



## **COUNTRY REPORT: BOTSWANA Indigenous Peoples' Rights to Water**

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### **Introduction**

Although there is no recent development on mainstream environmental issues in Botswana, the question of water as a basic human need, which has been in the country's programme of action for a long time, has culminated in decisions of the highest courts. The significance of water and its centrality to life is generally acknowledged. Water is essential for the substance of the life of every living organism. Water is life.

Lately, the international community has taken it upon itself to bring to the fore the significance of water. The *United Nations 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 (ECOSOC Report)* as well the recognition by the United Nations General Assembly in July 2010 (*UNGA Resolution*) are indicators of the importance placed by the international community on water issues as a human right with attendant implications.

In Botswana, the significant development features a clash of policy in respect of water needs and the rights of indigenous peoples. This is the case especially with respect to the Basarwa. This paradox has given rise to litigation in what is described here as the Central Kalahari Game Reserve Cases.

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## The Setting

Botswana, a landlocked country in Southern Africa, is generally flat and its climate largely arid and semi-arid with the extreme south-western part of the country falling under the arid zone. Most rainfall occurs as localized showers and thunderstorms. The mean annual rainfall ranges from 250 mm in the extreme southwest to 650 mm in the extreme northeast. Rainfall is erratic and unreliable. The country is prone to drought, which has since 1980, become a permanent feature of the country. Water is therefore a scarce resource in Botswana. In some cases, people have turned to natural fluids from wild plants as a forced alternative for water. However, this depends on the availability of the requisite plants and in any event it is seasonal, whereas the need for water is perennial. This has presented a challenge to the Government to ensure that at all times people are provided with water.

In the arid zone of the country lies the Central Kalahari Game Reserve (CKGR). This area signifies the center for conflict between avowed state policy supporting development, and fundamental rights of marginalized groups. The following quotation gives a background for the formation of the CKGR.

'The CKGR is a vast unique wilderness in an area in excess of 52000 square kilometers. It was created as a game reserve in 1961, and at the time of its creation, it was the largest game reserve in Africa. .. The creation of the reserve resulted from the recommendations... to carve out a large portion of the inner part of the Kgalagadi desert, where Basarwa and some Bakgalagadi who were already resident therein, could continue to follow their traditional hunting and gathering way of life. It is not an insignificant piece of land, it being about the size of Belgium. It has a harsh climate, is prone to droughts and has limited and unreliable rainfall.'<sup>1</sup>

The *Basarwa* are indigenous to the CKGR, having lived there for hundreds of years, possibly many centuries. After it was declared a game reserve, the Government provided them with basic essential services such as water while in the reserve. Towards the end of the mid 1980s, the Government determined that the *Basarwa* living in the CKGR should be relocated outside the reserve. The Government said it was necessary to extend the benefit of services to all its citizens including the *Basarwa*, who, as the Government put it, were disadvantaged by living in an area in

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<sup>1</sup> Per Dow J in *Sesana v AG* [2006] 2 BLR 633, at 685.

which only minimal services were provided, and at great cost to the taxpayer.<sup>2</sup> According to Government, the *Basarwa* were losing out on the economic growth of the country, and it was in their interest to relocate them to places where they would benefit from the country's economic growth just like any other citizen.<sup>3</sup> The Government then created new settlements outside the reserve, which settlements were provided with water, schools, medical clinics and other essential services.<sup>4</sup> Those who agreed to relocate were compensated for vacating their old settlements and were given land to grow vegetables and rear small stock that they were given as part of the compensation.<sup>5</sup> Some however, refused to relocate, saying they could not sever links with their ancestral land.<sup>6</sup> When it became clear that efforts to persuade them to relocate were failing, the Government informed those who refused to relocate that the basic and essential services being provided in old settlements in the CKGR would be terminated.<sup>7</sup> On 31 January 2002, the Government terminated the provision of basic and essential services to those who refused to relocate to the new settlements. It also withheld the special game licences it had provided to the *Basarwa* and refused their entry into the CKGR unless they had been issued with entry permits.

### **The *Sesana* Case<sup>8</sup>**

The *Basarwa* who remained in the reserve applied to the High Court for several orders, *inter alia*, that the termination by the Government of the provision of basic and essential services (such as water, food rations to those registered as destitutes and orphans, healthcare through mobile clinics and ambulance services, transport for children attending school outside the reserve) was unconstitutional. They argued that the Government was obliged to restore these services; that those individuals forcibly removed by the Government from the CKGR had unlawfully been despoiled of their possession of land; that such possession should immediately be restored; and that the refusal to issue the *Basarwa* with special game licenses or allow them access to

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<sup>2</sup> Opinion of Judge Phumaphi, at 746.

<sup>3</sup> Opinion of Judge Dow, at 719.

<sup>4</sup> Opinion of Judge Dow, at 696.

<sup>5</sup> Opinion of Judge Dow, at 718.

<sup>6</sup> Opinion of Judge Phumaphi, at 761.

<sup>7</sup> Opinion of Judge Dibotelo, at 657-660.

<sup>8</sup> *Sesana and Others v AG* [2006] 2 BLR 633.

the reserve without a permit was unconstitutional.<sup>9</sup> They were successful in respect of some of these claims; and were unsuccessful in others.

A summary of the decision is as follows; that the termination in 2002 by the Government of the provision of basic and essential services to the applicants in the CKGR was neither unlawful nor unconstitutional;<sup>10</sup> the Government was not obliged to restore the provision of such services to the applicants in the CKGR;<sup>11</sup> that prior to 31<sup>st</sup> January 2002, the applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR (this was a unanimous decision), that the applicants were deprived of such possession by the Government forcibly or wrongly and without their consent;<sup>12</sup> that the Government's refusal to issue special game licenses to the applicants was unlawful (this was a unanimous decision), that the Government's refusal to issue special game licenses to the applicants was unconstitutional;<sup>13</sup> and that the Government's refusal to allow the applicants to enter the CKGR unless they were issued with permits was unlawful and unconstitutional.<sup>14</sup>

In a minority judgment, Judge Dow considered that the termination included water and food rations for those destitute and orphans. She noted that these were essential for the survival of the recipients and terminating them entailed endangering life, a constitutionally protected right. She therefore held that their termination was unlawful and unconstitutional as it threatened the constitutional right to life, and being so, Government was under an obligation to restore those services.<sup>15</sup> She furthermore held that these services were terminated or withheld to force the *Basarwa* to move out of the CKGR.<sup>16</sup> From the summary of the decision it appears, and it is believed in the country, that the *Basarwa* were largely successful.

The Government appears not to have mustered good grace on the outcome of the case. Perhaps the greatest indication of absence of grace by Government was a refusal by it to allow the *Basarwa* in the CKGR to re-commission, at their own cost, a borehole that was previously used to supply water to the residents of the CKGR. This

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<sup>9</sup> For a comprehensive summation of all the forms of relief sought by the applicants, see the judgment of Dibotelo J in *Sesana and Others v Attorney General* [2006] 2 BLR 633, at 636-637.

<sup>10</sup> Per Dibotelo and Phumaphi JJ, Dow J dissenting.

<sup>11</sup> *Ibid.*

<sup>12</sup> Per Dow and Phumaphi JJ, Dibotelo J dissenting.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> See page 723-725 of the judgment.

<sup>16</sup> *Ibid.*

borehole had been de-commissioned as a way of terminating the supply of basic and essential services to the CKGR in 2002. This issue led to the *Mosetlhanyane* case.

### ***The Mosetlhanyane Case***<sup>17</sup>

This is a sequel to the *Sesana* case in which the court had held that the termination of food and water supplies to the people living in the CKGR was not unconstitutional and that the Government was not obliged to supply these services to people who chose to remain in the reserve.

In 2002, in pursuit of its stated policy, the Government proceeded to decommission a borehole from which water was supplied to the residents of the CKGR. This borehole had been drilled in 1985 by De Beers, a diamond prospecting company, for prospecting purposes in Mothomelo in the CKGR. In consequence of the decommissioning, the residents suffered serious water shortages and had to travel very long distances to fetch water. Following the decision of the High Court in the *Sesana* case, the residents requested the Government to permit them, at their own expense, to re-commission the borehole so that they could use the water for domestic use. They also requested permission, at their own expense, to sink additional wells and boreholes for the same purpose. Government did not respond even after numerous follow-ups. The residents then launched an application in the High Court alleging that the refusal by the Government to grant their requests was unlawful and unconstitutional. The High Court dismissed their application.

The Court of Appeal reversed the High Court and held that the *Basarwa* had the right, at their own expense, to re-commission the borehole at Mothomelo and to sink one or more boreholes and to abstract water for domestic purposes. It held further that, by refusing to grant the requests of the Applicants, the Government had subjected the *Basarwa* to inhuman and degrading treatment contrary to the Constitution.<sup>18</sup> The court observed that after the 2002 'relocations':

'a pump engine and water tank, which had been installed for purposes of using the borehole at Mothomelo were dismantled and removed. It is not far-fetched to conclude as a matter of overwhelming probability that this was designed to

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<sup>17</sup> *Matsipane Mosetlhanyane v AG* MAHLB-000393-09 (unreported).

<sup>18</sup> Para 22.

induce the residents to relocate by making it as difficult as possible for them to continue residing inside the CKGR'.<sup>19</sup>

The Appellants' account of the human suffering due to lack of water, which the court found to be uncontested,<sup>20</sup> was described as 'a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert'.<sup>21</sup>

It is significant that the Government's position had shifted in this case. While in the *Sesana* case the Government had said they wanted the *Basarwa* to move out of the reserve so they may better be able to enjoy the country's economic benefits like all other citizens, in the *Mosetlhanyane* case, the Government argued that the continued presence of *Basarwa* in the reserve would compromise government initiatives to protect wildlife in the area.<sup>22</sup> This argument was dismissed. The court found a violation of constitutional rights through the exercise of a 'value judgment', which entitled the court to have regard to international consensus on the importance of access to water. Two documents swayed the balance in favour of the *Basarwa*. The first was the *UNGA Resolution* which recognizes the right to safe and clean drinking water as a fundamental human right. The second was the *ECOSOC Report*, which acknowledges that:

'water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.'<sup>23</sup>

It furthermore states that:

'Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that: indigenous peoples' access to water resources on their ancestral is protected from

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<sup>19</sup> Para 7.

<sup>20</sup> Para 8.

<sup>21</sup> Para 4.

<sup>22</sup> Para 10.

<sup>23</sup> *ECOSOC Report*, Introduction.

encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water.<sup>24</sup>

The court found that there is a constitutional requirement, based on an international consensus, for Government to refrain from inflicting degrading treatment to peoples in its territory. Implicitly by refusing to facilitate access to water by the *Basarwa*, Government had violated the constitutional requirement. The court came to this conclusion partly on the basis that the *Water Act*<sup>25</sup> that allows any lawful occupier of land, without a water right, to use any borehole, or indeed drill one, for the purpose of abstracting water for domestic use. Since the *Basarwa* were in lawful occupation of the land, and they required water for domestic purposes, they were not constrained by the provisions of the *Water Act* to resuscitate the Mothomelo borehole, and therefore any act preventing the use of the borehole was unlawful.

As such, the court departed from its long practice of not enforcing rights recognized in international treaties unless they have been incorporated into domestic law by legislation.<sup>26</sup> In the past, the courts had only taken international treaties into account as aids to interpreting domestic law. However, the *Mosetlhanyane* case appears to indicate that the judiciary is now prepared to recognize and give domestic effect to substance rights contained on international instruments. This is commendable as it should prevent the situation where the Government undertakes international obligations and refrains from making those enjoyable by individuals on the domestic scene by resort to dualistic principles of international law.

Where violations against the Constitution and allegations of threats to human survival are made, it is incumbent upon a court to examine the deeper issues and not limit itself to the question of statutory interpretation. This is specially so where, as in the *Mosetlhanyane* case, there was not only an allegation of an infringement of constitutional rights, but also grave human rights violations threatening life itself. Denial of means to obtain water threatened the survival of the *Basarwa* and amounted to what was described in the *Sesana* case as condemning the community to death by starvation. It is significant to note that in this case the Government never raised any limitations based on resource constraints. Neither did it allege any form of inconvenience were the permission to be granted. Instead, the Government's

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<sup>24</sup> ECOSOC Report, para 16(d).

<sup>25</sup> Cap 34:01.

<sup>26</sup> See, for example: *Good v AG* [2005] 2 BLR 337.

position was that if the *Basarwa* in the CKGR wanted services, they had to secure them outside the reserve. In other words, the *Basarwa* had taken a risk by remaining in the CKGR and would not be heard to complain of circumstances they themselves created. This view was rejected by the court, which held the refusal to allow the CKGR residents to recommission the borehole at their own expense, amounted to inhuman and degrading treatment contrary to the Constitution. It would seem the Government had disregarded its obligations towards citizens and treated itself as a private party vis-à-vis the CKGR residents. It would seem the attitude of the Government was motivated by a desire for revenge following the 'success' of the *Basarwa* in the *Sesana* case. One would have expected the Government to handle with grace the pronouncements of the court and demonstrate its commitment to the rule of law. Notwithstanding the attitude of the Government, it is heartening to note that the borehole is now running and supplying water to the communities in the CKGR thanks to the assistance of Gem Diamonds, which provided financial assistance in recommissioning the borehole.

## **Conclusion**

One effect of these decisions is to secure the right of a disadvantaged group, the *Basarwa*, to remain on state land even against the avowed wishes of Government. It also demonstrates the difficulty that may be encountered by litigants who try to enforce claimed environmental rights within the legal framework of Botswana, and particularly given the absence of a constitutional provision to that effect. The absence of a clear constitutional right is a hindrance and may often prejudice especially vulnerable groups such as the *Basarwa*. The converse is that the introduction of such a right, depending on the conditions that are made on its application, will go a long way in ameliorating the situation and would secure the enjoyment of the rule of law based on visible, concrete and uniform standards. The case further cements the sound principle that denial of vital necessities of life, such as water, amounts to inhuman and degrading treatment. Commendably, the court did read into the constitutional provisions certain rights, such as rights to water, that the international community recognizes as fundamental. The cases effectively transformed this interest into one of the gamut of rights exercisable by individuals against the Government. Finally, this jurisprudence emanating from the CKGR demonstrates that the allocation of scarce national resource often requires a careful balance to be struck between many competing interests or rights - in this case including the fair and

equitable sharing of national resources, environmental concerns and the rights of the *Basarwa* to live in their natural environment with all the rights available to a human being. Given that all government policies should ultimately benefit human beings, this should not be particularly difficult.