REPORTABLE

CASE NO.: SA 07/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**First Appellant**
MINISTER OF AGRICULTURE, WATER AND FORESTRY	**Second Appellant**
MINISTER OF SAFETY AND SECURITY	**Third Appellant**
MINISTER OF JUSTICE	**Fourth Appellant**
and	
KARANDATA KATJIZEU & 31 OTHERS	**Respondents**

Coram: SHIVUTE CJ, MAINGA JA and HOFF AJA

Heard: **19 June 2014**

Delivered: **29 October 2014**

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and HOFF AJA concurring):

Background

[1] This is an appeal against the judgment of the High Court concerning a dispute about the number of cattle seized from the respondents by the first appellant. The respondents, all residents of Gam settlement, entered the Nyae

Nyae Conservancy in the Tsumkwe area with a large number of cattle, goats and sheep. For the purposes of controlling and preventing animal diseases as well as parasites in terms of the relevant provisions of the Animal Diseases and Parasites Act 13 of 1956, Namibia is demarcated into three zones, namely Free Zone, Buffer Zone and Infected Zone. A 'Free Zone', as the name implies, is free from Foot and Mouth Disease (FMD) as well as lung sickness. Gam area falls within the Free Zone. Tsumkwe settlement on the other hand is classified as a Buffer Zone, meaning that as animal diseases are known to spread from the infected zone to this area, the Buffer Zone is used to prevent FMD spreading from the Infected Zone to the Free Zone.

[2] The farmers entered the Nyae Nyae Conservancy without the necessary permits at a point where the Veterinary Cordon Fence was damaged and erected cattle kraals in the Conservancy. Consequently, they were arrested by the Namibian Police and their cattle seized by the first appellant. The farmers claim that they had decided to unlawfully enter the Buffer Zone, amongst other things, due to a poisonous plant known as *cymosium dichapetalum* that was killing their cattle. A dispute arose as to the exact number of cattle seized. The history of the dispute is succinctly summarised in the heads of argument filed on behalf of the respondents and I find it convenient to refer to that summary at length to continue giving the background information. The summary goes as follows:

> 'The respondents, all farmers from the Gam area, were arrested by the Namibian Police and their cattle seized during April and May 2009 in an area north of the veterinary cordon between Gam and Tsumkwe. The appellants refer to the area as the ‘Nyae-Nyae Conservancy’.

The respondents subsequently launched a review application to set aside the decision to confiscate and dispose of the cattle seized from them.

The review was lodged in the ordinary course given an undertaking by the appellants not to dispose of the animals pending the review.

In support of the review application a list of cattle confiscated was attached to the founding affidavit. This annexure lists a total of 2177 head of cattle.

The review was opposed by the appellants on 17 July 2009 and eventually on 3 November 2009 the record relating to the decision that was sought to be reviewed was filed.

Whilst the review was still pending and on 17 November 2009 the respondents brought an urgent application under the same case number seeking to interdict the appellants from disposing of the cattle pending the determination of the review application.

In the said interlocutory application the averments relating to the number of cattle seized were on two occasions stated as follows:

> *"*The total number of livestock confiscated as per annexure 'K1' is 2177 cattle, 100 goats and 49 sheep".

In the answering affidavit to the interlocutory application dated 23 November 2009 the Permanent Secretary of the second appellant [Mr Ndishishi] deals with the aforesaid averment as to the number of livestock seized as follows:

> "I deny that the livestock were confiscated either in May or April 2009 by the Namibian Police. It is indeed correct that the police seized the cattle as set out in annexure 'K1' to the applicants' papers. The respondent confiscated the said cattle in June 2009".

On 3 December 2009 an interim interdict was granted to respondents interdicting the appellants from disposing of the livestock.

In an answering affidavit filed out of time and dated 14 July 2010, i.e. about 8 months subsequent to the affidavit containing the admission the Permanent Secretary points out that the matter has become settled save for the number of cattle involved and then continues in an attempt to withdraw the aforesaid admission in the following terms:

> "20. As indicated herein before, the urgent application concerned an interdict to stop Respondents from slaughtering the cattle. The number of cattle impounded was not the issue and therefore not really relevant to the urgent application. It was common cause that a number of cattle were impounded and Applicants wanted to stop us from slaughtering the cattle.
>
> 21. 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.
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> 22. In fact, I was unaware of such admission until it was recently pointed out to me.
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> 23. I can assure the Court that I made the admission inadvertently and that it was 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 hereinbefore. To deny me the opportunity to withdraw the inadvertent admission will have severe financial consequences for the State."

As a result of the fact that the issues between the parties, save for the number of cattle impounded, had become settled, the Court was approached by agreement between the parties to refer this issue to oral evidence. This agreement between the parties was sanctioned by the Court on 19 July 2010 which ordered as follows:

> "That the only remaining issue between the parties is referred to oral evidence, namely to determine the number of livestock seized by the (appellants) apart from the livestock admitted by the respondents".

When the hearing for the oral arguments was about to commence, counsel for the respondents sought to argue the question whether the Court should allow the withdrawal of the admission in limine but the Court declined to deal with the matter in limine and ordered the oral evidence to proceed which then happened. Appellants' Heads of Argument state the happenings on that day as follows:

> "On 10 January 2011, when the matter was called to proceed as agreed but before the presentation of oral evidence, the respondents, despite the court order raised the issue that because there was an admission by the second appellant's Permanent Secretary on the number of cattle (and) that the respondents are bound by that admission. The legal representatives of the parties presented oral argument on this point and the court ruled that oral evidence be presented on this aspect. This is a confirmation of the court order referred to above".

In his judgment Ndauendapo J concluded with regard to the admission as follows:

> "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 (appellants) are therefore bound by the admission of Mr Ndishishi".'

[3] I may add that the High Court then found that in light of this finding, it did not deem it necessary to consider the *viva voce* evidence adduced before it. All the respondents testified and the appellants also called witnesses to testify on their behalf. It is clear from the evidence that the issue that had preoccupied the parties during the hearing concerned the number of cattle confiscated by the police. No evidence whatsoever was led regarding the application for leave to withdraw the admission made by Mr Ndishishi.

Submissions by counsel

[4] Counsel for the appellants characterised the issue for decision by this court as follows:

> '. . . the question that arises for determination is whether on the facts of this case, the court a quo was correct when it, despite the parties' agreement and its own order to have oral evidence adduced in order to determine the amount of cattle impounded by the Namibian Police, the court decided the very issue on a basis other than the oral evidence without notice or consent of the parties?'

[5] Counsel proceeded to contend, based on established principles, that a court cannot decide an issue referred to it for decision by relying on matters that were not put before it without inviting counsel to make submissions on that particular issue.

[6] Counsel for the respondents, on the other hand, argued that the High Court was correct in finding that the admission could not be withdrawn because, firstly, the ground advanced for the withdrawal of the admission in question was not well-founded, and secondly, the deponent to the affidavit in which the admission was made did not give evidence under oath in the subsequent hearing. Therefore, so it was contended, there was virtually no explanation given for the intended withdrawal.

[7] The legal principles relating to the withdrawal of an admission are common cause between the parties. Mr Hinda who argued the appeal on behalf of the appellants (together with Mr Mostert) submitted that the number of cattle admitted

was not an issue. In the submission of counsel, the issue was the respondents' allegation that there were more cattle over and above the number admitted and paid for by the appellants in terms of the settlement agreement. He continued to submit that the issue referred to oral evidence was the number of cattle over and above that which was admitted in the settlement agreement, not the admission made by Mr Ndishishi.

[8] Counsel further urged the court to look at the entire context within which the matter was heard in order to decide what issue was referred to oral evidence. He conceded that there was no order made in respect of the application for leave to withdraw the admission. He submitted in that regard that the evidence given during the oral hearing pertained to the number of cattle and not to the application for leave to withdraw the admission made by Mr Ndishishi. He contended that the manner in which the evidence was led at the hearing was not done according to normal practice. One would not, at the inception of the hearing, call 32 witnesses to demonstrate the number of cattle they own. The parties made submissions on the application for leave to withdraw the admission after which the court returned with an order that the matter must be referred to oral evidence. Thereafter the parties gave evidence pertaining to the number of cattle. The court could have resolved the question of whether or not to grant leave to withdraw the admission on the papers before it and it would not have been necessary to refer that issue to oral evidence, which in the submission of counsel strengthens the argument that the question referred to oral evidence was not the issue of the admission, but rather the issue of the number of cattle.

[9] Mr Hinda argued that the court *a quo* erred in deciding an issue that was not triable, namely the application for leave to withdraw the admission. Counsel submitted that a referral to trial was different from a referral to evidence on limited issues. In the latter case the affidavits stand as evidence to the extent that they deal with the disputes of fact; when evidence is needed to resolve a dispute, the matter is decided on the basis of the affidavits and oral evidence. In this case, the oral evidence was not considered by the court *a quo* but simply ignored.

[10] Counsel contended that the respondents entered into the settlement agreement, and that they knew that the admission referred to in the settlement agreement concerned the number of cattle already paid for by the appellants rather than the application for leave to withdraw the admission made by Mr Ndishishi. He continued to say that the respondents could not approbate and reprobate.

[11] Mr Frank, for the respondents (with him Mr P Kauta), submitted that the application for leave to withdraw the submission made by Mr Ndishishi on behalf of the appellants was not allowed at any point during the proceedings prior to the judgment in the matter being delivered. He continued to say that the matter referred to oral evidence was the application for leave to withdraw the admission by Mr Ndishishi. Counsel contended that the phrase in the settlement agreement which states that the issue between the parties must be referred to oral evidence, 'namely to determine the number of livestock seized by the respondents, apart from the livestock admitted by the respondents', refers to the admission made by Mr Ndishishi. Counsel argued that the appellants were bound to seek permission

from the court to withdraw the admission, and that when the settlement agreement was entered into, that admission had not been withdrawn. This, according to counsel, is why the agreement refers to the admission made by Mr Ndishishi.

[12] Counsel further contended that the arguments by the appellants are a belated attempt to create a misunderstanding. According to Mr Frank, the court *a quo* could not foresee that Mr Ndishishi would not testify and accordingly the judge made an order based on the issue of the admission made by Mr Ndishishi on the basis of the affidavits alone. He conceded that the evidence showed that the number of cattle proved by the respondents was fewer than those admitted on behalf of the appellants, but he added that the admission still stood as a factor to be taken into account by the court, and it was within the court's discretion whether or not to allow the application. The court in this instance refused to allow the application and accordingly that was the end of the matter.

[13] Mr Frank concluded his submissions with the contention that there was no question that the admission made on behalf of the appellants did not remain an issue because there was no basis to suggest that the respondents had accepted the withdrawal and the appellants could not continue as if it was not made.

The applicable legal principles

[14] As indicated above, counsel agreed on the legal principles pertaining to applications for leave to withdraw an admission, which have also been correctly referred to in the judgment of the High Court. Where the parties part company is on the application of those principles to the facts of the case. In summary, the

legal principles of application to the appeal are as follows. A court is bound by an admission while it is on record; an admission may be withdrawn if there is a reasonable explanation as to why the admission was made and no prejudice is suffered by the other party that cannot be rectified by an appropriate cost order;[1] an admission eliminates the admitted fact from issues to be tried; it must be justified by evidence that a reasonable basis exists for making the reasonably mistaken admission and why a withdrawal ought to be permitted;[2] the admission prohibits any further dispute of the admitted facts by the party making it in evidence in order to disprove or contradict it; the effect of the admission is that the admitted fact is not an issue to be determined by the trial court and the trial court has no jurisdiction to adjudicate upon it;[3] and a party must give full and satisfactory explanation on affidavit as to how the admissions came to be made and apply formally for their withdrawal.[4]

[15] For the purposes of this judgment, it is also important to consider the law pertaining to settlement agreements. In *Gollach Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 921, Miller JA made the following observations:

> 'In *Cachalia v Herberer & Co*., 1905 T.S. 457 at p. 462, SOLOMON, J., accepted the definition of *transactio* given by Grotius, Introduction, 3.4.2., as
>
> > "an agreement between litigants for the settlement of a matter in dispute".

[1] *Law of Evidence* issue 6, 2008, LexisNexis: Schmidt and Rademeyer.
[2] *Beck's Theory and Principles of Pleading in Civil Actions*, 6 ed.
[3] *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 at 605 and 606.
[4] *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (TPD).

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of *transactio*, agreements on doubtful matters arising from the uncertainty of pending conditions "even though no suit is then in being or apprehended". (*Gane's* trans., vol. 1, p. 452.) The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, *Civil Law*, vol. 1, para 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p 24, but which bears repetition:

> "A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing."

A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res judicata.'

[16] In *PL v YL* 2013 (6) SA 28 (ECG) at 48 the court held that:

'The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support, is in my view not something which is inconsistent with the policies underlying our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is placed on an equal footing with a judgment. It puts an end to a lawsuit and renders the dispute between the parties res judicata. It encourages the parties to resolve their disputes rather than to litigate. As Huber puts it:

> "A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits."

This was confirmed by the appeal court in *Schierhout v Minister of Justice* 1925 AD 417 at 423:

> "The law . . . rather favours a compromise . . . or other agreement of this kind; for interest *reipublicae ut sit finis litium*."
>
> [35] As a natural progression of the notion that the resolution of disputes by agreement, as opposed to litigation, is favoured and is in accordance with the policy of our law, any action by the court which has the effect of expressing a willingness to encourage the settlement of disputes must equally be favoured.'

Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893F-H adds the following:

> 'It is well settled that the agreement of compromise, also known as transactio, is an agreement between the parties to an obligation, the terms of which are in dispute, or *between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability* - see for example *Cachalia v Harberer & Co* 1905 TS 457 at 462, *Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others* 1977 (1) SA 197 (W) at 202, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921, *Trust Bank van Afrika Bpk v Ungerer* 1981 (2) SA 223 (T) at 225 and *Tauber v Von Abo* 1984 (4) SA 482 (E) at H 485-6. *It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations* - compare further for example *Jonathan v Haggie Rand Wire Ltd and Another* 1978 (2) SA 34 (N) at 38 and *Mothle v Mathole* 1951 (1) SA 785 (T) at 788G.'
> (Emphasis is mine.)

[17] A Canadian court has considered the effect of a settlement agreement and the following was stated in *George v 1008810 Ontario Ltd*, 2004 CanLII 33763 (ON LRB) in para 23:

'At common law, the effect of a settlement was to put an end to the underlying cause of action: *Halsbury's Laws of England*, 4th ed., vol. 37, para 391:

> "Effect of settlement or compromise. Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) *to put an end to the proceedings, for they are thereby spent and exhausted, (2) to preclude the parties from taking any further steps in the action except where they are provided for liberty to apply to enforce the agreed terms, and (3) to supersede the original cause of action altogether.* A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, as an estoppel by record." '
> (Emphasis is mine)

Application of the law

[18] A few details of this case must be highlighted here. The parties entered into a settlement agreement. The appellants have in terms of that agreement paid a certain amount to the respondents as compensation for the seizure of 1182 cattle. The respondents maintained that they were entitled to payment in respect of 2177 cattle. The parties then, according to the respondents' own written submission in the High Court which appears contrary to the position now adopted by them on appeal ' . . . agreed to refer to oral evidence the dispute concerning 995 cattle. As, Mr Ndishishi put it, in monetary terms the dispute concerns a sum of N$3 245 690,00 due to the Applicants'.

[19] The appellants' written submissions in the High Court stated in para 8 that '(t)he matter, except for one issue, became settled between the parties. The farmers were paid for the cattle impounded and the total number of cattle

impounded was based on the version of the respondents (appellants in this court), to wit - 1210 cattle. The amount per head of cattle was an agreed rate. The issue that remained for consideration and decision was the exact number of cattle impounded. The applicants (respondents in this court) alleged that 2177 were impounded, whereas respondents (appellants in this court) contend 1210. Evidence was presented by both sides as to the number of cattle impounded and the court is now saddled with the onerous task, if at all possible, to determine the number of cattle impounded. If the determination remains impossible, it is submitted that the court should grant absolution from the instance'.

[20] I will approach the issues in the appeal in the following manner: (1) which issue was referred for oral evidence? and (2) did the High Court err in coming to its conclusion on the issue?

Which issue was referred to oral evidence?

[21] As indicated above, the confusion that emerged emanated from the judgment of the High Court, which heard the oral evidence pertaining to the number of cattle and then decided the matter based on the application for leave to withdraw the admission made by Mr Ndishishi on behalf of the appellants. What added to this anomaly was that the settlement agreement - which was made an order of the court - stated that the matter should be referred to oral evidence apart from the admission made by the appellants. There were two admissions according to the different submissions by counsel, namely the admission made by Mr Ndishishi and the admission made in the settlement agreement in terms of which the appellants have made payment to the respondents.

[22] Mr Frank advanced arguments in support of his submission that the admission referred to was the admission made on behalf of the appellants by Mr Ndishishi, which concerned 2177 cattle. He submitted that the admission made was never withdrawn, and that there was no agreement between the parties that it should be withdrawn. Nor was there an order of the court withdrawing the admission, and accordingly it was appropriate for the court *a quo* to decide the matter based on that admission.

[23] Mr Hinda on the other hand contended that the admission referred to concerned the number of cattle admitted in the settlement agreement, in terms of which a certain amount had already been paid to the respondents. As indicated above, he urged this court to decide this issue by having regard to the context within which the issues were heard in order to decide what was referred to oral evidence. He submitted in the High Court that the parties agreed in the court order that the contest concerned the number of cattle and the respondent could not be allowed to approbate and reprobate.

[24] It is clear from the heads of argument filed by the respondents in the court below (which we especially requested in light of the dispute over the precise issue referred to oral evidence) that the parties understood that the matter which was referred to oral evidence was the number of cattle, and not the issue of whether leave to withdraw the admission made by Mr Ndishishi should be allowed. Furthermore, I agree with the submission made by counsel for the appellants that the manner in which the proceedings in the court *a quo* was conducted is a clear indication of an intention to determine the number of cattle over and above that

which was already paid by the appellants to the respondents. The record utterly bears out this contention.

[25] At the commencement of the oral hearing, the respondents began leading evidence, which would not have been the case if the issue referred to oral evidence was the application for leave to withdraw the admission. Had this been the case, the appellants would have borne the duty to begin.

[26] Mr Frank further argued that the admission made by Mr Ndishishi had not been withdrawn and could only be withdrawn with the leave of the court. He contended that it would have been possible to decide the issue on the affidavits filed. He also submitted that there was no question of the respondents agreeing to the withdrawal of the admission.

[27] Firstly, the question here is not whether an admission can be withdrawn by a settlement agreement, but rather whether a settlement agreement puts an end to the entire proceedings and its cause of action, and substitutes it with the terms of the settlement agreement. This is clear from the authorities cited. Once the parties have entered into a settlement agreement, all issues previously in dispute become *res judicata* as the proceedings come to an end. Each party recedes from his previous position and concedes something different. The effect of this in the present case is that the dispute between the parties, including the admission made by Mr Ndishishi, was no longer an issue to be adjudicated. As Mr Hinda put it, the issue of the application for leave to withdraw the admission 'is no longer triable'. The admission which is referred to in the settlement agreement was understood by

the parties as that made in the settlement agreement, and in terms of which payment was made by appellants.

[28] Secondly, the question before us is not whether the parties have by agreement withdrawn the admission. The parties have voluntarily entered into a settlement agreement and accepted the natural consequences of such agreement which is, as set out above, that the parties have substituted the proceedings before the court *a quo* with the settlement agreement, which disposed of all issues except the one remaining in dispute. The submission by Mr Frank that the admission by Mr Ndishishi could only be withdrawn with leave of the court *a quo,* and the authorities he cited to the effect that an admission eliminates the admitted fact from dispute is legally correct. However, this is so only in respect of the proceedings that were subsequently replaced by the settlement agreement. As already noted, by concluding an agreement or compromise the parties have receded from their previous positions and conceded something, either by diminishing their claim or by increasing their liability. What has been referred to oral evidence by agreement of parties as sanctioned by the court order is the determination of the number of livestock seized by the appellants over and above the number admitted by the appellants. I agree with Mr Hinda that the respondents cannot be allowed to approbate by accepting payment for the number of cattle admitted by the appellants, yet now seeking to reprobate by resurrecting the admission made by Mr Ndishishi.

[29] As previously indicated, the authorities emphasise the importance of settlement agreements in litigation. It is reiterated here that the settlement of

disputes without recourse to adjudication is generally favoured by our courts. As such, a higher premium should be placed on these agreements.

Did the High Court err in coming to its conclusion?

[30] In light of the above, it is clear that the court below should have reached a conclusion on the oral evidence and made a ruling only on the single issue referred to it without reverting to the issue that has become *res judicata* in light of the settlement agreement.

[31] I accordingly conclude that the appeal should succeed and the matter be referred back to the High Court for that court to decide on the number of cattle over and above those admitted by the appellants in the settlement agreement by having regard to the oral evidence.

Costs

[32] The respondents have asked only for costs of one instructed and one instructing counsel, regardless of the fact that two counsel were instructed. I did not hear the appellants make a similar submission. However, I do not consider this matter sufficiently intricate or of such a complex nature as to necessitate the services of two instructed counsel. Accordingly, I would propose a costs order to include the costs of one instructed and one instructing counsel.

Order

[33] The following order is made:

1. The appeal is allowed.

2. The matter is referred back to the High Court for the determination of the number of cattle over and above those admitted by the appellants in terms of the settlement agreement by having regard to the oral evidence.

3. The respondents are ordered to pay the appellants' costs of the appeal, such costs to include the costs of one instructed and one instructing counsel.

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SHIVUTE CJ

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MAINGA JA

_____
HOFF AJA

APPEARANCES

APPELLANT:	G S Hinda (with him C Mostert) Instructed by Government Attorney
RESPONDENTS:	T J Frank SC (with him P Kauta) Instructed by Dr Weder, Kauta and Hoveka Inc