REPORTABLE

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. CACLB-074-10
HIGH COURT CIVIL CASE NO: MAHLB-000393-09

In the matter between:

MATSIPANE MOSETLHANYANE	FIRST APPELLANT
GAKENYATSIWE MATSIPANE	SECOND APPELLANT
AND	
THE ATTORNEY GENERAL	RESPONDENT

Mr. Gordon Bennett (with him Ms. S. Junner) for the Appellants
Mr. P. W. Belger (with him Mr. B. G. Toteng) for the Respondent

CORAM: McNALLY JA
RAMODIBEDI JA
DR. TWUM JA
FOXCROFT JA
HOWIE JA

Heard: 17 January 2011
Delivered: 27 January 2011

JUDGMENT

RAMODIBEDI JA:

[1] The appellants, a married couple, who are members of a community resident at both Mothomelo and Kikao in the Central

Kalahari Game Reserve (for convenience, "the CKGR"), challenge a decision of the High Court (Walia J) dismissing their application for a declaratory relief couched in the following terms, namely, that:-

> *"(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 the 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 uncostitutional."

[2] Crucially, it is common cause that the first appellant was one of the original applicants in the highly publicised case of **Roy Sesana And Others v. Attorney General, Case No. Misca 52/2002,** reported as **Sesana And Others v The Attorney-General [2006] (2) BLR 633 (HC)**. That case was heard by a panel of three High Court Judges, namely, the Honourable Judges Dibotelo, Dow and Phumaphi JJ.

[3] Since the appellants have based their present matter on the **Sesana** case, it is necessary to reproduce at the outset the following order made by the Honourable Judges in that case on 16 December 2006 :-

> *"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. (Dow J dissenting.)*
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> *2. The government is not obliged to restore the provision of such services to the applicants in the CKGR. (Dow J dissenting.)*

3. *Prior to 31 January 2002, the applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR (unanimous decision).*

4. *The applicants were deprived of such possession by the government forcibly or wrongly and without their consent. (Dibotelo J dissenting.)*

5. *The government's refusal to issue special game licences to the applicants is unlawful. (unanimous decision)).*

6. *The government's refusal to issue special game licences to the applicants is unconstitutional. (Dibotelo J dissenting.)*

7. *The government's refusal to allow the applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional. (Dibotelo J dissenting)*

8. *Each party shall pay their own costs. (Dow J dissenting)"*

[4] The relevant facts as gleaned from the first appellant's founding affidavit and the **Sesana** case are hardly in dispute. I observe at once that it is 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. As the **Sesana** case shows, it all began in 1961 when the CKGR was established by the Colonial Government for two purposes, namely, (1) to conserve the

wildlife of the area and (2) to provide a residence for the "Basarwa", "San" or "Bushmen" people who were already living there before the creation of the CKGR, albeit on a nomadic basis, dependent, among other things, on the availability of water. As a result, these people were left alone to lead their traditional nomadic mode of life in and outside the CKGR without hindrance. It is not disputed that over the years they formed permanent settlements inside the CKGR whilst continuing with their traditional way of life as hunter-gatherers. To its credit, the Government provided them with essential services.

[5] The parties are on common ground that in or about 1986 the De Beers Company agreed that a prospecting borehole ("the borehole") which it had sunk at Mothomelo but which it no longer needed should now be used to provide water for the residents of the CKGR. It is important to record that the Government did not object. Hence the "Basarwa" communities including the appellants benefited from this arrangement. The borehole in question is the subject matter of this appeal.

Crucially, it is common cause that between 1986 and 2002 the Ghanzi District Council maintained the engine of the borehole pump. It provided fuel for it and regularly bowsed water from Mothomelo to the "Basarwa" communities in other parts of the CKGR.

[6] By 1984 the Government had a change of policy based on a perceived incompatibility of "Basarwa" communities living side by side with wildlife. On 31 January 2002, the Government "relocated" the appellants and others to settlements outside the CKGR specially built for that purpose. The reasons for this decision were (1) that the CKGR should now be used solely for the conservation of wildlife and (2) that human settlements were incompatible with conservation of wildlife. It was felt necessary, therefore, that the reserve's then residents be accommodated elsewhere outside the CKGR.

[7] It is once again common cause that during the "relocations" which followed, 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 induce the residents to relocate by making it as difficult as possible for them to continue residing inside the CKGR. Be that as it may, the borehole itself remained in place. It was of no use to anybody. It remains unused to this day. It has indeed turned into a white elephant whilst the "Basarwa" communities in the area continue to suffer on a daily basis from lack of water.

[8] Quite significantly, the first appellant's account of the human suffering at Mothomelo due to lack of water is uncontested. Very often the appellants and other members of the various communities in the reserve do not have enough water to meet their needs. They depend on melons which are either scarce or sometimes non-existent. As a result, life becomes "extremely difficult." They spend a great deal of their time in the bush "looking for any root or other edible matter from which we can extract even a few drops of water." The absence of water frequently makes them "weak and vulnerable to sickness."

Some of them suffer from "constipation, headaches or bouts of dizziness." Often they do not sleep well. Young children "cry a great deal." Often they do not have water to cook or to clean themselves. An official report describes them as "very dirty, due to lack of adequate water for drinking and other domestic use." In these circumstances the appellants are "anxious to have use of the borehole, which has now been lying idle for several years." They point to the fact that the borehole is of no use to anyone else but that it is vital to their well-being.

[9] It is convenient at this stage to give a brief account of the respondent's reaction to the application for the re-commissioning of the borehole. The answering affidavit was deposed to by Trevor Mmopelwa ("Mmopelwa") who is employed by the Government as the Director of Wildlife and National Parks. On the facts, he does not deny the material averments made by the first appellant as fully outlined above. These must, therefore, be accepted as correct on the authority of **Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** at 634 – 635. See also **Ndlovu v**

Ngwato Land Board [2007] 2 BLR 860 (CA); Greenways (Pty) Ltd v Engen Markerting Botswana (Pty) Ltd [2005] 2 BLR 270 (CA) at 275-276. Thus, for example, Mmopelwa does not deny that prior to their "relocation" the appellants obtained water from the borehole. He prefers, however, to call it a "prospecting hole" and not a "borehole". This appellation, as he says, is on advice from his attorneys, based on the provisions of the Water Act. Furthermore, so he says, the borehole was never meant to be the source of water supply to the appellants and other "Basarwa" communities but was drilled with a view to prospect for minerals.

[10] It is the respondent's case as gleaned from Mmopelwa's answering affidavit that it is the Government's policy that "encroachment of settlement onto wildlife area" such as the CKGR "leads to sprawling and land use conflicts." Furthermore, it is alleged that the bringing of water tanks or any such facility into the CKGR will "seriously and negatively compromise the very purpose for which the CKGR was established in that there will be unquestionable likelihood of

turning the CKGR from being a wildlife reserve and fauna conservation into a human habitation." Human settlement in the area would "endanger the life of wild animals and fauna generally." It is also the respondent's case that the Government declared and "zoned" the CKGR a wildlife reserve and fauna conservation area and that whatever hardships the appellants are facing are of their own making inasmuch as they freely chose to go and live where there is no water.

[11] Finally, it is further the respondent's case that s 6 of the Water Act, Cap 34:01 ("the Act") does not give the appellants an absolute right to abstract water. In any event, so it is alleged, the deponent himself does not have power under the Act to grant the appellants water rights in the CKGR.

[12] In my view, the respondent's reliance on zoning policy can quickly be disposed of as it is a non-starter. This is so mainly for two reasons. First , the appellant's occupation of the CKGR preceded the zoning policy in question. As will be recalled, this

fact is contained in the High Court order in the **Sesana Case** in these terms:-

> "*3. Prior to 31 January 2002, the applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR (unanimous decision).*"

Secondly, the High Court upheld the appellants' right of continuing occupation of their settlement in the CKGR. In this regard the court minced no words in its order when it said the following:-

> "*4. The applicants were deprived of such possession [of their settlements in the CKGR] by the Government forcibly or wrongly and without their consent. (Dibotelo J dissenting)*
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> .
> .
> .
>
> *7. The Government ['s] refusal to allow the applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional." (Dibotelo J dissenting)*

It is important to note that there was no appeal against the High Court order in the **Sesana** case. It is undoubtedly right and proper, therefore, for this Court to proceed on the basis of

the correctness of the High Court judgment. It follows from these considerations, in my view, that the point about zoning does not assist the respondent. The conclusion is inescapable in these circumstances that the appellants are lawful occupiers of their settlement in the CKGR.

[13] I turn then to consider the respondent's point based on s 6 of the Act. It is interesting to observe at the outset that the respondent's heads of argument in this appeal are strictly confined to an interpretation of this section. In essence **Mr. Belger**, counsel for the respondent, supports the court a quo's interpretation to the effect that s 6 of the Act does not confer upon the appellants a right to sink any borehole in the CKGR "at will, in unlimited quantities, from an unspecified number of boreholes". Indeed, the court a quo held that the right to abstract water under s 6 is inconsistent with the need for authorisation provided in s 9. In the court a quo's view the two sections are inconsistent with each other. That being the case, the court held that under s 29 of the Interpretation Act Cap1:04, s 9 of the Act, being a later one than s 6, prevailed over the

latter. On this line of interpretation the court a quo concluded 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.

[14] It is convenient at this stage to reproduce the relevant parts of sections 6 and 9 of the Act in order to fully understand the competing submissions in the matter. These sections provide as follows:-

"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.

9. (1) 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 construct any works, except in accordance with a water right granted under this Act."

[15] In my view, whilst s 6 is subject to the provisions of the Act, s 9 is itself plainly subject to the provisions of s 6. Insofar as the two sections and the use of water for domestic purposes are concerned s 6 is the dominant section. Its provisions override those of s 9. This view finds support in the words appearing in s 9, namely, "Subject to the foregoing provisions." It is as plain as can be that the "foregoing provisions" referred to in this section include s 6. In adopting this interpretation I am mainly attracted by the following remarks of Miller JA, writing for a Full Bench of eleven Judges in **S v Marwane 1982 (3) SA 717(A)** at 747 – 748 :-

"The words 'subject to the provisions of this Constitution' in s 93 (1) of the Constitution clearly govern the provision that laws in operation

immediately prior to the commencement of the Constitution are to continue in operation. The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As Megarry J observed in C and J Clark v Inland Revenue Commissioners (1973) All ER 513 at 520: 'In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail'."

On this interpretation, therefore, I am driven to conclude that the court a quo misdirected itself as to the relationship between the two sections. As **Mr. Bennett**, counsel for the appellants, correctly submitted, these sections are not merely entirely consistent with each other but they are integral to the scheme of the Act.

[16] It is contended on the appellants' behalf that the plain language of s 6 (1) (a), coupled with sheer common sense, mean that any person who lawfully occupies or owns land has a right to

sink a borehole on such land for domestic purposes without a water right. The point on common sense was crisply put in these terms in paragraph 27 of the appellants' heads of argument:-

> "27. *...In a country in which an occupier of land may have to drill beneath it to find water he and his family will need if they are to live there, it is unsurprising that Parliament should have decided that he should have an 'inherent' right to do just that."*

I find this submission not only attractive but also unanswerable in the context of the present matter where the appellants as lawful occupiers of the land in question merely seek, at their own expense, permission to use water from a discarded existing borehole for domestic purposes, something they had admittedly been doing before. Indeed, it is not their case that they should be granted a water right to abstract water "at will, in unlimited quantities, from an unspecified number of boreholes" as the court a quo incorrectly held. All that they need, as I say, is permission to use the existing or an alternative borehole at their own expense and not Government's expense. In my view, it cannot be emphasised strongly enough, as **Mr. Bennett**

correctly submitted, that in Botswana water is at a premium. Lawful occupiers of land such as the appellants must be able to get underground water for domestic purposes, otherwise their occupation would be rendered meaningless. Indeed, I accept that this is the rationale behind s 6 of the Act. Accordingly, I have no hesitation in concluding that the appellants, being the lawful occupiers, do not require a water right for the use of Mothomelo borehole, or indeed any other current or future borehole on land in the CKGR, for domestic purposes.

[17] But then the respondent had another string to her bow. It was contended on her behalf that the borehole at Mothomelo is in fact not a borehole but a 'prospecting hole' which in turn falls outside the definition of "borehole" in s 2 of the Act. It was contended, therefore, that the water extracted from the "prospecting hole" qualifies as public water because it is underground water admittedly made available by means of works as defined. This argument ignores the uncontested evidence that the borehole in question ceased to be a prospecting borehole several years ago. As correctly stated in

paragraph 8 of the respondent's heads of argument, "it is common cause that prospecting for minerals ceased long ago and the borehole was closed sometime in 2002." It is not in dispute that the borehole was subsequently converted to use for domestic purposes for the benefit of the appellants and other communities residing at Mothomelo.

[18] In the light of the foregoing considerations, **Mr. Bennett** submitted that the respondent has not advanced any legal basis for the Government's refusal to allow the appellants the use of Mothomelo borehole for domestic purposes. I agree. **Mr. Belger** sought to meet this point by submitting that the **Sesana** case held that the Government had complied with its constitutional obligations towards the appellants and other "Basarwa" communities occupying the CKGR. He naturally stressed the court a quo's finding that the Government was not obliged to restore the provision of basic and essential services to the occupants of the CKGR, a point which is readily conceded by the appellants. It is clear from the **Sesana** case, however, that the court a quo did not deal with the issue

confronting this Court in this appeal, namely, the appellant's right to use water for domestic purposes in terms of s 6 of the Act at their own expense. There was no finding that the Government was, notwithstanding s 6, entitled to seal the Mothomelo borehole as it did. I conclude, therefore, that the **Sesana** case does not assist the respondent in this regard. I repeat for emphasis that the appellants do not need a water right to use the borehole at Mothomelo at their own expense for domestic purposes. They are exactly in the same position as the original applicants in the **Sesana** case.

[19] It remains then to deal briefly with the appellants' point relating to s 7 (1) of the Constitution. Walia J held that this issue was, in effect, not pleaded but it was sufficiently raised and referred to in the papers before him to have justified an appropriate amendment of the notice of motion had that been sought. As it was, the issue was dealt with by both sides in this Court without any such amendment having been considered necessary. Section 7 (1) reads as follows:-

"7. (1) *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."*

As **Mr. Bennett** correctly submitted, in my view, the right is absolute and unqualified. Unlike the other rights contained in s3 of the Constitution it is not subject to any limitations "designed to ensure that the enjoyment of the said rights and freedoms of others does not prejudice the rights and freedoms of others or the public interest." I should add that I approach the 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. Reference to two important documents will suffice:-

(1) On 20 January 2003, the United Nations Committee on Economic, Social and Cultural Rights submitted a report on what it termed Substantive Issues Arising In The Implementation Of The International Covenant On

Economic, Social and Cultural Rights. In its introduction it stated the following:-

> *"1. 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 realisation of other human rights..."*

In paragraph 16 (d) of its report the Committee said the following:-

> *"16. 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:*
>
> *(d) Indigenous people's access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water".*

(2) On July 2010, the United Nations 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. Accordingly, the UN General Assembly called upon States :-

> "*(b) To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders.*"

[20] It was submitted on the appellants' behalf that the Government's refusal to allow them permission to use, at their own expense, the Mothomelo borehole, or any other borehole in the CKGR for that matter, for domestic purposes amounts to degrading treatment contrary to s 7 of the Constitution. For the sake of brevity, the appellants place reliance on the uncontested facts as fully set out in paragraph [8] above as constituting such treatment.

[21] Crucially, the respondent does not deny that the factors set out in paragraph [8] above amount to degrading treatment. As indicated earlier, it is contended on the respondent's behalf

that the Government has complied with its constitutional obligations towards the appellants. It is contended that it has been vindicated by the **Sesana** case which held that it is not obliged to provide the occupants of the CKGR with essential services. Furthermore, so the argument continues, the appellants must go and live outside the CKGR in order to get services such as water in terms of the Government policy of zoning.

[22] It is significant that the Government is unable to point to any qualifications the original applicants had in the **Sesana** case which distinguish them from the appellants insofar as use of water for domestic purposes is concerned. As was crisply pointed out to respondent's counsel during argument, the Government seems to be saying to the appellants:- "you can live in your settlement in the CKGR as long as you don't abstract water other than from plants." Surely that cannot be right. Doing the best I can in the exercise of a value judgment in these circumstances I am driven to conclude, therefore, that the factors set out in paragraph [8] above amount to degrading

treatment of the appellants. Indeed, I accept that there is a constitutional requirement based on international consensus, as **Mr. Bennett** contended, for Government to refrain from inflicting degrading treatment.

[23] At paragraph 7 of his judgment the Judge a quo made a finding that only the 189 applicants in the **Sesana** case had the right to reside in the CKGR without the need to apply for a permit. This finding might affect those of the appellants who were not applicants in the **Sesana** case but who nevertheless reside in the CKGR and claim the right to do so. It might affect others who make similar claims but who have not been heard by the court because they were not parties to the **Sesana** case and are not parties to the present proceedings.

Counsel for the appellants submits that the Judge a quo ought not to have made any finding as to whether persons other than the **Sesana** applicants have a right to reside in the CKGR, because neither party pleaded, led evidence on or argued the issue. Furthermore, the Judge a quo did not need to decide the issue in order to determine the applications before him. I

agree. Insofar as may be necessary the finding in question must be regarded as not binding.

[24] It remains to say that the appellants litigated on their own behalf and for the members of their community in the CKGR.

[25] In the light of the foregoing considerations the appeal must be upheld. The following order is made:-

(1) The appeal is allowed.

(2) The order of the Court a quo is set aside and substituted by the following:-

"1. It is declared that the applicants have the right at their own expense

1.1 To re-commission the borehole at Mothomelo in the Central Kalahari Game Reserve ("the Reserve") formerly used to provide water to the residents of the Reserve, and to sink one or

more further boreholes at such site inside the Reserve as the surveyor or borehole engineer they may employ may advise them is most likely to achieve the purpose referred to in paragraph 1.3.

1.2 To service, repair and maintain in good working order any borehole to which this declaration applies.

1.3 To use water abstracted from any such borehole for domestic purposes only, in accordance with section 6 of the Water Act.

1.4 By themselves or their agents to bring into the Reserve, and to the extent necessary to enable any borehole to which this declaration applies can be used for the purposes referred to in paragraph 1.3 to retain therein

1.4.1 any rig, machinery, plant or other equipment that they may reasonably require to carry out the works referred to in paragraph 1.1 and 1.2 ;and

1.4.2 any water tank that they may reasonably require to store water abstracted from any borehole to which this declaration applies, prior to its domestic use.

1.5 To obtain such advice or assistance from persons resident outside the Reserve as they may reasonably require to carry out the works referred to in paragraphs 1.1 or 1.2 and to transport the materials referred to in paragraph 4.

PROVIDED THAT

(1) Unless it has reasonable grounds to believe that a person for a purpose referred to in paragraph 1.5 is not competent or is of bad repute, on payment of the requisite fee the Department of Wildlife shall issue an entry permit to him on terms that enable him to complete his task within a reasonable period.

(2) The Department of Wildlife may direct any such person to leave the Reserve if it has reasonable grounds to believe that he has failed to comply with the terms of his permit or that his continued presence therein is likely to be detrimental to the interests of the Reserve.

(3) If and when the Department of Wildlife refuses to issue a permit under (1) or directs a person to leave the Reserve under (2) it shall inform the applicants orally and in writing and the applicants' authorised representatives in writing of the grounds on which it has done so.

(4) Before the borehole at Mothomelo is deepened or any new borehole is sunk, the requisite notice shall be given to the Director of Geological Surveys of Botswana pursuant to section 4 of the Borehole Act and that Act shall apply to any work carried out in accordance with the notice.

2. The respondent shall pay costs including the costs of two counsel."

DELIVERED IN OPEN COURT AT LOBATSE THIS 27TH DAY OF JANUARY 2011.

M. M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

N. J. McNALLY
JUSTICE OF APPEAL

I agree

DR. SETH TWUM
JUSTICE OF APPEAL

I agree

J. G. FOXCROFT
JUSTICE OF APPEAL

I agree

C. T. HOWIE
JUSTICE OF APPEAL