REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 27682/10

DATE:22/09/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

EMMANUEL TSEBE	First Applicant
SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA	Second Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
MR GEORGE MASANABO, ACTING DIRECTOR OF DEPORTATIONS	Third Respondent
MS ANN MOHUBE, ACTING DEPUTY DIRECTOR, LINDELA HOLDING FACILITY	Fourth Respondent
MR JOSEPH SWARTLAND, ASSISTANT DIRECTOR, LINDELA HOLDING FACILITY	Fifth Respondent

BOSASA (PTY) LTD t/a LEADING PROSPECTS TRADING	Sixth Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Seventh Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Eighth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Ninth Respondent

AND

CASE NO: 51010/10

In the matter between:

JERRY OFENSE PITSOE (PHALE)	Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
BOSASA (PTY) LTD t/a LEADING PROSPECTS TRADING	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

J U D G M E N T

THE COURT:

INTRODUCTION

[1] We have before us two applications, each having a counter-application. The first application is in Case No. 27682/10 and the second in Case No. 51010/10. We will refer to the first application as the "*Tsebe*" case and the second as the "*Phale*" case.

[2] The Tsebe and Phale applications have been consolidated as the claims and counter-applications in both matters are substantially identical.

[3] Both applications concern the obligations of the South African State under the Constitution, Act 108 of 1996, read with international law, regarding the extradition or deportation of a foreign national who is also a fugitive of justice to a State where he or she is at risk of being subjected to the death penalty. The applicants contend that under the Constitution no removal of any sort may occur in such circumstances whereas the respondents contend the contrary. The matter, therefore, concerns the relationship between two African states, The Republic of South Africa ("the RSA") as the requested state and the Republic of Botswana ("Botswana") as the requesting state. It will require an interpretation of the extradition treaty in existence between the two states as well as their respective constitutions and domestic laws coupled with an appropriate application of international law.

[4] The applicants contend that the Constitutional Court in **Mohamed and Another v President of the RSA and Others** 2001 (3) SA 893 (CC) ("*Mohamed*") has ruled that an absolute bar exists against any person being extradited or deported from South Africa to another country where a death penalty is a real risk. The respondents on the other hand contend that *Mohamed* is distinguishable on the facts thus permitting extradition and/or deportation to take place in the circumstances of this case.

THE PARTIES

[5] In the *Tsebe* case there are two applicants. Emmanuel Tsebe is the "first applicant" and the Society for the Abolition of the Death Penalty in South Africa is the "second applicant". The second applicant was granted leave to intervene by order of court.[1]

[6] The Minister of Home Affairs is the first respondent and the Director-General: Department of Home Affairs is the second respondent in both the *Tsebe* and *Phale* cases. In the *Tsebe* case, Bosasa (Pty) Ltd t/a Leading Prospects Trading, the Minister of Justice, the Minister of International Relations and Cooperation and the Government of the Republic of South Africa are respectively the sixth, seventh, eighth and ninth respondents whereas in the *Phale* case they are respectively the third, fourth, fifth and sixth respondents. Bosasa (Pty) Ltd and the Minister of International Relations and Cooperation have elected to abide the decision of the court in both instances.[2]

[7] In the *Tsebe* case Mr George Masanabo, the Acting Director of Deportations, Ms Ann Mohube, the Acting Deputy Director of the Lindela Holding Facility and Mr Joseph Swartland, the Assistant Director of the Lindela Holding Facility were cited as the third, fourth and fifth respondent respectively.

[8] All the respondents save those mentioned in paragraph [6], gave notice of intention to oppose the applications.

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1 See the order of Claassen J dated 9 February 2011 pages 45/6 of the second applicant's application to intervene under Case No. 27682/2010, commencing after page 726 in the record. The Index in Volume 2 of the *Tsebe* case refers to this application as item 25.

2 In the *Tsebe* case, see record pages 60, 61 and 61i; In the *Phale* case see page 189iii in respect of the 5th respondent. The 3rd respondent filed no opposition to the *Phale* application.

[9] Mr. Katz SC with Messrs Du Plessis and Lewis, all from the Cape Bar, appeared for Messrs Tsebe and Phale. Mr S Budlender with Mr Brickhill, both from the Johannesburg Bar, appeared for the Society for the Abolition of the Death Penalty. Mr Schippers SC with Ms Mayosi, both from the Cape Bar, appeared for the Minister of Home Affairs and the Minister of International Relations and Cooperation. Mr Donen with Ms Poswa-Lerotholi, also from the Cape Bar appeared for the Minister of Justice and Constitutional Development and the Government of South Africa.

[10] During argument, counsel for all the parties agreed that nothing turns on the application to condone the late filing of documents instituted by the first and second respondents.[3] The court can, therefore, accept that all documents are properly before it.

[11] The facts giving rise to the present application are either common cause or not seriously in dispute. The documents and annexures attached to the affidavits speak for themselves and sometimes louder than the deponents! Thus, no credibility issues arise. This is so due to the fact that the real disputes between the parties are legal in nature concerning the proper interpretation of various statutory instruments and the applicable case law.

CHRONOLOGY OF FACTS IN THE *TSEBE* APPLICATION

[12] Mr Tsebe was a Botswana citizen. He died on 28 November 2010, prior to the hearing of this application.[4]

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[3] See the *Phale* application, record page 481.

[4] See Annexure "GS1", the Death Report from Correctional Services, Krugersdorp, record page 614.

[13] In view of the fundamental public importance of the issues at stake, all parties and their representatives agreed that the application raised live issues, which should be heard and determined. This court has a discretion to hear questions of law which are likely to arise again as the questions in this case surely would. The applications raise important constitutional issues affecting inter state relations in regard to extradition of fugitives of justice and cannot, therefore, be regarded as moot.[5] In any event, the counter-applications are live issues, which have to be determined, including the costs occasioned by the applications and counter-applications.

2008

[14] Mr Tsebe was charged with having brutally murdered his common-law wife on 21 July 2008 by assaulting her with a machete and a stick in Botswana in contravention of section 202 of the Botswana Penal Code. The pathologist, who conducted the *post mortem* examination, concluded that she died of chop wounds to her head. The gruesome photographs in the papers, amply confirm this conclusion.[6] The Botswana Public Prosecutor issued a warrant for his arrest, on 30 July 2008.[7]

[15] In Botswana the death penalty may be imposed if an accused is convicted of murder without extenuating circumstances.[8]

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5 See paragraph 3 of Gina Snyman's replying affidavit, record page 546; the second applicant's founding affidavit in its intervention application at paragraph 11, record page 13. See also **Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie** 2005 (4) SA 506 (SCA) at paragraphs [5] to [7]; **MEC for Education, KwaZulu-Natal, and Others v Pillay** 2008 (1) SA 474 (CC) at paragraph [32].

6 6 See record pages 312 to 326.

7 See Annexure "JTR1", record page 230.

8 Sections 202 and 203 Division IV, "OFFENCES AGAINST THE PERSON", **Botswana Penal Code Chapter 08:01** state the following:

"202. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

203. (1) Subject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death.

[16] When the Botswana Police attempted to arrest Mr Tsebe he fled to South Africa. As such he is a fugitive of justice.

[17] He was arrested on 30 July 2008 by the South African Police on a farm in the Mokopane district, Limpopo. His first appearance in court occurred on 31 July 2008.[9] He remained in custody in Mokopane for more than a year until 26 August 2009.

[18] In a written "Apostile" dated 19 August 2008 issued under the Convention De La Haye of 5 October 1961, the Principal Prosecuting Counsel, Mr Merapelo Mokgosi acting under delegated authority from the Botswana Director of Public Prosecutions, Ms L.I. Dambe, formally applied via the appropriate diplomatic channels, for the extradition of Mr Tsebe to Botswana.[10] On 28 August 2008 the Department of Foreign Affairs forwarded this extradition application to the Director-General of the Department of Justice and Constitutional Development. [11]

[19] Thereafter on 11 November 2008 Mr M E Surty, the then Minister of Justice, responded to the request in the following terms:

> "Kindly be advised that I have carefully considered the request for the extradition of Mr Tsebe from the Republic of South Africa to the Republic of Botswana in order to stand trial on a charge of murder. Taking into consideration that the death penalty is the prescribed sentence upon a conviction on a charge of murder, and that no undertaking was attached to the request by the Directorate of Public Prosecutions, which undertaking should state that the Prosecution will not seek the death penalty and, if it is imposed,

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(2) Where a court in convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death.

(3) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of any ordinary person of the class of the community to which the convicted person belongs."

See record page 300.

9 See Annexure "JTR8", record page 343.

10 See record page 246 as read with Dambe's affidavit, paragraphs 4 and 5 at page 259 of the record. These documents from part of the extradition application, record pages 244 to 326.

11 See record page 243.

> it will not be executed**, I cannot order the surrender of Mr Tsebe to Botswana if found extraditable[12].**
>
> Although the request is yet to be placed before the magistrate who is to do an enquiry, it is advisable to have an undertaking before the magistrate makes a finding as to whether Mr Tsebe is extraditable, or not. This will assist us to process the extradition timeously if the magistrate were to find Mr Tsebe extraditable.
>
> It would be appreciated if the honourable minister can facilitate the making of the said undertaking."[13] [Emphasis added]

[20] Ultimately on 11 December 2008 an extradition enquiry commenced before magistrate Ms A. Swanepoel in the Mokopane Magistrates' Court.[14]

2009

[21] After a number of postponements of the enquiry, the magistrate found on 11 March 2009 that Mr Tsebe is liable to be surrendered to the Republic of Botswana.[15]

[22] In response to the letter by Mr Surty dated 11 November 2008, the Minister for Defence, Justice and Security of Botswana, Mr D.N.Seretse, replied in a letter dated 20 May 2009 as follows:

> "The Department of Justice of the Republic of South Africa has been informed **on a number of occasions** that the **Cabinet of Botswana** has **decided** that no such undertaking shall be made as there is no such provision in our laws or the treaty between the two countries to that effect." [Emphasis added]

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[12]12 Section 11(b)(iii) of the Extradition Act 67 of 1962 also provides that the Minister may order that a person shall **not** be surrendered if in all the circumstances of the case it would "be unjust or unreasonable **or too severe a punishment to surrender the person concerned**". Similarly, Article 3(1) of the Convention against Torture provides as follows:

> "No State party shall expel, return ('refouler') or extradite a person to another State where there **are substantial grounds for believing that he would be in danger of being subjected to torture.**"

[13]13 See Annexure "JTR7" record page 341.

[14]See record page 344.

[15] See Annexure "JTR8", record page 385.

The letter also requested a meeting to discuss this matter further with the current Minister of Justice, Mr Radebe.[16] It may be noticed, at this early stage already, that an executive "decision" seems to have influenced the independence of the prosecution in Botswana as to whether or not it should ask for a death sentence to be imposed in the event of *Tsebe's* conviction. We will return to this aspect at a later stage in this judgment.

[23] Recognising the conundrum caused by this stalemate between South Africa and Botswana, the following observations were recorded in an inter departmental memorandum addressed to the seventh respondent dated 9 June 2009 regarding Mr Tsebe[17]:

> "13.14 On a number of occasions officials in the Ministry for Defence, Justice and Security of Botswana have expressed the view that the undertaking undermines the legal system of Botswana. **On the other hand, if South Africa does not request an undertaking, the South African legal system will also be undermined.** In practice this issue, which is often encountered with other countries still to abolish the death penalty, is always addressed by the Department by requesting an undertaking from the requesting State. **Requesting States generally provide undertakings. This is the practice across the globe since a compromise is the only way to deal with the issue. Perhaps a permanent solution would be to amend the Treaty to provide for such an undertaking."** [Emphasis added]

[24] A meeting was arranged for 14 July 2009 at the offices of the seventh respondent in Pretoria. Confirmation of what was discussed between the parties appears in a letter written by the seventh respondent dated 4 August 2009 to Mr D.N. Seretse. In this letter the seventh respondent records the following:

> "You will recall that after discussing possible ways of assisting your Government regarding the above request, it was agreed that the Government of South Africa will not be in a position to extradite Mr Emmanuel Tsebe to your country to stand trial on the charge of murder because your Government cannot make the required undertaking to the Government of South Africa that your Prosecution will not seek the death penalty upon conviction of Mr Tsebe, and if it is imposed by the court, it will not be executed**. Furthermore, it was agreed that the Government of South Africa should prosecute Mr Tsebe before its own courts. It was further agreed that the**

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16 See Annexure "JTR9", record pages 392/3.

17 See Annexure "JTR10", record page 394 as read with paragraph 3.14 on page 401.

> **Extradition Treaty between the Government of South Africa and the Government of the Republic of Botswana be reviewed in line with modern trends.**
> At the present moment, the Government of South Africa does not have a legal mechanism to prosecute Mr Tsebe. We are considering the development of new legislation or amendment of existing legislation to give our courts extra-territorial jurisdiction over foreign nationals who cannot be surrendered to requesting States for reasons similar to that of the case pertaining to Mr Tsebe. However, the said legislation will apply to future requests. **Therefore, Mr Tsebe will be released by the Court since he cannot be surrendered to your country for the abovementioned reasons.** The Department of Justice and Constitutional Development and Home Affairs of the Government of South Africa will discuss as how best to resolve Mr Tsebe's stay in our country, or deportation to your country since he will be regarded an illegal immigrant upon his release**. This is a complex matter given our Constitutional Court judgment on deportation of persons sought for criminal prosecution to countries where they can be sentenced to death**."[18] [Emphasis added]

[25] The aforesaid view adopted by the seventh respondent is congruent with Article 6 of the extradition treaty in existence between South Africa and Botswana, which provides that:

> "Extradition may be refused if under the law of the requesting Party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested Party."[19]

[26] The Department of Justice and Constitutional Development commenced with the preparation of draft legislation conferring upon courts in South Africa jurisdiction in respect of offences committed outside the Republic for which extradition was requested in circumstances where the requesting State does not provide assurances that the death penalty will not be imposed or if imposed will not be carried out.[20] These recommendations were accepted by the seventh respondent on 6 August 2009. The contemplated draft legislation was designed to give effect to Article 5(c) of the Southern African Development Community ("SADC") protocol on extradition.[21] This subsection states the following:

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[18] See Annexure "JTR11", record pages 407/8.
[19] See Annexure "JTR2", record page 232.
[20] See Annexure "JTR14" dated 29 July 2009, record pages 423 to 427.
[21] See Annexure "JTR13", record page 410 as read with page 414.

> "Extradition may be refused in any of the following circumstances:
> (a) …
> (b) …
> (c) if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requested State shall, if the other State so requests**, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested**; … " [Emphasis added]

However, nothing concrete materialized in respect of such contemplated legislation. Presumably the reason for the termination of any further action in this regard is financial by nature.[22] In this regard it should be noted that territoriality of criminal law is not an absolute principle of international law. States do have a wide measure of discretion to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory.[23]

[27] In a letter dated 12 August 2009 Mr Seretse agreed to continue to engage with the South African Government "on the review of the extradition treaty…"[24]

[28] On 25 August 2009 the current Minister of Justice Mr J T Radebe issued an order repeating that Mr Tsebe is **not** to be surrendered to Botswana.[25] The next day, 26 August 2009, Mr Tsebe appeared in the Mokopane Magistrates' Court for the last time. On that date he was transferred to Lindela Holding Facility. At the Lindela Holding Facility, he was told by immigration officers that he was to be deported to Botswana.[26]

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[22]See paragraph 83.21 of the Minister of Justice's A/A in the *Phale* case at page 229 and paragraph [58] below.
[23]See the *Lotus* case 1927 PCIJ Reports, Series A no 10 at pages 18 to 20.
[24] See Annexure "JTR12", record 409.
[25] See Annexure "ET1" at page 36 of the record.
[26]See the F/A, paragraphs 37 and 38 as read with par 152 of the 7th respondent's A/A, record page 213, and par 60 of the 1st and 2nd respondents' A/A, record page 470.

[29] On 26 August 2009 a notification for the deportation of Mr Tsebe to Botswana as an "illegal foreigner" was issued by an immigration officer in the employ of the Department of Home Affairs.[27] This notification indicated that Mr Tsebe elected to appeal the deportation decision. On the same day a warrant for the detention of Mr Tsebe at Lindela Holding Facility was issued.[28] This detention was extended by court on 29 September 2009 for another 90 days.[29]

[30] On 22 December 2009 Dr N.C. Dlamini Zuma, the then Minister of Home Affairs, agreed to have Mr Tsebe deported.[30] For some unknown reason these threats and orders to deport were not immediately carried out although similar threats were repeated later on.

2010

[31] While still in detention at Lindela Holding Facility, Mr Tsebe obtained legal assistance from Ms Gina Snyman of Lawyers for Human Rights. On 14 May 2010 she addressed a letter to The Minister of Justice, Minister of Home Affairs, Director-General of Home Affairs, Director: Legal Services of Home Affairs and the Assistant Director: Lindela Holding Facility. The letter confirmed that Mr Tsebe had been detained for approximately 1½ years awaiting trial or possible extradition. She referred to the order issued by the Minister of Justice that he was not to be surrendered to Botswana. The letter continued:

> "Mr Tsebe has been detained at the Lindela Holding Facility in Krugersdorp since 26 August 2009, apparently without judicial process.
> Lindela is a holding facility for purposes of deportation, and is not authorised to detain for any other purpose, or to detain indefinitely. Moreover, because Mr Tsebe is not being detained for the purpose of deportation, he does not fall under section 34 of the Immigration Act 13 of 2002. In any case the Act only allows for detentions up to 120 days, and he has now been detained in

27 See Annexure "MA5", record page 519.
28 See Annexure "MA7", record page 522.
29 See Annexure "MA12", record page 528.
30 See Annexure "MA13", record page 534.

> excess of this legislated maximum period. Mr Tsebe is being detained at Lindela indefinitely and without any legal basis.
> We recognise that he has been accused of a serious crime, and upon conviction could be sentenced to imprisonment. However, without judicial process Mr Tsebe's continued detention at Lindela is indefinite, arbitrary and occurring outside the law. He further has a constitutional right to be informed of the reason for his detention, and to defend any charges brought against him.
> Kindly now advise us of what steps are being taken to ensure that Mr Tsebe is afforded his constitutional rights to due process, and judicial review of his detention to ensure that it is not continued outside of the law, arbitrarily and indefinitely." [31]

[32] On 8 June 2010 Ms Berdine Schutte replied on behalf of the Minister of Justice. This letter stated the following:

> "Our office forwarded a letter to the Department of Home Affairs indicating the position and advising them that Mr Tsebe not be deported. I've also spoken to officials of the Department of Home Affairs on several occasions.
> The matter is out of our hands. It is now for the Minister of the Department of Home Affairs to make a decision as to what is to happen with Mr Tsebe."[32]

It would seem as if the seventh respondent at this stage attempted to wash its hands from this issue and shift the responsibility elsewhere.

[33] In a letter dated 6 August 2010, the Director-General of Home Affairs informed the Director-General of the Department of Justice and Constitutional Development that Mr Tsebe would be deported. The letter states the following:

> "The Minister of Justice and Constitutional Development took a decision not to extradite Mr Tsebe as a result of the Botswana Government refusing to give an assurance that the death penalty would not be imposed should he be found guilty.
> The Minister of Home Affairs, after lengthy consultations with Home Affairs officials, has decided that Mr Tsebe should be deported to Botswana within the next few days as he remains a fugitive from justice and would not be eligible for status within the Republic of South Africa.
> We have therefore been instructed to carry out this instruction and to inform your Department."[33]

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31 See Annexure "ET2", record pages 37/8.
32 See Annexure "ET4", record page 42.
33 See Annexure "ET22", record page 115.

[34] In response to the letter of Ms Schutte dated 8 June, Ms Snyman once again wrote to all the respondents on 18 August 2010 wherein she recorded that Mr Tsebe was informed on 17 August 2010 in violation of the order from the Minister of Justice not to be surrendered to Botswana, "that he will be deported within 3 days". She referred the respondents to the decision in *Mohamed* where after she stated as follows:

> "In the circumstances we demand that all deportation proceedings against Mr Tsebe be immediately halted. We further record that we are in the process of the (sic) launching an urgent court application for the same…"[34]

[35] It is obvious that these threats of immediate deportation prompted Tsebe's legal representatives into action. On 19 August 2010 Victor J granted in this court an interim order wherein the first and second respondents were interdicted from deporting or in any other way causing the applicant to be returned to Botswana, pending the finalisation of an application to be launched by the applicant by no later than 27 August 2010.[35] The *Tsebe* application was indeed launched on 27 August 2010.[36]

THE RELIEF SOUGHT IN THE *TSEBE* APPLICATION

[36] During argument the relief sought by counsel for the first and second applicants was refined by abandoning certain of the prayers in the original notice of motion. Thus the relief currently sought is the following:

> "1. Declaring the deportation and/or extradition and/or removal of the applicant to the Republic of Botswana unlawful and unconstitutional, to the extent that such deportation and/or extradition and/or removal be carried out without the written assurance from the Government of Botswana that the applicant will not face the death penalty there under any circumstance;

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34 See Annexure "ET5" record pages 43/4.

35 See Annexure "ET6", record page 47.

36 See the registrar's date stamp on page 1 of the record.

2. Prohibiting the respondents from taking any action whatsoever to cause the applicant to be deported, extradited or removed from South Africa to Botswana until and unless the Government of the Republic of Botswana provides a written assurance to the respondents that the applicant will not be subject to the death penalty in Botswana under any circumstances;
3. Directing the first and second respondent and any other party who opposes the relief sought herein to pay the applicants' costs inclusive of the cost of two counsel."

THE *PHALE* APPLICATION

[37] The relief sought in this application is similar to that sought in the *Tsebe* application. The only difference is that it relates to a different person, being Mr Phale.

CHRONOLOGY OF THE FACTS

[38] Mr Phale was born in Mochudi, Botswana on 15 August 1970. His mother, Elsie Phale, married his stepfather Ramontsho Phale whose surname was given to him at his birth. His mother never married his biological father Johannes Baloyi. His biological father was a Tsonga and was born in South Africa. Baloyi fled to Botswana as an adult during the Apartheid years where he worked as a teacher.

[39] During or about 1988 when he was approximately 18 years old, Mr Phale came to what was then known as "Bophuthatswana" in the RSA and took up residence with his mother's cousin Lizzie Pitsoe, who informally adopted him. Since then and while in South Africa he only used the surname Pitsoe and not Phale. He alleges to have many relatives in South Africa on his father's side and that he always had close ties with South Africa. In 1988 with the assistance of his aunt Lizzie he was issued with an identity document under the former homeland government of Bophuthatswana.

[40] Mr Phale alleges that sometime between 1992 and 1994 when he was working on the mines in Rustenburg, he "traded in" his "homeland" identity document and was issued with a South African identity book. He voted as a South African in the 1994 elections and subsequent elections. His South African identity book is currently in the possession of the police.

[41] During 1996 he returned to Botswana after his brother was murdered. His mother asked him to return permanently to Botswana for safety reasons. He did not comply with this request and instead travelled between Botswana and South Africa on a regular basis.

[42] During October 2009 he was accused of committing a murder in Botswana in contravention of section 202 of the Botswana Penal Code. It was alleged that he murdered his former lover. On 1 October her decomposed body was found in Marula lands, about 35 kilometres from Francistown. Inside her car was found her clothing and a passport in the name of Mr Phale. Fearing that he would not receive a fair trial and not being able to afford an attorney, he fled to South Africa when the Botswana police attempted to arrest him.

[43] On 8 November 2009 he was arrested while at a church service in Moria, Tzaneen, by some of his co-church members who handed him over to the South African Police in Mankweng, Limpopo. He was arrested without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977. On 10 November he appeared in the Mankweng Magistrates' Court. He appeared in that court four times. On 2 March 2010 he was informed that the criminal case against him is withdrawn.[37] Despite such withdrawal he remained in custody. On 15

[37] See page 266 of the record.

April 2010 he was transferred to Lindela Holding Facility where he has been held in custody ever since.

[44] Unbeknown to the applicant a request was issued by Interpol for his arrest under the name of "Mr Phale".[38] Interpol indicated that he was to be informed that he was arrested under article 15 of the extradition agreement in existence between Botswana and South Africa. This request was issued on 10 November 2009 and addressed to the Station Commander of the Mankweng Police Station. Interpol requested his "provisional arrest". Attached to the documents was a copy of his passport indicating that he was a Botswana citizen.[39]

[45] At the request of the Directorate of Public Prosecutions in Botswana an application for his provisional arrest dated 10 November 2009 was attached to the Interpol documents.[40] At the hearing on 10 November 2009 Mr Phale was duly represented by a Mr Ramala. The lawfulness of his arrest was not put in issue and it was admitted that he was an illegal immigrant. For that reason there was no application for his release or for the granting of bail. He was remanded in custody until 20 November 2009 in anticipation of an extradition process.

[46] On 10 December 2009 in terms of a diplomatic Apostille a formal request by Ms Dambe, the Director of Public Prosecutions in Botswana was made for the extradition of Mr Phale.[41] The Department of International Relations and Cooperation forwarded this application to the Director-General of the Department of Justice and Constitutional Development under cover of a letter dated 22 December 2009.[42]

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38 See Annexure "JTR2", record page 268.
39 See record page 279.
40 See Annexure "JTR3" pages 273 to 283.
41 See Annexure "JTR6", record pages 296 to 298.
42 See Annexure "JTR5", record page 295.

[47] Mr Phale appeared again in the Magistrates' Court on 28 December 2009. He was represented by Mr Segooa. The Apostille containing the former request for his extradition was handed in to court as an exhibit and to the defence. Mr Phale's case was further remanded to 2 February 2010.

[48] In a letter dated 26 February 2010 addressed to the National Prosecuting Authority of South Africa, the Deputy Director of Public Prosecutions in Botswana intimated that **no assurance** that the death penalty will **not** be imposed by the President of Botswana, would be forthcoming.[43] The Minister of Justice alleges that he never requested such an undertaking in regard to the extradition of Mr Phale.[44] In the light of the aforesaid letter it was decided not to call an enquiry in terms of section 10(1) of the Extradition Act. And hence, when Mr Phale appeared in court again on 2 March 2010, the charge was withdrawn. The applicant was then discharged but not released from detention.

[49] The state of affairs in the *Phale* matter therefore took a similar turn to that in the *Tsebe* matter except for the fact that the citizenship of Mr Phale is in dispute. For purposes of this application the contention of the respondents will be accepted that Mr Phale is not a South African citizen but indeed a citizen of Botswana.

[50] On 22 July 2010 Mr Phale consulted with Ms Snyman of the Lawyers for Human Rights. Ms Snyman then addressed a similar letter to all the respondents as she had done in respect of Mr Tsebe, complaining of his indefinite and unlawful detention.[45]

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43 See Annexure "JTR7", record page 367.

44 See paragraph 32 of the A/A, record page 204.

45 The letter is supposedly attached as Annexure "JP3" but only the copy of the first portion of such letter appears at page 34 of the record. It will however be assumed that similar allegations as to the legality of the detention were made in that letter as the one written to the respondents in the Tsebe case.

[51] On 6 August 2010 Mr J N Labuschagne on behalf of the Ministry of Justice and Constitutional Development responded to the letter written by Ms Snyman. The letter contains the following:

> "If we understand your letter correctly, it seems to us that the criminal case against Mr Pitsoe in the Polokwane Court has been withdrawn. As such, there does not seem to be any court action pending against Mr Pitsoe in South Africa. On the same basis, we cannot find any indication that the Botswana Government has approached us for the extradition of Mr **Pitsoe.**[46] As a matter of fact, the indications contained in your letter seem to be that the Department of Home Affairs would want to deport him to Botswana. Deportation, as you are aware, is a matter that is vested in the Department of Home Affairs. Accordingly, I assume that the Minister of the Department of Home Affairs will take care of your representations and report back to you."[47]

[52] The applicant alleges that no further responses from the Department of Home Affairs were received by Ms Snyman. However, the charges of murder instituted against the applicant in Botswana are still pending.

[53] Mr Phale alleges that the attempt to deport him to Botswana is in fact a disguised extradition and therefore unlawful. Whether is so or not is in dispute but it is not necessary for the purpose of this application to resolve such dispute.

THE COUNTER-APPLICATIONS

[54] Counsel for the Minister of Justice, during argument, refined the relief sought in the counter-applications. The same relief is sought in the *Tsebe* and *Phale* counter-applications. The refined form of relief is contained in a draft order handed in by Mr Donen and reads as follows:

> "It is declared that the Minister for Justice and Constitutional Development is authorised by the Constitution of the Republic of South Africa 1996, read with the provisions of the Extradition Act No. 67 of 1962 (more particularly section 11 thereof) to order any person, accused of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State party to such agreement, and who has been committed to prison under section

[46] The reason for this statement is most likely to be found in the fact that all the documentation for extradition addressed to the DOJ &CD was in the name of "Jerry Phale" and not "Pitsoe".

[47] See Annexure "JP5", record page 36.

> 10 of the said Act, to be surrendered to any person authorised by such foreign State to receive him or her, notwithstanding that the extraditable offence for which extradition has been requested carries a death penalty under the law of that State, in circumstances where:
>
> (a) the Republic of South Africa has sought an assurance from the foreign State that the death penalty will not be imposed, or if imposed, would not be carried out; and
>
> (b) the foreign State has refused to provide such an assurance by virtue of provisions contained in its domestic law."

[55] In support of the aforesaid relief the Minister of Justice makes the following points:

1. Because the imposition of a death penalty remains a function of the judiciary in Botswana, any request by the Republic of South Africa for a death penalty assurance, involves foreign interference in the judicial process of the courts in Botswana and thus fetters the independence of such courts.
2. The Constitution of Botswana renders the Director of Public Prosecutions independent of control from any other person or authority and thus any assurance by the Executive of Botswana in relation to the death penalty will compromise the independence of the prosecution in Botswana.
3. The purpose of the declaratory relief sought is to permit the Executive of the Government of South Africa to exercise other foreign policy options over persons who find themselves in the position of Mr Phale and Mr Tsebe.

[56] It is further contended that the features of the present cases are distinguishable from the facts in the **Mohamed** case. The following features are relied upon in paragraph 83 [48] of the answering affidavit in the following terms:

> "83.1 The provisions of the Extradition Act stand to be applied in good faith in this matter and with reference to both the facts and the Constitution;

[48] See pages 222 to 230 of the record.

83.2 No provision of the Extradition Act or the Extradition Treaty, expressly prohibits the extradition of a fugitive for trial in a foreign State where a capital offence has been committed;

83.3 The present applicant is (as Mr Tsebe was) a national of Botswana who fled from justice in relation to a murder charge alleged to have been committed on a fellow-citizen of Botswana in Botswana;

83.4 The Government of Botswana wishes the alleged perpetrator to stand trial before its courts (that is in the territory where one of its citizens was unlawfully killed);

83.5 It is the sovereign right of Botswana to make the laws applicable for the conduct of such a trial, and to execute the laws in question;

83.6 Capital punishment is not impermissible under international law;

83.7 The Bill of Rights in the Constitution of South Africa has no direct extraterritorial effect and cannot interfere with the sovereign authority of Botswana;

83.8 The Bill of Rights binds the South African Government, even when it acts outside South Africa (subject to the consideration that such application does not constitute an infringement of the sovereignty of Botswana);

83.9 South Africa has an obligation to cooperate with Botswana in the prevention and combating of crime, and Botswana is likely to offer to reciprocate in respect of persons similarly wanted by the Republic of South Africa;

83.10 The Government of the Republic of South Africa (as a matter of policy) does not wish its country to be perceived as a haven for criminals committing capital offences in Botswana;

83.11 Because engagement between the Governments of Botswana and South Africa is governed by international law and operates on an international plain, it involves international politics, foreign policy considerations, securing the well-being of the people of South Africa and Botswana (primary functions of the Executive), as well as the interests of justice;

83.12 At all times before and after the surrender of the applicant, the executive will remain bound to act consistently with the obligations imposed upon it by the Bill of Rights. In exercising the permissive powers vested in me by section 11 of the Extradition Act and before reaching a decision whether or not to order the surrender of the applicant:

83.12.1 I will be required to pay due regard to the applicants' constitutional rights to human dignity, life and not to be treated or punished in a cruel, inhuman or degrading way;

83.12.2 I will also be required to consider the other material facts and circumstances referred to in his founding affidavit and the prohibition against the death sentence arising from the decision in S v Makwanyane and Another."

[57] A further "alternative remedy" to resolve the *impasse* suggested by the Minister of Justice was to involve the SADC Treaty by requesting its functionaries to resolve the issues.[49] Counsel for the Minister of Justice however abandoned this argument.

[49]See paragraph 83.14 at page 226 of the record.

[58] The Minister of Justice also relies upon the argument that the judicial process and the post-conviction processes for clemency or commutation of sentence by the President of Botswana are within the normal bounds of an open and democratic society. It is suggested that, if extradited, Mr Phale will be afforded all the normal human rights protection during his criminal trial in Botswana.

[59] Finally the Minister of Justice relies, rather vaguely, on the lack of funding and resources to accommodate any judicial process within the borders of South Africa in the event of Parliament passing legislation establishing extraterritorial jurisdiction in cases where crimes were committed by accused outside the borders of South Africa. [50]

[60] In order to deal with the various contentions advanced by the parties to the present litigation, it would be necessary to refer to relevant statutory and other instruments of law, which may have a bearing upon the ultimate decision in this case.

BOTSWANA AND THE DEATH PENALTY

[61] It should be noted that since its independence granted during 1966, Botswana has not presented with a good track record with regard to implementing death penalties. During the period between 12 November 1966 and 24 January 1998 no less than 32 persons were executed by hanging. During the period between 31 March 2001 and 1 April 2006 another six individuals were executed by death penalties.[51]

[62] Particularly regrettable was the case of *Mariette Bosch,* a South African woman, who was convicted of murder in Botswana and sentenced to

[50] See paragraph 83.21 at page 229 of the record.
[51] See Annexure "JTR15", record page 428 in the *Tsebe* application.

death. After her various appeals and a request for clemency addressed to the President were rejected, she made an application to the African Commission alleging a violation of various rights under the African Charter. On 27 March 2001 the Chairman of the African Commission wrote to the President of Botswana appealing for a stay of execution pending the final determination of her petition. Despite such request and on 31 March 2001, Botswana secretly executed her.[52] Despite the fact that the African Commission held Botswana not to have been in violation of the African Charter in doing so, it did conclude its report, in paragraph 52 thereof[53], in the following manner:

> "52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging **the evolution of international law and the trend towards abolition of the death penalty**. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty' and therefore encourages all states party to the African Charter to take all measures to refrain from exercising the death penalty." (Emphasis added)

[63] In the case of **Kenneth Good v Republic of Botswana**[54] the African Commission found that Botswana had violated articles 1, 2, 7.1(a), 9, 12.4, 18.1 and 18.2 of the African Charter. It further held that Botswana should take steps to ensure that sections 7(f), 11(6) and 36 of its Immigration Act conform to international human rights standards and in particular the African Charter. Furthermore, it ordered Botswana to provide adequate compensation for the losses Professor K. Good suffered as a result of these violations including remuneration and benefits he lost as a result of his unlawful expulsion and the legal cost he incurred during litigation in the domestic courts and before the African

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52 See *Tsebe* application, paragraph 97.8.1 of the R/A of Ms Snyman at page 581 of the record as read with pages 683 to 688 thereof.

53 See *Tsebe,* Annexure "GS4", record page 683 and paragraph 52 on page 687.

54 See *Tsebe,* Annexure "GS5", record pages 689 to 716.

Commission.[55] Despite the fact that Botswana is a signatory to the African Charter it indicated that it was **not** intending to implement the judgment. The Botswana Law Society referred to this intention as "regrettable". In so doing the Government of Botswana failed to respect its international human rights obligations.[56] At the time of the commencement of this case, no indication has been given in the papers of any change of heart on the part of the Botswana government in regard to its aforesaid stance on the issue.

[64] The International Federation for Human Rights conducted an in-depth international fact-finding mission to Botswana.[57] It investigated in depth the judicial system as well as the way in which the death penalty was carried out in Botswana. It interviewed a wide variety of Government officials, NGO's, practitioners and Parliamentarians.[58] In its report under the title "HASTY AND SECRETIVE HANGINGS" it noted a number of remarkable deficiencies in the judicial system of Botswana:

1. According to Mr Andrew Sesinyi, the Press Secretary of President Festus Mogae "only one person has been granted clemency after being sentenced to death in Botswana since the country attained independence in 1966".[59]

2. In regard to whether the right to a fair trial is violated by the system of *pro deo* counsel, it established that the low fees payable to such counsel resulted in *pro deo* cases being handled by inexperienced lawyers lacking skills, resources and commitments to handle such serious matters and this detrimentally affected the rights of the accused.[60]

55 See *Tsebe,* Annexure "GS5", record page 716.
56 See *Tsebe,* Annexure "GS6", record page 720.
57 See *Tsebe,* Annexure "GS3", record pages 646-682.
58 See *Tsebs,* record page 679.
59 See *Tsebe,* paragraph 3.2, record page 663.
60 See *Tsebe,* paragraph 3.4.2, record page 666.

3. It recorded the fact that national and international debates on the death penalty took place as a result of the execution of Marietta Bosch, the South African national, on 31 March 2001. Despite many legal and constitutional challenges levelled against the death penalty in the courts of Botswana, the removal thereof had not yet been successful.[61]

4. It found that the clemency procedure conducted by the Clemency Committee constituted an opaque process. It was an executive advisory body upon which *inter alia* the Attorney-General, the government's principal legal advisor, served as a member. It goes without saying that the ability of the Attorney-General to act independently from the president when clemency cases are under consideration is seriously compromised. This Committee is permitted by law to act even in the absence of members due to vacancies. The procedure in the Clemency Committee is not open to the public thus preventing any lawyer or members of the public to know the criteria and legal basis of the recommendations made by it to the President. The Government also habitually communicates the fact that a plea for clemency had been refused, only after the execution had been performed. In this respect the report concludes:

> "This complete opaqueness is a serious threat to due process and the administration of justice, and violates the right to seek pardon or commutation of the sentence, enshrined in Article 6, paragraph 4, of the ICCPR."[62]

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61 See *Tsebe,* paragraph 3.6, record page 670.

62 See *Tsebe,* paragraph 3.7.1, record pages 671 and 672.

[65] According to Amnesty International, 137 countries have abolished the death penalty. During 2007 twenty-four countries executed 1 252 people compared to 1 591 during 2006. Currently there are still more than 20 000 prisoners on death row across the world.[63] Despite these rather disheartening statistics, there does appear to be a worldwide decline in death penalty executions, presumably due to consistent activities of various anti-death penalty pressure groups and the effect of various international human rights instruments.

[66] Ironically and since 8 September 2000, Botswana became a signatory and a party to the Convention against Torture. So did South Africa.[64] It would, however, appear as if Botswana is not swayed by the international trend to abolish the death penalty nor by the consistent labour of the various anti-death penalty pressure groups.

[67] We would opine that extradition of the applicants to Botswana would be impermissible purely based upon its aforesaid track history in regard to the manner in which it has proven itself to be a flouter of human rights as far as the implementation of the death penalty is concerned. This past conduct by Botswana makes it a pariah state not synchronized with the majority of African countries that have either abandoned or are refusing to implement the death penalty. In our view justice and fairness demands that Botswana should not be the preferred choice to obtain extradition orders from the Republic in circumstances where its past conduct of secretive hangings has led to shock and outrage.[65] In addition, a requested state incurs responsibility if it has reasonable grounds to foresee that violation of human rights will occur in the

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63 See *Tsebe,* Annexure "JTR16", record pages 429 to 431.

64 See *Tsebe* Annexure "JTR17", record pages 433 and 434.

65 In the United States extradition was refused where it was held to be "blatantly unjust" to do so. See **Ahmed v Wigen** 726 F.Supp. 389, 411 (E.D.N.Y. 1989). In Canada courts have also applied this test. See **Canada v Schmidt**, [1987] 1 S.C.R. 500, 522 (per La Forest J). In **Ross v United States**, [1994] 93 Can. Crim. Cas. (3rd) 500, 538 (B.C.Ct. App.) Finch J said that it all comes down to the question whether the judges were "shocked" or "outraged" by the foreign system.

requesting state and, nonetheless extradites the criminal fugitives.[66] On this basis alone it would be permissible to grant the applications and dismiss the counter applications. However, in view of the importance of the issues at stake it is necessary to canvass them in the light of the domestic constitutional law for human rights and all other relevant statutory law, both national and international.

APPLICABLE STATUTORY AND OTHER HUMAN RIGHTS INSTRUMENTS

[68] A good place to start is to remind oneself of the supremacy of our Constitution. The relevant provisions of the **South African Constitution, Act 108 of 1996** are the following:

1. In section 1 of the Constitution it is stated that the Republic of South Africa is one, sovereign, democratic State founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the **supremacy of the Constitution and the rule of law.** It is an integral part of our constitutional law that courts in this country are bound to achieve and advance equality, human rights and freedom.

2. Section 2 states the following:

> "This Constitution is the supreme law of the Republic; law or **conduct** inconsistent with it **is invalid**, and the obligations imposed by it must be fulfilled." [Emphasis added]

The significance of this provision for present purposes is that any conduct by a state department purporting to act in terms of any law, which conflicts with the principles enshrined in the Constitution, is "invalid" and bound to be set aside by the courts.

[66] See "RECONCILING EXTRADITION WITH HUMAN RIGHTS" by John Dugard and Christine Van den Wyngaert, Vol 2 w92 A.J.I.L 187 (April 1998) at 191 *in fin.*

3. Section 7 states the following:

> "7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of **all people in our country** and affirms the democratic values of human dignity, equality and freedom.
> (2) The State **must** respect, protect, promote and **fulfil** the rights in the Bill of Rights.
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." (Emphasis added)

These provisions lay down unequivocally that the benefits of the Bill of Rights must be afforded to all people within the borders of South Africa, whether they are citizens or foreigners legally or illegally in the country. Messrs Tsebe and Phale cannot, therefore, be denied the protection of these benefits while they are still subject to the territorial sovereignty of our government. The duty to respect, protect, promote, fulfil and therefore pass on these benefits and protection to all and sundry, lays heavily on the South African government departments.

4. Section 8(1) states the following:

> "8(1) The Bill of Rights applies to all law, and binds the legislature**, the executive**, the judiciary and all organs of state." [Emphasis added]

This section demands unquestionably complete obedience by both government and the judiciary to the dictates of the Bill of Rights. The courts are the official watchdogs to ensure such compliance together with the other constitutional institutions such as the Public Protector etc. All government departments are obliged to direct their actions and decisions to comply with the dictates of the Constitution.

5. Section 9 provides as follows:

> "9(1) **Everyone** is equal before the law and has the right to equal protection and benefit of the law.
> (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including**…ethnic or social origin**,**…and birth**." [Emphasis added]

Without a doubt, this provision forbids any conduct that discriminates against people because of their ethnicity, birth or social origin. Hence, Messrs Tsebe and Phale, as ethnic citizens of Botswana may not be treated differently to any other person in South Africa if such treatment constitutes discrimination, directly or indirectly. To deny them protection against the death penalty will constitute a clear case of discrimination, since all other people in South Africa are indeed protected against such punishment in view of the interpretation given to the right to life by the Constitutional Court.[67]

6. Section 10 provides as follows:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

For purposes of this judgment, this provision obliges the Government of South Africa to respect and protect all people in South Africa even though they may be criminals, local or foreign, and treat them in order that their dignity as human beings will be respected and protected. This constitutional right is "inherent" to every human being, whether they are criminals or not.[68]

7. Section 11 provides:

> "Everyone has the right to life."

The effect of this right has been referred to above and undoubtedly protects Messrs Tsebe and Phale against execution by the imposition of a death penalty.

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[67] See **S v Makwanyane** 1995 3 SA 391 (CC)
[68] See paragraph [82] below.

8. Section 12 provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right –
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) **not to be treated or punished in a cruel, inhuman or degrading way**." [Emphasis added]

Section 12(1)(e) has been authoritatively held to be the cornerstone of the argument against permitting execution by death penalties. In South Africa it is regarded as a cruel, inhuman and degrading punishment.

9. Section 36 is the only limiting provision, which may come into play in order to permit law and/or conduct which otherwise is unconstitutional. It states:

> "36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ---
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve its purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

10. Section 39(1) provides that a court, when interpreting the Bill of Rights, **must** promote the values of human dignity, equality and freedom and **must** consider international law. Section 39(2) further provides:

> "When interpreting **any legislation**, and when developing the common law or customary law, every court, tribunal or forum **must** promote the **spirit, purport and objects** of the Bill of Rights." [Emphasis added]

[69] The **Extradition Act No. 67 of 1962** has the following relevant provisions:

1. In clause 1 the term "associated State" means any foreign State in respect of which section 6 applies.

2. As to persons liable to be extradited, Section 3 provides:

> "3(1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.
> (2) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

3. Section 9 of the Act provides for the holding of an enquiry before a magistrate as soon as possible after the arrest of a foreigner to determine whether or not such person is to be surrendered to the foreign state. Section 9(4) distinguishes between an enquiry in regard to someone from an associated state and one from a state other than an associated state. It states the following:

> "9(4) At any enquiry relating to a person alleged to have committed an offence –
> (a) in a foreign State other than an associated State, the provisions of section 10 shall apply;
> (b) in an associated State –

(i) the provisions of section 10 shall apply in the case of a request for extradition contemplated in section 4(1); and
(ii) the provisions of section 12 shall apply in any other case."

4. Summarised, section 10 prescribes what the magistrate holding the enquiry is to do where the arrested foreigner comes from a non-associated state **and** is also accused of having committed an offence. In such case the magistrate is to determine whether or not there exists "sufficient evidence to warrant a prosecution for the offence in the foreign state concerned". If such evidence does exist, the magistrate issues an order committing the foreigner to prison to await the Minister's decision whether to extradite or not. Where the magistrate is of the opinion that insufficient evidence exists, the person shall be discharged.[69]

5. Section 11 empowers the Minister to extradite a foreigner in terms of section 10 or to refuse to do so where criminal proceedings are pending against him/her or the foreigner is serving a sentence in South Africa. In addition, as a further alternative, subsection 11(b)(iii) entitles the Minister to refuse extradition "at all," or if he is of the opinion **that "for any other reason it would…be unjust or unreasonable or too a severe**

[69] "10(1) If upon consideration of the **evidence adduced at the enquiry** referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned **and**, in the case where such person is **accused of an offence**, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.
(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, **he shall discharge** the person brought before him.
(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report, as he may deem necessary."

punishment to surrender the person concerned." Subsection 11(b)(iv) relates to the Minister's powers in regard to the surrender of refugees and is not pertinently relevant to the present enquiry.[70]

6. Section 12 applies directly to the facts of this case. Section 12(1) is comparable in wording to section 10(1) save for the fact that section 12 deals with the extradition of a foreigner from an "associated State" as contemplated in section 9(4)(b) referred to above. Botswana is such an associated State by virtue of the Extradition Treaty[71] concluded with South Africa as contemplated in section 6 of the Act. In terms of section 12(1) the magistrate conducting the enquiry concerning a foreigner from an associated state who has committed an offence may surrender such person to such state subject to the provisions of subsection (2). In terms of this latter subsection the magistrate is given similar powers to that held by the Minister to refuse the extradition of a foreigner under section 11(b)(i) to (iv). This power to refuse extradition may only be exercised by the magistrate in the case where the foreigner hails from an associated state. It also provides for non-surrender where the offender is subject to criminal proceedings and the completion of serving a sentence in South Africa or "at

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[70] 11. The Minister may -
(a) order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her; or
(b) order that a person shall **not be surrendered**:
(i) …
(ii) …
(iii) **at all**, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interest of justice or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in a foreign State by reason of his or her gender, race, religion, nationality or political opinion.

[71] See *Tsebe,* Annexure "JTR2" at pages 231 to 241 of the record.

all". As a further alternative the magistrate is also empowered to refuse extradition if he/she is of the opinion **"that for any other reason it would…be unjust or unreasonable or too severe a punishment to surrender the person concerned."**[72]

[70] We are of the view that the principles and statutory provisions relating to the powers of deportation as provided for in the **Immigration Act No. 13 of 2002,** are not strictly in point to the facts of this case that concern extradition of a foreigner who is or is not to be surrendered to a requesting state to stand trial for a capital crime where such person may face a death sentence upon conviction. We will, however, return to the appropriateness of deportation of Messrs Tsebe and Phale when dealing with the respondents' contentions in this regard. [73]

[71] The **Constitution of Botswana** contains the following relevant provisions:

1. Section 7 provides as follows:

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

[72] 12(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(b)(ii) the magistrate finds that the person brought before him or her is liable to be surrendered to the associated State concerned, the magistrate shall, subject to the provisions of subsection (2), issue an order for his or her surrender to any person authorised by such associated State to receive him or her at the same time informing him or her that he or she may within 15 days appeal against such order to the Supreme Court.
(2) The magistrate may order that the person brought before him or her shall not be surrendered –
(a) …
(b) …
(c) **at all,** or before the expiration of a period fixed by him or her, or make such order as to him or her seems just if he or she is of the opinion that –
(i) by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interest of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, the unjust or unreasonable or too severe a punishment to surrender the person concerned; or
(ii) the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion."

[73] See paragraphs [95] to [97] below.

> (2) 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 authorises the infliction of any description or punishment that was lawful in a country immediately before the coming into operation of this Constitution."

Subsection (2) is obviously intended to qualify the prohibition against inhuman and degrading punishment. Presumably it is this saving provision upon which the Botswana government relies for its alleged lawful retention of the death penalty.

2. Section 51 deals with the Attorney-General in Botswana and section 51(3) provides as follows:

> "(3) The Attorney-General shall be the principal legal adviser to the Government."

1. Section 51A makes provision for a Director of Public Prosecutions:

> "51A(1) There shall be a Director of Public Prosecutions appointed by the President whose office shall be a public office and who shall be subject to the administrative supervision of the Attorney-General.
> (6) In the exercise of the function vested in him or her by subsection (3) of this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority:
> Provided that –
> (a) …
> (b) before exercising his or her powers in relation to cases considered by the Attorney-General to be of national importance, the Director of Public Prosecutions shall consult the Attorney-General."

2. In section 53 a prerogative of mercy is afforded the President to grant a convicted person pardon, a respite, a lesser sentence or to remit the whole or part of the punishment. Section 54 establishes an advisory committee on the prerogative of mercy. This section provides:

"54(1) There shall be an advisory committee on the prerogative of mercy which shall consist of –

(a) the Vice-President or a Minister appointed by the President by instrument in writing under his or her hand;

(b) the Attorney-General; and

(c) a person qualified to practice in Botswana as a medical practitioner, appointed by the President by instrument in writing under his or her hand.

(4) The committee may act notwithstanding any vacancy in its membership and its proceeding shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.

(5) Subject to the provisions of this section, the committee may regulate its own procedure.

55(1) Where any person has been sentenced to death for any offence, the President shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as he or she may require, to be considered at a meeting of the advisory committee on the prerogative of mercy; and after obtaining the advice of the committee he or she shall decide whether to exercise any of his or her powers under section 53 of this Constitution.

(2) The President may consult with the committee before deciding whether to exercise any of his or her powers under the said section 53 in any case not falling within subsection (1) of this section."

3. Section 95 determines the jurisdiction and composition of the high courts. What is singularly lacking is an unqualified statement of judicial independence of these courts. Section 95(1) provides as follows:

"95(1) There shall be for Botswana a high court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

[72] South Africa and Botswana concluded an **Extradition Treaty** during 1969.

[73] South Africa, Botswana and several other countries in Southern Africa concluded a **PROTOCOL ON EXTRADITION.**[74] The extradition treaty in existence between South Africa and Botswana is regarded as complimentary to the extradition protocol of the SADC.[75]

[74] **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** was entered into on June 26 1987.

1. Article 3 provides as follows:

> "1. No State party shall expel, return ('refouler') or extradite the person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purposes of determining whether there are such grounds, the competent authority shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

2. The evidence referred to above in paragraphs [61] to [67] constitute in our view proof of " a consistent pattern of gross, flagrant … violations of human rights" as contemplated in the above convention.

NATIONAL LAW

[75] We shall now proceed to discuss and evaluate the effect our national law has on the outcome of the two applications. In doing so we shall also deal with the parties' respective arguments regarding the interpretation and applicability of our constitutional jurisprudence. Thereafter we will

[74] See Annexure "JTR13" *Tsebe* case record pges 410 to 421.
[75] See article 19.

analyse and evaluate the effect of international law on the issues in these applications.

The right to life and the death penalty

[76] What follows here is an analysis of the right to life from a South African perspective, its importance within our constitutional framework, and its place within South Africa's international obligations. In doing so, we will also determine whether the South African authorities have limited the right to life of Mr Tsebe and Mr Phale by authorising the extradition in casu and whether such limitation is justified.

[77] The first step in addressing the constitutional right to life in this matter is to discuss its importance within South Africa's constitutional framework and to concentrate on its application within the realm of the death penalty.

[78] It is clear that the death penalty is completely unconstitutional and outlawed in South Africa. The Constitutional Court unanimously held in **S v Makwanyane** 1995 (3) SA 391 (CC) that the death penalty constitutes inhuman and degrading treatment, and that it cannot stand constitutional muster. Despite the clarity of **Makwanyane**, the respondents submit that the decision is not binding on this court for two reasons:

1. They submit that the decision in **Makwanyane** should not be "literally interpreted."
2. It is further argued that it did not deal with a situation where, as in this case, an assurance was called for and was refused. It was also argued that regard should be had to the context in which the decision had to be made.

[79] In response to this, we must point out that the nature in which **Makwanyane** binds this court owes not to the specific circumstances of the case but instead to the integral factor that has to be considered, namely the right to life in the face of the death penalty. The fact that the **Makwanyane** case did not deal with a situation of extradition in which an assurance was requested but refused, does not mean that its decision as to the unconstitutionality of the death penalty finds anything less than penultimate importance when considering the question surrounding the right to life of Mr Tsebe and Mr Phale.

[80] The respondents do not clarify their warning against a "literal interpretation" of **Makwanyane**. However, we do not see how one could, when deciding whether to limit the right to life, use any other interpretation. **Makwanyane** is absolute in its declaration that the death penalty is completely unconstitutional with no exceptions. If this is then to be the literal interpretation of this decision in contrast to a figurative interpretation thereof (whatever that may be), then we are bound thereby.

[81] This absolute binding nature of **Makwanyane** also disproves the respondents' assertion that the context in which it was decided has any effect on its relevance. The court in **Makwanyane** did not qualify its judgment by stating that extradition (whether coupled with an assurance or not) gives rise to any form of exception from its ruling against the death penalty. Furthermore, the only relevance of **Makwanyane** that the applicants wish to assert is its unqualified declaration of the unconstitutionality of the death penalty. The arguments of the respondents in this regard cannot refute this.

[82] The seventh and ninth respondents, in paragraph 106 of their heads of argument, claim that any prior decision to extradite the applicant will

only remotely be connected to his execution. We disagree.[76] The fact that the death penalty in *casu* may possibly be imposed in Botswana and not South Africa, does not mean that **Makwanyane's** decision of the unconstitutionality of the death penalty does not apply here. In this regard, the following dicta from **Makwanyane** is important:

> "Everyone, including the most abominable of human beings, has the right to life, and capital punishment is therefore unconstitutional."[77]

[83] Justice Mohamed furthermore stated the following in the **Makwanyane** judgment:

> "The death penalty sanctions the deliberate annihilation of life. As I have previously said, it 'is the ultimate and the most incomparably extreme form of punishment'…It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind."[78]

[84] It is clear that the Constitutional Court in this ruling did not intend on qualifying these statements. The court specifically refers to "everyone". It is clearly meant that this declaration on unconstitutionality shall apply to everyone who has rights under The Bill of Rights, which includes all persons within the territory of the Republic. Furthermore, this declaration of unconstitutionality is not limited to persons within the territory who face the death penalty at the hands of the South African executive only. The Constitutional Court intended to protect everyone to whom the South African Constitution applies from capital punishment in any manner or form that it may present itself. We are of the opinion that this includes protection from the imposition of the death penalty abroad.

[85] The Constitutional Court[79] went further and stated the following at paragraph [144]:

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[76] See further at paragraph [94] below.
[77] See paragraph [392] per Sachs J at page 521B.
[78] See paragraph [265]
[79] Per Chaskalson P

> "**The rights to life and dignity are the most important of all human rights**, and the source of all other personal rights in chap 3. by committing ourselves to a society founded on the recognition of human rights **we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals**." [Emphasis added]

[86] The Constitutional Court importantly stated here that South Africa is required to value the right to life in "everything that it does". This certainly requires the right to life to be respected when the State decides whether or not to extradite a person in the circumstances that we now face, thus confirming **Makwanyane's** relevance and importance to the matter at hand.

[87] In addition to the absolute outlawing of the death penalty in **Makwanyane**, it was also held in **Mohamed and Another v President of the RSA and Others** 2001 (3) SA 839 (CC) that such prohibition also affects the extradition of foreigners to countries where the death penalty is still applied.

[88] In **Mohamed**, the first applicant faced extradition to the United States of America to be prosecuted for his involvement in the bombing of two USA embassies, one in Nairobi and one in Dar es Salaam. These crimes were punishable with the death penalty in the USA.

[89] The facts of **Mohamed** are thus essentially similar to the facts of this case. The integral difference, according to the respondents, is that the facts in **Mohamed** show that the South African government failed to request an assurance from the USA that Mohamed, if extradited, would not face the death penalty under any circumstances, whereas such assurances were sought but were not provided by Botswana.

[90] We do not agree that this minor factual difference between the matter at hand and the **Mohamed** case leads to the latter not binding this court. The assertion of the respondents is clearly that the **Mohamed** case merely required that an assurance be requested by the South African government, and that this request on its own (whether it is complied with or not) constitutes grounds upon which to extradite the persons concerned. This cannot be seen as an adequate attempt by the South African government to protect the right to life, which we have already determined is paramount and derogable, that would justify the limitation of such right.

[91] Furthermore, this contention of the respondents regarding the non-binding nature of **Mohamed**, is clearly refuted in the case itself at paragraph [37] where the following was said about Mohamed's extradition:

> "Therefore, even if it were permissible to deport Mohamed to a destination to which he had consented and even if he had given his informed consent to such removal, the government would have been **under a duty to secure an undertaking** from the United States authorities that a sentence of death would not be imposed on him, before permitting his removal to that country." [Emphasis added]

[92] The wording in **Mohamed** is thus clear. It is not sufficient merely to request an assurance or undertaking; such assurance or undertaking must have been secured before an extradition may occur in these instances. Therefore, the issue in **Mohamed** revolves around whether an assurance has been attained, not merely requested, making the central facts analogous. The South African authorities, in being refused an assurance despite their request, have therefore failed to attain such assurance. Such failure constitutes an absolute bar to extradition to a country where the death penalty still survives.

[93] **Mohamed** makes the following important statement at paragraph [37] regarding the death penalty as a punishment:

> "[T]he Constitution not only enjoins the South African government to promote and protect these rights but precludes it from imposing cruel, inhuman or degrading punishment. **The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment**." [Emphasis added]

[94] The court stated further at paragraph [53]:

> "The fact that Mohamed is now facing the possibility of a death sentence is the direct result of the failure by the South African authorities to secure such an undertaking. The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed."

[95] The first respondent also asserts that Mr Tsebe's (and consequently Mr Phale's) removals from South Africa and placement in Botswana would be justified as constituting the deportation of an illegal immigrant in terms of sections 32(2) and 34(1)[80] of the **Immigration Act 13 of 2002.** We do not accept this argument.

[96] It has already been determined that **Mohamed** is applicable to the facts in question. Therefore, on the topic of extradition and deportation, the following dicta is found at paragraphs [41] and [42]:

> "[41] Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one State to another State of a person convicted or accused there of a crime, with the purpose of enabling the receiving State to deal with such

[80] Section 32 provides as follows:
"32(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
(2) Any illegal foreigner shall be deported."
Section 34 has the following provisions that are relevant:
"34(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General…"
Section 34(1)(d) further provides that such detention may not be longer than 30 calendar days without a court warrant and may be extended by court for no longer than a further period of 90 calendar days. It is common cause that in respect of Mr Phale the respondents acted in contravention of these provisions.

> person in accordance with the provisions of its law. **The purposes may, however, coincide where an illegal alien is deported to another country which wants to put him on trial for having committed a criminal offence the prosecution of which falls within the jurisdiction of its courts**.
>
> [42] Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. **In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation**. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the deportation or extradition is carried out." [Emphasis added]

[97] Therefore, the obligation of the South African government to gain an assurance from Botswana (which is again emphasised by paragraph [42] of **Mohamed** as being more than a mere request for such assurance) applies whether Mr Tsebe and Mr Phale's removals from South Africa were to be justified in terms of either the Immigration Act or the Extradition Act.

[98] **Mohamed** therefore binds the South African authorities to refuse the extradition and the causal connection identified by **Mohamed** at paragraph [53] will clearly exist should this court choose to authorise the extraditions of Mr Tsebe and Mr Phale. The circumstances relied upon by the Minister of Justice in paragraph 83 of his replying affidavit, are, in our view, insufficient to justify any distinction of or departure from **Mohamed**.

Is the limitation of the right to life justified?

[99] Accepting now that Mohamed is in fact binding, it is our view that the South African authorities acted unlawfully in authorising the extraditions without attaining the assurances that were requested.

[100] If the extraditions at hand were to be effected, then the rights held by Mr Tsebe and Mr Phale, by virtue of them being human beings within the territory of our democratic republic, would be removed and replaced with the rights afforded to persons in Botswana, which do not include the right not to be put to death by the executive should they be convicted. Therefore, extraditing a person to a country in which they are likely to face the death penalty does constitute a limitation of such person's right to life in terms of the South African Constitution.

[101] Given the importance afforded to the right to life in the face of the death penalty by **Makwanyane** and because there are no legal grounds upon which either Mr Tsebe or Mr Phale could be extradited to Botswana, the limitation of their right to life cannot be justified in terms of section 36 of the Constitution.

A safe haven for criminals

[102] The respondents submit on numerous occasions that refusing the extradition of persons in the position of Mr Tsebe and Mr Phale creates the impression that South Africa is a safe haven for criminals from abroad and that unwarranted advantage is being taken of our Constitution.

[103] The respondents also assert that this would endanger the lives of South African citizens and that any harm caused by Mr Tsebe and Mr Phale would lay squarely on the shoulders of the judiciary for failing to send them back to Botswana to face the death penalty.

[104] This claim is, however, not supported with any real evidence or proper legal argument. It constitutes conjecture and speculation. Even if it were true, that does not empower this court to disregard the important decisions of **Makanyane** and **Mohamed**. We cannot question the Constitutional Court and the Constitution itself based on unproven assertions.

[105] Furthermore, section 35(h) of the Constitution affords Mr Phale and did afford Mr Tsebe the right to be presumed innocent until proven guilty. The court cannot factor into its decision the possibility that Mr Phale will continue, or Mr Tsebe would have continued, to commit crimes when their guilt in relation to their offences committed in Botswana has yet to be determined by that country's courts or our own.

[106] Dugard and Van den Wyngaert state in their article titled "Reconciling Extradition with Human Rights",[81] that in extradition cases certain factors have to be considered. In some cases supporters of the death penalty are of the view that limitations on extradition create a "safe haven" for serious offenders as a country is then pressurised into giving an assurance that they would not normally grant. Dugard is of the view that this can be reconciled if an amicable agreement can be reached between the affected states. At page 187 he states:

> "Inevitably, there is a tension between the claim for the inclusion of human rights in the extradition process and the demand for more effective international cooperation in the suppression of crime, which resembles the tension in many national legal systems between the 'law and order' and human rights approaches to criminal justice. As in domestic society, it is necessary to strike a balance between the two so as to establish a system in which crime is suppressed and human rights are respected."

[107] He is of the opinion that the **Soering v United Kingdom**, 11 Eur Human. Rts. Rep. 439 (1989) case is the perfect example of how an

[81] American Journal of International Law, April 1998 pages 187 to 212

extradition in the circumstances faced by the court should be dealt with. The outcome in that case has been supported by a wealth of scholarly writing.[82] He states that in **Soering**, the demands of the general interests of the community were met as the accused was arrested and sent to the United States to stand trial. However, the individual's fundamental rights were protected as the United States had to guarantee that he would not receive capital punishment. In his view, it is in the interest of all nations that an offender who flees to another country should be brought to justice, but not at the expense of the right to life.

[108] According to Dugard's view, which this court agrees with, South Africa would not stand as a safe haven to criminals if requesting states were prepared to give assurances against the death penalty. If only this compromise could be reached with Botswana, justice could still be served, and non-imposition of the death penalty in the requesting state would be a small price to pay. Botswana's refusal to co-operate is strange seen in the light of the PROTOCOL[83] as well as the Extradition Treaty[84] in existence. Both documents to which Botswana is bound

[82] At p 195 *in fin*, Dugard states:

> "More important, the three premier nongovernmental international law associations – the Institute of International Law, the International Law Association and the International Association of Penal Law – have approved reports recommending that both executive and judicial authorities should refuse extradition where there is a real risk that a fugitive's human rights will be violated in the requesting state. The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* also recognizes that extradition 'is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution…or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state.' The most far-reaching recommendation is that of the Institute of International Law in its resolution entitled New Problems of Extradition, adopted in 1983, which provides that extradition may be refused 'in cases where there is a well-founded fear of the violation of the fundamental rights of an accused in the territory of the requesting State.' Several supporters of this resolution indicated that human rights, as *jus cogens*, prevailed over extradition treaties."

[83] Article 4(f) provides for a mandatory refusal to extradite:

"if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment …"

Article 5(c) provides for optional refusal to extradite:

"if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. .."

[84] Article 6 of the Extradition Treaty deals with capital punishment. It provides as follows:

"Extradition may be refused if under the law of the requesting party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of

contemplate a prohibition against extradition where the requesting state has retained the death penalty and the requested state has abolished it. Both provide for the supply of the necessary assurances for the extradition to go through. Botswana was aware of these provisions and its attempt to obtain extradition without complying with these provisions appears somewhat opportunistic.

[109] However, the grant of assurances is not the only possible solution to such an impasse. Dugard discusses varieties of conditional extraditions which would overcome this problem. It is not, however, necessary for purposes of this judgment to traverse these possibilities.

INTERNATIONAL LAW

[110] It is correct that capital punishment is not outlawed by international law. In this regard, Chaskalson P stated in **Makwanyane** at paragraph [36]:

> "[36] Capital punishment is not prohibited by public international law and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of s 11(2). International human rights agreements differ, however, from our Constitution in that, where the right to life is expressed in unqualified terms, they either deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law. This has influenced the way international tribunals have dealt with issues relating to capital punishment, and is relevant to a proper understanding of such decisions."

[111] Dugard *supra* at page 196 states the following:

> "No human rights convention outlaws the death penalty, although protocols to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights do so. All Western European states have abolished this penalty *de facto* or *de jure*, but it is still a lawful penalty in many states. Neither *usus* nor *opinio juris* therefore supports such a prohibition under international law. In *Soering* the European Court of Human Rights was obliged to base its finding on the death row phenomenon rather than on the death penalty itself because the latter is not outlawed by either the European Convention or customary

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the requested party."

> law, while the former as a form of inhuman and degrading treatment is so prohibited. However, in *Kindler v. Canada* the UN Human Rights Committee held that, 'while States Parties are not obliged to abolish the death penalty totally, they are obliged to limit its use.'"

[112] Extradition matters are a combination of national and international law. On the one hand, extradition itself occurs between two nations and extradition agreements or treaties usually exist between the nations concerned (as is the case with South Africa and Botswana). On the other hand, the actual decision whether to extradite and to enforce such extradition is performed in terms of the national law of the country requested to extradite the person concerned (hence the application of South African law above).

[113] Section 233 of our Constitution states that international law binds the Republic **insofar as it is not in conflict with the Constitution**. This has a very important implication for this matter, which will be discussed below.

[114] Although not strictly speaking part of international law, the right to life has been recognised and applied in international law. Brief examples will follow below:

1. In 1948, the Universal Declaration of Human Rights as adopted by the United Nations General Assembly declared in Article 3 that "everyone has the right to life, liberty and security of person."

2. In 1950, the European Convention on Human Rights was adopted by the Council of Europe declaring a protected human right to life in Article 2.

3. In 1966 the International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly. Article 6.1 states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[85]

4. Article 4 of the African Charter on Human and People's Rights also makes provision for the protection of one's right to life.[86]

5. Furthermore, the above instruments of international law have been applied and respected on numerous occasions by domestic and regional courts around the world in matters of extradition.

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[85]The following sections of the ICCPR also protects the origin and ethnicity of peoples from discrimination and prohibits cruel and inhuman punishment:
"Article 2.1 Each State party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind, such as…national or social origin…birth or other status.
Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation
Article 16 Everyone shall have the right to recognition everywhere as a person before the law.
Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground such as…national or social origin…birth or other status."

[86]Additional relevant articles of the African Charter are:
"Article 1: The member States of the organisation of African unity parties to the present charter shall recognise the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them.
Article 2: Every individual shall be entitled to the enjoinment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as…national and social origin…birth or other status.
Article 3.1. Every individual shall be equal before the law.
3.2. Every individual shall be entitled to equal protection of the law.
Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[115] In **Soering** the European Court of Human Rights ruled that Soering's extradition to the United States without an assurance that capital punishment would not be imposed constituted a violation of Article 3 of the European Convention on Human Rights. One should, however, note that this case compelled the court to base their finding on the "death row phenomenon" rather than the death penalty because the latter is not outlawed by either the European Convention or customary law, while the former as a form of inhuman and degrading treatment, is so prohibited. In this particular case a German national, Jens Soering and his girlfriend murdered her parents in Bedford, Virginia. He then fled to the United Kingdom where he was arrested. Both Germany and the United States requested that Soering be extradited. Germany based their argument on the fact that their national laws permit prosecution of nationals for certain crimes committed outside the territory. Germany had at that point abolished the death penalty whereas Virginia had not. The United States had to provide the assurance required and it was only then that Soering was extradited and sentenced to ninety-nine years in prison.

[116] The Supreme Court of Canada has held that the extradition of a suspect to a country where the death penalty will be imposed is constitutionally prohibited. In **Minister of Justice v Burns and Rafray**, 2001 SCC 7 S. C. Canada, both accused persons were charged with first-degree murder in Washington, United States. The Canadian Minister of Justice signed an extradition order for both men refusing to seek assurances that the death penalty would not be imposed upon them once they return to the United States. Both men appealed this aspect of the matter. The Supreme Court of Canada ultimately held that article 7 of the Canadian Charter of Rights and Freedoms precluded the defendant's extradition without assurances that the United States would not seek the death penalty.

[117] The Italian Constitutional Court has taken a step further in this regard by refusing to extradite suspects even in the face of assurances. In the case of **Venezia v Ministero di Grazia & Giustizia 79 Rivista di Diritto Internazionale** 815 (1996), the Italian Constitutional Court held that under no circumstances would Italy extradite an individual to a country where the death penalty existed despite assurances that the death penalty would not be imposed or, if imposed, would not be implemented.

[118] It must be noted that in none of the abovementioned cases, did any of the courts indicate that the ascertainment of an assurance can be in any way equated to the mere request for one. This is in line with the judgment of **Mohamed** and refutes the suggested interpretation by the respondents of this case.

[119] It is trite that the right to life has limitations in both domestic and international law. Furthermore, it is trite that the death penalty is not outlawed by international law and stands as a limitation to the right to life in certain countries, including Botswana. However, these limitations do not find application in this matter.

[120] The reason for this is that the right to life is being examined through the prism of the South African Constitution in light of the death penalty and the limitation that such penalty imposes on the right. Because the death penalty is absolutely outlawed in South Africa by the **Makwanyane** decision, any limitations in international law to the right to life are immediately in conflict with our Constitution when applied to this matter, as these limitations can only find application insofar as they form part of the rationale behind the death penalty. As explained in light of **Makwanyane**, this is a rational that finds no place in South Africa's constitutional democracy.

[121] Therefore, any international law principles that may seek to justify the imposition of the death penalty by Botswana are not binding on this court and any attempt to satisfy them would be unconstitutional. Section 233 of the Constitution does not allow for international law to be applied if it is contrary to the Constitution. However, international law that is in accordance with the Constitution is binding on the Republic.

[122] Bearing this in mind, we refer back to the general international law principles that enunciate the right to life (see paragraphs [114] to [117] above). These parts of international law, insofar as they do not allow for a limitation of life under the death penalty, are binding on the Republic. Therefore, South Africa is bound by its Constitution as well as the international law that conforms with its Constitution, to protect the right to life and should refuse extradition in circumstances such as those faced by this court.

[123] Given that an extradition is performed in terms of domestic law, which is the law of South Africa, and given that the Constitution affirms that it is the supreme law of South Africa,[87] the extraditions of Mr Tsebe and Mr Phale had to conform fully with the Constitution, and thus be accompanied with an assurance from Botswana, despite any international obligations to the contrary.

[124] Therefore, there can be no international law obligations on South Africa to extradite anyone to their possible deaths at the hand of the executive of another state as it would be contrary to our Constitution and invalid. Quite to the contrary, South Africa is bound to honour international obligations that would prevent the extraditions in questions.

[87] Section 2 of the Constitution

COMITY OF NATIONS

[125] The last factor to consider is the relationship between Botswana and South Africa in light of the circumstances.

[126] Comity of nations as defined in the Shorter Oxford Dictionary is the courteous and friendly understanding by which each nation respects the laws and usages of each other so far as may be **without prejudice to its own rights and interests**.

[127] In **Hilton v Guyot**, 159 U.S. 133, the American Supreme Court expressed the following opinion:

> "No law has any effect beyond the limits of the sovereignty from which its authority is derived. The extent to which one nation shall be allowed to operate within the dominion of another nation depends upon the comity of nations. Comity is neither a matter of absolute obligation nor a mere courtesy and good will. It is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, **having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws. The comity thus extended to other nations is not impeachment of sovereignty. It is the voluntary act of the nation by which it is offered and is inadmissible when contrary to its policy or prejudicial to its interests**. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignty to which they belong, that courts of justice have continually acted upon, as a part of the voluntary law of nations. It is not the comity of the courts but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided." [Emphasis added]

[128] Comity of nations is therefore customary international law. Extradition works on both an international and domestic level in South Africa and although the interplay of the two may not be severable they are distinct. On the international plane, a request from one state to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. The main issue is

the relation between states. **Comity, however, requires that a state comply with its own domestic laws**.

[129] In summary, therefore, Botswana has to bear in mind and take into consideration that South Africa's domestic laws and constitution have procedures in place that have to be adhered to. South Africa stands to suffer the most prejudice if Botswana fails to provide the assurance required in extradition matters as its rights and interests as set out in the Constitution will be violated. Botswana has to take heed of the fact that **Makwanyane** and **Mohamed** were hailed as setting an example to the rest of Africa and failure to abide by our own cases could create the impression that South Africa does not value its own constitution. Botswana can only have itself to blame for the Republic's refusal to extradite the applicants. As indicated above, it is out of synchrony with the trend worldwide to abolish the death penalty; it has an appalling history of "secret executions" in regard to its implementation of the death penalty; its constitution does not induce confidence that the clemency provisions are applied in a humane and independent manner; the international investigative reports as to the quality and fairness of its judicial system when dealing with capital crimes are less than complimentary; the international instruments that binds it contemplate that extradition would be refused by the Republic; the national law of the republic to its knowledge prohibits the extradition; and there is no international law which would force the republic to extradite under these circumstances.

[130] For the reasons set out above the following order is made in respect of both case numbers 2010/27682 and 2010/51010:

1. Declaring the deportation and/or extradition and/or removal of the applicant to the Republic of Botswana unlawful and unconstitutional, to the extent that such deportation and/or

extradition and/or removal be carried out without the written assurance from the Government of Botswana that the applicant will not face the death penalty there under any circumstance;

3. Prohibiting the respondents from taking any action whatsoever to cause the applicant to be deported, extradited or removed from South Africa to Botswana until and unless the Government of the Republic of Botswana provides a written assurance to the respondents that the applicant will not be subject to the death penalty in Botswana under any circumstances;
4. Directing the first and second respondent and any other party who opposed the relief sought herein to pay the applicants' costs inclusive of the cost of two counsel.
5. The counter-applications are dismissed with costs which are to include the costs of two counsel.

THUS DONE AND SIGNED AT JOHANNESBURG ON THIS 22nd DAY OF SEPTEMBER 2011

_____
P. M. MOJAPELO
DEPUTY JUDGE PRESIDENT OF THE SOUTH GAUTENG HIGH COURT

I agree

_____
C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____

G. BIZOS
ACTING JUDGE OF THE HIGH COURT

Counsel for the first Applicant in the Tsebe application:	Adv Katz SC Adv du Plessis Adv Lewis
Counsel for the Second Applicant in the Tsebe application:	Adv S. Budlender Adv Brickhill
Counsel for the Minister of Home Affairs; Minister of International Relations and Cooperations:	Adv Schippers SC Adv Mayosi
Counsel for the Minister of Justice and Constitutional Development; and Government of South Africa:	Adv Donen Adv Poswa-Lerotholi

Argument was heard on: 23 - 24 May 2011