THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 137/2024

In the matter between:

MAROPENE FRANS NAKANA	**APPELLANT**
and	
JOHANNES CLAASSENS	**FIRST RESPONDENT**
MINISTER OF POLICE	**SECOND RESPONDENT**
WARRANT OFFICER WILLIAMS STATIONED AT WESTERNBURG POLOKWANE, LIMPOPO	**THIRD RESPONDENT**

Neutral citation: *Nakana v Claassens & Others* (137/2024) [2025] ZASCA 52 (7 May 2025)

Coram: MOCUMIE, KGOELE and KATHREE-SETILOANE JJA, PHATSHOANE and WINDELL AJJA

Heard: 10 March 2025

Delivered: 7 May 2025

Summary: Criminal law – malicious prosecution – whether the Supreme Court of Appeal (the SCA) may interfere with the order of the Limpopo Division of the High Court, Polokwane (the full court), awarding the first respondent damages, against the appellant, in a claim for malicious prosecution against the appellant –

held – the full court committed a misdirection on the facts – the SCA is therefore at large to interfere with the full court's award of general damages.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba and Muller JJ and Lithole AJ sitting as a court of appeal):

1 The appeal is upheld with no order as to costs.

2 Paragraph 2.2 of the order of the Limpopo Division of the High Court, Polokwane (the full court) is set aside and replaced with the following order:

'2.2. The first respondent is ordered to pay the sum of R80 000 to the appellant, being general damages for the malicious prosecution.'

3 The application to adduce further evidence on appeal is struck from the roll with costs.

JUDGMENT

Kathree-Setiloane JA (Mocumie and Kgoele JJA, Phatshoane and Windell AJJA concurring):

[1] The central question in this appeal is whether this Court may interfere with the order of the Limpopo Division of the High Court, Polokwane, Makgoba and Muller JJ and Lithole AJ concurring (the full court), awarding the first respondent, Mr Johannes Claassens (Mr Claassens) damages in a malicious prosecution claim against the appellant, Mr Frans Maropeng Nakana (Mr Nakana).

[2] The facts that gave rise to the claim for malicious prosecution are largely common cause. Mr Nakana and Mr Claassens lived on neighbouring farms in Polokwane. Mr Nakana operated a chicken business on his farm and

Mr Claassens operated a conservation business on his. They had a very acrimonious relationship which culminated in the arrest and detention of Mr Claassens by the South African Police Service (the SAPS).

[3] On 1 July 2015, Mr John Kubayi, an employee of Mr Claassens, removed a common boundary fence on his instructions. The boundary fence was on a servitude road that formed the boundary between the two farms. It was in a state of disrepair and Mr Claassens' intended to replace it with a sturdier fence. On the same day, Mr Nakana reported this to the SAPS at the Polokwane Police Station (the police station). Shortly thereafter, the third respondent, Warrant Officer Williams (W/O Williams) and other members of the SAPS, arrested and detained Mr Claassens. He was detained at the police station for almost three days, from about 14h30 on 1 July 2015 to about 9h30 on 3 July 2015, when he was released on bail. He was charged with theft of the boundary fence and contravention of a protection order. He was prosecuted in the Polokwane Magistrates' Court. On 11 January 2016, the prosecution withdrew the charges against him.

[4] Mr Claassens instituted a claim for unlawful arrest, detention and malicious prosecution against Mr Nakana, the Minister of Police (the Minister) and W/O Williams. The Minister was cited as the second respondent in the action. The matter was set down for trial in the Limpopo Division of the High Court, Polokwane on 21 and 22 September 2020 (Mdhluli AJ sitting as the court of first instance). At the commencement of the trial Mr Nakana, through his legal representative, conceded liability in the claims for malicious prosecution, unlawful arrest and detention. The Minister and W/O Williams also conceded liability, but only in respect of the claim for unlawful arrest and detention. By agreement between the parties, the trial proceeded on the issue of the *quantum* of the damages in respect of both claims.

[5] Mr Claassens testified in the trial. He was 60 years old at the time of his arrest and detention and 67 years old when he testified. On the day of his arrest more than 16 police officers in three motor vehicles arrived at his farm. Certain police officers who were unknown to him together with W/O Williams arrested him in the presence of his son and Mr Kubayi, his employee. They were very aggressive to him. They handcuffed him. But in the process of doing so, caused him to suffer pain in his left elbow, which he had fractured in the past. They instructed him to get into the police van. When he experienced difficulty climbing into the van, they pushed him and he fell. On arrival at the police station, he struggled to get out of the van, and had to shuffle out on his back side. W/O Williams mocked him as he shuffled out. He was detained in a cell at the police station with other inmates.

[6] In the cell, Mr Claassens was body searched by two inmates for cigarettes and money. The cell was dirty and smelt of human faeces, urine and vomit. Although it was crowded, he managed to find a cement seat on which to sit. The seat was cold and wet as it was adjacent to a shower, where inmates showered and urinated. It was bitterly cold in the cell as it had no ceiling. An inmate gave him a blanket to keep warm, but it was dirty, reeked of human odour and covered in lice.

[7] He was horrified by the chanting of the inmates and the screams of others who were being assaulted. Mr Claassens could not sleep during the first night. He was forced to sit upright all night, as there was no sleeping space in the cell. He could not stand the next morning and had to be assisted by a few inmates. He was released on bail. When he got home, he showered three times to get the stench of the police cell of his body. He was traumatised by his arrest and detention, and broke down while testifying in the trial, even though this was many years later.

[8] On 21 January 2021, Mdhluli AJ handed down judgment and made the following order:

'1. [Mr Nakana, the Minister and W/O Williams) are guilty of unlawful arrest and detention.

2. [Mr Nakana, the Minister and W/O Williams] are ordered to pay [Mr Claassens] general damages in the amount of R40 000.00 (forty thousand rands) jointly and severally the one paying the other to be absolved.

3. [Mr Nakana, the Minister and W/O Williams] are ordered to pay [Mr Claassens'] legal bill in the amount of R25,524.00 jointly and severally the one paying the other to be absolved.

4. Interest on the award calculated at the prescribed rate from date of issue of summons to date of the final payment.

5. [Mr Nakana, the Minister and W/O Williams shall pay [Mr Claassens'] party and party costs jointly and severally the one paying the other to be absolved.

6. [Mr Claassens'] claim for malicious prosecution is dismissed with costs.'

[9] Mr Claassens applied for leave to appeal against his judgment and order. Mdhluli AJ granted him leave to appeal against paragraph 6 of the order, only. Dissatisfied, Mr Claassens applied to this Court for leave to appeal against the remaining paragraphs of the order. This Court granted him leave to appeal to the full court against paragraphs 2 and 5 of the order. The full court set aside the order of Mdluli AJ and replaced it with the following order:

'1. The appeal is upheld with costs;

2. The order of the court a quo in respect of paragraphs 2 and [6] thereof is set aside and substituted with the following:

2.1 The [Minister] is ordered to pay the sum of R400 000.00 to [Mr Claassens], being general damages for unlawful arrest and detention.

2.2 [Mr Nakana] is ordered to pay the sum of R250 000.00 to [Mr Claassens] being general damages for the malicious prosecution.

3. Payment of interest at the prescribed rate from the date of judgment in the [c]ourt a quo (21 January 2021) until the date of payment, payable by [Mr Nakana and the Minister] on the respective amounts awarded.

4. [Mr Nakana] and [the Minister] are ordered to pay the costs of action jointly and severally, the one paying the other to be absolved.'

Mr Nakana, subsequently, applied to this Court for special leave to appeal the judgment and order of the full court. This Court granted him leave to appeal on 7 February 2024.

[10] In his notice of appeal filed in this Court, Mr Nakana noted an appeal against paragraphs 1, 2.2, 3 and 4 of the order of the full court. The notice of appeal does not set out the grounds of appeal but rather seeks an order: (a) upholding the appeal with costs; and (b) setting aside the order of the full court and substituting it with an order dismissing Mr Claassens' claim, and absolving Mr Nakana from the instance.[1]

[11] Mr Nakana filed an application to adduce new evidence in the appeal. The evidence which he sought to adduce in the appeal is a protection order which he purportedly obtained against Mr Claassens, on 14 January 2015, from the Polokwane Magistrates Court. The order restrained Mr Claassens from having contact with Mr Nakana and from entering his premises without his permission. Mr Nakana made the following allegations in the application to adduce further evidence: Mr Claassens had contravened the protection order when he removed the boundary fence between the two farms. He reported this to the SAPS. At approximately 14h30, members of the SAPS including W/O Williams went to Mr Claassens' farm, where Mr Nakana pointed to Mr Kubayi who was still in the

[1] The notice of appeal states that an order is sought in the following terms:
'1 The appeal is upheld.
2. The order of the full bench is set aside and substituted with the following order:
'(a) [Mr Claassens'] claim is dismissed.
(b) [Mr Nakana] is absolved from the instance, in that [he] was within his rights to report contravention of the Fencing Act, 1963, theft of the perimeter fence at his farm No 39 Tweefontein, Limpopo Province, and contravention of the domestic violence interdict issued by the Polokwane Magistrates' [C]ourt against the [Mr Claassens].
3. [Mr Claassens] is ordered to pay the costs of the appeal.'

process of removing the boundary fence. Mr Nakana identified Mr Claassens as the person who instructed Mr Kubayi to remove the fence, and to whom the protection order applied.

[12] None of this evidence was led in the trial by Mr Nakana as, on his own version, he had conceded liability in the malicious prosecution claim against him. Despite the concession, he now requests this Court to consider an application to adduce further evidence that is directed at the merits of the claim. He ascribes his decision to concede liability in the claim, to advice he received from his erstwhile attorneys to the effect that he did not have prospects of success on the merits of the claim. He accepts that his concession meant that the requisites for a malicious prosecution were established in that (a) he set the law in motion by instigating or instituting the criminal proceedings; (b) he acted without reasonable and probable cause; (c) he acted with malice or *animo injuriandi*, (d) the prosecution had failed; and (e) Mr Claassens had suffered damages.[2]

[13] He, however, says that on proper advice received from his current attorneys, and in hindsight, he realises that he was ill-advised. This, according to him, resulted in a miscarriage of justice because he made the concession in circumstances where he acted within the law in reporting Mr Claassens, to the SAPS, for contravening the protection order. He, therefore, contends that he is not liable for the payment of damages arising from Mr Claassens' claim for malicious prosecution against him.

[14] The new evidence which Mr Nakana seeks to adduce on appeal is directed at the issue of his liability for damages in the malicious prosecution claim against him. That issue is, however, not before us on appeal as it was settled at the

[2] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135B-F and 136D.

commencement of the trial. What is before us is the order of the full court. In light of this, Mr Nakana's application to adduce further evidence on appeal is not only superfluous, but is also irrelevant to the outcome of the appeal. That said, I consider it unnecessary to determine whether the application to adduce further evidence on appeal meets the remaining criteria for admission on appeal.

[15] It is regrettable that Mr Nakana might have received misguided advice, to concede liability in the claim against him, from his former attorneys. However, his remedy was to make an application to set aside the concession made by his former attorney. Alternatively, it was to sue the attorney for unprofessional conduct, if so advised.

[16] By conceding liability, Mr Nakana agreed to compromise or settle the question of his liability for damages in the claim against him. This brought an end to the litigation on the merits of the claim. In *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* (*Slabbert*),[3] this Court held that an agreement of compromise creates new rights and obligations, as it is a substantive agreement that is independent of the original cause. Its purpose is to either avoid litigation or bring an end to it.[4]

[17] A compromise is an agreement made by consent. It may only be set aside on the grounds of fraud or of *iustus* error. To succeed on the latter basis, it must be shown that the error vitiated true consent and did not merely relate to motive or the merits of the dispute.[5] Absent an order setting aside a concession made in open court which settled the merits of the claim, the concession stands. In the

[3] *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* [2016] ZASCA 157 (*Slabbert*) para 7. See also *Thompson v SA Broadcasting Corporation* 2001 (3) SA 746 (SCA) (*Thompson*) para 7.
[4] Ibid *Slabbert* para 7.
[5] Ibid.

circumstances, it is not competent for a court to consider an appeal against the merits of the claim. Nor may it consider an application to adduce further evidence on that aspect. For these reasons, the application to adduce further evidence falls to be struck off the roll with costs.

[18] That does not, however, dispose of the matter as Mr Nakana noted an appeal against paragraphs 1, 2.2, 3 and 4 of the order of the full court, which concern the question of the quantum of damages awarded to Mr Claassens. As Mr Nakana omitted to set out the grounds of appeal against the full court order, in his notice of appeal, counsel for Mr Claassens argued that it is impermissible for this Court to consider the appeal.

[19] In *Leeuw v First National Bank*,[6] this Court considered this very question.[7] It held that 'apart from being bad, the point has lost its significance'[8] because '[i]n this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this Court is entitled to make findings in relation to 'any matter flowing fairly from the record'. The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed out to anything that has been overlooked'.[9]

[20] On the weight of this authority, I find that Mr Nakana's omission to state the grounds of appeal against the full court's order, in the notice of appeal, does not preclude this Court from determining the appeal. There can be no prejudice, as the parties were given an opportunity to make full submissions on this aspect

[6] *Leeuw v First National Bank* [2009] ZASCA 161; [2010] 2 All SA 329 (SCA) ; 2010 (3) SA 410 (SCA) (*Leeuw*). *Leeuw* endorsed the view of this Court in *Thompson* para 7
[7] Ibid *Leeuw* paras 2 and 4.
[8] Ibid para 5.
[9] Ibid.

in supplementary heads of argument, which they did subsequent to the hearing of the appeal.[10]

[21] The amount to be awarded for general damages in a claim for malicious prosecution is at the discretion of the court. The discretion is one in the true sense. This means that it can only be overturned on appeal in circumstances where an appeal court finds 'that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection of the facts, or that it reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.[11]

[22] The factors that a court must consider in awarding general damages in a claim for malicious prosecution include the gravity of the charges; the nature of the prosecution; the length of time the individual was subjected to the prosecution, absence of reasonable and probable cause in setting the law in motion; the presence of improper motive or malice in initiating or instigating the prosecution; the deprivation of liberty; the status, age, and health of the plaintiff; the publicity given to the criminal proceedings and the absence of a reasonable explanation or apology by the defendant. This is not a closed list.

[23] In ordering Mr Nakana to pay Mr Claassens damages in the amount of R250 000, the full court took into account the following factors:

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[10] After the hearing of the appeal, the court issued the following directive to the parties:
'1. The parties are directed to file short heads of argument dealing with the following questions:
1.1 Are the contents of the notice of appeal adequate to enable this quote to interfere on appeal with the order of the full court that the appellant pay the respondent the sum of R250,000.00 being general damages for malicious prosecution?
1.2 Please make submissions on the question of quantum, should this court be inclined to deal with it in the appeal.
1.3 Please make submissions on costs, should this court be inclined to deal with the appeal on the issue of quantum.
2. The heads of argument must be filed with the Registrar on or before 20 March 2025.'

[11] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 11.

'The uncontested evidence of [Mr Claassens] is that he and [Mr Nakana] are neighbors. They have a very acrimonious relationship because [Mr Claassens] had in the past reported [Mr Nakana] for illegal poultry farming to the authorities. Mr Nakana is an ex-police officer and has previously laid false charges against [Mr Claassens] during 2012- 013.

In the light of the above facts, I am of the view that [Mr Nakana] abused his power and connections as an ex-police officer and laid false charges of contravention of a [p]rotection [o]rder and [t]heft against [Mr Claassens] which eventually led to the arrest of [Mr Claassens]. [Mr Nakana] was present on the day when [Mr Claassens] was arrested. It is clear that the arrest was accompanied by malice and revenge. [Mr Nakana] had a vendetta against [Mr Claassens].[12]

Additionally, the full court also took into consideration that Mr Claassens had spent almost three full days in the cells, under horrible conditions.

[24] Mr Nakana did not testify in the trial. So except for discerning from his concession that he had an improper motive and acted with malice, what his actual motive was is not apparent from the record. If that fact is apparent from the evidence led at the trial, then it is certainly a factor to be taken into account. But in this case, it is not evident from the trial record what Mr Nakana's motive in reporting Mr Claassens to the SAPS was. That notwithstanding, the full court took into consideration that Mr Nakana 'is an ex-police officer who previously laid false charges against [Mr Claassens] in 2012-2013'; that he abused his power as a police officer; that he 'had a vendetta against Mr Claassens. None of these facts are, however, contained in the trial record. The full court, accordingly, committed a misdirection on the facts. This Court is therefore at large to interfere with the full court's award of general damages and substitute its discretion for that of the full court.

[25] Although Mr Nakana conceded liability in the claim against him for malicious prosecution, it is clear from Mr Claassens' evidence that Mr Nakana was only responsible for reporting a complaint to the SAPS, which led to

[12] Paragraphs 38 and 39 of the judgment of the full court.

Mr Claassens' arrest and detention. Any improper motive that he had was limited to this. He did not lay the charges nor institute proceedings against Mr Claassens. Nor did he have control of how the criminal proceedings against Mr Claassens would unfold and for how long.

[26] Furthermore, as I see it, the full court placed undue weight on the conditions under which Mr Claassens was detained in the cells at the police station. It took these facts into account, rightly so, when it exercised its discretion in favour of ordering the Minister to pay Mr Claassens general damages in the amount of R400 000. It, however, duplicated that award by ordering Mr Nakana to pay Mr Claassens a further amount of damages arising out of those facts.

[27] An appeal court is entitled to set aside an award of general damages where there is a striking disparity between the award of the trial court, and what it considers should have been an appropriate award. [13] Taking into consideration Mr Nakana's limited involvement in Mr Claassens' arrest, detention and subsequent prosecution, I am of the view that the damages the full court ordered Mr Nakana to pay is disproportionately excessive. A just and appropriate award should have been one in the amount of R80 000. For these reasons, the appeal must succeed.

[28] I consider it fair and just that each party pay their own costs in the appeal. It is hoped that this will contribute to ending the hostilities between them.

[29] In the result, I make the following order:

1 The appeal is upheld with no order as to costs.

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[13] *Erasmus v Davis* 1969 (2) SA 1 (A) at 9E.

2 Paragraph 2.2 of the order of the Limpopo Division of the High Court, Polokwane (the full court) is set aside and replaced with the following order:

‘2.2. The first respondent is ordered to pay the sum of R80 000 to the appellant, being general damages for the malicious prosecution.’

3 The application to adduce further evidence on appeal is struck from the roll with costs.

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F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances

For the appellant:	M H Masilo
Instructed by:	HLM Mamabola Attorneys, Polokwane
	Horn & Van Rensburg Attorneys, Bloemfontein
For the first respondent:	A C Diamond
Instructed by:	Charl Naude Attorneys, Polokwane
	Symington De Kok Attorneys, Bloemfontein