Reportable

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 235-2009

In the matter between:

KARANDATA KATJIZEU & 31 OTHERS	**APPLICANTS**
and	
THE GOVERNMENT OF REPUBLIC OF NAMIBIA	**1st RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND FORESTRY	**2ND RESPONDENT**
MINISTER OF SAFETY AND SECURITY	**3RD RESPONDENT**
MINISTER OF JUSTICE OF THE REPUBLIC OF NAMIBIA	**4TH RESPONDENT**

Neutral citation: *KARANDATA KATJIZEU & 31 OTHER S v THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA & 3 OTHERS* (A 235/2009) [2013] NAHCMD 17 (29 January 2012)

Coram: NDAUENDAPO J

Heard: 10-23 January 2011, 8-17 June 2011, 11-22 July 2011, 12-13 March 2012 17-18 September 2012

Delivered: 29 January 2013

Flynote: Law of Evidence—Admission as to the number of cattle confiscated —Law on admissions restated—Respondents bond by admission—No full and satisfactory/reasonable explanation provided for admission—Respondents bond.

Summary: The applicants invaded Nyae Nyae conservancy (Tsunkwe) with a number of cattle. The respondents confiscated the cattle. In the interdict application, (to prevent the cattle from being disposed of) applicants stated that their cattle were 2177. Respondents admitted the number. Dispute about the number of cattle impoundment. Applicants argued that the respondents were bound by the admission. Respondent filled an affidavit explaining that the admission was a bona fide mistake and applied to court to have it withdrawn. Held, admission not fully explained nor reasonable explanation for admission. The application to withdraw admission refused.

ORDER

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[1] The respondents are ordered to pay the applicants N$3 245690.00, for the balance of 995 cattle impounded by respondents, with interest at rate of 20% from the 17 July 2010 to date of payment.

[2] Respondents are ordered to pay the costs of the applicants as follows:

2.1 for the hearing on 10-23 January 2011, costs to include one instructing and two instructed counsel.

2.2 for the hearing on 8-17 June 2011, costs of one instructing and one instructed counsel.

2.3 for the hearing on 11-22 July 2011 costs of one instructing counsel.

2.4 for the hearing on 12-13 March 2012 costs of one instructing counsel.

2.5 for the hearing on 17-18 September 2012 cost of one instructing counsel.

Judgment

Ndauendapo J

[1] Introduction

During May 2009, the applicants, who were born in Botswana and are descendants of the Ovaherero people, who were born in the then Germans Suid West Africa and who fled to Botswana during the 1904 uprising between the Germans and Ovaherero people entered the Nyae-Nyae conservancy area with a large number of cattle, goats, sheep and donkeys. They came from Otjomuinguindi, Gam area. They left Otjomuinguindi because their animals were dying of a poisonous plant (cymosium dichapetalum). After they entered Ongura, in the Tsumkwe constituency, the Namibian police arrested the applicants and impounded their cattle. The first respondent then took a decision to confiscate and depose of the livestock of the applicants. The applicants then brought a review application (to review the decision to confiscate their cattle). The matter was then settled between the parties and the respondents agreed to pay the applicants compensation for their cattle. However, the parties could not reach an agreement on a number of cattle confiscated. On 14 July 2010 the agreement was made an order of court. Paragraph one of the court order stated as follows:

'1 the Court notes that the matter has been settled except for one issue. 2. That the only issue between the parties is referred for hearing oral evidence, namely to determine the number of livestock seized by the respondent, apart from the livestock admitted by the respondents.'

When the matter came before me, I referred the matter for oral evidence as agreed between the parties on the limited issue, namely, the number of cattle confiscated. Before I made that ruling, senior counsel for applicants raised a *Point in limine*.

Mr Frank SC together with Mr Denk appeared for the applicants and Mr Hinda together with Mr Mostert appeared for the respondents.

The parties

[2] The **first applicant is Karandata Katjizeu** an adult male subsistence farmer who resides in Tsumke, Republic of Namibia. The other **thirty one (31) applicants** are also adult male subsistence farmers their full names appear in the review application under case no A235/2009 and are herein incorporated for ease of reference.

The first Respondent is the **Government of the Republic of Namibia** herein represented by its Cabinet, constituted in terms of article 35 of the Namibia Constitution, c/o the Government Attorneys, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek, Republic of Namibia.

The Second Respondent is the **Minister of Agriculture, Water and Forestry of the Republic of Namibia** who is cited herein in his capacity as such, c/o the Government Attorneys, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek, Republic of Namibia.

The Third Respondent is the **Minister of Safety and Security of the Republic of Namibia** who is cited herein in his official capacity as the head of the Namibia Police Force, c/o the offices of the Government Attorney, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek, Republic of Namibia.

The Fourth Respondent is the **Minister of Justice of the Republic of Namibia**, who is cited herein in her official capacity as such, c/o the offices of the Government Attorneys, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek, and Republic of Namibia.

[3] *Point in Limine*

At the commencement of the hearing, senior counsel for applicants submitted, that Mr Ndishishi, on behalf of the respondents (second), admitted the number of cattle confiscated by the respondents and that the respondents are bound by that admission. **In the interdict application[1] served on the respondents on 17 November 2009, Mr Katjizeu, in the supporting affidavit, stated that *the total number of livestock confiscated as per annexure K1 is 2177 cattle, 100 goats' and 49 sheep.'***

In his answering affidavit, Mr Ndishishi, on behalf of the second respondent stated the following:

"It is indeed correct that the police seized the cattle as set out in annexure "K1" to the applicants' paper. The respondent confiscated the said cattle in June 2009'. The admission was made on 23 November 2009.

[4] On 19 July 2010 Mr Ndishishi, on behalf of the second respondent, filed an application for condonation for the late filing of the answering affidavit to the review application. In this affidavit Mr Ndishishi stated that:

"the second respondent's answering affidavit in the urgent application was drafted by my legal representatives in great haste and over a weekend. When I saw the figure of 2177 in the founding affidavit, I trusted that it was correct. I had no basis to doubt the correctness of the figure and I did not make any enquiries as I did not deem it necessary. I also did not have personal knowledge of the number of cattle, as I did not see it at any stage and I also did not count the cattle. In fact, I was unaware of such admission until it was recently pointed out to me. I can assure the Court that I made the admission inadvertently and that it is a bona fide mistake. I humbly request the court to accept my explanation and allow me to withdraw same on the strength of my explanation as set out herein

[1] An application brought by the applicants interdicting the respondents from disposing of the livestock of applicants

before. To deny me the opportunity to withdraw the inadvertent admission will have severe financial consequence for the state"

[5] Senior counsel for applicants submitted that the attempt to explain the admission and to seek leave to withdraw same was not satisfactory and reasonable and the court should not grant leave to withdraw the admission. It should stand and the respondents should be bound by it, he contended. In support of his submissions senior counsel for applicants referred this Court to various authorities. I will refer to those authorities when I deal with the legal position.

Senior counsel for the respondents submitted that leave should be granted to withdraw the submission as it was a *bona fide* mistake. He submitted that Mr Ndishishi gave a full and satisfactory explanation as to how the admission came to be made. In support of his submissions senior counsel referred this Court to the matter of *President Versekenigs Maatskappy Bpk V Moodles 1964 (4) 109 and Brummond v Brummond's Estate 1993 (2) SA 494 (NM).*

[5] **The legal position**

In **Law of Evidence issue 6, 2008, LexisNexis, Schmidt and Rademeyer** state the following:

> ***"An admission must be made expressly or by implication. Because it may have serious consequences for the person making the admission, it must appear clearly and unambiguously that an admission was in fact made…a court was bound by an admission while it was on record."***

The Authors go on to state that:

> **"An amendment will be granted if:**
>
> ***(a) there was a reasonable explanation why the admission was made; and***

(b) the amendment does not prejudice the opposition in such a way that it cannot be rectified by an appropriate order of costs.
A reasonable explanation can indicate only that a bona fide mistake was made."

In Beck's Theory and Principles of Pleading in Civil Actions, 6th Edition it was stated that:

"An admission puts no point in issue at all but operates to eliminate the admitted fact from the issue to be tried. Its effect was to bind the party making it and he or she was bound to the extent of its inevitable consequences or necessary implication unless these are specifically stated to be denied. Thus the admission of an undertaking includes an admission of liability thereon unless the liability was specifically denied.
An admission in plea once made can be withdrawn only with leave of Court. In general the Court will require evidence of the circumstances under which the admission was made before it will allow the withdrawal. Evidence to justify a withdrawal must show a reasonable basis for making the reasonably mistaken admission and a reasonable basis as to why a withdrawal ought to be permitted."

Water Renovation (Pty) Ltd v Gold Fields of SA Ltd 1994 (2) SA 588 at 605 H-I

"…Such an admission was binding upon the party making it, i.e prohibits any further dispute of the admitted facts by the party making it in evidence to disprove or contradict it."

Brummund v Brummund's Estate 1993 (2) SA 494 (NM): at 495 the court held that:

> ***"where a party in motion proceedings wishes to withdraw an admission made in his Affidavit he is obliged to give a full and satisfactory explanation on Affidavit as to how the admissions came to be made and if they were made in error, to apply formally for their withdrawal. It is insufficient to instruct Counsel to state from the Bar that the mistake has been made and that the admissions should be ignored."***

President-Versekeingsmaatskappy Bpk v Moodley 1964 (4) SA 109 (TPD)the court held that:

'…But, though the approach is the same, the withdrawal of an admission is usually more difficult to achieve because it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might for that reason have omitted to gather the necessary evidence.

[7] Application of the law to the facts

[5] In this case the admission by Mr Ndishishi was clear and unambiguous. To state as Mr Ndishishi stated, that the 'number of cattle impounded was not the issue and therefore not really relevant to the urgent application; is besides the point. The number of cattle impounded was very relevant. The figure of 2177 cattle was clearly stated in the papers of the applicants, it appeared twice in the papers and therefore the admission was a specific one.

[8] *Mr Ndishishi stated that: 'the urgent application was drafted by my legal representatives in great haste and over a weekend. When I saw the figure of 2177 in the founding affidavit, I trusted that it was correct. I had no basis to doubt the correctness of the figure and I did not make any enquiries as I did not deem it necessary'.*

It is not clear what is meant by 'the urgent application was drafted by my legal representatives in great haste and over a weekend'. If they made the admission, Mr Ndishishi (and therefore the second respondent) is bound by that and there is no explanation from the legal representatives why the admission was made. ***In SOS at 490 C-D Kinderdoff International V Effie Lentin Architects 1993 (2) SA 481.*** *The court held that: 'where a case is conducted by a client's legal representative, such representatives are in charge of proceedings.*
A litigant is bound in the conduct of its case by counsel (within the limits of counsel's brief) and by admissions which the legal representatives may make in pleadings or in the drafting of affidavits, unless satisfactory reasons are given to show that such persons had no right to make such admissions.'

[9] Mr Ndishishi does not fully explain why he trusted that the number of cattle was correct since he did not count the cattle nor did he had personal knowledge of the number of cattle. On what was the trust based? The allegations that he had no basis to doubt the correctness of the figure and did not deem it necessary to make any enquiries are also difficult to fathom. I say so because prior to the admission being made, the number of cattle that were confiscated were in the range of 1020,1210 or 1262 and not exceeding 2000 and he was aware or should have been aware of that. Mr Ndishishi was the Permanent Secretary of the Ministry of Agriculture, Water and forestry and on 12 May 2009, prior to the admission being made, a meeting was held by the Ministry of Information and Communication Technology and according to the 'draft minutes' the purpose of the meeting was: 'Discussion on the invasion of livestock in the Nyae Nyae Conservancy by farmers from the Gam constituency. Mr Ndishishi attended that meeting. Under the heading 'Namibia Police statistics & legal implication', it is stated that: *'A total of **1020** animals were impounded.'*

[10] *In a confidential report forwarded to the Permanent Secretary Ministry of Agriculture, water and forestry (Mr Ndishishi,) by Mr Ua-Njarakana and titled, 'report on the fact finding mission on the invasion of Nyae Nyae conservancy by some Gam*

*Farmers it was stated that a total of **1210** cattle were recorded to have entered the NNC by Sunday 17th May. This report was also forwarded to Mr Ndishishi prior to the admission being made.*

In another document styled 'AGENDA MEMORANDUM TO CABINET' (on the letter head of Ministry of Agriculture, Water and forestry stamp dated 5 June 2009, under the heading 'Background & discussion' 3.1 it is stated that 'until today 4th June 2009, a total number of **1262** animals are involved.'

[11] From the above documents it is clear that Mr Ndishishi was aware or should have been aware that according to the police and the report of the fact finding mission the cattle impounded were either 1020 or 1210 or 1262 and not 2177 that he admitted and now wants the Court to grant him leave to retract. He does not fully explain why he admitted to the number of 2177, whereas the figures of the impounded cattle from the police and the fact finding mission were either 1020 or 1210. Based on the figures of the police and the fact finding mission he should have doubted the figure stated by the applicants and should have made inquiries about the number of 2177.

[12] I agree with the submission by senior counsel for applicants that to say that he made the admission inadvertently and that it was a bona fide mistake, whilst he had information about the number of cattle impounded prior to making the admission, is unreasonable and unacceptable. Senior counsel for applicants correctly submitted that: 'with that information it is totally incredulous for Mr Ndishishi to say that he had no reason to doubt and check the figure of 2177.'

[13] Having regard to the above, I am not satisfied that a full and or satisfactory and reasonable explanation was given as to why Mr Ndishishi made the admission. Leave to withdraw the admission is refused and the respondents are therefore bound by the admission by Mr Ndishishi. In the light of my ruling, I do not deem it necessary to consider the *viva voce* evidence adduced before me.

In the result, I make the following order.

[1] The respondents are ordered to pay the applicants N$3 245 690.00 for the balance of 995 cattle impounded by respondents, with interest at a rate of 20% from the 17 July 2010 to date of payment.

[2] Respondents are ordered to pay the costs of the applicants as follows:

2.1 for the hearing on 10-23 January 2011, costs to include one instructing and two instructed counsel.

2.2 for the hearing on 8-17 June 2011, costs of one instructing and 1 instructed counsel.

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2.5 for the hearing on 17-18 September 2012 cost of one instructing counsel.

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NDAUENDAPO J

Judge

APPEARANCE

FOR THE APPLICANTS SC FRANK
A DENK
P KAUTA
OF DR WEDER, KAUTA & HOVEKA

FOR THE RESPONDENTS C MONSTERT
G HINDA

INSTRUCTED BY THE ATTORNEY GENERAL OFFICE