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

A. **COURT OF APEAL CIVIL CASE NO. CACGB-096-14**
HIGH COURT CIVIL CASE NO. MAHGB-000057-14

In the matter between:

THE ATTORNEY GENERAL	**1ST APPELLANT**
THE PERMANENT SECRETARY, MINISTRY OF HEALTH	**2ND APPELLANT**
THE PERMANENT SECRETARY, MINISTRY OF JUSTICE, DEFENCE & SECURITY	**3RD APPELLANT**
THE PRESIDENT OF THE REPUBLIC OF BOTSWANA	**4TH APPELLANT**
and	
DICKSON TAPELA	**1ST RESPONDENT**
MBUSO PIYE	**2ND RESPONDENT**
BOTSWANA NETWORK ON ETHICS, LAW & HIV/AIDS	**3RD RESPONDENT**

Attorney Ms Y.K. Sharp (with Ms N.K. Sharp and Ms K.K. Mabote) for the Appellants

Adv. G.J. Marcus SC (with Ad. I.A. Goodman, Mr T. Rantao and Mr T. Gaongalelwe) for the Respondents

B. **COURT OF APEAL CIVIL CASE NO. CACGB-076-15**
HIGH COURT CIVIL CASE NO. UAHGB-000066-15

In the matter between:

THE ATTORNEY GENERAL	**1ST APPELLANT**
THE COMMISSIONER OF PRISONS	**2ND APPELLANT**
THE MINISTER OF HEALTH	**3RD APPELLANT**

THE DIRECTOR OF PUBLIC PROSECUTIONS **4TH APPELLANT**

and

GIFT BRENDAN MWALE **RESPONDENT**

Attorney Ms Y.K. Sharp (with Ms N.K. Sharp and Ms K.K. Mabote) for the Appellants

Attorney Mr K.G. Motswagole (with Mr F.D. Leburu) for the Respondent

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J U D G M E N T

CORAM: **KIRBY J.P.**
FOXCROFT J.A.
LESETEDI J.A.
GAONGALELWE J.A.
LORD HAMILTON J.A.

KIRBY J.P.

1. These two appeals both deal with the same issue, namely the lawfulness of a Government directive that anti-retroviral treatment, which is provided free of charge to HIV positive citizen prisoners, should not be so provided to foreign prisoners. (HIV is the acronym for the Human Immuno-deficiency Virus).

2. At the request of all the parties the appeals have been heard together and will be decided in a single judgment of the full

Court. To that end the Attorney General no longer pursues her appeals in regard to a number of preliminary issues raised in the two matters, nor is the issue of contempt before us.

THE PARTIES

3. I shall refer, for convenience, to the first case as 'the Tapela appeal' and to the second case as 'the Mwale appeal'.

4. The Attorney General represents the President and each of the Government officials cited in the two appeals. She will be referred to, as the context requires, either as 'the Attorney General' or as 'the appellant'. Where they are mentioned, the other appellants will be cited according to their positions, suitably abbreviated where it is easier to do so.

5. In the Tapela appeal, the respondents are Dickson Tapela ('Mr Tapela'), Mbuso Piye ('Mr Piye'), both of whom are Zimbabweans nationals who were serving prisoners at all relevant times in the Gaborone Central Prison, and the Botswana Network on Ethics, Law and HIV/AIDS ('BONELA'), a

non-governmental organization, involved in research, advocacy and litigation relating to the well-being of people living with HIV and AIDS. ('AIDS' stands for Acquired Immune Deficiency Syndrome).

6. In the Mwale appeal the sole respondent is Gift Brendan Mwale ('Mr Mwale') who is also a Zimbabwean national, presently serving a term of imprisonment in the Gaborone Maximum Security Prison.

BACKGROUND

7. The introduction to the Revised Botswana National Policy on HIV and AIDS (2012) ('the HIV/AIDS Policy') reveals that Botswana's first case of HIV infection was reported in 1985 and that since then prevalence rates have steadily increased. Notwithstanding the Government's consistent efforts to curb the pandemic, new infections were, at the date of the report, estimated at 15,000 per year. To quote the opening words of that introduction,

> "The HIV and AIDS epidemic in Botswana represents the greatest developmental challenge to the country. What had been decades of socio-economic gains is being reversed by the effects of the epidemic."

8. Both the HIV/AIDS policy and the expert affidavit filed in the Tapela case set out in detail the deadly progression from initial infection with HIV to full-blown AIDS and, ultimately, to the death of the patient. HIV is a retrovirus which compromises the immune system of infected persons, particularly by attacking the CD4 cells, which have a critical role to play in that system. Left untreated, the HIV infection spreads, lowering the patient's resistance to opportunistic infections (OI's), such as tuberculosis, meningitis, pneumonia, and certain forms of cancer. During this progression patients suffer from debilitating symptoms including diarrhoea, weight loss, and bodily sores.

9. AIDS is not a specific disease. It is categorized as the fourth and final stage of the progression of HIV infection, when the immune system has been so compromised that opportunistic infections and illnesses begin to overwhelm the body, leading almost invariably, but over time, to the death of the patient.

10. Botswana is recognized as one of the leaders in the fight against AIDS and, subject to resource constraints, has kept abreast of developments in the care of HIV/AIDS patients, and in the administering of palliative drugs. But while successes have been recorded in the incidence of mother to child transmission of the virus and in the improving life-span of patients under treatment, new infections continue to occur at an alarming rate.

11. The progression of the virus is monitored by means of what is known as a CD4 cell count assessment. In the early stages of HIV a patient's CD4 count is usually between 600 and 2000 cells/ul, but this steadily drops over time as HIV progresses.

12. Various drugs have, during the course of the AIDS pandemic, been developed to slow the replication of HIV. There are now combinations of antiretroviral medications (ARVs), which can completely suppress the replication of HIV. These combinations of drugs are known as Highly Active Anti-Retroviral Therapy or HAART. The treatment is expensive, costing in the region of

P3500 per month for each patient, and once begun, the treatment needs to be sustained indefinitely, because withdrawal from it has extremely negative consequences. A patient who stops such treatment may become immune to first-line HAART and if he fails to resume the treatment he will die. Patients on HAART are able more effectively to stave off opportunistic infections, and both their quality of life and life-span prospects are significantly improved, although there is as yet no cure for AIDS.

13. In 2012 there were published and adopted the Botswana National Treatment Guidelines ('the Guidelines'), which provide for patients whose CD4 cell count is 350 cells/ul or below to be put on HAART. HIV positive patients with a higher CD4 count are to be regularly monitored.

14. According to the affidavit of Dr W.D.F. Venter, a respected expert in the field, tuberculosis (TB) is the leading OI which causes the death of people living with AIDS. The incidence of TB is significantly reduced by the administration of HAART.

Pulmonary TB is transmitted through airborne droplets which can survive in the air for a long time when indoors or in ill-lit surroundings. The disease is highly infectious and is particularly prevalent among prisoners due to overcrowding, poor ventilation, little sunlight and comparatively poor nutrition. According to Dr Venter, the denial of HAART to non-citizen prisoners with HIV can result in the premature death of such prisoners, increase the likelihood of the transmission of HIV to other prisoners, and hasten the spread of TB and other OI's to the prisoners and to their warders. Dr Venter's affidavit has not been challenged by the appellants.

15. Against this background, there was, on 26th March 2004, dispatched to all public hospitals, clinics, and medical personnel an internal directive, or savingram headed

> "PROPOSED CHANGES TO PRESIDENTIAL DIRECTIVE CAB 13/C/2002 ON THE PAYMENT FOR MEDICAL SERVICES BY NON-CITIZENS"

which provided, insofar as is relevant to these appeals, that:

"Addressees are hereby informed that the following have been approved through Presidential Directive Cab 5/B1/2004

.....

..... provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS."

I shall refer to this as 'the directive' or 'the savingram', as the context requires.

16. There has been some debate in the Courts below as to the reach of this directive, including a finding by Sechele J. that it did not proscribe assessment and ARV treatment of HIV positive prisoners, who had not yet progressed to the stage of full-blown AIDS. But it is not in dispute that it has been interpreted by all involved to prohibit free assessments and ARV treatment of HIV positive foreign prisoners whatever the stage of their infection. It has also been interpreted to prohibit the free administering of HAART to non-citizen prisoners, although treatment of opportunistic diseases and infections is provided to these prisoners at State expense. Neither of the

Presidential Directives referred to in the savingram has been placed before the Court, so that details of the treatment accorded to citizens both in and out of prison and the terms thereof do not appear from the papers. All parties argued, however, on the basis that ARVs and HAART, where these are available, are administered free of charge to citizens, but that non-citizens have to pay for such treatment. In the absence of any contrary suggestion, we shall take that to be the current position.

17. Initially it was pleaded that review proceedings were not allowed at so late a stage without the leave of the Court. This issue was resolved on a calculation of the time when treatment was refused to the affected prisoners, and no issue of lateness is before us on either appeal.

THE FACTS

18. Mr Tapela and Mr Piye were both convicted of armed robbery in 2007 and were sentenced to long terms of imprisonment. Subsequent to their imprisonment each was diagnosed as being

HIV-positive. When they sought to have their viral loads assessed, with a view to accessing ARV treatment, they were informed that as foreign prisoners they were not eligible to be assessed.

19. Later, they were assisted by BONELA, who financed their CD4 count assessment.

20. Mr Piye was assessed in 2008. His CD4 count was 208 cells/ul. Although his health was deteriorating, he was refused ARV treatment, on the grounds that he was a non-citizen. In the months and years that followed he suffered from dizziness, rashes, diarrhoea and sores. He was assessed again in 2009 and his CD4 count remained very low. He sought to be enrolled on HAART, but was refused on account of his Zimbabwean citizenship. Later his parents funded his enrolment on HAART by selling a cow. When the money ran out, he was assisted by an organization called the Prison Fellowship for a four month period. At the time when the case was heard, that

period was due to expire, and he feared for his life should the treatment be discontinued.

21. As for Mr Tapela, it was only in 2010 that he managed to obtain the assistance of BONELA in having his CD4 count assessed. It was critically low at 98 cells/ul. He was refused enrolment on HAART as a non-citizen. Since 2007 his health has steadily deteriorated. He has developed all the unpleasant symptoms already described, and in addition he was diagnosed with TB in July of 2013. His sister then assisted him with funding to pay for HAART enrolment, but could only afford to do so for a short time. He too was then assisted by the Prison Fellowship, but only for the same limited period. He averred that:

> "If I go off treatment, my health will deteriorate and I may die. I am afraid of what the future holds."

22. Mr Mwale, too, was convicted of robbery, although this was several years later. At the time of lodging his High Court case early in 2015, he had three years of his sentence left to run,

having served four years already. While in prison, he contracted HIV, which subsequently mutated into full-blown AIDS. His CD4 cell count was at 266 cells/ul. He enlisted on HAART at his own expense, as he was told this treatment was not available free of charge to non-citizens on the basis of the savingram referred to above. He subsequently learned of the judgment of Sechele J. in the Tapela case and he then expected to be provided with free HAART treatment, but this was refused. That is when he took the decision to challenge that refusal as being unlawful, unconstitutional, and also in contempt of the order of Sechele J.

THE HIGH COURT PROCEEDINGS

23. On 3rd February 2014 the respondents in the Tapela appeal filed a Notice of Motion in which they sought the following orders:

> "1. Reviewing, setting aside and declaring invalid the decision of the second respondent (or anyone acting under his authority), to refuse to provide the first and second applicants with access to and/or to enrol them on Highly Active Anti-Retroviral Treatment (HAART).

2. Declaring that the refusal to provide HAART to the first and second applicants is unlawful and violates their constitutional rights, including

   2.1 The right to life guaranteed by section 4;

   2.2 The right not to be subjected to inhuman and degrading treatment guaranteed by section 7; and

   2.3 The right to non-discrimination guaranteed by sections 3 and 15.

3. Declaring that the refusal to provide HAART to the first and second applicants is in breach of the National Policy on HIV and AIDS and is unlawful.

4. Declaring that the refusal to provide HAART to the first and second applicants is in breach of the duty owed by the respondents to the first and second applicants and to similarly situated HIV-positive foreign inmates to provide basic health care services to prisoners.

5. To the extent necessary, declaring that Presidential Directive number Cab 5(b) 2004 is unconstitutional, unlawful and invalid to the extent that it denies of HIV-positive foreign inmates access to and/or enrolment on HAART.

6. To the extent necessary, declaring the policy of denying HIV-positive foreign inmates access to HAART to be unlawful and unconstitutional.

7. Ordering the second and third respondents forthwith to provide the first and second applicants with HAART.

8. Ordering the second and third respondents forthwith to provide HAART to all prisoners who are HIV-positive and who are not citizens of Botswana.

9. Ordering such respondents as oppose this application to pay the costs hereof.

10. Granting the applicants further or alternative relief."

24. The founding affidavit of Mr Tapela makes it clear that the dominant relief sought is the review and setting aside of the directive, so as to gain for him, for Mr Piye and for others in their predicament, free access to HAART treatment on the same basis as their citizen fellow prisoners. He commences his overview of the application with these words:

> "In these proceedings, the second applicant, Mr Piye, and I seek to review and set aside the decision of the Permanent Secretary Ministry of Health and the Government to refuse to enrol us on, and provide us access to Highly Active Anti-Retroviral Treatment (HAART)."

25. The supporting prayers for constitutional and other declarations serve to bolster the review application by providing reasons and grounds re-inforcing their central argument that that decision is unlawful and *ultra vires* the provisions of the Act under which

they derive their entitlement to medical treatment and other rights, namely The Prisons Act Cap 21:03, and the Regulations promulgated thereunder.

26. Full sets of affidavits were exchanged, the Attorney General submitting that the Government's decision not to provide free ARV and HAART treatment to non-citizens was justified in the public interest due to resource constraints, and was unimpeachable as an exercise of executive power, protected by the separation of powers between the Judiciary, the Executive, and the Legislature. She denied any breach of the Constitution, and argued that section 15(4)(b) thereof specifically permitted discrimination against persons who were not citizens of Botswana.

27. There followed various interlocutory exchanges which are not relevant to the appeals, and argument from both sides. On 22nd August 2014 Sechele J. handed down his judgment in which, after dismissing the preliminary points raised, he ordered that:

"(a) The decision of the 2nd respondent (or anyone acting under his authority) to refuse to provide the 1st and 2nd applicants with access to and/or enrolment on Highly Active Anti-Retroviral Treatment (HAART) is hereby set aside and declared invalid.

(b) The refusal to provide HAART to the 1st and 2nd applicants is violative of their rights as enshrined under sections 3, 4, 7 and 15 of the Constitution of Botswana.

(c) The refusal to provide HAART to 1st and 2nd applicants is in breach of the duty owed to them by the respondents to be provided with basic health care services.

(d) The 2nd respondent's savingram dated 26th March 2004 is, to the extent that it seeks to exclude the 1st and 2nd applicants from HAART enrolment, irrational and invalid.

(e) The respondents shall enrol the 1st and 2nd applicants and other non-citizen inmates whose CD4 cell counts has reached the threshold for HAART enrolment, under the treatment guidelines of HAART.

(f) The respondents to bear the costs of this application and which costs are to include the costs of two counsel."

28. It is against each of those orders that the Attorney General appeals, and her grounds of appeal repeat the arguments advanced by her in the Court below. In particular, she

complains that Sechele J. failed to deal with her argument relating to section 15(4)(b) of the Constitution which she categorizes as being at the root of her appeal.

29. It appears from the record that the order of Sechele J. was not complied with for a number of months. However, that order came to the notice of Mr Mwale, who then applied for, and was refused enrolment on free HAART. From the prison, and without legal assistance, he filed a Notice of Motion, stated to be under section 18(1) and (2) of the Constitution, in which he sought an order that his sentence be set aside, and he be discharged, as his rights under section 7 of the Constitution (relating to inhuman or degrading punishment or treatment) had been infringed. Alternatively, he prayed for his sentence to be reduced to 4 years imprisonment so that he could return to Zimbabwe forthwith and obtain free ARVs. The respondent was cited as the State, and the application was served on the Director of Public Prosecutions (DPP). Notice of Opposition was filed by the DPP, on 10th March 2015 together with heads of

argument pointing to various deficiencies in the application, including that the Attorney General should have been cited, that the application was, in effect, a second appeal, which was impermissible, and that the appropriate relief should have been an order requiring compliance with the order of Sechele J.

30. The application came before Dingake J. on 12th March 2015, when Mr Mwale, having obtained legal representation, was granted leave to file fresh papers citing "all the necessary parties".

31. There was then filed by Attorney Motswagole an entirely new application, not only citing "all the necessary parties", but seeking totally different relief. What was now sought mirrored in the main the relief previously sought by Mr Tapela and Mr Piye before Sechele J. but with the addition of a prayer that three of the respondents (the Attorney General, the Commissioner of Prisons and the Minister of Health) be held in contempt for failing to supply Mr Mwale with HAART. The other prayers were for declarations that the decision of the

respondents to deny HAART to Mr Mwale was in breach of their obligation to provide medical care to all prisoners, and that this denial violated Mr Mwale's rights under sections 3, 4, 7 and 15 of the Constitution.

32. Each of those declarations had already been made, as the Judge was aware, by Sechele J, not only in relation to Mr Tapela and Mr Piye, but also to all foreign prisoners, which would have included Mr Mwale. Since Dingake J. agreed with the conclusions of Sechele J, what remained was to enforce his order and to deal with the contempt application. It was unnecessary to cover the same ground, although some additional points were made.

33. In the event, Dingake J. did grant a mandamus, but devoted the majority of his judgment to constitutional matters. He issued separate declarations that the decision to deny HAART to Mr Mwale was in breach of each of sections 3, 4, 7 and 15 of the Constitution. He then added that:

"5. The decisions of the 1st, 2nd and the 3rd respondents are in breach of their obligations to provide medical care to those in the care of the 2nd applicant in terms of the Prisons Act Cap 21:03.

6. The respondents are directed to avail the requisite medication (ARVs) to the applicant forthwith."

An order for costs was also made.

34. So, having regard to both cases, the aim of Mr Tapela and Mr Piye was to gain access for themselves and other foreign prisoners to free HAART. The aim of Mr Mwale was to enforce Sechele J's order insofar as that applied to him. Those aims were achieved by Sechele J's Orders (a) and (e) (above) and by Dingake J's Order (6) (above). The constitutional and other declarations served to bolster those orders, but were not necessary to arrive at them. The central complaint was of non-compliance with the provisions of the Prisons Act which gave all the respondents the right to medical care along with their fellow prisoners.

35. The Attorney General's grounds of appeal against this judgment (once her appeals on preliminary issues were abandoned) were the same in substance of those in the Tapela appeal. She argued that the Judge erred in finding that the refusal to enrol Mr Mwale on HAART was unlawful and discriminatory, as this was specifically permitted by Section 15(4)(b) of the Constitution, and was justified on financial grounds as a matter of public interest, and also that the Judge erred in making a mandatory order which usurped an executive prerogative, so offending against the separation of powers. The Attorney General accordingly relied upon the same Heads of Argument in both appeals.

36. We are informed that before this appeal was heard, both Mr Tapela and Mr Piye were released from prison, having completed their sentences. Counsel assured us, however, that they both (and also BONELA) wish to pursue their appeals, as these affect not only themselves, but also all other similarly circumstanced foreign prisoners. This consolidated judgment

concerns the rights of Mr Mwale as well, who is still in prison, so that the issues raised are not moot.

THE LAW

37. Constitutional cases are of great moment. They are thus brought only in exceptional cases, since the vast majority of disputes can be resolved by reference to the common law and to the statutes enacted by Parliament, and by review proceedings. It is for this reason that it has been consistently held, as Mr Marcus pointed out, that where a case can be determined without resorting to the Constitution, that is the route which should be followed. In **RAMANTELE vs MMUSI & OTHERS CACGB-104-12** (as yet unreported) a full bench of this Court held (per Lesetedi J.A. at para 41) that:

> "It is a well-recognized rule of decision-making that where it is possible to decide a case before the Court without having to decide a constitutional question, the Court must follow that approach. See **MHLUNGU & OTHERS 1995 (3) SA 867 (CC) at 895E**."

38. This was described in my concurring opinion at para 22 as "a firm rule of practice", where the words of Kentridge A.J. in **MHLUNGU's** case were cited, namely,

> "I would lay it down as a general principle that where it is possible to decide a case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

See also **STATE vs RODNEY MASOKO CLCGB-058-14** (full bench) **at para 18.**

39. The real complaint in the applications which form the subject of the appeals before us, although this was not stated in so many words, is that the decision of the authorities to withhold free HAART from foreign prisoners while according it to citizen prisoners was unlawful as being *ultra vires* the Prisons Act Cap 21:03 ('the Prisons Act'), or was reviewable as being irrational. It was argued that that decision was unconstitutional in several respects, and was in breach of the affected prisoners' common law rights. It is trite that the Prisons Act, as is the case with all legislation, must be interpreted, where the language so allows,

in line with the common law (see **MEDICAL RESCUE INTERNATIONAL vs THE ATTORNEY GENERAL (2006) 1 BLR 516 CA** (full bench) **at 522/3**); so as to comply with the Constitution (see **ATTORNEY GENERAL vs DOW (1992) BLR 119 CA** (full bench) **at 140**); and also as far as possible, in line with Botswana's international obligations (**DOW**, supra **at p.132**). So if the applications (and accordingly the appeals) can be determined by applying and interpreting the provisions of the Prisons Act and the Regulations made thereunder, then there will have been (and will be) no necessity to address the constitutional questions raised, and the discussion and findings on these by the Judges *a quo*, although interesting, will be *obiter* in nature.

THE PRISONS ACT AND REGULATIONS

40. In terms of the common law the State has the duty to keep in good health the prisoners in its custody because, having forfeited their freedom, they are unable properly to fend for themselves. This duty is reflected both in the legislation and in

the legal precedents of most countries. Thus the South African Constitutional Court has held in **LEE vs MINISTER FOR CORRECTIONAL SERVICES 2013 (2) SA 144 (CC) at para 17** that –

> "A person who is imprisoned is delivered into the absolute power of the State and loses his or her autonomy. A civilised and humane society demands that when the State takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of the prisoner."

See also **MINISTER OF POLICE vs SKOSANA 1977 (1) SA 31 A at 40 A**.

41. In the United States of America Marshall J. in **ESTELLE vs GAMBLE 429 US 97** reaffirmed the Government's obligation to provide basic medical care for those it is punishing.

42. So too in Botswana, notwithstanding that there is no constitutional right to health care, as there is in South Africa and some other countries, the Prisons Act and its Regulations provide the statutory embodiment of those common law principles. These include the right to equal treatment of all

prisoners, as will appear from an analysis of its relevant sections. And as Gaongalelwe J.A. held in a recent judgment of this Court (**DLAMINI vs THE STATE CLCGB-070-13 at para 17**)

> "Those who offend against the law within this jurisdiction must not only be treated equally, but must be seen to be so treated."

43. It is also so, as Sechele J. held, that while prisoners have their liberty curtailed by the sentence of the Court, they remain entitled to enjoy the residuum of their constitutional and human rights, subject only to the lawful derogations permitted by the Constitution. See **GOLDBERG & OTHERS vs MINISTER OF PRISONS & OTHERS 1979 (1) SA 14(A) at 39**. And I concur with the learned Judge that imprisonment equalizes all inmates, regardless of their status or place of origin.

44. The Prisons Act contains, insofar as is relevant to these appeals, the following provisions:

- S.2 defines a prisoner as "<u>any</u> person, whether convicted or not, under detention in a prison;"

- S.65 provides that "every prisoner shall be subject to the provisions of this Act;"

- S.56(1) obliges the Permanent Secretary to appoint a medical officer responsible for each prison;

- By section 56(2) "The medical officer shall be responsible for the health of all prisoners and shall cause all prisoners to be medically examined at such times as shall be prescribed."

- S.57(1) states that:

> "A medical officer may, whether or not a prisoner consents thereto, take or cause to be taken or direct to be taken such action (including the forcible feeding, inoculation, vaccination and any other treatment of the prisoner whether of the like nature or otherwise) as he considers necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease." (my underlining)

45. The underlined portions confirm that there is to be no discrimination between prisoners, and that the medical officer is enjoined both to minister to the health of prisoners and to prevent the spread of disease where possible. In my view, the use of the word 'may' in section 57(1) has reference only to the limitations a doctor may encounter in his ministrations. 'May' must be read in the sense of "must where practically and financially possible" rather than in the sense of entitling him to

withhold treatment at his pleasure. So, in that respect at least, this is one of the rare instances in which "may" is used in the directory sense. (See: **KAGISO TIRO vs ATTORNEY GENERAL CACGB-104-12 (CA) at para 42**). This is made clear by the wording of Regulation 13 of the Prisons Regulations which provides that:

> "A medical officer shall –
>
> (a) examine all prisoners who complain of illness;
>
> (b) treat all sick prisoners;
>
> (c) notify the officer in charge of all cases of serious illness or infectious or contagious disease; and
>
> (d) make in writing to the officer in charge such recommendations regarding the treatment, isolation or care of a sick prisoner as he thinks fit."

46. Under the common law, as under the Prisons Act and its Regulations, prisoners are entitled to be provided with basic health care which equates, in my view, with the expression "adequate health care", as used, for example, in the Constitution of South Africa, at section 35(2). It will not extend

to advanced or cosmetic procedures not normally available to or affordable by the ordinary populace. But in the context of prisoners, adequate medical treatment will cover, at the very least, the free treatment which is made available to citizen prisoners in Botswana's gaols. The Attorney General concedes that that is the proper yardstick to be employed. It follows that enrolment on HAART of prisoners whose CD4 cell count is below 350 cells/ul forms part of the adequate medical treatment to which all prisoners are entitled in Botswana.

47. Part V of the Regulations also provides for the other entitlements of prisoners for which the State assumes responsibility upon taking a prisoner into its custody. These include prison clothing, bedding, food, and washing facilities. All of these, including medical treatment, are provided free of charge, and are not so available to others outside the prison walls. So the Prisons Act and Regulations properly provide for all the entitlements of a prisoner in terms of the common law, and it is not necessary to look to the Constitution for these.

Nowhere in the Act or in the Regulations is any mention made of citizenship or of place of origin, so that discrimination on those grounds (or unfair discrimination on any other grounds) is not permitted by the statute.

48. It is against that backdrop that the savingram of 26th March 2004, and all subsequent refusals by the authorities to provide HAART to foreign prisoners, including the respondents, is to be assessed.

49. The headline grounds upon which administrative and quasi-judicial decisions may be reviewed and set aside in Botswana are illegality, irrationality, and procedural impropriety. See: **ATTORNEY GENERAL vs KGALAGADI RESOURCES (1995) BLR 234**, in which **THE COUNCIL OF CIVIL SERVICE UNIONS & OTHERS vs MINISTER FOR THE CIVIL SERVICE (1984) 3 All E.R. 935 (H.L.)**, and **JOHANNESBURG STOCK EXCHANGE vs WITWATERSRAND NIGEL LTD 1988 (3) SA 132 AD** were applied. The word 'irrationality' is used in the sense of

'Wednesbury unreasonableness' as characterised by Lord Greene in **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs WEDNESBURY CORPORATION (1947) 2 All E.R. 680 C.A. at 683** as "a decision on a competent matter ... so unreasonable that no reasonable authority could ever have come to it", and by Corbett J.A. in the **WITWATERSRAND NIGEL** case at p.152 as "(a decision) so grossly unreasonable as to warrant the inference that he (the decision-maker) had failed to apply his mind to the matter ..." The ground of illegality, or unlawfulness, embraces also the doctrine of *ultra vires*, and in this case the complaint is that the directive conveyed by the savingram, is *ultra vires* the Prisons Act, and is also irrational.

50. Certainly, but subject to the defences which the Attorney General has raised, and upon which she relies in the two appeals, with which I shall deal presently, the decision to deny HAART to foreigners while according it free of charge to citizens is, in my judgment, *ultra vires* the Prisons Act and Regulations,

in that it discriminates unlawfully against foreign nationals in a manner not permitted either by the Act or by the Regulations.

51. The respondents argue that it is also irrational in that it permits treatment for opportunistic infections and diseases, such as TB while forbidding treatment (ARVs and HAART) for HIV, which is the underlying cause of these. This, it is argued, will be far more expensive than HAART in the long run as the HIV will be allowed to progress to full-blown AIDS without being suppressed by ARVs. It will thus facilitate the infection of others within the prison both with HIV and with infectious OIs, like TB. This is contrary to the Prisons Act, which requires action to prevent the spread of communicable diseases.

52. The directive, and its application by refusing free treatment to HIV positive foreign prisoners may, on the expert evidence presented, be both unwise and ill-advised, but it is not, in my judgment, irrational. As Lord Greene pointed out in the **WEDNESBURY** case, wrong decisions may be made in good faith upon due consideration, but those will not be reviewable

on the grounds of irrationality because they are unwise. The HIV/AIDS Policy provides in its terms for preferential treatment to be given to Botswana citizens, notwithstanding its overall objective of providing ARV treatment to all where resources allow this. Genuine concerns may have been that where treatment was not available in their countries of origin for HIV and AIDS, foreigners, and in some cases illegal immigrants, might commit crimes in Botswana to gain entry to prison and the free ARV treatment available therein. Those fears might render the decision to withhold ARV treatment from foreign prisoners rational, but it would not cure the unlawfulness of the decision in the light of the provisions of the Prison Act. This Court has the added advantage, as had the Courts below, of comprehensive expert evidence on the effect of HIV and AIDS on the prison population, although it does not appear on the papers that a full cost/benefit analysis of the effect of this decision has been conducted. I will deal in more detail with the legal effect of Government directives and of national policies

adopted by Parliament, when I address the defences/grounds of appeal raised by the Attorney General, which follow.

THE ATTORNEY GENERAL'S DEFENCES

53. The main defence raised by the Attorney General to justify the admittedly discriminatory treatment of foreign prisoners, is that such discrimination is authorized by section 15(4)(b) of the Constitution, and that the Constitution, as the supreme law, takes precedence over the Prisons Act and Regulations. It is necessary, in order to test that defence, to examine section 15 of the Constitution in more detail. This provides, in the relevant portions, as follows:

> "15(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –

(a) _____

(b) with respect to persons who are not citizens of Botswana.

(c) _____

(d) _____

(e) where persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) _____

(6) subsection 2 of this section shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.

(7) _____

(8) _____

(9) _____."

54. It is not suggested that any part of the Prisons Act is either discriminatory or unconstitutional, so subsection 15(1), which refers to laws, is not applicable.

55. The refusal of free enrolment on HAART to non-citizen prisoners when this is afforded to citizen prisoners clearly discriminates against the non-citizens on account of their place of origin, and that is prohibited by subsection (3).

56. In terms of the Savingram of 26th March 2004, and no doubt in terms of the Presidential Directive it implements, the Permanent Secretary, who is a public officer performing his functions as such, directs that foreign prisoners shall be treated in a discriminatory manner by the refusal of free enrolment on

HAART. Subsection (2) is thus engaged and contravened. This applies equally to prison officers or doctors who implement that direction.

57. The effect of subsection 4(b) is that subsection (1) does not apply to any law which discriminates against persons who are not citizens of Botswana. Such discrimination is constitutionally permitted, provided that this complies with the general boundaries set by section 3, as the substantive umbrella section, namely that this is in the public interest or for the protection of the rights of others. (See **RAMANTELE's** case, SUPRA **at para 65**). Subsection 4(b) is applicable only to laws and does not excuse discrimination in the performance of public functions, contrary to section 15(2). It accordingly does not excuse the discrimination inflicted by the Savingram of 24th March 2004, and those implementing this.

58. Subsection 4(e) also refers back to subsection (1) and applies only to laws. It too does not excuse discriminatory treatment under subsection (2). So in this case the question of

discrimination which is reasonably justifiable in a democratic society does not arise. Sechele J. was in error to address the application on this basis, although his decision on the review was correct.

59. It is subsection 6 which gives the exceptional circumstances when subsection 2, relating to discriminatory treatment by public officers, does not apply. However, the exclusion applies only to discriminatory treatment authorized by any law made in terms of subsections (4) and (5). It does not excuse discrimination in the performance of the functions of a public office or authority, unless such discrimination is expressly or by necessary implication authorized by a law. So the question is: is such discrimination so authorized?

60. Counsel for the appellant sought, but without much conviction, to categorize a Presidential Directive as a law, so as to bring it within the compass of section 15(1) as read with 15(4)(b) of the Constitution, but that argument cannot be sustained. First,

neither of the Presidential Directives referred to has been produced, and so no informed discussion of these is possible. Before us is only an administrative direction given by the Permanent Secretary by means of a savingram. Certainly that does not amount to a law. Secondly, and in any event, Presidential Directives convey Government decisions, taken by the President acting on the advice of Cabinet. These are an exercise of executive power under section 47(1) of the Constitution as read with section 50(1) and (2). They are binding on public officers but do not amount to a law. See: **MURIMA & ANOTHER vs KWENENG LAND BOARD (2002) 1 BLR 18 at 26**. The exercise of executive power is subject to the Constitution and subject to the laws of the land. That is the essence of the rule of law, to which Botswana is a proud adherent. The discrimination practiced here, far from being authorized by any law, flies in the face of the Prisons Act and the Regulations made under it (both of which are clearly laws).

61. It follows that the Attorney General's main ground of appeal cannot avail her.

62. The Attorney General sought further to argue that Presidential Directives constitute an exercise of executive, or prerogative power, and are not subject to review. That may be so in matters of high policy, such as the declaration of war, or of a state of emergency, or the making of appointments to Cabinet or to other high offices (See **PATSON vs THE ATTORNEY GENERAL (2008) 2 BLR 66 at 82**). But it is certainly not so here, where an administrative decision not to provide free anti-retroviral medicine to foreign prisoners was conveyed by the Permanent Secretary. Section 47(1) of the Constitution, which confers executive power on the President, states expressly that this power is to be exercised "subject to the provisions of this Constitution." Further, it is upon Parliament, and not upon the President, that the power to make laws is conferred by section 86 of the Constitution. So, in my judgment, executive power is, by extension, to be exercised subject to the laws made by

Parliament as well. (See: **MINISTER OF HOME AFFAIRS & ANOTHER vs BOTSWANA PUBLIC EMPLOYEES UNION & OTHERS CACGB-083-12** (full bench) **at para 81 and 100**).

63. It follows that in terms of the wide powers granted to the Courts by sections 18(2) and 95(1) of the Constitution an executive decision conveyed through a Presidential Directive will be reviewable if it is shown to be *ultra vires* either a law passed by Parliament or the Constitution. We need not, however, go as far as that in the present appeals, because what has been set aside is a Government decision conveyed through a Permanent Secretary's savingram. I leave open the question of whether certain of the executive decisions taken under section 47(1) of the Constitution are reviewable also on grounds other than unlawfulness (in the sense that such a decision was *ultra vires*).

64. I agree with Dingake J. when, in his judgment in **MWALE**'s case, he states that the relationship between the three

branches of Government embraces the shared responsibility of all three of these – the Executive, Parliament and the Judiciary – to uphold the rule of law, and that (in his words):

> "This dialogic model of constitutionalism views the judiciary and the executive as partners in a common enterprise, rather than adversaries in a perpetual contest for supremacy."

65. But that is not, as he suggests, a characteristic of "modern constitutionalism" introduced by his "contemporary generation of jurists." It is the very foundation of democracy in Botswana, a partnership principle which has been promoted by successive administrations since Independence Day and by the Judges of our Courts (including 'the Judges of yesteryear' to whom he makes an unseemly reference). It is only in recent years that some tensions between the executive and legislative branches relating to the roles of each and of the Judiciary have been suggested by some litigants. But the constructive partnership between the three branches of Government to promote adherence to the rule of law remains firm and unshaken.

66. The Attorney General's submission that the review here sought is impermissible as offending against the doctrine of the separation of powers cannot be sustained.

67. Finally, the Attorney General argues that the decision to withhold free HAART from foreign prisoners was taken in the public interest due to financial constraints, and was thus rendered lawful by section 3 of the Constitution, notwithstanding the provisions of section 15. It will be recalled that section 3, which is the umbrella section embracing the complete bouquet of human rights which are accorded in Botswana, provides that:

> "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely –
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

68. The subjection of all human rights to the public interest and to respect for the rights and freedoms of others has been held in **RAMANTELE**'s case (supra) to extend also to the derogation clauses set out in the other sections of Chapter II of the Constitution.

69. It is generally accepted, particularly in developing countries, that the Courts have no role to play in dictating to the Executive or to the Legislature on issues of policy or on budgetary matters involving the use or distribution of public funds. These are matters properly within the province of the Government, with all the expertise and resources available to it.

This is particularly so in a Constitution such as ours which does not provide for judicially enforceable socio-economic rights, such as the right to health, the right to education and the right to housing.

70. So normally the Courts will defer to the Executive and to the Legislature in matters of that sort. But it will not always be so. There will be many decisions of the Court that by their very nature carry financial implications for the Government. Examples are the award of damages payable by the Government, the re-instatement of wrongly dismissed public officers (in appropriate circumstances), and even the imprisonment of offenders. There are many others. It is the responsibility of Government to budget for the fulfilment of its legal obligations. If the law requires a service to be provided, then funds must be found to provide that service, or Parliament must be engaged to amend that law. Lack of funds will not in the normal course justify disobedience of the law.

71. But those legal obligations too must be carefully construed. They do not extend, for example, to the implementation of Government policies, even when approved by Parliament, such as the HIV/AIDS Policy. Laws are passed by Parliament in the manner provided in the Constitution. Policies, on the other hand provide the compass by which the Government and its organs are guided. They normally express ideal and intended eventual outcomes, but make reservations on availability of human and financial resources. They are guidelines to be followed to the extent possible. They are not laws. The HIV/AIDS Policy does not, as the respondents have argued, require the universal enrolment of all present in Botswana on HAART. It expresses that as an ideal, but makes it clear that the realization of that ideal will be subject to financial constraints. In Clause 5.1 it states that:

> "... all such procedures and parameters, and the services they direct will, <u>to the extent possible</u>, be rendered to all residents of Botswana based on accepted criteria <u>and costs</u>" (my emphasis).

72. Many of its provisions (such as 4.3, 5.2.1, 6.1.1, 6.2, and 7.1.1) provide for health interventions to be provided to 'citizens of Botswana', and 7.1.4 provides that:

> "Every person in Botswana shall not be discriminated against in terms of access to health services. That notwithstanding Government may confer preferential treatment on its citizens" (again, my emphasis).

73. Sight must also not be lost of the fact that constitutional rights do not extend in Botswana to socio-economic rights, such as the right to health, the right to shelter, and the right to clean water. This is deliberate and is appropriate in view of the manpower and financial constraints experienced particularly by developing countries. Some countries, by their own choice, have included such rights in their Constitutions. Botswana has chosen not to do so, but strives nonetheless to achieve those ideals where resources allow. Any attempt by the Courts to confer socio-economic rights, such as universal access to health care, by the overbroad construction of sections of the Constitution such as section 4 (the right to life) and section 7 (the prohibition on inhuman or degrading punishments or other

treatment) as Dingake J. appears to suggest, would, in my judgment, be overstepping the bounds of judicial discretion. That would be venturing into policy areas and budgetary concerns which are properly to be addressed by the other arms of Government.

74. Finally, on the issue of affordability, no evidence whatever has been placed before the Court of any of the material facts upon which it would be necessary to base a finding that the provision of HAART to non-citizen prisoners would be unaffordable. We have not been enlightened on the number of foreign prisoners suffering from HIV/AIDS in our prisons at present. In both appeals we have before us only three such prisoners. We have not been provided with the comparative cost of treating the many opportunistic illnesses and infections contracted by prisoners who are HIV positive and are not enrolled on HAART. No evidence has been led on the cost of treating other patients to whom HIV or other illnesses such as TB have been passed by foreign prisoners as a result of their not being enrolled on

HAART. And there is no suggestion that in Government's budget for the care of prisoners any distinction has ever been made between funds allocated in respect of citizen prisoners, and those allocated in respect of foreign prisoners. All we have before us is a bald statement that the provision of HAART to non-citizens is unaffordable. That cannot suffice. See: **WIGHTMAN t/a JW CONSTRUCTION vs HEADFOUR (PTY) LTD & ANOTHER 2008 (3) SA 371 SCA at 375,** where HEHER J.A. held that:

> "A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will, of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

75. The same principles apply to a bare averment such as the present one. It is peculiarly within the ability of the Government, as represented by the Attorney General, to provide information on the number of HIV positive foreign prisoners held in Botswana, on the cost of providing ARVs to these, and of the cost to Government (in the form of treatment of OI's) of not providing such ARVs. If Government fails to provide such information as the basis for its averment that the treatment is unaffordable, then it will fail to discharge its onus to prove that averment. So unaffordability has not been adequately demonstrated in this case, and the Attorney General's final ground of appeal must also fail, as must the whole appeal.

76. Since the applications (and the appeals) could be definitively decided without reference to the constitutional issues, it was not necessary for the Courts below to deal with these, and nor is it appropriate for this Court to do so. It may well be that the refusal of HAART to foreign prisoners constitutes an additional

and unusual punishment in respect of those prisoners, contrary to section 7 of the Constitution. It may also be that such refusal endangers the health of other prisoners and so cannot be said to be in the public interest or necessary for the protection of the rights of others, so as to be admissible as an exception to section 3 of the Constitution. Persuasive arguments have been presented to that effect both by counsel in this appeal and in the judgments of Sechele J. and Dingake J, but the learned Judges' opinions on those matters are obiter in their nature, and do not at present stand as binding precedents for the future.

77. I have dealt in more detail with the aspect of discrimination contrary to section 15 of the Constitution, because the Attorney General sought refuge under one of its provisions as a defence to the review application. So far from establishing that defence, an examination of the section merely re-inforces the finding that such discriminatory treatment was unlawful and *ultra vires* the Prisons Act.

78. As regards the suggestion that the refusal of HAART to foreign prisoners contravenes their rights to life, that is a much more complex issue, in view of the constitutional prohibition referring to the deliberate deprival of life. That argument too must await a case where its resolution is necessary for the determination of an issue before the Court.

79. It follows that the judgments and decisions in the Courts below should have been confined to the review ground of *ultra vires*, which was decisive of the case, and should not have proceeded to the various declaratory orders made. I will adjust the orders accordingly in due course. Before concluding this judgment I should add a few cautionary remarks concerning aspects of the judgment of Dingake J.

80. Firstly, he characterised his whole judgment as concerning a matter "best illuminated by a consideration of the position of prisoners in international law." Much of his judgment is devoted to the analysis of cases which have arisen in other

countries of the world, whose Constitutions and socio-economic circumstances differ from our own, and would require detailed analysis in both respects before a valid comparison with the law and prevailing conditions in Botswana could be made. This Court has repeatedly cautioned against over reliance on such precedents (see, for example, **ATTORNEY GENERAL vs OATILE (2011) 2 BLR 209 CA** (full bench) **at 291 H**). In the present case the issues could be resolved by reference to the Prisons Act and the local precedents.

81. Secondly, the learned Judge devoted a substantial part of his judgment to the application of what he referred to as 'soft-law', or the body of norms comprised in treaties, conventions and the like, whether ratified or not, which have attained the status of international customary law or *jus cogens*. To that end he provided a list (without analysis or further details) of no less than twenty four international instruments dealing directly or indirectly with the care and medical rights of prisoners and particularly those with HIV/AIDS. The position in Botswana has

been made clear by this Court, namely that treaties and conventions entered into or ratified by Botswana, do not have the force of law in this country unless they have been incorporated (as many have) in domestic legislation. Domestic laws will, however, be interpreted, where the language so permits, so as to give effect to Botswana's international obligations under such treaties and conventions. See: **RAMANTELE**'s case (supra) **at para 69**; **ATTORNEY GENERAL vs DOW (1992) BLR 119 (CA) at 132**.

82. Counsel in the **MWALE** appeal supports the application of 'international customary law', and calls in aid the High Court judgment in **REPUBLIC OF ANGOLA vs SPRINGBOK INVESTMENTS (PTY) LTD (2005) 2 BLR 159**, in which I applied what has come to be known as the doctrine of incorporation, in approving an international consensus derived from judicial precedent, that in the absence of any provision to the contrary diplomatic immunity does not extend to disputes arising out of the commercial activities of diplomats. In the

absence of any provision to the contrary under our law, I adopted that rule as being applicable too in Botswana. There was no appeal. I do not take the decision on that narrow issue as having introduced a general rule expanding upon the principles laid down by the Court of Appeal. The present case required no such treatment. It could be determined solely on local statutes and precedents.

83. Thirdly, there is discernible in much of the judgment of Dingake J, the learned Judge's view that socio-economic rights, and particularly the right to health care, should be read into the constitutional rights to life and to freedom from inhuman or degrading treatment as laid down in the Botswana Constitution. He says at paragraph 104 that:

> "In my considered view, whilst the Constitution does not expressly provide for the right to health, the section 4 protection of the right to life can be understood in a broad way to include measures that state parties must take to safeguard health, and thereby life."

84. This, he says, should follow from the ideals expressed as national obligations in many international human rights

instruments to which Botswana subscribes. Those instruments convey the hopes and aspirations of most nations, including Botswana, but the country's legal obligations derive from our own laws, which generally keep pace with what is practical and affordable in our circumstances. Some reliance has been placed by counsel on the judgment of this Court in **ATTORNEY GENERAL vs MOSETLHANYANE & ANOTHER (2011) 1 BLR 152 CA**. That case was decided upon an interpretation of section 6 of the Water Act Cap 34:01. It was held that Government's refusal to allow the applicants to recommission and utilize a disused borehole on land lawfully occupied by them was *ultra vires* that Act and thus unlawful. In that case, as in this, the claim was bolstered by an additional prayer for a declaration that Government's refusal was unconstitutional (on the basis that this amounted to inhuman or degrading treatment contrary to section 7 of the Constitution). Having decided the appeal on the initial point, Ramodibedi J.A. went on to state:

> "It remains then to deal briefly with the appellants' point relating to section 7(1) of the Constitution."

85. He proceeded to do so, in a short and subsequent part of his judgment, in which he opined that in terms of certain international instruments the right to clean drinking water was a fundamental human right, and the deprival of this amounted to inhuman treatment. Those findings were, as in the judgments of the High Court in this case, *obiter* in nature, and the learned Judge did not proceed to make a declaratory order on the constitutional point, as prayed, but merely made an order setting out and enforcing the applicants' rights under the Water Act, with no reference to the Constitution. That *obiter* opinion should not be taken as being authority for the proposition that section 7 can be construed in any circumstances as conferring the socio-economic right to clean drinking water. That is not a right granted by the Botswana Constitution in its present form.

86. Finally, it must be stressed that the decision in this case relates strictly to the special circumstances of foreign persons imprisoned by the State, and the medical treatment to which

they are entitled. It does not address at all the situation of foreign residents, foreign visitors, or illegal immigrants outside the prison walls. Their situation is entirely different, and it may well be argued that differential treatment of foreigners is justifiable as being in the public interest and necessary to safeguard the rights of citizens in a developing and landlocked country with unenviably porous borders. As is the case with most sovereign developing States the country's obligations to its own nationals take priority, and this is reflected in many of our laws and policies, such as the provision of old age pensions, free schooling, free health services, destitute care, job and business reservations, citizen economic empowerment policies and others. Suggestions by Dingake J. to the contrary are purely his own. They too are *obiter*, and any argument on the rights of visitors must stand over for another day.

87. The appeal of the Attorney General must thus be dismissed, but the orders of the Courts below will be adjusted (as in

MOSETLHANYANE's case, supra) to exclude any references to the Constitution. The order of the Court is as follows:

(1) The appeals are dismissed with costs, including the costs of two counsel.

(2) The Orders of the two Judges in the Court below are set aside and are replaced in each case by the following Order:

(a) The decision to withhold free medical treatment from non-citizen prisoners with AIDS conveyed, in the Permanent Secretary's Savingram of 24th March 2004 is set aside.

(b) There is to be full compliance with the Prisons Act and Regulations by the provision to the applicant/s or such of them as remain in custody at the date of this Order, and to other HIV positive foreign prisoners, on the same basis as to citizen prisoners, of free testing, assessment and treatment with ARVs and HAART where appropriate.

(c) The respondents are to bear the costs of the application, which costs shall include the costs of two counsel.

DELIVERED IN OPEN COURT AT GABORONE THIS 26th **DAY OF** August **2015.**

I.S. KIRBY
JUDGE PRESIDENT

I AGREE

J.G. FOXCROFT
JUSTICE OF APPEAL

I AGREE

I.B.K. LESETEDI
JUSTICE OF APPEAL

I AGREE

M.S. GAONGALELWE
JUSTICE OF APPEAL

I AGREE

LORD HAMILTON
JUSTICE OF APPEAL