim for damages for the extended detention in this case is a crucial distinguishing factor from *Woji, Zealand v Minister for Justice and Constitutional Development and Another* (*Zealand*),[22] and many other cases in which the claims for damages were based on wrongful and/or unlawful detention. In this case, the opposition to bail (and the withholding of information as submitted at the appeal hearing)[23] was alleged to have been done maliciously, and in concert with the prosecution. The correct test was not applied and there is no evidence in the record on which it can be satisfied. On this basis, only the claim for extended detention should have failed.

[41] Furthermore, even if Mr Nontsele's case could be decided on the basis of breach of a legal duty, it seems to me that no proper case was made out against the Minister. Mr Nontsele pleaded that it was the conduct of both Ms Maarman and Sgt Njotini that led to his continued detention beyond 3 February 2014. It is not clear

[22] *Zealand v Minister for Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC).
[23] Or as the high court found.

from both the particulars of claim and the evidence, whose conduct was material, in relation to the decision of the magistrate. The high court found that Ms Maarman had failed to advise the magistrate about the weaknesses of the case together with the fact that it was built on 'circumstantial hearsay evidence'. The wrongful conduct by the police, more specifically Sgt Njotini, was found to be the failure to inform the court of the results of the DNA test.

[42] In *Woji*, this Court found that the Mr Woji's detention was unjustifiable as a result of a police officer's erroneous identification of Mr Woji, in a video footage, as one of the robbers that invaded had a bank. On the same principle, Mr Zealand's detention was found by the Constitutional Court to have been unlawful for the purpose of his delictual damages claim, which arose from the failure by the court registrar to communicate to prison officials that Mr Zealand had successfully appealed his conviction for murder. The failure resulted in the unlawful extension of Mr Zealand's detention.

[43] I do not think that the conclusions reached by the courts in these cases establish a principle that all instances of failure to communicate information to a court will necessarily support a claim for delictual damages. In principle, in such claims, damages will follow only if the harm was causally linked to the wrongful and negligent act or omission. In *Woji* and *Zealand*, causation was readily established. In this case, the result of DNA testing neither absolved nor implicated Mr Nontsele. It was neutral. A positive DNA result is not a pre-requisite for a rape conviction. A conviction of rape may well ensue in the absence of a positive DNA result, where the facts and circumstances of a particular case support such a conviction. Consequently, a negative or neutral DNA result will not necessarily persuade a judicial officer to release a rape accused on warning or bail. This is

particularly so in a case such as the one before us, where the police are in possession of information (other than the neutral DNA result) implicating the accused.

[44] The information that was in Sgt Njotini's possession on 3 February 2014 included Mr Nontsele's statement, the J88, and statements made by various people including the complainant. According to the J88, the complainant had sustained injuries which were consistent with sexual assault. By all accounts, the fact that the complainant had been sexually assaulted was not in dispute. In addition, the complainant had told Sgt Njotini that her mother had received a call made by Mr Nontsele from her (the complainant's) phone which was stolen on the night of the incident. According to Sgt Njotini however, Mr Nontsele had denied having been in possession of the complainant's phone when he confronted him about the allegation.

[45] Furthermore, in her statement to the police, the witness, Ms Mbuqe, had made the following allegations, that:

'I went inside the room on my arrival I saw Kono doing sex with [the complainant] then I asked Konono what he was doing and Konono stand up and he was dressed naked and he put his penis inside the trouser. . . . Before I enter the room I met Mabhaso Nontsele on the way out of room he was naked on top but I did not ask Mabhaso why he was like that.'

It also relevant that according to Sgt Njotini, on the day of the arrest Mr Nontsele told her (Sgt Njotini) that the complainant had consented to having sexual intercourse with him.

[46] The extent and weight of the information that was in Sgt Njotini's possession must be determined as at the time of the application for bail, and when he instructed his colleague for bail application. A shown above that time, there was substantially

more information that implicated Mr Nontsele, that the magistrate would have had to consider, in addition to the neutral DNA results. Courts have, in appropriate circumstances, considered the results of DNA analysis to be superseded by other evidence.

[47] In *Thwala v S*[24] the Constitutional Court considered, for the third time, an application by Mr Thwala for leave to appeal against a judgment of the Supreme Court of Appeal, in terms of which his conviction for several offences, including rape was confirmed. He also sought to lead evidence of reports from DNA tests, contending that the high court had convicted him without considering the DNA evidence that was being processed, even though it was notified that such evidence would be available in 15 weeks. The Court refused leave and, amongst other things referred to its decision on the previous occasion that Mr Thwala had brought an application for leave to appeal, citing the failure to consider the DNA results. It held that on that occasion it had 'evaluated the impact of the DNA evidence and concluded that, in the circumstances of gang rape the fact that 'the spermatozoa matched a co-accused and not Mr Thwala [was] not significant'.[25] The Constitutional Court considered the other evidence on record and held that Supreme Court of Appeal had correctly dismissed the application for leave to appeal on the basis of lack of prospects of appeal.

[48] In the case before us, even if Mr Nontsele had brought a claim for damages on the basis of unlawful extended detention, it would fail on the same reasoning as in *Thwala.* For each of the reasons set out above, the appeal must be upheld.

[24] *Thwala v S* [2018] ZACCC 34; 2019 (1) BCLR 156 (CC).
[25] Para 17.

[49] The following order is granted:

1 The cross-appeal is struck from the roll with costs.

2 The appeal is upheld with costs.

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

‘The plaintiff’s claim is dismissed with costs.’

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N DAMBUZA

JUDGE OF APPEAL

Appearances

For the appellant:	P M Dukada
Instructed by:	The State Attorney, Mthatha
	The State Attorney, Bloemfontein
For the respondent:	S H Cole SC
Instructed by:	Magqabi Seth Zitha Attorneys, East London
	Mlozana Attorneys, Bloemfontein