IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

Misca. No. 52 of 2002

In the matter between:

ROY SESANA	1st Applicant
KEIWA SETLHOBOGWA AND OTHERS	2nd & further Applicants

and

THE ATTORNEY GENERAL (in his capacity as Recognized agent of the Government of the Republic of Botswana)	Respondent

Mr. G. Bennett for the Applicants
Mr. S. T. Pilane with him Mr. L. D. Molodi for the Respondent

J U D G M E N T

CORAM: Hon. Mr. Justice M. Dibotelo
Hon. Justice U. Dow
Hon. Mr. Justice M. P. Phumaphi

M. DIBOTELO, J.:

1. On the 19 February 2002, the Applicants filed an urgent application on notice of motion seeking at paragraphs 2 and 3

thereof an order declaring, inter alia, that:

"2 (a) The termination by the Government with effect from 31 January 2002 of the following basic and essential services to the Applicants in the Central Kalahari Game Reserve (CKGR) (namely) –

(i) the provision of drinking water on a weekly basis;

(ii) the maintenance of the supply of borehole water;

(iii) the provision of rations to registered destitutes;

(iv) the provision of rations for registered orphans;

(v) the provision of transport for the Applicants' children to and from school;

(vi) the provision of healthcare to the Applicants through mobile clinics and ambulance services

is unlawful and unconstitutional;

(b) the Government is obliged to:

(i) restore to the Applicants the basic and essential services that it terminated with effect from 31 January 2002; and

(ii) continue to provide to the Applicants the basic and essential services that it had been providing to them immediately prior to the termination of the provision of these

services;

(c) those Applicants, whom the Government forcibly removed from the Central Kalahari Game Reserve (CKGR) after the termination of the provision to them of the basic and essential services referred to above, have been unlawfully despoiled of their possession of the land which they lawfully occupied in their settlements in the CKGR, and should immediately be restored to their possession of that land.

3. the Respondent pays the Applicants' costs."

The Application was supported by the founding affidavit of the First Applicant.

2. On the 4 March 2002, the First Applicant filed a supplementary affidavit seeking additional declaratory orders "….. that the refusal by the Government's Department of Wildlife and National Parks to:

(a) issue special game licences to the Applicants; and
(b) allow them to enter the CKGR unless they possess a permit,

is unlawful and unconstitutional."

The application was opposed by the Respondent who filed several opposing affidavits. The Applicants then filed the replying affidavit of the First Applicant and several supplementary or supporting affidavits. In his opposing papers, the Respondent also raised several points in limine. When the matter came up for hearing only the points of law were argued. On the 19 April 2002 I upheld those points of law and dismissed the application but in doing so, I also granted the Applicants, if they so wished, leave to re-institute their action on properly prepared papers in terms of the Rules of Court.

3. The Applicants were dissatisfied with my decision and took the matter to the Court of Appeal which on the 11 July 2002 took the view that it should be referred back to this Court for determination of the issues to be agreed by the parties. On the 23 January 2003 after the parties had formulated and agreed on the issues, the Court of Appeal referred this matter to the High Court, inter alia, in the following terms:

"IT IS ORDERED BY CONSENT AS FOLLOWS:

1. The matter is referred to the High Court for the hearing

of oral evidence by the Applicants' witnesses at Ghanzi and the Respondent's witnesses at Lobatse on a date to be determined by the Registrar as a matter of urgency in consultation with the parties' legal representatives on the following issues:

(a) whether the termination with effect from 31st January 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and constitutional.

(b) whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve;

(c) whether subsequent to 31st January 2002 the Appellants were:

(i) in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve;

(ii) deprived of such possession by the Government forcibly or wrongly and without their consent.

(d) whether the Government's refusal to:

(i) issue special game licences to the Appellants;

and

(ii) allow the Appellants to enter into the Central Kahalahari Game Reserve unless they are issued with a permit

is unlawful and constitutional."

Paragraph 8 of that Order states in part that:

> "The Court will give its full reasons in a judgment which will be handed down before the end of the session."

4. The judgment referred to in paragraph 8 of the order was in fact handed down on the same day the order was made, i.e. the 23rd January 2003. In that judgment the Court of Appeal expressed the view that whether it upheld or set aside the judgment of this Court against which the Applicants had appealed, "on the affidavits which were already filed either by the appellants or by the respondent there would clearly be serious disputes of fact" (vide page 2 of that judgment); and went on to state at page 6 thereof that "….. the whole purpose of referring the matter for the hearing of oral evidence was to overcome any problems in relation to affidavits filed thus far and that any issues relating to them should no longer be a consideration in having the dispute between the parties resolved by oral evidence", (my emphasis).

5. Issues 1(a) to (d) of the Court of Appeal order are the ones that require to be determined by this Court. Furthermore, a close examination of these issues reveals that they substantially incorporate the reliefs originally sought by the Applicants at paragraph 2 of their notice of motion, and the reliefs contained in the supplementary affidavit of the First Applicant filed on the 4 March 2002. The Respondent has urged the Court to determine who the Applicants are in this action so that there should be no doubt or confusion as to who the beneficiaries of the court order would be in the event the Court finds in favour of the Applicants, especially when it came to the implementation of the court order by the Government. It is an established principle that a Court should be able to supervise its own orders and to achieve that purpose it is important that there should be certainty as to who the litigants are in any given case. The Court has also from time to time raised this matter with Counsel for the Applicants because no witnesses who testified purported to speak for all the Applicants; even Losolobe Mooketsi (PW7) who relocated to New Xade where he was a paid Headman of Arbitration for Kikao Ward did not purport to speak on behalf of the Applicants. It has been argued by Counsel for the Applicants "that it would have been utterly impossible to call more than 240 Applicants to testify as to the individual circumstances in which each of them was relocated." This may well be so but it did not and could not debar or prevent the calling of the leaders of the Applicants to testify on behalf of the Applicants in regard to the circumstances surrounding the relocation of the Applicants from the CKGR in early 2002. It is also important to identify who the Applicants are so that the outcome in this action binds only those persons. When the action was instituted there were 243 Applicants and some have since died, but were not substituted, while others did not come forward to prosecute their claim. One hundred and eighty-nine Applicants have authorized Attorneys Boko, Motlhala and Ketshabile to represent them in this action and it is those Applicants whose names appear in Table A annexed to the judgment who are parties to this action.

6. The trial took some 130 days spread over a period of just over two years and the typed record of the proceedings comprise

some 18,900 pages. During the trial, there were several lengthy postponements at the instance of the Applicants, and save, for only one week when one of us was bereaving due to the loss of his mother, and may Her soul rest in ever lasting peace, the trial was never postponed for the reason that the Court was in no position to proceed with the same. At the commencement of the trial, the Court decided to conduct an inspection in loco of the new settlements of Kaudwane and New Xade outside the CKGR, and of the settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Old Xade inside the CKGR. The decision to conduct the inspection of the settlements inside the CKGR was strongly opposed by the legal representatives of the Applicants in May 2004, but was supported by the Respondent who also asked the Court to visit Gope inside the CKGR. The main ground for opposing the inspection in loco of the settlements inside the CKGR by the legal representatives of the Applicants was that there was nothing for the Court to see in those settlements as the residents who used to live there had relocated to outside the CKGR. The Court decided to defer the

visit to Gope, but indicated that it would do so if the need arose during the trial. The Court conducted the inspection in loco from the 4th to 7th July 2004 of the new settlements outside the Reserve and those inside the Reserve. The trial commenced in New Xade on 12 July 2004 when the first witness for the Applicants started to testify. During the inspection, photographs were taken and a photo album and video of that inspection have been compiled.

7. (a) At Kaudwane the Court drove around the village on the 4th July 2004 and observed the Kgotla made of a concrete structure roofed with corrugated iron; a clinic; a rural administration centre; an unused tannery; a primary school consisting of four buildings with additional buildings under construction and teachers' residences; semausu (vendor shop); homesteads with two to four huts as residential accommodation per compound; homesteads with huts and one-roomed corrugated iron-roofed houses; cement brick houses; two

boreholes; water reservoir; donkeys, cattle, chickens and horses; people playing on football and netball grounds; and residential houses some with solar panels for accommodating government or council employees.

(b) Some features which we observed during the inspection were common to Gugamma, Kikao, Mothomelo, Metsiamanong and Molapo in the CKGR. We saw some matlotla (ruins) at these places and, except for Kikao where there was some water at the nearby Kikao Pan at the time, there was no evidence of the source of water. Save for Mothomelo where we saw a sealed borehole with no engine and pump house, there was a concrete platform at each of the other four places where a water tank had rested at one point. There was no sign of people or evidence of their presence nor were there any standing huts at what used to be Kikao and Mothomelo settlements.

(c) We took two hours to travel on a formidable road from Kutse Game Reserve Gate to Gugamma where we observed about 10 huts made of traditional materials

within some compounds which were fenced with traditional materials; about 10 adults and 7 children; personal effects such as pots and clothing hanging on hut-like structures; goats, dogs and chickens; animal kraals, and a donkey cart. One woman who showed us matlotla told us that they got water from Kikao pan using the donkey cart; and that they had ploughing fields on which they cultivated beans, sorghum, maize and melons. We also observed another set of huts some distance away which we did not visit.

(d) (i) At Kikao pan we saw donkeys drinking from the pan.

(ii) After driving for some 30 minutes from Kikao, we stopped and were informed, but did not see, that there was in the distance and away from the road a newly constructed compound in which 9 adults and 5 children lived; and that the residents of the newly constructed compound had donkeys, horses, dogs, goats and chickens. We observed that there was no obvious access road to the new compound.

(iii) At Mothomelo where we arrived at 2 p.m. the Station Commander of Takatokwane Police Station who had been showing the Court around returned to Takatokwane and his position in the Judges' vehicle was taken by the Ghanzi District Commissioner, Mr. Macheke, who later testified as DW12.

(e) (i) We arrived at a pan a kilometre outside

Metsiamanong at 4:30 p.m. having traversed what was at times a very difficult terrain. The pan was dry but we observed 200 litre drums there, two of which were full of water while some were half full as well as a 20 litre white plastic container with water. All these were enclosed in a thorn-bush protective fence.

(ii) We arrived at Metsiamanong at 5 p.m. on the 5th July 2004. At Metsiamanong we observed adults and children; 5 to 6 compounds; one unoccupied old hut whose entrance was barricaded; some old huts while other huts were new or under construction; goats, chickens, ploughing fields; and women carrying firewood and building materials. One man who was said to be a former Councillor introduced himself to us as Moeti Gaborekwe at the entrance of his compound. We spent the night in tents at Metsiamanong. In the morning of 6th July

2004 before the Court left for Molapo at 8:30 a.m., the Applicants and their Counsel invited residents of the compounds to the Court's camp and we observed about 30 to 35 adults and 15 to 17 children who turned up at our camp.

(f) We arrived at Molapo around 12 noon. At Molapo there were men, women and children, in all about 11 adults and 8 children. We saw a man holding wild succulents and a wild tuber which he said was for human consumption; a hut full of melons (marotse); 19 to 20 huts with some huts under construction; personal possessions on top of some huts; dogs, chickens, donkeys, kraals, and goats; hats and towels the Respondent's representative alleged had been distributed to residents of New Xade recently; and two motor vehicles. We left Molapo at 1:30 p.m. and not far from there came across another set of huts which was said to be part of Molapo settlement, and a dry pan a kilometre from Molapo where there were some empty 200-litre

drums. We also observed that at Molapo, like at Metsiamanong some people had recently arrived because some huts had recently been constructed while others were under construction.

(g) At 4 p.m we arrived at a place called Xaka where we saw a solar-powered borehole for wildlife and a pan with water, the source of which was the borehole.

(h) The Court arrived at Old Xade after sunset where we spent the night in tents having traversed what at times was the most difficult terrain on earth. We conducted the inspection the following day starting at 9 a.m. and finished at 9:35 a.m. At Old Xade we observed a borehole; buildings, some under construction, some under repair and some in disrepair; a two-block dilapidated building that used to be a clinic and adjoining building described to the Court as the nurse's residence; an old primary school comprising of four blocks, four classrooms, and a cooking area; a standpipe and water reservoir; newly constructed offices for DWNP; DWNP camp with showers, where we even showered, and toilets; a cooperative shop; and a kgotla which comprised a corrugated iron-roofed structure.

(i) When we finished at Old Xade on 7th July 2004, we travelled to New Xade, some 60 kilometres away and 40 kilometres from the western boundary of the CKGR in the Ghanzi direction. At New Xade we drove around the village and made the following observations – The Kgotla which is a modern building with offices staffed by the Chief, police officers and court staff; a primary school

comprising seven blocks of buildings; children in school uniform playing in the school playground; an 80m x 80m fenced horticultural project yard where there were ripe tomatoes; a reservoir into which water was pumped; community hall of the type found in many villages in Botswana; modern houses with paved front yards for extension workers; a church, clinic with maternity ward, out patient consulting rooms, dressing room, dispensary, registry etc.; hostels for school children where the Court would be sitting; a bar which had a man and woman as the only customers, a shop; and a bottle store which appeared to be closed.

At New Xade we also drove to Kikao Ward where we observed a Kgotla, various huts, one-roomed concrete houses similar to the ones observed at Kaudwane; horses, cattle; children in school uniform; non-school going children, and adults; standpipe and square yards.

At Metsiamanong Ward in New Xade we observed huts similar to those at Kikao Ward; corrugated iron-roofed houses; children and adults; cattle, goats, chickens, and square yards as opposed to round or oblong yards found in the CKGR.

Molapo Ward had similar huts and houses as Kikao and Metsiamanong Wards but there we also saw the biggest

residential house with indoor plumbing. We further observed square plots, some with wire mesh and pole fencing; chickens, cattle and goats.

At the cattle kraals there were people, cattle, goats and donkeys, watering troughs, loading ramps, and crushes. The source of water for the residents of New Xade and livestock was said to be a borehole 20 kilometres from that village.

Although the Applicants' legal representatives opposed the inspection of settlements by the Court in the CKGR, their Counsel has now conceded that it was a valuable exercise because it gave the Court "….. an impression of the physical location of the settlements and the difficulties which confronted the residents which otherwise we might not have known." (vide page 8482 of Record of Proceedings Vol. 20). When we inspected the settlements we traversed some very difficult terrain and passed some desolate areas as well as observing some of the harshest conditions in the CKGR.

8. An application was made by the Respondent on 14 June 2005 for the Court to visit Gope to conduct an inspection in loco. Gope is a place from which some of the Applicants, including PW4, allege they were forcibly relocated and where some

prospecting for minerals had previously been carried out. The issue of mining at Gope was raised by the Respondent in the supporting affidavits of Dr. Nasha and Dr. Tombale (DW3) who were the Minister of Local Government and Permanent Secretary to the Ministry of Minerals, Energy and Water Affairs respectively although the Applicants had not referred to mining in the founding and supplementary affidavits. In the application Counsel for the Respondent submitted that the Respondent had raised the issue of mining at Gope because it was "plain to us that although the Applicants had not said anything about it in their originating papers ….. it was an issue possibly tactically left to discussion in the press and to discussion elsewhere but kept out of the court case" (vide Vol. 20 at page 8492 of Record of Proceedings). He told the Court that the First Applicant was constantly discussing that issue in the press by saying that the residents of the CKGR believed they had been relocated to give way to mining while at the same time having declined to take the witness stand to testify so that his allegations could be tested in open Court. He drew

the attention of the Court to the evidence of Mr. Albertson (PW9) who had talked about mining in Gope by testifying that the attraction of the mine (at Gope) caused people to stay at that site for longer periods than they would have done in the past. I have also noted that in their admissions of 22nd February 2006, the Applicants state that they do not admit the second sentence in paragraph 8.8 of Dr. Nasha's affidavit (Exhibit D125) in which she alleges that "So there is no link of the relocation to the diamonds." This denial by the Applicants shows that they contend, although not in so many words, that the relocation is linked to the mining of diamonds at least at Gope, and lend support to First Applicant's allegations referred to by Counsel for the Respondent that the mining of diamonds in the CKGR is linked to the relocation of the Applicants. The Respondent therefore asked the Court to visit Gope to confirm that there was no mining of or preparations to mine diamonds at Gope.

9. Counsel for the Applicants opposed the application mainly on

the ground that the Applicants had not pleaded that issue, but when he was asked by the Court on the 8th August 2005 when preparations were being made to visit Gope to confirm that as a fact there was no mining at Gope or preparations to mine he would only say that there were no such as at April 2004 (vide Vol. 20 at page 8492 of Record of Proceedings). As Counsel for the Applicants could not unequivocally go on record to confirm that there was no mining or preparations to mine at Gope, the Court visited Gope to conduct an inspection. At Gope the Court observed some matlotla but no sign of people or evidence of their presence. The Court also observed that there was an abandoned rehabilitated mining site and no signs of mining or preparations to undertake mining operations at Gope. I should point out that the allegation that the First Applicant was running articles in the press during the trial to the effect that the mining of diamonds in the CKGR was one of the reasons why the government was relocating the residents of the CKGR is true and was in fact not denied by the First Applicant, who also strangely even stated that he did not have confidence in

the manner the Court was handling this case, which statement resulted in his apology to the Court through his Counsel. I must also state that Counsel for the Applicants has told the Court that it is not part of the Applicants' case that they were relocated from the CKGR by the Government in order to give way to the mining of diamonds in the Reserve. Furthermore, as a fact, the Court found when it conducted an inspection at Gope in the CKGR, where prospecting and testing for diamonds had previously been carried out, that the mining site had been rehabilitated and abandoned and that there was no mining or any sign of preparations to mine diamonds at Gope. The evidence of Dr. Akolang Tombale (DW3) who was the Permanent Secretary in the Ministry of Minerals, Energy and Water Affairs that no mining has ever taken place in the CKGR and that the diamond deposits discovered at Gope during prospecting have been found to be uneconomic has not been disputed by the Applicants. I therefore find that evidence to be truthful.

10. Where the Court hearing a matter instituted by way of

application supported by affidavits takes the view that there are serious disputes of fact which cannot be resolved on affidavits, it may refer that matter to oral evidence. In referring the matter to oral evidence, the Court may give directions in regard to the issues to be determined or decided at the hearing of the oral evidence by defining those issues. In casu, that is what the Court of Appeal has done. In situations where the Court refers a matter to oral evidence, it is not uncommon for the Court to direct that affidavits filed at that time should stand as pleadings. However, even if the Court, in its referral of a matter to oral evidence, does not specifically direct that the affidavits should stand as pleadings, in my view, the effect of such referral would still be the same in regard to the filed affidavits, namely that the affidavits filed by the parties at the time of referral to oral evidence together with any further affidavits and statements which that Court may grant leave to the parties to file stand as pleadings unless the Court directs to the contrary. The result in those circumstances is that, subject to admissions of all or some of the contents of the said affidavits or statements by either party, all the allegations not admitted in such affidavits and statements have to be proved by a party upon whom the burden of proof lies at the hearing of the oral evidence. In this matter, it is common cause that once the dispute was referred to the hearing of oral evidence, all the affidavits and witnesses' statements filed of record stood as and became pleadings with the result that all allegations contained therein, unless admitted by either party, had to be proved on a balance of probabilities to enable the Court to make a determination of the issues defined by the Court of Appeal in its order of 23 January 2003 reproduced above.

11. Before turning to the issues, I must point out that the First Applicant has elected not to go into the witness box to testify and be cross-examined by the Respondent. The First Applicant, as leader of FPK, is the person who instituted these proceedings on behalf of the residents of the CKGR by filing

several affidavits in which he made detailed allegations in an endeavour to show that the residents and Applicants of the CKGR had been forcibly relocated to Kaudwane and New Xade by the Government. Once the matter was referred to oral evidence all the allegations contained in the First Applicant's affidavits that have not been admitted had to be proved. As the First Applicant has not testified to the unadmitted allegations in his affidavits, Counsel for the Applicants has correctly conceded that such allegations do not constitute evidence. During the course of his submissions and in response to questions from the Court of the 5th September 2006, Counsel for the Applicants told the Court that the affidavit of Mr. Sesana "ought to be treated as in effect a pleading but no more and no less than that." The allegations in the first Applicants' affidavits are therefore not evidence and remain bald allegations which have not been proved and tested under cross-examination. The record will show that the decision by the Applicants not to call the First Applicant and Alice Mogwe of Ditshwanelo, both of whom alleged in their

affidavits that they were present and saw what happened at some of the settlements during the relocations of 2002, to testify was confirmed by Counsel for the Applicants in open Court in response to questions from the Court before he closed the case for the Applicants, (vide pages 4768 and 4769 of record of proceedings Vol. 11). Further, during his submissions on the 5th September 2006, Counsel for the Applicants gave as a reason for not calling the First Applicant that "a view was taken on the basis of the length of time that was required to cross-examine other witnesses of fact called by the Applicants, and the view formed was that if and when Mr. Sesana went into the witness box, the length of the trial was likely to be extended by several weeks and that was something we simply could not afford to happen." I find it disingenuous on the part of the First Applicant to continue to make allegations that the Applicants were relocated by force in order to give way to mining of diamonds in the CKGR while at the same time having chosen not to testify in the case which he had himself instituted so that his allegations could be tested in open court.

Although the First Applicant as a party to these proceedings has decided not to go into the witness box to give evidence, it is unfortunate that during the trial when he made comments to the media, which were not disclaimed by him and which he was entitled to make, about the alleged forcible removal of the Applicants from the CKGR by the Government, he went out of his way to malign and cast aspersions on this Court to the extent that at one point his Counsel had to apologise on his behalf to the Court for what were undoubtedly disparaging comments by him in May 2005 about this Court in its conduct of this case. The Attorney for the Applicants, Mr. Boko, who hardly attended court proceedings, at one point in this trial also engaged in this pass time, which seems to have become fashionable these days in this country, to the extent that he was called to order by this Court. I must affirm that it is indisputable and totally acceptable that citizens and residents of this Republic have a fundamental right enshrined in the Constitution to express their views freely and without fear or

interference and that this Court will, where appropriate, protect that right where it is sought to be stifled. The First Applicant and his Attorney were not the only persons who were responsible for these misdemeanours. During this trial, I noted a very disturbing tendency or trend by some public figures or institutions who set out to also disparage and malign this Court; some of them did not even attend court proceedings to hear first hand what was happening before engaging in uncalled for attacks on the Court or deliberately distorting what was happening in Court. One does not know why those public figures or institutions chose to conduct themselves in that manner. However, a clear signal must issue forthwith and all and sundry must be warned that this Court will not, as it became abundantly clear during the trial, stand idly by when its dignity is being maligned, in the discharge or exercise of the functions conferred upon it by the Supreme Law of this Republic, namely, the Constitution. Let none complain when appropriate action is taken against them for bringing this Court

into disrepute irrespective of who they may be.

12. Several interim matters arose during the course of the trial as

was to be expected in such a long trial. One such matter arose in August 2005 when the Respondent sought to use and produce a report prepared by Dr. Alexander, (DW6) who was testifying about the effect of diseases in domestic animals on wildlife in game reserves and national parks. What happened was that during the court recess in July 2005, there was an outbreak of disease called sarcoptic mange in some goats in the CKGR and at that time, Dr. Alexander happened to be in the Reserve. As a veterinary doctor, she examined some of the goats and prepared a report on the possible effect of that disease on wildlife in the CKGR. One of the factors which was interesting and occupied a considerable amount of the time of the Court but which was, in my view, peripheral to the determination of the issues in this matter was the presence of domestic animals in the settlements inside the CKGR which was

alleged to constitute a disturbance factor to wildlife because domestic animals some time transmit disease to wildlife and vice versa. I do not think that anybody in this country can dispute that disease is sometimes transmitted from domestic animals to wild animals and vice versa; for example, buffaloes are known to transmit foot and mouth disease to cattle and foxes transmit rabies to domestic dogs which when infested with rabies sometimes bite human beings and transmit rabies to them with disastrous consequences. The reason, however, why I say this factor was peripheral to the issues to be determined by this Court is that the evidence that has been led shows that the presence of livestock or domestic animals was never given or put forward to the residents of the settlements in the CKGR as one of the reasons why they were being asked to relocate from the CKGR to the new settlements outside the

Reserve prior to the February 2002 relocations.

13. The Report on the outbreak of the disease in the CKGR had been prepared without invitation to and participation by the representatives of the Applicants and after the Applicants had

closed their case. Counsel for the Applicants objected to the use of that report mainly on the grounds that the Applicants had closed their case and would be prejudiced if the Respondent was allowed to use it as they would not be able, procedurally, to adduce any rebuttal evidence to counter the contents of the report. The Court upheld the objection by a majority of two to one. I am the one who held the minority view that that report could be used by the Respondent. My reasons for that view were that as Dr. Alexander was still testifying in chief, the Applicants' Counsel would have the opportunity to cross-examine her on the contents of the report and, secondly, that even though the Applicants had closed their case they could still be granted leave, if they so wished, to call evidence in rebuttal of Dr. Alexander's opinions arising from or in that report on the effect the outbreak of disease in goats in the CKGR was likely to have on wildlife. In my view, in that event, the Applicants would not be prejudiced by the fact that Dr. Alexander had testified on the outbreak of disease on domestic animals in the CKGR after the Applicants had closed

their case. On another matter, I would like to state that one of the services in the form of the provision of transport for the children to and from school of the Applicants and residents who never relocated is not in issue because evidence that has been adduced by both parties shows that that service has never been terminated; in fact Minister Pelonomi Vension (PW13) testified that the Government took the decision to continue with that service because it did not want the children whose parents did not relocate to be disadvantaged by not having access to education. Furthermore, even though from the pleadings and the order of the Court of Appeal the date for the termination of the provision of services to the Applicants in the CKGR is put as 31st January 2002, in my view, there is no evidence that the services were terminated on that date. On the contrary, the evidence shows that the services, especially water, continued to be provided during the relocations and that they were finally terminated in or about 4 March 2002 when the Ghanzi District Council Secretary gave written instructions to the Council Water Affairs Department to seal the borehole at Mothomelo, collect

the engine and pump house, and to remove all water tanks from all the settlements in the CKGR (vide Exhibit P152 in Bundle 3C at page 105).

I now turn to the issues defined by the Court of Appeal for determination by this Court.

14. A. Issue Number 1 (a) – Was the termination of the provision of basic and essential services to the Applicants in the Central Kalahari Game Reserve unlawful and unconstitutional?

This is the first issue that calls for determination by this Court in terms of the order of the Court of Appeal of the 23 January 2003; it was also the first issue that the Applicants wanted the Court to decide in terms of their original notice of motion filed on the 19 February 2002 where at paragraph 2(a) thereof they sought a declarator that the termination of basic and essential services in the CKGR by the government was unlawful and unconstitutional.

15. The issue whether the termination of basic and essential services (services) was unlawful and unconstitutional is dealt with at paragraphs 718 to 826 of the Applicants' written submissions. Their reasons for the contention that the termination of services was unlawful and unconstitutional are set out or summarized succinctly in the following terms:-

> "718. We submit that the basic and essential services were terminated unlawfully or unconstitutionally on one or both of the following grounds:
>
> that the Applicants enjoyed a legitimate expectation that they would be consulted before their services were terminated, but they were not consulted.
>
> that the termination was a breach of the National Parks and Game Reserve Regulations 2000 ("the 2000 Regulations")."

The unlawfulness and unconstitutionality of the termination of services in the submission of the Applicants is based on two grounds in regard to issue number one; namely, the doctrine of legitimate expectation and the breach of the 2000 National Parks and Game Reserve Regulations.

16. At paragraph 719 of the Applicants' written submissions, it is stated that:

> "719. The law of Botswana recognizes that an administrative body may, in a proper case, be bound to give a person who is affected by its decision an opportunity of making representations, if he has a right or interest or legitimate expectation of which it would not be fair to deprive him without a hearing."

They further submit at paragraph 726, and correctly in my view, that "Consultation does not ….. require the decision

maker to accept the views of those he consults. He may quite properly reject their views, as long as he takes them properly into account before doing so" (my emphasis).

17. They refer in their submissions on this issue to Regulation 18(1) of the National Parks and Game Reserve Regulations 2000 which provides that -

> "Community use zones shall be for the use of designated communities living in or immediately adjacent to the national park or game reserve"

and submit that when the Department of Wildlife and National Parks prepared the Third Draft Management Plan (TDMP), which is Exhibit 7) it involved communities resident in the CKGR whose views it took into account and arrived at a mutually agreed proposal that Community Use Zones (CUZs) would be established within the CKGR for use by and benefit of the resident communities in clear recognition of the provisions of Regulation 18(1) quoted above. The process of formulating the TDMP is said, by the Applicants, to have involved the resident communities over a period of two years, but they contend that when the Department of Wildlife and National Parks (DWNP) purportedly refined the views expressed in the TDMP, it turned those views on their head which in their submission "made nonsense of two years of community consultations" supposedly intended "to ensure that the points of view and opinions of the communities are adequately represented in the Central Kalahari and Kutse Game Reserve Management Plan" (vide para. 777 of submissions).

18. In paragraphs 779 and 780, they submit that they had a legitimate expectation that the Government would take no

steps which were intended or bound to subvert or undermine the process involved in formulating the TDMP, and that -

> "In particular they (the Applicants) had a legitimate expectation that the Government would not withdraw services from the Reserve until it had considered on its merits a final Draft Plan which proposed CUZs for the communities still resident in the Reserve."

At paragraphs 784 to 803 of their submissions the Applicants refer to or rely on the Ministry, Commerce and Industry Circular No. 1 of 1986 (Exhibit "P22") which set out government policy on human settlements in the CKGR and submit, inter alia, that it is not in dispute that "the residents had a legitimate expectation that Government would comply with the terms of that policy" and further that –

> "786. The 1986 Policy laid down two crucial propositions (that):
>
> > "viable sites for economic and social development should be identified outside the Reserve and the residents of the Reserve encouraged – but not forced – to relocate at those sites." [para. 3.37]
> >
> > "the Ministry of Local Government and Lands should advise Government on the incentives required to encourage residents in the Reserve to relocate." [para. 3.4]."

19. In the submission of the Applicants, the crux of the 1986 Policy was that even though the government would persuade the residents to relocate outside the reserve, it would nevertheless be left to the residents to decide whether or when they wished to do so; and that for the purposes of ensuring that the residents only relocated because they wanted to do so, the government would focus on the positive methods of encouragement to relocate to new sites rather than the negative aspects of relocating outside the reserve. In the contention of the Applicants -

> "the 1986 Policy gave rise to a legitimate expectation that services would not be cut unless and until either the residents had relocated of their own free will or the Policy was revoked"

and further that –

> "…. at the very least, the 1986 Policy gave rise to a legitimate expectation on the part of the Applicants that they would be consulted before the services were terminated," (vide Paragraphs 797 and 798 of Applicants' written submissions) (my emphasis).

20. The Applicants also rely on the National Settlement Policy of 1998 for the contention that the termination of the provision of services to them by the Government in the CKGR was unlawful and unconstitutional which Policy they maintain was in force when the decision to withdraw or terminate the services was taken. They submit that -

> "It cannot be disputed that the Applicants had a

> legitimate expectation that they would benefit from the terms of the National Settlement Policy in the same way as they were entitled to benefit from the 1986 Policy," (vide para. 807).

They argue further that under the 1998 National Settlement Policy, the settlements with a population of 150 to 249 people were to be provided with potable water while those with a population of less than 150 were to be provided with basic services on a mobile basis where feasible. They argue that because at the time of the 2002 relocations Mothomelo and Molapo had populations of 245 and 152 people respectively, they were entitled to potable water while the other settlements were entitled to basic services on a mobile basis if that was feasible.

21. In their submissions, they argue that there was no evidence that by August 2001, it was no longer feasible to provide basic services to the settlements in the CKGR as Mrs. Kokorwe had told the meetings she addressed because the Government or Ghanzi District Council had been providing such services for many years prior to 2001, (vide paragraph 811 of Applicants'

written submissions). However, at paragraph 815 of their submissions they state that -

> "815. We do not submit for the present purposes that it was not open to the Government to depart from the 1998 Policy, although that may be the position in law" (my emphasis).

But they maintain in the following paragraph that –

> "…**.** the residents had a legitimate expectation that before the Government did decide to deviate or depart from the 1998 Policy it would genuinely consult them about the proposed decision."

The Applicants further rely for their contention that the termination of services was unlawful and unconstitutional on Regulation 3(6) of the National Parks and Game Reserve Regulations 2000 which states that –

> "In the absence of a management plan, the development and management of a national park or game reserve shall be guided by the draft management plan for the national park or game reserve, where such exists, or the instructions of the Director where such draft does not exist."

It is the contention of the Applicants that in terms of this sub-regulation, government ministers were to be guided by TDMP when they considered whether to terminate the services but were not. The Applicants point out that one of the primary

objectives of the TDMP was –

> "…. to ensure that communities with traditional rights are able to benefit from the sustainable utilization of wildlife resources and to try to minimize conflicts between communities and the reserves" (vide para. 822.1).

The Applicants argue that the TDMP provided for the CUZs for

the resident communities in each settlement in the CKGR; and also that one of the objectives of the TDMP was that the communities inside the Reserve would participate in and benefit from the future development of the Reserve which objective in their submission would be rendered meaningless if the communities ceased to exist in the CKGR as a result of the termination of the provisions of services to the Applicants therein by the Government.

22. The concept or principle or doctrine of legitimate expectation has been accepted as part of our law. In MOKOKONYANE v. COMMANDER OF BOTSWANA DEFENCE FORCE AND ANOTHER [2000] 2BLR 102, the Appellant was, in terms of Regulation 4(5)(b) of the Defence Force (Regular Force) (Officers) (Amendment) Regulations 1996, given three months' notice in writing that he was being compulsorily retired on the ground that there were no future prospects for his promotion in the force. Regulation 4(4) of the said Regulations gives the Commander of BDF a discretion to require any officer below the rank of Lieutenant – Colonel who has attained the age of 45 years to retire from the force. The compulsory retirement age in the BDF is 55 years. When the Appellant was given notice, he was 47 years and was not given prior notice of the decision to retire him nor was he given the opportunity to contest the decision. The Appellant applied to the High Court for an order to set aside the decision of the Commander of the BDF to retire him but the application was dismissed. He appealed to the Court of Appeal where it was argued on his behalf that he had a legitimate

expectation that he would not be compulsorily retired until he reached 55 years and that if his retirement at an early age was being considered he would be advised of this and be given the right to be heard before the decision to compulsorily retire him could be made. It was further contended on his behalf that as he was not afforded such right, the decision to retire him was invalid and had to be set aside. It was held by Zietsman, J.A., dismissing the appeal, at page 107 F-G that:

> "As was pointed out by Amissah, J.P. in his judgment in the MOTHUSI case, the claim of legitimate expectation and the claim of a right to be heard fall to be considered in relation to each other as the claim of legitimate expectation is the basis which gives standing to the claim of the right to be heard. His judgment deals fully with the legitimate expectation principle which has been accepted as being part of the law of this country,"

and further on same page at letters G-H that:

> "The essence of the principle (of legitimate expectation) is the duty to act fairly, and to give a person the right to be heard before a decision is made by a public official which decision may prejudicially affect the person in his liberty, his property, or his rights, unless the statute empowering the public official expressly or by implication indicates to the contrary" (my emphasis).

The principle of legitimate expectation, I should stress, is founded on fairness in that public authorities or officials are expected to act fairly when they make decisions which are likely to affect or prejudice the interests of other people. In

MOTHUSI v. THE ATTORNEY GENERAL [1994] B.L.R 246

Amissah, J.P. (as he then was) at page 260 A-C described the

principle of legitimate expectation thus –

> "The concept of legitimate expectation has developed in administrative procedures to protect those who have been led either by contract or practice to expect a certain course of action in cases where the expected course of action has been altered without giving them the right to make representations. Starting from a procedural concept by which the requirement of natural justice could be brought into operation, it has been in some cases ….. not merely to cover the procedural concept, but to require the fulfillment of a promise made by authority."

23. In BOTSWANA RAILWAYS WORKERS UNION v. BOTSWANA

RAILWAYS ORGANISATION [1991] B.L.R. 113 Howitz, Ag.J, as he then was, had occasion to deal with the concept or principle of legitimate expectation and said at page 121 B -

> "The concept of a legitimate expectation has its origins in a determination to control and bring within judicial review arbitrary and unfair decisions of administrative public authorities. This (concept of legitimate expectation) has resulted in an extension of the doctrine of audi alteram partem which is an important aspect of the duty to act fairly,"

and the learned judge went on to state at page 122 B that –

> "A person whose claim falls short of a legal right may nevertheless be entitled to some kind of

> hearing if the interest at stake rises to the level of a "legitimate expectation" of which it would not be fair to deprive him without hearing what he has to say. Put another way, it is one aspect of the duty to act fairly."

He further quoted what Lord Fraser said in COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS v. MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL E.R. 935 at page 944 A-B when discussing the circumstances or situations under which the doctrine may become applicable that -

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue"

and further referred to the caution by the same judge that –

> "The limits of the doctrine of legitimate expectation ….. must be clearly understood as there is a tendency to elevate mere expectation into a right."

24. In my view, the issue of termination of services is the most important of them all because it triggered all the other issues or events that followed; its importance is borne out by the fact it is issue number one in both the Applicants' notice of motion

and the order of the Court of Appeal. The thread running through all the Applicants' contentions that the termination of services was unlawful and unconstitutional is that they were not consulted before the decision to terminate the services provided to them in their settlements in the CKGR was made notwithstanding that they had a legitimate expectation that the government would consult them before making such a decision which was likely to adversely affect them or their interests or to prejudice them. The Respondent maintains that the residents of the settlements in the CKGR were consulted before the services were terminated and has adduced or placed evidence before the Court in an endeavour to show that consultations took place over a number of years before the provision of services to the residents in the CKGR was finally terminated in early 2002.

25. The burden of proof is on the Applicants to prove that the government did not consult them before the services were terminated; that burden of proof in our civil proceedings is required to be discharged by the Applicants on a balance of probabilities. The basic principle in civil proceedings on the onus or in regard to the burden of proof is that he who alleges must prove (my emphasis). The Respondent, it must be stressed, bears no burden to prove that the government consulted the Applicants before

terminating the services in the absence of any evidence by the Applicants showing that they were not consulted before the services were terminated. It is only when the Applicants have placed evidence before the Court showing that they were not consulted that it becomes necessary for the Respondent to adduce evidence in rebuttal to prove that the government consulted the Applicants before terminating the services. The standard of proof required of the Respondent in that rebuttal evidence is also on a balance of probabilities.

26. As I have already stated, a strong and consistent thread running through the Applicants' submissions in support of their contention that the termination of services was unlawful and unconstitutional is that they had a legitimate expectation that the government would consult them before the decision to terminate the provision of basic and essential services provided to them in their settlements in the CKGR was made, which consultation they maintain was not done. I pause here and observe that in their founding affidavit, the Applicants allege an ulterior motive on the part of the government as the reason for terminating the services, and that allegation is foreshadowed in paragraphs 79 to 85 of the First Applicant's founding affidavit wherein he alleges, inter alia, as follows:

> " ULTERIOR MOTIVE
>
> 79. (a) I am advised that the decision by the Government to cut all services to the residents of the CKGR is motivated by an ulterior motive. The Government engaged the representatives of the residents in the negotiations for the implementation of the community based natural resource management programme over a period of ten months.

(b) These negotiations led to the conclusion of an agreement on the extent of community use zones boundaries within which the residents of the CKGR might utilize its natural resources.

The Government was clearly angered by the campaign waged by Survival International. As its response to this campaign, the Government has decided to violate the most basic human rights of the residents (and the Applicants) of the CKGR. It intends to deprive the Applicants, who intend to claim their land and residence rights within the CKGR, of their rights to be provided with water, food rations, basic health care and access to education. These services are provided to other citizens of the Republic of Botswana irrespective of whether they exercise rights of ownership to land." (my emphasis)

At the trial, however, no evidence was adduced by the Applicants to support these allegations of ulterior motive on the part of the Government for terminating the services with the result that they remain bald allegations as they are unproven. Further, no explanation has been proffered by the Applicants as to why they have not led evidence to prove these allegations of ulterior motive as a reason for terminating the services in the CKGR on the part of the Government.

27. The Applicants' contention that they had a legitimate expectation that they would be consulted before the services were terminated but were not is foreshadowed in paragraphs 90 to 92 of First Applicant's founding affidavit in the following terms:

"LEGITIMATE EXPECTATION

90. I am advised that not only do the Applicants have a constitutional right to be provided with the services referred to ….. above, which we have always been provided with, but the Government has created a legitimate expectation in the minds of the Applicants that it would continue to provide these services.

91. The Government has not informed the Negotiating Team that it intended to terminate the services ….. The Government only sought to communicate its decision to the Applicants during the week commencing Monday, 21 January 2002. The only other manner in which the Government has attempted to communicate this decision, was by making announcements in the press and by announcing the decision at the opening of Parliament in October 2001.

92. Accordingly, as the Government had created a legitimate expectation in the minds of the Applicants that it would continue to provide the services to them, the Government had a duty to consult properly with the Negotiating Team and Applicants before taking its decision to terminate the provision of these services. By its failure to do so, I am advised that the Government has acted unlawfully and that its decision to terminate the above services is invalid" (my emphasis).

28. I am persuaded by the argument and accept that the Applicants had a legitimate expectation that the government would consult them before the decision to terminate the provision of services in their settlements in the CKGR was

made. The Applicants have, however, argued strongly that they were not consulted before the decision to terminate the provision of services in the CKGR was made by the government; hence their contention that the termination was unlawful and unconstitutional and should be quashed by this Court. I have already set out above what in my view is the law governing the concept or doctrine of legitimate expectation or what I believe are the circumstances under which such a principle or doctrine or concept may arise or become applicable by referring to the case law where our Courts have described or defined what the doctrine of legitimate expectation is or what it entails. I shall now proceed to examine whether the Applicants' contention that they were not consulted before the termination of services is supported by the evidence which has been placed before this Court, always bearing in mind that the burden of proof is on the Applicants to prove, not beyond a reasonable doubt but on a balance of probabilities, their allegation that they were not consulted before the decision to terminate the provision of services in the CKGR was made by

the government.

29. I must point out and state that none of the witnesses of fact who gave evidence for the Applicants testified that the government did not consult the residents or Applicants before the decision to terminate the provision of services to the Applicants was made and no explanation was put forward by the Applicants to the Court why this was so, especially when regard is had to the fact that the Applicants had pleaded that allegation and that it was denied by the Respondent. Given this denial in the pleadings by the Respondent which the Applicants were very much aware of, one would have expected that the Applicants would lead and place direct evidence before the Court to prove that the government did not consult them before it made the decision to terminate the provision of services in the CKGR. What comes out clearly is that their contention that they were not consulted before the decision to terminate the services was made is not supported by the evidence before this Court. The evidence of the Applicants and the government shows that they were as a matter of fact consulted before the decision to terminate the services was made, and further that as a fact the Applicants were aware that the provision of services would be stopped or cut at some date or time in future.

30. In terms of Government Circular No. 1 of 1986 (Exhibit "P22") issued through the Ministry of Commerce and Industry, the Government took a policy decision that social and economic development of human settlements should be frozen or stopped within or inside the CKGR. It was in that policy that the Ministry of Local Government and Lands was directed to identify viable sites outside the CKGR for economic and social development to which the residents of the CKGR were to be encouraged but not forced to relocate. My understanding is that the Applicants are not challenging the 1986 Government Policy in these proceedings that there should be no economic and social development in the settlements inside the CKGR. Indeed, if they were challenging that policy and wanted the Court to review the decision of the Executive arm of Government to adopt that policy they would have to prove that that policy was unreasonable or irrational in a constitutional democracy where the

Constitution provides for separation of powers between the three arms of government and where the formulation of policy is a function of the Executive arm of government, and where the policy adopted by the Executive may only be reviewed by the Courts generally where it can be shown that the policy in question is unreasonable or irrational.

31. My position or view that the government consulted the Applicants before it made the decision to terminate the provision of services in the CKGR is supported by the evidence of some of the Applicants' witnesses in the following respects -

(a) Tshokodiso Bosiilwane, who testified as PW3 and was one of the Applicants states that:

> "The government has been talking to us for about 15 years. The government has been consulting us for 15 years and we have never come into agreement with government but now we are given six months" (vide page 451 to top page 452 in Vol. 2 of record of proceedings)

and further at page 453 that –

> "Without depending on government we can continue to live the way we used to live (on) the food that God provided us with. We would depend on cucumber, moretlwa, and all other fruits that we have been depending on" (my emphasis).

Further, when PW3 was asked how he felt when he learnt that the government would terminate the provision of services

within six months he replied –

> "I just said whatever government wants to take away it is their property, they can take it away and I will give up as I have already given up." (vide page 453 Vol. 2 of the Record of Proceedings)

At page 526 he states that he was not complaining about the government taking away the services. Finally, PW3 told the Court at page 539 of the record that it was during the consultations that he told the government that they (the residents) did not accept to be relocated outside the Reserve and preferred to be relocated within the Reserve nearer to Metsiamanong.

(b) Motsoko Ramahoko (PW4) was asked when he gave evidence-in-chief what his response was when Assistant Minister Kokorwe told the residents at Metsiamanong that the provision of services would be stopped in six months and his answer was:-

> "I said if you do cut your services, we do not care and we are not moving from our land." (vide page 637 Vol. 2 of Record of Proceedings) (my emphasis)

Furthermore, at pages 693 to 694 of the record of the proceedings (Vol.2) PW4 after having earlier accepted that since the 1980s parties of people had been coming to Gope urging residents to relocate was asked and answered under

cross-examination as follows:-

> "Q: They had been told many times before that at a certain date the services would cease. So they had plenty of warning?
>
> A: Yes, we know that the government had been telling us that we should relocate and at times they would take away their services, but what we said was that they can go away with their services and water and leave us alone on our land because we had been surviving in that land without government providing services." (my emphasis)

32. In some of their formal admissions, the Applicants have unreservedly admitted that they were consulted by the government before the 2002 relocations after being called upon by the Respondent to make admissions. I should in fairness to the Applicants point out that some of their admissions were made with reservations. However, the following are examples of admissions made by the Applicants without any reservations:

(a) The witness statement (Exhibit "D157") of Gasehete Leatswe, appearing at pages 718 to 719 in Bundle 3B, which is as follows:

> "1. She is an adult female, currently a Councillor of Karakubis in Gantsi District.
>
> 2. From 1999 to 2001, she was the Ghanzi District Council Chairperson and was, in that capacity, involved in consultations in respect of relocations which included advising residents that the provision of services within the Central Kalahari Game Reserve would eventually be stopped as it was unsustainable. Her involvement included frequent visits to and addressing residents of settlements

within and outside the Reserve.

3. Consulting residents on the above matters was the main purpose of the visits into the Reserve. She had been involved with the consultations both before she became and after she ceased to be Council Chairperson.

4. While some residents were opposed to relocating, most were keen on doing so as they come to realize that life in the Reserve had no future. She interacted with many residents at a personal level" (my emphasis).

(b) Ghanzi District Council Relocation Task Force Inquiry Report dated 9th December 2002 (Exhibit "P93") appearing at pages 83 to 91 in Bundle 2B. This Report has been admitted by the Applicants in their "Admission of Facts" Notice filed on 27th February 2006. It is common cause that the Report was produced by a Task Force set up by the Ghanzi District Council to investigate why the residents who previously relocated from the CKGR to the settlements outside the Reserve were going back to the Reserve. At page 87 of the Report under the heading "Findings" it is stated, inter alia, that -

> "From the data analysis, it was clear that some people never relocated and they are still not prepared to relocate. They stated the

following reasons for their resistance:

- They confirmed that intensive consultation was done through all possible modes, but they did not and do not understand why wild animals should prevail over human beings …..” (my emphasis).

(c) Witness’ statement (Exhibit “D156”) of Walter Mathuukwane which appears in Bundle 3B at pages 716 to 717. The Applicants have unequivocally admitted the following from his statement -

> “1. He is an adult male and currently a Councillor at the Ghanzi Township West. He has been a Councillor since 1989, and Council Chairman from 1995 until 1999.

2. From 1983 – 1989 he was a member of the Ghanzi Land Board and at one time he held the Chairmanship of the Land Board.

4. By virtue of his position as a Land Board Chairman and Council Chairman, he was personally involved in a series of consultations with residents of the CKGR whose purpose was to persuade them to relocate to places outside the Reserve. The consultations took the form of holding meetings with the CKGR residents at some and sometimes all their settlements within the Reserve.

5. In some of these meetings, the witness accompanied Government Ministers, including Minister Ngwako about 1986/87 who went to the CKGR to hold consultations with the residents.

6. On another occasion he accompanied Honourable Patrick Balopi, then Minister of Local Government and Housing, on a consultative meeting with the residents of the CKGR. The witness will confirm that various other meetings were held with residents of the CKGR for the purpose of encouraging residents to relocate ……, and advising

them that the provision of services was not sustainable and could not be a permanent feature.

7. …..

8. Following series of consultations, some residents voluntarily relocated while others remained in the CKGR. The first relocations started in 1996. The consultations and effort to persuade continued in regard to those who refused to move out of the CKGR" (my emphasis).

> They have admitted a portion of Statement (Exhibit "D159") of Lewis Malikongwa, D.C. for Kweneng District, that his task force addressed a series of meetings of the residents of Mothomelo, Kikao and Gugamma at which "….. residents (who attended such meetings) were advised of the Government's decision to terminate the services in the near future" (my emphasis).

Part of the Statement (Exhibit "D143") of Assistant Minister Kokorwe relating to consultations with the residents of the CKGR has been unequivocally admitted by the Applicants and she states that -

> "5. The residents of the Central Kalahari Game Reserve were consulted extensively since the early mid 1980s. The consultations pointed out the advantages and benefits of relocating, and the fact that the provision of services within the Reserve could not go on indefinitely and would have to be stopped at some stage ….." (my emphasis).

In her kgotla meetings at Metsiamanong and Mothomelo in

August 2001, the recordings of which have been admitted without reservation by the Applicants at paragraph 16.5 of their admissions filed on 27th February 2006, Assistant Minister Kokorwe states that the government had been discussing the issue of relocation of the residents of the CKGR outside the Reserve for 15 years and that consultation had been going on since 1986. At page 996 in Bundle 3B (Vol.2) she enumerates the services that the Ghanzi District Council had been providing to the residents of Metsiamanong and then proceeds to state, inter alia, that:

> "At the end of each month, expenditure in these services, which the District Council brings to you, amounts to P55,000.00. Expenditure exceeds this figure, taking into account the fact that the vehicles break down and have to be repaired. In view of this therefore, it is necessary that consultation which has been going on since 1986 should not continue indefinitely; there has to come a stage whereby people say, we have consulted enough, we now agree to stop. It is in the view of this ….. that I have come to tell you that we request you to make a decision within six months from August to the end of January next year. This means you have six months to yourselves to decide ….. All we have come to tell you is that consultation has been going on for a long time and that, the District Council's assessment of expenditure, which they incur every month, is such that it retards developments in other

> parts of the district, therefore, from January next year they will stop bringing water and other services; you should understand me in the proper context that these services will continue to be available, except that they will be provided at New Xade and Kaudwane" (my emphasis).

The admitted tape recordings of Assistant Minister Kokorwe's meetings at Mothomelo in August 2001 also show that at that settlement she repeated similar statements to the residents that consultation had been taking place since 1986. She told the residents at Mothomelo that they were being given six months' notice that the delivery of services to them inside the Reserve would be stopped and all this has been admitted by the Applicants.

33. In my judgment, the examples I have cited above show and demonstrate that the government consulted the Applicants and residents of the settlements inside the CKGR extensively before it made the decision to terminate the provision of services to the Applicants. It has been argued that the termination of services was unlawful or wrongful as it was preceded by the Government's prevarication in that the Government had

consistently given assurances prior to the announcement in August 2001 that the services would not be withdrawn as long as some people continued to live in the settlements in the CKGR. It is argued on behalf of the Applicants for example that on 22nd – 23rd May 1996 the Government representatives assured the Ambassadors of Sweden, The United States, Britain, Norway and an official of the European Community that "social services to people who wish to stay in the Reserve will not be discontinued" (vide Exhibit P23); that on the 4th June 1996 the Minister of Local Government repeated that "Services presently provided to the settlements will not be discontinued" (vide Exhibit P23); that on the 18th July 1996 the Acting Permanent Secretary in the Ministry of Local Government circulated a paper to other government departments stating that "The current residents of the CKGR will be allowed to remain in the Reserve and the current Government services will be maintained, though no new services will be provided" (vide Exhibit D193); that on the 16th September 1997 the District

Commissioner, Ghanzi and Ghanzi Council Secretary wrote a letter (Exhibit D64) to the Botswana Guardian Newspaper stating that "The Government's position is that services will continue being provided for as long as there shall be a human soul in the CKGR"; and lastly that in April 2001 Dr. Nasha was reported to have told Mmegi Newspaper that "She did not approve the Ghanzi District Council Motion calling for the cutting of essential services" and that the motion "served to circumvent her Ministry's plans" (vide Exhibit P29). It is submitted very strongly that the decision of the Government to terminate the provision of services to the residents in the CKGR placed it in breach of these assurances, thus rendering that decision wrongful or unlawful.

I have noted that, save for what is attributed to Dr. Nasha in April 2001 and to which I shall revert shortly, these assurances were made in 1996 and 1997, some four years before the decision to terminate the services was made in 2001 and most of them even before the first relocations in 1997. I do not understand the Applicants to be saying that the Government

was not entitled to change its position or policy that services would continue being provided as long as there were some people living in the CKGR; indeed if that were so, it would run counter to their contention elsewhere that they had a legitimate expectation that before the services were withdrawn they would at least be given reasonable notice to make alternative arrangements for the supply of basic services to them; further they have stated at paragraph 815 of their submissions that they do not submit for the present purposes that it was not open to the Government to depart from its policy, although there they were referring to the 1998 Policy, but that they had a legitimate expectation that before the Government decided to deviate or depart from its policy it would genuinely consult them. There is no doubt that in the words quoted from the Mmegi Newspaper above, Dr. Nasha was reacting to the resolution of the Ghanzi District Council but in my view it will be a mistake to read those words in isolation, instead the article should be read as a whole to appreciate the true import of what the Minister is reported to have said because in the same

article she is also reported to have said that she did not understand what the article was about as she was on leave and that the issue (of termination of services) had long been settled and "Basarwa had moved to New Xade and Kaudwane." In my view, if there was any doubt that the Government was not equivocating on the issue of termination of services that doubt was put beyond doubt by the President at the opening of Parliament in October 2001 when he confirmed the Government decision to terminate the provision of services to the residents of the settlements in the CKGR with effect from the 31st January 2002, and in the letter (Exhibit P32) Dr. Nasha wrote to Ditshwanelo on the 7th January 2002 after the latter had written in December 2001 requesting an extension of the deadline to terminate the provision of services. In her letter (Exhibit P32) Dr. Nasha states in no uncertain terms at paragraph 3 thereof that:

> "I am to inform you that the decision to terminate services to the CKGR will not be reversed."

In my view, it is clear that once the Government took the

decision and then announced in August 2001 that the provision of services to the Applicants in the CKGR would be terminated in six months there is no evidence that after that announcement it gave any assurances to anyone, let alone to the Applicants, that such services would continue to be provided to the Applicants after the cut off date, or that the services would continue to be provided as long as there were some people in the settlements. Further, it is important to note that none of the Applicants or their witnesses has testified that he or she believed that as a result of the assurances which were made in 1996 and 1997 the Applicants would always be provided with services. There is no evidence from the Applicants that they had always been under the belief, or for that matter even the impression, that the provision of services to the settlements in the CKGR would not be terminated as a result of assurances that were given by government officials in 1996 and 1997 that services would be provided as long as there were some people in the CKGR. Instead, those who testified at all on the issue told the Court that the residents had

been told over a period of time that the services would be terminated in future and that they had not opposed the termination of services and had responded by saying they did not care if the services were terminated as they could live in the CKGR without those services. That the Applicants can live in the CKGR without the services is, in my view, true because some of the Applicants or residents never relocated while others who relocated in 2002 have since returned to and live in the settlements in the CKGR even though the services have not been restored. I therefore find as a fact that the government consulted the Applicants before it made the decision to terminate the provision of services inside the CKGR. In the premises, the contention of the Applicants that the termination by the Government of the provision of the basic and essential services to them in the CKGR was unlawful and unconstitutional has no merit and I reject it.

34. B. <u>Issue Number 1(B) - Whether the Government is Obliged to Restore the Provision of Services to the Applicants in the Central Kalahari Game Reserve?</u>

In their original notice of motion, the Applicants sought a declaratory order that the Government was obliged, first, to restore to them the basic and essential services that it terminated from the 31st January 2002; and, secondly, to continue to provide them with the basic and essential services that it had been providing immediately prior to the termination of the provision of those services. The consent order on this issue however, only directs the Court to establish after hearing evidence whether the Government is obliged to restore the provision of services to the Applicants in the CKGR. In my view, if the Court were to find on the first issue that the termination of the provision of services to the Applicants in the CKGR was unlawful, it would have to decree that the Government is obliged to restore the provision of those services to the Applicants in the CKGR, otherwise the finding that the termination of services was unlawful would be hollow and meaningless. I have already found on the first issue that the termination of the provision of services to the Applicants by the Government was neither lawful nor unconstitutional because I

am satisfied on the evidence that the decision to terminate the provision of services to the Applicants was made after the Government had consulted the Applicants, who I am also satisfied knew and were aware from those consultations that the provision of such services would be terminated at some point in the future. For the reasons stated in support of those findings, therefore, it follows that the Government is not obliged to restore the provision of services to the Applicants in the CKGR.

35. There is, however, further evidence before the Court by the Applicants on the basis of which it cannot be concluded that the Government is obliged to restore the provision of services to the Applicants in the CKGR. Only Amogelang Segootsane (PW2), who never relocated testified that he had a constitutional right to be provided with services by the government at a place of his own choosing within the CKGR. This witness moved permanently to the Gugamma in the CKGR in 1986 and he falsely testified that his parents were born in the CKGR while he was born at Salajwe in 1962 outside the CKGR where he said his parents were visiting; and, astonishingly, he also said even in 2004 when he gave evidence his parents were still on a visit to Salajwe. However, during his cross-examination, he was confronted with evidence which showed that his parents were in fact born in Salajwe where they lived. When he was confronted with this evidence, all he could afford to do was to mumble that his father must have lied to him.

36. The following are some of the examples from the evidence of

some of the witnesses who testified for the Applicants which shows that these witnesses said they do not need the services. PW3 told the Court that the residents could continue to live as they used to in the Reserve without depending on the services provided by the Government; he said his position was that if the Government wanted to take its property (services) it could do so and further that he was not complaining about the Government taking away its services but about his land; and that he never delegated anyone to go and complain about services on his behalf but only about land (vide pages 453 and 526 Vol. 2 of Record of Proceedings). PW4 testified, inter alia, that he told Assistant Minister Kokorwe at a meeting at Metsiamanong in August 2001 that she could cut her services in the CKGR and they (the residents) did not care. He also confirmed in his evidence that the Government had been telling them (the residents) over time that it would take away the services and their reply was that the Government could go away with its services and leave them alone on their land on which they had been surviving without being provided with

such services by the Government. PW5 also told the Court under cross-examination that they did not need the services (vide page 888 Vol. 3 of Record of Proceedings); while PW6 also said under cross-examination that at a meeting that was addressed by Assistant Minister Kokorwe in August 2001 no one opposed the termination of services; and that instead they (the residents) said:

> "….. we are now okay, we will live on our crops, you (can) take your services away" (vide pages 1027 to 1029 Vol. 3 of Record of Proceedings).

As I pointed out earlier, Counsel for the Applicants has submitted that, contrary to what Assistant Minister Kokorwe told the meetings of the residents she addressed in the CKGR, "there was no evidence whatsoever that by August 2001 it was no longer feasible to provide basic services", to the settlements on a mobile basis. He has argued that this was so because it was known that "it had been feasible to deliver services to each of the CKGR settlements hitherto" because the Government or District Council had done so for many years, and further that:

> "811.2 There was not a scrap of evidence before the Court to show why a service delivery which had been feasible for many years prior to 2001 should

suddenly become no longer feasible that year."

In my view, the Applicants' contention that there was no evidence that it was no longer feasible to provide basic services to the settlements is not sustainable when it is juxtaposed with the Applicants' admitted evidence of the Respondent and a few examples from that admitted evidence will suffice. As Counsel for the Respondent has correctly submitted, the Applicants have admitted the statement from the affidavit of Eric Molale, the then Permanent Secretary in the Ministry of Local Government and now Permanent Secretary to the President that:

> "The Government had forewarned and explained to the CKGR residents the difficulties she was having with the sustainability and costs effectiveness of such" (services)." (vide paragraph 4 thereof)

and paragraphs 30 and 31 thereof that:

"(30) In year 2000 (2001), the Gantsi District Council, out of desperation passed a resolution that due to unavailability of service provision in the CKGR, they were going to terminate. Government requested them to wait and instead intensify their persuasion strategy. In the meantime the resolution was studied and the supporting facts pointed out that the whole process was not cost effective.

(31) Government ultimately agreed with the Council and in June (August) 2001 the Assistant Minister went to the CKGR to inform the residents that the services would only be provided at existing settlements of New Xade and Kaudwane and that those remaining in the reserve would receive them at New Xade and Kaudwane." (my emphasis).

They have admitted further the statement (Exhibit "D157") of

Galehete Leatswe that during the many consultation meetings with the residents she addressed in the settlements in CKGR as Ghanzi District Council Chairperson from 1999 to 2001, she advised the residents that:

> "….. the provision of services within the Central Kalahari Game Reserve would eventually be stopped as it was unsustainable," (vide paragraph 2 thereof) (my emphasis)

They have admitted the statement contained in the affidavit of Ringo Ipotseng, Ghanzi District Council Secretary, at paragraph 8(h) that:

> "It is cheaper for Government to pool its resources in one village unlike where P55,000.00 cumulatively, was spent on each trip to CKGR" (my emphasis).

The Applicants have also admitted the statement (Exhibit "D156") of Walter Mathuukwane, a Councillor at Ghanzi Township that he took part in consultative meetings with the residents of the CKGR and:

> "will confirm that various other meetings were held with the residents of the CKGR for the purpose of encouraging residents to relocate ….. and advising them that the provision of services was not sustainable and could not be a permanent feature." (my emphasis)

Further and as one of the many such admissions, the Applicants have admitted the tape recordings of the meetings Assistant Minister Kokorwe addressed in the settlements in the CKGR in August 2001 at which she told the residents that it was too costly for the Ghanzi District Council to continue to provide them with services in the CKGR and that as a result the provision of services would be stopped or

terminated at the end of January 2002. Given these admissions, I do not agree with the submissions of Counsel for the Applicants that the Respondent has placed no evidence before the Court showing that it was no longer feasible to provide basic services to the Applicants in the CKGR.

Further, I have no doubt from the evidence that the Applicants and residents knew and were aware for a long time before the 2002 relocations that the provision of services to the settlements in the CKGR would be terminated at some time in the future. This conclusion is based on the admitted evidence of Galehete Leatswe who was the chairperson of the Ghanzi District Council from 1999 to 2001. The Applicants have admitted her evidence that during the period 1999 to 2001 she addressed several meetings in the settlements in the CKGR at which she told the residents, who included the Applicants, that the provision of services was not sustainable and would eventually be stopped. They have likewise admitted the evidence of Walter Mathuukwane that he told the residents during consultations that the provision of services could not be a permanent feature because it was not sustainable. Tshokodiso Bosiilwane (PW3) has testified that the residents

had been warned many times before the 2002 relocations that by a certain date the provision of services by the Government to the settlements in the CKGR would cease. The Applicants have, however, argued further on the issue of termination of services that they had a legitimate expectation that no decision would be taken to withdraw the services at least until:

> "The residents had been given a reasonable period of time in which to make alternative arrangements as were open to them for the supply of basic services" (vide para. 801.2 of Applicants' written submissions).

The thrust of this submission is that the Government should have given the Applicants reasonable notice before it terminated the provision of services in the CKGR. It is, however, common cause that in August 2001, Assistant Minister Kokorwe addressed meetings of the residents, who included the Applicants, in the settlements in the CKGR at which she told the residents that she was giving them six months' notice that the provision of services in the CKGR would be terminated. It was in fact at one of those meetings at Metsiamanong where Motsoko Ramahoko (PW4) said he told the Minister that they

(the residents) did not care if she cut the services, while Xanne Gaotlhobogwe (PW6) testified that at the meeting the Minister addressed at Molapo, none of the residents opposed the termination of services and that instead the residents told the Minister that she could take away her services and they would live on their crops. I have not the slightest doubt that the six months' notice Assistant Minister Kokorwe gave to the Applicants before the termination of services by the Government in the CKGR was more than adequate and reasonable to afford or enable them, if they had wanted or wished, to make alternative arrangements for the supply to them of the services in place of those that were due to be terminated. The Applicants may well have not taken seriously the notice given by the Minister especially as they had been told over many years that services were temporary without immediate action being taken to terminate them but that did not and cannot affect the reasonableness of that notice.

In the premises, I have come to the conclusion that the Government is not obliged to restore the provision of services to the Applicants in the Central Kalahari Game Reserve.

37. C. Issue Number Three – Whether Subsequent to 31st January 2002 the Applicants Were:

(i) In Possession of the Land Which They Lawfully Occupied in Their Settlements in CKGR;

(ii) Deprived of Such Possession by the Government Forcibly or Wrongly and Without Their Consent.

On the first question the starting point of the Respondent is that the CKGR is state land and that the settlements of the Applicants were situated on state land. In his written submissions Counsel for the Respondent states that:

> "87. It is common cause that:
> 87.1 The CKGR is state land;
> 87.2 The Applicants have neither ownership nor the right of tenancy to the CKGR."

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 lands 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. In fact, the Applicants themselves do not claim any ownership of the land in the CKGR as evidenced by their submission at paragraph 134 of their reply to the Respondent's submission where they state that:

> "Their legal claim is not to ownership, but to a right to use and occupy the land they have long occupied, unless and until that right is taken from them by constitutionally permissible means." (my emphasis)

This first question is in two parts in that it requires the Court to determine (a) whether the Applicants were in possession of the land, and (b) whether the Applicants occupied that land lawfully in their settlements in the CKGR at the time of the 2002 relocations.

38. On the first leg of this question, the Applicants maintain that they were in possession of the land in question. Initially, the Respondent adopted a somewhat ambiguous or equivocal

position when in terms of the "Notice to Admit Facts" dated 5th June 2003 he was called upon by the Applicants to admit the allegation that the Applicants were in possession of the land they lawfully occupied in the CKGR prior to and subsequent to 31st January 2002. I say the Respondent's answer was ambiguous because while admitting this allegation, he went on to qualify his answer by adding that the Applicants "were preferably in occupation and not in possession" of that land. The Respondent has however now admitted without reservation that the Applicants were in possession of that land

in his written submissions by stating that -

> "85. We concede that Applicants were in possession of their settlements in the CKGR as at 31st January 2002."

I therefore find as a fact that the Applicants were in possession of the land they occupied in their settlements in the CKGR before the 2002 relocations.

39. The second leg of the first question is whether the Applicants lawfully occupied the land in their settlements in the CKGR before the 2002 relocations. The Respondent has argued that the occupation by the Applicants of the land in the settlements in the CKGR was unlawful because the CKGR is owned by the Government as it is state

land. In the submission of the Respondent, this is so because the Applicants have not only claimed that they were unlawfully dispossessed of the land by the government but have also gone further to claim that their occupation of the land in question was lawful which the Respondent disputes. According to the argument of the Respondent, as the Applicants do not only claim that their dispossession was unlawful but also want the Court to declare their occupation lawful and want to be restored to that lawful occupation as a matter of right, this has led to a competition of rights of the owner and those of a possessor and in the submission of the Respondent "a claim of the restoration of possession cannot be stronger than that of ownership unless such possession was lawful", (vide paragraphs 86.4 to 87 of Respondent's written submissions). As I have already stated the Applicants have submitted that:

> "Their legal claim is not to ownership, but to a right to use and occupy the land they have long occupied, unless and until that right is taken from them by constitutionally permissible means" (vide para. 134 of their reply to Respondent's written submissions).

40. I do not agree that the occupation of land in the settlements in the CKGR by the Applicants was unlawful even though the CKGR is state land and is owned by the government, the fact of it being state land having been conceded by the Applicants as I stated earlier. I take the view that the occupation of this state land by the Applicants was lawful for the simple reason that their occupation had not been lawfully terminated by the Government; and until such occupation was lawfully terminated by the owner of the CKGR, it could not be successfully contended in my view that the Applicants occupied the land in their settlements unlawfully. As this was state land, the Applicants occupied it at the sufferance or passive consent of the Government but that did not and could not mean in my judgment that their occupation of that land was unlawful, especially when regard is had to the fact that both the British Government and its successor in title, i.e. the Botswana Government, allowed or permitted the Applicants to remain on and use that land over many years. For the avoidance of doubt, therefore, I find as a fact that the

occupation of the land in the settlements by the Applicants in the CKGR was lawful.

41. The second part of the third issue is whether the Applicants were deprived of possession of the land they occupied in their settlements in the CKGR by the Government forcibly or wrongly and without their consent which the Applicants contend should be answered in the affirmative. The Respondent denies that the Applicants were forcibly or wrongly deprived of the land they occupied in the CKGR. It has been submitted on behalf of the Applicants that the Government must have foreseen that the consequences of its decision to terminate the provision of services to the residents of the CKGR would be to force them to relocate in the large numbers to the new settlements outside the CKGR. It has further been submitted that the Court should find that the decision of the Government to terminate or withdraw the provision of services to the residents of the CKGR was intended to and did force those residents, including the Applicants, to leave the CKGR to relocate to the new settlements of Kaudwane and New Xade.

42. The burden of proof is of course on the Applicants to prove on a balance of probabilities that the decision by the government to terminate the provision of services in the CKGR forced them to leave the CKGR to relocate to the new settlements outside the Reserve. Before deciding whether or not the termination of the provision of services to the Applicants by the Government was intended and did force the Applicants to relocate outside the CKGR, I must point out that the Applicants in their submissions on this issue contend or seem to suggest that it is the Government which must prove that it was not the termination of services that forced them to relocate outside the CKGR. At paragraph 134 of his submissions, Counsel for the Applicants lists or enumerates what he maintains are undisputed facts that prevailed before the relocation which include the provision to the residents by the government of water, food rations and special game licences in the CKGR and then submits that with the knowledge of those facts the Government:

> "must have foreseen – and ….. plainly intended –

> that the withdrawal of services would cause a large number of residents to leave the Reserve" (vide paragraph 137)

and further that:

> "139. We were not able to put these points (that government must have foreseen and intended that the withdrawal of services would cause large number of residents to leave the CKGR) to Dr. Nasha, Ms. Kokorwe, Mr. Molale or anyone else directly concerned in the decision to withdraw the services, because Government thought it better not to call any of these witnesses to give evidence.

140. As we have already observed, this was a remarkable omission. The Government has known since the outset that one of the principal allegations made against it is that it deliberately withdrew the services to induce residents to leave. If the allegation is false, why on earth did it not call witnesses who could show that it was false?" (my emphasis).

In my view, these submissions of the Applicants that shift the onus on the Respondent to prove the Applicants' allegations that the Government deliberately withdrew the services to force the residents to leave the CKGR are false is completely misplaced; on the contrary, the evidential burden lies on the Applicants to prove these allegations and until they have discharged that burden the Respondent has no obligation to adduce any evidence in rebuttal of these allegations.

43. The foregoing are not the only examples where the Applicants' Counsel falls into the temptation of putting forward propositions that it is the duty of the Respondent to adduce evidence to disprove the allegations put forward by the Applicants. Some of the further examples are in their submissions in regard to the issue whether the

Applicants were relocated from the CKGR without their consent as they allege by arguing that the relocation was not voluntary in that in their view -

> "the combined effect of the withdrawal of services, hunting ban and the manner in which the relocation was carried out robbed the relocated Applicants of any genuine choice in the matter" (vide para. 350 of Applicants' submissions).

The Applicants argue that up to just before the 2002 relocation, they had always maintained that they did not want to relocate, but when the services were terminated a large number of them moved out of the Reserve which they say support their contention that the termination of services forced them to relocate while on the other hand the government denies this and insists that those who relocated in 2002 did so voluntarily; the Applicants then submit at page 113 of their written submissions that:

> "352. One might therefore have expected the Government to put forward a cogent explanation for such a remarkable change of heart. This, it might be thought, would be rather an effective way to refute the allegation that the Applicants had been forced out the Reserve against their will. There were several means by which this could have been done:

353. The Government could, for example, have put two or three former residents into the witness box to tell the Court why they chose to leave. Their evidence could have been enormously helpful to the Court, and might have done a body blow to the Applicants.

354. But the Government was either not able or not willing to put forward even a single relocatee. The Court might want to ask itself: Why not?"

These submissions leave no doubt that the position of the Applicants is that the Respondent should put forward witnesses to disprove the allegations put forward by the Applicants that the termination of services forced the Applicants to leave the Reserve. This position was evident also during the cross-examination of the Respondent's witnesses when it was sought to prove through them the allegations made by the Applicants in their affidavits, now pleadings, which were denied by the Respondent and about which the witnesses called by the Applicants had not given evidence or laid the foundation when they testified.

44. Perhaps in their eagerness to shift the evidential burden onto the Respondent to prove their own allegations, the Applicants have overlooked that they have admitted the evidence of one relocatee which was put forward by the Respondent contrary to what they submit at paragraph 354 of their written submissions reproduced above. In their "Admission of Facts" Notice dated 22nd February 2006, the Applicants have unreservedly admitted, after being called upon to do so by the Respondent, the statement (Exhibit "D163" in Bundle 3B) of one Kelereng Ramatlhwaatloga, born 1947 and married with five children, who was a former resident of Mothomelo who relocated to Kaudwane. In that statement, the witness says government

officials held several meetings at Mothomelo whose purpose was to encourage residents to relocate to other places outside the Game Reserve where they would be provided with schools, livestock, health facilities, water, and many other facilities and development opportunities which were available in the settlements outside the Reserve. He says after consultations with government officials he decided to relocate to Kaudwane.

In that statement, it is stated further, inter alia, that:

> "4. He was never threatened or in any way forced by anyone to leave the game reserve, nor did he see or hear that anybody else had. He willingly opted to relocate with his family because he wanted to have access to clean water, supplied with livestock, to find a job and earn some money and more particularly, for his children to go to school.
>
> 5. He was compensated and supplied with 15 goats.
>
> 6. He does not regret moving from the game reserve and also does not have any intentions of going back into the CKGR because his life and that of his family has improved. In particular, he is happy to have relocated because his children have access to school and some have finished schooling and are now working" (my emphasis).

The foregoing which has been admitted by the Applicants shows that the Government has placed before the Court evidence of a person who relocated from the reserve showing

why he chose to relocate. Contrary to the contention of the Applicants therefore, it is not true that the Respondent has not put forward evidence of any relocatee as to why he chose to leave the Reserve in 2002. This evidence does what their Counsel terms a body blow to the Applicants because it tells why a former resident chose to leave Mothomelo permanently in the Reserve for Kaudwane outside the Reserve. In the light of this admission, it was in my view not necessary for the Respondent to put any of the relocatees in the witness box to tell the Court why he relocated.

45. Although it has been argued strongly and submitted on behalf of the Applicants that the decision of the Government to terminate the provision of services to the Applicants in the CKGR was intended to and did force the Applicants to leave the Reserve, it is highly significant and it must be stated that as a fact none of the witnesses of fact who gave evidence for the Applicants, some of whom are Applicants, has told the Court that either him or other residents were forced or decided to relocate as a result of the termination of the provision of services to them in the settlements in the CKGR by the Government. Why no witnesses were called to say the Applicants left the Reserve because of the termination of services by the Government, if that was indeed the principal reason why they left the Reserve, remains a mystery and is puzzling. No explanation has been put forward by the Applicants why this was not done. It is correct as has been submitted by their Counsel that the Applicants are alleging that the termination of services was intended and did

force them to leave the Reserve, but the Applicants knew and have always been aware that the Respondent was denying these allegations. One would therefore have expected that faced with this denial the Applicants, who had the opportunity to do so, would adduce direct evidence in support of their allegations that the termination of the provision of services by the Government in the CKGR was intended to and did force them to relocate. In my view, the reason none of their witnesses said in evidence that they relocated because of the termination of services, as they now want the Court to believe, is because the termination of the provision of services was never a reason or ground for their relocation, otherwise their witnesses would have said so in their evidence. In fact, Mongwegi Tlhobogelo, (PW5), provided the reason for their relocation when she was asked under cross-examination why she and her husband did not return to Molapo from New Xade before they were given cattle and paid compensation money when she replied rhetorically by saying:

> "How would (could) we go back to Molapo before we received that which caused us to go to New Xade?" (vide page 884 of Record of Proceedings).

Her answer makes it clear that they relocated to New Xade in order to be given livestock and paid compensation money and not as a result of the termination of the provision of services in the CKGR by the Government. She made it clear in her evidence that they would not return to the CKGR until they had been paid compensation and given cattle which had since been done with the result that they had returned to Molapo but were not prepared to refund to the Government what had been paid to them as compensation; she said they were waiting to be paid further money for their property that was lost when they relocated to New Xade. What the Applicants now want the Court to do is to speculate and then draw an inference that the termination of the provision of services in the CKGR by the Government forced them to leave the Reserve in the absence of evidence from them which they were required to lead and should have led, but never did, that shows that the termination of services was intended to and did force them to

leave the Reserve. I find this contention of the Applicants totally untenable and therefore unacceptable. Where in a trial the plaintiff is given an opportunity to adduce evidence to prove an allegation denied by the defendant, that plaintiff must adduce evidence to prove his allegation, and in the absence of that evidence the plaintiff cannot ask and is precluded from calling upon or asking the Court to speculate and draw an inference that his allegation which is being denied is true.

46. The evidence before this Court shows that some of the residents or Applicants never relocated from the CKGR notwithstanding that the provision of services to the residents was terminated by the Government at the latest at the beginning of March 2002; for instance, it is common cause that PW2, PW3 and the former Councillor, Mr. Moeti Gaborekwe, who the Court met at Metsiamanong during the inspection of the settlements in July 2004, did not relocate. Furthermore, when the Court conducted an inspection of the settlements in the CKGR before the trial started, there were visible signs that some of the residents who had previously relocated had returned or were returning to Metsiamanong and Molapo because at that time some people had recently completed building new huts while others were in the process of constructing new huts in those settlements; this was so notwithstanding that the provision of services inside the CKGR had been terminated by the Government some two years back. It will be recalled that in early November 2002 the Ghanzi District Council appointed a Task Force to carry out an inquiry "to find out why people were returning to the CKGR," I have already referred to the Report of that Task Force which is Exhibit "P93". The establishment of this task force in November 2002 demonstrates that former residents of the CKGR were returning to the Reserve notwithstanding that the provision of services in the CKGR had been terminated by the Government some nine or ten months back and had not been restored to the settlements. The Applicants have not even attempted to explain why, if their allegation that the termination of the provision of services to the settlements in the CKGR forced them to relocate is to be believed, some of them and other former residents of the CKGR

who relocated have now returned to the settlements in the CKGR where they have settled notwithstanding that the provision of services has been terminated and that those services have not been restored to the settlements in the CKGR. This has been pointed out by Counsel for the Respondent in his written submissions who has further correctly submitted, in my view, that part of the evidence of Mr. Albertson (PW9) shows that before the 2002 relocations some of the residents in the settlements inside the CKGR left the Reserve permanently almost every year to leave outside the Reserve and that this was demonstrated by the reduction of the populations in the settlements notwithstanding that the services were being provided inside the Reserve which supports the contention of the Respondent that in 2002 the residents did not necessarily relocate as a direct consequence or result of the termination of the provision of services in the CKGR by the Government.

47. It will be recalled that one of the contentions of the Applicants is that the termination of the provision of services by the Government was unlawful because they were not consulted before the decision to terminate the services was made by the Government notwithstanding that the Applicants had a legitimate expectation that they would be consulted before the decision to terminate the services, which was likely to adversely affect them or their interests, was made. It will further be recalled that, except for one witness, the witnesses called by the Applicants testified that they did not need the services in any event. I have already found in deciding issue number one that there is ample evidence from both the Applicants and Respondent which proves that the Applicants were consulted and even told that the provision of services to them in their settlements was temporary before the decision to terminate the provision of those services was made by the Government, and that as a result, the termination of the provision of those services by the Government was lawful. Arising from those findings it cannot, in my view, be successfully contended that the Applicants were forcibly or wrongly deprived of possession of the land they occupied in their settlements in the CKGR by the Government. In my judgment, the contention of the Applicants that the Government forcibly or wrongly deprived them of possession of the land they lawfully occupied in their settlements in the CKGR has no merit and must fail.

48. D. The last question, in terms of the order of the Court of Appeal, which I have to decide is also in two parts; namely, whether the Government's refusal to:

(a) issue special game licences to the Applicants; and
(b) allow the Applicants to enter the CKGR unless they have been issued with a permit

is unlawful and unconstitutional.

In regard to the first part of the question, the First Applicant

alleges in the founding affidavit that the refusal by the Government to issue special game licences to the Applicants was one of the threats issued by the Government calculated to force the Applicants to move out of the CKGR. He alleges that the Applicants have been informed that they would no longer be issued with special game licences, and further that since October 2001 the Department of Wildlife and National Parks has refused to issue special game licences to the Applicants; (vide paragraphs 87(d) and 88(b) of the Founding Affidavit).

On the second part of the question, the First Applicant

alleges in his supplementary affidavit that on 14th and 15th February 2002, he was in Gaborone when he received reports of mass forced removals of the Applicants and other residents from the CKGR. He alleges, inter alia, that on the 21st February 2002 he drove with his colleagues from Gaborone to the CKGR by first traveling to Kaudwane taking with them (food) rations for some of the Applicants they believed still remained in the Reserve, and that at the entrance to the CKGR through the Khutse Game Reserve Gate DWNP game scouts refused to allow them entry into the Reserve unless they paid the entrance fee or were in possession of a permit (to enter the Reserve). He avers further in his supplementary affidavit filed on the 4 March 2002 that:

> "13. This was the first time that I had ever been refused entry into my ancestral home in the CKGR, or told that I had to pay to enter the reserve, or have a permit to do so.
>
> 14. We ignored the instruction not to enter and proceeded into the Khutse Game Reserve en route to the CKGR ….."

He says later they returned to Gaborone to consult their

lawyers as they were concerned that DWNP regarded their presence in the CKGR as unlawful. In Gaborone his lawyers helped him write a letter (Exhibit "P36") to DWNP demanding entry into the CKGR and pointing out that the conduct of the DWNP in refusing them entry into the CKGR was unlawful. In that letter the First Applicant also alleges, inter alia, that although their rights were enshrined in the Constitution, that was the first time he and other Bushmen had been denied entry into the CKGR which he says was in contravention of Section 14 of the Constitution.

49. The CKGR was established by the High Commissioner's Notice No. 33 of 1961 (Exhibit "P43") dated 14th February 1961 pursuant to the provisions of Section 5(1) of the Game Proclamation (Chapter 114 of the Laws of the Bechuanaland Protectorate, 1948 - Exhibit "D42") which provided that the High Commissioner may from time to time by Notice in the Gazette declare any territory to be a Game Reserve. The High Commissioner's Notice establishing the CKGR did not establish

the reserve for anything else other than a game reserve; in other words, that notice did not state that in addition to the CKGR being a Game Reserve it was also a Reserve for the Basarwa. It is contended on behalf of the Applicants that the Reserve was established not only as a sanctuary for wildlife but also as a reserve or homeland for the Basarwa, and this contention is predicated on the arguments or proposals that were advanced at about the time the CKGR was established. One such proposal was that the game reserve should not only be established to conserve game but should also be established "to protect the food supplies of the existing Bushmen in the area from the activities of the European farming community at Ghanzi and visitors to the territory who were entering the area in increasingly large numbers either to poach game for biltong or to shoot predatory animals such as lion and leopard for their skins" (vide Exhibit P64 dated 9th February 1961 at page 36 in Bundle 2B). It was argued at the time the CKGR was established, as it is being argued now, that the intention in establishing the reserve was to establish a game reserve as

well as a place where Basarwa may reside and hunt freely. At one stage after its establishment, it was even proposed that the CKGR should be changed to a Bushmen Reserve. For example, some three years after its establishment it was proposed that:

> "The Reserve should be established as a reserve for Bushmen, rather than remain a Game Reserve, as their hunting is presently quite illegal and there would appear to be political advantage in making it clear that the Reserve is primarily for Bushmen and secondarily a game reserve" (vide Exhibit P76 dated 10th April 1964 at page 49 in Bundle 2B).

Although these proposals were advanced at and after the establishment of the CKGR it is very important and significant that when the CKGR was finally established there was no doubt or ambiguity as to the purpose for which it was established; namely, a game reserve. The High Commissioner's Notice No. 33 of 1961 dated 14th February 1961 (Exhibit P43) which established the CKGR states:

> "It is hereby notified for general information that His Excellency the High Commissioner has been pleased to declare part of the Ghanzi District which lies to the east of meridian of longitude which passes through the highest point of the hills known as Great Tsau shall be a Game Reserve, to be

known as The Central Kalahari Game Reserve."

I have already stated that this Notice was made pursuant to the provisions of section 5(1) of the Game Proclamation, Chapter 114 of the Laws of Bechuanaland, 1948. The wording of this Notice is clear and unambiguous that by law the CKGR was established as a game reserve and for no other purpose; and it was established for that purpose only in spite of the several proposals that it was also to be a reserve for the Basarwa. In my view, if the High Commissioner or British Government at that time had wanted or intended the CKGR to be a game reserve as well as a Bushmen Reserve that would have been provided for or spelt out in clear terms in the High Commissioner's Notice No. 33 of 1961 that established the CKGR. The arguments that this Court should find that the CKGR was established as a sanctuary for wildlife as well as a reserve for the Basarwa are not new; they were advanced and rejected at the time of the establishment of the CKGR. I therefore see no justification to read into this Notice, as the

Court has been urged to do, that which was never intended to be implied as forming part of the High Commissioner's Notice No. 33 of 1961 whose wording is patently clear as to the purpose of establishing the CKGR; namely, a game reserve and nothing more and nothing less. As the wording of the notice establishing the CKGR is clear and unambiguous, I take the view that it should not be interpreted by having regard to the arguments that were advanced and rejected before or at the time the Reserve was established. Section 5(2) of the Game Proclamation outlawed hunting in a Game Reserve but Section 14(2) thereof gave the Resident Commissioner a discretion to grant any person a special permit to hunt in a Game Reserve for specific purposes. Before the British Government established the CKGR in 1961, the residents of Central Kgalagadi, who included the Basarwa, hunted game in that part of the country and the establishment of the CKGR therefore rendered unlawful their hunting of wildlife in the CKGR. That the establishment of the CKGR had the effect of rendering unlawful hunting by the Basarwa in that Reserve was

acknowledged in the statement quoted above from Exhibit P76 that "their hunting is presently quite illegal" and also by Dr. Silberbauer, (PW1), who was the Bushmen Survey Officer in 1961 and was also one of the people who were instrumental in the establishment of the CKGR. He testified that while the British Government knew that it was illegal to hunt game in the CKGR following its establishment, they looked at the illegal hunting by the Basarwa in the CKGR with what he termed "Nelson's Eye"; which he explained to mean that when faced with such illegal hunting the authorities looked the other way round or pretended that hunting by the Basarwa in the CKGR was legal when as a matter of law the reverse position was the case.

50. Section 12(3) of the Wildlife Conservation and National Parks Act, Cap 38:01, outlaws hunting in a game reserve except only in accordance with the terms and conditions of a permit issued under Section 39. Section 39(1) (b) of the same Act gives the Director of Wildlife and National Parks (the Director) a discretion to grant permits authorising -

> "(b) the killing or capturing of animals in the interests of conservation, management, control or utilization of wildlife."

What is clear from the legislation at the time of the establishment of the CKGR and from the successive pieces of legislation since then is that hunting in the CKGR by the Basarwa has never been a matter of right but has always been at the discretion of those under whom the responsibility for the CKGR falls. Section 92 of the Act gives the Minister power to make regulations to give force and effect to the provisions and for the better administration of the Act. Regulation 45(1) of the Wildlife Conservation and National Parks Regulations 2000 made by the Minister pursuant to the provisions of Section 92 of the Act provides that -

> "45(1) Persons resident in the Central Kalahari Game Reserve at the time of the establishment of the Central Kalahari Game Reserve, or persons who can rightly lay claim to hunting rights in the Central Kalahari Game Reserve, may be permitted in writing by the Director to hunt specified animal species and collect veld products in the game reserve and subject to any terms and conditions and in such areas as the Director may determine," (my emphasis).

Again, what is clear from the provisions of sub-regulation 45(1) is that it is within the discretion of the Director to grant or not to grant permission in writing to hunt to persons who were either resident in the CKGR when it was established in 1961 or who can rightly lay claim to hunting rights in the CKGR; in other words, the provisions of this sub-regulation are not peremptory but permissive in regard to the Director's power to grant permission to persons mentioned therein to hunt in the CKGR. Regulation 3(1) of the Wildlife Conservation (Hunting and

Licensing) Regulations 2001 also made by the Minister pursuant to the provisions of Section 92 of the Act outlaws the hunting of a game animal by any person whatsoever unless such person has been issued with a licence to do so and under sub-regulation (2)(d) thereof one such licence which may be issued is a special game licence. It is provided in regulation 9(1) to (3) of these 2001 Regulations that -

> "9. (1) A special game licence ….. shall be issued free of charge.
>
> (2) The special game licence shall be valid for a period of one year.
>
> (3) The special game licence may only be issued ….. to citizens who are principally dependent on hunting and gathering of veld products for their food and such other criteria as may be determined by the Director" (my emphasis).

51. The Applicants have led no evidence in these proceedings to show that they are principally dependent on hunting for their food notwithstanding that the burden of proof was on them to do so. In fact, the evidence before the Court shows that the Applicants are not principally dependent on hunting for their food because that evidence shows that their life in the CKGR

had increasingly become sedentary in their settlements from which game had moved further and further away, making the ability to find such game difficult unless one used horses to travel long distances. Evidence before the Court also shows that the Applicants did not principally depend on hunting for their food because they cultivated crops such as maize, beans and melons and kept domestic animals like goats and chickens as a source for their food. For instance, PW6 told the Court that when Assistant Minister Kokorwe addressed a meeting of the residents at Molapo in August 2001 on the withdrawal of services, they told her that she could take away her services and they would live on their crops. As the issuing of special game licences to the Applicants on a yearly basis was at the discretion of the Director of Wildlife and National Parks, it follows that special game licences were not issued as a matter of legal right to the Applicants; in terms of the law, the Director may refuse to issue special game licences. This is, however, not the end of the matter because the discretion conferred by statute on the Director of Wildlife and National Parks to issue

special game licences to the Applicants in the CKGR has to be exercised judicially by him. The Applicants and residents of the CKGR have over some years been issued with special game licences on stated conditions, and there is no doubt that the decision to stop the issuing of special game licences was altering a practice which the Applicants had come to expect from the Government. This decision was therefore bound to affect the Applicants or their interests adversely in that they would no longer be able to hunt game in the CKGR but there is no evidence or suggestion that the Applicants were given the opportunity to make representations before the decision to stop the issuing of special game licences was made. In our law it is accepted that a public authority may under certain circumstances be bound to give a person who is affected by its decision an opportunity of making representations if that person has an interest of which it would not be fair to deprive him without first giving him a hearing. As the Director of Wildlife and National Parks did not give the Applicants an opportunity to make representations before he made the

decision to stop the issuing of special game licences to them which decision was likely to affect the Applicants or their interests adversely that decision was invalid and falls to be set aside. The constitutionality of the action of the Director of Wildlife in refusing to issue special game licences does not arise in this instance because the enabling legislation gives him the discretion when it comes to issuing special game licences to the Applicants, all that is required is that the Director should exercise the discretion conferred upon him judicially.

In the premises, the Government's refusal to issue special game licences to the Applicants was unlawful and is set aside.

52. Although the Applicants argue that the Government's refusal to allow them to enter the CKGR unless they have been issued with a permit is unlawful and unconstitutional, the difficulty in deciding this issue is again caused by the fact that none of the Applicants has come forward to give evidence in regard to how and when he or she was denied entry into the CKGR; what is before the Court are the allegations by the First Applicant on this issue who has elected not to give evidence so that his allegations may be tested in open Court; and who notwithstanding his allegation that he was denied entry into the Reserve did enter the Reserve in any event without a permit. It is one of the Respondent's witnesses who gave evidence which was not refuted by the Applicants and which I therefore believe that it was only when some of the former residents

tried to enter the Reserve at an ungazetted point that they were prevented from doing so. It will be recalled that the Applicants have conceded, and it is now common cause, that the CKGR is state land. This means that ownership of the CKGR is vested in the Government. It follows therefore that as owner of the CKGR, the Government can exercise all rights of ownership in respect of the CKGR, including the right to determine who may come into the CKGR and under what terms and conditions, and the right to decide who may or may not go into the CKGR. Based upon the Applicants' admission that the CKGR is owned by the Government, it follows that the Government has the right to impose conditions as to how any person, including the Applicants, may enter the CKGR. The position now is that the Government as owner of the CKGR wants the Applicants to obtain permits before they can enter the CKGR, and this is a proper exercise of one of the rights of ownership on the part of Government which the Government is entitled to do.

53. I have found that the termination of the provision of services to the Applicants by the Government in the CKGR was not unlawful. I have also found that the Government did not forcibly or wrongly deprive the Applicants of the possession of the land they occupied in the settlements in the CKGR. When the Applicants relinquished possession of the land they occupied in the settlements in the CKGR and relocated to the new settlements of Kaudwane and New Xade outside the CKGR, they were allocated plots in the new settlements. Furthermore, the Applicants were compensated for the structures they had erected on the land they occupied in the CKGR. They were then allowed to dismantle those structures and the material they had used to construct those structures was transported to the new settlements where the Applicants used it to build their dwellings on their new plots. The Applicants are not challenging the adequacy of the compensation they received for the structures they had built in their settlements in the CKGR. It has been suggested in evidence by PW5 that she did not know what they were being compensated for on the ground that it was not explained to her what the compensation was for. However, I have no doubt that the Applicants knew and understood that the land they were allocated in the new settlements was in replacement of the land whose possession they had relinquished in the CKGR and further that the money they were

paid was for the materials they had used to build their structures, including dwelling huts, in the CKGR. The evidence of the Respondent that since 1997 the relocation was a continuous process has not been disputed by the Applicants. After the first relocations in 1997 up to before the 2002 relocations, some residents relocated outside the CKGR from the settlements where the Applicants resided and those relocatees were paid compensation. I therefore find it improbable that the Applicants would not have known what those other residents who previously relocated were paid compensation for. The law accords equal treatment to all in that every person who desires to enter the Reserve must have a permit. In my view, therefore, there is nothing offensive in requiring the Applicants who relocated to obtain permits like everybody else in order to enter the CKGR. Further, "The New Shorter Oxford English Dictionary" defines the word "compensate" inter alia as to "make amends to, recompense" which last word it defines as to "make amends (to a person for loss, injury"). "The Concise Oxford Dictionary" defines the word "compensation" as "2 something, esp. money, given as recompense" while recompense is defined therein as "1 to make amends (to a person) or for (a loss etc.)." From these definitions, I have no doubt that the Applicants were paid the money they received and given plots they built their residences on at Kaudwane and New Xade for the loss of the sites or plots they occupied in the CKGR before the relocation. The receipt of compensation in the form of money as well as new plots in the settlements outside the CKGR was in replacement of the rights of the Applicants to occupy and possess land in the settlements inside the Reserve. I therefore do not agree that the Government's refusal to allow the Applicants to enter the CKGR unless they have been issued with a permit is unlawful and unconstitutional.

54. Lastly, on the issue of costs, the general rule is that costs follow the result. The Applicants have succeeded in two out of the six issues that I had to determine in that I have found they were in lawful possession of the land they occupied in the settlements before the 2002 relocations and that the Government's refusal to issue special game licences to the Applicants was unlawful. However, the First Applicant has elected not to give evidence in this matter notwithstanding that he initiated the action in which he made

detailed allegations but has not come forward to support them. The other Applicants may well have genuinely believed that as their leader he would take on the responsibility and testify on their behalf in these proceedings which he has not done. They may never have thought he would jump ship. It may therefore be contended that he personally should pay a portion of the costs of the Respondent in this action. In my view, however, justice will be better served if each party pays their own costs in this action. Before I conclude, I would like to make an observation that it is probable that the result of this litigation will not end the dispute between the parties. It is therefore to be hoped that, whatever the outcome of this case, the parties will after this litigation come together to resolve their differences.

The result is that, save for the two issues in which the Applicants have succeeded, their action in respect of the remaining four issues is dismissed.

55. Finally, in view of the decisions reached by each of us, the court makes the following Order:

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).
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 Jan 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 refusal to issue special game licenses to the Appellants is unlawful (unanimous decision)

6. The Government refusal to issue special game licenses to the Applicants is unconstitutional (Dibotelo dissenting)

7. The Government refusal to allow the Applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional. (Dibotelo dissenting)

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

Delivered in open court at Lobatse this 13th day of December 2006.

M. DIBOTELO

Judge

DOW J.:

A. Introduction

1. This judgment is one three, the case having been presided over by a panel of three judges. I have read the judgments of my two fellow judges and I have sufficient disagreements with their reasoning and/or their conclusions

to justify the writing of a full stand-alone judgment. I am also convinced that such a judgment, covering all areas, even those on which I am in agreement with my fellow judges, is also justified for a better understanding and appreciation of the conclusions I reach on the various issues. My two fellow judges too have found it necessary, for the same reasons, to write full stand-alone judgments. The extent to which we agree and/or disagree is finally reflected in the Order of this Court and it appears at the end of the three judgments.

2. This judgment is organized under the following main topics:

    a. The Initial High Court Application

    b. The Court of Appeal Decision

    c. The Unsuccessful Application to Amend The Original Relief

    d. Findings of Fact

    e. A Comment on Irrelevant Evidence

    f. Selected Rulings Made During the

Hearing of this Case.

g. Conclusions and Decisions on the Issues

h. Directions on the Way-Forward

i. The Order

B. The Initial High Court Application:

1. On the 19th February 2002, the Applicants, then represented by Rahim Khan, filed an application in which they sought that this Court make an Order in the following terms:

a. Termination by the Government, with effect from 31 Jan 2002 of the following basic and essential services to the Applicants in the CKGR is unlawful and unconstitutional

i. The provision of drinking water on a weekly basis;

ii. the maintenance of the supply of borehole water;

iii. the provision of rations to registered destitutes;

iv. the provision of rations for registered orphans;

v. the provision of transport for the Applicants' children to and from school

vi. the provision of healthcare to the Applicants through mobile clinics and ambulance services,

b. The Government is obliged to:

i. restore the Applicants the basic and essential services that it terminated with effect from 31 January 2002; and

ii. continue to provide to the Applicants the basic and essential services that it had been providing to them immediately prior to the termination of the provision of these services;

c. Those Applicants, whom the Government has forcibly removed from the CKGR after termination of the provision to them of the basic and essential services referred to above, have been unlawfully despoiled of their possession of the land which they lawfully occupied in their settlements in the CKGR, and should

immediately be restored to their possession of that land.

d. Order that the Respondent pay the Applicants' costs granting further or alternative relief.

2. The application came before a single judge of the High Court, on a Certificate of Urgency. It was filed and argued at the height of the relocations that were then being complained off. The application was dismissed with costs on the 19th April 2002, the reasoning being that the Applicants had failed to comply with certain procedural rules.

3. The Applicants were granted leave to re-file the same application, if they so wished, but they elected to appeal the High Court decision. It was not until the following year that the matter came before the Court of Appeal.

C. The Appeal to the Court of Appeal

1. On the 23rd January 2003, the matter came before the Court of Appeal which court observed that there were material disputes of facts and that such disputes could only be resolved by the hearing of oral evidence. The Court of Appeal made a Consent Order, which essentially turned the relief sought by the Applicants into questions for consideration and answering by the High Court. The full Order of the Court of Appeal appears in

Justice Dibotelo's judgment and the questions to be answered are reproduced later in this judgment.

2. To minimize costs the Court of Appeal ordered that the hearing of the Applicants' witnesses' be done at Ghanzi and that of the Respondent's witnesses at Lobatse.

3. The matter was to be heard as one of urgency on dates that were to be set by the Registrar in consultation with the parties' legal representatives but it was not until May 2004 that the Applicants were able to prosecute their case.

D. The Unsuccessful Application to Amend The Original Relief

1. A year after the Court of Appeal Order, on the 28th May 2004, the matter came before the High Court once again, but this time before the present panel of three judges.

2. At this hearing the Applicants unsuccessfully attempted to have the matter postponed to a date at which an application to amend their prayers by the inclusion of what they termed 'a land claim' could be heard. Mr. Du Plessis, the then instructing attorney for the Applicants indicated that he was not sufficiently

briefed to handle the matter and that he had instructions to withdraw from the case if the Court pressed him to argue the application for amendment. He explained that the advocates who were in a position to argue the matter were appearing in another court in another country. This court took a very dim view of the attitude adopted by the Applicants' attorneys and consequently, with Mr. Du Plessis to describing himself as a post-office box for the real counsels for the Applicants, it struck out the application for the amendment and proceeded to make directions on the future conduct of the case. The directions related to dates of 'inspection in loco' of the settlements and villages at the heart of the case as well as the dates and places for the hearing of evidence.

E. Findings of Fact

E. 1. Introduction:

1. The initial application was founded on the Founding Affidavit of the First Applicant, Roy Sesana, which in turn was supported by the Supporting Affidavits of Abdul Rahim Khan and Mosodi Gakelekgolele. The Applicants' case was later expanded upon

by additional affidavits and witness summaries.

2. The case for the Applicants remained, largely, as pleaded by Sesana in his Founding Affidavit, although there are some allegation made by Roy Sesana that were either not supported by any evidence or were abandoned as the case progressed. An example of a position that was abandoned is the allegation that the 1997 relocations were 'forced removals'. The new position seemed to be that those relocations were based on the consent of those or at least the majority of those, who relocated and that the relocations followed extensive consultations at Old Xade. Indeed it became an important part of the Applicants' argument that while all of Old Xade residents relocated to New Xade, the majority of the residents in the smaller settlements never relocated and some of those who did, began to trickle back to the Reserve over the years that followed the 1997 relocations. The case as originally pleaded by Mr. Sesana was amended in at least that one respect.

3. The Applicants allege that the Respondent wrongfully, forcibly and without their consent terminated the provision of

basic and essential services to them. The unlawfulness and wrongfulness of this action, it is said, arises from the fact that the Applicants had a legitimate expectation that the services would not be terminated without their first being consulted on the matter. It is said that indeed at the time of the abrupt and sudden notice to terminate the provision of services, the discussions between the parties had suggested that ways could be found that would allow the continued residence in the Reserve of those residents who did not wish to relocate. The relief sought on this point is that the services be restored while Respondent consults the Applicants on the matter.

4. The other allegations are that the Applicants were in lawful possession of their settlements in the CKGR and that they were dispossessed of that land forcefully, wrongfully and without their consent. It is alleged further on this point that the condition that those who were relocated in 2002 can only re-enter the CKGR with permits is unlawful.

5. The other main piece of the Applicant's case is that the decision to refuse the issuance of hunting licences to the

Applicants is unlawful and unconstitutional.

6. The Respondent's defence too has many pieces to it. Initially, one of the main pieces of the Respondent's defence was that the Respondent had not terminated the services as alleged by the Applicants, but had merely relocated them to other places. It has been since been conceded that the service provision at the settlements has been terminated, period.

7. On consent to relocate, the Respondent has pleaded that the Applicants have consented to the relocation. The case, it was pleaded was launched by Roy Sesana, who, supported by some international busybodies, was attempting to prevent the Applicants from relocating. It is further the Respondent's case that as the date given for the termination of services approached, people began to register to relocate and around the time of the actual termination of services, even more people registered to relocate. At no point was there force, coercion or improper conduct on the part of the Respondent's representatives. By the time the exercise was complete, it is said, 17 of the initial 600 or so residents still remained in the

CKGR and this, the argument goes, is prove enough that no one was forced to leave.

8. On the lawfulness of the termination of services and the stoppage of the issuance of special game licences, the defence is essentially that:

   a. The Respondent was justified in terminating the services as it had taken a position a long time ago that they were temporary and secondly, it had repeatedly consulted with the Applicants on the matter. After years of consultations the Respondent finally, in August 2001, communicated with the Applicants its decision to terminate services and gave them six months before it executed its decision.

   b. The services were too expensive to main on a long-term basis.

   c. Human residence within the reserve posed a disturbance to the wildlife there and was contradictory to the policy of total preservation of wildlife.

9. The shear volume of the evidence led makes it impossible for every little piece of testimony to be discussed, thus only

those aspects, and even then, only a selected portion, that are considered to be relevant to the disposition of the matter are discussed below.

10. The original urgent application has, over the four years that the case has run, evolved into a full-scale trial, of a scale none of the parties, nor the two courts, for that matter, could have initially anticipated. It has turned out to be the most expensive and longest running trial this country has ever dealt with. It has also attracted a lot of interest, as well a fair amount of bandwagon jumpers, both nationally and internationally, than perhaps any other case has ever done.

11. The trial has also had more than its fair share of dramatic antics from various players:

    a. Counsel for the Respondent, Mr. Pilane, was found to be in contempt of the court when he was unable to muster the necessary grace to accept a ruling against him. He finally apologized to the Court and not much more needs to be said about the matter.

    b. Counsel for the Applicants, Mr. Boko, who it must be said

has not been particularly helpful in this trial, decided that he was more effective in criticising the Court and other lawyers, in the media, than in representing his clients in Court. Against this Court he had many laments, one of them being that his clients could not expect justice before a court whose rules they did not understand. As regards his fellow lawyers he lambasted the ones he called 'briefcase lawyers', the type, he explained, who engaged foreign attorneys and then limited their participation to carrying their briefcases. Mr. Boko would apologize to the court for his antics only to dash-off yet another missive to the press the following week. In the final analysis, it seems fair to say that Mr. Boko is cited as an attorney in this matter not because of his active participation in Court, but because his firm is the one that instructed Mr. Bennett, the British attorney who took over from the South African team early on in the case. He might not have carried Mr. Bennett's briefcase, but he certainly could have been more help to him and to the Court than

he has been.

c. Mr. Roy Sesana, the very man whose Founding Affidavit was the anchor of these proceedings, had a lot to say outside the Court; but to this Court, he said absolutely nothing. Outside Court, through the media and without the limitations of an oath to tell the truth, he had plenty to say, some of which, sadly, was pretty ridiculous. Of significance, though is that on many occasions, what he presented to the public through the press as his case was at variance with what his Attorney, Mr. Bennett presented to this Court as the Applicants' case. On more than one occasion Mr. Bennett offered apologies on Mr. Sesana's behalf and promised to rein him in. Mr. Bennett even, at one point promised to file a letter of undertaking by Mr. Sesana that he would stop the presentation of the distorted version of his case to the public. The apologies and the offer of an undertaking changed very little, if anything at all. Mr. Sesana simply continued to argue his case in the media, free to embellish and/or distort. An

example; it was, not, the Court was told, the Applicants' case that the relocations were motivated by diamond mining; but that was exactly the case Mr. Sesana kept on pushing in the press, perhaps with that as the rallying crying, he could raise the money to fund this case. That the case was funded by donors who had to be persuaded to continue to part with money for a case that was taking longer than originally planned was a cry that the Court heard from Mr. Bennett on several occasions. It appears that Mr. Sesana decided that the end justified the means, he wanted money, a cry that he had been relocated for diamond mining would raise the necessary money and that is the cry he yelled to the papers. Of course it is not the case that Mr. Sesana presented to the media that is being judged here, but it is unfortunate that Mr. Sesana chose to deny this court the opportunity to hear him, since he clearly had a lot to say, and instead used his energies in the way that he has done. It is not even as if he was not available to give evidence; he was present in

court on many occasions. He could have taken the stand, had he wished, but he chose not to do so for reasons that have never been explained. The only conclusion one can reach, and it is an adverse one, is that this was a case of 'he who pays the piper, calls the tune', that is, Mr. Sesana chose to sing the tune dictated by those or some of those who paid for his fees. Unfortunate.

d. Some Government representatives too, found it rather hard to remain silent, and not infrequently their comments were borderline unacceptable. One would have expected that at least from that quarter, the Court could have received the dignity it deserves.

12. While it is accepted that the nature, scope, length and duration of this case was always going to create media frenzy, it is a pity that some of the parties were unable to refrain from feeding that frenzy. None of these antics, in the final analysis, will be helpful to this court; for it is not the case that has been presented to the media that must be judged, but the one that has been presented to this court. And it is not the media, but

this court, notwithstanding Mr. Boko's misgivings about its competence, that must decide this case.

13. What follows next then are the facts I find to have been proven and such facts are the basis for the conclusions I finally reach. The findings are derived from an assessment and analysis of all the evidence offered; that is the Applicants evidence, the Respondent's evidence, the admitted evidence, such evidence in the various affidavits and witness summaries that has not been challenged or has been found to be asserted by both parties and such observations made during the inspection of New Xade, Kaudwane, Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, as were read into the record as representing what both sets of lawyers accepted was what pertained on the ground.

14. The findings cover the following broad sub-topics:

a. The Applicants: Who They Are?

b. The Central Kgalagadi Game Reserve

c. The Applicants: Their Personal and Other Circumstances

d. The Respondent's Strategy of Provision of Services to the

Applicants

e. The Respondent's Execution of its 'Persuade but not Force' Plan
f. The Applicants' Resistance to Relocation from the CKGR
g. The Respondent's Declared and Acted-Out Positions on Termination of Services and Relocation
h. The General Circumstances and Processes of the 2002 Relocations
i. The Termination and Withdrawal of Special Game Licences

E. 2. The Applicants: Who They Are?

1. Of the original Applicants, there are 215 Applicants still living, 182 of whom are represented by Mr. Bennett on the instructions of the law firm Boko, Motlhala, Rabashwa and Ketshabile. The remaining 29 Applicants were not represented and they remain litigants on paper only. Notwithstanding, having launched the case, they remain parties to the case and are bound, for better or for worse, by the decision of this Court. They had ample time, over the last four years, to withdraw from

the case, if that is what they wished.

2. The First Applicant is Roy Sesana, about whom, in view of the evidence that has been led or accepted unchallenged, the following can be said:

3. He is a member of the Kgei band of the San or Basarwa people and his ancestors are indigenous to the Central Kgalagadi region and they have lived in and around the settlement of Molapo.

4. He had two or three wives living within the Central Kgalagadi Game Reserve [the CKGR or The Reserve], two at Molapo and a third at another settlement. With one of his wives he had at least six children. He himself was ordinarily resident outside the Reserve, perhaps in Ghanzi.

5. He was a member of the First People of the Kgalagadi (FPK), which organisation represented the Applicants in these proceedings. He was also a member of consortium of individuals and organisations called the Negotiating Team, which too was concerned with interests of the residents of the CKGR of whom the Applicants were a part.

6. He has spearheaded the launching of this case and in that respect he engaged all the lawyers who have, over the past four years represented the Applicants. He was also in attendance during the court's travel through the CKGR and was visibly a part of the Applicants' team. Thus although he chose not give evidence, his interest in the case cannot be doubted.

7. Two of his wives and six of his children were relocated

from Molapo during the 2002 relocations.

8. A list of the rest of the Applicants, who are typically adult residents, at the material time, of the settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, forms a part of the record.

9. The Applicants comprise residents who relocated as well those who did not. According to admitted evidence, at the conclusion of the 2002 relocation exercise, the following adults and children had been moved from the indicated settlements to places outside the Reserve:

a. 96 people; 40 adults and 56 children, were relocated from Mothomelo.

b. 132 people; 72 adults and 60 children were relocated from Molapo.

c. 100 people; 34 adults and 66 children were relocated from Metsiamanong.

d. 14 people; 7 adults and 7 children were relocated from Kikao.

e. 10 people; 3 adults and 7 children were relocated from

Gugamma.

f. 3 people; 1 adult and 2 children were relocated from Gope.

10. The Respondent says, but the Applicants dispute the point without giving a counter-position, that 17 people remained in the Reserve. In July 2002, there were 35 people at Metsiamanong.

E. 3. The Central Kgalagadi Game Reserve [CKGR]

1. The settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, which are at the heart of this dispute, are situated within the CKGR, which in turn is situated within the Kgalagadi ecosystem. The villages of Kaudwane and New Xade are situated outside the boundaries of the CKGR, but within the Kgalagadi ecosystem.
2. The CKGR is partly fenced, of particular importance; there is no fence between Kaudwane and the Reserve or between New Xade and the Reserve.
3. The CKGR is a vast unique wilderness in an area in excess of 52,000 square kilometres. It was created as a game reserve in

1961, and at the time of its creation it was the largest game reserve in Africa. It is now the third or so largest. It is the largest game reserve in Botswana.

4. The creation of the reserve resulted from the recommendations of a Survey of the San or Basarwa conducted by Dr. Silberbauer. The proposal, at the time, was 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. At the time of the creation of the reserve though, apartheid South Africa, with its racists and segregationist policy, was thriving next door, it was considered politically unacceptable to be seen to be creating, at best a human reservation and at worst a human zoo. A deliberate decision was thus taken to create, not a Bushman Reserve, but a game reserve.
5. When all was done though, the colonial government had created a game reserve within which Basarwa continued to live; hunting, gathering and keeping small stock, with one important

new problem; hunting and keeping stock were prohibited by the new law. Since the prohibitions had not been intended, these activities were ignored though and the Basarwa were more or less left alone to lead their traditional way of life. The entry into the reserve by others, who typically were tourists, hunters or anthropologists, was regulated through the issuance of permits.

6. The residents of the Reserve were then in 1961 and continued to be up until the 2002 relocations, family groups of the San, Bakgalagadi, San/Bakgalagadi descendants and to a very limited extent, descendants of intermarriages with these two groups to other Tswana groups.
7. It is not an insignificant piece of land, it being about the size of Belgium, but the human population there in has never been large. According to the 1991 and 2001 population censuses, the population of the CKGR has been 991 and 689, respectively.
8. It has a harsh climate, is prone to droughts and has limited and unreliable rainfall.
9. It is home to a significant population of wildlife, including large antelopes such as gemsbok, hartebeest, eland, giraffe, kudu

and wildebeest and large carnivores such as lion, leopard, cheetah and hyenas.

10. It is home to one of the few remaining descendants of hunting and gathering peoples in the world.

11. The residents of the Reserve have over time come to live in permanent settlements, whose populations have varied from season to season and/or from year to year, sometimes shrinking and sometimes increasing, depending on water availability. In some instances, settlements have disappeared altogether, while in one case at least, a settlement has formed. Examples of settlements that have disappeared altogether are Manwatse, Bape and Kaka and an example of a settlement that has formed in recent years is Gope.

12. A settlement can have a population of as few people as 3 and as many people 245.

13. About the re-settlement villages and the CKGR settlements, the following can be said.

    a. Gugamma: Gugamma or Kukama, or Kukamma is first of the five settlements located on the main track that one

would have to take to traverse the Reserve if one entered at Kaudwane and exited at or near Old Xade. The other four settlements along this track are Kikao, Mothomelo, Metsiamanong and Molapo. Gugamma is situated about 70 kilometers from Kaudwane. It has no permanent water source. Its population, in 1988-89, 1991, 1996 and 1999, respectively, was zero, zero, 26 and zero. By July 2004, when the Court visited the settlement, at least twelve adults and seven children were observed in the settlement. There were ten huts in one or two compounds that the Court could see.

b. Kikao: Kikao or Kikau is located a few kilometers from Kaudwane and has a pan that in July 2004, midway between two rainy seasons, had water. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 104, 98, 30 and zero. In 2001 its population was 31. Its entire population was relocated in 2002, but by July 2004, when the Court toured the Reserve, two donkeys were observed drinking at the pan. No people were observed, but the Court was informed, and neither side seemed to take issue with this, that deep in the bush from the original settlement, there was a newly

constructed compound, inhabited by about nine adults and five children.

c. Mothomelo: Mothomelo was a large settlement, by CKGR standards. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 145, 149, 272, 150. In 2001, it was 245. Its entire population was relocated in 2002 and in July 2004, no resettlement had taken place. It is located about 28 km from Gugamma, and just under 100 km from Kaudwane. There was at Mothomelo, until the relocations of 2002, a borehole from which Mothomelo and the other settlements were supplied with water.

d. Metsiamanong: Metsiamanong is about 48km from Mothomelo and is situated next to pan that in July 2004, was observed to be dry. At the edge of the pan, around protective thorn bushes were nestled a couple of 200liter metal drums and a few 20liter plastic containers. It was determined that some of the drums contained water while some were empty. In the settlement itself, there were about four to five compounds, in which there were old and new huts. There was evidence of huts being under

construction. There were residents, about 30-35 adults and about 15-17 children. There were also a couple of vehicles. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 90, 71, 130, 130 and in 2001, 141.

e. Molapo: Molapo is situated 110km from the northeastern boarder of the Reserve, 135 from Old Xade and 223km from Kaudwane. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 202, 61, 113, and 130 and in 2001 it was 152. All its residents were relocated in 2002, but by July 2004, the Court observed more than thirty huts, more than twenty people, about four vehicles and dogs, chickens, goats and donkeys in and around Molapo.

f. Gope: Located 36km from the Eastern edge of the Reserve, Gope was the closest settlement to Reserve boundary. Its population, like that of all the other settlements, has grown and shrunk over recent years and by the time of the Court visit on the 10th August 2005, there was no one resident at Gope. For the years 1988-89, 1991, 1996 and 1999, the population of Gope

has been 100, 43, 110 and 10 respectively. In 2001, there were 63 people in Gope. There has been diamond exploration at Gope since 1981 and test mining took place in 1997. By 2000, the company involved had decided that the profitability of the mine was not assured but not wishing to give up all together, it applied for a retention license. The people who settled in Gope were drawn to the mine site by the availability of water.

g. New Xade: New Xade was first settled in 1997, as a result of the relocations of that year. Its population, in 2001, was 1094. In 2004, it had a Kgotla housed in a modern building and staffed by a Kgosi and a police officer, a primary school, boreholes and water tanks, a community hall of the type found in many villages in the country, a horticultural project, a modern clinic with a maternity wing, a shop, a bar, and hostels. The village is situated about forty kilometers from the western boundary of the Reserve and there is no fence separating the village from the Reserve. As regards the residential accommodation of the residents, huts, similar to the ones that had been observed in the Reserve were situated in plots lined up to make street-like passages between them. The whole village

was organized into wards, named after settlements in the Reserve and plots had been allocated on the basis of where people had originated. As regards how people sustained themselves, cattle, goats, a horticulture project were observed.

h. Kaudwane: The settlement village of Kaudwane is situated across the road from the edge of the south-eastern part of the Reserve. Its population was 551 in 2001 and ten years earlier, in 1991, it did not exist, having been established in 1997, when five hundred residents were relocated there from the Reserve. In 2004, the residents lived in the main in clearly demarcated lots, on which stood huts of the type found in the Reserve as well as a sputtering of one-roomed corrugated iron-roofed cement brick houses. It boasted a health clinic, a Rural Administration Center, A primary school, 2 boreholes, a water reservoir, standpipes and residential accommodation for government workers. In terms of how people sustained themselves, the following were observed: A tannery (abandoned), donkeys, cattle, goats, chickens and a horse. Kaudwane is about 260km from Gaborone.

E. 4. The Applicants: Their Personal and Other Circumstances:

1. On the totality of the evidence given, those Applicants who

gave evidence and a few about whom they testified, had, prior to the relocations of February 2002, the following general characteristics in common.

2. They were either born in the CKGR or had sufficient ties, by either blood or marriage, to claim residence in the CKGR.
3. They were Basarwa, Bakgalagadi, and Basarwa/Bakgalagadi, although the possibility of some of them being partly descendent from other Tswana ethnic groups cannot be ruled out.
4. Their primary places of residence within the Reserve was in one of six settlements; namely, Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope.
5. They lived in family units that comprised their immediate as well as, in many instances, extended family members.
6. They lived in huts built completely with locally harvested materials, these being grass, wooden poles and some brush.
7. Huts were located in compounds and compounds were typically oblong shaped yards fenced in by bush or brush. A typical compound was inhabited by a husband and wife, their children,

some of whom were in some instances adults and their extended family members, some of whom too, could be adults.

8. Huts and compound fences required seasonal repairs and/or rebuilding. Completely broken down huts left no injury to the land and the location of a hut, once the materials had broken down completely, could prove difficult to pin-point.
9. A few men had more than one wife, typically, two, although in the case of Roy Sesana, possibly three.
10. They lived in small settlements and the populations in 2001 were Kikao 31, Mothomelo 245, Metsiamanong 141, Molapo 152 and Gope 63.
11. They could not read or write, except for the occasional person who could read and write a little bit of Setswana. They spoke Setswana with various degrees of proficiency but otherwise spoke seG//ana, and/or seG/wi and/or Sekgalagadi, depending on one's own ethnicity or associations over the years.
12. They were a highly mobile people, traveling constantly within the Reserve as well as to places outside the reserve. As

far back as 1961, the mobility of the then residents was such that some residents lived an average of four months within the reserve. Mobility in and within the reserve has, during the years, been linked to availability of drinking water.

13. While they have, in the past, lived as hunter-gatherers, carrying out subsistence activities within the confines of clearly defined territories called ngo's, they have, for more than forty years now, been augmenting their diet with agricultural produce and for more than twenty years with services provided by the Respondent. These services are now 'essential' to their livelihood.

14. In terms of agricultural produce, they grew crops, such as melons, beans, maize and reared livestock, notably goats, donkeys, horses, chickens and dogs. They did not rear any cattle within the reserve although an insignificant number, amongst them the Moeti family, may have reared them at places outside the reserve.

15. They also hunted for meat, employing such methods as chasing down game on horseback and killing it by the aid of

dogs, trapping and bows and arrows.

16. At the time of the 2002 relocations, there was a permanent water source, in the form of a borehole, at Mothomelo, but the other settlements, expect for Gope, depended on water being brought in by truck by the Respondent, as well rainwater that collected seasonally in pans. The Gope residents at one point depended on borehole water at the diamond mine prospecting site that was then taking place there.

17. They survived on limited resources, in terms of food, water, shelter and health services. Most of them were classified as destitute, in terms of the Respondent's policy on the matter and as such received food rations and transport of their children to schools outside the reserve. They also on occasion, it seemed, received donations of clothing; when the Court went through the CKGR, it was observed that most of the residents found at Molapo had uniform towels to protect them from the cold. The group that huddled for a photograph, on the suggestion of the Applicants' counsel, Mr. Bennett resembled a

group one might see at a refugee camp – bare-footed, poorly clad for the weather, and the desert temperatures do, during winter nights, plummet to freezing, and obviously without sufficient water for proper hygiene.

18. They are indigenous to the Central Kgalagadi region.

19. Tshokodiso Bosiilwane and Amogelang Segootsane are two males whose personal circumstances are fairly typical of the average male Applicant who gave evidence. Bosiilwane was born in the CKGR while Segootsane was not. They say the following.

20. Tshokodiso Bosiilwane: He was born at Metsiamanong and so was his wife, but he does not know his birth date. His parents and grand parents too were born at Metsiamanong. He and his family were resident at Metsiamanong at the time of the 2002 relocations. He and his wife belong to the Xanakwe ethnic group. At the time he gave evidence he and his wife had five children.

21. Bosiilwane and his wife had nine huts in their compound in Metsiamanong. They grew crops, and reared goats, donkeys

and horses. They also gathered veldt products. They also received food rations from the Government.

22. Bosiilwane's children attended school outside the Reserve and the Respondent transported the children to and from school at the beginning of the school term and at the end, respectively.

23. Bosiilwane did not wish to relocate and in pursuit of this end he associated himself with FPK because he believed they would represent his interests on the issue.

24. During the relocations, Bosiilwane says he made his wishes known to the officials that he did not wish to relocate, but the officials dismantled his huts and those belonging to his wife and daughter. He claims they took his wife away by 'force'. His wife came back to Metsiamanong later in the year but when he gave evidence, he was still bitter at the way, he says, the Government had disregarded his wishes that his wife not be relocated.

25. Before the relocations, Bosiilwane hunted for meat, using horses, on the authority of hunting licences granted to him by

the Department of Wildlife and National Parks [DWNP]. When the DWNP announced that there would be no more hunting, he could no longer hunt and the licence he then had was rendered useless.

26. Before the relocations, Bosiilwane came to know that the Government was planning to 'take away what is theirs' and he decided that he would continue to live in the CKGR even without the services.

27. Amogelang Segootsane, another male Applicant who did not relocate, had a similar story to tell.

28. Segootsane was born in Salajwe, just under 100km from Gugamma, of parents who had some historical ties to the CKGR. He lives in Gugamma and is married with children. He can read and write a little Setswana. He has three huts where and he lives with his wife and three children.

29. Segootsane's two oldest chidlren are in school at D'Kar, and they are driven to school in a council vehicle at the beginning to the term and driven back to Gugamma, at the end of the term. This arrangement continued even after the 2002

relocations.

30. He knows that his parents come from the Reserve because they told him they were born in the CKGR, in "the same area" as Gugamma.

31. He has 2 donkeys, 4-6 goats, chickens and dogs and a horse. He grows crops. He gathers veldt products and he used to hunt but was told that the Government was no longer issuing hunting licenses.

32. During the 2002 relocations, government officials removed the water tank from which the residents of Gugamma used to get water. The water in the tank was thrown out.

33. Since the relocations, he gets water, using donkey carts, from a pan at Kikao and boreholes in the resettlement village of Kaudwane. At first, he was stopped by Government officials when he attempted to bring water from outside the Reserve to Gugamma. He then wrote to the Government, seeking permission to bring water into the CKGR. DITSHWANELO, The Botswana Centre for Human Rights [Ditshwanelo] drafted the letter for him and the Government gave him permission to

bring water for himself and his immediate family only.

34. Before the relocations, the Government used to provide health and some food rations and pension to residents in Gugamma, but this has since been stopped.

35. He associates himself with FPK, and says it fights for the land rights of the Basarwa and Bakgalagadi. He is a member of the Negotiating Team.

36. At the start of the 2002 relocations, he was in Salajwe visiting his sick father-in-law who was also Gugamma's headman. He returned to Gugamma to find that relocations were in progress and people were dismantling their houses. His own three huts were still standing but many people had left. He did not want to relocate because he wants to live on his ancestral lands.

37. He has no intention to relocate from the Reserve.

38. The Basarwa in particular and the Bakgalagadi to some extent, as ethnic groups have historically been at the lower end of the social, economical and political social strata, and indicators of this disadvantaged position are:

a. The language employed by the Colonial Government during the debates about the need for the setting aside of a 'reserve' in which the Basarwa and the Bakgalagadi then resident in that area could continue to practice their traditional way of life. They are called 'little people', 'uncivilized' and 'wild'. Others, notably officials and anthropologists, speak for them as options are explored and decided upon about how their future can be secured;
b. The Colonial Government's failure to carve out a 'tribal territory' for either group, in the same way that it carved out 'tribal territories' or 'native reserves' for some ethnic groups in the then Bechuanaland Protectorate.
c. The lack of mention of either of the ethnic groups in Sections 77, 78 and 79 of the Constitution and the consequence that neither has representation, in the way that the Bakgatla or the Bakwena, for example, have on the House of Chiefs;
d. The position adopted, in 1964 by the Colonial Government, when preparations were being made for the

first elections that, "Any really intensive effort to secure registration of potential Bushmen voters would however be of little value".

e. The high illiteracy level, compared to the national average, of the residents of the CKGR.

f. In the Respondent's own words, "The Basarwa are the most socially and economically disadvantaged ethnic community in Botswana" and "Until recently, the Basarwa were politically 'silent'".

E.5.The Respondent's Strategy of Provision of Services to the Applicants:

1. The Respondent, and rightly so, fully appreciates its responsibility to provide all populations with such services as can reasonably be afforded and it was guided on this by various policies. As the country evolved from one of the poorest in the world to a middle-income country, the services provided grew in sophistication and diversity over the years. The various settlement policies reflect this

development.

2. As regards service provision to the Applicants, the Respondent has adopted the following path:

3. In 1985 it appointed a Fact Finding Mission, whose mandate was to 'study the potential conflicts and those situations that were likely to adversely affect the Reserve and the inhabitants of the area'.

4. In 1986, having considered the Mission report, the Respondent took various decisions, some of which were that:

a. Social and economic developments of settlements within the CKGR be frozen with immediate effect.

b. Viable sites for economic and social development should be identified outside the Reserve and the residents of the Reserve encouraged – but not forced – to relocate at those sites.

c. The Ministry of Local Government and Land should advise Government on the incentives required to encourage residents in the Reserve to relocate.

d. Wildlife policies be speedily implemented to facilitate faster realization of the benefits from wildlife.

e. Regulations for the Game Reserve be promulgated as a matter of urgency.

f. Settlements then receiving water deliveries not to continue to receive such water deliveries, not even as a temporary measure.

5. In 1994, the Respondent, through a decision of Cabinet, reaffirmed its 1986 decision and further directed the relevant ministry to accelerate development sites for relocations.

6. The Respondent's strategy was thus to attract CKGR residents to locations outside the reserve by the provision, at those places, of services and opportunities for economic development.

7. It took eleven years before the 'viable sites for economic and social developments' were ready for occupation. In the meantime, not withstanding the decision not to deliver water to those settlements that had been receiving such deliveries, the Respondent did in fact continue to deliver water to those settlements.

8. Had the Respondent stopped the deliver of water to the settlements, in accordance with its decision, without

first establishing sites to which to relocate the residents, there would have been a congregation at Old Xade and Mothomelo, where there were boreholes and to which deliveries had not been necessary. Such congregation would have led to depletion of wildlife resources around the borehole area.

9. And had the Respondent not only stopped water deliveries to the settlements, but had further sealed the Old Xade and Mothomelo boreholes as it did at the latter settlement in 2002, it is fair to say that the majority, if not all the residents of the Reserve would have relocated to places outside the Reserve. Whether or not they would have gone back seasonally, when it rained, would have depended upon whether they could hunt during such seasonal residence.

10. The services that were being provided by the Respondent, which both parties agree were 'basic and essential services' were:

a. Drinking water on a weekly basis to each settlement;

b. A borehole at Mothomelo, which pumped water into two 10,000 litre tanks.

c. For Kikao, Gugamma, Metsiamanong and Molapo residents, trucked-in water from borehole at Mothomelo. Truck pumps water into 10,000 litre storage tanks at each of the named settlements.

d. Provision of rations to registered destitutes in all the settlements. In 2002 there were 96 registered destitutes in the Reserve, distributed as follows; Molapo 36, Metsiamanong 22, Gope 8, Mothomelo 15, Kikao 7 and Gugamma 8.

e. Provision of rations to registered orphans, of which, in 2002, there were 13 in Mothomelo, 8 in Gugamma and 7 in Kikao.

f. Provision of transport for Applicants' children, to and from school.

g. Provision of healthcare to Applicants through a mobile clinic and an ambulance service.

11. The Respondent, thus had a three pronged approach to

resolution of the 'conflicts' within the CKGR which it had sought to resolve by the appointment of the Fact Finding Mission of 1986; to persuade but, not to force residents to relocate, to terminate provision of water to the settlements and lastly to develop economic sites at locations outside the Reserve.

E.6. Respondent's Execution of its 'Persuade but Not Force' Plan:

1. Initially, for reasons that have not come out clearly from the evidence, the Respondent attempted to relocate everyone to the then Xade, now Old Xade, but that plan, executed around 1995, does not seem to have found favour with either the residents of the smaller settlements or ecologists. The residents complained of life at Old Xade and the death of their life-stock, while an ecologist, Dr. Lindsay saw problems with, amongst others, establishing a village that could be expected to grow to about 2,000 in the migration route of some of the wildlife in the Reserve.

2. Respondent decided to find alternative relocation sites outside the Reserve and that is how New Xade and Kaudwane came to be established.

3. The Respondent appears to have believed that all it

had to do was to identify sites within the general geographic area of the CKGR and then make them attractive to residents of the Reserve by the provision of services of a superior nature to those that residents had been used to and the Applicants would then want to move to those areas.

4. In Respondent's own words, 'When relocations took place government reasoned and expected that those who had remained behind would overtime weigh the advantages and disadvantages of remaining in a Game Reserve and would for their own benefit, their future and that of their children consider to follow others outside.'

5. On the above reasoning, the Respondent:

a. During 1996, formed a Resettlement Reference Group. That group in turn formed a Task Force, consisting of representatives of the Ministry of Local Government, the Departments of Water Affairs, Agriculture and Transport, DWNP, the Ghanzi District Council and Ghanzi Land Boards.

b. On 19 and 20 September 1996, the Task Force conducted a visit to sites inside and outside the CKGR to consult with Old Xade residents for the development of "New Xade".

c. The Task Force engaged residents of the Reserve in discussions and consultations about where to relocate New Xade. Sites were selected, boreholes sunk, schools and clinics built and extension staff posted.

d. The residents of the CKGR were expected to want to move to this place; they would not have to be separated from their school-going children, they would have access to water, enough not just to drink, but to bathe and water their livestock too, they would have economic opportunities that had never been open to them within the CKGR. The settlement of New Xade was even given an optimistic name, Kgeisakweni, meaning 'we want life" signifying a 'new beginning' or a 'new future'.

6. Indeed the residents of Old Xade and perhaps a few from the other settlements were over months, persuaded to move to New Xade and Kaundwane and the majority of those who relocated in 1997 have settled there and seem to have made homes there.

7. Judging from the public announcements made around the time leading up to the 1997 relocations, the Respondent must have been either optimistic about the attractiveness of the re-settlement villages and/or convinced of the right of those residents who wished to

remain to continue to receive such services as had been supplied before the relocations.

8. On the 22-23 May 1996 Government representatives assured the Ambassadors of Sweden and the United States, the British High Commissioner, the Norwegian Chargé d'Affaires and an official of the European delegation that "social services to people who wish to stay in the Reserve will not be discontinued".

9. At a briefing session on 4 June 1996 the Minister of Local Government, Lands and Housing stated that "Services presently provided to the settlements will not be discontinued".

10. On 18 July 1996 the Acting Permanent Secretary at the Ministry of Local Government circulated to other government departments a paper which "will be always the basis of their talks whenever they are required to talk about the plight of the Remote Area Dwellers or the Basarwa People": This expressly stated that "The current residents of the CKGR will be allowed to remain in the Reserve and the current Government services will be maintained, though no new services will be provided".

11. In a letter to the Botswana Guardian dated 16 September 1997, the Ghanzi Council Secretary and the Ghanzi District Commissioner stated that "The Government's position [is] that services will continue being provided for so long as there shall be a human soul in the CKGR. So there is no violation of any human rights nor reneging of any promises by Government. Anything to the contrary would be pure propaganda":

12. The expectation, it seems was that it would be a matter of time before all the residents saw the value and wisdom of moving from the Reserve. They would not be forced, but they would be persuaded by what was being offered in the new settlement villages – schools, clinics, title to land, cattle and goats grants; generally living a Tswana type life. It was supposed to be an improvement on the life they lived in the Reserve.

13. The promise though was that in the event that anyone failed to see the value and wisdom of relocating, they would be allowed to live in the Reserve, enjoying the limited services that were then being provided.

E.7. The Applicants' Resistance to Relocation from the CKGR:

1. Notwithstanding the superiority of the services provided at New Xade and Kaudwane, those Applicants who gave evidence and some about whom they testified resisted relocation to places outside the CKGR and demonstrated such resistance in the following ways:

2. They had associated themselves with the First People of the Kgalagadi (FPK), the Negotiating Team and Ditshwanelo, all organizations that have supported, to varying degrees and in various ways, some residents' attempt at seeking a way of remaining in the CKGR.

3. During the time leading up to the 1997 relocations, the consistent message from the majority of the residents in the smaller settlements was that they did not wish to relocate, either to Old Xade as was the initial plan or to any place else.

4. In fact at the end of the registration exercise undertaken in September 1996, not one household at Metsiamanong or Gope and only one at Molapo, had registered to relocate.

5. Following the 1997 relocations, which the Applicants have come to accept were, contrary to what they had originally pleaded, not forced, they have remained in the reserve and some of those who had relocated have since returned to the Reserve.

6 The relocations became, to use the Respondent's own words a 'sensitive issue' meaning that it was not an matter that a government

representative raised with residents if he wished to continue to remain friendly with them, unless one had specific authority to do so.

7. Notwithstanding their frequent sojourns to places outside the reserve, during which time they would have observed Kaudwane, New Xade and other places, they continued to make the reserve their primary place of residence or at least an important enough place to call 'home'.

8. With the support of FPK, The Negotiating Team and Ditshwanelo, they engaged the Respondent in lengthy, time consuming, technical discussions, all aimed at retention of the land they occupied within the CKGR.

9. Following the announcement, in 2001, that services would be terminated the Negotiating Team acted on their behalf, seeking to have the Respondent reconsider its position.

10. When the Respondent would not change course and as the date for the termination of services approached, they launched the present case.

E.8. Respondent's Declared and Acted-Out Positions on Termination of Services and Relocations:

1. Prior to the initiation of the 2002 relocation exercise, Respondent took the following positions on termination of services and/or relocation of the CKGR residents.

2. It adopted, in 1986, a policy that said two main things:

   a. Residents would 'be encouraged - but not forced - to relocate'.
   b. Water would not continue to be provided, even on a temporary basis.

3. It consulted, in preparation of the 1997 relocations, with the residents of Old Xade as well as residents of the other six settlements about the benefits of relocating to places outside the CKGR.

4. It assured, during the planning of the 1997 relocations, residents, either directly or through the making of public statements directed at others, that services would not be terminated as long as there were residents within the CKGR.

5. It consulted, after the 1997 relocations, with residents on alternatives to relocations. One consultant, Masuge, discussed with the residents the idea of creating Community Use Zones (CUZs) within the Reserve and the residents selected areas for this purpose. Masuge's had been engaged specifically to "assist the DWNP to encourage and facilitate community development programmes and community consultation for management planning purposes with the people in and around the Central and Southern Parks".

6. It promulgated, in 2000, Regulations that confirmed

and/or assumed and/or facilitated human residence within the Reserve.

7. The National Parks and Game Reserves Regulations No. 28 of 2000 promulgated in terms of the Wildlife Conservation and National Parks Act, No 28 of 1992, provides, in part that; "3 (1) The Director [of DWNP] shall prepare a management plan…

"(6) in the absence of a management plan, a draft management plan will be used as a guide where one exists

"(7) the plan shall be subject to a comprehensive review at least every 5 years, but also can be reviewed as and when required.

"18 (1) areas can be designated Community Use Zones.

"(2) CUZs are for the use of designated communities living in or adjacent to the national park or game reserve.

"(3) CUZs are only to be used for tourism activities, sustainable use of veld products but not hunting unless otherwise specified."

The Regulations provide for hunting by residents in the following terms:

"45 (1) People who were residents of the CKGR at the time it was established, or persons who can rightly lay claim to hunting rights in the CKGR may be permitted in writing by the Director to hunt specified animal species and collect veld products in the game reserve and subject to any terms and conditions and in such areas as the Director may determine."

> It developed, over a period of about two years, various drafts of a Management Plan of the Reserve to the stage of three drafts, with human residence within the Reserve as a recurring feature. The position, even as recently as February 2001 was that "This resettlement is completely voluntary. Many people have taken the opportunity but a significant number do not wish to move. It is proposed that this project will support both the people who wish to move and the CKGR residents through appropriate zonation of the reserve and encouragement of suitable economic activities."

8. In November 1998, DWNP must have been managing the Reserve in terms of the Second Draft Management Plan, since, in terms of the applicable Regulations, "in the absence of a management plan the development and management of the national park or game reserve shall be guided by the draft management plan".

9. It informed the residents on numerous occasions that services were temporary and would one day be terminated.

10. It took a resolution, around the first week of April 2001, to cut off all services in the CKGR. The Resolution was that of the Ghanzi District Council.

11. It refuted, through a press interview in April 2001 that

services would be terminated. The interview was given by Dr. Margaret Nasha, the then Minister of Local Government and Lands who later in her affidavit explained that "Whereas most of the article is by and large correct, I did not overrule the Ghanzi Councillors. What I said was that services have to be maintained for a while but gradually will be phased out. There was a need for consultations to be done before the termination of services completely."

12. It provided services up and until the 2002 relocations when they were finally terminated, except for the transportation of children to schools, which service continued uninterrupted.

E.9. The Circumstances and Processes of the 2002 Relocations:

The 2002 relocation process was undertaken under the following climate or circumstances:

1. Respondent having decided to terminate basic and essential services it had been providing to the Applicants made public its decision and gave the Applicants six months notice of the impending termination.
2. Respondent made a blanket decision to terminate issuance and withdrawal of already issued, of special game licences (SGLs) to all residents.
3. Respondent, once the relocations were underway, poured water from water tanks and sealed the Mothomelo borehole. At first, soon after the relocations, one resident, PW2 was prevented from bringing water into the reserve. Only after he enlisted the help of Ditshwanelo, was he allowed to bring water into the reserve and even then restrictions as to the use of the water and with whom he could share it with were imposed on the permit.
4. Respondent, in many instances, made relocation pacts with individuals, as opposed to families. PW3's huts, for example

were dismantled even though he said he was not keen on leaving while his wife apparently wanted to go.

5. Hut dismantlement was a key feature, perhaps a necessary part of relocations.

6. Registration to relocate by an individual was immediately followed by the measurement of the huts and fields identified by the individual as their own, the dismantlement of huts, the loading of items identified by the individual as her own into a truck and the transportation of that individual, 'her' goods and all members of the her household to New Xade, Kaudwane or Xere.

7. There was some police officers present during the relocation process and in the case of the relocation of two of Sesana's wives, one officer commissioned their oaths in a letter they wrote asking to be relocated.

8. In view of the extent to which the police service is used in this country, the presence of the police in an operation of this nature and size would not, of itself, be curious; what is curious though, is the persistent denial by the Respondent's witnesses that there was police presence.

9. The relocation exercise involved twenty-nine big trucks and seven smaller vehicles, drivers, lorry-attendants and officials. This must have represented a significant and overwhelming disturbance in the settlements, regard being had to the population sizes of the settlements.

10. On occasion, families, especially husbands and wives, were separated and little attempt, if any, was made to get a common position by both.

11. Those who were reluctant to relocate were engaged in discussions designed to make them change their minds and such discussions ranged from persuasion to pestering. One particular family not wishing to relocate had to request the District Commissioner to let them stay to take care of an ailing relative. While permission was given for them to stay, the ailing relative excuse was recognized as a ploy used by the family not to relocate.

12. The question becomes why someone who is not under pressure to relocate would need a ploy to remain in the Reserve.

13. No one had ever told the residents before that they could not keep life-stock.

14. There was no opportunity created for negotiations relative to the amount of compensation to be paid and what interest could be compensated.

15. There was insufficient information about the way in which compensation would be calculated, when it would be paid or the amount that would be paid.

16. At least 11 of the residents, some of them Applicants, who relocated and then went into the Reserve are facing criminal charges for re-entering the Reserve without the entry permits.

F. Irrelevant Evidence:

1. A point needs to be made about three issues that took a significant amount of the Court's time but which, in the end of the day, can be called, for lack of a better expression, 'red herrings'. This was essentially either irrelevant evidence or evidence led to answer issues that, although they might have been raging in the 'court of public opinion', were not issues before this Court.

2. The first is the lengthy, technical, and without doubt professionally sound, evidence offered by Dr. Alexander on disease transmission from wild animals to domestic animals and vice-versa. The technical and detailed evidence on of how banded-mongooses, wild dogs and other wild- animals, might get this or that disease from this or that domestic animal, and vice versa, have not been helpful to the disposition of this case. That whole evidence was, by and large, a waste of time. This is by no means a negative comment on the professional integrity of Dr. Alexander, but it is certainly a comment on the relevance of her testimony on this point to the issues that faced the court.

3. The second relates to equally lengthy and equally technical evidence, supported by graphs, maps, tables and shape-files, offered by both Mr. Albertson and Dr. Alexander on wildlife distribution in the CKGR and whether human settlements were likely to affect such distribution. Once again, Dr. Alexander may have offered sound professional opinions about whether or not a gemsbok is likely to amble along foot-paths in Metsiamanong, when there are people at that location and/or whether the settlements are located near fossil valleys, thus forcing a competition for food resources, between man and animal. My view though is that while all that evidence explained why it made sense, from an ecological point of view, to limit or exclude human settlements from game reserves it did very little to help answer the questions of the lawfulness or otherwise of the Respondent's actions, vis-à-vis the termination of services and/or relocating the residents, nor did it help in determining whether the Applicants consented to the relocations. A detailed discussion about

how wildlife of a number that could only be estimated would thrive or fail to thrive, in an unfenced area of approximately 52, 000km, if 600 or so people, their stock whose numbers have not been given and their crop fields whose sizes have not been given, were eliminated does nothing to answer the questions before this Court. Even if this evidence were remotely relevant, it certainly did not need to be as detailed as it was.

4. The third is the diamond mining issue. Mr. Bennett's position was that the Applicants never pleaded that they had been relocated because of diamond mining. Mr. Pilane, on the other hand was not satisfied with that answer and queried why it was, if the issue was not part of the case, that it kept on bubbling to the surface. Finally, on the application of Mr. Pilane and in the face of opposition from Mr. Bennett, the court visited Gope and found that while diamond prospecting had taken place there in the past, there was no actual mining then taking place. This issue was not only irrelevant, but such an assertion lacks credibility for the following reasons:

a. The Applicants accept, as Mr. Bennett conceded in submissions, that the settlement of Gope was established as a result of diamond prospecting as opposed to having been closed down because of diamond mining. It was the availability of water at the prospecting site that had attracted people there and led to the establishment of a settlement. In fact, it was the prospectors or an agent of the prospectors, who gave the name 'Gope', 'meaning nowhere', to that locality. This is not to say, though, that there were no people in the Gope area, for indeed the evidence is that the residents of the Reserve were historically highly mobile and Albertson places three families in this general area. The 'Gope area' by the very fact of its location, covers areas both inside and outside the Reserve and indeed the people who congregated at Gope during the prospecting came from both places inside as well as outside the Reserve.

b. Gope is too far from the other settlements for mining at that site to require relocations of residents from the other

settlements. In fact to relocate people from Molapo to Kaudwane would necessarily mean bringing the people nearer to the mine site than away from it.

c. Gope is only 36km from the eastern border of the reserve so fencing it off for mining purposes could have been done without any of the other settlements feeling the faintest ripple.

d. The CKGR is part of the larger Kgalagadi area and therefore if diamonds are a feature of the Reserve, they may well be a feature of the region. Relocations motivated by the need to make way for diamond mining would have to be to points beyond the 5km that Kaudwane is from the southeastern boundary of the Reserve and the 40km that New Xade is beyond the western boundary of the Reserve.

e. Re-settlement at Kaudwane or New Xade is not and cannot, according to the law or any reasoning, be a promise that if minerals were to be discovered there, people located there would be protected from any

disturbance.

5. While diamond mining as a reason for the CKGR relocations might be an emotive rallying point, evoking as it does images of big, greedy multinationals snatching land from, and thus trampling the rights of small indigenous minorities, the case before this Court does not fit that bill. It would be completely dishonest of anyone to pretend that that is the case before this court. Those looking for such a case will have to look somewhere else.

G. Selected Rulings Made During the Hearing of this Case:

1. This Court has made various orders over the course of the four years that it heard this case and a selection of the ones that are deemed to be of significance are given below.

2. The 5th November 2004 Order on Mr. Boko's mandate to represent all 242 of the Applicant: The Applicants' lawyers at the beginning of the hearing of evidence seemed to be in two distinct camps. On one camp was the team made up of Mr. Du Plessis and Mr. Whitehead and on the other was Mr. Bennett,

who came into the scene just before the inspection of the settlements. The team split up early on during the taking of the evidence of the Applicants. Mr. Du Plessis and Mr. Whitehead withdrew from the case and Mr. Bennett remained, acting on instructions from a new set of attorneys, Boko, Motlhala, Rabashwa and Ketshabile. A question arose as to whether Mr. Boko, who had evidently never met the people he claimed where his clients, except perhaps Mr. Sesana, really had the mandate to represent them. After hearing arguments on the matter, it was ruled that:

a. Attorneys Boko, Motlhala, Rabashwa and Ketshabile have authority to act for Roy Sesana, Jumanda Gakelebone and the 131 Applicants whose names appear at the foot of the letter of 19th August 2004 addressed to Du Plessis.
b. Attorneys Boko, Motlhala, Rabashwa and Ketshabile have no authority to act for the remaining 111 Applicants and such Applicants remain as unrepresentative litigants.
c. The case will proceed in the absence of the un-represented Applicants, who are at liberty to continue

without representation or to engage any attorney at any further date during these proceedings.

d. Boko to prepare, file and serve, by the 12th November 2004, a list of the full names of the applicants he acts for, assigning them the numbers they were assigned in RS1.

3. The 25th May 2005 Order: The question was whether Respondent's summary of evidence of Mr. Joseph Matlhare complied with order 41, sub-rule 9, which rule regulates the introduction of a witness as an expert. It was observed that Mr. Bennett had failed to raise an objection for close to one year and further that the defect he complained as regards the summary of evidence of Mr. Matlhare, was a defect that afflicted the summaries of his own expert witnesses. The objection was overruled and it was ruled that the Respondent could lead Mr. Matlhare as an expert witness.

4. The 30th August 2005 Order: The question was whether the Respondent could use a report on of " a field assessment of the [CKGR]" the purpose of which had been to evaluate "wildlife

and domestic animal health and ecological conditions in the Reserve". The report was complied by one of the Respondent's expert witness, Dr. Alexander the pictures included in the report were taken by yet another of Respondent's witnesses, Mr. J. Broekhuis and the two were accompanied by about twenty other persons, termed "participants". Amongst 24-strong-party were one of the attorneys for the Respondent, Mrs. Manewe and an official who was still to give evidence, Mr. Ringo Ipotseng. The assessment was undertaken during the Court's recess, without prior notice to either the Court or the Applicants' counsel and was based on information collected, in part, from interviewing some Applicants and examining domestic animals in their possession. The Applicants' objection was upheld on a majority of 2 to 1, (Dibotelo J dissenting) and it was ordered that the Respondent could not use the report in question in any way in advancement of its case. The Order was based on the reasoning that the Respondent could not, in terms of Order 41 (6) examine a thing in the possession of an opposing party without first giving that party notice of its intention to examine the thing; the Respondent had not been justified in not informing the Court and the Applicants of its intention to undertake the assessment; the Respondent had improperly interviewed some Applicants, in an on going case, without any

reference to their counsel. The whole exercise had been prejudicial to the Applicants.

5. 28th October 2005 Order: The main question was whether the Respondent was justified in removing stock from the Reserve, some of which belonged to some Applicants. A related question became whether the use of the Dr. Alexander Report in this interlocutory application in any way affected the earlier order that it could not be used in the main application. It was decided that the interlocutory application was moved by one Applicant, Mr. Segootsane and his wife; that the removal of their stock from the Reserve was not justified, and that the use of The Alexander Report did not in any way make it evidence in the main case. Respondent remained precluded from using it is furtherance of its case.

H. Conclusions on the Issues

H.1. Introduction:

1. With the above factual findings as the foundation, final conclusions on the issues are reached hereunder. In some instances, additional findings are made and in that case, the basis

of those findings is indicated. Otherwise, where positive statements of facts are made, the basis for such assertion can be found in the earlier part of this judgment.

2. The position I hold is that while each of the various questions could very well be answered as stand-alone questions, there is significant inter-play and inter-connectedness between the questions, making such an approach too narrow and too simplistic. For example, while the termination of services, may, by itself not raise constitutional questions, the consequence of such termination may well do. If for example, it is found that the termination of services had the consequence of forcing the Applicants out of the Reserve, then the termination would necessarily raise such constitutional questions, as for example, the right to movement. And in view of the acceptance by the parties that the services were basic and essential, their termination, if that is found to have been unlawful, will necessarily raise the constitutional question of whether the right to life has been abridged.
3. Another example, if it is found that the Applicants' right of

movement has been unconstitutionally curtailed by the requirement of entry permits into the Reserve and further that termination of SGLs was unlawful and not only unlawful, but affected the Applicants' right to enjoyment of residence in the Reserve, the termination of SGLs, becomes a constitutional issue, when, ordinarily, it might not have been.

4. Before answering the questions, some of the issues, concepts and principles that inform the way the questions will be answered are discussed below.

5. First, I take the position that the fact the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples' is of relevance and more particularly, I find relevant that:

    a. Botswana has been a party to The Convention of the Elimination of All Forms of Racial Discrimination since 1974. The Race Committee adopted Recommendation XXIII, which requires of state parties to: "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and

interests are taken without their informed consent".

b. The current wisdom, which should inform all policy and direction in dealing with indigenous peoples is the recognition of their special relationship to their land. Jose R. Martninez Cobo, states:

> "It is essential to know and understand the deeply spiritual relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.
>
> "For such peoples the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely." Para 196 and 197.

6. Second, I adopt the position that has been followed in this Court and the Court of Appeal on the proper approach to constitutional construction. In the case of The Attorney General v Dow Justice Aguda, had the following to say on the issue:

> "Generous construction means to my understanding that you must not interpret the Constitution to whittle down any of the rights and freedoms unless by clear and

unambiguous words such interpretation is compelling.

"I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity"

7. Flowing from the above approach, in deciding whether or not the Applicants succeed in their assertion that their freedom of movement has been curtailed or limited, I take the view that a related notion has to be the right to liberty, as guaranteed by Section 3 of the Constitution. I take the position that the right to liberty connotes more than just the right not be retrained or restricted in one's movement. I subscribe to the views of the United States Supreme Court that:

> "Liberty is a broad and majestic term which is among the constitutional concepts purposely left to gather meaning from experience and which relates to the whole domain of social and economic facts, subject to change in a society that is not stagnant."

And

> "Without doubt it denotes not merely freedom from bodily

restraint, but also the right of the individual to contract, to engage in any of the common occupations of life… and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

8. The question then becomes whether, the actions of the Respondent, taken in their totality, and in view of the special situation of the Applicants, amount to a curtailment of their rights to life, liberty and freedom of movement.
9. Third, in interpreting the relevant legislation, including legislation now repealed, I am guided by the Section 24 (1) of the Interpretation Act, which provides that:

> "For the purposes of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant

international agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates of the Assembly".

H.2. The Issue: Whether subsequent to 31st Jan 2002 the Applicants were in possession of the land they lawfully occupied in their settlements in the CKGR.

H.3. The Reasoning:

1. Section 49 of the Interpretation Act defines occupy as including:

> "use, inhabit be in possession of or enjoy the premises in respect whereof the word is used, otherwise than as mere servant or for the purposes of the care, custody or charge thereof."

2.It is common cause between the parties that those residents, amongst them the Applicants, who were relocated 2002, were in possession of the land that they

occupied at time of the relocation.

3. Further, the Government when in invited to admit that the Applicants "both before and subsequent to 31 January 2002 were in possession of the land which they occupied in their settlements in the CKGR": replied 'admitted, but the [the Applicants] were preferably in occupation and not possession'.
4. The Respondent is ineffectually quibbling with words.

H.4. The Decision: The Applicants were in possession of the land they occupied their in settlements in the CKGR.

H.5. The Issue: Whether the Applicants were in lawful possession of the land they occupied in the CKGR.

H.6. Reasoning:

1. Some of the Applicants are descendants of people who have been resident in the Kgalagadi area, more particularly the CKGR area, before the Reserve was established as such in 1961. They were, by operation of the customary law of the area, in lawful occupation of the land prior to the creation of the Bechuanaland Protectorate and they were in lawful occupation at the time of the creation of the Reserve.
2. Some of the Applicants, amongst them Segootsane and

possibly some of the persons relocated from Gope, are persons and/or descendants of persons, who were resident in the Kgalagadi area, but not necessarily within the CKGR, at the time of the creation of the CKGR. They would ordinarily have been in lawful possession, of the land they occupied, whether such land fell inside or outside the Reserve, at the time of the creation of the Reserve.

3. Segootsane, and possibly some of the people who were resident in Gope at time of the 2002 relocations, were not born within the CKGR. Segootsane, would have been, all things being equal, in lawful possession of the land he occupied in Salajwe, by operation of the customary law of the area and/or the received law.
4. All the Applicants who gave evidence and some additional Applicants, about whom they testified, were resident in the CKGR at the time 2002 relocations. Where they, in 2002, in lawful possession of the land they occupied in the CKGR?
5. At the time of the creation of the Reserve, only forty one years before the 2002 relocations, the mobility of the residents of the

inner-part of the Kgalagadi area, was recognized and it was the Bushmen who spent on average at least four months in a year in that area, who were expected to benefit from the creation on a Reserve that excluded all others, unless such others possessed entry permits to enter it.

6. Thus the people who were to benefit from the creation of the Reserve, were not persons locked in there, year in and year out, but persons who occasionally left the Reserve for all kinds of reasons, sometimes for months, sometimes for years and sometimes for ever. Segootsane's parents may well represent an example of residents who left and never returned to the Reserve.
7. Segootsane and his family are resident in the Reserve, the Respondent has never required a permit from them and continues to take the position that they not having relocated, they do not require an entry permit into the Reserve.
8. During his residence in the Reserve, and up until the 2002 relocations, Segootsane has benefited from the issuance by the Respondent to him of Special Game Licenses (SGLs), which

licenses are issued to "citizens of Botswana who are principally dependent on hunting and hunting veld produce" and in the case of the hunting in the CKGR, persons who were "resident in the [CKGR] at the time of the establishment of the [CKGR], or persons who can rightly lay claim to hunting rights in the [CKGR]"

9. While the Colonial Government had by letter of the law outlawed hunting and the keeping of small animals within the Reserve and by practice allowed them, the Botswana Government, by operation of law allowed hunting in the Reserve.

10. It is reasonable to conclude that one could only claim hunting rights in the CKGR if one could claim right of residence. Such right can only flow from one either having been born in the Reserve or having been born to persons who themselves could claim residence there.

11. The right of the residents of the CKGR to reside therein without the requirement of a permit and the right of the Government to exclude others, if such exclusion is necessary for their protection, was at the time of the creation of the

Reserve, contained in the legislation or the interpretation of the legislation that created the Reserve.

12. At independence, this special right of residence in the Reserve and the right to exclude others if need be, found its way into the Constitution after much debate by the Colonial Government about the matter.

13. The Constitution provides as follows at Section 14 (1) and 14 (3) (c):

> "No person shall be deprived of his freedom of movement, and for the purpose of this section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana. …
>
> "Nothing contained in or done under the authority of any law shall be held to be in consistent with or in contravention of this section to the extent that the law in question makes provision –
>
> "for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well being of Bushmen."

14. Section 14 (3) (c) is a derogation clause, in that it curtails or sets limits to the right to freedom of movement granted under Section 14 (1). The section further curtails the equality rights granted to all under Section 3 (a) and Section 15 of the

Constitution. Section 3, grants all persons inter alia, equality before, and equal protection of, the law and does that in the following language:

> "Whereas every person in Botswana is entitled to the fundamental rights an freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-
> "…protection of the law".

15. "Protection of the law", has been held to mean "equal protection" of the law and indeed the Section 3 makes it clear that such rights as are detailed therein are to enjoyed without discrimination.

16. Section 15, goes further to make clear that the right not to be discriminated against guaranteed under that section is subject to, among others, Section 14 (3). Sections 15 (1), (3) and (7) are reproduced hereunder:

> " Section 15 (1) Subject to the provisions of subsections (4), (5) and (7), of this section, no law shall make any provision that is discriminatory either in itself or in its effect.
> "(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin…whereby persons of one such description are

subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

"(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restrictions on the rights and freedoms guaranteed in section 9, 11, 12, 13 and 14 of this Constitution, being such restrictions as is authorized by Sections 9 (2), 11(5), 12 (2), 13 (2) and 14(3) as the case may be."

17. Section 14 (c) allows for unequal protection of the law or discrimination, in that it allows the Respondent to exclude non-Bushmen from defined areas, if such exclusion can be justified on the grounds of the protection of the well being of Bushmen.

18. Under the operation of Sections 14 (3) (c) and Section 15 (7) therefore, the Respondent had full authority to regulate the entry into the Reserve of persons who were not Bushmen, if such regulation, could be justified on the basis that it was for the latter's protection.

19. The CKGR is a "defined area" within the meaning of Section 14 (3) (c) and I so hold for the reason that there cannot be any doubt that that portion of the Constitution was

informed by the concerns about the future of the Bushman then resident in the CKGR at the time leading up to independence.

20. The Constitution could hardly protect that which was unlawful to begin with, thus residence by the Bushmen in the Reserve was lawful as at the time of the adoption of the independence Constitution and nothing since has been done, either by way of policy or legislation, to change that.

21. In fact, quite to the contrary, the Respondent has over the years adopted policies, regulations and practices and promulgated laws, that have supported human residence in the Reserve.

22. The residents whose residence in the Reserve the Respondent has supported and facilitated through policies, laws and practices are the "Bushmen" who in 1961 were to be protected by the creation of the Reserve and their descendants and such residents and their descendants, as were, either by marriage or other social ties, ordinarily resident in the Reserve at the time of the 2002 relocations. The Applicants fall within

this category.

23. The provision of services to residents in the Reserve, without questioning their right to reside there is an act that supports the proposition that the Respondent accepts the lawfulness of the Applicants' residence in the CKGR.

24. The policy of not seeking to regulate the entry and exit of the residents of the Reserve through the issuance of permits is yet another indicator that Respondent did not, at least until 2002, question the lawfulness of the residence of the Applicants in the Reserve

25. Section 45 (1) of the Wildlife Conservation and National Parks (Regulations) recognizes that there were residents with the CKGR at the time of its establishment and gives those residents and as well as persons who "can rightly lay claim to hunting rights" in the Reserve, an opportunity to hunt therein. Parliament would hardly facilitate that which is unlawful.

26. Section 18 (1) of the Wildlife Conservation and National Parks Act (Regulations) provide for the creation of Community Use Zones within national parks and game reserves of for the

benefit of communities living in or immediately adjacent to such parks or game reserves.

27. Section 26 of the Interpretation Act provides that: "Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit".

28. The intent and purpose of the provisions above was to recognize rights of residence and hunting that existed prior to the establishment of the CKGR and to facilitate continued enjoyment of those rights.

29. It has been said that the CKGR is State land and so it is. So are Gaborone Township, Lobatse Township and other areas not falling within tribal territories. That fact alone does not make residence therein unlawful. Residence within Gaborone Township is guided by land use policies, regulations and laws, just as residence in the CKGR is. But there is one difference, residence in the CKGR of Bushmen, is specially protected, in that others may be excluded.

30. The CKGR is a piece of State land with two primary uses

that pre-dates 1966, the year of Botswana's independence. The uses are game conservation and residence by a specified community of people.

31. The Respondent has long recognized this dual use of the land, and that explains the policies, laws and practices if has adopted over the years.

32. At no point during the discussions about relocations has the Respondent suggested that residence within the Reserve was in any way unlawful.

33. It has been said that human residence within the Reserve is inconsistent with the Respondent's policy of total preservation of wildlife. That may be so, and in that case, the Respondent has adopted a policy that cannot be realized. Alternatively, the Respondent policy must be read as an ideal with certain acknowledged limitations, one of them being the reality of human residence within the Reserve. After all, the policy came after the people.

H.7. Decision: The Applicants were in lawful possession of the land they occupied in their settlements.

H.8. The Issue: Whether the Applicants were deprived of such possession by the Government forcibly or wrongly and without their consent

H.9. The Reasoning:

1. In dealing with this issue the following points are considered: the Respondent's policy framework that informed the relocation and service provision, the relocation process, in terms of but dismantlement, pouring out of water, compensation processes and the individual versus the family in seeking consent to relocate. Also considered in making findings on consent is the relevance of the relative powerlessness of the Applicants.

H.9.1. The Respondent's Policy Positions:

1. The Respondent has the right, indeed the obligation, to make policies regarding management and allocations of national resources.

2. The Respondent's policy of 'encourage but not force' was contradictory to the policy of 'no water provision, even on a temporary basis'. This inherent contradiction explains the Respondents acts of failing to observe the latter policy. In short, the Respondent appreciated, as far back as 1986 that termination of the provision of water would necessarily lead to some, if not all, of the affected residents leaving the Reserve in search of water at places outside the Reserve. As far back as 1965, it was recognized that water availability within the CKGR was a major determinant in mobility of the residents. An inherently problematic policy therefore,

guided the Respondent right from the start.

3. The Respondent adopted conflicting and irreconcilable positions over relocations and service terminations.

4. They took the position that services were temporary and indeed informed the residents of this position but provided the 'temporary services' for many years. This temporary provision of services continued for more than fifteen years and was terminated in 2001 on a six months' notice.

5. They informed third parties who took an interest on the issue that services would not be terminated as long as people were resident in the Reserve. There was then at least, no suggested that there was a policy on timeline and at the very least the promise was that service provision would not terminated as long some people still remained in the Reserve.

6. Just two years before they took the decision to terminate the services and fourteen years earlier having decided that all regulations relevant to the management of the Park should be strictly enforced, they promulgated new regulations that had

provisions that assumed and in fact facilitated, human residence in the Reserve.

7. Up until August 2001, the Respondent's policies on residence within the Reserve and its provision of services to those who resided there were neither clear nor easily ascertainable. Was it to terminate services, whether or not there were people in the reserve? Was it to provide services, as long there were people who had not been persuaded to leave the reserve? Was it to provide services temporarily, persuade but not force people to relocate and terminate the services, whether persuasion failed or succeeded?
8. The August 2001 position that services would be terminated in six months, could have been read in one of two ways:
    a. As a clear statement of policy, which overrode all earlier ones, and cleared all earlier ambiguities.
    b. As yet, another statement by Respondent that only added to the then existing confusing policy position, especially with the April 2001 publicised position by Minister Nasha refuting that services would be

terminated.

9. As it turned out, it was one position that was going to be followed through; indeed, at the expiration of the six months, the Respondent moved into the Reserve to execute its decision.

10. In fact, the August 2001 position, coming as it did during the drafting of a Management Plan that took human residence within the CKGR as a given, seemed to come out of the blue. In view of the Respondent's own position that others who had no business to meddle in local affairs were doing just that, this new position was most probably fuelled by a feeling that 'enough was enough' to quote Mr. Bennett.

11. Respondent would have appreciated that the termination of services would result in most, if not all, of the then residents of the CKGR relocating to Kaudwane, New Xade and perhaps to Xere too. This is borne out by the size of the exercise, in terms of the number of trucks employed, the number of staff members both at the settlements and at the destinations, the diversity of the government departments involved. In short, the Respondent was prepared, in terms of resources and logistics,

to relocate all the residents of the six settlements; it must therefore have expected that termination of services would lead to residents getting into the offered trucks. In short, the Respondent gave the residents six months' notice and then set about to prepare for the only consequence – relocation.

12. The execution of the service-termination-within-six-months decision led to exactly what it would have led to 16 years previously, had the 1986 'no water, even on a temporary basis' decision been executed; the relocation of the residents of the Reserve.

13. The Applicants say that they had a legitimate expectation that the Respondent would not change its policy on service provision without first allowing them an opportunity to be heard on that change.

14. The Botswana Court of Appeal case of Labbeus Ditiro Peloewetse and Permanent Secretary to the President and Attorney General and Shaw Kgathi, CA No 26/99, which involved a challenge to the terms of which the third Respondent, Shaw Kgathi, was appointed to the position of

Director of Sport and Recreation, is instructive on the position of the law. The Applicant in that case claimed that he had a legitimate expectation to the position as advertised because he fit the qualifications for the position, while the third Respondent did not. The Court adopted the view that a legitimate expectation arises "where a person responsible for taking a decision had induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken…It is founded upon the basic principal of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public." at 13-14.

15. Thus, on the above authority, a legitimate expectation can arise from an express promise given by a public authority. It must also cause those receiving the benefit of the promise to believe they will receive such benefit or be given a hearing before the final decision in taken. Having a legitimate expectation to benefit from a promise or decision by a government authority is something that is important to the rule

of law and a government's relations with the public.

16. In Council for Civil Service Unions v. Minister for the Civil Service cited above offers some guidance. Lord Diplock cited specific circumstances when judicial review of administrative decision may be allowed. To qualify for judicial review: [T]he decision must have consequences, which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: by altering rights or obligations of that person which are enforceable by or against him in private law; or by depriving him or some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated some rational grounds for withdrawing it on which he has been given an opportunity to comment. [at 408].

17. In view of the pre-August 2001 environment, what could an average resident of the Reserve expect from the Respondent? Some might have expected that what had obtained for more

than fifteen years, supported by policy, law and practice, would not be changed without them first being given a chance to be heard. Others might have expected not be forced to relocate, but rather that attempts to persuade them would continue, provided of course that indications were still that they might be persuaded. Yet others might have thought that the Respondent had accepted that persuasion was not happening. These might have expected continued provision of basic and essential services in their settlements, until such time that a new policy on service provision was developed and with their input. At the very least, all were entitled to clarity on what the policy was and were entitled to be informed about a policy change before it was made.

18. I find that the Respondent operated under a confusing and unclear policy and on this point alone I would hold that the Applicants were deprived of possession of the land they lawfully occupied wrongfully and unlawfully and without their consent, but I go on to consider other factors that I say are informative on whether the Applicants gave their free and informed consent

to the relocation.

H.9.2 The Relevance of Family and other Social Ties to Consent:

1. Once the Respondent executed its decision, it failed to appreciate the importance of the fact that the Applicants lived in families, compounds and small settlements. This was not a relocation of people living in an apartment building in New York or Block 8 in Gaborone. This was a relocation of people linked together by blood, marriage, mutual-cooperation and general inter-dependence. And true consent by any one to relocate could hardly be obtained unless the family, the compound and in some instances the whole settlement was taken as a unit.

2. While the Respondent had, at its disposal and even at the scene of the relocations, social workers whose job is the promotion of the welfare of people in their constituencies, no attempt was made to enquire into the consequences, to the rest of the family, of an individual 'registering' to relocate. Those who executed the relocations took this as a cue to

process the person as an individual, disregarding the welfare of those who may have shared the individual's assets, assuming they had indeed been individual assets. It seems that the agents of the Respondent, although they ought to have known better, decided to use the notion of individual ownership to property to guide them in the relocation process. Life in the small communities in general and in the communities of the Applicants in particular, is generally cooperative and interdependent; the actions of one, will necessarily affect the actions of another. Processing people as individuals necessarily 'forced' family members living with that individual to relocate.

3. There were instances where a hut from a compound was dismantled, leaving another or others standing, on the reasoning that the owner of the dismantled hut wished to relocate while the owner of the hut left standing did not wish to. No attempt was made to enquire into why the various persons shared a compound in the first place and how they had cooperated and how the 'consent' of one would affect

those who did not wish to relocate.

4. There was a recurring theme suggesting that the residents valued consultation amongst families before taking a position on relocation. Except in the case of Kikao, it seemed that the Respondent's agents found it too cumbersome to deal with families and rather preferred dealing with people as individuals, with the result that in some instances, wife was pitted against husband and child against parent. It has to be in the Respondent's interest to promote, rather than undermine, family unity and community cohesion. Respondent's agents ought to have appreciated that dissentions within families undermined and called into question the true consent of those who registered.

5. On the above point, the admitted evidence of Kaisara Caesar Mpedi, the then Council Secretary of the Kweneng District states: "It is worth noting that although there were some reluctant families in Kikao and Kukamma, some family members volunteered to move against the will of their leaders. In Kikao, Ms. Mokgathiswe and two others relocated and in Kukamma, Letsema and Mashote, who were the sons of the old man, Mr. Tshotlego Mohelang, volunteered to

relocate and were only waiting to discuss the matter with their father."

6. The example of how Sesana's two wives were relocated, illustrates how the relocation of one, necessarily affected the decision of others. As the huts were dismantled and residents boarded trucks and the village of Molapo literally disappeared around them, they had no choice but to 'request to be relocated.'

H.9.3. The Relevance of the Relative Powerlessness of the Applicants to the issue of Consent:

1. In view of the position of the Applicant, in terms of their ethnicity, their literacy levels and political and economic clout, to obtain true consent to relocate, that is, to be sure that it had 'persuaded but not forced' anyone to relocate, common sense dictated that the Respondent acknowledged and addressed the relative powerlessness of the Applicants.
2. The Basarwa and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in

the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants' situation. A model of consultations that assumed that the calling of a 'kgotla' meeting as one would in a Tswana village was sufficient consultation may not necessarily have been the best. This is not to hold as a matter of fact that the 'kgotla' meeting model was not proper consultation in all instances, but it is certainly a questioning of that process. What, for example, constitutes a 'kgotla' meeting in a settlement like Gope, where there was no chief, or in Kikao, where the entire settlement is basically one family or in Gugamma where the headman was away sick in Salajwe?

3. The Applicants belong to an ethnic group that has been historically looked down-upon, often considered to be no more than cheap, disposable labour, by almost all other numerically superior ethnic groups in Botswana. Until

recently, perhaps it is still the case, 'Mosarwa' 'Lesarwa' 'Lekgalagadi' and 'Mokgalagadi' were common terms of insult, in the same way as 'Nigger' and 'Kaffir' were/are. Any adult Motswana who pretends otherwise is being dishonest in the extreme. The relevance of this fact is that those Applicants who had been politicised through their involvement with FPK, Ditshwanelo and the Negotiating Team were bound to see any action that smelled of a top-down approach as yet another act of disrespect by the initiators of the action. On the other hand, the average non-politicised Applicant, illiterate, dependant upon Government services, without political representation at the high political level, was hardly in a position to give genuine consent. It was the Respondent's obligation to put in place mechanisms that promoted and facilitated true and genuine consent by individuals, families and communities. Groups like Ditshwanelo or the Negotiating Team could have been invited to ensure some levelling out of the negotiation playing field.

4. The Respondent has charged that Roy Sesana and 'his

international friends' to quote Mr. Pilane who on occasion was unable to contain his irritations and frustrations with 'foreigners' who will not leave 'us' alone, are really the cause of the problems. The Applicants wanted to move, the Respondent says, but FPK, The Negotiating Team and Survival International have intimidated them into not relocating. Here is an African Government – is the essence of the complaint - that has the best interests of its citizens at heart, that has built clinics and schools, has sunk boreholes to ensure clean portable water, has granted title to land and granted choices of cattle or goats. It has plans to facilitate and promote private enterprise within the re-settlement villages, and a bunch of latter-day-colonialists are scuttling all that, with their talk of indigenousness, culture and land rights. What is a Government to do?

5. How can one not sympathise with the Respondent on this point, it might be asked? After all;
6. Slavery carted black people across the seas and the ripples are still felt today.

7. Colonialism carved up Africa, including the CKGR, for European benefit. In the case of Botswana, when it officially ended, the country was one of the poorest five in the world and boasted the legendary 12 miles of tar road, in a country the size of France.
8. Apartheid's wounds are still oozing, not quite healed. And Apartheid was thriving and well and the colonial government was managing Botswana from its bosom, when it was deciding whether or not to carve out a piece of land for residence of Basarwa and what to call it once it had been carved out.
9. When the Respondent's own advisers (The Mission Report) suggested the partitioning of the CKGR into two, keeping one part for the residents another part for wildlife, the views of the European Union were relevant to the rejection of that proposition. The European Union had money to offer and the African government had designs on that money, so that plan, not to say it was a good plan, never saw the light of day. And donor money often comes with consultants to offer advice and counsel, and the

case of Phillip Marshall, the author of the early versions of the CKGR Management Plans, is a case in point.

10. Since the relocations started in 1996, the Respondent has had to assure diplomats of one Western country or another that it will do that and it will not do that as regards the future of the CKGR and its residents.

11. Then, an act that has irked the Respondent enough to find mention in various of its affidavits and witness summaries; Survival International threw its weight behind, the Respondent will say, in front of, the Applicants. Yet another Western player, insinuating itself between a people and their Government, the Respondent says.

12. Then, a British lawyer, a thing that has irritated Mr. Pilane, flew from England to represent the Applicants. Will it ever stop; you can almost hear the cry, this continued and continuous interference from the West? What is a Government to do?

13. The case being judged, though is not whether slavery was brutish, which it was, or whether colonialism was a

system fuelled by a racist and arrogant ideology, which is was or whether apartheid was diabolical, which it was. It is not even about how high the Botswana Government should jump when a Western diplomat challenges or questions its decision. I think it is only fair to observe that African governments will continue to do quite a bit of jumping as long the global economic and political arrangements remain the way they are. But that is not the case before us.

14. As regards, Mr. Bennett's appearance in this court, why, it is the Respondent's own laws that makes that possible. Mr. Pilane cannot justifiably take that against Mr. Bennett or his clients. The Applicants had a right to engage whom they wished and if they wished for Mr. Bennett and the law allows it, then he can fly from England as often as he wishes and Mr. Pilane should accept it and if that irritates him, he just must muster some grace and hide his irritation as best he can.

15. As regards the role of Survival International, like FPK, Ditshwanelo and The Negotiating Team, it seems to me that these organisations have given courage and support, to a

people who historically were too weak, economically and politically to question decisions affecting them. For present purposes, the fact that Survival International it is based in the West is neither here nor there. The question is whether or not the Applicants had a right to associate with this group in their attempts to resist relocating and the answer has to be in the affirmative. It was always up to the Applicants to decide whose arguments, those of the Respondent or those of any one else, including those the Respondent considered irksome, made sense to them. Finally, it had to be their decision and that is the only question that matters; what did the Applicants decide?

16. What is a Government to do? The Government can be as irritated and/or annoyed as it wants to be at what it considers outside interference in its affairs, but it cannot, it should not, in response to such irritations disadvantage its own people. More than anything else, a Government that hears sounds of discontent is obligated to pause and listen and ask itself why

it is that a course of action it thought reasonable and rational is attracting dissent and disquiet.

17. Even assuming that it had believed that the Applicants were keen to relocate, once there appeared to be some resistance, once the FPK, The Negotiating Team and Ditshwanelo started to seek a revision of the relocation decision, once the lawyers were instructed and litigation was threatened, the Respondent was obligated to pause and listen.

18. After all, the Respondent's interest must ultimately be the welfare of its people, and its people include the Applicants. The decision to terminate the services, to relocate the Applicants, to terminate the issuance of special game licences, to refuse the Applicants re-entry into the reserve, are ultimately resource management and allocation and welfare promotion decisions.

19. Such decisions require a balancing of rights, a consideration of who benefits and who is adversely affected when one path or other is followed. Such a balancing exercise would have necessarily involved a comparative analysis of the expected losses and the benefits to the Applicants, as well as the expected losses and the benefits to the nation, of relocations.

20. In considering whether the Applicants consented to relocate, perhaps it is worth considering, what an individual Applicant would actually gain by relocating.

21. The Respondent says those who relocate will get title to land. The question becomes, to do what with it? What is the value of a piece of paper giving one rights to a defined piece of land, typically 40m x 25m when one had access to a much larger area? This is not to say there is no value, but it is to question whether such a possible value was discussed with the residents.

22. The Respondent says those who relocate will have a choice of between fifteen goats or five cows. No doubt this is fifteen more goats or five more cattle than they had before, but clearly not enough to pull them out of the need to receive destitute rations, at least in the short term. The Respondent's realised that and directed that all those relocated be classed as 'temporary destitutes'.

23. The Respondent says those who relocate will have access to health care services and schools; but they had those before, it just that one had to travel to get to them. A mobile clinic that comes twice a week to one's settlement may well be considered sufficient, making relocation to a village close to a big clinic that is available 24 hours a day seem unnecessary, especially to a highly mobile individual who is well prepared to travel to where the clinic is on a need basis.

24. The Respondent says those who relocate will get water, but they did get water; perhaps not sufficient to ensure healthy levels of hygiene, but an individual might well decide that water-on-tap is not a sufficient incentive to relocate.

25. The Respondent says that those who relocated were offered wards in which they could live with people they had lived with in their settlements, but this ignores the fact that space within compounds, space between

compounds space between settlements and space generally, was a key feature in the Applicants' pattern of settlement. Being jammed together in square plots, separated by a wire fence from one's neighbour was not one of the features of life in the settlement.

26. It is not difficult to see how, at a personal level, an individual might well have decided that it was better to be poor at home, than to be poor in a new and unfamiliar place.

27. It is not hard to see how a person from Kikao, might have been less enthusiastic about moving to New Xade, than a person from Old Xade. After all in 1985, the dry season population of Kikao was 4 people and that of Old Xade was 860. In 2001, the population of Kikao was 31 and that of New Xade, all of Old Xade having been relocated, was 1094.

28. This is not to say that the Respondent did not have the interests of the Applicants at heart, but it is to say that they ought to have listened more carefully at what motivated or was likely to motivate the Applicants' decisions and choices.

29. The Respondent, saw the economic-development potential, the health benefits and the educational opportunities to the children of the Applicants, of the relocations, but failed to see the cultural and social upheavals that could result. Two illustrations:

a. The then Minister of Local Government wrote to Ditshwanelo that, "May I add here once more, that the Government has the interests of the Basarwa at heart. The decision to relocate was taken with many positive things in

mind. We as a Government simply believe it is totally unfair, to leave a portion of our citizens underdeveloped under the pretext that we are allowing them to practice their culture. I would therefore urge you, in communicating this Government decision to the rest of the Negotiating Team, to appreciate that all we want to do is treat Basarwa as humans not Game, and enable them to partake of the development cake of their country."

b. When one of the Applicants gave evidence that she did not wish to relocate, because she wished to be near the graves of her ancestors, Mr. Pilane burst out laughing and when it seemed clear by the silence in the Court that he needed to explain the source of his mirth, he explained that he had not been aware that they buried their dead, but had rather thought that they collapsed a hut over their dead and moved on.

30. The two examples demonstrate the how the Respondent's view of development fails to take into consideration the knowledge, culture, and ideologies of the Applicants.

31. Operating under the believe that relocation to centres offering 'secure' land tenure, the opportunity to rear cattle, better healthcare, educational and other facilities has to be something everyone wants, the Respondent was unable to appreciate the reasons behind the persistent resistance to relocate and finally explained it away as the result of bad advice by busybodies meddling in matters that did not affect them.

32. But the Respondent ought not to have been surprised that some people might chose to remain in the Reserve, not withstanding the better facilities outside, for as far back as 1986, their own advisers cautioned that "relocations would create a group of frustrated people".

33. Respondent might want to pause and consider whether the disappearance of a people and their culture isn't too high a price to pay for the gain of offering those people services at a centralised location. It might want to consider, whether with Botswana's relatively small population of 1.6miilion people, regard being had to its land size and its relative wealth, cannot,

faced with a unique culture on the verge of extinction as it is, afford to be innovative in its development programmes. The failure of economic projects at Kaudwane and New Xade may well have something to do with the culture and pattern of life of those who relocated there. Perhaps they do not even like tomatoes and in that case, no matter how much money is poured into the horticulture projects, the projects will not thrive. Perhaps never having reared cattle in the Reserve, being given five cattle to take care of is more of a challenge than a benefit. Perhaps the community that made up Kikao would have been persuaded to move to a game ranch of its own, than to growing tomatoes in Kaudwane. And this is not a fanciful idea; the Respondent current policies actually have programmes and projects that allow for individuals to own large tracts of land for game and/or cattle farming. This is not to make definitive findings on these point, but it is to say that I am not convinced, on the evidence, that the decision to terminate services and relocate the Applicants and what to offer them once they has been relocated, took into

consideration such relevant considerations as the potential disruptions to their culture and the threat to their very survival as a people. I note the Respondent's position that it does not discriminate on ethic lines, but equal treatment of un-equals can amount to discrimination.

34. The Respondent allowed its annoyance with the involvement of groups who were themselves not residents of the CKGR, especially the involvement of Survival International, to influence its dealings with the Applicants and ultimately the Respondent changed course too swiftly and without allowing the Applicants an opportunity to be heard on the matter.

H.9.4. The Relevance of the Pouring out of Water to Consent

1. The only explanation for the pouring out of water and the sealing of the borehole at Mothomelo at the time and in the manner that was done has to be that the Respondent wanted to press the point to those who

could have been doubtful, that the only option was relocations. Water is a precious resource anywhere and a particularly scarce one in the CKGR and it would have been brought there at some costs, so to up-turn tanks would have been a dramatic and clear statement to the Applicants. This is particularly so since the those in charge of the relocation exercise needed water too, but this problem was solved by bringing water that they could control, the message being very clear, namely that there would be water only as long as the registration process was in progress. This act was intended to cause the residents to register to relocate.

H.9.5. The Relevance of Dismantlement of Huts to Consent

1. It is said that huts were dismantled because those residents who relocated wished to re-use the materials at their destinations. While that is a reasonable explanation, it seems very strange that not one person elected to leave

his/her hut with a relative who did not wish to relocate.

The other purpose of the dismantlement of huts has to have been a keenness to ensure that nothing remained that could possibly entice people back. The Respondent has insisted that there is no difference in vegetation type between the old settlements and the resettlement villages. If that is the case, why transport used poles at considerable expense when the residents could have harvested materials around their new homes? And why is there no shred of evidence that there was any discussions whatsoever about there being a choice to leave huts standing?

2. It is common cause that at the end of the relocation process, in the case of Molapo, for example, everyone had been relocated, whether they had registered or not. The dismantlement of huts would have caused the whole settlement to disappear and thus made it almost impossible for anyone to decide to stay behind.

H.9.6. Acceptance of Compensation as an Indicator of Consent

1. It is said that the residents appreciated that the

measuring of their huts and fields and the counting of the poles used to build some of those structures was for purposes of paying them compensation. While this must indeed have been the case, it is remarkable that it was assumed by the Respondent that the Applicants would accept whatever was offered. No attempt was made to make any of the residents aware of how the amount would be calculated and on average how much they could expect. The Respondent was aware of the Applicants associations with Ditshwanelo, FPK and The Negotiating Team and surely it would have been a small mater to invite these groups to assist in compensation negotiations. There were, in fact, no compensation negotiations, only a one-sided decision process. The whole process was top-down in its execution, and was conducted as just one more step to go through in getting the task at hand, which was relocation, executed.

2. The manner in which the compensation process was handled was also unique in another way. The normal

compensation procedure is for the compensation payment to be made first or at least an offer of an amount to be made, and only then is the person required to move. In the present case, there was no room for negotiations. The Compensation Guidelines used by the Respondent suggest that only in the case if an emergency will occupants be asked to vacate 'their land' before compensation is paid.

H.9.7. The Relevance of the Termination of the Issuance of Special Game Licenses (SGLs) to Consent:

1. On the 17th January 2002, the Respondent, through the office of the DWNP, issued a blanket instruction to the effect that no more SGLs would be issued and further that existing ones would be withdrawn. The instruction was based on the reasoning that "In view of the recent Government decision to terminate services to the residents of the …Reserve…the Department is obliged to conform. The Department has considered the services it

offers in the …Reserve and it has decided to cease issuance of Special Game Licences to people residing inside the Reserve."

2. The motivation could not have been cost, since the Director of DWNP has not remotely suggested that cost was a motivator.

3. The motivation could not have been conservation of wildlife, since the Director did not avert his mind to that issue before terminating the issuance of the licences and withdrawing already issued licences.

4. The motivation could not have been disease control, since that issue does not seem to have exercised the Director's mind until he came to give evidence in this case. Dr. Alexander's views of disease transmission from domestic animals to wild animals and vice-versa were not sought during the many months that the DWNP was developing a plan to manage the Reserve.

5. The motivation could not have been anything that the Applicants had done; for the Director would then have dealt with individual offenders.

6. If the Respondent's position that it was always its view that those who wished to remain could do so even after termination of services, the question becomes why then withdraw the one benefit that could be enjoyed with

no extra cost to the Respondent? Officials of the DWNP patrol the Reserve all the time and delivery of SGLs to the Applicants, who lived in settlements hugging the main track running through the Reserve, was hardly an onerous task.

7. The plan, therefore, was that by the end of 31st January 2002, there would be no water, no food, and no hunting, within the Reserve. Life would simply be very hard, if not outright impossible.

H.9.8. The Applicants' Actions and Consent

1. The Applicants actions were consistent with their intention to remain in the CKGR thus suggesting that they did not consent to the relocation; those actions include the following.
2. The instruction of FPK to negotiate with the Government on finding ways and means of ensuring that they remain within the reserve;
3. The instruction of the Negotiating Team to engage the Respondent in consultations aimed at ensuring their retention of possession of their settlements;

4. The participation, by some Applicants and through the Negotiating Team, in the protracted and technical negotiations with the Department of Wildlife, all aimed at facilitating residence within the CKGR.
5. The instruction of attorneys to challenge the termination of services and this at height of the very relocations that the Respondent says they consented to.
6. The actions of some, and in view of the sizes of the settlements, this really means most, of the residents in the smaller settlements have been consistent in their reluctance to relocate. Some reluctantly relocated to Old Xade in 1995 only to go back to their settlements later. Some relocated to Kaudwane and New Xade during the 1997 relocations, only to go back to the Reserve during the years that followed that. Some relocated Kaudwane, New Xade and Xere in 2002 only to return to the Reserve by July of the same year. Some never relocated at all. The evidence is that they did not consent to the 2002 relocations. The evidence is further that in 2002, they were dispossessed of the land they occupied wrongfully and

unlawfully and without their consent.

H.10. Decision: Those Applicants who relocated in 2002, whether they had registered to relocate or relocated with their families were deprived of possession of the settlements they lawfully occupied by the Government forcibly, wrongly and without their consent.

H.11. Issue: Whether the termination of by the Government of the provision of basic and essential services to the Applicants in the CKGR was unlawful and unconstitutional.

H.12. The Reasoning:

1. The termination of basic and essential services was intended to force relocation and the reasons given above for the holding that relocation was forced, wrongful and without consent applies to this issue as well.

2. While the cost of service is certainly a factor that Respondent is entitled to take in deciding whether to supply same at any one location, the Respondent failed to take into consideration the fact in the case of the Applicants, relocation meant a complete new way of life. Was the financial saving worth the social and cultural loss? Did any

one do the maths? Was the potential loss to a people's identity worth the financial saving?

3. The constitutionality of the issue arises from the fact that the services, which included water and food to destitutes and orphans, were essential; by this the parties must Ë[an essential to the recipients' survival. Their termination endangered life and, thus their termination had the consequence it had, relocation.
4. The right to life is a constitutionally right and the termination of essential services was in essence, a breaching of that right.

H.13. Decision: The termination with effect from 31st January 2002 by the Government of the provision of basic and essential services to the Applicants in the CKGR was unlawful and unconstitutional.

H.14. Issue: Whether the Government is obliged to restore the provision of such services to the Appellants in the CKGR.

H.15. The Reasoning:

1. Four and a half years has gone by since the Applicants launched this application and in the meantime many Applicants have remained in the re-settlement villages.
2. On the other hand, while the Respondent maintain that by the time the relocations were complete, only seventeen people

remained in the Reserve, it is also the Respondent's evidence that by May of the following year, there was a total of 57 people, living Molapo (35), Metsiamanong (19) and Gugamma (3).

3. Further, at the time the Court travelled through the reserve in July 2004, there was evidence of re-building of compounds and huts in some settlements, notably at Metsiamanong and Molapo. It is not known to the Court how many, if any, of the people who were observed re-building have remained in the reserve without Government basic and essential services. There were then more than ninety of people in the Reserve.
4. The Applicants never challenged the Respondent's ultimate right to terminate services. What they complain about is the process of the decision-making. They are essentially saying that, had the Respondent paused and listened to them, considered their viewpoint, they may well have reached a different decision. They are saying, provide the services while you consult us, as you should have done in the first place. The relief therefore is for temporary restoration, while

consultations take place, which consultations may result in either termination or non-termination, the Respondent having considered the position in full.

5. Some of the Applicants have found solutions, perhaps temporary, to securing services. Segootsane obtained a permit to bring in water and the Court observed vehicles parked at some of the settlements. It is reasonable to assume that with some of the relocated residents having access to compensation money, for the first time ever, for there is no record whatsoever of motor-vehicle ownership by any resident prior to the 2002 relocations, some of them purchased vehicles.
6. To order restoration of services is in effect to order specific performance against the Government, an order that is available generally and against the Government specifically, in limited circumstances.
7. Specific performance being an extra-ordinary remedy, it is only available where no other possible remedy will offer relief. In this case, there will be some people for whom an order for

damages would be sufficient while for others it would not be sufficient. The latter group would be people who have either never relocated or have since gone back to the Reserve.

8. For those Applicants, who, as a result of the passage of time, have made permanent homes in re-settlement villages and have no wish to go back to live in the Reserve, an order for damages would be appropriate. I note that no prayer was made for damages, but I hold the view that it is the passages of time that calls for ordering a 'further or alternative relief'. After all, Section 18 of the Constitution gives this court broad powers once it finds that the Constitution has been offended against.
9. For those Applicants who wish to remain in or if they relocated to return to the Reserve, an order for specific performance is indicated.

H.16. Decision: The Respondent is obliged to restore basic and essential services to those residents who are in the Reserve and those residents who are prepared to back to reside

in the Reserve and is obliged to pay damages to those residents who do not wish to go back. Such damages to be agreed or assessed by a Judge or a panel of Judges as the Chief Justice might direct.

H.17. The Issue: Whether the Government refusal to issue special game licenses to the Applicants is unlawful and unconstitutional:

H.18. Reasoning:

1. The powers of the Director of DWNP to issue SGLs was in terms of Sections 26 and 30 of the Wildlife Conservation and National Parks (The Act) and Section 45 (1) of the National Parks and Game Reserves Regulations of 2000 (The Wildlife Conservation Regulations) and Section 9 of the (Hunting and Licensing) Regulations (The Hunting Regulations) and the Director was obligated to exercise the powers granted to him reasonably, rationally and fairly.

2. In terms of the Act, and The Hunting Regulations, persons who were entitled to be issued with SGLs were persons who were 'principally dependent on hunting and gathering veld produce for their food.' (Section 30 (1)).

3. In terms of Regulations, persons who were resident within the CKGR at the time of its establishment or those who could

lay claim to hunting rights in the CKGR could be permitted to hunt therein.

4. Prior to the 2002 relocations, the Respondent had determined that the Applicants fell within one or more of the above categories and had issued them with SGLs. The licence purports to have been issued in terms of Section 30, thus bringing Segootsane, for example, within the category of persons 'principally dependent on hunting and gathering' for food.

5. The Director's decisions not to issue special game licences, as well as to render invalid those already issued, was not based on the need to conserve or to protect wildlife, but rather on the view by the then Director of DWNP that a special game licences was a service subject to withdrawal in terms of the Respondent's decision to withdraw services to the residents of the CKGR.

6. The Director should have been guided by the provisions of the Act and the Regulations, as opposed to what he heard over the radio, on how to exercise powers granted to him under the said Act and Regulations.

7. The Act and the Regulations contemplate a situation where the Director would evaluate, on a case-by-case basis, whether an individual or a household, fell within the category of persons described by the said Act and/or the Regulations and the

Director failed to do that.

8. The Director thus acted outside the powers granted to him by law or at the very least failed to act as the law directed him to act.
9. In any event, the DWNP had no power to withdraw already issued licenses; such an act would constitute a wrongful deprivation of a right to property without an opportunity to be heard.
10. An existing SLG conferred a right and the taking away of that right without an opportunity to be heard was unlawful.

H.19. Conclusion: The Respondent refusal to issue special game licenses to the Applicants unlawful and unconstitutional.

H.20. The Issue: Whether the Government refusal to allow the Appellants to enter the CKGR unless they are issued with a permit is unlawful and unconstitutional.

H.21. The Reasoning:

1. The Respondent position seems to be that only those who did not relocate and it says there are 17 of them, may remain in, and if they leave, re-enter the Reserve without permits and

that all others, are caught by Section 49 of the National Parks and Game Reserves Regulations, 2000 (The Regulations). This group would include every one who vacated the Reserve during the 2002 relocations, whether they 'registered' to relocate or not. For those who 'relocated' it appears that their right to return to the Reserve without a permit depends on whether they have been 'compensated'. This policy is contained in the 30th October 2002 Presidential Directive which states on this point, "All those people who have relocated and were compensated should not be allowed to resettle in the CKGR." The case of Kaingotla Kanyo, illustrates the Respondent's point. His wife Mongwegi Tlhobogelo, gave evidence and the portion relevant to this point is as follows. She relocated with her husband, he having registered to relocate. Both went to New Xade and after he had collected the compensation money in the amount P66, 325.00, received 5 head of cattle and land to settle in, they headed back to the Reserve, leaving the cattle behind in New Xade.

2. It appears from what she said that the reason she and her

husband went to New Xade was to get compensation money and the cattle. Asked in cross-examination why she did not go back to Molapo before they were given the cattle, she asked rhetorically: "How could we go back to Molapo before we received that which caused us to go to New Xade?" In answer to why they did not go back to Molapo before they were given the money and the cattle, she said: "We were waiting for the money or the said compensation before we reverted back to Molapo and we are still waiting for some more for the goods that we lost during the relocation." She also said that they kept the money and the cattle even though they returned to Molapo.

3. In June 2003, The Respondent issued summons against Kaingotla Kanyo, charging that he had entered the Reserve without the requisite permit the allegation being that such an act is contrary to Section 49 of the National Parks and Game Reserves Regulations.

4. Kaingotla Kanyo was one of at least eleven former residents of the Reserve who was charged with re-entry into the Reserve

without a permit.

5. The Respondent's policy though is far from clear. On the very same matter, the Respondent has advanced the position that; "There are however, a few who have returned to the game reserve with their new livestock…. Their decision to resettle in the game reserve has placed them in breach of the agreement that they voluntarily entered into with the Government to relocate outside the game reserve. However, in line with its declared policy of persuasion, the Government of Botswana has not done anything to force these people to leave the reserve."
6. The question becomes; is the Respondent policy to persuade or to prosecute? It can hardly be both.
7. Since it is Respondent's position that those who never relocated, and by this it is meant those who were not transported by the Respondent out of the Reserve during the 2002 relocations, can remain, exit and re-enter without permits, it must be the Respondent's position that it was their act of relocating, and perhaps coupled with the acceptance of

compensation, that extinguished their rights to re-enter without permits. It must then, also be the Respondent's case that, prior to the relocations, the Applicants had a right to live in the Reserve.

8. Whatever the Respondent says is the basis of the continuing right of those Applicants who did not relocate and the right, prior to relocation, of those who did, to reside in the Reserve, there are various problems with the proposition that relocations or relocations coupled with acceptance of compensations, extinguished the right of those who relocated to re-enter the Reserve without permits.

9. The first problem is that for the people who 'registered' to relocate, the extinction of their right to relocate must be said to have occurred when they accepted the terms of the relocation. What were those terms? When did the Respondent communicate those terms to the Applicants? Where these new terms, applicable only to the 2002 relocations and not to earlier relocations? After all, some people who had relocated before had returned to the Reserve and no demands for

permits were made on then.

10. The second problem is that the reality on the ground was that many people vacated the Reserve not because they had made a personal decision to leave, but because a family member, who could point at a hut as his or hers, had 'registered' and the hut had been taken down. With a wife, husband, parent etc, leaving, such 'dependent' family members had no option but to get into the truck. For the rights of these persons to return to the Reserve to be extinguished, it would have to be said that the leaving with a family member constituted an agreement that all rights to return would be extinguished.

11. If the Respondent's position is that it is actually the acceptance of compensation that extinguished all rights to return, the Respondent reasoning hits the same snags discussed above, and more.

12. There is no evidence to suggest that either party even contemplated that compensation would extinguish the right to return to the Reserve. This possible consequence was not

discussed and in fact in the past some persons who had relocated had returned to the park and there is no evidence that such returns were regulated by issuance of entry-permits, nor that anyone had ever been prosecuted for entry without a permit. It was only after the 2002 relocations and after the Respondent had set-up a Relocation Task Force, to enquire into "Why People Are Going Back to the Central Kgalagadi Game Reserve" that returns were visited with punishment. One of the recommendations of this Task Force was that the DWNP should be flexible in issuing entry permits for people going into the Reserve to visit relatives and ancestral places and in the case of those who did not exit on the given dates, "they should be followed and be removed" from the Reserve.

13. If it was compensation that extinguished the right to return without a permit and if relocation was an individual decision, and if compensation was paid to the individuals who relocated, then other members of that family could not possibly be bound by the decision of the individual to extinguish his/her right to return. Thus, on this reasoning,

Mongwegi Gaotlhobogwe, the wife of Kaingotla Kanyo can, without offending against the law, return to the Reserve to resettle, but her husband can only visit her if he is issued with a permit, which permit will have a specific date on which he is to exit. The Ghanzi District Council has made a recommendation that an entry permit should grant the permit-holder a seven-day stay. What of their children, it might be asked?

14. A similar question arises in relation to Roy Sesana and his family. He ordinarily lives outside the Reserve and had two wives and six children at Molapo. Before the relocations, there is no question of him requiring an entry permit to see his family. His wives, Sesotho Gaotlhobogwe and Mmamoraka Roy received compensation in the sums of P36,347.00 and P7,708, respectively. Did these payments extinguish Roy Sesana's right to enter the Reserve without a permit? It would appear that the Respondent's position is that it did as it did refuse Roy Sesana entry on at least one occasion during the 2002 relocations. What of his children's right to enter the Reserve

without a permit?

15. If compensation was intended to extinguish the right to return, and if the Respondent was relocating individuals and was not concerned whether such relocations could separate husband from wife, for example, then acceptance of compensation by one could well have meant a permanent spilt of families, a consequence the Respondent could not or should not, have wished at all.

16. The question of what rights might be retained by the residents of the Reserve even after relocation was raised but it appears no position was taken, by at least one official of the Respondent as far back as 1996, before the 1997 relocations. The then Director of DWNP expressed the view, at a meeting of the CKGR Resettlement Steering Committee that it would be necessary to consult with the residents about what rights they wished to retain and whether such rights would be enjoyed by both those who relocated and those who remained in the Reserve.

17. In any event, flowing from the holdings that the

Applicants were in lawful occupation of their settlements and that the entire relocation exercise was wrongful, unlawful and without the necessary consent, any rights that were lost as a result thereof were lost wrongfully and unlawfully. Any attempt to regulate the enjoyment of those rights by permits, when such permits were not, prior to the 2002 relocations, a feature of the enjoyment of such right is an unlawful curtailment of the right of movement of the Applicants. It is unlawful and constitutional.

18. There can not be any doubt that the Respondent, through the DWNP, was always entitled, as part of its management of the Reserve, to monitor and regulate traffic, especially vehicular traffic, into the Reserve. In the case of the Applicants, such monitoring and regulation might well include keeping records of identities and numbers of the residents, the incidence of entry and exit from the Reserve, the nature and impact on the Reserve of the transportation they used for such entry and exit. But such management cannot be used as a means of denying the Applicants to right to reside in the

Reserve.

H.22. Conclusion: The Respondent's refusal to allow the Appellants to enter the CKGR unless they are issued with a permit is unlawful and unconstitutional.

I. Directions on the Way-Forward

1. In conclusion, it seems to me that this case invites the concluding comments. This Court has been invited to resolve a dispute, which at first blush is about the termination of water and other named services to a few hundred people, who are demanding access to a specified piece of land and the right to hunt in that piece of land. While that is indeed correct, this dispute cannot be resolved, will not be resolved, unless the Respondent acknowledges and addresses its deeper context, its nub, and its heart.

2. This is a case that questions the meaning of 'development' and demands of the Respondent to take a closer look at its definition of that notion. One of colonialism's greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised. All the current talk about African renaissance is really a twisting and turning at the yokes of that ideology. Botswana has a unique opportunity to do

things differently.

3. The case is thus, ultimately about a people demanding dignity and respect. It is a people saying in essence, 'our way of life may be different but it worthy of respect. We may be changing and getting closer to your way of life, but give us a chance to decide what we want to carry with us into the future.' Did any one even think to record settlements on video and/or film, before they disappeared into the grassland? Did any one consider that perhaps a five-year old being relocated may one day wish to know where she/he came from? Or perhaps the Respondent lifestyle was seen as a symbol of poverty that was worth preserving.
4. The Respondent's failure has been in assuming that a cut and paste process, where what has worked in someplace else, and even then taking short cuts at times, would work with the Applicants. When the case started, Mr. Pilane was full of talk about how the services belonged to the Respondent and how the Respondent had a right to do what it wished with them. This prompted some Applicants to say that in that case, the Government could take the services and leave them in their land. That, in my view, is a very unfortunate view of the role of governments. Governments exist for one reason only; to manage the people's resources for the people's benefit, period. They do this guided by policies and laws and they put in place structures and agencies that make this possible. In doing so, they very often have to make very difficult decisions about resource allocations. But the resources do not belong to governments to do what they wish with them. They belong to the people.
5. The world over, non-governmental organisations are increasingly being recognised as legitimate and important actors in civil society. The Applicants have identified Ditshwanelo, FPK and the Negotiating Team as their representatives. The Respondent should see this as offering an opportunity for the promotion of true consultation between the parties, as opposed to a meddling by third parties.
6. Roy Sesana, too, if he genuinely seeks the resolution of this dispute might want to decide whether he is still with the rest

of the Applicants, especially those who have given evidence or he is now dancing to a completely different tune. His actions; particularly his failure to give evidence, his consistent defiance of his own Counsel on what he can or can not say to the media and his blatant misrepresentation to the media of what his case is, suggests that he cares little about what this Court decides. That is unfortunate.

J. It is my conclusion that the Applicants have proved their case on all points and I would make the following Order:

1. The Applicants had a right to have communicated to them a clear and unambiguous policy on their continued residence within the CKGR and further, they had a right to be consulted on any variation of the policy that had the foreseeable consequence of adversely affecting their enjoyment of such residence.
2. The termination with effect from late February or early March 2002, by the Government of the provision of basic and essential services to the Applicants in the CKGR was unlawful and unconstitutional.
3. Pending the formulation of a clear policy on residence within the CKGR, and the giving the Applicants an

opportunity to consider and give their views on such a policy, the Government is obliged to restore the provision of basic and essential services to the Applicants in the settlements of Gugamma, Kikao, Metsiamanong, Mothomelo, Molapo and Gope, in the CKGR.

4. The Government is obliged to pay damages to those of the Applicants who have, due to the passage of time, made homes outside the CKGR and have now decided to settle at those homes instead of returning to the CKGR and the amount of such damages is to be determined by agreement, failing which, either party may set the matter down before any judge, or a panel of judges as the Chief Justice might direct, for assessment.
5. The consequence of the relocations of February to March 2002 was to deprive the Applicants of possession of their land forcibly, wrongly and without their consent.
6. The Government's refusal to issue special game licenses to the Applicants is unlawful and unconstitutional.
7. Government's refusal to allow the Applicants to re-enter

the CKGR unless they are issued with a permit is unlawful and unconstitutional.

8. Costs to the Applicants and against the Respondent.

Delivered in open court at Lobatse this 13th day of December 2006

.....

U. DOW
[JUDGE]

PHUMAPHI J:

1. I have read the judgments of my Brother Dibotelo J. and my Sister Dow J. and I agree with the background of the case, as laid down in their judgments. I also agree with their summaries of the inspections-in-loco conducted by this Court in the CKGR.

2. This case was referred for trial before this Court, by the Court of Appeal. The relevant part of the Order of the Court of Appeal is as follows:

> "BY CONSENT IT IS ORDERED AS FOLLOWS:
>
> 1. The matter is referred to the High Court for the hearing of oral evidence by the Appellants' witnesses at Ghanzi and the Respondent's witnesses at Lobatse on a date to be determined by the Registrar as a matter of urgency in consultation with the parties' legal representatives on the following issues:
>
> (a) Whether the termination with effect from 31st January, 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and unconstitutional.
>
> (b) Whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve.
>
> (c) Whether subsequent to 31st January, 2002 the Appellants were:
>
> (i) in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve;

(ii) deprived of such possession by the Government forcibly or wrongly and without their consent.

(d) Whether the Government's refusal to:

(i) issue special game licences to the Appellants; and

(ii) allow the Appellants to enter the Central Kalahari Game Reserve unless they are issued with a permit.

is unlawful and unconstitutional.

A. Whether the termination with effect from 31st January, 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and unconstitutional?

3. In order to answer the above question, this Court has to look at the pleadings as well as the evidence tendered during the hearing. Since the matter started as an application, the Applicants' pleadings are largely contained in the founding affidavit, and the supplementary thereto deposed to by Roy Sesana, as well as the annexures thereto.

4. When dealing with the Respondent's decision to terminate services, Roy Sesana had the following to say inter alia:

"68. During approximately May 2001, an international non-governmental organisation, Survival International, which lobbies for the rights of indigenous persons, launched a campaign designed to embarrass the Government about its treatment of the residents (including the Applicants) in CKGR.

69.(a) During the forced removals of 1997 (paragraph 40) and following the meetings of the Negotiating Team with the then Minister of Local Government, Lands & Housing, Minister Kwelagobe (paragraph 45), the Government on various occasions had threatened to terminate basic services to the residents remaining in the CKGR.

(b) ...

(c) At around the first week of April 2001, it was reported in the press that the Ghanzi District councillors had resolved to cut off all the services in the CKGR. The Minister of Local Government & Lands, Ms Margaret Nasha, publicly refuted this threat in an article in the newspaper, Mmegi (20-26 April 2001), when she categorically stated that it was not the policy of the Government to terminate those services. I annex hereto a copy of this report marked annexure "RS11".

70.(a) The threats by the Government to terminate

services however resumed following the intensification of the campaign by Survival International which included a sit-in of the Botswana High Commission in London and a call for a tourist boycott of Botswana.

The Assistant Minister of Local Government, Minister Kokorwe, repeated the threats to cut services. The threat was reported in an article in the Daily News of 13 August 2001. I annex as annexure "RS 12", a copy of this article.

The Government is reported to have claimed that the decision to terminate the provision of services had been taken because of the cost of providing services. It claimed that it cost Pula 55,000 per month to provide services to the Applicants. It also claimed that there are 559 persons resident in the CKGR. On the Government's own statistics, which I do not accept as necessarily accurate, it thus spends less than 100 Pula per person per month on services in CKGR.

71.(a) The Acting Head of Delegation of the European Union immediately addressed the Permanent Secretary in the Ministry of Local Government on 16 August 2001 following the report in the Daily News of 13 August 2001, annex a copy of this letter as "RS 13". He refers to previous assurances made on behalf of the Respondent that services to the residents in the CKGR would not be cut off and that these assurances had formed the basis for the approval of European Union funding in an amount of Pula 70 million for a further 5 years for the implementation of community based natural resource management programmes by communities inside the CKGR.

(b) As Assistant Minister Kokorwe had claimed that the Government could not afford to provide basic services to the residents of the CKGR, the European Union in its letter of 16 August offered to examine "ways…to finance part or all of these costs…".

At the opening of Parliament in October 2001, the President of the Republic confirmed the decision of the Government to terminate the services to the residents of the CKGR with effect from 31 January 2001.

73.(a) The Negotiating Team as a matter of urgency sought meetings with the Government in an endeavour to persuade it either to reverse or postpone its decision to do so. On 30 November 2001 it met with the Vice President, Lt. Gen. Ian Khama, and on 13 December 2001 with the Minister of Local Government & Lands, Minister Margaret Nasha. I was present at both meetings.

74. (a) …

(b) It was confirmed to the Negotiating Team at these meetings that notwithstanding its negotiations with DWNP, the campaign by Survival International had hardened attitudes in Government.

75. The Vice President informed the Negotiating Team that the decision to cut all services to the residents had been taken and could only be reversed by Cabinet. He undertook to facilitate an urgent meeting with the Minister of Local Government & Lands before the Cabinet's last meeting of 2001.

76. Minister Nasha agreed to meet the Negotiating Team before the last meeting of Cabinet for the year so that she could put the request referred to in paragraph 73 above to that Cabinet meeting. However the meeting only took place after the final Cabinet meeting for the

year had been held. I again attended.

77. ...

78. DITSHWANELO as member of and on behalf of the Negotiating Team addressed a follow up letter to the Minister on the same date that the meeting had been held. The Minister responded to that letter in writing on 7 January 2002, wherein she confirmed her advices (sic) to the meeting of 13 December 2001. I annex hereto at annexure "RS 14" a copy of the letter from Minister Nasha to DITSHWANELO."

RS 14, Exhibit P32 reads as follows:

"CLG.14/8XIV (145)

7 January 2002

Ms Alice Mogwe
Director
Ditshwanelo
Private Bag 00416
GABORONE

Dear Ms Mogwe

Withdrawal of Services to the CKGR

I refer to our discussions on the above matter at our meeting of 13th December 2001. Reference is also made to your follow-up letter of the same date, copied to the H.R. the President as well as His Honour the Vice President.

I write to confirm that I have consulted accordingly, regarding your request for extension of the deadline for termination of services to the CKGR to a date after consideration of the Third Draft Management Plan by Government.

I am to inform you that the decision to terminate services to the CKGR will not be reversed.

We would like you to appreciate two very important points in this whole issue of termination of services to the few remaining residents in the Central Kalahari Game Reserve:

a) the issue of relocation of the CKGR residents to either Kaudwane or Kgo'esakeni is neither new nor "sudden". Discussions have gone on for more than 12 years now. The majority of the CKGR residents have now relocated, and it no longer makes sense to continue taking services to the few who are still refusing to relocate.

b) There is no linkage between the need for the remaining residents to relocate, and the Third Draft Management Plan for CKGR…

Yours sincerely

…….(signed)……
Margaret Nasha
Minister of Local Government"

5. The picture that emerges from what has just been quoted above is the following:

The Applicants through Roy Sesana have made a number of allegations in relation to the termination of services, the effect

of which is that:

(i) the Government of Botswana threatened to terminate services to the CKGR in response to a campaign launched by Survival International "to embarrass the Government about its treatment of the residents of the CKGR."

(ii) When Ghanzi District Council took a resolution in April 2001 to terminate the services to the CKGR Minister Nasha stated that, it was not Government policy to terminate the services in the CKGR, but the decision to terminate the services was subsequently confirmed by Assistant Minister Kokorwe in August 2001 when she gave the residents of the CKGR, who included the Applicants, notice that services would be terminated on 31 January 2002. The decision to terminate the services was further confirmed by the President of the Republic of Botswana when he opened Parliament in October 2001.

(iii) The Government's attitude on the question of the termination of services had been hardened as a result of the negative campaign launched by Survival International.

6. All the witnesses of fact who were called to give evidence in support of the Applicants' case with the exception of

Amogelang Segootsane, told the Court that when the Respondent intimated its intention to terminate the services, they told the Respondent to go ahead and do so. All they wanted was to be left undisturbed on their land. Roy Sesana, the deponent to the founding affidavit and the supplementary thereto, elected to remain silent, the monumental allegations he made in his affidavits notwithstanding.

7. The Respondent on the other hand called evidence, the import of which was that lengthy consultations had transpired between the parties for some 16 years prior to the 2002 relocations, and it was made abundantly clear to the Applicants during those consultations, that the services were temporary.

8. It was further explained on behalf of the Respondent that, continuing with the services in the Central Kalahari Game Reserve (CKGR) was unsustainable on account of costs. The evidence given on behalf of the Respondent was partly viva voce and partly admissions made by the Applicants. Herebelow

is some of the admitted evidence. Walter Mathuukwane's admitted evidence (Bundle 3B(1) page 716-717) reads as follows:

> "5. …The witness will confirm that various other meetings were held with residents of the CKGR for the purpose of encouraging residents to relocate outside the Game Reserve in line with the Government Policy, and advising them that the provision of services was not sustainable and could not be permanent measure.
>
> 6. The residents were fully apprised of the reasons which informed Government Policy to relocate them and such residents were given adequate opportunity and time to ventilate their views in respect of the envisaged relocation. They were advised that it would be in their best interest to move from the CKGR to a place where basic facilities like water and health post would be more accessible. They were further advised that the Government would eventually terminate the services. It was also emphasized to them that Government had a responsibility to develop them like other Batswana, and that they had no less a right to enjoy the benefits of economic development as other Batswana.
>
> 7. …
>
> 8. Following series of consultations, some residents voluntarily relocated while others remained in the CKGR. The 1st relocations started in 1996. The consultations and effort

to persuade continued in regard to those who refused to move out of the CKGR." (underlining mine)

9. Gasehete Leatswe's admitted evidence (Bundle 3B(1) pages 718-719) reads in part as follows:

> "2. From 1999 to 2001, she was the Gantsi District Council Chairperson and was, in that capacity, involved in consultations in respect of relocations which included advising residents that the provision of services within the Central Kalahari Game Reserve would eventually be stopped as it was unsustainable. Her involvement included frequent visits to and addressing residents of settlements within and outside the reserve.
>
> 3. Consulting residents on the above matters was the main purpose of the visits into the Reserve. She had been involved with the consultations both before she became and after she ceased to be Council Chairman.
>
> While some residents were opposed to relocating, most were keen on doing so as they come to realize that life in the Reserve had no future. She interacted with many residents at a personal level." (underlining mine)

10. The aforegoing admitted evidence was also confirmed by Exhibit P93, Bundle 2B pages 83-91, which is "Ghanzi District Council Relocation Task Force Inquiry Report on Why People are

Going Back to Central Kalahari Game Reserve" which was introduced by the Applicants. At page 87 Bundle 2B the report reads in part:

"FINDINGS

> From the data analysis, it was clear that some people never relocated and are still not prepared to relocate. They stated the following reasons for their resistance.
>
> - They confirmed that intensive consultation was done through all possible modes, but they did not and still do not understand why wild animals' protection should prevail over human beings." (underlining mine)

11. It must be said from the onset that, once this matter was referred to trial, all the statements contained in Roy Sesana's affidavits became mere allegations which the Applicants had to prove by evidence as the domini litis, except where the Respondent admitted them as true. The same goes for all the statements contained in the affidavits sworn on behalf of the Respondent. It was also common ground between both Counsel, that the contents of the affidavits filed by either party were not evidence but allegations that had to be proved.

12. It behoves every litigant who makes assertions or allegations about any issue to lead evidence to prove the issue unless it is admitted by the other side. This accords with the cardinal principle that he who alleges must prove.

Vide: Pillay v Krishna and Another 1946(2) SA 946 (AD) at 952 where Davis A.J.A said:

> "But there is a third rule, which Voet states in the next section as follows: "He who asserts, proves and not he who denies..." This rule is likewise to be found in a number of places in the Corpus Juris: I again give only one version: "Ei incumbit probatio qui dicit, non qui negat" (D. 22.3.2). The onus is on the person who alleges something and not on his opponent who merely denies it."

Vide also Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965(II) SA 706 (Ad) at 711 where Potgieter A.J.A. said:

> "In other words he who seeks a remedy must prove the grounds therefor. There is, however, also another rule…That is to say the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove."

13. It follows from the above authorities which are highly persuasive, but not binding on this Court, that allegations made by Roy Sesana in his affidavits shall remain unproven unless

they are covered by the other witnesses who gave evidence or they were admitted by the Respondent.

14. At the close of the Applicants' case, the following exchange took place between the Court and learned Counsel for the Applicants:

"Phumaphi J: Before you close your case Mr Bennet, I have a few questions to ask you which I feel they (sic) are very important. I just want to be sure that you are closing your case at this stage without calling Roy Sesana who sworn (sic) to founding affidavit and you are not calling Jumanda who also sworn (sic) to a number of affidavits which are part of the record?

Bennet: Yes.

Phumaphi J: And you are not calling Alice Mogwe who was actually involved in some respects in the relocation?

Bennet: We are not.

Phumaphi J: You have no other, you are not calling any other witnesses, there are no other witnesses that you consider important?

Bennet: My lord there were a very large number of witnesses which we could call we had to

> make, I hope practical decision, and we have called those witnesses whom we believe ought to call and could call in the time available and only subject to constraint that are imposed upon us."

15. It came as a surprise to this Court that, Roy Sesana who deposed to the founding affidavit and the supplementary thereto, was not called as a witness, yet his averments in those affidavits form the very pith and core of the Applicants' claim. However, as the case progressed, it became apparent that learned Counsel for the Applicants hoped that Respondent would call evidence that would prove his clients' case. See the following submissions (Applicants' submissions page 113):

> "352. One might therefore have expected the Government to put forward a cogent explanation for such a remarkable change of heart. This, it might be thought, would be rather an effective way to refute the allegation that Applicants had been forced out of the Reserve against their will. There were several means by which this could have been done.
>
> 353. The Government could, for example, have put two or three former residents into the witness box to tell the Court why they chose to leave. Their evidence could have been enormously helpful to the Court, and might have dealt a

body blow to the Applicants.

354. But the Government was either not able or not willing to put forward even a single relocatee. The Court may want to ask itself: Why not?

355. Or the Government could have cross-examined our witnesses of fact as to the reason or reasons for which, according to the Government, residents had volunteered to relocate. The Court could then have appraised the witnesses' reactions. The Government's counsel did not do this either.

356. Equally curious was the inability of any of the five Government witnesses who participated in the Relocation to offer even the slimmest clue as why the Applicants had chosen to leave."

16. The suggestion that Respondent should lead evidence to rebut allegations that Applicants were forced out of the reserve, is at odds with the principle that, the Applicants as the domini litis must establish a prima facie case before the evidential burden can shift to the Respondent to lead evidence in rebuttal.
Vide: Pillay v. Krishna and Another 1946(II) SA (AD)

946 at 953 where Davis A.J.A. said:

"But I must make three further observations. The

> first is that, in my opinion, the only correct use of the word "onus" is that which I believe to be its true and original sense (cf. D.31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent.
>
> …Any confusion that there may be has arisen, as I think, because the word onus has often been used in one and the same judgment in different senses, as meaning (1) the full onus which lies initially on one of the parties to prove his case, (2) the quite different full onus which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any prima facie case so far made by opponent: this duty alone, unlike a true onus, shifts or is transferred. (Underlining mine)

17. The Respondent was only under an obligation to lead evidence in rebuttal after Applicants had made out a prima facie case, which is more than mere allegations contained in the pleadings.

18. Counsel for the Applicants contended that the termination of services was both unlawful and unconstitutional on two grounds viz: see page 246 paras 718.1 and 718.2 which read:

> "718.1 that the Applicants enjoyed a legitimate expectation that they would be consulted

before their services were terminated, but they were not consulted.

718.2 that the termination was in breach of the National Parks and Game Reserve Regulations 2000 ("the 2000 Regulations")

19. Dealing with legitimate expectation, it is contended that it was

Applicants' legitimate expectation that:

(a) Government would not terminate the services until it had considered the merits of proposals made in the Third Draft Management Plan for the future development of the CKGR.

(b) Government would not terminate the services until it held genuine consultations with the Applicants.

(c) In the event Government decided to terminate it would give Applicants adequate notice.

20. In considering the three aspects of legitimate expectation raised by the Applicants, one has to investigate how the expectations could have arisen. The genesis of the situation under discussion is to be found in Circular No. 1 of 1986, which was produced as Exhibit P22, vide Bundle 1A at pages 79-80.

The Circular reads in part as follows:

"MINISTRY OF COMMERCE AND INDUSTRY
CIRCULAR NO. 1 OF 1986

REPORT OF THE CENTRAL KALAHARI GAME RESERVE FACT FINDING MISSION

1. In February, 1985 the Minister of Commerce and Industry addressed a joint meeting of Ghanzi Land Board and Ghanzi District Council to obtain the views of these local authorities on the future of the Central Kgalagadi Game Reserve. It became clear from the discussions between the Minister and Ghanzi District Council and Land Board members that a detailed examination of the potential conflicting issues concerning the Reserve was urgently needed.

2. Government therefore appointed the CKGR Fact Finding Mission with specific terms of reference to study the potential conflicts and those situations that were likely to adversely affect the Reserve and the inhabitants of the area. Government has completed a review of the Mission's Report, a copy of which is attached.

3. GENERAL DECISIONS

After considering the report Government has made the following general decisions: -

…

3.1 that viable sites for economic and social development should be identified outside the Reserve and the residents of the Reserve encouraged - but not forced – to relocate at those sites; and…

6. REJECTED RECOMMENDATIONS

Recommendations rejected by Government because they are unacceptable, not applicable or inappropriate are listed below:

6.4 As an interim measure only, water continue to be transported to the settlements currently receiving water deliveries (Recommendation 6)." (underlining mine)

21. It is quite clear from the Circular that, the Respondent thought that it was not a good idea to have both wildlife and people living in the CKGR. The Respondent therefore, took a conscious decision to have people relocated outside the reserve. In order to achieve its objective, Respondent mounted a campaign to persuade people to relocate outside the CKGR. The emphasis of the campaign was to "persuade but do not force".

22. The Circular also makes it very clear that, water was not to be supplied to the CKGR as an interim measure while the "persuasion" campaign was on and serviced settlements outside the reserve were being established. Presumably, Government realised the conflict that would arise, if it sought to

persuade people to relocate to serviced settlements outside the reserve, while at the same time, it provided the same services within the reserve. However, the Government must also have realised, the hardship that would be occasioned to the residents, if services were to be abruptly terminated, before they were available at the contemplated settlements outside reserve. That explains why the Ghanzi District Council, which is an arm of the Respondent, continued to supply water and other services to the residents in the CKGR, in the face of a clear decision by Respondent not to supply water as an interim measure, pending the establishment of serviced settlements outside the reserve.

23. The Circular contemplated that as part of the "persuasion strategy", that the Ministry of Local Government (which is the ministry under which Ghanzi District Council falls), would make incentives available in settlements outside the CKGR, so as to lure the residents to relocate to those settlements. The supply of services to the CKGR as an interim measure, therefore,

created contradiction with the "persuasion strategy", as envisaged at the time the Circular was issued. The contradiction was later further exacerbated by several public announcements by agents of the Respondent, to the effect that the services would not be stopped for as long as there were people in the reserve.

24. Legitimate expectation can arise in one or other of the following two situations.

(a) Where a promise has been made on behalf of a public authority that a benefit will be granted or allowed to continue.

(b) Where there exists a practice which a claimant can reasonably expect to continue.

Vide: Mothusi v Attorney General 1994 BLR 246 (C.A) at 260-261 where Amissah P said:

> "The concept of legitimate expectation has developed in administrative procedures to protect those who have been led either by contract or practice to expect a certain course of action in cases where the expected course of action has been altered without giving

them a right to make representations. Starting from a procedural concept by which the requirement of natural justice could be brought into operation, it has been held in some cases outside this jurisdiction not merely to cover the procedural concept, but to require the fulfillment of a promise made by authority. That is, if the authority has made a promise as to the manner of the exercise of a discretion, the authority ought to be held to that promise.

...Lord Fraser in Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 All E.R. 935 at p. 949 f-j:

> "To qualify as a subject for judicial review the decision must have consequences which affect some person...It must affect such other person either (a) by altering rights of obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (Underlining mine)

25. Turning now to the instant case, the first question is, whether

there was a practice on the basis of which a legitimate expectation may have arisen that the services would not be terminated? The practice of providing services to the CKGR was in place for quite some time but from the admitted evidence, it was always accompanied by the explanation that they would be terminated at some point. See the admitted evidence of Mathuukwane and Leatswe supra.

26. The second question is whether there was a promise by the Respondent that the provision of services to the CKGR would continue indefinitely? There were several promises that were made by the agents of the Respondent that, services in the CKGR would not be terminated. The following exhibits contain examples of such promises:

> Exhibit P23 Bundle 1A p.81
> "Extracts from notes of a Briefing Session by the Minister of Local Government, Lands & housing and the Minister of Commerce and Industry on the issue of the Basarwa of Xade, held on 4 June 1996
>
> 1) MLGLH: The GoB has never had the intention to force the people living in CKGR settlements to move outside the reserve.

2) MLGLH:

Services presently provided to the settlements will not be discontinued.

3) MCI:

Possibilities could be found as means for the economic development of the people who would prefer to stay in the reserve such as tourism guides, drivers, camp attendants, handicraft makers, trackers, game farmers, etc.

> Extract from reply to European Parliament Question 1645/96
>
> The Ambassadors of Sweden and the United States together with the British High Commissioner, the Norwegian Charge d'Affaires and an official of the Delegation of the European Commission in Gaborone visited the area on 22-23 May [1996] and were assured by the Government representatives that not only no forcible resettlement will be carried out but social services to people who wish to stay in the reserve will not be discontinued and economic development related to wildlife or tourism activities will also be encouraged. The same terms were also confirmed by the Minister of Commerce and Industry and the Minister of Local Government, Lands and Housing at a briefing for all the diplomats accredited to Botswana held on 30 May 1996."

27. Exhibit D64 in Bundle 3B(1) page 693(g) at 693(h) (letter from the Council Secretary and District Commissioner, Ghanzi to the Guardian dated 16th September 1997) states in part as follows:

> "…Having shed light on this issue therefore it can be seen that this council is fully committed to abide by the gov't's position that services will continue being provided for as long as there shall be a human soul in the CKGR. So there is no violation of any human rights nor reneging of any promises by gov't.

> Anything to the contrary would be pure propaganda."

28. Counsel for the Applicants contended that, once Respondent made promises in its public pronouncements that, it would not terminate the services in the CKGR, while there were still some people living there, the residents were entitled to expect that, if Respondent contemplated to change that policy, it would allow them an opportunity to make representations before a decision was finally made to terminate.

29. He also contends that the residents had a legitimate expectation that they would be given adequate notice so that they could make alternative arrangements.

30. There is no doubt that these public statements would, if they reached the Applicants, give rise to a legitimate expectation that, the services would not be terminated and that, if a decision was taken to terminate, the residents would expect to be given an opportunity to be heard.

31. It appears that these assurances were made to the diplomatic community, and some were briefing notes for an answer to a question asked in the European Parliament. There is no evidence that the assurances reached the Applicants. However, the Mmegi report tendered as Exhibit P29 (Bundle 1A page 98) may have reached some of the residents of the CKGR. Whether someone's expectation has been raised, is a question of fact, which must be proved by evidence. Although lengthy submissions have been made on the subject of legitimate expectation, not a single one of the Applicants has come forward to tell this Court that they were aware of the promises made by the Respondent, and what expectations were raised as far as they were concerned. The Court has been left to reason by inference in circumstances where evidence should have been clearly forthcoming. There is nothing the doctrine of legitimate expectation can protect, if the claimant was not aware of the practice or promise.

Vide: Prof. Forsyth Vol 3 University of Botswana Law Journal published June 2006 at page 13:

"Self evidently, if a person does not expect

anything, there is nothing that the doctrine of legitimate expectation can protect. It is therefore simply wrong to find that there is an expectation to protect when as a matter of fact there is no expectation because the person affected did not know of the practice or the promise." (Underlining mine)

At page 14 the learned author says:

"Whether an expectation exists, is self-evidently, a question of fact. If a person did not expect anything, then there is nothing that the doctrine of legitimate expectation can protect. So, a person unaware of an undertaking made by a public authority, cannot expect compliance with that undertaking." (underlining mine)

32. In August 2001 Assistant Minister Kokorwe went to the various settlements in the CKGR, and announced to the residents therein that the provision of services would be terminated by the 31st January 2002. The announcement was consonant with the various communications previously made to the residents of the CKGR by members of the Ghanzi District Council, a typical example of which is the admitted evidence of Mathuukwane, Leatswe recited supra and Motsoko Ramahoko

(PW4) Vol 2 pages 693-694. By the time Minister Kokorwe made the announcement about termination of services, the Respondent who previously had been blowing hot and cold about the termination of services, had become resolute and from thenceforth tenaciously maintained the position that the services would be terminated by the 31st January 2002.

33. It is evident from both exhibits P23 and P31 that those pronouncements were made as far back as 1996 prior to the first relocations, while Exhibit D64 was made in 1997. There were no similar pronouncements made by agents of the Respondent subsequent thereto, although the discussions of the management plans, which culminated in the Third Draft Management Plan contemplated a continued presence of people in the CKGR, took place till 2001.

34. To resolve the issue of legitimate expectation, this Court has to answer the following questions:

(a) Did the fact that the Respondent participated in the discussions that culminated in the Third Draft Management Plan give rise to legitimate expectation on the part of the Applicants, that Respondent would not take any decision that could be inconsistent with what was contemplated by the Plan?

(b) Did the Respondent consult the Applicants about its contemplated termination of services to afford them an opportunity to make representations against termination?

(c) Did the Respondent give the Applicants adequate notice of intended termination, to enable them to make alternative arrangements if they were so inclined?

35. From the available evidence, the Respondent embarked on a persuasion campaign, following the issue of Circular No. 1 of 1986 for some ten years before the relocations started. By 1995 the campaign was beginning to show signs of bearing fruit, as evidenced by Exhibit D72 Bundle 3C page 197-199, which was a letter from some of the residents of Old Xade, who wrote requesting to be relocated. At same time there were

concerns from some quarters which included the European Union that, the residents of the CKGR might be coerced to relocate, and that the Respondent might be contemplating termination of services to the CKGR. The Respondent gave assurances to those who voiced the concerns, that there would neither be coercion of the residents to relocate nor termination of services to the CKGR. The assurances were made, presumably to allay those concerns.

36. These assurances were followed by the relocations which commenced in 1997 and continued until 1999 (Vide: Molale's admitted evidence – Bundle 1A pages 144-149). At the end of those relocations there were still some residents who were unwilling to relocate. The Respondent continued with its campaign to persuade and at the same time informed the residents that the services would be terminated at some stage.

37. By April 2001 the Ghanzi District Council resolved to terminate the services. It would appear the resolution was published in

the media before the Minister of Local Government was briefed about it, as she was reported to have said she had not yet seen it.

38. The evidence also indicates that, in terms of the Wildlife Conservation and National Parks Act, the Third Draft Management Plan would only become final, once it was approved by the Director of Wildlife. It is further indicated that, the practice was that before the Director could approve a plan, it would be presented to Cabinet for consideration. This clearly means that, there was always a possibility that the plan might never see the light of day, if the Director and/or Cabinet did not agree with it.

39. No doubt the Applicants hoped the plan would receive approval, but their hope cannot, in my view, be elevated to legitimate expectation, as the authority vested with the power to give the final approval, had neither made a promise to the Applicants nor engaged in a practice that would have given rise to

legitimate expectation on their part.

Vide Mothusi v Attorney General above.

40. As stated earlier, the residents were kept informed during the persuasion campaign that followed the 1997 relocations, that the services would be terminated in due course.

41. If the residents were minded to make representations, they had a period of about three years starting from 1999 to 2002 to do so. They cannot be heard to say they had legitimate expectation which arose as a result of promises made in 1996/97 when, according to the admitted evidence, they were frequently reminded that the services were temporary. In the result I find that the Applicants were consulted about the fact that the services were temporary and were afforded the opportunity to make representations if they so desired, before a decision to terminate. They, therefore, cannot be availed by the doctrine of legitimate expectation in the circumstances.

42. The next question is whether the Applicants were given

adequate notice of the termination of services, to afford them an opportunity to make alternative arrangements for the provision of services. The Applicants were given about five and a half months before the services were terminated. There has been no evidence from them to suggest that the period was too short, and I have no reason to think it was.

43. The submissions by learned Counsel for the Applicants were predicated on the premise that, the Applicants were not consulted about the contemplated termination of services. With the greatest respect to learned Counsel for the Applicants, that was totally misconceived in view of the evidence he admitted on behalf of his clients. Vide the evidence of Mathuukwane, Leatswe and Exhibit P93 (Ghanzi District Council Relocation Task Force Inquiry Report on Why People are Going Back to Central Kalahari Game Reserve) quoted supra. I therefore conclude that the Applicants were given adequate notice.

44. Counsel for the Applicants also contended that termination of services was in violation of Regulation 3(6) of the National Parks and Game Reserve Regulations, 2000 – the Regulation provides that, where there is no approved management plan, the development and management of the park/game reserve shall be guided by the draft management plan. Counsel says the termination of services should have been informed by the Third Draft Management Plan.

45. On the other hand learned Counsel for the Respondent says the draft is a mere guide which can be deviated from by the Respondent.

46. The question that comes to one's mind is, whether in a situation where there are several drafts of the management plan, like in the instant case, should each one of them provide a guide before it is superseded by a subsequent one? If the answer is "yes", I can envisage a situation where a subsequent draft might be in conflict with an earlier one, and if action had

been taken in accordance with the earlier draft, to comply with the subsequent draft might entail a complete reversal of an earlier action which might be quite awkward.

47. It seems to me that, it would be reasonable to expect guidance to be found in the final draft. The Third Draft Management Plan was not the final draft, and therefore, the violation thereof is neither here nor there in my view. Besides, Applicants' Counsel seems to imply that the provision was binding on the Respondent. If that is what he means, that argument is untenable because a provision which is meant to provide a guide, cannot, by any mode of interpretation, be peremptory. The argument does not advance the Applicants' case at all. I find that there has been no violation if Regulation 3(6) of the 2000 Regulations.

48. I conclude that the Applicants have neither established a case of legitimate expectation based on the promise nor on practice, they therefore fail on this account.

49. I hold that the termination of services was not unlawful and unconstitutional.

B. Whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve.

50. It is submitted on behalf of the Applicants at paragraph 829 of their submissions that before Respondent terminated the services, it would:

> "829. We have submitted that those expectations were that before any decision was made to terminate services the Government would:
>
> 829.1 consider on its merits a draft management plan which contained the same or substantially the same proposals for CUZs for communities resident in the CKGR as were contained in the TDMP; and/or
>
> 829.2 consult the communities in the CKGR as to whether and if so how they could remain in the Reserve if their services were withdrawn; and in either case
>
> **829.3** wait for a reasonable period after the announcement of any decision to terminate services before putting the decision into effect, so as to allow the residents an opportunity to make

alternative arrangement."

51. It is proposed to deal with these submissions very briefly because submissions on legitimate expectations have already been treated at length, in answer to the previous question.

52. As previously stated, not a single one of the Applicants has told the Court what his or her expectation was, which he or she wishes the Court to protect.

53. The Applicants had legal onus to bring themselves within the purview of the doctrine of legitimate expectation, by leading evidence that would justify a finding that they were entitled to the protection of their legitimate expectation. It is not enough, for the Applicants to merely make allegations, not to lead evidence to prove them and then expect the Court to resort to circumstantial evidence, when they could have tendered direct evidence. Even where the court has to reach a conclusion based on circumstantial evidence, there has to be evidence to prove the facts from which the court is able to draw an

inference on which it bases its conclusion. The Court usually reasons by inference where direct evidence is not available but not where it deliberately withheld.

54. I have already found in answer to the previous question that the Applicants cannot be availed by the doctrine of legitimate expectation, and there are no new factors which entitle me to find differently in answer to this question I am dealing with.

55. It seems to me that, if this Court were to decide that the services should be restored, in the face of admitted evidence to the effect that provision of services in the reserve is unsustainable on account of costs, the import of the Court's decision would be to direct the Respondent to re-prioritise the allocation of national resources. In my view, the Court should be loathe to enter the arena of allocation of national resources unless, it can be shown that the Respondent has, in the course of its business transgressed against the Supreme Law of the land or some other law.

56. I am fortified in this view by Professor C Forsyth in the aforequoted article at page 10 paras 1 and 2. The learned author had this to say:

> "Although substantive protection has been recognised several times in the decided cases in England, it sits awkwardly with the need not to fetter the exercise of discretion and, moreover, decision-makers must not, by the substantive protection of expectations, be prevented from changing their policies.
>
> Substantive protection cases must be exceptional or else the courts will be sucked into the merits of decisions everyday and also into decisions about the allocation of resources. Harsh though it may seem, it cannot be right for the court to be involved in the allocation…of resources. It may be of significance that substantive protection usually takes place where there are only a small number of persons involved. Substantive protection has not yet been adopted in Botswana. I submit that it should not be excluded if an appropriate case arises; but that the courts should proceed with caution." (underlining mine)

57. In the circumstances I hold that the Government is not obliged to restore basic and essential services to Applicants in the CKGR.

C.(i) Whether subsequent to 31st January 2002 the Appellants were in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve.

58. Learned Counsel for Applicants, has declined to deal with that part of the question that seeks to establish whether the Applicants were in lawful occupation of the land in the CKGR. He explains that the lawfulness or otherwise of the occupation is irrelevant for establishing that the Applicants were despoiled of the land they possessed, the important factor being whether they were in possession, which fact he says has already been admitted by the Respondent and therefore, there is no need for him to address himself to lawful occupation.

59. Learned Counsel for Respondent, on the contrary argues that the Court of Appeal in its wisdom, saw the need to address the lawfulness or otherwise of the Applicants' occupation of the land in the CKGR, hence it agreed to make an order of Court, the draft order in the form which was agreed by the parties. He thus has treated the matter at some length, and concludes that the Applicants were in unlawful occupation, since the

CKGR is State land and the Applicants had no lease or rights of any sort over that land.

60. It is rather surprising, that learned Counsel for the Applicants avoided dealing with the issue of lawful occupation, when nearly all the Applicants who gave evidence claimed the CKGR to be their land, from which they did not want to be moved. Sometimes I wondered during the trial, whether there was a breakdown in communication between Mr Bennett and his clients because there were a number of instances where he contradicted his clients.

> See Applicants' submissions pages 47-48 paragraphs 131-134.
>
> "131. Before we respond to particular submissions, we should make a preliminary point about the nature of the claim made on the Applicants' behalf.
>
> 132. The Respondent repeatedly asserts that the Applicants claim ownership of the land in the CKGR, apparently on the basis that some of them gave evidence to that effect in the box: see RS 88. But the nature of the rights that the Applicants may enjoy as a result of their long occupation is a matter of law for the

Court to decide after legal submissions.

133. None of the Applicants' witnesses (or, for that matter the Respondent's witnesses) were qualified to give evidence on matters of law or to express their opinions on land tenure. They may have said what they felt and believed about their relationship with the land, but their feelings and beliefs cannot dictate the nature of their legal claim.

134. Their legal claim is not to ownership, but to a right to use and occupy the land they have long occupied, unless and until that right is taken from them by constitutionally permissible means."

61. Learned Counsel says the Applicants were not qualified to give evidence on matters of law, but when the Applicants made the assertion that the CKGR was their land, they appeared to be stating a fact which they believed was correct. On the other hand, it seems Counsel believes his clients are wrong. If indeed they are wrong, the question is on whose instructions is he acting? Could it be that he subscribes to the "skeleton principle" theory discussed in the Mabo case which is considered later in this judgment?

62. This Court is therefore left in a situation where it has to answer

the question posed by the Court of Appeal, without the benefit of argument on behalf of the Applicants.

63. Perhaps at this juncture, it is appropriate to investigate how the Applicants found themselves on land that they claim as their own, while at the same time it is an accepted fact that the land is a game reserve, which was previously Crown land.

64. Dr Silberbauer who conducted research on the Bushmen in the CKGR at the time the creation of CKGR was mooted, accepted the proposition that the Bushmen have been in the area which includes the CKGR for thousands of years: Volume 1 of transcript of evidence at pages 46-47 where the following transpired:

> "Q: …Can you just go to page 17 paragraph 2.5.2 it says "It is known that Basarwa or San peoples have inhabited the region which is now Botswana for many thousands of years. Although they were mobile, their movements had limits, so it is reasonable to say that the area which includes CKGR and Khutse has been the domain of the Basarwa for many centuries.

A: I would agree with that."(Underlining mine)

65. He also said that their adaptation to CKGR environment shows that they have been there for hundreds of years. See Vol 1 pages 32-33:

"Q: What does that prove on the indigenous modernised part?

A: That indicates that the populations have been stable for a considerable period many hundreds of years.

Q: In the third second and third line you talk about high degree of culture adaptation to the present environment. Just explain what that means?

A: The selection of food plants, the knowledge of food plants and other sources of fruit growing in the area was considerable. This included plants which are poisonous in the raw state and are only of use when they have been cooked. This indicates that it must have taken a long time for people to have discovered this very wide range of knowledge of plants. The techniques of hunting are particularly well suited to this environment." (underlining mine)

66. The same view is reflected in debates of the Joint Advisory

Council on 17th and 18th October 1960 during which the Acting Government Secretary said the following (Bundle 2B page 31):

> "What Government has in mind is to take this central section of the country, amounting in all to some 20,000 square miles, and, in providing the Game Reserve, to provide also that Bushmen may reside freely there and hunt freely, and to develop water supplies there which would ensure that in the dry season they would have a source of water; and, if assistance were necessary in the form of rations, there would be centres where this assistance could be afforded, rather than leaving the Bushmen to the mercy of the dry season conditions. It is, Your Honour, a dual purpose – to utilise an area which cannot be easily utilised economically, for the preservation of the Kalahari fauna which will thus be available more easily as a source of food to the Bushmen who are themselves the aboriginal inhabitants and the only inhabitants who have lived throughout in this central region of the country." (underlining mine)

67. It will appear from the aforegoing that, the Bushmen are indigenous to the CKGR which means that they were in the CKGR prior to it becoming Crown Land, thereafter a game reserve and then State land upon Botswana attaining independence.

68. The CKGR became Crown land by virtue of the Bechuanaland Protectorate (Lands) Order-in-Council 1910 promulgated on 10 January 1910. It reads as follows:

> "Now therefore, His Majesty, by virtue of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased by and with the advice of His Privy Council to Order, and it is hereby ordered as follows: -
>
> 1. In addition to the Crown Lands defined by the Bechuanaland Protectorate (Lands) Order-in-Council, 1904, all other land situate within the limits of the Bechuanaland Protectorate elsewhere than in the Tati District shall, with the exception of
>
> (1) Such land as is either
>
> (a) included in any native reserve duly set apart by Proclamation; or
>
> (b) the subject of any grant duly made by or on behalf of His Majesty; and
>
> (2) the forty-one farms known as "the Baralong Farms" held by members of the Baralong (sic) tribe by virtue of certificates of occupation issued by the Chief Montsioa on the 28th day of March, 1895.

vest in His Majesty's High Commissioner for South Africa and be subject to all the provisions of the said Order-in-Council as Crown Lands.

2. His Majesty may at any time add to, alter, or amend this Order.

2. This Order may be cited for all purposes as the Bechuanaland Protectorate (Lands) Order-in-Council, 1910." (Underlining mine)

69. The Proclamation is completely silent on the rights of people who may have been living in those Crown Lands, except those whose titles derive from or were recognised by His Majesty in some previous Proclamation. The question is, what does this silence mean, to anyone who may have had what has been described as "native title" to the land that was proclaimed Crown Land? As matter of fact, learned Counsel for the Applicants argued at length about "native title" when he was dealing with another issue yet to be considered by this Court at a later stage.

70. His argument was based on the Australian case of Mabo and Others v The State of Queensland High Court of Australia 1991-1992. Although this case is not binding on this Court, it considered a situation not very different from the instant.

71. The Australian Court, however, was labouring under some serious disability which was expressed by Brennan J. as follows at pages 29-30:

> "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency…Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country (59), it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own (60). The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the

benefit flowing from the overturning." (underlining mine)

72. This Court does not suffer a similar disability, since in this jurisdiction, the Constitution which embodies the fundamental human rights, is the supreme law of the land and all laws and all acts of the State are tested against it. In considering the Mabo case, this Court has to bear in mind the limitations that constrained the High Court of Australia.

73. The Mabo case discusses the notion that, once a country is colonised, all land in the colony belongs to the Crown and prior rights held by indigenous inhabitants are extinguished upon colonisation.

74. The Bechuanaland Protectorate (Lands) Order-in-Council 1910 seems to abide by that notion, because it does not provide for anyone who might have rights, other than those originating from or recognised by the Crown. The notion was a fallacy designed to justify the theory that, a colony that was found

inhabited by indigenous people was a terra nullia. The courts of the time had to resort to a hypothesis that they could not challenge an act of the Crown, in a municipal court, to lend some semblance of legality to their decisions. See page 45 of the Mabo case where Brennan J. continued as follows:

> "It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants."

75. The theory that all land belongs to the Crown does not distinguish between the right to rule a colony acquired by colonisation and the acquisition of ownership of land within the colony itself. For the colonial power to acquire ownership of land, there has to be a specific act of acquisition distinct from the act of colonisation, as land within a colony could be owned by various people. Such ownership could be by an individual or by a community, etc.

76. The Colonial Courts took the easy route of not recognising

"native land tenure", because it was convenient for them not to try and understand what rights were cognisable under the tenure and it was much easier to fall back on what they were familiar with, which was the common law.

77. In the course of time, however, they were constrained to come to terms with the reality that, there existed a "native tenure", but even then, they likened the tenure to some concepts already known to their common law. See Mabo at pages 50-53 where Brennan J. says:

> "In Amodu Tijani, the Privy Council admitted the possibility of recognition not only of usufructuary rights but also of interests in land vested not in an individual or a number of identified individuals but in a community. Viscount Haldane observed (38):
>
> > "The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of

> the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.

…True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of the people's traditional land. But the common law has asserted that, if the Crown should acquire sovereignty over that land, the new sovereign may extinguish the indigenous people's interest in the land and create proprietary rights in its place and it would be curious if, in place of interests that were classified as non proprietary, proprietary rights could be created. Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a

burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum (40), enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

…Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty. Those are rights and interests which may now claim the protection of s. 10(1) of the Radical Discrimination Act 1975 (Cth) which "clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community"; Mabo v

Queensland (44)" (Underlining mine)

78. From the above quotation, it is clear that the Court was of the view that the native rights could only be extinguished by a specific act, such as alienation of land to a third party, or appropriation of the land by the Crown itself. The Court held that native rights were not extinguished by the declaration of game reserves or Crown lands except where the use to which such land is put, is inconsistent with the continued existence of native rights. I interpret that "inconsistent use" would include where the land was alienated to third parties to be used for cultivation of crops, development of a residential estate, etc., such that the holder of native rights cannot continue to enjoy

his/her rights. Vide Brennan J. at pages 55-56:

> "Lord Sumner in In re Southern Rhodesia (56) understood the true rule as to the survival of private proprietary rights on conquest to be that "it is to be presumed, in the absence of express confiscation or of subsequent exproprietary legislation, that the conqueror has respected them and forborne to diminish or modify them.
>
> …the decision in Amodu Tijani laid down that the cession of Lagos in 1861 "did not affect the

character of the private native rights.

> …The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law." (Underlining mine)

79. The reasoning of the Australia Court is quite persuasive, but this Court would not readily endorse any action taken by the State to extinguish the "native rights" of citizens, unless it is done in accordance with the Constitution of the Republic of Botswana. I have earlier said the evidence indicates that the Bushmen were in the area now known as the CKGR prior to 1910, when the Ghanzi Crown land which included the CKGR was proclaimed. It therefore follows that they must have claimed "native rights" to land, which has since become the CKGR, as they keep referring to it in their evidence as 'their land', like many other inhabitants of the then Bechuanaland,

who claimed rights to the land they occupied. The question to be answered is whether such rights were ever extinguished by,

(a) the proclamation of the land they occupied a Crown land or

(b) the declaration of the land they occupied a game reserve.

80. Dealing with the first question, the 1910 Proclamation was silent on rights of the people who occupied the land that was proclaimed Crown land. It does not even allude to their presence on the land. This is hardly surprising in light of what has been discussed above, that the colonial power's modus operandi, was to pretend that the land it grabbed did not belong to anyone, yet, in reality it was inhabited by people who had rights.

81. The rights of the Bushmen in the CKGR were not affected by the proclamation of the land they occupied to be Crown land, as they continued to live on it, and exploit it without interference from the British Government. They continued to hunt and wander about the land, without let or hindrance

except, if they moved to Ghanzi farms, where they were considered a nuisance to the white farmers.

82. Not only is the British Government presumed (on the authority of In re Southern Rhodesia and Amodu Tijani supra), to have respected the "native rights" of the Bushmen in the CKGR upon proclamation of the Crown land, but the fact that it considered providing them with water, so that they could remain in the CKGR, is a clear indication that it did not extinguish their "native rights" with respect to the CKGR. The "native rights" of the Bushmen in the CKGR were therefore not extinguished in 1910 when the Crown land was declared.

83. Did the declaration of the land occupied by the Bushmen to be a game reserve (CKGR) extinguish their rights in respect thereof?

84. There is copious documentary evidence indicating that, the British Government intended the CKGR to be a free hunting area for the resident Bushmen. However, it got itself entangled

in a diplomatic web and ended up declaring a game reserve in which the Bushmen had no hunting rights, quite contrary to the ostensible reason for creating the reserve. See the following exhibits:

Exhibit P61 in Bundle 2B at page 34B reads:

"Inward Telegram to Commonwealth Relations Office

From: South Africa (B.B.S.)

D: Pretoria 17.32 hours 15th December 1960

R: 18.20 hours 15th December 1960

1. ....

(c) Survey will take longer than originally expected to achieve satisfactory results. Proposal in interim report forwarded with my Savingram No. 735 of 7th October, 1960, is for declaration of game reserve i.e. interim measure to satisfy most important need of primitive bushmen, namely preservation of game on which they live. It can be readily achieved under existing legislation without need to steer new and possibly controversial legislation through Joint Advisory Council and such legislation should await final report of survey officer and consideration detailed policy proposals in new Executive and Legislative Councils especially as best areas for eventual bushmen reserve or reserves have not yet been determined." (Underlining mine)

Exhibit P63 in Bundle 2B at page 35A reads:

"COMMONWEALTH RELATIONS OFFICE,
LONDON, S.W.1.

23rd December, 1960

...

5. The main issue, to which I now come, is the question of setting aside some kind of reserve for the benefit of Bushmen. This point was also mentioned in Sykes' letter of 6th December. The Minister of State would still hope to see a reserve for Bushmen established, rather than a reserve for game for Bushmen. But, it, as stated in paragraph 2(b) of telegram No. 841, the game reserve can be established quite quickly, and a Bushmen reserve will be more difficult and will take longer, I think that he would be content with a game reserve as an interim measure. What is important from the London angle is that something should soon be done, and be seen to be done, for the benefit of the Bushmen." (Underlining mine)

Exhibit P68 in Bundle 2B at page 39A reads as follows:

"H.C.N. has just been signed and will be promulgated shortly establishing Central Kalahari Game Reserve which will protect food supplies and assure needs of bushmen in area.

(I) As Parliamentary Under Secretary said in House of Lords on 21st December 1960 needs of Bushmen in regard to lands and other matters is in forefront of our minds. Establishment of Game Reserve is interim measure to satisfy their most important needs. Further measures such as establishment of Bushmen Reserves must await consideration of Silberbauer's final report bearing in mind that best areas for such Reserves have not yet been determined." (Underlining mine)

Exhibit P72 paragraph 4 in Bundle 2B at pages 43-44 reads:

"4. It has always been the intention that Bushmen should be free to hunt within this Game Reserve but I am unable to find legal provision in the Proclamation for this. Section 34, which provides for the issue of permits by the Resident Commissioner, is appropriate in this case. Is the solution therefore to regard this as a case where the Crown need not bind itself?" (Underlining mine)

85. The CKGR was declared a game reserve by His Excellency The High Commissioner by notice No. 33 of 1961 dated the 14th February 1961, (See Exhibit P43 Bundle 1A page 322) pursuant

to sub-section 1 of section 5 of the Game Proclamation (Cap 114 of the Laws of Bechuanaland Protectorate 1948).

86. Sub-section 2 of the same provision makes hunting in a game reserve illegal except where the hunting is in terms of a permit issued pursuant to section 14(2) of the same proclamation which provides as follows:

> "14.(2) The Resident Commissioner may at his discretion grant to any person a special permit to hunt, kill or capture animals at any time for the following purposes and in the following circumstances, that is to say –
>
> (a) he may grant a permit for scientific or administrative or complimentary reasons to hunt, kill or capture any animals;
>
> (b) he may grant a permit to hunt, kill or capture any animal or bird in a Game Reserve or Sanctuary –
>
> (i) for scientific or administrative reasons; or
>
> (ii) when the presence of that animal or bird is detrimental to the purposes of the Game Reserve or Sanctuary;
>
> (c) he may grant a permit, subject to such

> conditions as he may think fit, to hunt, kill or capture any species of large game or small game on any land where he is satisfied that such game is causing damage to property or losses in farming activities (c).

87. The plain language of the Game Reserve Proclamation in terms of which CKGR was declared a game reserve, made it quite clear that hunting in the CKGR was forbidden for everyone including the Bushmen indigenous to the CKGR. This was so, despite the fact that there is abundant evidence above, to the effect that, when the idea of declaring the game reserve was conceived, the intention was that it would serve a dual purpose: viz (i) to protect game from poachers, and (ii) to provide land for the Bushmen where they could hunt freely to satisfy their nutritional needs without interference from outsiders.

88. Dr Silberbauer who was the prime motivator for a dual purpose game reserve, admitted that he had failed to prevail upon his superiors to declare a dual purpose game reserve. He

regretted that his failure had resulted in rendering illegal, the hunting by the Bushmen, which had hitherto been legal. He, however, explained that the Colonial Government decided to turn "Nelson's eye" at the continued hunting by the Bushmen, since one of the primary aims of declaration of the game reserve, was to provide them with a place where they could hunt. (See Vol 1 of the Record of Proceedings pages 155-158)

"Mr Pilane:…Now we have accepted that whereas before the declaration they had a right to hunt following the declaration they did not?

PW1: That is correct, they no longer had a right to hunt.

Mr Pilane: Declaring this place a game reserve took that right away from them?

PW1: That is a correct statement of the legal situation.

Mr Pilane: So it cannot have been part of the purposes of declaring it a game reserve to give them a right to hunt?

PW1: The measure had failed in that purpose, from a legal view point.

Mr Pilane: So the declaration did not achieve some of its intended purpose?

PW1: It failed to legally establish one of its intended purposes.

Mr Pilane: Now during the period 1961 after the declaration was made and the time in 1967 when you left the service, was the law altered to give them the right to hunt within the reserve?

PW1: I believe it was not.

Mr Pilane: During that period were they given permits to hunt within the reserve?

PW1: No.

Mr Pilane: So during the period 1961 and 1967 any hunting that was conducted within the game reserve by the Basarwa was quite illegal?

PW1: That describes the legal position correctly.

Mr Pilane: Now that they should be able to hunt was a very important part of what you sought to do for them?

PW1: Yes.

Mr Pilane: And all you succeeded in doing was to take away from them a right they had?

PW1: I had taken away a legal right, yes.

Mr Pilane: Resulting in them engaging in illegality for that period of time?

PW1: Sorry, engaging in?

Mr Pilane: In illegal hunting during that entire period?

PW1: Legally speaking that is quite correct.

…

Mr Pilane: The purpose that you had wanted to achieve by making the declaration had failed by your own admission and nothing was done about it for 7 years.

PW1: That is correct.

…

Mr Pilane: The purpose was achieved but not in law, the law did not matter, to your government.

PW1: …I do not think it could be fairly and truthfully said that law did not matter, however in many situation it was deemed expedient and wise to as it were to turn a blind eye upon offences.

…

J. Phumaphi: …He says it was deemed expedient to turn a blind eye at what?

PW1: At the continued of free hunting by the inhabitants of the CKGR." (Underlining mine)

89. Dr Silberbauer who was at the time the Bushmen Survey Officer, made some attempt subsequent to the declaration of

CKGR, to regularise the hunting by the Bushmen, but all to no avail. The Nelson's eye situation persisted till Botswana attained independence in 1966 and was only regularised by "THE FAUNA CONSERVATION (AMENDMENT) ACT 1967". Section 3 thereof reads:

> "(3) Subject to the provisions of any regulation to the contrary regulating the terms and conditions of hunting within a controlled hunting area, nothing in this Act shall render unlawful the hunting on State land of an animal other than conserved animal, by a person belonging to a community which is entirely dependent for its living on hunting and gathering veld produce, and who is himself so dependent, where the animal is hunted for the reasonable food requirements of the hunter or of the members of the community to which he belongs."

90. The Act allowed members of communities which were primarily dependent on hunting and gathering veld products, to hunt animals on State land to meet their reasonable food requirements. Subsequent legislation that has since been enacted, has always recognised the presence of the Bushmen in the CKGR, and has provided for their continued hunting,

albeit subject to some controls.

91. The independence Constitution of the Republic of Botswana recognised the presence of Bushmen in the CKGR by making a special provision in respect of them (section 14(3)(c)). There was never a time when the CKGR Bushmen were considered trespassers in the CKGR, either by the British Government or the Botswana Government. That explains why when the Botswana Government decided a policy to relocate them, the policy was "persuade but do not force". If their presence in the CKGR offended against any law, the Government would have been within its right to hand the matter to the Botswana Police to deal with them. The 1963 Regulations make it plain that they are exempt from producing permits to enter the CKGR.

92. I therefore find that creation of the CKGR did not extinguish the "native title" of the Bushmen to the CKGR. It follows that since I have come to the conclusion that, neither the declaration of the Ghanzi Crown land nor of CKGR extinguished the native

rights of the Bushmen to CKGR, the Applicants who are part of the natives of the CKGR, were in possession of the land which they lawfully occupied in their settlements in the CKGR subsequent to the 31st January 2002.

C.(ii) Whether subsequent to 31st January, 2002 the Appellants were deprived of such possession by the Government forcibly or wrongly and without their consent?

93. The 2002 relocations were a sequel to the 1997 relocations, which took place consequent upon several years of frequent contacts between the CKGR residents and officials of the Government of Botswana. The frequent contact was born out of Circular No. 1 of 1986 which announced the policy to "persuade but not force" the residents of the CKGR to relocate outside the CKGR where services would be provided. As stated earlier, by 1996 some of the residents of CKGR had seen the wisdom of relocating outside the reserve, and they manifested their desire to relocate by writing a letter (Exhibit D57, Bundle 3B(1) page 693N-693O dated 12 February 1996) to the Council Secretary, Ghanzi District Council.

94. Following the request by some old Xade residents to be relocated, a meeting attended by Old Xade residents and representatives from all the other settlements in the CKGR was held at Old Xade. The result of the meeting was that, some of the residents were selected to go and identify a place outside the reserve where the residents could relocate to. That is how New Xade came into being.

95. Between 1997 and 1999 the whole of Old Xade settlement and some residents from the other settlements were relocated outside the reserve. There were, however, several residents in the settlements, who were not prepared to relocate outside the reserve and they were unequivocal about it.

96. A number of residents, however, gave their names to Moragoshele, DW9, on occasions he went into the reserve to either collect or deliver school children, so that he could forward them to those responsible for relocating the residents

outside the reserve. An assessment team was dispatched into the reserve between 1999 and 2002, to assess the property of those residents, after DW9 alerted the authorities of their desire to relocate, but they were not immediately relocated.

97. In August 2001, Mrs Kokorwe went into the reserve to announce that, the services provided in the CKGR would be terminated by 31 January 2002. The general tenor of the evidence tendered for the Applicants was that, the residents were engulfed by a sense of dismay at the announcement, but the majority were resolute that they would remain in the reserve even after the services were terminated. They resigned themselves to reverting to their old ways of survival in the reserve without the basic services. They told Mrs Kokorwe that she could terminate the services, but they still preferred to remain on their land.

98. In January 2002 the District Commissioner, Ghanzi; Council Secretary, Ghanzi; and several other Government officials

visited the CKGR, to remind the residents that time for termination of services was drawing near and that, those who were willing to relocate should get ready to be relocated soon. It is worth noting that the anticipated relocation would offer those who had given their names to DW9, an opportunity to relocate.

99. Towards the end of January 2002, the District Commissioner dispatched three teams into the reserve to assess and relocate those of the residents who were willing to relocate according to Respondent's evidence. According to the evidence of Kelebemang (DW7), Kandjii (DW8) and Moragoshele (DW9), the teams were under very clear instructions from the District Commissioner, not to encourage anyone to relocate, lest they be accused of coercing the residents to relocate. They were simply to set up camp and waited for people who wanted to relocate, to approach them for registration to relocate.

100. Once they were approached, they would then go and measure

the property, which in the majority of cases, comprised huts, yards, fields and kraals. After measuring the property, they would then ask the owners to dismantle their property, so that the building materials could be transported for re-use where people chose to relocate. The teams only assisted in the dismantling of the property of those who asked to be assisted, like old people who could not manage on their own. For this purpose each relocation team had casual labourers whose duty was to dismantle where assistance was sought.

101. It also emerges from the evidence tendered on behalf of the Respondent that, in the majority of cases the teams registered those who had property and proceeded to measure it for purposes of compensation at a later stage. There is not much said about people who did not have property, although in response to a question one of the witnesses mentioned that, if they were approached by someone who did not have property, they would record his/her names, his/her Omang and then assist him/her to relocate. It does not appear the teams had a

specific way of dealing with the unpropertied such as old age pensioners, the destitutes, etc.

102. It is also worth noting that, where the teams were dealing with married couples, they registered the property in the name of one or the other of them without regard for the views of the other spouse. The examples of this are to be found in the stories told by Tshokodiso Bosiilwane (PW3), Motsoko Ramahoko (PW4), Mongwegi Tlhobogelo (PW5), and Matsipane Mosetlhanyane (PW8). What is common to all these witnesses is that their spouses were relocated without their consent, their property was dismantled without their consent or with the consent only of the other spouse. There was never an investigation into the property regime of the spouses, or a way of establishing that whoever registered property as theirs, it was indeed theirs and there were no competing claim to it.

103. The evidence given on behalf of the Applicants about how the relocations took place, is as different from that tendered for the

Respondent as day is from night. The thrust of the evidence for the Applicants is that, when the relocation teams went into the reserve, they went there with a single purpose, which was to relocate everyone from the reserve.

104. Contrary to the story that the teams merely pitched up camp and waited for residents to come and register, it is stated by the various witnesses for Applicants, that the teams were proactive in exhorting people to relocate. Those who manifested reluctance were threatened in different ways and their huts were dismantled without their approval. The following are, but a few examples of how pressure was allegedly exerted on them to relocate:

(i) PW3 – Bosiilwane told the Court that –

(a) his huts were dismantled without his consent by the relocation team.

(b) his wife was taken away without his consent.

(c) he had to sleep in the open guarding his livestock and was almost eaten by lions which were marauding the area.

(d) the social worker told him that he was not married to his wife because he did not get a

wedding ring for her.

(ii) PW4 – Motsoko Ramahoko stated that –

(a) both his wives were relocated without his consent.

(b) donkeys and goats were let into his field by Government officers while he was away, so that they could destroy his crop.

(c) he was left with no option but to relocate after both his wives were relocated without regard to his views on relocation and his crop had been destroyed by livestock.

(iii) PW6 – Xanne "Speed" Gaotlhobogwe stated that –

(a) his huts were dismantled by the Molapo relocation team without consent.

(b) a CID officer and Wildlife officers took away a radio communication equipment without his consent and dismantled the hut in which it had been kept, without his consent.

(c) Moragoshele persistently pestered him to relocate and made it clear that no one was to remain in the reserve, after the 2002 relocations.

(iv) PW7 – Losolobe Mooketsi stated that -

(a) Government officers told the residents of Kikao who were all relatives that if they did not relocate, they were not going to get transport to go and see their headman who

was sick in New Xade.

(b) When Kelebemang returned from New Xade after sending the headman for medical treatment, he claimed that the headman sent him to tell them to relocate.

105. Apart from the suggestion made by the Respondent's learned Counsel to PW6 that, the radio communication equipment was taken away because it was unlicensed, the Respondent's witnesses deny all the evidence enumerated above. As stated earlier, the Respondent's witnesses say they never tried to persuade the residents to relocate during the 2002 relocations.

106. In order to determine which of the two diametrically opposed versions is probable, one has to have regard to other evidence tendered in the case.

107. I have already discussed the fact that when Circular No. 1 of 1986 was issued, Respondent was aware that the continued supply of services to the CKGR during campaign "persuade but do not force" to relocate, pending the establishment of serviced

settlements outside the reserve, would be counterproductive. However, the realities of the situation left Respondent with no viable option but to supply them.

108. Consequently, the monster that the Government sought to avoid by rejecting the recommendation to supply water to settlements in the reserve, pending the establishment of settlements outside had been created after all. The policy of "persuade but do not force" was proving futile, as some of the residents were quite comfortable and happy to receive the services in their "ancestral land." The lure that the serviced settlements outside the reserve were supposed to provide to the residents, was of no appeal to them and they therefore declined to relocate.

109. The resultant situation was that, the Botswana Government was now providing services to the settlements outside the reserve, as well as to settlements inside the reserve. It does not require rocket science to figure out that, the cost of the

provision of services to settlements both inside and outside the reserve was duplicated and therefore must have been increased significantly.

110. Incidentally, at the start of the case, this Court traversed CKGR and it is only too well aware of what a harsh, desolate, rugged and difficult sandy terrain the CKGR presents. It can well appreciate the admitted evidence about frequent breakdowns of water bowsers.

111. As if the quagmire the Government found itself in was not problem enough, the European Union started exerting diplomatic pressure regarding the issue of the relocation of the residents of CKGR and the Botswana Government started blowing hot and cold. On the one hand, as is shown in exhibits P23, P29, P31, P32, and D64 supra, the Government said for as long as there is a human soul in the CKGR, services would continue.

112. On the other hand, it kept telling the residents that the supply of services to the CKGR was unsustainable on account of costs. Vide the admitted evidence of Leatswe, Mathuukwane and statement of Mrs Kokorwe 2001, August, etc.

113. The dilemma that confronted Botswana Government about the CKGR, was history repeating itself. When the idea of CKGR was conceived, it was said that it would serve the interests of the Bushmen, but the British Government found itself criminalising the hunting by the indigenous Bushmen, as the proclamation creating the reserve took away their hunting rights, which they had hitherto enjoyed.

114. Incidentally, the Bushmen were given a raw deal by the British Government. They were displaced from fertile land, with readily accessible water. The land was carved into farms which were granted to some white settlers and thereafter the Bushmen were regarded as trespassers and a perennial nuisance to the Ghanzi farmers, when they went there during

the dry season in search of water.

115. Part of the reason the CKGR was created was to keep away them from the Ghanzi farms. The real idea was to create a Bushmen reserve, but it could not be called a Bushmen reserve for fear that the Ghanzi farmers would object saying that their labour reservoir was being taken away from them. See Vol 1 of the Record of Proceedings pages 135-136.

"J. Phumaphi: And I want to now (sic) to go to page 320, which is your recommendation dated 28th April 1960. Let me read it. Paragraph 3, I am reading from the middle of the paragraph of bundle 1(a) page 320 paragraph (3). You are talking about a creation of Bushmen reserve as such and you say, "It would call for involved administrative measures, possibly necessitate new legislation, and provoke the Gantsi farmers (who would interpret the measure as likely to spoil the labour market)." I understand you to be saying that the idea is to create a Bushman reserve, but there are problems in that it would require legislation but over and above that you create an impression to the Gantsi farmers that their reservoir of labour would be interfered with. Is that a fair interpretation of what you are saying?

PW1: My lord this is an example of the diplomacy that I had to resort to, the diplomacy that I referred to earlier, and your lordship is correct.

J. Phumaphi: And you were careful to make sure that the Bushmen were available as a labour reservoir?

PW1: Not quite. I had to be careful not to appear to threaten the labour supply, but I was certainly not going to protect, in I think the sense that you have mind, your lordship.

J. Phumaphi: Further still on the same paragraph you say "It would also be an irrevocable measure; while overseas outcry would remain within bearable limits of audibility if a reserve for wildlife were undeclared it would be quite deafening if an indigenous people were involved." I understand you to be saying what you actually have in mind was declaring a Bushmen reserve but you want to call it a game reserve or dress it up in game so that it looks acceptable?

PW1: That plus the fact that it was administratively expedient in terms of the existing legislation.

J. Phumaphi: You did it out of expedience, is that what you are saying?

PW1: The idea of the game reserve rather than a Bushman reserve was done in the light of the consideration that you referred to in paragraph 3 and administrative expedience, yes my lord."

116. The aforequoted clearly shows that the creature this Court is landed with to-day is born out of the diplomatic intrigues of the

British Government, which created a problem and left it unresolved.

117. Perhaps the evidence of Jan Broekhuis (DW1), Joseph Matlhare (DW2) and Dr Kathleen Alexander (DW6) may shed some light on the thinking of Government. DW1 told the Court that once the Government decided that services should be terminated in the CKGR, his department would not do anything that would go against the Government's decision and therefore they had to stop the issuing of SGLs.

VIDE: Broekhuis' evidence - Vol 14 of the Record of Proceedings pages 6010-6011.

"Bennet: Can I suggest to you Mr Broekhuis that the department's position was that it was not going to assist in any way, any strategy or proposal which might result in some people remaining in the reserve who would otherwise be required to leave?

Broekhuis: Obviously, the department being a government department wouldn't do anything that would go against the government policy.

...

Phumaphi J: But when you say the department was not going to do anything that would go against this policy, what policy?

Broekhuis: That any services should be provided outside the reserve."

118. The view espoused by Broekhuis is consistent with original position not to supply services (water) in the game reserve contained in Circular No. 1 of 1986. Understandably, it would be contradictory to try and attract the residents to move outside the reserve by providing services there, while at same time they services were provided within the reserve.

119. Both Mr Matlhare and Dr Alexander were called by the Respondent as expert witnesses. According to Mr Matlhare the presence of humans in the reserve, constituted a disturbance factor to wildlife and therefore the residents had to be moved out. As far as he was concerned a game reserve was for wildlife and not for humans. There was to be absolute preservation of wildlife, and no consumptive or sustainable use allowed in the

reserve. Vide: Matlhare's evidence Vol 19 of the Record of Proceedings pages 7857-7860:

"Bennet: I want to put this to you and you may comment on it if you wish, the reality was that you were faced with a fate accompli by the Ministry of Local Government, they made the decision that special game licences were no longer to be issued and you had no alternative so you thought, but to go along with that decision, is that correct?

Matlhare: Well, it is apparent that the decision had been made that the special game licences should be stopped but we also consider them a service so in that respect we discussed it along those lines because we considered it a service that the government was offering to the resident of the reserve.

Bennet: If I understand your evidence correctly Mr Matlhare it wouldn't matter very much whether special game licences were treated as a service or not because if the ministry had decided that special game licences were no longer to be issued you would regard yourself as bound by that decision, is that correct?

Matlhare: I would be bound by that decision because it would have been a government decision.

Bennet: Yes. What authority did you consider the Ministry of Local Government had to tell you how to exercise your powers

under the 2000 or 2001 regulations?

Matlhare: I didn't tie the announcement to necessarily to regulations (sic), when a minister makes an announcement you take it that it is a collective government decision, to actually carry out whatever it is that is being announced.

Bennet: Was the issue of special game licences any business of the Ministry of Local Government?

Matlhare: In this respect it is in that they were the ones who were making the announcement as to what was going to obtain vis-à-vis those people who are resident in the CKGR and Ministry of Local Government and Lands does – it is involved in the issues relating to people, settlements and that is one aspect of the services that government – because you cannot default the Ministry of Local Government and Lands from the old government set out, and I am sure that was not the decision which was taken by the ministry alone.

Bennet: Would it be fair to say that you did not trouble yourself to consider what authority if any the Ministry of Local Government had in connection with the preservation or conservation of the wildlife in the CKGR?

Matlhare: I said so but I also said ministry of local government it is an arm of government, so whatever decisions are made normally within Botswana they are made collectively by the government."

120. Dr Alexander gave very lengthy, incisive and educative evidence on wildlife in general, disease transmission between humans and animals, as well as between domestic animals and wildlife. She also told the Court that, the presence of people and domestic animals in the game reserve poses a risk of disease transmission to wildlife. In her view, the ideal situation was that there should be no resident human population and domestic animals in the game reserve. Like Mr Matlhare, she said there should be total preservation of wildlife in the game reserve. The bulk of her evidence, however, highly informative as it was, could not assist the Court to determine whether force was used against the Applicants during relocations, or whether the termination of services was unlawful and unconstitutional, etc.

121. The nub of the evidence of these two expert witnesses, was that the idea of having people resident in the CKGR, and being able to hunt therein was contrary to the concept of total preservation of wildlife in the reserve. In their view it was

contrary to wildlife conservation.

122. When the evidence tendered in Court is viewed as a whole, the following also emerges:

(a) That many of the residents all along steadfastly maintained that they did not want to relocate, but once the 2002 relocation exercise commenced, they relocated from all the settlements except for a few at Metsiamanong and Gugamma. This change of heart occurred without persuasion from the relocation teams, if the Respondent's witnesses are to be believed.

(b) That on 19 February 2002 the Applicants launched an application in Court in which they sought an order declaring that they had been despoiled of their land which they lawfully occupied among other things.

(c) That the water tanks were emptied while there were still some people in the settlements.

(d) That in relocating the residents, the relocation teams paid no regard to fact that they might

destroy marriages by splitting families. The attitude of the Respondent was succinctly put by its learned Counsel in the following terms (Vol 2 of Record of Proceedings page 522):

"PW3: Yes, I wish to comment on that. I would say I didn't want my wife to be relocated and I didn't want to be relocated as well and until now I do not want her to be relocated. I want her back home.

Pilane: Well, sir your wife and your children are adults and in the eyes of the government they make their own choices; you don't make them for them. He is welcome to comment if he wishes to.

PW3: What I am saying is that if my wife wanted to relocate and myself as her husband I didn't want to relocate and I didn't want her to be relocated, now I am asking you a question what steps had been taken to help me because I didn't want her to be relocated.

Pilane: Let me assure him that government of Botswana is not going to help him force his wife and his children who are adults to do what he wants. The government will assist them to do their choices.

(e) That the relocatees were made to sign forms for the assessment of their property, and application forms for plots at the new settlements, without much information being divulged to them. The relocatees

were left in the dark about many things of crucial importance. For instance, it was never explained to them that acceptance of compensation meant that they would forgo their right, to return to the reserve, it was never explained to them how their compensation was calculated and they were never given a chance to seek a second opinion about the calculations. In many instances they were made to thumbprint blank forms or forms that had not been fully completed. See Exhibit D110 Bundle 3D pages 36-37. Form 2 of the exhibit is partly complete and Form 3 is not.

(f) That the issuing of SGLs was abruptly stopped by DW2 in compliance with the decision of Government to terminate services and an instruction was issued for that licences that were still current at the time were to be withdrawn.

123. When the evidence of DWs 1, 2 and 6 is viewed in the light of the Government policy to relocate residents outside as well as facts in sub-paras (a) to (f), one cannot, but conclude that the probabilities weigh in favour of the Applicants that they did not freely consent for the following reasons.

- It is quite unlikely that the Applicants would have had a sudden change of mind about relocation without further persuasion from the Respondent's agents.

- The launching of an application in Court seems incongruous with the conduct of people who were willing and happily relocating. It is therefore quite unlikely that the Applicants would have launched an application if they were willing relocatees.

- The emptying of the water tanks whilst there were people in the reserve seems to have been designed to disabuse those of them, who might have believed that they would have water for some time after relocations, if they did not relocate. It is unlikely that if the residents were co-operating with the teams, the latter would have had cause to deny them water while they were still being processed to be relocated. The only reasonable explanation was to pressurise them to relocate.

- It is unlikely that, if the residents were relocating willingly, the Respondent's agents would have

disregarded the welfare of their families to the extent that they could precipitate the separation of couples. It seems the separation was meant to force them to seek each other out at the settlements, as happened in the cases of Ramahoko and Mosetlhanyane to mention, but two.

- Once the provision of rations was terminated, hunting became a very important alternative for sourcing food. It is therefore unlikely that if the residents were not being pressured they would have been denied SGLs. It appears the idea was to starve those remaining in the reserve so that the lure of the serviced settlements outside the reserve would loom large among their options for survival.
- It is unlikely that, if the residents were relocating willingly, they would have been kept in dark about the purpose for which they were made to thumbprint documents, and the fact that once they had received compensation they would not be allowed back in the reserve.

124. As a matter of fact, one of the witnesses called 'Speed' said he thought he was being compensated, because he relocated

against his wishes. He may be excused for thinking so, because the relocation teams said they were not to discuss anything with the residents beyond identifying who they were and measuring their properties.

125. If one were to come to the conclusion that, those who had all along been reluctant to relocate, ultimately decided to relocate of their own volition in 2002, one would still have to deal with the question whether they fully understood and appreciated what it all entailed, particularly with regard to compensation and the right to go back into the CKGR. On the available evidence, this information was not forthcoming from the relocation teams. The result would be that their consent would be vitiated by the fact that their minds were not ad idem with those of the agents of the Respondent.

126. On the evidence discussed, above I come to the conclusion that the Applicants were deprived of such possession by the Government wrongly and without their consent.

D.(i) Whether the Government's refusal to issue special game licences to the Appellants is unlawful and unconstitutional?

127. According to the evidence of Mr Matlhare, DW2, the DWNP decided to stop issuing Special Game Licences (SGLs) to the residents of the CKGR upon learning that the Government had decided to cease provision of services in the CKGR. It would appear this decision to stop issuing SGLs was taken purely in sympathy with the Government's decision which Mr Matlhare considered was binding on him, and for no other reason. DW1, Jan Broekhuis told the Court that DWNP would not do anything that would go against policy.

128. There is no doubt that it was the view of both Mr Broekhuis and Mr Matlhare that the issuing of SGLs was, as much a service as the provision of water, medical facilities, etc. While it is true that SGLs were issued in accordance with Government policy, it is also true that they were issued pursuant to the provisions of the Wildlife Conservation and National Parks Act (Cap. 38:01). It therefore follows that if a decision had to be taken, not to

issue SGLs and to withdraw them, it had to fall within the purview of the said Act.

129. The authority to issue the SGLs is to be found in the following provisions of the Act:

> "30 (1) Regulations made under this Act may provide for the issue of special game licences in respect of any animals other than protected game animals to citizens of Botswana who are principally dependent on hunting and gathering veld produce for their food… (Underlining mine)

130. Regulation 45(1) and (2) of the National Parks and Game Reserve Regulations was promulgated pursuant to section 30 provides as follows in respect of the CKGR residents:

> "45(1) Persons resident in the Central Kalahari Game Reserve at the time of the establishment of the Central Kalahari Game Reserve, or persons who can rightly lay claim to hunting rights in the Central Kalahari Game Reserve , may be permitted in writing by the Director to hunt specified animal species and collect veld products in the game reserve and subject to any terms and conditions an in such areas as the Director may determine:
>
> Provided that hunting rights

contained herein shall be by means specified by the Director in the permit by those person listed therein." (Underlining mine)

131. Section 30 of the Act recognises the need for citizens of this country, who are largely dependent on hunting and gathering, to be afforded the opportunity to hunt for their sustenance, but it also recognises the need to control their hunting, so that wildlife and veld products may be used sustainably. In order to achieve the above objectives, the Regulation gives the Director the authority, to issue Special Game Licences to residents as he determines their need for licences. He can impose conditions that he considers desirable to maintain the appropriate equilibrium, between the needs of the residents of the CKGR and conservation of wildlife in the CKGR.

132. The abovequoted provisions, give the Director the discretion as to the number of SGLs he can issue, depending on the conclusion he has reached after balancing the different interests. The discretion bestowed upon the Director has to be exercised reasonably and not whimsically. He must not be

influenced by the factors extraneous to the legislation from which he derives his power.

133. From the evidence of both Mr Matlhare and Mr Broekhuis the sole motivator for refusal to issue SGLs, was the fact that Government took a decision to terminate services and the DWNP felt automatically bound to follow suit. No consideration was given to the empowering legislation at all. The Director did not exercise his discretion at all, let alone exercising it reasonably.

134. In the circumstances I have no hesitation in coming to the conclusion that the refusal to issue SGLs was unlawful for the reason that it was ultra vires the empowering legislation.

135. Was the refusal to issue SGLs unconstitutional? Section 30(1) of the Wildlife Conservation and National Parks Act provides for SGLs to be issued to those citizens of Botswana who are principally dependent on hunting and gathering veld products.

The provision was made with the realisation that hunting was a major component of their source of food.

136. The evidence before this Court was that, when the issuing of SGLs was stopped, it coincided with the termination of services to the settlements in the CKGR. The services that were terminated, included the supply of food rations. The withdrawal of food rations and the stopping of issuing SGLs meant that those of the residents of the CKGR who did not relocate, were left to rely only on veld products, yet history shows that hunting has always complimented veld products, to meet their nutritional needs.

137. In my view, the simultaneous stoppage of the supply of food rations and the issuing of SGLs is tantamount to condemning the remaining residents of the CKGR to death by starvation.

138. In the circumstances, I find that, not only is the refusal to issue SGLs to the Applicants ultra vires the Wildlife Conservation and

National Parks Act, but it also violates the Applicants' constitutional right to life.

Vide: section 4(1) of the Botswana Constitution which provides as follows:

> "4(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted."

D(ii) Whether the Government's refusal to allow the Applicants to enter the Central Kalahari Game Reserve unless they were issued with a permit is unlawful and unconstitutional?

139. When the CKGR was proclaimed a game reserve, the Applicants and their ancestors, from whom some of them inherited the right to live in the CKGR were already resident in the CKGR. The Proclamation declaring the game reserve contained a section that made it a requirement for all persons entering the reserve to obtain a permit. Although the Applicants were already resident in the reserve, they were not excepted from obtaining a permit by the proclamation. The Government of the day however, did not insist on them complying with the

provision of the Proclamation until 1963 when the CKGR (Control of Entry) Regulations 1963 were promulgated. These regulations were produced in evidence as Exhibit P44 (in Bundle 1A page 323). Regulation 3(1) provides as follows:

> "3(1) No person other than a Bushman indigenous to the Central Kalahari Game Reserve shall enter the said Reserve without having first obtained a permit in writing from the District Commissioner, Ghanzi."

140. The Regulation restored the free movement which the Applicants had always enjoyed in and out of the CKGR. From then onwards, the Applicants have never been required to obtain entry permits into the CKGR, until after the Presidential Directive (Exhibit P96 in Bundle 2C page 129) issued in October 2002 after the 2002 relocations. The Presidential Directive stated inter alia that:

> "(b) The National Parks regulations be strictly enforced within the CKGR. This should be reinforced by regular patrols within and along the CKGR boundaries by Department of Wildlife and National Parks;
>
> ...
>
> (d) The following strategies be employed to help retain people in the new settlements:

(i) Special Game Licenses for domestic purposes be exclusively issued to "resident" Kaudwane and New Xade members of the Community for hunting in the wildlife management area;

(ii) All those people who have relocated and were compensated should not be allowed to resettle in the CKGR."

141. This was the first time ever, that the residents were denied entry into CKGR on the ground that they did not have an entry permit. Both the British Government and the Botswana Government have always recognised the presence of the residents in the CKGR and allowed them free movement in and out of the reserve.

142. As discussed earlier in this judgment, services were provided for them at settlements inside the reserve.

143. It is also to be noted that, when the Government decided on a policy to resettle the residents of the CKGR outside the reserve,

it was predicated on the premise that, the residents would be persuaded but not forced to relocate. That connotes an acceptance on the part of Government that, those who were unwilling to relocate were entitled to remain in the CKGR. The acceptance by the Government, is consonant with all the Fauna Conservation legislation, to the present day, from the time of the creation of the CKGR as a game reserve, which has always recognised that there were Bushmen who are permanently resident in the reserve.

Vide: The Wildlife Conservation and National Parks Act (Cap 38:01) provides at section 94(1) and (2) as follows:

> "94. (1) The Fauna Conservation Act and the National Parks Act are hereby repealed.
>
> (2) Any subsidiary legislation made under and in accordance with the provisions of the Fauna Conservation Act or the National Parks Act shall continue of force and effect as if made under the provisions of this Act, to the extent that it is not inconsistent with such provisions, until revoked or amended by or under this Act."

144. The aforequoted section repeals the previous fauna legislation,

but saves the subsidiary legislation promulgated under the previous legislation, whose main theme was to acknowledge that the permanent residents of the CKGR required no permit to enter or remain in the CKGR, starting with the 1963 CKGR (Control of Entry) Regulations.

145. It is contended on behalf of the Applicants that, at the date of relocation in 2002 the Applicants had a legal right to reside in the CKGR. At page 288 of the Applicants' submissions paragraphs 839, 839.1 and 839.2 learned Counsel for the Applicants submitted as follows:

> "839. We will submit that the Applicants had at the date of their removal and have still a legal right to occupy and use the CKGR.
>
> 839.1 As a matter of common law, by virtue of their long and uninterrupted possession of the lands now comprised in the Reserve.
>
> 839.2 As a matter of constitutional law, under section 14 of the Constitution."

146. Counsel submitted in support of the first ground that the

Applicants' ancestors occupied the area where the CKGR is, prior to 1885, when Botswana became a British Protectorate and therefore the Applicants' rights to occupy the CKGR pre-existed, both the proclamation of Crown land and of game reserve. He argued these pre-existing rights could have been extinguished by the British or Botswana Governments, but neither of them did so, hence those rights still exist even to-day.

147. Learned Counsel for the Respondent contended that the Applicants had no rights whatsoever to be in the CKGR. At pages 214-215 of his written heads, paragraphs 235, 235.2, 235.3 and 235.4 he says:

> "235. Our respectful submission is that no rights such as are contended for, indeed any other rights akin to them, exist.
>
> 235.2 Applicants have not acquired ownership to the Central Kalahari Game Reserve by operation of prescription or any other basis;
>
> 235.3 The legislation relied on accord no rights to the Applicants to either live in, enjoy uncontrolled access to the Game

Reserve, nor to be able to hunt in it;

235.4 The occupation of the Reserve by the Applicants, past and current as the case may be, was and remains illegal. The same goes for their cultivation of crops, and the keeping of domestic animals within the Reserve.

148. The submission about the acquisitive prescription is totally misconceived because, in terms of section 14 of the Prescriptions Act (Cap. 13:01) prescription does not run against the State. The argument, therefore, does not merit further comment, save to mention that, I do not understand the Applicants to base their case on acquisitive prescription, but on pre-existing native rights that have hitherto not been extinguished.

149. The contention on behalf of the Respondent to the effect that, legislation does not confer any rights to the Applicants to either live and enjoy unlimited access to the CKGR ignores clear provisions of the Wildlife Conservation and National Parks Act (Cap. 38:01). Section 14(c) contemplates the presence people

in a game reserve permanently. It provides as follows:

> "14. Regulations made by the Minister under section 92 may, with regard to game reserves, sanctuaries and private game reserves, or any one such reserve or sanctuary, or any part thereof, include the following –
>
> …
>
> (c) the control of persons who…are therein, either permanently or temporarily."

150. Regulations 18(2) and 45(1) of the 2000 Regulations make provision for communities residing in game reserves including the CKGR. They provide as follows:

> "18. (2) Community use zones shall be for the use of designated communities living in or immediately adjacent to the national park or game reserve."

> "45(1) Persons resident in the Central Kalahari Game Reserve at the time of the establishment of the Central Kalahari Game Reserve, or persons who can rightly lay claim to hunting rights in the Central Kalahari Game Reserve, may be permitted in writing by the Director to hunt specified animal species and collect veld products in the game reserve and subject to any terms and conditions an in such areas as the Director may determine:
>
> Provided that hunting rights

contained herein shall be by means specified by the Director in the permit by those person listed therein." (Underlining mine)

151. All the above provisions indicate that Government accepted that there are people who are permanently resident in the CKGR. I therefore find that the contention that the occupation of CKGR by the Applicants is unlawful, untenable and reject it. I have already held that the Applicants' residence in the CKGR is lawful and I hold that their residence in the CKGR is also lawful even on this account.

152. I now turn to consider whether denying the Applicants entry into the reserve without a permit is unlawful and unconstitutional.

153. Section 14(1) of the Constitution guarantees every person freedom of movement throughout Botswana. It provides as follows:

> "14. (1) No person shall be deprived of his freedom of movement, and for the purposes

of this section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana."

154. The freedom of movement is, however, not absolute. It is qualified by the derogation provisions that occur in subsections 2 and 3 of section 14. They provide as follows:

> "2. Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
>
> 3. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> …
>
> (c) for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen."

155. It is submitted on behalf of the Applicants that the CKGR is a defined area as contemplated by section 14(3)(c) and

therefore, restriction of entry therein may not be applied to the Bushmen as they are excepted by the same subsection.

156. On the other hand, learned Counsel for the Respondent contends that no area in Botswana has ever been defined as contemplated by section 14(3)(c) and therefore the suggestion that the CKGR was meant to serve a dual purpose of providing a home for the Bushmen and protection for wildlife is incorrect.

157. I have reviewed in detail the correspondence that transpired between the Bushmen Survey Officer and the Government Secretary, other correspondence between British Government officials and debates of the Joint Advisory Council prior to the declaration of the reserve, all of which point to the fact that the declaration to the CKGR, was meant to serve a dual purpose. The CKGR was to provide a home for the Bushmen in which they could hunt freely and to protect wildlife which was a source of their food.

158. Subsequent to declaration of CKGR a game reserve, the 1963 CKGR (Control of Entry) Regulations made it very clear that the Bushmen to the CKGR were exempted from having to obtain a permit to enter the CKGR, while all other people required permits to enter the reserve. (See Bundle 1A page 323). This exemption of the Bushmen from requiring a permit into the CKGR found its way into the Constitution as section 14(3)(c).

159. The Westminster debates on the Botswana Independence Bill demonstrate how section 14(3)(c) of Botswana Constitution came about. They show that the provision was meant to ensure that the game reserve was available to the Bushmen, while other communities were prohibited from occupying the game reserve. (See Exhibit P79, Bundle 2B page 51B).

160. The conduct of Botswana Government shows that it accepted this section from the time of independence up to now. There have also been several amendments in the Fauna legislation, designed to facilitate the residence of the Bushmen in the

reserve. When the Government decided to relocate the residents outside, it took the route of persuasion as it appreciated that the Bushmen lawfully resided in the CKGR.

161. The next question for consideration is whether upon relocation Applicants have abandoned their rights to reside in the CKGR by virtue of an agreement they entered into with the Respondent?

162. Learned Counsel for the Respondent has also submitted that those of the Applicants who were paid compensation have relinquished possession of their settlements in the CKGR on the basis of an agreement with Government. In terms of that agreement they are not to go back to the CKGR. Government has honoured its part of the bargain and they have to honour theirs too. At page 222 of his submissions, learned Counsel states at paragraphs 241-244 as follows:

> "241. …The agreement that those of the Applicants who relocated would relocate was and remains binding on both. The obligations of

the Applicants there-under were that, assisted by the Government as the evidence has shown, they were to relocate from the CKGR and thereby to relinquish possession of settlements they previously occupied in the CKGR.

242. The Government's obligations were to facilitate the relocation as the evidence has shown, to pay compensation to those who registered to relocate, to give them a choice of 5 head of cattle or 15 goats, to allocate those who would accept it residential land in the village of their choice outside the Game Reserve, and to give plough land to those who requested it. As a special dispensation for a time and not an obligation under the agreement, Government gives each family a special game licence on application.

243. The Government has fulfilled all its obligations to all under the agreement, including to those such as PW5 and her husband who, in breach of the agreement, have returned to the Reserve without tendering return of Government's performance. In so far as their actions amount to repudiation of the agreement, Government rejects it. No complaint by any Applicant in terms that Government has failed to meet its end of the bargain is in evidence in this matter, nor has any been made anywhere.

244. Government will not accept any repudiation of that agreement…"

163. The evidence that has been led in this case generally indicates

that all those who were found to have property at the time of the 2002 relocations were compensated. It also suggests that such compensation was based on the assessment made by the assessment teams that were part of the relocation teams. It also appears that the compensation was for property which was either dismantled or abandoned. In addition to the pecuniary compensation relative to the above, those who were compensated were given the option to choose between being given five herd of cattle or 15 goats, to assist them in starting a new livelihood.

164. Although Counsel contends that there was an agreement between the relocatees and government, that once they were paid the above, they would forgo their claim to the CKGR and would not go back, there was no evidence to support the submission. None of the witnesses called gave evidence to that effect. On the contrary it would appear that some of the relocatees like Mongwegi (PW5), seemed to think that it was quite in order to receive compensation and then head straight

back to the CKGR. As a matter of fact there is evidence that even some of those who relocated earlier than 2002, went back to Mothomelo.

165. There is no evidence that at the time of relocation, or at any other time at all, the people who were relocating were made aware of the terms of the agreement Counsel is referring to. On the contrary there is evidence from Respondents witnesses, if they are to be believed, that they were not to say anything to the residents at the time of relocation. One would have expected those details of the agreement, to have been discussed then, particularly that it is suggested that some people decided at the last minute to relocate. They obviously would not have known of the terms and conditions of the agreement, unless they were explained to them at the time they suddenly decided to relocate.

166. The only documentary evidence, relative to the relocations is the assessment forms and the handwritten notes that were

attached to the forms. In a number of instances they contained very scanty information such as the particulars of an individual and nothing else. The handwritten notes only contained the particulars of property assessed.

167. The majority, if not all people who relocated were illiterate, judging by the fact that most of them thumbprinted the forms. One would have expected that there would have been a thorough explanation of the terms of the agreement that learned Counsel refers to. It should have been explained to them in clear terms, what the compensation was being paid for. It is not clear how it is alleged they signified their agreement to the conditions of the alleged agreement. In the circumstances I find no agreement has been proved.

168. I have earlier held that the Applicants were lawfully in the CKGR. It follows therefore that the provision of the Wildlife Conservation and National Parks Act that forbids entry into the reserve does not apply to the residents of the CKGR who are

permanently resident there. It also follows that refusal to allow the Applicants, who are part of the permanent residents of the CKGR, entry into the CKGR without permit is both unlawful and unconstitutional for the reason that it violates Applicants' rights of freedom of movement guaranteed by section 14(1) of the Constitution.

169. On the issue of costs, I have considered whether they should follow the event but decided against it because:

(1) I realised that this judgment does not finally resolve the dispute between the parties but merely refers them back to the negotiating table.

(2) The Respondent has already incurred considerable costs in financing the two inspections-in-loco conducted by this Court in the CKGR.

(3) Roy Sesana who is the main litigant elected not to participate in the trial of a cause he initiated, but resorted to litigating through the media while the matter was still sub judice. This he persisted in despite advice from his Counsel.

170. In the circumstances I am of the view that the Court should express its displeasure by denying the Applicants the costs on the four issues in which I found for them. They will also not pay the costs on the two issues in which I found against them. I therefore order that each party shall pay its own costs.

DELIVERED IN OPEN COURT AT LOBATSE THIS WEDNESDAY THE 13TH DAY OF DECEMBER 2006.

M P PHUMAPHI
[JUDGE]