



Matsipane Mosetlhanyane et al. v The Attorney General

Matsipane Mosetlhanyane & Ors v. The Attorney General [2011] Civil Appeal No. CACLB-074-10 (Bots.)

Country: Botswana

Region:

Year: 2011

Court: Botswana Court of Appeal

Health Topics: Water, sanitation and hygiene

Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to life, Right to water and sanitation

Facts

Decision and Reasoning

HEADNOTE

The appellants were members of a Basarwa community who were denied by the High Court permission to re-commission, at their own expense, an existing and unused borehole in the Central Kalahari Game Reserve that had been used previously to abstract water for domestic purposes. The Court of Appeal found that the government had violated the fundamental human right to water, as well as s. 7 (1) of the Constitution of Botswana by denying them access to water. The Court further held that the appellants lawfully occupied the CKGR, and as lawful occupiers were not required to obtain a water right under the Water Act to use the borehole. Appeal allowed.

FACTUAL AND PROCEDURAL BACKGROUND

The appellants are members of a "Basarwa" community resident in the Central Kalahari Game Reserve (CKGR) in the Kalahari Desert. The CKGR was established in 1961 by the government to conserve wildlife and provide a residence for the indigenous Basarwa people living in the area. In 1986, a prospecting borehole sunk at Mothomelo, an area within the reserve, was no longer needed and it was agreed that the borehole would be used to provide water for the residents of the CKGR. The appellants had been living in the CKGR and benefitted from this borehole until 2002 when the government relocated them outside the Reserve to conserve wildlife of the area. The government dismantled and removed the borehole pump to induce residents to relocate. The borehole remained in place and unused, while the Basarwa communities suffered daily from lack of water. The appellants and other community members often did not have enough water to meet their basic needs and the severe lack of water frequently made community members weak and vulnerable to sickness. Many suffered from constipation, headaches or dizziness.

The appellants were anxious to use the borehole, and claimed it was of no use to anyone else but vital to their well-being. The appellants argued that this suffering, caused by the government's refusal to allow them permission to use at their own expense the borehole for domestic purposes, amounted to degrading treatment and therefore violated s. 7(1) of the Constitution. The appellants therefore sought reversal of the High Court decision that had dismissed their application for declaratory relief to permit them to re-commission, at their own expense, the borehole in order to abstract and use water for domestic purposes.

The Attorney General argued that the government had complied with its constitutional obligations; it was not obliged to provide the CKGR communities with essential services. The Attorney General further argued that the hole in question was never meant to be the source of water supply to the residents, and bringing water tanks and facilities into the CKGR would seriously and negatively encroach on wildlife in the area, which defeats the purpose of zoning the CKGR as a wildlife reserve and fauna conservation area. Furthermore, any hardships faced by the appellants were of their own making as they chose to live in an area with this zoning policy and limited access to water. Finally, the Attorney General argued that per ss. 6 and 9 of the Water Act the appellants did not have an absolute statutory right to abstract water from the borehole.

RELEVANT LEGAL PROVISIONS

s. 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.

s. 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.

Constitution of Botswana 1966:

s.7 (1): No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. The Court held that regardless of the zoning policy, the appellants were lawful occupiers of their settlement in the CKGR. The appellants’ occupation of the CKGR preceded the policy, and the High Court had already upheld the appellants’ right of continuing occupation of their settlement in the case of *Sesana and Ors v the Attorney General* [2006] (2) BLR 633 (HC).

The Court held that the appellants did not require a water right to be granted under ss. 6 and 9 of the Water Act to use any borehole in the CKGR for domestic purposes. The High Court misinterpreted the Act; s. 6 overrides s. 9. The government’s intent in s. 6 was to enable lawful occupiers of land like the appellants to get underground water for domestic purposes without requiring the granting of a water right. Otherwise, their occupation would be rendered meaningless.

The Court held that the suffering caused by the lack of access to water and the refusal to allow the appellants permission to use the bore hole at their expense, violated s. 7(1) of the Constitution. According to the Court, s. 7(1) is an absolute and unlimited right; however, determining whether a person has been subjected to inhuman or degrading treatment involves a value judgement by the court. In making this value judgement, the Court considered international consensus on the importance of access to water. The Court therefore considered the United Nations General Assembly’s recognition of the right to water as a fundamental human right that is essential for full enjoyment of life. The Court also considered the protection of the right to water provided by the International Covenant on Economic, Social and Cultural Rights, to which Botswana is a signatory. In particular, states are to ensure that Indigenous people’s access to water on their ancestral lands is protected. The Court concluded that there was a constitutional requirement based on international consensus for the government to refrain from inflicting degrading treatment, and the suffering caused by limiting access to safe and clean drinking water amounted to degrading treatment.

The Court held that the High Court’s order was to be set aside, and the appellants had the right at their own expense to recommission the borehole at Mothomoleo, to sink one or more further boreholes at the site and to use water abstracted from the boreholes for domestic purposes in accordance with s. 6 of the Water Act.

Decision Excerpts

Para 16: “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 [Water] 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.”

Para 19: “In my view, the [s. 7(1)] right is absolute and unqualified. [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 judgement, the Court is entitled to have regard to international consensus on the importance of access to water [i.e.] the United Nations General Assembly recognized 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.”

Para 22: “the Government seems to be saying to the appellants “you can live in your settlement in the CK

as long as you don't abstract water other than from plants. Surely that cannot be right. Doing the best I can 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 [!] for Government to refrain from inflicting degrading treatment.

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