IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

MAHLB-000393-09

In the matter between:

MATSIPANE MOSETLHANYANE	**1st Applicant**
GAKENYATSIWE MATSIPANE & FURTHER APPLICANTS	**2nd Applicant**
and	
ATTORNEY GENERAL OF BOTSWANA	**Respondent**

Mr. G. Bennett (with Ms. Attorney S. Junner) for the Applicants
Mr. P.W. Belger (with Ms. D.N. Lundström and Mr. Attorney B.G. Toteng for the Respondent)

JUDGMENT

WALIA J:

1. The applicants seek the following orders:

    1. The refusal or failure of the Respondent to permit the Applicants to re-commission at their own expense the borehole ("the Borehole") at Mothomelo in the Central Kalahari Game Reserve ("the CKGR") formerly used to

provide water to the residents of the CKGR so that the Applicants may abstract and use water therefrom for domestic purposes is unlawful and unconstitutional.

2. The refusal or failure of the Respondent to confirm that on the payment of the specified fees it will issue permits under Regulation 4 of the National Parks and Game Reserve Regulations 2000 to any reputable contractors appointed by or on behalf of the Applicants to enter the CKGR to re-commission the Borehole for the aforesaid purposes is unlawful and unconstitutional.

3. The refusal or failure of the Respondent to confirm that the Applicants have the right at their own expense to sink one or more wells or other boreholes on land in the CKGR and to abstract and use water therefrom for domestic purposes in accordance with Section 6 of the Water Act is unlawful and unconstitutional.

4. The refusal or failure of the Respondent to confirm that on the payment of the specified fees it will issue permits under the said Regulation 4 to any reputable surveyors or contractors appointed by or on behalf of he Applicants to enter the CKGR to identify suitable sites for and to sink one

or more wells or other boreholes for the aforesaid purposes is unlawful and unconstitutional."

2. There is some uncertainty on the number of applicants before me. Only eleven powers of attorney have been filed while annexure MM1 to the founding affidavit reflects the names of eighteen persons purporting to be the applicants.

3. This anomaly is perhaps explained by the fact that eight of the eighteen persons in annexure MM1 were not applicants in **SESANA AND OTHERS v. THE ATTORNEY GENERAL 2006 (2) BLR 633** (hereinafter referred to as "the Sesana case".)

4. The significance of the number of applicants lies in the acknowledgment by applicants' counsel that the only people entitled to reside inside the CKGR are the 189 applicants in the Sesana Case and that any other persons require to obtain entry permits under the National Parks and Game Reserves Regulations.

5. It follows therefore that the eight persons named in annexure MM1 aforesaid who were not applicants in the Sesana case, are not properly before me.

6. This acknowledgment by the applicants also deals effectively with the respondent's argument that the use of the existing borehole or the sinking of new ones, would result in an influx of people into the CKGR.

7. Further debate on the respondent's concerns in this regard is therefore not necessary and I can, even at this early stage in the judgment, make a finding that only the 189 applicants in the Sesana case have the right to reside in the CKGR without the need for making application for the necessary permits and therefore the respondent's argument on the danger of influx is without merit.

8. In some respects this application is a sequel to the Sesana case. Frequent reference is made to that case in the pleadings and argument before me.

9. Some argument, largely academic, was raised on whether or not I am bound by the decisions and findings of the Judges in that case. For purposes of this judgment, I align myself with the majority decisions of that court.

10. The following majority decisions appearing on page 677 of the judgment are of immediate relevance to this application.

> "1. 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.
>
> 2. The government is not obliged to restore the provision of such services to the applicants in the CKGR.
>
> 3. Prior to 31 January 2002, the applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR."

11. It is not the applicants' case that the Government is under any obligation to provide water or other essential services to the applicants.

12. The applicants also acknowledge that they do not question or challenge the revised national settlement policy as approved by the National Assembly on 30th March 2004.

13. The following clauses of that policy are of relevance to this application:

> "4.1.6.1 There shall be no new settlements established except for special purposes, such as for new mining and security operations.
>
> 4.1.6.2 Establishment of new settlements in fertile arable land, national parks, game reserves and forest reserves shall be prohibited.
>
> 4.1.6.3 Population shall be guided and encouraged to settle in areas where they will be provided with infrastructure and services in a cost effective and efficient manner."

14. There is tacit acceptance by the respondent that the aforesaid provisions of the national settlement policy have application to new settlements only and that the applicants are not affected thereby.

15. My attention has been drawn to numerous international conventions and reports on various human rights issues, among them convention on the rights of the child, the report of the United

Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, human rights committee's advanced unedited version, consideration of reports submitted by States parties under Article 40 of the covenant, United Nations Economic and Social Council's substantive issues arising in the implementation of the international covenant of economic, social and cultural rights and United Nations General Assembly's resolution adopted by the General Assembly: the right to development 15th February 2000.

16. The respondent has not sought, in any way, to underplay the importance of these conventions and reports and I readily acknowledge that in the right context, they have an important role to play in general and special human rights issues. I will deal with their importance to this application in due course.

17. In paragraphs 2-16 above, I have dealt with matters which are largely common cause and on which extensive debate is not necessary.

18. Turning to the pleadings before me, the notice of motion, founding and confirmatory affidavits and draft order were filed on 16th July 2009. The notice of opposition followed on 29th July 2009 and a notice of exception was filed on 28th August 2009.

19. At a case management conference held on 5th March 2010, the following orders were made by consent:

> "1. The substituted and amended affidavits of MATSIPANE MOSETLHANYANE and JUMANDA GAKELEBONE filed on the 2nd day of February, 2010 are hereby accepted and form part of the pleadings and court record.
>
> 2. The exceptions raised in the Respondent's notice of exception in so far as they related to the founding affidavit and lack of confirmatory affidavit, shall now fall away in light of the filing of the amended and substituted affidavits referred to in paragraph 1 above.
>
> 3. Both parties shall file written submissions 14 days before the date set down for hearing of this matter by the Honourable Court, for the court's assistance and in an attempt to expedite this matter. Pleadings shall then be deemed closed.
>
> 4. Costs of the withdrawal of the exceptions referred to in paragraph (2) above shall be awarded to the Respondent.
>
> 5. This application will be heard on 9th June 2010."

20. Following that order, comprehensive and well researched heads of argument were filed and the application was argued on 9th June 2010. I am indebted to counsel for both parties for their industry.

21. The circumstances giving rise to this application are virtually common cause and there are no significant disputes of fact. A brief overview of the averments in the parties' respective affidavits clearly shows this.

22. The applicants aver that they are in lawful occupation of their settlements in the CKGR by virtue of the judgment in the Sesana case. They reside variously at Mothomelo and Kikao.

23. In or about 1985 De Beers drilled a borehole for prospecting purposes at Mothomelo and water was supplied to settlements in the CKGR from this borehole. In or about 2002 the borehole was decommissioned and supply of water therefrom ceased.

24. Between 2004 and 2007 the applicants and their families settled in the CKGR. Among the settlers are a septuagenarian, an octogenarian and some infants.

25. The settlers suffer serious water shortages in the dry season and the melons and other succulents do not provide sufficient water substitutes.

26. The nearest water source outside the CKGR is at Kaudwane which is inconveniently far to fetch water from. Paragraphs 30-34 of the founding affidavit capture the essence of the application and I reproduce them herebelow:

> "30. Mothomelo is too far from Kaudwane to fetch water with donkeys. I can sometimes use a vehicle that I borrow from a relation in Gugamma, if I have enough money to pay for fuel and the vehicle is available and in working order. In 2008 I was able to make this journey only once.
>
> 31. Moreover water is heavy, the track from Kaudwane to Mothomelo is very rough, and the vehicle is small. Although we are very careful with it, any water I bring from Kaudwane is normally exhausted within a couple of weeks or so. The rest of time, especially in the dry season, we are desperately short of water. Even in the rainy season it does not always rain. Tourists sometimes promise to bring us water but hardly ever do.

32. This is why we are so anxious to have the use of the Borehole, which has now been lying idle for several years. It is of no use to anyone else but is vital to our wellbeing.

33. The Borehole will have to be restored to working order and properly maintained. I am informed by Jumanda Gakelebone of First People of the Kalahari ("FPK") that funders who supported the Original Action have said that they are prepared to pay for this, provided that the Government agrees that we may use the Borehole or the Court makes an appropriate declaration.

34. Mr. Gakelebone also informs me that borehole engineers in Gaborone have said that they are willing to carry out the necessary work on the Borehole, but that they too will require proof that the Government has agreed to the project or that the Court has made a declaration."

27. The applicants aver that there has been no or insufficient response to the correspondence to the Government to ameliorate their lot and that the Government, although having promised to do so, has made no decision on the borehole.

28. The applicants then make reference to numerous international law principles, conventions and papers and suggest that the Government is in breach of its obligations in disallowing the use of the borehole.

29. The applicants sum up their averments on such principles, conventions, etc, in paragraph 50 of the founding affidavit, which reads:

"In April 2008 several of these provisions were invoked by the High Court of South Africa in MAZIBUKO and 4 OTHERS v. CITY OF JOHANNESBURG. Reference will be made to this decision at the hearing. Tsoko J began his judgment with the words: "This case is about the fundamental right to have access to sufficient water and the right to human dignity." I respectfully submit that the same hold true of the present application."

30. The applicants then aver that they Government's refusal (tacit or express) to permit the applicants to use the borehole "forms a pattern of behaviour in which the Government has shown itself ready to use any means at its disposal to prevent us exercising our legal and constitutional right to live in the Reserve."

31. The applicants aver that they are willing and able, without taxing Government resources, to recommission the borehole but for this purpose, require the requisite permits for their contractors to access the CKGR. They are, however, apprehensive that the Government will refuse to grant such permits without an appropriate Court order.

32. In the applicants' view, in terms of Section 6 of the Water Act, they enjoy the unfettered right to recommission the existing borehole or to sink one or more new boreholes and abstract water therefrom.

33. In her answering affidavits, the respondent does not take issue with the force and effect of the various international treaties, conventions and papers referred to in the applicant's founding affidavit and has deliberately steered clear of what are described in the papers as legal issues.

34. There are, however, essential averments in the answering affidavits which encapsulate the respondent's view of the matter. Paragraph 15, in response to the applicants' averments of the inconvenience caused by the distance between the settlements and the nearest water source outside the CKGR reads:

"I know that Mothomelo is almost 40 km from Kaudwane and I admit that the road is bad. But while I am not aware of how many trips the applicants make to Kaudwane, I would like to state that the applicants have made their own choice to live that kind of life since they have chosen to stay where there is no water. I can therefore aver that whatever hardships the applicants are likely to face in the exercise of their choice such hardships are of the applicants own making."

35. The applicants' averments of their right to sink boreholes and abstract water without any authorization from the Government are met in paragraphs 19.1 and 25.2 of the answering affidavit by Trevor Mmopelwa, the Director of Wildlife and National Parks.

36. Paragraphs 19.1 reads:

"Whilst I admit that the applicants wrote and requested me to grant them permission to deepen a borehole or continue using the prospecting hole to supply them with water, I am advised by the respondent's attorneys and verily believe that it is not within my authority or power to grant such

permission. The granting of water rights upon, inter alia, deepening a borehole lies in the ambit of the water apportionment Board following a successful application by an applicant."

37. Paragraph 25.2 reads:

"Secondly the applicants' basis for requesting me to grant them water rights (which power I do not have) by deepening a borehole in the CKGR is allegedly section 6 of the Water Act Cap 34:01 of the laws of Botswana in that they are "occupiers" of the CKGR. However, I am advised by the respondent's attorneys that section 6 does not give the applicants absolute right to be given water rights. The granting of water rights to an occupier of land under section 6 is subject to the provisions of the Water Act itself and any other written law. Respondent's attorney will advance this argument at the hearing of the matter."

38. Although the parties have not specifically identified the issues for determination, I can safely say that determination of the following broad issues is called for:

38.1 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

38.2 That the applicants have the right without the necessity for any authorization under the Water Act to recommission the existing borehole or sink new boreholes to abstract water.

39. It is suggested by the applicants that the concomitant to 38.2 above is that the Government is obliged to facilitate the recommissioning or fresh drilling by granting the necessary permits to the applicants.

40. The applicants' counsel opened his address with the suggestion that the whole application must be considered in the context of the right to water and the argument in this regard is based on Resolution No. 54/175 adopted by the United Nations General Assembly and the South African case of THE CITY OF JOHANNESBURG AND OTHERS v. LINDIWE MAZIBUKO AND OTHERS – Supreme Court of Appeal Case No. 489-08.

41. Paragraph 12 (a) of the UN resolution referred to above provides:

"The rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative."

42. Mazibuko is a celebrated case raising important issues arising from the obligation to provide essential services in terms of the South African Constitution.

43. The summary of that judgment reads:

"Section 27 of Constitution – sufficient water is the quantity of water required for dignified human existence – the Water Services Act 108 of 1997 does not deprive anyone of the right of access to sufficient water in terms of Section 27 (1) – a person who cannot afford to pay for water has no access to water being charged for – local authority obliged to supply free water to residents who cannot afford to pay for the water if reasonable to expect it to do so – prepayment water meters used by the appellants not authorized by bylaws and unlawful."

44. Applicants' counsel then advances his submissions under specified heads, based on the prayers specifically sought in the notice of motion.

45. The essence of the applicants' argument is that they acknowledge that the Government is under no obligation to provide any essential services or supplies to them but they are willing and able, at their own cost, to abstract water for their domestic use.

46. They have the unfettered right to abstract water in terms of section 6 of the Water Act without first acquiring a water right and without any specific authorization from the Government or the Water Apportionment Board constituted under the Act. All they seek is Government approval for their contractors to enter the CKGR.

47. In his response, respondent's counsel submits that the Government is neither indifferent nor callous. It has, in furtherance of its policies, made water, clinics, schools and other essential services available outside the park and nothing prevents the applicants from availing these facilities and services.

48. The applicants have chosen to settle in areas far from those facilities. They do not challenge the Government policy but have become victims of their own decisions to settle an inconveniently long distance from the services and facilities provided by the Government.

49. Respondent's counsel 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.

50. This is a surprising departure from the averments in the answering affidavit that section 6 does not confer such an absolute right and that water may not be abstracted without proper authorization under the Act. I will, however, deal with section 6 and its effect later in this judgment.

51. Respondent's counsel raises a further argument, that the CKGR is Tribal land. Alternatively, it is Tribal and State land. Tribal and State land are not mutually exclusive. That being the case, the provisions of section 6 do not apply to the CKGR in terms of section 6 (3) of the Act.

52. The respondent meets the applicant's argument on the dearth of water with this terse submission:

"The State has provided adequately for the applicants; they are merely unwilling to accept the State's policy decisions with respect to the location of such services."

53. Respondent's counsel reinforces the aforegoing with the following submission:

"The Basarwa have been provided with reasonable access to water and other basic services outside the CKGR. In that way the Government has sought to maintain the dignity and humanity of its people by providing such services. That those resources are provided outside the CKGR enables the Government to meet both its obligation to respect the rights of its people, while still realizing its conservation objectives."

54. The respondent's argument that the CKGR is Tribal and State Land is easy to deal with. In my view, it is no more than an ingenious but somewhat feeble effort at escaping the consequences of its own acknowledgment, albeit at variance with the averments in the answering affidavit, that section 6 of the Water Act permits every owner or occupier of Land in Botswana to abstract water from such land without a water right.

55. The portions of section 6 of the Water Act relevant to this application provide:

"6. (1) Subject 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 an Advisory Board established in pursuance of Section 35 in respect of that area:

Provided that this paragraph shall not authorize the sinking of any borehole within 236 metres of any other borehole (other than a dry borehole) or authorize the deepening of any borehole which is within this distance of any other borehole.

(b) .....

2. Where any person is authorized under the provisions of subsection (a) to construct or deepen a borehole, he may also construct or deepen stand by boreholes ancillary thereto;

Provided that the total quantity of water which may be abstracted under this section from a borehole and any stand by borehole ancillary thereto shall not exceed in aggregate the total quantity which may be abstracted from a single borehole under the provisions of that paragraph.

3. Nothing in this section shall be deemed to authorize an occupier of tribal land to do any of the things referred to herein except to the extent that he is permitted to do so under any customary law applicable to him or by agreement with the owner of such land."

56. The respondent seeks to rely on subsection (3) above in support of her argument that the CKGR being Tribal Land, the applicant does not enjoy the right conferred on an owner or occupier of land.

57. Tribal Land is not defined in the Water Act. It is not even defined in the Tribal Land Act. In terms of the Tribal Land Act, "Land" means land in a tribal area and subject to the provisions of the Mines and Minerals Act, the Water Act and the Mineral Rights in Tribal Territories Act includes any interest in land and anything which is either artificially or naturally attached to the land and which, by operation of the common law, accedes to it.

58. In terms of the Tribal Land Act, "tribal area" means –

"(a) every tribal territory as defined in the Chieftainship Act; and

(b) The areas defined in the second, third, fourth and fifth schedules."

59. It is not necessary for me to traverse the respondent's convoluted argument on why the CKGR is tribal land, nor the applicants' lengthy counter argument on why it is not.

60. The status of the CKGR is easily resolved by reference to the fifth schedule to the Tribal Land Act and the Sesana judgment. The fifth schedule aforesaid provides the coordinates of Ghanzi Tribal Area but specifically excludes therefrom, inter alia, the Central Kalahari Game Reserve.

61. The status of the CKGR was unequivocally settled in the Sesana case and I quote paragraphs E – F on page 664:

"The position of the respondent that the CKGR is state land has been accepted by the applicants and it is therefore common cause that the settlements of the applicants were or are situated on state land. It is also not in dispute that it was the British Government that made the CKGR crown land through the 1910 Order in Council; and that at

independence in 1966 ownership of all Crown land including the CKGR, which had previously been vested in the British Government by the Bechuanaland Protectorate (lands) Order in Council of 1910 in the then Bechuanaland Protectorate, became vested in the Government of Botswana as state land....."

62. I have no hesitation in finding that the CKGR is state land and the respondent's argument that it is excluded form the provisions of Section 6 (1) of the Water Act by reason of its being Tribal Land must therefore fail.

63. Equally easy to resolve is 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.

64. The starting point in dealing with that argument must be that it forms no part of the case the respondent is required to meet. The orders sought in the notice of motion make no mention whatsoever of the Government being in violation of the applicant's constitutional rights relating to protection from inhuman treatment, enshrined in Section 7 of the constitution of Botswana.

65. The prayers in the notice of motion are all for declarations of illegality and/or unconstitutionality of the Government's refusal or failure to allow the re-commissioning of the existing borehole or the sinking of one or more new ones. The illegality or unconstitutionality alleged in the notice of motion does not raise the issue or question of the inhuman or degrading treatment of the applicants.

66. Sure, there is mention in the founding affidavit of hardship suffered by the applicants but nowhere is it alleged, even obliquely that they are subjected or exposed to inhuman or degrading treatment.

67. The allegations of inhuman or degrading treatment made in the submissions are very serious indeed and it would have been expected of the applicants to state in the notice of motion at the very least, that the refusals alleged therein amount to such treatment. It would have been expected of them further, to make such averments in their affidavits, as would have alerted the respondent to their complaint and to respond to it.

68. As the papers stand, all that can be gleaned from the notice of motion is that the applicants question the legality/constitutionality of the Government's refusal without a hint of the nature of the unconstitutionality. The only thing the notice of motion is clear on is that according to the applicants, the Government's refusal was contrary to the applicants' rights under section 6 of the Water Act.

69. All that can be gleaned from the averments in the founding affidavit is that the continued disuse of the borehole results in hardship to the applicants as they are required to traverse long distances over unfriendly terrain to obtain water.

70. It is, in my view, an undesirable pleading practice, to spring on one's opponent in motion proceedings at the stage of submissions, what has not been properly canvassed in the notice of motion and founding affidavits.

71. Masuku J as he then was, faced with a similar situation in **IKGOPOLENG SHABANE AND 25 OTHERS v. KERENG SOLLY MOGAMI AND THE ATTORNEY GENERAL 2005 (1) BLR 343** said, **at page 345**:

"……Particularity exactitude and meticulous attention to detail is always desirable and necessary in the

drafting of notices of motion for the reason that the notice in part, together with the draft order, form the basis for the relief that the court may later be minded to grant. That the relevant information omitted from the notice of motion, and consequently from the draft order, is contained in the founding affidavit has not curative effect. All the particulars of the relief sought, must without exception be concisely stated in the notice of motion, as this will make apparent to any reader, especially the respondent, the parameters and the effect of the relevant order of court. No room for surmise or conjecture must be allowed. The order must speak for itself fully, admitting of no addition or editing."

72. The issue of inhuman and degrading treatment is, in my view, an afterthought, a second string to the applicants' bow, as it were, to bolster their case. The applicants are bound by their pleadings and may not seek to establish what has not been pleaded.

73. There is another, more compelling reason for the argument on inhuman and degrading treatment to fail. In raising that argument, the applicants ignore altogether, the unequivocal acknowledgement on their part that the Government is under no obligation to provide any essential service to them. If the

Government has no obligation to provide an essential service, a fortiori, it is under no obligation to facilitate any such service.

74. The applicants enjoy the right to reside in the CKGR. The right to reside is not confined to a specified area. There is no reason, for example, why they cannot opt to reside in an area closer to where water and other services are available. I therefore have some sympathy for the respondent's argument that having chosen to settle at an uncomfortably distant location, they have brought upon themselves any discomfort they may endure.

75. It should be borne in mind that the complaint in the applicants' papers is about the distance they have to traverse to procure water.

76. It is the same distance they would have to traverse to seek medical attention for the old and the infirm and if they so choose, education for the young. It is not therefore an altogether absurd scenario that at some stage the applicants might, on the grounds now advanced, seek the provision of such services within easy reach inside the CKGR.

77. I have already stated that the large volume of literature placed at my disposal on the importance of water cannot be ignored. However, the applicants' argument in the context of this application would have validity if there were an obligation on the Government to provide water where the applicants chose to stay in the CKGR. At the risk of overburdening the judgment with the acknowledged position, the Government is under no such obligation and it has met its obligations as regards accessibility to water by providing adequate supplies outside the CKGR.

78. The inconvenience suffered by the applicants in accessing that supply cannot, in my view, be described as inhuman or degrading treatment.

79. I now move on to the pivotal issue in this application. It is the applicants' contention that on a proper interpretation of section 6 of the Water Act, any owner or occupier of land in Botswana may, without holding a water right, drill a borehole or a number of boreholes on such land to abstract water for domestic use.

80. In answer to some questions put by me to applicants' counsel, he suggested that the language of the section is clear and therefore

the applicants are at liberty to drill as many boreholes as the sites they may choose to occupy in their peripatetic way of life.

81. Stretched, to its logical conclusion, this proposition suggests that each applicant, as an occupier, could, if he or she so wished, drill his or her own borehole.

82. The possibilities created by the applicants' interpretation are limitless. For example, in the days of water rationing by a Water Authority, owners and occupiers in urban areas could drill their own boreholes to avoid the consequences of rationing; lesees of multi-residence complexes too, as occupiers, could drill boreholes on the lessor's land without his consent.

83. I have not just conjured up the scenarios described above. The possibilities referred to in paragraph 82 were specifically put to applicants' counsel and it was his response that these scenarios are permissible in terms of section 6 of the Act.

84. The respondent's position on the interpretation of section 6 is by no means clear. At best for her, she is ambivalent. In the answering affidavit it is averred that neither the re-commissioning

of the existing borehole, nor the drilling of new ones, may be undertaken without proper authorization under the Water Act.

85. In his submissions before me, respondent's counsel concurred with the interpretation advanced by the applicants' counsel, and yet, the following appears, albeit in a different context, in the respondent's supplementary heads of argument:

"It could never have been the intention of the legislature that a conservation area could hypothetically be used by its occupants to sink boreholes at will anywhere, subject only to the requirement that they be a certain distance apart (that being 236 m in terms of the proviso in section 6 (1) (a) of the Water Act). The meaning contended for by the applicants would, respectfully, result in an absurdity."

86. It therefore falls upon me to interpret section 6 of the Water Act and that necessitates consideration of other provisions of the Water Act.

87. "Water Right" is defined as a right granted or deemed to have been granted under the Water Act and subject to the provisions of Section 10, includes an existing right.

88. Section 9 (1) provides:

"Subject to the foregoing provisions, no person shall divert, dam, store, abstract, use, or discharge any effluent into, public water or for any such purpose contract any works, except in accordance with a water right granted under this Act."

89. Water rights are granted under Section 15, the relevant portions whereof provide:

"15 (1) The Board may grant to any person the right to divert, dam, store, abstract, use, or discharge any effluent into public water from such source, in such quantity, for such period, whether definite or indefinite, and for such purpose as may be specified in the water right, subject to such terms and conditions as it may deem fit.

(2) Application for the grant of a water right shall be made to the Board through the Water Registrar who shall give notice of the same in the prescribed manner.

(3) Any interested person may notify the Water Registrar within such period as may be prescribed that he objects to the grant of a water

right and shall specify the grounds of such objection, and shall, if he so require, have a right to be heard thereon by the Board.

(4) The Board shall consider every application and any objections made to it in respect thereof and may, after consulting such persons and authorities, if any, in its sole discretion, decide to consult, grant such right as it may consider appropriate or dismiss the application."

90. As regards Section 9 aforesaid, applicants' counsel submits that that section must be read and construed subject to the foregoing provisions of the Act, which provisions include Section 6.

91. There was no argument presented on Section 15 as the applicants contend that they may abstract water without any authorization under the Act and the respondent has advanced no argument against that contention.

92. The provisions of Section 9 and 6 are clearly mutually contradictory. While Section 6, according to the applicants authorizes abstraction without approval, Section 9 prohibits abstraction without a water right granted under the Act (Section

15). If Section 6 of the Act is construed as contended by the applicants, Section 9 becomes entirely superfluous.

93. On a proper construction of Section 6, the applicants face an immediate difficulty they have not even attempted to overcome. Section 6, even on the interpretation contended for by the applicants, does not permit the abstraction of unlimited quantities of water from an unlimited number of boreholes at unidentified locations.

94. Section 6 (1) (a) is quite clear. Water may be abstracted for domestic use only in such quantities as may be prescribed in relation to the area where such well or borehole is situated.

95. No evidence has been placed before me of the quantities required by the applicants nor of the quantities prescribed in respect of the CKGR. I do not even know if any quantities have been prescribed in respect of the CKGR.

96. The applicants do not say that they intend to abstract a given literage or that they will, if the application succeeds, ascertain the quantity. It is their case, instead, that they have the right to

abstract unlimited quantities from an unspecified number of boreholes.

97. I am therefore being asked to declare that the applicants have the right to abstract water at will, in unlimited quantities from an unspecified number of boreholes. I am clearly prevented by Section 6 (1) (a) of the Water Act from doing so. I find therefore that the applicants do not have the right, even on their own interpretation of Section 6, to abstract water in excess of the quantities, if any, prescribed in respect of the various areas of the CKGR.

98. This, however, does not fully resolve the debate before me. There are specific declarations sought and at the heart of each declaration is the Government's refusal to allow the applicants to exercise their right to abstract water in the CKGR.

99. The papers before me do not reveal any express refusal on the part of the Government. For the purposes of this judgment and for that purpose only, I am willing to accept the Government's failure to respond to the applicants' demands within a reasonable period as tacit refusal.

100. The meaning of Section 6 contended for by the applicants makes it necessary for me to resolve the obvious difficulty referred to in paragraph 92 above.

101. The starting point, obviously, is the Interpretation Act (Cap 01:04). Section 29 provides:

> "(1) An Act or instrument shall be construed as a whole.
>
> (2) Where provisions of an Act or instrument are inconsistent and the inconsistency cannot be resolved by construing the enactment as a whole, a provision which appears later in the enactment shall prevail over an earlier provision."

102. On the interpretation of Section 6 of the Water Act contended for by the applicants and at the stage of argument, agreed by the respondent, the right to abstract water under section 6 is clearly inconsistent with the requirement for authorization provided in Section 9.

103. I have shown that the respondent has not pursued a fixed line of argument on the interpretation of Section 6. Be that as it may, in so far as counsel for both parties contend that Section 6 confers an unfettered right to abstract water and Section 9 is to be construed

subject to Section 6, I intend to depart, with respect, from their combined wisdom.

104. The inconsistency between Sections 6 and 9 of the Water Act can, in my view be resolved in terms of Section 29 of the Interpretation Act. The obvious result is that Section 9 prevails. In the result, any person wishing to abstract water may do so only by authorization as provided in Sections 9 and 15 of the Water Act.

105. Also, the absurdity created by the meaning contended for by the applicants cannot be sustained.

106. In **OODIRA v. THE STATE 2006 (1) BLR 225 (CA)** Tebbutt JP said, at page 228 F-G:

"Although the primary rule in the construction of statutes is that the language of the legislature should be given its ordinary meaning, this rule is itself subject to exceptions. One such exception is that where the language of the legislature leads to absurdity so glaring that it could never have been contemplated by the legislature then the court is justified in departing from such meaning."

107. I therefore go back to the respondent's counsel's submission that it could never have been the intention of the legislature to allow occupiers of the CKGR to sink boreholes at will.

108. In my judgment therefore, the correct interpretation of Section 6 is that an owner or occupier of land intending to sink or deepen any well or borehole thereon and abstract water therefrom for domestic purposes, may do so only in accordance with a water right granted under the Act. The respondent's refusals or failures referred to in the notice of motion are therefore neither unlawful nor unconstitutional.

109. It follows from the foregoing that the application fails and is hereby dismissed.

110. The applicants have not asked for costs. The respondent, though claiming costs, has not pursued the claim with any degree of enthusiasm. In my view, a proper order in respect of costs would be for each party to pay its own costs, save for costs otherwise specifically awarded and I so order.

111. I ask the respondent to urgently address the ambiguities and inconsistencies in the Water Act so vividly exposed in this case and

take such steps as may be necessary to effect the necessary amendments.

DELIVERED IN OPEN COURT AT LOBATSE THIS 21st DAY OF JULY, 2010.

.....
L.S. WALIA
JUDGE

Duma Boko & Company for the Applicants
Attorney General for the Respondent