CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/11
[2012] ZACC 16

In the matter between:

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Applicant
GEORGE MASANABO, ACTING DIRECTOR OF DEPORTATIONS	Third Applicant
ANN MOHUBE, ACTING DEPUTY DIRECTOR LINDELA HOLDING FACILITY	Fourth Applicant
JOSEPH SWARTLAND, ASSISTANT DIRECTOR LINDELA HOLDING FACILITY	Fifth Applicant
and	
EMMANUEL TSEBE	First Respondent
JERRY OFENSE PITSOE (PHALE)	Second Respondent
SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA	Third Respondent
BOSASA (PTY) LTD T/A LEADING PROSPECTS TRADING	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent

MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION — Sixth Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — Seventh Respondent

and

AMNESTY INTERNATIONAL — Amicus Curiae

and

Case CCT 126/11
[2012] ZACC 16

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — First Applicant

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — Second Applicant

and

EMMANUEL TSEBE — First Respondent

JERRY OFENSE PITSOE (PHALE) — Second Respondent

SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA — Third Respondent

MINISTER OF HOME AFFAIRS — Fourth Respondent

DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS — Fifth Respondent

GEORGE MASANABO, ACTING DIRECTOR OF DEPORTATIONS — Sixth Respondent

ANN MOHUBE, ACTING DEPUTY DIRECTOR LINDELA HOLDING FACILITY — Seventh Respondent

JOSEPH SWARTLAND, ASSISTANT DIRECTOR
LINDELA HOLDING FACILITY — Eighth Respondent

BOSASA (PTY) LIMITED T/A LEADING PROSPECTS
TRADING — Ninth Respondent

MINISTER OF INTERNATIONAL RELATIONS
AND CO-OPERATION — Tenth Respondent

and

AMNESTY INTERNATIONAL — Amicus Curiae

Heard on : 23 February 2012

Decided on : 27 July 2012

JUDGMENT

ZONDO AJ (Mogoeng CJ, Cameron J (except for [55], [56] and [60] to [62]), Froneman J (except for [55], [56] and [60] to [62]), Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J (except for [55], [56] and [60] to [62]) and Van der Westhuizen J (except for [55], [56] and [60] to [62]) concurring):

Introduction

[1] The applicants[1] for leave to appeal are the Minister of Justice and Constitutional Development (Justice Minister), the Minister of Home Affairs (Home Affairs Minister),

[1] In this Court, although the Minister of Justice and Constitutional Development and the Minister of Home Affairs and officials under the latter's control brought separate applications, this is one matter. There seems to be confusion in the Notice of Motion and the Founding Affidavit of the Minister of Home Affairs' application to this Court as to whether it was direct access or direct appeal under Rule 19, but it will be treated as an application for direct appeal under Rule 19.

the Government of the Republic of South Africa (Government), the Director-General of the Department of Home Affairs and various officials of that Department. The respondents include Mr Emmanuel Tsebe and Mr Jerry Ofense Pitsoe (Phale).[2] The applicants were some of the respondents in two applications that were brought separately by Mr Tsebe and Mr Phale in the South Gauteng High Court (High Court) but were later consolidated into one matter.[3]

[2] The primary purpose[4] of Mr Tsebe's and Mr Phale's applications was to obtain an order restraining the Government, the Home Affairs Minister, certain officials of the Department of Home Affairs, as well as the Justice Minister and others from extraditing or deporting the applicant in each case to the Republic of Botswana (Botswana) in the absence of a written assurance from Botswana that, if convicted of murder, the death penalty would not be imposed, or, if imposed, it would not be executed (requisite assurance). Mr Tsebe also sought an order declaring that, in the absence of the requisite assurance, his extradition or deportation would be unlawful and unconstitutional.

[3] The Justice Minister and the Government brought a counter-application in the High Court in which they sought an order declaring in effect that, where the Government

[2] At some stage in Mr Pitsoe's life he used the surname Phale and later used the surname Pitsoe. Phale is the surname of his stepfather and Pitsoe is his mother's cousin's surname which he used from the time when he lived with his mother's cousin in former Bophuthatswana.

[3] In the High Court, Lamont J granted an order consolidating the Tsebe and Phale matters.

[4] This refers to the purpose of the two applications as at the hearing of the applications before the High Court where some orders that had been asked for in the Notices of Motion were abandoned.

has been requested to extradite a person to a foreign State to face a criminal charge which could lead to the imposition and execution of a death sentence and the Government has asked that State to give the requisite assurance but that State has refused, the Government is then entitled to extradite or deport the person concerned to that State.

[4] The applications were heard by a Full Court.[5] The High Court granted Mr Tsebe's and Mr Phale's applications and dismissed the Justice Minister's and the Government's counter-application.[6]

[5] The applicants now apply for leave to appeal directly to this Court against the Full Court's judgment and order. Before the applications can be considered, it is necessary to set out the factual background to the matter.

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[5] The Full Court consisted of Mojapelo DJP, Claassen J and Bizos AJ.

[6] The order that was made by the High Court in both cases 27682/10 and 51010/10 was in the following terms:

> "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.
>
> 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 opposed the relief sought herein to pay the applicants' costs inclusive of the cost of two counsel.
>
> 4. The counter-applications are dismissed with costs which are to include the costs of two counsel."

The judgment of the Full Court has been reported as *Tsebe and Another v Minister of Home Affairs and Others; Pitsoe v Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ) (The High Court judgment).

Background

[6] In July 2008 Mr Tsebe, a national of Botswana, was accused of murdering his wife or romantic partner in Botswana. A similar accusation was made against Mr Phale in relation to his girlfriend or wife in October 2009. It is not necessary to give details of how they are alleged to have murdered their partners but it suffices to say that, if the allegations about how they killed their partners are true, the killings were brutal. When the police in Botswana tried to arrest Mr Tsebe and Mr Phale in separate incidents and at separate times, they fled to South Africa.

[7] It is common cause that Mr Tsebe's entry into South Africa was illegal. Mr Phale disputes the contention that his entry into South Africa was illegal. He says that he is a South African citizen and was issued a South African identity document. The Department of Home Affairs says that he is not a South African citizen and that he obtained the South African identity document fraudulently. After Mr Tsebe's and Mr Phale's flight from Botswana, the authorities in Botswana issued warrants of arrest against them. Botswana also requested South Africa to extradite the men to Botswana to face murder charges.

[8] On or about 27 July 2008 Mr Tsebe was arrested. He was initially detained at Tomberg Police Station and Polokwane Prison from 28 July 2008 to 25 August 2009, and later at Lindela Holding Facility from 26 August 2009 onwards. The detention at Tomberg Police Station was effected pending the outcome of extradition proceedings.

The detention at Lindela Holding Facility was effected pending a final decision whether he would be extradited to Botswana to face the murder charge. He appeared in the Mokopane Magistrate's Court a number of times in connection with his extradition proceedings.

[9] An extradition inquiry was initiated in the Mokopane Magistrate's Court, in terms of the Extradition Act[7] (EA), to establish whether Mr Tsebe was liable for extradition. The then Justice Minister, Mr Surty, wrote to his counterpart in Botswana and informed him that South Africa would not extradite Mr Tsebe unless Botswana gave South Africa the requisite assurance. Botswana's response was that it would not give the requisite assurance because there was no provision for it in its domestic law and in its extradition treaty with South Africa.

[10] A meeting between the current Justice Minister and his counterpart from Botswana was held without success on 14 July 2009 to try and resolve the impasse between the two countries. Botswana's Justice Minister then suggested that South Africa should put Mr Tsebe on trial in South Africa for the murder. The Justice Minister subsequently wrote to the Justice Minister of Botswana and informed him that South Africa had not passed legislation that would give the South African courts jurisdiction to try people for crimes committed outside its borders. On 11 March 2009 the extradition inquiry in the

[7] Act 67 of 1962.

Mokopane Magistrate's Court was completed. The Magistrate found that Mr Tsebe was liable for extradition.

[11] On 25 August 2009 the Justice Minister issued an order in terms of section 11(b)(iii) of the EA[8] to the effect that Mr Tsebe should not be surrendered to Botswana to face the charge of murder. The Justice Minister's order in this regard was based on internal legal advice given to him in the light of the provisions of section 11(b)(iii) of the EA and the decision of this Court in *Mohamed and Another v President of the RSA and Others*[9] (*Mohamed*).

[12] Mr Tsebe was subsequently transferred to the Lindela Holding Facility pending deportation to Botswana despite the Justice Minister's order that he should not be surrendered to Botswana. Mr Tsebe was transferred because certain officials of the Department of Home Affairs, despite the Justice Minister's order, took the view that

[8] In so far as it is relevant, section 11 of the EA reads as follows:

> "The Minister may—
>
> …
>
> (b) order that a person shall not be surrendered:
>
> …
>
> (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."

[9] [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC). As to what was decided in *Mohamed*, see below at [25].

Mr Tsebe should be deported since he was an illegal foreigner and in terms of the Immigration Act[10] (IA) he was required to be deported. For quite some time officials of the Department of Justice and officials of the Department of Home Affairs took contradictory positions on whether Mr Tsebe should be deported, with officials of the Department of Justice saying he should not and officials of the Department of Home Affairs saying he should be deported.

[13] Although the Justice Minister had issued a non-extradition order in respect of Mr Tsebe, he subsequently deposed to an affidavit opposing Mr Tsebe's and Mr Phale's applications. He made an about-turn saying that he had not applied his mind to all the issues when he took the decision to issue the non-extradition order. He contended that, since Botswana had refused to give the requisite assurance, the Government was entitled to extradite Mr Tsebe to Botswana. He said this despite the fact that the extradition may have posed a risk for the imposition of the death penalty if Mr Tsebe was convicted. The Justice Minister said that South Africa would use other forums under the auspices of the Southern African Development Community (SADC) to try and get Botswana not to execute the death penalty. The Justice Minister did not say what would prevent Botswana from executing the death penalty if South Africa's efforts in the SADC failed, since Mr Tsebe would have already been extradited by the time those efforts failed.

[10] Act 13 of 2002. Section 32(2) of the IA reads: "Any illegal foreigner shall be deported."

[14] Ultimately, the Home Affairs Minister took the decision that Mr Tsebe should be deported. It would appear that she based her decision, at least in part, on the legal opinions given to her by certain internal legal advisors in the Department of Home Affairs. One reason for the Home Affairs Minister's decision to deport Mr Tsebe to Botswana, despite the fact that Botswana had refused to give the requisite assurance, was that, even after Mr Tsebe's deportation, South Africa could still continue to put pressure on Botswana not to execute the death penalty if Mr Tsebe was convicted of the murder and sentenced to death. The Home Affairs Minister also did not say what would happen if Botswana did not give in to the pressure at a time when Mr Tsebe was already in Botswana. Another reason was that Mr Tsebe remained an illegal foreigner and the IA required that he be deported.

[15] To prevent his imminent deportation, Mr Tsebe brought an urgent application in the High Court for an interim interdict to restrain the Home Affairs Minister, certain officials of the Department of Home Affairs, the Justice Minister and the Government from extraditing or deporting him to Botswana in the absence of the requisite assurance. Victor J granted an interim interdict pending the outcome of an application by Mr Tsebe for the review and setting aside of the decision of the Home Affairs Minister that he be deported. After Mr Tsebe had launched his application in the High Court, he was charged with contraventions of the IA and taken to Krugersdorp Prison where he was detained as an awaiting trial prisoner. Mr Tsebe passed away on 27 November 2010 before the High Court could hear his application.

[16] After his arrest in Limpopo, Mr Phale was detained by the South African Police Service. He subsequently appeared in the Mankweng Magistrate's Court. His last appearance there was on 2 March 2010. On that day he was told that the criminal case against him had been withdrawn.

[17] The withdrawal of the case against Mr Phale occurred because an official of the Department of Justice had advised the National Prosecuting Authority (NPA) that, in the light of the non-extradition order in Mr Tsebe's matter, the Justice Minister would not order the extradition of Mr Phale in the absence of the requisite assurance and the NPA had then shared this information with the Director of Public Prosecutions in Botswana. After consultation with the Executive in Botswana, the Director of Public Prosecutions in Botswana advised the NPA that Botswana would not give the requisite assurance in Mr Phale's case either. It seems that, as a result of these communications, the NPA decided not to pursue extradition proceedings in regard to Mr Phale and that is why the "criminal case" was withdrawn against him. All this happened without the Justice Minister having taken any decision with regard to extradition proceedings concerning Mr Phale and Botswana's request for Mr Phale's extradition.

[18] Mr Phale was informed that he was to be deported to Botswana. In December 2010 he launched his application in the High Court. After this, the Department of Home Affairs had criminal charges initiated against him in the Rustenburg

Magistrate's Court. One of the charges was a charge of fraud. It was alleged that he had fraudulently obtained a South African identity document. Other charges related to contraventions of the IA.

The decision of the High Court

[19] There was only one issue for determination by the High Court. That was whether or not the Government had the power to extradite or deport Mr Tsebe and Mr Phale to Botswana to face their respective murder charges even though Botswana had refused to give the requisite assurance.[11] If the answer to this question was in the affirmative, that would be the end of the matter and Mr Tsebe's and Mr Phale's applications would fall to be dismissed. If the answer was in the negative, Mr Tsebe and Mr Phale would be entitled to the declaratory order and interdict they sought.

[20] In a very thorough judgment the Full Court considered the issue and concluded that it was bound by the decision of this Court in *Mohamed* and that there was no basis on which the present case could be distinguished from *Mohamed*.[12] In the light of this the Court concluded that, if the Government extradited, deported or removed Mr Tsebe and Mr Phale to Botswana, the extradition or deportation would subject them to the risk of the imposition of the death penalty and would be unlawful.[13] The Full Court held that the

[11] High Court judgment above n 6 at para 3.

[12] Id at para 98.

[13] Id at paras 99-100.

respondents before it would also be in breach of their constitutional obligations under section 7(2) of the Constitution[14] if they extradited or deported or in any way removed Mr Phale to Botswana without the requisite assurance.

Jurisdiction of this Court

[21] There can be no doubt that this Court has jurisdiction over this matter because the matter concerns the constitutionality of the deportation or extradition by the State of a person to a country in which the death penalty is a competent sentence for the offence for which he will stand trial in circumstances where that country has refused to give the requisite assurance. The questions are whether in effecting an extradition or deportation of a person in such a case the State will be acting in breach of its obligations provided for in section 7(2) of the Constitution and whether such an extradition or deportation would violate Mr Tsebe's and Mr Phale's right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way.[15]

Condonation

[22] The applicants were late in lodging their applications. They have applied for condonation. Having regard to the explanation that they have given and the importance of the issues raised, there can be no doubt that it is in the interests of justice that condonation be granted.

[14] See below at [28].

[15] See below at [30].

Is it in the interests of justice to grant leave to appeal to this Court?

[23] It is clear that there is much uncertainty within the Executive as to the effect of the Constitution and this Court's decision in *Mohamed*. Between the parties there are no substantive disagreements on the facts. There is no reason why this Court should first have the views of the Supreme Court of Appeal before it can entertain this matter. The matter raises important constitutional issues. There is also some urgency in the need to ensure that the Executive knows exactly what is expected of it in cases of extradition and deportation involving persons in the position of Mr Tsebe and Mr Phale. Furthermore, the Justice Minister and the Home Affairs Minister are faced with, on the one hand, the decision of this Court in *Mohamed*, which, if applicable to this case, would preclude the extradition or deportation of Mr Phale in the absence of the requisite assurance and, on the other, the provisions of the IA which require that an illegal foreigner be deported. In my view it is in the interests of justice that this Court should grant the applicants leave to appeal directly to it.

The merits of the appeal

[24] The issue for determination is whether or not the Government has the power to extradite or deport or in any way surrender a person, including an illegal foreigner, to another country to stand trial on capital charges if the death penalty is a competent sentence in that country and that country is not prepared to give the requisite assurance. Within the context of an appeal the question is whether the High Court's decision that the

Government had no power to extradite, deport or surrender Mr Tsebe or Mr Phale to Botswana in the absence of the requisite assurance and interdicting the Government from extraditing or deporting them and the decision dismissing the Justice Minister's and Government's counter-application were correct.

[25] The approach taken by this Court in *Mohamed* was that, when South African authorities hand someone over to another country to stand trial on a charge which, to the knowledge of the South African authorities, could lead to the imposition and execution of the death penalty on such person if he is found guilty, they facilitate the imposition of the death penalty and that is a breach of their obligations contained in section 7(2) of the Constitution.[16] In *Mohamed* this Court held that the conduct of the South African authorities in handing Mr Mohamed over to the authorities of the United States of America (US) to stand trial in that country, in the full knowledge[17] that, if convicted, he could be sentenced to death, without obtaining the requisite assurance from the US government, violated Mr Mohamed's constitutional right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way.[18]

[26] If the correctness of *Mohamed* is not challenged, the answer to this question before us will depend on two further questions. One will be whether the present case is

[16] *Mohamed* above n 9 at paras 58 and 60.

[17] Id at para 60.

[18] Id at paras 37, 58 and 60.

distinguishable from *Mohamed*. If it is, the Court will then deal with the matter in the light of that distinction. If it is not, the next question will be whether or not, if extradited or deported, Mr Phale would face a sufficient risk of the imposition and execution of the death penalty to justify this Court holding that his extradition or deportation would constitute a violation of the Constitution or a facilitation by South Africa of the imposition of the death penalty on him in Botswana if he is convicted.

The Constitution

[27] This country is founded on, among others, the following values:[19]

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Supremacy of the Constitution and the rule of law.

Our 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.[20]

[19] Section 1 of the Constitution.

[20] Section 2 of the Constitution.

[28] Section 7(1) of the Constitution provides that our Bill of Rights, which covers sections 7 to 39, is a cornerstone of our democracy. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) reads:

> "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

[29] Section 7(3) provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill of Rights. Section 8(1) of the Constitution provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

[30] Sections 10, 11 and 12 of the Constitution deal, respectively, with the right to human dignity, the right to life and the right to freedom and security of the person. Section 10 reads:

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

Section 11 reads:

> "Everyone has the right to life."

Section 12(1) reads:

> "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."

The provisions which this matter directly raises for consideration are those relating to the values upon which the democratic South Africa is founded, sections 2, 7(1) and (2), 10, 11 and 12 of the Constitution.

International law

[31] It is necessary also to refer to some instruments or treaties relating to extradition and the fight against crime to which both South Africa and Botswana are parties. In 1969 South Africa and Botswana concluded a treaty on extradition (Extradition Treaty). In terms of that treaty Botswana and South Africa agreed that they may refuse to extradite a person for a crime punishable by death. That treaty is still in operation. Article 6 reads:

> "**Capital Punishment**
>
> 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."

[32] Furthermore, South Africa and Botswana and certain other SADC countries are also parties to the Protocol on Extradition concluded under the auspices of the SADC (SADC Extradition Protocol). Article 5(c) of the Protocol allows a State which is being requested to extradite a person to refuse to do so—

> "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."

This article goes on to say:

> "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".

[33] This is the second instrument, to which both South Africa and Botswana are parties, that allows one of them to refuse extradition of a suspect charged with a capital offence in the absence of the requisite assurance. From this it is clear that South Africa has acted in accordance with the Extradition Treaty between itself and Botswana and in accordance with the SADC Extradition Protocol in insisting on the requisite assurance before it could extradite Mr Tsebe.

[34] Article 5(c) of the SADC Extradition Protocol goes even further because it obliges the requested State (South Africa in the present case), if the requesting State (Botswana

in the present case) so requests, to take steps to have the person whom it refuses to extradite put on trial before its own courts for the crime for which extradition was sought. Under the SADC Extradition Protocol South Africa has agreed that, if so requested by, for example Botswana, to do so, it will put persons in the position of Mr Phale on trial before the South African courts. South Africa and Botswana are also signatories to other SADC treaties and protocols in terms of which they have bound themselves to work together and with other SADC countries to combat crime in the SADC region.[21]

The death penalty in Botswana

[35] It is also necessary to have regard to the statutory provisions governing the imposition of the death penalty for murder in Botswana. Section 203 of the Penal Code of Botswana reads as follows:

> "(1) Subject to the provisions of subsection (2), any person convicted of murder *shall be sentenced to death*.
>
> (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 an ordinary person of the class of the community to which the convicted person belongs."
>
> (Emphasis added.)

[21] For example, the Protocol on Combating Illicit Drugs which came into operation on 20 March 1999; the Protocol on Politics, Defence and Security Co-operation which came into force on 2 March 2004; the Protocol on the Control of Firearms, Ammunition and Other Related Materials, which came into force on 8 November 2004; the Protocol on Mutual Legal Assistance in Criminal Matters which came into force on 1 March 2007; and the SADC Mutual Defence Pact which came into force on 17 August 2008.

This provision makes the imposition of the death sentence on those convicted of murder in Botswana mandatory where there are no extenuating circumstances. The Penal Code of Botswana also provides that, where a person has been sentenced to death, he shall be hanged by the neck until he dies.[22]

Statutory framework

[36] It is also necessary to refer to provisions of the EA and the IA which may have a bearing on the dispute between the parties. In part, section 11(b)(iii) of the EA[23] gives the Justice Minister the power to order that a person should not be surrendered to another State if the offence for which he is wanted is of a trivial nature or if his surrender is not required in the interests of justice or if, for any other reason and having regard to all the circumstances of the case, it would be unjust, unreasonable or if the punishment would be too severe. In other words, the EA recognises that there are circumstances in which South Africa should refuse to extradite a person and sets out those situations in section 11(b)(iii). Such situations include a situation where the Justice Minister considers the punishment or sentence that the person will or may face, if he is extradited, to be severe. The Justice Minister has stated in his affidavit that it was on the basis of the provisions of section 11(b)(iii), read with *Mohamed*, that he issued the non-extradition order in Mr Tsebe's case. There are also provisions of the IA which need to be referred to but these will be referred to later in this judgment.

[22] Section 26(1) of the Penal Code of Botswana.

[23] See above n 8.

[37] Mr Tsebe's and Mr Phale's cases were based on the provisions of the Constitution as interpreted and given effect to by this Court in both *Makwanyane*[24] and *Mohamed*. The decision of the High Court in the present matter also sought to give effect to the decision of this Court in *Mohamed*. In the light of this a word or two on these two decisions is necessary.

Makwanyane

[38] In *Makwanyane*[25] this Court held that the death penalty was inconsistent with provisions of the interim Constitution and declared it unconstitutional.[26] In his judgment, which enjoyed the broad support of a number of the other Justices, Chaskalson P pointed out that, by committing ourselves to a society founded on the recognition of human rights, we were required to give particular value to the rights to life and dignity and that "this must be demonstrated by the State in everything it does".[27]

[24] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*).

[25] The position adopted by the first democratically elected South African government towards the death penalty at the hearing of the *Makwanyane* case was that the death penalty was unconstitutional and should be declared invalid. See para 11 of Chaskalson P's judgment in *Makwanyane*.

[26] Section 9 of the interim Constitution provided: "Every person shall have the right to life." Section 10 of the interim Constitution provided: "Every person shall have the right to respect for and protection of his or her dignity." Section 11(2) of the interim Constitution read thus: "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[27] *Makwanyane* above n 24 at para 144.

Mohamed

[39] Mr Mohamed was a Tanzanian national who, after allegedly taking part in the bombing of two US embassies in Nairobi and Dar es Salaam, entered South Africa illegally. In the full knowledge that, if taken to the US, Mr Mohamed would stand trial for multiple murders arising from the bombings and that, if convicted, he could be sentenced to death, the South African authorities handed him over to US officials without making any acceptable arrangement to ensure either that the death penalty would not be imposed on him if he was convicted or that, if imposed, it would not be executed.

[40] One of the questions in *Mohamed* was whether the South African authorities were in the above circumstances entitled to hand Mohamed over to the US authorities. This Court found that Mr Mohamed's deportation from South Africa to the US was unlawful. This finding must be understood within the context of the fact that in *Makwanyane* this Court had already held that the death penalty was unconstitutional because it violated the right to life, the right to human dignity and constituted cruel, inhuman and degrading punishment.[28] In *Mohamed* this Court held that the provisions of section 7(2) of the Constitution oblige the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman and degrading punishment or treatment.

[28] Id at para 95.

[41] This Court's conclusion that Mr Mohamed's deportation was unlawful was based in part on *Makwanyane*, section 7(2) of the Constitution, the knowledge of the South African authorities of the risk of the imposition of the death penalty that Mr Mohamed would face in the US if he was removed from South Africa and taken to the US and the fact that the removal or deportation in the circumstances in which it happened violated Mr Mohamed's right to life, right to human dignity and right not to be subjected to cruel, inhuman or degrading punishment.[29]

[42] In *Mohamed* this Court stated that under our Constitution there are no exceptions to the protection of the right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way.[30] However, the Court said that it must be remembered that, like all the rights in the Bill of Rights, these rights are subject to limitation as provided for in section 36 of the Constitution.[31] This Court also said:

> "Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated."[32]

The Court went on to say in the next sentence that there was no doubt that "the removal of Mohamed to the United States of America posed such a threat." It found that "[t]he

[29] *Mohamed* above n 9 at paras 48, 54, and 58-60.

[30] Id at para 52.

[31] Id at para 48.

[32] Id at para 52.

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" an undertaking from the US that the death penalty would not be imposed or, if imposed, would not be executed.[33]

[43] The question that arises is: What is the principle that *Mohamed* established? The principle is that the Government has no power to extradite or deport or in any way remove from South Africa to a retentionist State[34] any person who, to its knowledge, if deported or extradited to such a State, will face the real risk of the imposition and execution of the death penalty.[35] This Court's decision in *Mohamed* means that if any official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution.

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[33] Id at para 53.

[34] A retentionist State is a State that has retained the death penalty.

[35] The proposition that the test is a real risk is supported by the fact that, after quoting from *Soering v United Kingdom* (1989) 11 EHRR 439 (*Soering*); *Hilal v United Kingdom* (2001) 33 EHRR 31 (*Hilal*); and *Chahal v United Kingdom* (1996) 23 EHRR 413 (*Chahal*), all of which referred to "a real risk", this Court in *Mohamed* went on to say at para 58:

> "These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the State to 'protect, promote and fulfil the rights in the Bill of Rights'." (Footnotes omitted.)

See *Mohamed* above n 9 at paras 55-9.

[44] In *Mohamed* this Court discussed a number of foreign cases[36] dealing with how various courts and other tribunals have dealt with the question under consideration in this case. It is not necessary to repeat that discussion in this judgment even though parties have referred to such cases in their argument. We are not called upon to reconsider the correctness of this Court's decision in *Mohamed*. Accordingly, unless the present case is distinguishable from *Mohamed* we are bound to decide it in accordance with the principle established in that case.

[45] The principle established in *Mohamed* has a direct connection with the provisions of sections 7(2), 10, 11 and 12 of the Constitution and the values upon which our new constitutional democracy is based. When the first democratically elected Parliament adopted our Constitution we, as a nation, turned our back on a very ugly past which had caused untold suffering to many in our society. We committed ourselves to the building of a new society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism, non-sexism and the supremacy of the Constitution and the rule of law. We sought to create a society whose cornerstone[37] is our Bill of Rights which enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

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[36] The foreign cases included *United States v Burns* [2001] 1 RCS 283; *Kindler v Canada (Minister of Justice)* [1991] 2 RCS 779; *Reference re Ng Extradition (Canada)* (1991) 6 CRR (2d) 252; *Halm v Canada (Minister of Employment and Immigration)* (TD) 1996 1 F.C. 547; *R v Brixton Prison (Governor), ex parte Soblen* (1962) 3 All ER 641 (CA); *Soering* above n 35; *Hilal* above n 35; and *Chahal* above n 35.

[37] Section 7 of the Constitution.

[46] One of the values of our Constitution on which our new society is based is the advancement of human rights. The effect of our commitment to a society based on, among others, this value is that, as a nation, we have committed ourselves to advancing human rights in all that we do. Furthermore, the State is enjoined by section 7(2) of the Constitution not only to respect, protect and fulfil all the rights in the Bill of Rights but, very importantly in the context of this case, also to promote all rights in the Bill of Rights. Accordingly, it is in this context that the principle established in *Mohamed* must be seen. In *Kaunda and Others v President of the Republic of South Africa*[38] this Court also emphasised in effect the centrality of the advancement of human rights and freedoms in our society. It said:

> "The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses."[39]

This passage applies also when the Government deals with foreigners who are within the borders of this country who face the real risk of the abuse of their human rights if they were to be extradited, deported or in any way surrendered to another country in which they would be exposed to such violations.

[38] [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

[39] Id at para 66.

Is Mohamed *distinguishable?*

[47] It is important to record that at the hearing of this matter neither counsel for the Justice Minister nor counsel for the Home Affairs Minister argued that *Mohamed* was wrongly decided and should be revisited. On the contrary counsel for the Justice Minister informed the Court that he embraced[40] this Court's decision in *Mohamed*. For his part, counsel for the Home Affairs Minister indicated that, on the facts of the *Mohamed* case and on the correct application of the relevant legal principles to the facts in *Mohamed*, no court could have reached any conclusion other than the conclusion that was reached by this Court.

[48] Although counsel for the Justice Minister initially announced that he would not seek to distinguish the present case from *Mohamed*, he later sought to do so. He pointed out that in *Mohamed* there was no possibility of Mr Mohamed going free whereas in the present case there was a possibility that Mr Phale could go free if he could not be extradited or deported. What counsel was referring to was that, if Mr Phale cannot be deported, he will have to be freed from detention because he cannot be detained indefinitely. The fact that there was no possibility of Mr Mohamed going free is not a basis to distinguish the present case from *Mohamed*. One need only go back to the principle established in *Mohamed* to appreciate this because the decision was not dependent upon whether Mr Mohamed could or could not go free.

[40] That was the term used by counsel in argument.

[49] The Justice Minister also submitted in his affidavit that the present case was distinguishable from *Mohamed* because in that case the Court did not have to consider the provisions of the EA whereas in this case the Court has to consider the provisions of the EA. We do not agree. The submission ignores the fact that in *Mohamed* this Court made it clear that the obligation of the Government to secure the requisite assurance could not depend on whether the removal is by extradition or deportation. This Court said that the constitutional 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.[41]

[50] Counsel for the Justice Minister also submitted that, when the Justice Minister performs his statutory extradition duties, he performs an act of State. This submission seems to suggest that in such a case the Justice Minister is not obliged to respect, protect, promote, or fulfil the rights in the Bill of Rights as required by section 7(2) of the Constitution. I am unable to agree with this submission. Section 7(2) is not qualified in any way. Accordingly, the obligations it places upon the State apply to everything that the State does. This Court has already made it clear in *Mohamed* that there are no exceptions to the right to life, the right to human dignity and the right not to be subjected

[41] *Mohamed* above n 9 at para 42.

to treatment or punishment that is cruel, inhuman or degrading.[42] These are the rights that the State must respect, protect, promote and fulfil in a case such as the present one.

[51] Counsel for the Justice Minister also submitted that the Court should find that to require that the Government should ask Botswana to give the requisite assurance would constitute interference with the prosecutorial independence of the prosecuting authority of Botswana and with the independence of the Judiciary of Botswana. One answer to this is that it is not an essential requirement of the assurance that the death penalty will not be asked for by the prosecutorial authorities of Botswana nor is it an essential requirement that the trial Judge in Botswana will not impose the death penalty. What is of critical importance is the giving of the assurance that, if the death penalty is imposed, it will not be executed. Accordingly, this does not in any way affect the independence of the courts of Botswana or the prosecutorial independence of the Director of Public Prosecutions in Botswana. The execution of the death penalty falls within the authority of the Executive. It is up to the Executive whether it is prepared to provide the requisite assurance. The Constitution of Botswana gives the President of that country power to intervene and substitute a term of imprisonment for the death penalty. [43] Another answer is that in terms of the SADC Extradition Protocol, to which both Botswana and South Africa are parties, Botswana has agreed that South Africa may request it to provide the requisite assurance in a case such as Mr Tsebe's and Mr Phale's.

[42] Id at para 52. It was accepted in *Mohamed* (at paras 47 and 52) that, like all rights in the Bill of Rights, these rights are also subject to the limitation contained in section 36 of the Constitution.

[43] Section 53 of the Constitution of Botswana.

[52] Counsel for the Justice Minister also submitted that the Executive must be given an opportunity to resolve the dispute between South Africa and Botswana politically through the Organ of Politics, Defence and Security under the auspices of the SADC. This is correct and a resolution in that forum is desirable. Although one has some understanding of the Justice Minister's concern in this regard, the fact of the matter is that Mr Phale has a dispute with the Government that can be resolved by the application of law and he has a right in terms of section 34 of the Constitution to have that dispute resolved through the application of law by the courts.[44] Once he has brought the dispute to the courts, the courts must decide the dispute. If this Court comes to the conclusion that the Government cannot extradite or deport Mr Phale to Botswana in the absence of the requisite assurance without being in breach of the Constitution, this will not mean that the Executive may not pursue a political solution to the problem through some or other structures of the SADC. That may be done and, indeed, is to be encouraged. However, to avoid a breach of the Constitution, it is necessary to protect the rights of Mr Phale pending the exhaustion of those avenues. Accordingly, this Court cannot uphold the Justice Minister's contention.

[44] Section 34 of the Constitution reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[53] In the affidavits delivered by the Department of Home Affairs one of the bases upon which the judgment of the High Court was criticised was that it approached the *Mohamed* case as if it laid down an absolute rule that precluded the consideration of each case on its merits. It seems that this criticism may have been based on the statement in *Mohamed* that the Government's obligation to secure the requisite assurance depended "on the facts of the particular case and the provisions of the Constitution".[45] The reference to the facts of the particular case in *Mohamed*[46] was nothing more than a reference to the facts relating to whether or not it could be said that there was a real risk that, if the person concerned was extradited or deported, he would face the imposition and execution of a death penalty or he would face treatment or punishment that would be cruel, inhuman or degrading. What was meant was that, once it was accepted that the facts established such a risk, the principle in *Mohamed* applies. That statement did not mean that there were exceptions to the principle established. The position is, therefore, that, if the extradition or deportation of a person will expose him to a real risk of the imposition and execution of the death penalty, the State may not extradite or deport that person. There is no exception to this principle. If the requisite assurance is given, there is, as a general proposition, no such real risk and the person may be deported or extradited.

[45] *Mohamed* above n 9 at para 42.

[46] Id.

[54] The Justice Minister also suggested in his affidavit that the decision of the High Court was based upon an excessive concern about the rights of Mr Tsebe and Mr Phale and a complete disregard for the rights of the rest of the people of South Africa who are also entitled to the protection of their rights contained in the Bill of Rights and the obligation which the Government has of protecting the rest of the population against people who may have committed violent crimes. The implication of the Justice Minister's suggestion was that, if the Court below had also paid attention to the rights of people other than Mr Tsebe and Mr Phale, it would have concluded that the Government was entitled to extradite or deport Mr Phale. In support of this contention reference was made to *Carmichele v Minister of Safety and Security*.[47]

[55] Part of the answer to this is that neither Mr Tsebe nor Mr Phale had been convicted of murder. In terms of our law anyone who is charged with a crime or who is suspected of the commission of a crime is presumed to be innocent until proven guilty. That principle applies to persons in the position of Mr Phale as well. In any event there are many citizens of our own country who are not in jail or detention and who are out in society even though they face serious charges like murder. We do not say that they must never get bail merely because they are charged with serious crimes. After all, the obligation to protect the population, which the Government has, requires nothing more than that the Government must put in place reasonable measures to discharge that obligation. The decision of this Court in *Carmichele* is not necessarily inconsistent with

[47] [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*).

the non-extradition or non-deportation of a person in Mr Phale's position. Finally, as *Carmichele* was relied upon without any elaboration, no further consideration thereof is warranted.

[56] In any event the approach taken by this Court in *Mohamed* in consequence of sections 7(2), 10, 11 and 12(1) of the Constitution is one that many progressive societies in the world adopt. As indicated earlier, section 11(b)(iii) of the EA also contemplates that the Justice Minister may order that someone wanted for a crime in another country shall not be surrendered to that country. In this regard it needs to be pointed out that section 11(b)(iii) is not a pre-democracy provision. Although the EA was enacted before 1994, section 11(b)(iii) was introduced into the EA after 1994.[48] Furthermore, the SADC Extradition Protocol contemplates that a State that is party to that Protocol may refuse to extradite a person in Mr Tsebe's and Mr Phale's position.

[57] The allegations against Mr Phale are very serious. He should, indeed, face justice. The question is how to reconcile the need to bring him to justice with the protection the Constitution affords him against the death penalty. The reconciliation, as I have suggested elsewhere, lies in the sphere of inter-governmental relations because it is clear that, under international law, Botswana is able to give the requisite assurance and South Africa is entitled to decline to surrender Mr Phale until that has happened.

[48] Section 9 of the Extradition Amendment Act 77 of 1996.

[58] All the complaints which the Justice Minister, the Home Affairs Minister, the Director-General of Home Affairs and various officials of the Department of Home Affairs have articulated about the implications or difficulties which they perceive will arise if the legal position is that Mr Phale may not be surrendered, extradited or deported to Botswana are implications that would arise in any event if the Justice Minister were to decide, as he decided in the case of Mr Tsebe, that he would use his powers under section 11(b)(iii) of the EA to order that Mr Phale or anybody in Mr Phale's or Mr Tsebe's position for that matter, should not be extradited despite the fact that he is wanted for a serious crime in another country. That is a power which the Justice Minister already had before this Court's decision in *Mohamed*. The Justice Minister has had the power since the coming into effect of section 9 of the Extradition Amendment Act 77 of 1996. This Court's decision in *Mohamed* was handed down in 2001.

[59] The concerns which both the Home Affairs Minister as well as the Director-General of Home Affairs raise concerning the obligations that they have under the IA to ensure the deportation of illegal foreigners and the question of what such a person's status in the country would be if he was not deported or extradited are concerns which would also arise if the Justice Minister were to use his powers under section 11(b)(iii) of the EA even if this Court's decision in *Mohamed* had not been made. This does not detract from the fact that these are legitimate concerns. However, the provision of the

IA[49] relating to the obligation to deport an illegal foreigner must be read consistently with the Constitution. It cannot be read to require the deportation of a person in circumstances in which the deportation would be a breach of the Constitution. It is true that the continued presence of Mr Phale in the country, an alleged illegal foreigner who is wanted by another country for a crime as serious as murder, would be a continuing concern for the Government and the people of South Africa in general. However, it needs to be pointed out that the IA defines "deport" in wide terms which include the Director-General ordering an illegal foreigner to leave South Africa, but if such foreigner thereafter remains in the country, he is guilty of an offence punishable by imprisonment in terms of the IA.[50] Having said this, I am of the view that the preferable solution to the problem lies, as already pointed out, in inter-governmental interaction and an acceptance by Botswana that South Africa's conduct is not in breach of but is in accordance with the Extradition Treaty between and in accordance with the SADC Extradition Protocol.

[60] The Justice Minister also referred in his affidavit to the fact that his department is working on revised draft extradition legislation. The purpose of that draft legislation is to give the South African courts jurisdiction to try crimes that have been committed outside the borders of this country in cases such as Mr Tsebe's and Mr Phale's because ordinarily the South African courts do not have jurisdiction to try such cases. The Justice Minister

[49] Section 32(2) of the IA. See above n 10.

[50] Section 1 of the IA defines "deport" or "deportation" as "the action or procedure aimed at causing an illegal foreigner to leave the Republic" in terms of the IA. Section 49(1)(b) of the IA provides that:

> "Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding nine months."

revealed that there are instances where South Africa has already put in place legislation that gives the South African courts jurisdiction to try certain specified offences despite the fact that they were committed outside South Africa. He gave two examples of pieces of legislation that have been passed in this regard, namely, the Prevention and Combating of Corrupt Activities Act[51] and the Implementation of the Rome Statute of the International Criminal Court Act.[52]

[61] It seems that, if South Africa could pass legislation to give its courts jurisdiction to try crimes which have been committed outside South Africa, there is no reason why similar legislation cannot or should not be put in place to ensure that persons in Mr Tsebe's and Mr Phale's position can be tried by the South African courts when countries in which they allegedly committed the crimes are not prepared to give the requisite assurance. Such legislation would prevent persons in the position of Mr Tsebe or Mr Phale not being put to trial at all because South Africa will not extradite or deport them in the absence of the requisite assurance and cannot also put them on trial and the other State cannot try them because they are not there and will also not give South Africa the requisite assurance. In doing so, South Africa would also be discharging its obligations under the SADC Extradition Protocol to put on trial before its courts persons in Mr Tsebe's and Mr Phale's position where the SADC country requesting extradition

[51] Act 12 of 2004.

[52] Act 27 of 2002.

refuses to give South Africa the requisite assurance and requests it to put such person on trial before its own courts.

[62] The Justice Minister has indicated that there will be difficulties in bringing foreign witnesses to South Africa to testify in trials relating to crimes committed outside South Africa. We do not see this as an insurmountable difficulty. Obviously, such trials will need the co-operation of the country which would have sought the extradition of the person concerned. It is unlikely that such countries would prefer that such persons should not be put on trial at all if they cannot be put on trial in those countries. It is likely that they would rather have them tried in South Africa and hope that they will get long terms of imprisonment instead of not being punished at all. For that reason it is likely that such countries will co-operate with South Africa to put such persons on trial in South Africa. In this case Botswana did suggest to the Justice Minister that Mr Tsebe be put on trial in South Africa but South Africa could not accede to the request because it had not passed the necessary legislation to give the South African courts jurisdiction. It seems to me that Botswana would have taken whatever steps were necessary to ensure that the state witnesses who would have been used in Botswana are brought to South Africa at the time of the trial to give evidence.

[63] The Justice Minister has also expressed the concern that the Government does not want our country to be perceived as a safe haven for illegal foreigners and fugitives from justice wanted for serious crimes in other countries. This concern was discussed by the

High Court.[53] Although it is a legitimate concern, it will not arise if countries seeking an extradition of someone in Mr Phale's position would be prepared to give the requisite assurance. Furthermore, our concern about that perception cannot override the need for us as a nation to stay on course on the path we have chosen for ourselves to respect, protect, promote and fulfil human rights, to observe our Constitution and deepen the values upon which we have chosen to create our new society. Those values include human dignity, the achievement of equality and the advancement of human rights and freedoms.

[64] It also seems implied in the Justice Minister's statements in the affidavit that he or the Government may also be concerned that, if the Government cannot deport or extradite persons in Mr Tsebe's and Mr Phale's position, this may be seen as undermining its obligations under treaties concluded with other states in terms of which they must co-operate to fight crime, particularly in the SADC region. This Court regards these concerns as legitimate because it is true that the Government must not only fight crime but it must also be seen to be sparing no effort in fighting crime. However, it must be remembered that our Constitution is our supreme law and in section 7(2) it places on the State the obligation to respect, protect, promote and fulfil, among others, the right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. In addition the SADC Extradition Protocol entitles the signatories to it to refuse to extradite suspects if the requesting State does not furnish the requisite

[53] High Court judgment above n 6 at paras 102-9.

assurance. Accordingly, among the SADC countries South Africa's conduct will not be perceived negatively because the SADC Extradition Protocol contemplates South Africa's conduct. So, the Government will not be doing anything wrong if it refuses to extradite or deport Mr Phale. In terms of the SADC Extradition Protocol it will be within its rights to do so. In any event, the obligations South Africa incurs in terms of treaties concluded with other countries are required to be consistent with its constitutional obligations.

[65] The human rights provided for in sections 10, 11 and 12 of our Constitution are not reserved for only the citizens of South Africa. Every foreigner who enters our country – whether legally or illegally – enjoys these rights and the State's obligations contained in section 7(2) are not qualified in any way. Therefore, it cannot be said that they do not extend to a person who enters our country illegally. In the light of this the question then would be: How does the Government discharge its section 7(2) obligations in respect of such a person if it extradites, deports or surrenders him to a State where, to its knowledge, he runs the real risk of the imposition and execution of the death penalty if he is convicted of the crime for which he is wanted?

[66] The question in the preceding paragraph leads one to the counter-application for an order that would allow the Government to extradite, deport or surrender persons in Mr Tsebe's and Mr Phale's position after the Government has asked the State concerned to give the requisite assurance and that State has refused. That application was correctly

dismissed by the High Court. What would be the value of South Africa's request for the requisite assurance if its rejection would have no consequences for the other State? The other side of every legal obligation is a legal right. In this context the State has section 7(2) obligations and the person who has the legal right to the State's protection, promotion and fulfilment of his right to life, right to human dignity and right not to be subjected to cruel, inhuman or degrading punishment is the person sought by the other State for extradition. If the position was that, after South Africa has asked such a State for the requisite assurance and such State has refused, South Africa may extradite, deport or surrender such person to such State, that person would be entitled to say: The right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading punishment and the State's obligations under section 7(2) are not worth anything. That would be untenable.

[67] We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the

kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.

[68] If we as a society or the State hand somebody over to another State where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone. This Court's decision in *Mohamed* said that what the South African authorities did in that case was not consistent with the kind of society that we have committed ourselves to creating. It said in effect that we will not be party to the killing of any human being as a punishment – no matter who they are and no matter what they are alleged to have done.[54]

[69] Counsel for the Home Affairs Minister also submitted at some stage during argument that the matter should be remitted to the High Court for that Court to assess whether the risk to which Mr Phale would be exposed if he was deported to Botswana was real. Later counsel submitted that the Home Affairs Minister must be given an opportunity to assess that risk. In my view there is no need to do so because there is enough before this Court to make the assessment of the risk.

[54] This does not necessarily include a war situation: see *Makwanyane* above n 24 at para 149.

[70] In their affidavits, the Justice Minister and Mr Modiri Matthews of the Department of Home Affairs advanced various other bases upon which they contended that the present case should be distinguished from *Mohamed*. In our view those bases were not material and cannot be relied upon to distinguish the present case from *Mohamed*.

Application of the Mohamed *principle to the facts*

[71] The dispute between the parties is whether the Government has the power to deport or extradite Mr Phale to Botswana to face a trial for murder in that country in the absence of the requisite assurance. In the light of the fact that in oral argument no party argued that *Mohamed* was wrongly decided, and no basis exists to distinguish the present case from *Mohamed*, the only question that requires determination in order to decide whether the decision of the High Court was right is whether it can be said that, if Mr Phale was to be extradited or deported to Botswana, he would, if convicted of the alleged murder, face a real risk of the imposition and execution of the death penalty.

Would Mr Phale face the real risk of a death penalty if extradited or deported?

[72] Counsel for the Home Affairs Minister submitted that there was only a possibility and not a real risk or likelihood of the imposition and execution of the death penalty on Mr Phale if he was deported. He submitted that a mere possibility of the imposition and execution of the death penalty was not enough. We do not agree that in this case there is only a mere possibility of the imposition and execution of the death penalty on Mr Phale if he is extradited or deported to Botswana and is thereafter convicted of murder. First,

the alleged killing was brutal. Second, the law in Botswana is that for murder the death penalty is mandatory if there are no extenuating circumstances. Third, none of the parties placed before the Court any extenuating circumstances. Accordingly, this Court must assess the risk of the imposition of the death sentence on Mr Phale, if he is convicted, on the basis that he will have been found guilty of murder without any extenuating circumstances. In such a case the imposition of the death penalty will be mandatory. Accordingly, there can be no doubt that, if Mr Phale were deported or extradited to Botswana, he would face a real risk of the imposition of the death penalty if he were to be found guilty.

[73] Once the death penalty is imposed, there will be nothing to prevent the State of Botswana from executing the death penalty. Indeed, a study of the execution of the death penalty in Botswana conducted by the International Federation for Human Rights reveals that there has only been one case in which the death penalty was not executed. The evidence put before this Court showed that there were 32 executions between 1966 and 1998. According to my calculations, that amounts to an average of at least one execution per year. In any event, if Botswana did not intend to execute the death penalty on Mr Phale if one was imposed, there is no reason why it would not have given South Africa the requisite assurance. In the light of this, the conclusion is that, if Mr Phale were extradited or deported to Botswana, he will face a real risk of the imposition and execution of the death penalty if he is found guilty of the murder.

[74] Accordingly, in terms of section 7(2) of the Constitution the Government is under an obligation not to deport or extradite Mr Phale or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the Government deport or extradite Mr Phale without the requisite assurance, it would be acting in breach of its obligations in terms of section 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading. In my view no grounds exist upon which the judgment of the High Court can be faulted.

[75] The appeals fall to be dismissed. With regard to costs there is no reason why the applicants should not be ordered to pay the costs of the Society for the Abolition of the Death Penalty in South Africa and Mr Phale, including the costs consequent upon the employment of two counsel. As indicated earlier, Mr Tsebe died before his application could be heard by the High Court. I note that an attorney from Lawyers for Human Rights deposed to an affidavit in opposition of the applicants' application before this Court and indicated in that affidavit that she was doing so "on behalf of" Mr Tsebe. She indicated that she was doing so because all the parties were of the view that it was in the public interest that Mr Tsebe's matter should also be heard. It seems to me that there is no basis for making an order of costs in respect of Mr Tsebe's matter in the proceedings before this Court since Mr Tsebe died prior to the hearing in the High Court. In any event, the issues raised in respect of Mr Phale's matter were in substance the same issues

as those raised in respect of Mr Tsebe. That being the case, I am of the view that if only Mr Phale's matter was proceeded with, it would not have been necessary also to oppose the applicants' application "on behalf of" the late Mr Tsebe. Accordingly, I propose to confine the order of costs to Mr Phale and the Society for the Abolition of the Death Penalty in South Africa.

[76] In the result the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeals are dismissed.
4. The applicants are ordered to pay the costs of Mr Phale, and the Society for the Abolition of the Death Penalty in South Africa, including the costs consequent upon the employment of two counsel.

CAMERON J (Froneman J, Skweyiya J and Van der Westhuizen J concurring):

[77] I concur in the judgment of Zondo AJ, except for [55], [56] and [60] to [62], which in my view are not necessary for the decision.

YACOOB ADCJ:

[78] I have read the judgment of Zondo AJ and cannot agree that leave to appeal should be granted. I would refuse leave to appeal.

[79] This is an application for leave to appeal against a decision of the Full Court of the South Gauteng High Court[55] (High Court) in effect holding that the extradition or deportation of Mr Jerry Ofense Phale[56] (second respondent), a Botswana national, to Botswana to face capital charges in that country was unconstitutional. The High Court reached its decision on the basis of the judgment of this Court in *Mohamed*[57] which held that our Constitution did not allow a Tanzanian national to be deported or extradited to the United States of America to face capital charges there without first receiving an assurance that the death penalty would not be imposed, or, if imposed, that it would not be executed.

[80] The High Court had two applications before it, which were consolidated and heard together. The one was by Mr Emmanuel Tsebe[58] (first respondent) and the Society for

[55] *Tsebe and Another v Minister of Home Affairs and Others; Phale v Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ).

[56] Mr Phale apparently used the surname Pitsoe after he came to South Africa.

[57] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (*Mohamed*).

[58] Regrettably, Mr Tsebe died before the application was heard but Lawyers for Human Rights who were Mr Tsebe's attorneys, along with the Society for the Abolition of the Death Penalty in South Africa decided to proceed

the Abolition of the Death Penalty in South Africa and the other by Mr Phale against the Minister of Home Affairs (Home Affairs Minister) and the Minister of Justice and Constitutional Development (Justice Minister). They both sought the following order:

> "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;
> 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."

[81] The Justice Minister, in a counter-application, asked for an order declaring that:

> "[T]he 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 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 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:

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because of the public importance of the issues raised in this case and its relevance for people like Mr Tsebe and Mr Phale.

(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."

[82] The High Court granted the order sought in both applications with costs and dismissed the Justice Minister's counter-application, also with costs.

[83] The High Court handed down only one judgment. The application for leave to appeal by the Home Affairs Minister, Justice Minister and other government entities is against the whole of the judgment of the High Court. The submissions by the applicants for leave to appeal in both cases overlap considerably. I will therefore refer to the applicants jointly as the government and to the submissions as government submissions.

The relevant facts

[84] The relevant facts are common cause and it is not necessary to set them out in great detail. In brief:

a. Mr Tsebe and Mr Phale fled to South Africa and were both charged with murder in Botswana in that they intentionally killed their partners.

b. Botswana sought separately to have Mr Tsebe and Mr Phale extradited.

c. Capital punishment remains alive in Botswana.

d. The Justice Minister requested an assurance from Botswana that, upon extradition, the death sentence would not be imposed on Mr Tsebe and that if it was, it would not be executed. This request was refused.

e. With respect to Phale, it appears that Botswana refused to give the assurance that the death penalty would not be imposed and that it would not be executed if imposed.

f. The Extradition Agreement between South Africa and Botswana provides, in effect, that South Africa is not obliged to extradite any person to Botswana in respect of an offence for which the death penalty is competent.

Application for leave to appeal

[85] This case is concerned with the lawfulness and constitutionality of the intended deportation of Mr Phale. The only issue that needs our attention is whether it is in the interests of justice to grant leave to appeal.

[86] It is true that there was initially a difference between the Home Affairs Minister and the Justice Minister on whether or not Mr Tsebe should be removed from the country.[59] The Justice Minister took the view, on the authority of *Mohamed*, that extradition was not competent without the requisite assurance while the Home Affairs Minister came to the conclusion that deportation was competent despite the decision in

[59] The initial positions of the Ministers with regard to Mr Phale are unclear. See High Court judgment above n 53 at paras 46-8.

Mohamed and the threat of the death penalty. Indeed, the Home Affairs Minister would have deported Mr Tsebe and Mr Phale in the face of the reasoning in *Mohamed* without approaching any court! The Justice Minister's opinion has now changed as is apparent from the declarator applied for by him and by the fact that he did not request any assurance in relation to Mr Phale.[60] I do not think there is any uncertainty. Both the Justice Minister and the Home Affairs Minister are of the view that it is not unconstitutional or unlawful to extradite or deport Mr Phale to Botswana absent an assurance that the death penalty will not be imposed. It was on the basis of this conviction that the Home Affairs Minister opposed the application in the High Court and the Justice Minister sought the declarator there.

[87] It is worth re-emphasising that the Home Affairs Minister sought to remove Mr Tsebe and Mr Phale without approaching a Court despite the judgment in *Mohamed*.[61] Having applied her mind to *Mohamed*, the Minister should have realised, that at best the deportation or extradition of Mr Tsebe and Mr Phale was far from straightforward and, potentially contrary to a judgment of this Court. Government should indeed be more careful and sensitive, especially where a decision to be taken is likely to have an impact on fundamental rights. In this case Mr Phale would have faced the likelihood of a death

[60] The request for the assurance in the case of Mr Tsebe was made at the time when Mr E Surty was the Justice Minister, whereas extradition issues in relation to Mr Phale were dealt with by the present Justice Minister, Mr JT Radebe. It would seem that the two Justice Ministers differed on the meaning and impact of *Mohamed*.

[61] The Justice Ministry's stance on Mr Tsebe and Mr Phales's deportation was hardly positive either. Initially, at a time when the former Justice Minister was in office extradition was opposed. Later, in the face of the complaint of Mr Tsebe and Mr Phale's lawyers about their imminent deportation, the Justice Minister, currently in office took the stance that the matter was "out of his hands".

sentence if the plans of the Home Affairs Minister were not rendered awry by the actions of Lawyers for Human Rights and the Society for the Abolition of the Death Penalty. We cannot expect that third parties will come to the aid of vulnerable people in the position of Mr Tsebe and Mr Phale at the last minute. One would have thought that at the very least, government would have approached the High Court for clarification before attempting to proceed with their removal in these circumstances. All the more so, since the relevant Ministries were not initially wholly in agreement as to the approach to be followed.

[88] If indeed there was any uncertainty, it was resolved by the detailed High Court judgment, which deals extensively and persuasively with many of the arguments re-advanced in this Court by reference to the provisions of our Constitution, international law, South African extradition law, and in particular *Mohamed*.

[89] I accept that the matter is of some importance but where, in a matter of public importance, the judgment of a High Court is detailed and convincing it will ordinarily be in the interests of justice to grant leave to appeal only if there is a reasonable prospect that the High Court was wrong. We cannot ordinarily grant leave to appeal where the criticisms of a High Court judgment do not amount to prospects of success.[62] There may

[62] See generally *De Lacy and Another v SA Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) at para 50; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 22; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *Bruce and*

be cases in which a High Court's reasoning is questionable even though the decision might be correct. I now turn to the contentions advanced by the government in order to determine whether it establishes reasonable prospects of success or whether there is any respect in which the reasoning of the High Court might be said to be wrong.

[90] The government accepted the correctness of *Mohamed* and that it remains valid law in our country. The contentions advanced were that the cases before us are distinguishable from *Mohamed* in certain respects. I deal with each of these separately.

[91] The first distinguishing feature relied upon by government is that Mr Mohamed was a Tanzanian national who had been deported to the United States of America, while Mr Phale was to be deported to his own country. This proposition is unarguable. How can it make any difference whether the person is sentenced to death in his own country rather than in some other country? The fact is that he will, if extradited or deported, be sent from this country and that creates a causal link between his extradition or deportation and the imposition of the death penalty. The notion that this difference is sufficiently material to distinguish these cases from *Mohamed* falls to be rejected. There is no prospect that this argument will succeed.

Another v Fleecytex Johannesburg CC and Others [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 6-7; and *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at paras 44 and 51.

[92] The second purported distinction is that there is not a real risk, as was the case in *Mohamed*, that Mr Phale would be sentenced to death. This proposition too is untenable for two reasons. First, if the state's allegations are correct, Mr Phale committed a murder which may well attract the death sentence. Second, it is destroyed by the insistence of the Botswana government to not give the necessary assurance. Why refuse if there is no possibility that the death penalty would be imposed anyway?

[93] The third equally untenable distinguishing feature contended for was that there was a possibility that Mr Phale would go free in this case if not extradited while there was no such possibility in *Mohamed*. This implies that the Constitutional Court in *Mohamed* would, if Mr Mohamed had still been inside South Africa at the time the application was made, have allowed his deportation or extradition to go ahead even if there had been a real risk that the death penalty would have been imposed. In other words, this Court's decision on the unlawfulness of Mr Mohamed's removal was based on the fact that he was no longer in this country. This is an unacceptable contortion of *Mohamed* and has no prospect of acceptance by this Court.[63]

[94] The final distinguishing feature relied upon was that *Mohamed* was not concerned with the Extradition Act.[64] This submission ignores the whole thrust of the decision to the effect that it did not matter whether Mr Mohamed was extradited or deported. An

[63] See *Mohamed* above n 53 at paras 60, 70-1 and 73.

[64] Act 67 of 1962.

extradition occurs in terms of the Extradition Act. Again, the proposition is not worthy of consideration.

[95] Other arguments advanced before this Court were that:

a. The Justice Minister performed his extradition function as an act of state and it should not be impinged upon;
b. requiring the assurance impacted negatively on prosecutorial and judicial independence in Botswana;
c. the Executive must be given the opportunity to negotiate delicate instances of this kind;
d. the decision of the High Court precluded a consideration of the case before it on its particular facts and circumstances; and
e. the High Court judgment showed excessive concern for people like Mr Tsebe and Mr Phale.

[96] These submissions have nothing to do with the contention that the cases before us are distinguishable from *Mohamed*. Rather, they are an attempt at criticisms of *Mohamed* and to seek its modification. This attempt cannot be entertained. *Mohamed* requires no modification.

[97] As is apparent from the judgment of the High Court, *Mohamed* is simply not capable of the construction that it is permissible to extradite someone if a request for the

necessary assurance is refused. Nor is it capable of meaning that a deportation would be competent absent an assurance. The High Court was undoubtedly right and it is unnecessary, in my view, to cover the terrain so well traversed by the High Court in relation to the legal issues and their resolution all over again.

[98] In the circumstances it is not in the interests of justice to grant leave to appeal. Accordingly, I would refuse leave to appeal with costs.

[99] To the extent that uncertainty is the pivot for granting leave to appeal, I must point out in conclusion that this judgment leaves the government in no doubt that deportation, extradition or any form of removal under these circumstances is wholly unacceptable.

For the First to Fourth Applicants in CCT 110/11:	Advocate MTK Moerane SC and Advocate L Gcabashe SC instructed by the State Attorney.
For the First and Second Applicants in CCT 126/11:	Advocate M Donen SC and Advocate S Poswa-Lerotholi instructed by the State Attorney.
For the First and Second Respondents in CCT 110/11 and CCT 126/11:	Advocate A Katz SC, Advocate M du Plessis and Advocate N Lewis instructed by Lawyers for Human Rights.
For the Third Respondent in CCT 110/11 and CCT 126/11:	Advocate S Budlender and Advocate J Brickhill instructed by the Legal Resources Centre.
For the Amicus Curiae:	Advocate P Kennedy SC, Advocate D Simonsz and Advocate M Adhikari instructed by the Wits Law Clinic.