

# The right to water in Botswana: A review of the *Matsipane Mosetlhanyane* case

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## Summary

*The Botswana Court of Appeal has recently pronounced on the right of the Basarwa, resident in the Central Kalahari Game Reserve, to water. This case note looks at this decision of the Court of Appeal pertaining to the refusal of the government to allow the Basarwa to recommission, at their own expense, an existing borehole. It examined the arguments that were placed before both the High Court and the Court of Appeal by the parties as well as the decisions of the courts. The note provides insight into the possible implications of the decision on the judicial enforcement of socio-economic rights in Botswana.*

## 1 Introduction

On 27 January 2011, the Court of Appeal of Botswana handed down judgment in the case of *Matsipane Mosetlhanyane v The Attorney-General of Botswana*.<sup>1</sup> The appellants emerged victorious after their challenge to a decision by the government to deny them access to water. However, the victory was not theirs alone. It was a victory for the rule of law, the protection of human rights in Botswana and, most importantly, the judicial enforcement of socio-economic rights within a legal framework that does not adequately provide for the protection of such rights.

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<sup>1</sup> *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana*, Court of Appeal, CALB-074-10 (unreported).

The Court observed that the case was ‘a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert where the appellants and their Basarwa community live’.<sup>2</sup> The decision has since been described by the international media as a step in the right direction and as a historic legal case against the Botswana government.

Events preceding this decision can best be described as dramatic and torturous to the appellants. Whilst the appellants and their families were suffering from thirst because of the government, the government was engaged in lengthy debates with Survival International (SI), a London-based international non-governmental organisation (NGO). SI called on tourists to boycott Botswana, hoping that a call for a tourism boycott of Botswana would pressure government to reverse its decision. The Khama administration was not moved and accused SI of ‘embarking upon a campaign of lies and misinformation’, calling the organisation ‘modern day highway robbers’.<sup>3</sup> The government strongly denied that cutting off the only water supply of the appellants in the Central Kalahari Game Reserve (CKGR) was one of the many tactics used by the Botswana government to stop the Basarwa from returning to the CKGR.

This commentary traces this case from the High Court to the highest court in Botswana, the Court of Appeal. It starts by highlighting the arguments that were raised by both parties at the High Court and the judgment by the High Court. This is followed by a discussion of the Court of Appeal’s decision. It is through a brief critique of the decision that I highlight why it should be celebrated. This discussion ends with a few concluding remarks on the issues highlighted.

## 2 *Matsipane Mosetlhanyane and Others v The Attorney-General of Botswana*<sup>4</sup>

### 2.1 Applicants’ case

The applicants in the case sought, among others, an order declaring that the refusal by the government to permit them to recommission, at their own expense, the borehole in the CKGR, was unlawful and unconstitutional.<sup>5</sup> The borehole was dismantled and sealed by the government following the relocation of the Basarwa from the CKGR and the decision

<sup>2</sup> *Mosetlhanyane* (n 1 above) para 4.

<sup>3</sup> *The Botswana Gazette* ‘SI accuses Khama of racism’ 15 December 2010 [http://www.gazettebw.com/index.php?option=com\\_content&view=article&id=8299:si-accuses-khama-of-racism&catid=19:northcast&Itemid=2](http://www.gazettebw.com/index.php?option=com_content&view=article&id=8299:si-accuses-khama-of-racism&catid=19:northcast&Itemid=2) (accessed 24 March 2011); *Afrol News* ‘Botswana outraged over diamond tourism boycott’ <http://www.afrol.com/articles/36983> (accessed 24 March 2011).

<sup>4</sup> *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana* High Court decision MAHLB-000393-09 (unreported).

<sup>5</sup> *Mosetlhanyane* (n 4 above) para 1.

of the Botswana High Court that the government was under no obligation to provide essential services to those Basarwa who opted to remain in the Reserve in the *Sesana and Others v The Attorney-General* case.<sup>6</sup> The applicants also sought an order declaring as unlawful and unconstitutional the refusal by the government to confirm that on the payment of the specified fees it would issue permits under the Regulation of National Parks and Game Reserve Regulations 2009, allowing reputable contractors appointed by the applicants to enter the CKGR to recommission the borehole for their domestic use.<sup>7</sup> The applicants further sought an order declaring that the refusal by the government to confirm that they had the right to sink a borehole at their own expense and use water therefrom for domestic purposes in accordance with section 6 of the Water Act, was unlawful and unconstitutional.<sup>8</sup>

The presiding judge, Walia J, stressed that he aligned himself with the majority decision in the *Sesana* case, in particular that the termination by the government of basic and essential services within the CKGR was neither unlawful nor unconstitutional and that the government was under no obligation to restore the provision of such essential services to the applicants in the CKGR.<sup>9</sup> He further acknowledged that the case was in essence a sequel to the decision of the High Court in the *Sesana* case.

The upshot of the litigation in the *Mosetlhanyane* case was that the applicants suffered a great deal of shortages of water during the dry season as melons and other succulents did not provide sufficient water. Further, that even in the rainy season, little rain fell in the Reserve. It was the applicants' argument that alternative sources of water were highly inconvenient as they were almost 40 kilometres from where the applicants stayed. The applicants contended that, even though the water could be transported into the Reserve from the outside, the journey to fetch water was exhausting as it could only be done over 'harsh, desolate, rugged and difficult terrain', likely to result in 'frequent breakdowns'.<sup>10</sup> It was also argued that the case was about the applicants' fundamental right to have access to water and their right to human dignity, as access to a reliable source of water was bound to enormously improve both their physical and mental state of health, particularly of the young, the elderly and the infirm, all of whom are citizens of Botswana whose well-being must be of concern to the government.<sup>11</sup>

Another argument was that the government's refusal (tacit or express) to permit the applicants to use the borehole indicated a

<sup>6</sup> *Roy Sesana & Others v The Attorney-General* MISCA 52 of 2002, reported as *Sesana & Others v The Attorney-General* 2002 1 BLR 452 (HC). For the purpose of the present article, reference will be made to the original judgment.

<sup>7</sup> *Mosetlhanyane* (n 4 above) para 2.

<sup>8</sup> *Mosetlhanyane* (n 4 above) para 3.

<sup>9</sup> *Mosetlhanyane* (n 4 above) paras 9-10.

<sup>10</sup> *Sesana & Others* (n 6 above) 761.

<sup>11</sup> Para 12 of the applicants' written submissions (on file with author).

pattern of behaviour in which the government has shown itself ready to use any means at its disposal to prevent them from exercising their legal and constitutional right to live in the Reserve.<sup>12</sup> This was in light of the fact that the applicants were willing and able — without taxing Government resources — to recommission the borehole.<sup>13</sup> It was also argued that the government's refusal to permit the applicants to use the existing borehole violated their constitutional right not to be subjected to inhuman or degrading treatment.<sup>14</sup> With respect to this argument, the applicants relied on section 7 of the Constitution, which provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. The applicants argued that when melons are scarce, they spend a lot of time looking for roots from which to extract a few drops of water, and that a lack of water makes them prone to sickness. They suffer from constipation, headaches or dizzy spells. They lack energy and spend many hours in their huts. Mothers lack milk to feed their children. Often they do not have water with which to clean themselves.<sup>15</sup> In an attempt to show how inhuman and degrading the refusal by the government to allow them to sink the borehole was, the applicants pointed out that<sup>16</sup>

[t]he government takes active steps to ensure that animals in the Reserve are given the water they require at the same time as [sic] it refuses to allow the applicants to make their own arrangements to the same end. They are expected to grub for roots or beg from passing tourists while animals use watering holes. This is to lower in estimation or dishonour the applicants, both in their own eyes and in the eyes of others. Their need for water is regarded as less deserving of respect than that of wild animals. This constitutes degrading treatment because the applicants are thereby humiliated or debased. No respect is shown for their human dignity.

To support this assertion, reference was made by the applicants to several international instruments<sup>17</sup> as well as several foreign decisions<sup>18</sup> that sought to elaborate on the normative content of this right.

<sup>12</sup> *Mosetlhanyane* (n 4 above) para 30.

<sup>13</sup> *Mosetlhanyane* (n 4 above) para 31.

<sup>14</sup> *Mosetlhanyane* (n 4 above) para 63.

<sup>15</sup> Para 80 of the applicants' written submissions (on file with author).

<sup>16</sup> Paras 83–84 of the applicants' written submissions (on file with author).

<sup>17</sup> UN General Assembly Resolution 54/175; General Comment 15 of the UN ESCR Committee; art 24(2) UN Convention on the Rights of the Child (CRC); art 9 International Law Association Rules on the Equitable and Sustainable Use of Waters, 9th Draft <http://www.ilahq.org/pdf/Water%20Resources/Draft%20Rules9November2003.pdf> (accessed 31 March 2011); art 14(2)(h) UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); art 1(2) International Covenant on International Civil and Political Rights (ICCPR).

<sup>18</sup> *V v United Kingdom* [1999] 30 EHRR 121 175; *Tyrer v United Kingdom* [1979-80] 2 EHRR 1 11; *McNab & Others v Minister of Home Affairs* [2007] NAHC 50; *The City of Johannesburg & 2 Others v Lindiwe Mazibuko & 4 Others* (489/08) [2009] ZASCA 20; 2009 3 SA 592 (SCA); 2009 8 BCLR 791 (SCA).

It is worth noting that, central to the applicants' case, were the provisions of the Water Act,<sup>19</sup> in particular sections 6 to 9 of the Act.<sup>20</sup> The applicants argued that the totality of the sections — with greater weight placed on section 6 of the Water Act — conferred upon them the unfettered right to sink one or more new boreholes in the CKGR and to abstract and use water therefrom for domestic purposes without having to obtain water rights from the Water Apportionments Board (Board).<sup>21</sup>

## 2.2 Respondent's case

The respondent's case was stated in brief terms. Any inconvenience caused by the distance between the settlements and the nearest water source outside the CKGR was because of the applicants' choice 'to live that kind of life since they have chosen to stay where there is no water'<sup>22</sup> and that 'whatever hardships the applicants are likely to face in the exercise of their choice, such hardships are of the applicants' own making'.<sup>23</sup> The respondent further submitted that the government was neither indifferent nor callous in its policies, as it made water, clinics, schools and other essential services available outside the Reserve and that nothing prevented the applicants from utilising these facilities and services.<sup>24</sup> It was also argued that 'those resources that are provided outside the CKGR enable the government to meet both its obligations to respect the rights of its people, while still realising its conservation objectives'.<sup>25</sup>

All in all, the respondent's case was that the applicants had become victims of their own foolhardiness by deciding to settle an inconveniently long distance from the services and facilities provided by the government.<sup>26</sup>

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<sup>19</sup> Cap 34:01.

<sup>20</sup> Sec 6(1) of the Act appears in Part II of the Act and provides that '[s]ubject to the provisions of this Act and of any other written law, the owner or occupier of any land may, without a water right – (a) sink or deepen any well or borehole thereon and abstract and use water therefrom for domestic purposes, not exceeding such amount per day as may be prescribed in relation to the area where such well or borehole is situated by the Minister after consultation with any advisory board established in pursuance of section 35 in respect of that area'. Sec 9(1) provides that '[s]ubject to the foregoing provisions, no person shall divert, dam, store, abstract, use or discharge any effluent into public water, or for any such purpose construct any works, except in accordance with a water right granted under this Act'.

<sup>21</sup> *Mosetlhanyane* (n 4 above) para 32; paras 22-38 of the applicants' written submissions (on file with author).

<sup>22</sup> *Mosetlhanyane* (n 4 above) para 34.

<sup>23</sup> As above.

<sup>24</sup> *Mosetlhanyane* (n 4 above) para 47.

<sup>25</sup> *Mosetlhanyane* (n 4 above) para 53.

<sup>26</sup> *Mosetlhanyane* (n 4 above) para 48.

The respondent further contended — in their papers — that section 6 of the Water Act does not give the applicants an absolute right to be given water rights, since the granting of water rights under section 6 is subject to the provisions of the Water Act itself and any other written law. However, during final submissions in court, counsel for the respondent concurred with the applicant's counsel that, in terms of section 6 of the Water Act, any owner or occupier of land is entitled, without holding a water right, to sink boreholes or otherwise abstract water.<sup>27</sup>

### 2.3 Court *a quo*'s response

After restating the arguments raised by the parties, Walia J came to the conclusion that it was indeed easy to resolve the applicants' argument that the government's refusal to permit the applicants to use the existing borehole violates their constitutional right not to be subjected to inhuman or degrading treatment. His Lordship concluded this on the basis that the aforesaid argument did not form part of the case that the respondent was required to meet. This was because — the learned judge highlighted — the orders sought in the notice of motion made no mention whatsoever of the government being in violation of the applicants' constitutional rights relating to the protection from inhuman treatment, enshrined in section 7 of the Constitution of Botswana. To that end, the respondent was not given a proper opportunity to respond to the issue of inhuman and degrading treatment. Citing an earlier decision by Masuku J,<sup>28</sup> the learned judge came to the conclusion that it was undesirable pleading practice to spring on one's opponent in motion proceedings, at the stage of submissions, what was not properly canvassed in the notice of motion and founding affidavits. Hence, the issue of inhuman and degrading treatment was an afterthought and, bound by their pleadings, the applicants could not seek to establish what had not been pleaded.

Further, it was pointed out by the Court that there was another compelling reason why the argument on inhuman and degrading treatment should fail. This, according to the Court, was because the applicants in their arguments ignored altogether their unequivocal acknowledgment that the government is under no obligation to provide any essential service to them.<sup>29</sup> The Court held that such an acknowledgment on the part of the applicants meant that the government was under no obligation to provide an essential service, *a fortiori*; the government was under no obligation to facilitate any such service.

<sup>27</sup> *Mosetlhanyane* (n 4 above) para 49.

<sup>28</sup> *Ikgopoleng Shabane & 25 Others v Kereng Solly Mogami & The Attorney-General* 2005 (1) BLR 343 345.

<sup>29</sup> *Mosetlhanyane* (n 4 above) para 49.

The Court pointed out that it was indeed sympathetic to the respondent's argument that, having chosen to settle at an uncomfortably long distant location, the applicants have brought upon themselves the hardships they were now facing. The learned judge went on to point out that, since the applicants enjoyed the right to reside in the CKGR, their right to reside was not confined to a specified area. Hence, there was no reason why they could not opt to reside in an area closer to where water and other services were available. The Court then proceeded to duly acknowledge the literature and authorities cited in support of the right to water, but highlighted that same would have had validity if there was an obligation on the part of the government to provide water where the applicants chose to stay in the CKGR.<sup>30</sup> The learned judge concluded that the government was under no such obligation and that it had met its obligations as regards accessibility to water by providing adequate supplies outside the CKGR.<sup>31</sup> The inconvenience suffered by the applicants in accessing that supply could not, in the Court's view, be described as inhuman or degrading treatment.<sup>32</sup>

The learned judge then went on to discuss the issue of water rights in Botswana under the Water Act. After considering the various provisions of the Water Act, the Court came to the conclusion that the provisions of sections 9 and 6 were clearly mutually contradictory.<sup>33</sup> According to the findings of the Court, if section 6 of the Act is construed as contended by the applicants, section 9 becomes superfluous.<sup>34</sup> Accordingly, the interpretation of section 6 by the applicants was clearly inconsistent with the requirement of authorisation provided for in section 9 of the same Act.<sup>35</sup> It is on that basis that the Court rejected both parties' counsel's submissions that the applicants had an unfettered right to abstract water. The Court then resolved to apply the rules of interpretation to address the inconsistency between the two sections. In the end, the 'obvious' result was that section 9 prevailed. Hence, in the Court's opinion, any person wishing to abstract water could do so only by authorisation as provided for in section 9 as read with section 15 of the Water Act.<sup>36</sup>

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<sup>30</sup> *Mosetlhanyane* (n 4 above) para 77.

<sup>31</sup> As above.

<sup>32</sup> *Mosetlhanyane* (n 4 above) 19.

<sup>33</sup> *Mosetlhanyane* (n 4 above) para 92.

<sup>34</sup> As above.

<sup>35</sup> *Mosetlhanyane* (n 4 above) para 102.

<sup>36</sup> *Mosetlhanyane* (n 4 above) para 104.

### 3 Court of Appeal's decision<sup>37</sup>

When the matter finally reached the Court of Appeal, the five-man court was unanimous in its judgment. In a judgment that has been described in some quarters as 'brilliantly' progressive, the Court of Appeal made several findings that may bring relief to the appellants.

The three main issues that were put before the Court of Appeal by the appellants were that the court *a quo* erred in holding that the appellants required the grant of an appropriate 'water right' by the Water Apportionment Board under the Water Act (Cap 34:01) before they can sink one or more boreholes in the Central Kalahari Game Reserve;<sup>38</sup> secondly, that the appellants required the grant of a water right under the same Act to abstract water from a borehole that already existed at a place inside the Reserve, called Mothomelo;<sup>39</sup> and further that the Court erred in holding that the respondent's attempts to deny them access to the borehole did not amount to inhuman or degrading treatment prohibited by the Constitution of Botswana.<sup>40</sup>

In relation to the appellants' water rights under the Water Act, in particular the application of sections 6 and 9 of the Act, the Court held that, whilst it was clear that section 6 was subject to the provisions of the Act, section 9 was plainly subject to the provisions of section 6. Thus, the provisions of section 6 overrode those of section 9. The appellants' submission was therefore that, according to the scheme of the Act, any person who lawfully occupies or owns land has a right to sink a borehole in it under section 6(1)(a), by virtue of his occupation or ownership of that land. The Court accepted the appellants' submissions with respect to the issue and pointed out that the applicants were not requesting that they be granted a water right. Instead, they were asking for permission to use the existing or alternative borehole at their own expense and not at government's expense.

The respondent further argued that the borehole at Mothomelo was in fact not a borehole but a 'prospecting hole', which fell outside the definition of a borehole as per section 2 of the Water Act.<sup>41</sup> To that extent, the argument continued, the water extracted from the 'prospecting hole' qualified as public water because it was underground water. The Court rejected both arguments and proceeded to hold that water being a 'premium' in Botswana, lawful occupiers of the land, such as the appellants, must be able to get underground water for domestic purposes. That, in the Court's opinion, was the rationale behind the provisions of section 6 of the Water Act. With respect to the

<sup>37</sup> *Mosetlhanyane* (n 1 above).

<sup>38</sup> *Mosetlhanyane* (n 1 above) para 1.

<sup>39</sup> As above.

<sup>40</sup> As above.

<sup>41</sup> Sec 2 provides that 'a "borehole" does not include any borehole constructed in prospecting for minerals'.



second argument raised on behalf of the respondent, the Court held that it was common cause that prospecting for minerals had ceased a long time ago and that the borehole had been closed thereafter. It underscored the fact that the borehole was converted to use for domestic purposes for the benefit of the appellants and other communities residing at Mothomelo.

The Court was thus able to conclude, without hesitation, that the appellants, being the lawful occupiers of the land, did not require a water right for the use of the borehole.<sup>42</sup> The inescapable conclusion was therefore that the government's refusal to allow the appellants to use the borehole for domestic purposes was devoid of any legal basis.

It is at this point necessary to point out that the respondent further argued that the *Sesana* case held that the government had complied with its constitutional obligations towards the Basarwa resident in the CKGR; further, that the government was thus under no obligation to restore the provision of basic and essential services to the residents of the CKGR. This was in fact a point which the appellants conceded. The Court highlighted three issues or factors that made this assertion by the respondent untenable. Firstly, in the *Sesana* case, the Court did not deal with the issue that the Court was tasked with, namely, the appellants' right to water for domestic purposes in terms of section 6 of the Water Act at their own expense. Secondly, there was no finding in the *Sesana* case that the government was, notwithstanding section 6, entitled to seal the Mothomelo borehole as it did. Thirdly, and most important, was the fact that, as the Court had held that the appellants did not need a water right to use the borehole at Mothomelo, the appellants were thus in the same position as the original applicants in the *Sesana* case.

I have argued elsewhere that the *Sesana* case may be used as authority for the proposition that economic, social and cultural rights (socio-economic rights) are not justiciable in Botswana.<sup>43</sup> Indeed, the argument that was raised by the respondent in the *Mosetlhanyane* case, that the government was under no obligation to provide the Basarwa living in the CKGR with water or essential services, fortifies that assertion. Through the Court's findings in that case, the respondent argued that the government was under no obligation to provide the appellants with water services.

Perhaps the most interesting constitutional issue placed before the Court was the appellants' third and last ground of appeal, namely, that the Court erred in holding that the respondent's attempts to deny

<sup>42</sup> *Mosetlhanyane* (n 1 above) para 18.

<sup>43</sup> BR Dinokopila 'The judicial enforcement of socio-economic rights in Botswana and the case of Basarwa in the Central Kalahari Game Reserve (CKGR)', paper presented at the ANCL-RADC Annual Conference 'The Internationalisation of Constitutional Law' Rabat, Morocco, 20 January 2011 <http://www.ancl-radc.org.za/annual-ancl> (accessed 21 March 2011).

them access to the borehole did not amount to inhuman or degrading treatment prohibited by the Constitution of Botswana. With respect to this issue, the Court highlighted the fact that the appellants' account of the human suffering due to a lack of water was uncontested;<sup>44</sup> further, that the appellants and other members of the various communities in the Reserve did not have enough water to meet their needs,<sup>45</sup> and that the absence of water frequently made them 'weak and vulnerable to sickness'.<sup>46</sup>

Rejecting the court *a quo*'s finding that the issue was not pleaded and as such could not be addressed by the Court, Ramodibedi J, writing the judgment on behalf of the Court, held that the issue relating to section 7(1) of the Constitution was sufficiently raised and referred to in the pleadings to justify consideration by the Court. It was argued on behalf of the appellants that the government's refusal to grant the appellants to use, at their own expense, the Mothomelo borehole, or any other borehole in the CKGR for that matter, for domestic purposes, amounts to inhuman and degrading treatment. It was the appellants' argument, therefore, that the actions of the government were contrary to the provisions of section 7 of the Constitution. Section 7(1) of the Constitution provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. The inhuman or degrading treatment that the appellants complained of was the government's refusal to allow them to make their own arrangements to recommission the Mothomelo borehole. According to the appellants, that was part of the larger scheme of things as the government was convinced that the refusal to grant them access to water would compel them to leave the Reserve.<sup>47</sup> The Court in the main noted that the appellants' account of the human suffering at Mothomelo was not contested by the respondent.<sup>48</sup>

In particular, the Court noted that it was not contested that very often the appellants and other members of the various communities resident in the Reserve did not have enough water to meet their needs. As a result, they depended on water melons which were either scarce or non-existent. The Court further noted that the appellants and those communities resident in the Reserve spent a great deal of their time in the bush looking for a root or other edible matter from which they could extract a few drops of water.<sup>49</sup> Further to the above, the Court came to the conclusion that the absence of water frequently made the appellants and those living in the Reserve weak and vulnerable to sicknesses as some of them suffered from constipation, headaches or

<sup>44</sup> *Mosetlhanyane* (n 1 above) para 21.

<sup>45</sup> *Mosetlhanyane* (n 1 above) para 8.

<sup>46</sup> As above.

<sup>47</sup> Para 27 appellants' heads of argument.

<sup>48</sup> *Mosetlhanyane* (n 1 above) para 8.

<sup>49</sup> As above.

bouts of dizziness. It was also concluded that children often did not sleep well and cried a great deal, that they did not have enough water to cook or clean themselves with, and that an official report described them as 'very dirty, due to lack of adequate water for drinking and other domestic use'.<sup>50</sup>

In reaction to the above, the Court firstly accepted the appellants' submissions that, unlike other rights contained in section 3 of the Constitution, the right contained under the section 7 was absolute, unqualified and was not subject to any limitations. The judge then proceeded to hold that:<sup>51</sup>

I approach this matter on the basis of the fundamental principle that, whether a person has been subjected to inhuman or degrading treatment, involves a value judgment. It is appropriate to stress that in the exercise of a value judgment, the Court is entitled to have regard to international consensus on the importance of access to water.

It was in light of this statement that the learned Judge proceeded to make reference to the United Nations (UN) Committee on Economic, Social and Cultural Rights Report on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In essence, the report underscored the importance of the human right to water to the dignity of a person and the fact that it is indeed a prerequisite to the realisation of other human rights.<sup>52</sup> It was also highlighted that, on 10 July 2010, the UN General Assembly recognised the right to safe and clean drinking water as a fundamental human right that is essential for the full enjoyment of life and all human rights.<sup>53</sup> The UN Resolution on the right to a safe and clean environment was followed by the Human Rights Council's Resolution on the Right to Water and Sanitation, affirming that water and sanitation are human rights.<sup>54</sup> The Human Rights Council's Resolution essentially linked the right to drinking water and sanitation to existing treaty provisions, and thus to General Comment 15 on the right to water that was adopted by the ESCR Committee, defining the implicit right to water under ICESCR.

## 4 Critique

The decision of the Court of Appeal is indeed a welcome development in Botswana and should be celebrated in at least three major respects.

<sup>50</sup> As above.

<sup>51</sup> *Mosethanyane* (n 1 above) para 16.

<sup>52</sup> *Mosethanyane* (n 1 above) para 16.

<sup>53</sup> *Mosethanyane* (n 1 above) para 19; UN Resolution A/RES/64/292 on the Human Right to Water and Sanitation.

<sup>54</sup> UNHRC Resolution (A/HRC/15/L.14) on Human Rights and Access to Safe Drinking Water and Sanitation.

Firstly, it should be highlighted that the decision is important in so far as it indicates the independence of the judiciary in Botswana. It is beyond doubt that the issue of the Basarwa living in the CKGR is heavily contested, pitting the government of Botswana against local NGOs, such as Ditshwanelo — The Centre for Human Rights (Ditshwanelo), and international NGOs, such as Survival International (SI). The government feels strongly regarding the relocation of the Basarwa from the Reserve and the provision of essential services within the Reserve. It is indeed laudable that the Court has taken this stance with regard to the issue of access to water by communities residing within the CKGR. By its decision it has shown that, indeed, the judiciary in Botswana is committed to the protection of human rights as enshrined in the Constitution.

Secondly, the decision may be celebrated for the reason that it may have brought succour not only to the appellants, but also to the Basarwa who are resident in the CKGR. As noted above, the appellants suffered a great deal as a result of the decision by the government to seal the borehole that they used as their only source of water. To that extent, the decision is a restatement of the sanctity of the appellants' rights. However, the relief mentioned above will only materialise in the event that the litigants are able to find the funds to recommission the borehole at issue. This is because the Court held that the applicants should, at their own expense, be allowed to have access to the borehole. Perhaps the most important feature of the Court's decision is the fact that it authoritatively states that the right to water is indeed an internationally recognised fundamental right.

The decision could have benefited from the jurisprudence of other jurisdictions,<sup>55</sup> and was an opportunity for the Court to have further explained the normative content of the right to water in Botswana. Making reference to only two non-binding documents was insufficient and is likely to portray the decision as hurried. Decisions such as the present one no doubt serve many functions and, in particular, are meant to provide redress to the parties that have approached the court for redress.<sup>56</sup> However, it should always be noted by the learned justices that such decisions should strive and endeavour to bring certainty to a particular area of law. This they should do by effectively, decisively and eloquently elaborating on the principles of the law in the process of settling a particular legal dispute. It is admitted that the decision

<sup>55</sup> Eg *City of Johannesburg* (n 18 above); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W); *Sawhoymaxa Indigenous Community v Paraguay*; *Subhash Kumar v State of Bihar* AIR 1991 SC 420; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

<sup>56</sup> See CM Fombad 'Highest courts departing from precedents: The Botswana Court of Appeal in *Kweneng Land Board v Mpofu & Nonong*' (2005) 1 *University of Botswana Law Journal* 128, highlighting that '[a]ppellate decision making has at least two main functions: firstly, to dispose of the case at hand, and secondly to affirm and shape the law for future cases in the course of disposing of the case in hand'.

has achieved its first and, perhaps, main purpose by affording relief to the litigants. However, the same cannot be said about the aforementioned duty of the Court to elaborate and develop its jurisprudence in so far as the right to water is concerned. It is therefore regrettable that the Court failed to elaborate, perhaps by way of making reference to judicial decisions on the issue, on the value judgment that it adopted in deciding the present appeal. Ramodibedi J pointed out that he was inclined to have regard to international consensus on the importance of access to water. Unfortunately, the Court did not take advantage of this opportunity to discuss the matter in the light of international instruments and decisions on the right to water aforementioned. To that end, it is impossible to pass off this decision, as regards the right to water, as one that finds its basis in international human rights law and as applicable to every citizen in Botswana whose right to water is curtailed or threatened. What the Court did was to ascertain the consensus of the international community and did not proceed to apply international law providing for the right to water. The Court did not even elaborate on the approach of the value judgment it had adopted. Notwithstanding that, the decision remains to be celebrated because of its international relevance.

Thirdly, and most importantly, the decision uses civil and political rights to enforce socio-economic rights. That is, the appellants' right to water was judicially enforced through section 7 of the Constitution which proscribes inhuman and degrading treatment. Apart from the fact that the Court held that the appellants had a water right by virtue of them being lawful occupants in the CKGR, the Court was prepared, and indeed held, that government's decision amounted to inhuman and degrading treatment. This is a welcome development, considering that Botswana falls in the category of states with no constitutionally-guaranteed socio-economic rights. The practice in other jurisdictions has been to use civil and political rights to achieve the judicial enforcement or protection of socio-economic rights. Rights, such as the right to life, dignity, freedom from inhuman and degrading treatment, as well as the right to non-discrimination, have been used to imply socio-economic rights.<sup>57</sup> The position in such countries is thus similar to the one adopted by Justice Dow in her dissenting opinion in the *Sesana* case,<sup>58</sup> and by the Court of Appeal in the present case. In her dissenting judgment, Justice Dow held that the termination of services within the Reserve endangered life and was tantamount to a violation of the applicants' right to life;<sup>59</sup> further, that the government was under an

<sup>57</sup> R Miamingi 'Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 interim Constitution of the Sudan' unpublished LLM dissertation, University of Pretoria, 2008 17.

<sup>58</sup> *Sesana* (n 6 above) para H13.

<sup>59</sup> As above.

obligation to restore basic and essential services to those residents who were in the Reserve.<sup>60</sup>

In light of the aforesaid, one can safely conclude that there remains hope for the judicial enforcement of socio-economic rights in Botswana. The approaches adopted by Justice Dow in the *Sesana* case and Justice Ramodibedi in this case are not only progressive, but in conformity with international human rights standards, in particular Botswana's obligations under the African Charter on Human and Peoples' Rights (African Charter). This is so, especially considering that the Vienna Convention on the Law of Treaties requires that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith',<sup>61</sup> and that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.<sup>62</sup> Further, The UN General Assembly has stated that '[s]tates shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations'.<sup>63</sup>

## 5 Concluding remarks

The government of Botswana seems to plan to comply with the decision. However, it remains to be seen whether the implementation of the orders of the present case will be without difficulties. This general ambivalence is borne by the problems faced by the Basarwa in the implementation of the *Sesana* case. That notwithstanding, one cannot lose sight of the fact that the victory of the appellants in the present case entails that, funds permitting, they will be saved from the harsh conditions of the Kalahari Desert. Further and most importantly, their human dignity will have been restored.

One can happily conclude that the Botswana courts will henceforth be mindful to interpret cross-cutting rights to protect socio-economic rights. Until a constitutional amendment that will see the inclusion of socio-economic rights, the solution to problems that impede the judicial enforcement of such rights in Botswana may be solved by using civil and political rights to enforce socio-economic rights. The Court of Appeal in the present case has shown that the Botswana courts are more than willing to adopt this approach.

<sup>60</sup> *Sesana* (n 6 above) para H16.

<sup>61</sup> Vienna Convention on the Law of Treaties, art 26, 1155 UNTS 331, entered into force 27 January 1980.

<sup>62</sup> Vienna Convention (n 61 above) para 27.

<sup>63</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly, Resolution 60/147, UN Doc A/RES/60/147 (21 March 2005).