

MOSETLHANYANE V ATTORNEY GENERAL OF REPUBLIC OF BOTSWANA

Court of Appeal of Republic of Botswana (Ramodibedi J)
27 January 2011
Civil Appeal No CACLB-074-10

Constitutional law – Indigenous law – Botswana – Mothomelo – Basarwa – San – Bushmen – Central Kalahari Game Reserve – borehole – prospecting hole – Sesana – Water Act, Cap 34:01 – water rights – lack of water – Botswana Constitution – human suffering at Mothomelo – inhuman and degrading treatment

Facts:

This case is significant for the fact that its outcome affords recognition of the fundamental legal right of Botswana's 'Basarwa' or 'San' people – commonly referred to as 'Bushmen' – to access water on their ancestral lands. The appeal involved a challenge to the decision of the High Court which refused declaratory relief sought by the appellants concerning, *inter alia*, their rights to re-commission, at their own expense, a borehole at Mothomelo in the Central Kalahari Game Reserve ('CKGR'), and to sink other wells or boreholes in order to access water for domestic purposes, in accordance with s 6 of the *Water Act* Cap 34:01 ('the Act'). It was common ground between the parties that in or about 1986 the De Beers Company agreed that the prospecting hole it had sunk at Mothomelo, but which was no longer required, was to be used to provide a domestic water source to residents of the CKGR. Also, it was not in dispute between the parties that a lack of water contributed to human suffering at Mothomelo.

At issue was the basis of the respondent's concern for the impact of human settlements on the wildlife in the CKGR, which the government had 'zoned' as a wildlife reserve and conservation area. At the end of January 2002, the appellants and other San people were relocated to 'specially built' settlements outside the CKGR. It was the respondent's contention that the San people – and specifically the appellants – thereafter chose to settle in an area where there was no water. Secondly, the respondent asserted the view that s 6 of the Act did not confer an absolute right to draw water and instead, was subject to the need for authorisation mandated

by s 9; in this regard, it was at issue whether it was within the authority of the Director of Wildlife and National Parks to grant water rights to the appellants in the CKGR. There was also a question concerning whether or not the borehole at Mothomelo was actually a 'prospecting hole', thereby falling outside the definition of 'borehole' in s 2 of the Act. On this basis, any water extracted would be public water and not water to which the appellants would be personally entitled.

The appellants' appeal was grounded on the basis of the High Court's decision in *Sesana and Others v Attorney General* [2006] (2) BLR 633 (HC) ('the *Sesana Case*'), where the first appellant was one of the original applicants. In this regard, the *Sesana Case* effectively decided that, prior to 31 January 2002, the applicants lawfully possessed the land in the CKGR via their settlements thereon, notwithstanding their nomadic way of life. The *Sesana Case* also reflects that the San people in the CKGR were historically dependent on the availability of water in the CKGR. Further, the appellants contended that ss 6 and 9 of the Act are consistent with each other, such that the language of s 6, 'coupled with sheer common sense', means that a person lawfully occupying the land has a right to sink a borehole thereon for domestic purposes, without the need for a water right *per se*. Finally, the appellants claimed that a denial of their right to re-commission and use the Mothomelo borehole for domestic purposes, amounted to degrading treatment by the government, so as to fall foul of s 7 of the Constitution.

Held, in favour of the appellants, on the issue of their occupation of land in the CKGR:

1. The High Court’s judgment in the *Sesana Case* was not appealed and hence, may be regarded as decisive for the fact that the appellants’ lawful occupation of the land in the CKGR preceded the government’s zoning policy. In addition, the *Sesana Case* upholds the right to continue to occupy their settlement in the CKGR: [12].

Held, in favour of the appellants, concerning their water rights in terms of s 6 of the Act:

2. Having regard to the structure of the respective provisions, while s 6 is subject to the provisions of the Act, s 9 is subject to the provisions of s 6; accordingly, s 6 is the dominant section and overrides s 9. More specifically, though, the appellants were correct in their submission that the aforementioned provisions are consistent with each other and further, a plain reading of s 6(1)(a), taking ‘sheer common sense’ into account, gives the appellants – *qua* lawful occupiers of the land in the CKGR – the right to sink a borehole for domestic purposes or re-commission, at their own expense, the existing borehole at Mothomelo without the need for a water right: [14], [15]–[16]; *S v Marwane 1982* (3) SA 717(A), followed.

Held, in favour of the appellants, on the issue of whether the borehole at Mothomelo was in actual fact a ‘borehole’:

3. The respondent’s argument ignores the ‘uncontested evidence’ that the borehole at Mothomelo ceased being a ‘prospecting’ borehole in previous years; further, it was also uncontested that the borehole *was* subsequently converted to use for domestic purposes, prior to being sealed in 2002. Also, the respondent had failed to advance a proper legal basis in this regard for the government’s refusal to allow the appellants access to the borehole at Mothomelo, for domestic purposes. While the *Sesana Case* stands for the proposition that the government had adhered to its constitutional obligations to the appellants and other ‘Bushmen’ communities occupying the CKGR, there was nothing in that decision to the effect that the government was entitled to seal the borehole as it did: [17]–[18].

Held, in favour of the appellants, on the issue of whether the government, via its denial of the appellants’ water rights, had inflicted degrading treatment on the appellants, in breach of s 7 of the Constitution:

4. The right to remain free from inhuman or degrading treatment in s 7 of the Constitution is an absolute right; also, the question of whether a person has been exposed to inhuman or degrading treatment involves a value judgment. On this basis, and having regard a report of the United Nations Committee on Economic, Social and Cultural Rights, and the uncontested facts advanced by the appellants concerning their suffering as a result of a lack of water at Mothomelo, the failure or refusal of the government to allow access to the borehole amounts to degrading treatment of the appellants and the Bushmen communities at Mothomelo: [19]–[22].

5. The Court allows the appeal and grants the declaratory relief sought by the appellants: [25].