

DEATH PENALTY PROJECT

PROGRESS REPORT - 1999

Introduction

DITSHWANELO's Strategic Plan 1997- 2001 has as one of its strategic objectives taking up of test cases to challenge existing laws and/or to advocate for law reform.

This death penalty project is based on activities of the Paralegal Programme when they started to make enquiries with the Commissioner of Prisons about this case in 1998. Campaigns by Amnesty International, London requesting clemency from the President were also started in 1998. In January 1999, the Activism programme engaged in urgent action and this work plan describes the strategy in detail and is therefore an internal document.

The death penalty project has garnered support from all programmes, especially Human Rights Education and Information in an attempt to effect change and public debate on the issue of capital punishment. Especially in the "Who Has the Right to Kill" public education campaign. There has also been strong support from the Kasane office which has often had to make sacrifices to assist with collection of information for the case.

The test case concerns Mr Tlhabologang Maauwe and Mr Gwara Brown Motswetla who were arrested in 1995 for murdering the owner of an ox they had stolen. The man happened upon them when they were watching over the drying meat. They were pronounced guilty by the High Court of Botswana in April 1997. The Court of Appeal upheld their sentences in July 1997. In November 1998, their appeals for mercy from His Excellency President Festus G. Mogae were turned down. There were several postponements over the year for various reasons. In April 1999 the legal team challenged a Prison Regulation which provided for all visits to condemned prisoners to be within sight and hearing of hearing of Prison Officials. The Judge in the matter found that the said regulation was a violation of the Prisoners' right to consult in private. He ordered that all future consultations be in sight but out of hearing of Prison officials.

The **hearing from 2 - 5 August 1999**, dealt essentially with the **preliminary objections** which the Attorney General raised on behalf of the State. The AG had several objections especially relating to DITSHWANELO's **locus standi**. In his opinion, DITSHWANELO had no right to bring the matter to court as, among other things, DITSHWANELO was not a natural person and hence could not claim the constitutional rights which we were claiming and also because DITSHWANELO was not directly in the "...shadow of the noose..." and hence not directly affected by the matter.

The Judge ruled that DITSHWANELO did in fact have *locus standi* in the matter. He considered that DITSHWANELO would fit in the broadest definition of being "a person". He also stated that our constitution should be available and accessible to all. Difficulties arise in meeting this ideal by reason of factors that apply to certain persons such as lack of resources, remoteness and problems of communicating and understanding. In his view, there was enough evidence before the Court that Maauwe and Motswetla were illiterate, suffered from difficulties of communication, and were without resources and were otherwise ill-equipped to pursue their allegedly infringed rights whereas DITSHWANELO was in the position to act for them. He then ruled that to exclude DITSHWANELO at that point would be an unwelcome step as far as Maauwe and Motswetla are concerned and may amount to a threat to the interest of justice.

The Judge also noted that one of the **pro deo lawyers** appointed had stated on oath that his obligations and duties ended at the appeal stage of the case. It was apparent from the lawyers statement that the pro deo lawyers appointed would not have taken any further steps, such as taking constitutional points, to attempt to protect the rights of these two condemned men. The Judge presumed that the State would not object to granting DITSHWANELO *locus standi*, since "...it could be regarded as the best possible legal

measure being available to Maauwe and Motswetla in this matter. Furthermore it is in the interest of justice particularly where Maauwe and Motswetla are not in a favourable position to pursue their rights adequately themselves...”

The Attorney General also raised an **objection to several affidavits** filed by DITSHWANELO and its two co-applicants. He objected on the grounds that some of the affidavits were **scandalous and irrelevant**, while others were **vexatious** and some he said, were **not affidavits** at all. Others, he claimed contained statements of **hearsay** (These are statements about facts which a person has not perceived with his or her 5 senses e.g. what was seen and heard by someone else) and **arguments** which were not allowed in affidavits as the law required that the affidavits must only contain statements of fact. He said that certain other affidavits especially **those made by illiterate people** as well as those **made outside Southern Africa**, should not be admitted by the Court as they had not been made in accordance with the law. Affidavits made by illiterate persons were required to have a certificate from the commissioner of Oaths stating that the affidavit had been translated and explained to the deponents in a language which they understood. He said that the paragraph in the text of the affidavit relating to illiteracy and translation (i.e. “... I am illiterate and this affidavit is being translated to me...”) was not sufficient to comply with the law.

The Judge said that the parts of the affidavits which contained statements of hearsay and arguments would be struck out and that we were free to file replacement affidavits if we felt the need to. Concerning the affidavits made in the USA, the Judge ruled that the documents were inadmissible but that we were free to file corrected affidavits.

He said the **affidavits relating to the death penalty** were irrelevant as the High Court had no jurisdiction to make a pronouncement on the death penalty as the matter had already been previously decided by a higher court of justice i.e the Court of Appeal in the Ntesang Case. On this, the Judge ruled that the Ntesang Case did deal with a constitutional challenge to the death penalty, however the challenge was raised on different grounds to those raised by DITSHWANELO et al and hence he had the jurisdiction to hear such new arguments. He however directed that at the next hearing, he would first hear and deal with issues relating to a possible mistrial of the two men. If he found that the two men had indeed not had a fair trial and rules for a mistrial, then the two men would no longer be under sentence of death and therefore all arguments relating to the death penalty would be irrelevant.

This is the basis upon which the arguments at the hearing from **4 - 5 October 1999** were confined. At this hearing the Counsel for both sides confined themselves to **arguments on the issue of the mistrial**. Our attorneys argued that the counsel for the two co-applicants (Maauwe and Motswetla) at the initial trial **did not consult** with Maauwe and Motswetla. The counsel for Motswetla had since fled the Country escaping other charges of fraud levelled against him. Therefore the arguments were confined to the counsel for Maauwe who had made an affidavit on behalf of the State. To prove his point our lawyer brought the Court's attention to the fact that there were **no consultation notes** in the file obtained from that counsel. There were **no notes from the trial** itself (i.e. this showed that either he did not care much or he did not have any instructions from the client and had no strategy) Also, in reference to the record of proceedings, that counsel had **failed to cross-examine key witnesses** on essential aspects and evidence given by those witnesses. A handwriting expert had examined the counsel's file and found that the **two entries on the file cover** indicating prison visits were suspect. The entries of 12/6/96 and 13/6/96 had “prison visit” indicated beside them. They were written by the same pen as a date in February 1997(about the same date as the letter to the Registrar - refer below); and, the date of **13/6/96** was written after the date of **17/6/96**, meaning that it was put there after the fact. As well as **other inconsistencies** made by counsel in his affidavit.

There was also a **letter written by that counsel to the Registrar** stating that he had been forced to make a second visit to the prison with a Sesarwa (the language spoken by Maauwe and Motswetla) interpreter, as the two could not understand Setswana (the main language spoken in Botswana) or iKalanga (a language spoken widely in the region where Maauwe and Motswetla come from). He had however stated in an affidavit filed on behalf of the State, and before the court during the initial trial, that

he had consulted with the two men in iKalanga. In his affidavit he says the two men understood both Setswana and iKalanga.

The AG's arguments were that counsel's poor conduct of the case could have been out of "...incompetence or stupidity..". and that it is probable that the counsel wrote the letter to the registrar so as to "...get more money..". However that did not refute the fact that counsel had consulted with the two men. The AG also argued that it was not true that the Maauwe and Motswetla were unable to understand Setswana and iKalanga as several affidavits filed on behalf of the state showed that they did, including an affidavit from the chief of the area from which Maauwe and Motwetla came.

On 29 October 1999, Judge Reynolds gave his ruling in the aspect of the mistrial. There were three issues raised by Counsel for the Applicants which the **Judge considered**. Firstly, that the **pro deo Counsel** assigned to the Second and Third Applicants were incompetent and/or they did not represent them adequately or properly. Secondly, that the Second and Third Applicants **did not understand the proceedings properly** as these were at times conducted in languages with which they were not fully conversant. Thirdly, that a **letter, which was written by Mr Maauwe and Mr Motswetla to the Registrar** of the High Court stating their dissatisfaction with their Counsel and asking that their Counsel be replaced, was not acted upon at all. Consequently, their letter was never placed before the Court of Appeal and the same Counsel represented them at the Court of Appeal level.

Judge Reynolds dealt first with the **issue of the letter** and expressed his view that this letter should undoubtedly have been placed before the Court of Appeal. Failure to do so amounted to a serious irregularity. **Solely on this basis, the Appellant's request for a new trial succeeds**, as this was in breach of the fundamental rights afforded them by Sections three (3) and ten (10) of the Constitution of Botswana. Section three (3) of the Constitution deals with, amongst other things, the protection of law. Under section ten (10) of the Constitution an accused person is entitled to a legal representative of his choice and an interpreter if he cannot understand the language used at the trial.

With regard to the other two issues in question, that is the alleged inadequacies of *pro deo* counsel and their inability to understand the proceedings. The Judge was of the opinion that since the written affidavits filed by both sides were contradictory oral evidence would have been helpful in determining these issues. Unfortunately this was not possible given the nature of the proceedings. Therefore the opportunity would be afforded them to give oral evidence and clear up these contradictions on a retrial.

The Learned Judge therefore held that the **convictions and sentences** imposed on Mr Maauwe and Mr Motswetla should be **set aside immediately**. A **new trial** in this matter was ordered. The Judge further said that the Attorney General has the right to decide on the nature of the charges to be brought against these two men and has the right to decline to prosecute at all. **No costs were awarded to either side**.

REPORT ON OBJECTIVES OF THE PROJECT

1. Doing research and collecting information for use in court on 28, 29, 30 April 1999.

Planned Output

- 1.1 Methodical research on anthropological and sociological aspects of the case
- 1.2 Obtaining evidence by use of research or affidavits as to the cruelty of death by hanging
- 1.3 Identifying aspects of the case that may suggest or indicate unequal or unjust treatment of the law.

Indicators of Achievement

- 1.1.1 Completing the research required for each head of argument by 20 March 1999
 - 1.2.1 Compiling the entire research material in a systematic and easily accessible manner by 25 March 1999
 - 1.3.1 Availing to the advocates the information obtained from research by 27 March 1999

Report on planned output

- 1.1. Concerning the research on **anthropological and sociological aspects** of the case:- To facilitate the search for information we asked '**friends**' of DITSHWANELO who we could trust - keeping in mind the confidentiality aspect of the case and the **lack of human resources** within DITSHWANELO - to assist us with the gathering of information and also with ideas on where the information we sought could be obtained. We had **regular meetings** every day which gradually decreased to once a week and then to as often as it was necessary to get an update on the various tasks that had been allocated to different members of the group. The **scope of the research work kept extending** as new facts come to light and the grounds of argument were increased. Examples of the causes of **unforeseen delays**, include the fact that we had originally thought it would only be necessary to analyse the judgements for those cases where the accused persons were executed; but as time went on it became apparent that we would have to analyse all the murder cases on record from 1966 to date. The difficulty experienced most of the time was that there are **no bound Law reports after 1992**. Another problem we have experienced is that there are only a few people to do the huge amount of work that needs to be done.

Another cause of unforeseen delays lies in the fact that we have had a lot of **difficulty in trying to obtain official records** necessary for our research. Most of the time we are denied access to the information we require in order to build our case. Initially it was the number of people who have been executed since independence (1966). We received a letter from the Commissioner of Prisons saying that such information was classified and yet within the same week, the Commissioner signed an affidavit on behalf of the State giving a list of names of all the persons who had been executed from 1966 to date. We have experienced the same trend in trying to obtain other relevant documents like a certain post mortem report and inquest file (we have still, to date not been able to peruse the original copies of the said documents). The state held off giving us both documents until just before we filed an application to obtain the file. Consequently **time was wasted** on preparing documents for an application to obtain the inquest file instead of on other more pertinent affidavits.

The research extended to the **obtaining of affidavits** from various persons including experts in the fields of linguistics, medicine, sociology, criminology, handwriting, etc and from the families of the condemned men and other persons who are in some way or another involved in the case. We have succeeded in filing **more than 50 affidavits** so far.

On 29 April 1999, the hearing was again postponed to allow us to introduce further evidence and also to permit the Attorney General to deal with the body of evidence which was admitted at the hearing. On that day, the court gave us until 17 May 1999 to file all our papers. We were unable to file all of the documents by that date due to unforeseen delays. Other than the difficulty with obtaining official documents, there was also the **difficulty in finalising the affidavits**. The affidavits from the experts were delayed due to the fact that these experts had other obligations which we had to work around. Also most of them were not charging us for their services and hence we had to wait until they could make time. However, we continuously pressed upon them the need for urgency. At some point we **feared that the AG's would pre-empt us** by filing their documents before we did. Their deadline for filing their set of documents was Friday 26 June 1999. We therefore filed the documents we already had and wrote a letter to the AG's explaining our position. The affidavits that were still outstanding were: Bob Hitchcocks affidavit (which was at the time, being prepared by Adv. Spilg) and Mr. Kgafela's affidavit which would be the **main affidavit explaining and co-relating all the other affidavits** as well as explaining the long delay in the filing of the affidavits.

During the August hearing, the AG complained that **Kgafela's affidavit** contained arguments and should not be admitted by the court as the law stated clearly that affidavits must contain only facts. Our lawyers explained that this was the affidavit that **brought together all the other affidavits** and documents submitted by our side; documents which were contained in 4 different box files and which, without Kgafela's affidavit, would take too long to go through, explain and understand. However the Judge ruled that the parts which contained arguments must be removed. Kgafela's affidavit has been amended from the previous 70 pages to 54 pages, but still requires some editing.

Another affidavit was made by **Ms Mogwe** concerning why DITSHWANELO should have **locus standi** in the matter and explaining what DITSHWANELO's objectives are as well as why we are involved in the case. Another affidavit was made by **Robert Hitchcock** relating to the **socio-economic situation of Basarwa** in Botswana.

We have recently obtained affidavits from a handwriting expert in South Africa, **Cecil Greenfield**. He was looking at the **file belonging to Mr Furusa**, the *pro deo* counsel during the initial trial. He focused on certain dates when Mr Furusa claims that he visited prison to consult with his clients. He used high tech equipment including a machine at the Forensic Laboratory in Pretoria which is the only one of its kind in Africa. His analysis including photographs of the relevant sections of the file cover where this information was obtained. Some of his findings are given above.

Another affidavit was also made by **Kgafela** rebutting an **affidavit given by Mr Furusa** on behalf of the State regarding his claim of having consulted Maauwe and Motswetla in iKalanga and Setswana.

The **AG filed 17 affidavits** dealing with the issues of **languages** that Maauwe and Motswetla spoke as well as the **death of Gwati Monato** who was arrested at the same time as Maauwe and Motswetla. This necessitated further affidavits from Maauwe and Motswetla explaining further.

- 1.2. This was to be **done by the Advocates**. They went to the **United States** to confer with persons known to have expertise on the subject of the death penalty. They also **managed to get affidavits** to support the expert opinion.

Also, Adv. Prof. David Unterhalter located a **neurosurgeon in Pretoria** who was ready to give a report on the cruelty of the process of hanging. He however wanted a letter from DITSHWANELO confirming Adv Unterhalter's instructions and undertaking to pay his costs. He has since sent us a report, his affidavit and related invoices. He however **did not sign/initial every page** of his affidavit. We therefore asked him to redo the signing/commissioning of his affidavit. Which we have filed.

As per the Judge's ruling (detailed above) we are in the process of getting **affidavits authenticated by the Botswana Embassy** in the USA. We have experienced great difficulty in this aspect as there is only one Botswana Embassy in the USA, and it is in Washington. Prof Bright and Prof Radelet do not reside in Washington. **Prof Bright** was visiting Washington and we managed to arrange for an appointment for him to have his affidavit authenticated. It is still with the couriers. For **Prof Radelet** we are arranging a procedure that should amount to substantial compliance with the relevant Law. We are arranging for an Attorney in Florida (where Radelet resides), to notarise the document. At that time the Ambassador will call and confirm that the document is being notarised by an Attorney who is authorised by the laws of Florida State to do so, and give a certificate on the affidavit to that effect. **Prof Dieter's** affidavit, is ready for collection and is still with the embassy. In order to save on resources we wish to collect Prof Dieter's and Prof Radelet's affidavits at the same time. Even though the case has been decided we need to have the affidavits to complete the court record. We were unable to obtain affidavits from **Mr Lobsenz** an Attorney in USA who's currently handling a death penalty case. We had submitted his heads of arguments as an annexure to one of our affidavits, but the AG objected to it. David Unterhalter was in touch with him and Lobsenz said that it would not be possible to obtain the affidavit.

- 1.3. We are in the process of looking through **Court records of all murder cases** between 1987 and 1997. We have looked at all the records available at the Court of Appeal Registry and we are now looking at the case in the High Court Registry. At the Court of Appeal Registry we looked at less than 20 cases. At the High Court Registry, we have looked through the 1997 cases and are about to begin on the 1996 ones.

We have divided the cases into three categories:

- i) Those who have been found guilty of murder but have received a **lesser sentence** than that of death
- ii) Those whose have been sentenced to death and had the sentence **reversed on appeal**
- iii) Those whose appeals had been unsuccessful and were subsequently **executed**

The factors that we are looking at are:

- a. Develop a clear and concise pattern relating to **socio-economic background** of the accused persons, where possible. It may in fact not be possible to establish that there is such a pattern, as socio-economic factors have not to date been considered as mitigating factors in the sentencing process.
- b. If possible, look into the **contrast of circumstances** where a poor man kills a rich man as compared to when a rich man kills a poor man.
- c. Look into the type of representation these people had - whether counsel was engaged on **pro-deo basis or on a paid brief**. Where counsel was indeed engaged on a paid brief, what sort of counsel the person was able to engage.

- d. Look into whether the case was decided by a Judge sitting alone or whether the **Judge sat with assessors**.
- e. What factors were raised by counsel as **extenuating circumstances** and whether these factors were accepted or rejected by the Judge. We are specifically interested in whether any previous counsel has raised socio-economic issues (e.g. poverty) as an extenuating or mitigating circumstance. How much time/ pages were devoted to extenuating circumstances. Was it cursory or quite elaborate?

- f. How many times was **evidence taken on extenuating circumstances** and how many times was it accepted by the court?
- g. Did Judge stop any evidence/witnesses on the grounds that that evidence was **not extenuating and therefore not relevant**? If yes, what was the evidence given or attempted to be given by that witness, and what were the Counsel's arguments for or against this decision?
- h. In how many judgements were certain factors **not accepted as extenuating** and could not be taken into account; and what were these factors?
- i. We would also like to look into the **language factor** - whether any interpreters were used and whether there was any complaint about them.
- j. Whether there was any evidence given by members of the accused's family or what the **role of the family members** were in the case. Mistrial Issue - no DP

Once we have gathered this information and made copies of the relevant pages, we shall then need to send the information to two University professors, **Prof Molamu** in Pretoria and **Dave Mac Donald** in Pakistan. They were both at the University of Botswana before leaving and have both done research on the Basarwa previously. They are very interested in the death penalty case. They had agreed to do some work for us. The purpose of sending them this information would be to get a **definite analysis** on the issues raised above.

Even if we are not able to use the information obtained from this research for the purposes of the case, we will use it for the seminars we are planning on the death penalty as well as for formulating arguments during the re-trial.

We have done a preliminary analysis based on the information we have gathered to date. Please refer to the report attached and marked "Death Penalty Research on Murder Cases 1987 - 1997"

Relation to indicators of achievement

- 1.1.1. Research **continues to be done**. There may be **need for further research** during the re-trial stage
- 1.2.1. It was **originally intended** that all the information would be compiled first and then submitted to the advocates but then **new evidence kept coming to light** necessitating more research to be done and so instead the information obtained from research was **immediately forwarded** to the advocates.

We have also **kept copies of all the documents** relating to this case which have been filed in clearly marked and indexed box files. We have endeavoured to obtain copies of all the correspondence, all the court documents filed as well as all the material obtained from research. The purpose of this is to ensure that even if a document goes missing we have in our possession a **backup copy** of the said document. We have found this system to be extremely useful as many a time, the **advocate(s) / attorney require a document which they cannot trace** in their own bulk of paper and have turned to us for a copy. However, **our records are incomplete**. We are in the **process of updating all our files** to include documents that were received at the hearing and that are not in our possession.

- 1.3.1. Due to 1.2.1. above this is an ongoing process

2. Enlightening the public as to the intricacies involved in carrying out the death penalty. Including the possibility of innocence, the non-existence of any humane form or execution and the importance of the right to life.

Planned Output

- 2.1. Working with HUREP and Information to produce a pamphlet or booklet on the death penalty
- 2.2. Working with Information to hold public debates or discussions on the death penalty and,
- 2.3. Participating in popular radio programmes and making use of the media in general to advocate for abolition of capital punishment
- 2.4. Ensuring full media coverage for the hearing and up to date press statements in the various newspapers

Indicators of Achievement

- 2.1.1. Publication of a pamphlet or booklet on the death penalty by May 1999
- 2.2.1. Participating in "Moakaneng" a popular radio programme before end of April
- 2.3.1. Report on marked public awareness on the issue of the death penalty

Report on planned output

- 2.1. Worked with Information to produce a **pamphlet on the death penalty**. This was finalised in April 1999. **Information dealt with the distribution** of the pamphlet.

Also in April, a **sticker** was produced with the slogan "**Who Has The Right To Kill**" in conjunction with Information and HUREP. Another sticker was produced in May, this time in **Setswana** following the same theme. **Information dealt with the distribution** of the stickers as well. The Information officer has availed to me his planned distribution list which details all the places which have received stickers and pamphlets.

On 18 June 1999, 20,000 pamphlets were placed as **newspaper inserts** in the Mmegi and Guardian by the information programme. This incited the **greatest public response** we have had to date on the death penalty. Previously, we had no major response. The **public was rather silent** on the issue with a few lone voices. But there has been a considerable response to the inserts both by letter and by telephone. Even though these **responses are negative** we feel that they are **better than the silence**. We did not however give individual replies and have simply continued with our public education campaign.

We also **produced t-shirts** which HUREP has been selling. Most of the 60 initial t-shirts produced were sold and we have had to **order 100 more**. There are two kinds of t-shirts: One with a noose at the front and the DITSHWANELO logo on the sleeve and another with the DITSHWANELO logo in front. Both t-shirts have the inscription "WHO HAS THE RIGHT TO KILL?" at the back. The t-shirt with the noose was the most popular t-shirt.

HUREP organised an **essay competition** based on our Public Education theme of “Who Has the Right To Kill”.

- 2.2. We held a **panel discussion** on the death penalty at the University of Botswana on **Friday 12 February 1999**. Our panellists for the day were: Rev Macheng from the Roman Catholic Church, Pastor Mtetwa of the Pentecostal Church, Kgosi Masunga a member of the House of Chiefs, Hon Kokorwe a member of Parliament, Mr Mokgasana a traditional doctor and Mr Modimo an attorney. Our intention was to **get opposing views from the same fields of life** e.g. two church leaders representing the religious aspect, one for and one against the death penalty. We succeeded in getting two perspectives in the political field as well. Unfortunately on the day of the panel discussion Mr Mokgasana the traditional doctor was unable to make it due to a death in the family.

We took advantage of the panel discussion to carry out a **mini-survey on the general public perception** as regards the death penalty. We passed round to members of the audience small sheets of paper on which they were to indicate whether they were for or against the death penalty. The result was that **165 people were in support** of the death penalty while **87 were in favour of its abolition**.

HUREP has been including the death penalty as part of their **public education in schools**. On 24 July 1999 HUREP organised for a **Street Drama** by the Metlhaetsile drama group, which was done at the Mall. During the play pamphlets, stickers and the article entitled “Who Has the Right To Kill” were distributed to the crowd which gathered. Also staff members made an effort to **answer questions raised by members of the public**.

- 2.3. Participation in ‘Monakeng’ was **not accomplished** and will be pursued in the coming year.

It is also useful to mention that part of the campaign to **sensitise the public on the death penalty** has included briefing donor organisations and other sister NGOs on the case so far. Also on 19 June 1999 we gave a talk at **Maru-a-Pula School** on the death penalty during their assembly. We had ten minutes which we utilised by first performing a skit followed by a brief ‘speech’ on the death penalty. This was organised in conjunction with the Education programme. We are also trying to **identify certain eminent personalities** who are prepared to take a stand against the death penalty and use their statements of support as part of our death penalty campaign.

As part of our preparation to the hearing of the case, we had thought that it would be beneficial to hold a press breakfast or a press conference. We however decided against it as we felt that it would not be strategic as we had no guarantee of the press attending the conference let alone being present in court. We however, prepared a **press package** which was delivered to all the papers. The press did turn up at the hearing but their coverage was not very impressive. They seemed to focus on the dignitaries who had attended the hearing rather than on the hearing itself or on the families who were also present.

During both the August and the October hearing, we **sent out invitations** to ‘Friends of DITSHWANELO’ as well as to the persons who attended the panel discussion in February said yes to the abolition of the death penalty. We asked them either to attend the hearing or for support. Some of them attended while others sent letters of support and/or regret.

Other than the families of Maauwe and Motswetla, **those who were present** at the August hearing included: the Ombudsman of Botswana, Mr. L. Maine; Anglican Archbishop, Khotso Makhulu, who is also Patron of DITSHWANELO; Kgosi Linchwe II, President of the Customary Court of Appeal; and Minister D. K. Kwelagobe, Minister of Local Government, Lands and Housing. Also represented, were civil society organisations, including The Botswana Christian Council (BCC), and The Botswana Council of NGOs (BOCONGO). Representatives from San (Basarwa) based NGOs were from Kuru Development Trust, WIMSA (Working Group on Indigenous Minorities in Southern Africa) and FPK (First People of the Kalahari). There were individuals as well who came in support of DITSHWANELO like Ellen Drake, Richard Chance; as well those like Mr Bosikele Bosikele from Botswana Telecomms who came just out of curiosity. The Archbishop and Mrs Makhulu and Kgosi Linchwe II also attended the October hearing. Ms Masunga of Women's NGO Coalition was also present at the August hearing

We were however disappointed by the fact that no board member other than the Patron was present at both hearings. Also the NGO support was greatly lacking. Whereas DITSHWANELO shows support to our fellow Ngo's in their time of need, the other NGOs failed to show their support. We wrote them letters after the August hearing to express our disappointment at the **lack of support**.

- 2.4. We have to date **released press statements** to the media for every step that we have taken in this case. However the media has tended to publish only part of the press statements we send to them. There was a sensational article in one of the weeklies: the Mid-week Sun regarding certain information being withheld from the President implying that he was 'duped' into signing the death warrants of Maauwe and Motswetla. We were not impressed by the article as it reflected badly on our side.

There has also been a rather **lethargic support from the press** but we continue to push them trying to get them to attend the hearing and continuously remind them of upcoming hearing dates and answering any questions they might have regarding the death penalty in general or the case in particular. We however had to be careful as to how much we say about the case so as not to infringe on matters which were *sub-judice* (being dealt with by the court) and risk being held in contempt of court or prejudicing our case in any other way.

We have produced a **summary of the August hearing** which we sent to all our contact and friends who were unable to attend the hearing themselves. We also produced a **summary of the judgement** on the preliminary issues which was sent out to all our contacts. To those who required it, we sent the entire judgement. We did the same with the final judgement. We did not however produce a **summary of the October hearing** as it lasted for only two days and we felt that the Press statements covering the two days would suffice.

Caitlin Davis who is an independent journalist did a story on DITSHWANELO's case especially as regards the issue of *locus standi*. She sent the article to AIA a news agency in Zimbabwe to which a number of newspapers subscribe and get their stories. The story was published in one of the local dailies.

Lorato Mbele from SABC was also interested in conducting an interview with DITSHWANELO relating not directly to the merits of the case but to other issues involved e.g. why DITSHWANELO took on this case, what were the problems involved in taking up this case especially since these people are so marginalised, etc. She had already had an interview with Rein Dekker of Kuru Development Trust on the marginalised nature of the Basarwa. She would have liked to link up that

interview with DITSHWANELO's comments. Unfortunately there was no body to do the interview.

BBC - Africa Focus also did an interview on the death penalty case and our reaction to the judgement declaring a mistrial.

Linda Pfothenauer also did an interview on the death penalty for a young generation magazine that will be released next year

As a show of support, **Ms Olsen of the Gazette** has donated a specified amount of space to our case once a week (it is a weekly paper), to whatever we want.

We have sent press statements and information on our case to various **web-based organisations** to include us in their mailing lists and distribution networks. We have also been appealing for **funding from various donor organisations**. These include: Prodder (David Barnard), Penal Reform International, WCC, and to all the people who signed our petition letter.

Relation to indicators of achievement

- 2.1.1. Has been achieved, plus stickers and t-shirts in both English and Setswana
- 2.2.1. This activity is in progress
- 2.3.1. The report will have to be **re-visited** when there is **sufficient public education** to merit a measure of change in the society. We are still at the teething stages of public education on the death penalty.

We are however, already aware of a marked public awareness of the death penalty. Only when people begin to discuss any one topic is there room for a change in the opinions and mentalities surrounding that topic.

We will however, **continue with our Public Education** campaign and **lobbying** influential members of society to give statements against the death penalty.

3. Initiating a discussion on the death penalty both in Parliament and in the house of chiefs

Planned Output

- 3.1. Drafting questions that can be asked in Parliament and in the House of Chiefs
- 3.2. Locating a sympathetic or ?reformative? Member of Parliament or Chief to ask the question(s)
- 3.3. Meeting with such Chief or MP to discuss the finer details of the draft question(s)
- 3.4. Finalising the question and having it asked.

Indicators of achievement

- 3.1.1. Finalising the question
- 3.2.1. Having it asked in Parliament during the current parliamentary session
- 3.3.1. Having the question asked in the House of Chiefs by the end of April

Report on planned output

- 3.1. The research group formed in 1. Above **came up with the idea** to ask the parliamentary question with both the intention of **opening up a discussion** on the death penalty in Parliament and also to find a **way around bureaucratic red tape** that prevented us from obtaining information that is relevant to our case. The question had been finalised. We were in the process of locating someone to ask the question in Parliament when more information came to light forcing us to review the question. Consequently the question has still not been asked. We had experienced **difficulty in locating a Member of Parliament** who would be willing to ask the question. This was because this was the election year and no MP was willing to jeopardise his Parliamentary seat or his Party by speaking up against the death penalty. Now that elections are over and a new Parliament is in place we will pursue this matter more fervently. We did however **distribute to all the Members of Parliament**, a package which included the draft *advertorial* (that we intend to put in the press) before the close of the last Parliamentary session. We also managed to send the **same packages to members of the House of Chiefs**.
- 3.2. Information officer was able to get in touch with the 'Chairman' of the House of Chiefs who agreed to assist us in **locating someone to ask the question**, and undertook to ask the question himself if he was unable to locate such a person. The **question has long since been finalised and translated into Setswana**. We have recently met the 'Chairperson' of the House of Chiefs and reminded him of the request to have the question asked. We need to follow up the matter. House of Chiefs is not currently sitting.
- 3.3. We have not as yet met with the people who will ask the questions as these persons have not as yet been positively identified.
- 3.4. Both the Parliamentary question and the House of Chiefs question are yet to be asked.

Relation to indicators of achievement

- 3.1.1. Parliamentary question had been finalised but had to be reviewed in the light of new and additional information. The house of Chiefs question has been finalised in both English and Setswana.
- 3.2.1. To be asked
- 3.3.1. We are to follow up the 'Chairman' of the House of Chiefs.

4. Giving a human face to the condemned men by locating their families and portraying them against their socio-economic environment

Planned Output

- 4.1. Preparing a list of questions to ask the condemned persons when we meet them
- 4.2. Locating their families and investigating their socio-economic background
- 4.3. Identifying the finer aspects of their culture and tradition, especially as regards their understanding of the legal system *vis-a-vis* their traditional concept of punishment.

Indicators of Achievement

- 4.1.1. Having spoken with the two condemned men to find out more about them, about their lives before they were arrested, their homes, their families and their understanding of the legal process before the hearing
- 4.2.1. Having met their respective families before the hearing
- 4.3.1. Having some of their family members present at the hearing

Report on planned output

- 4.1. After the initial visit to the prison, it became apparent that we would require to **visit the two men several times** in order to get answers to questions that arose from the first visit, and also **visit the village** to get clarification on some of the facts.

It is also pertinent to mention the issue concerning visitation of the two condemned men in prison and the sort of **problems we have encountered** in an attempt to do this. As an organisation, we were only able to meet the two men for the first time in **March 1999**. Our attorney was only allowed to see them **by an order of the court** when the case first came up for hearing on 22 January 1999. Previous to that we as an organisation or through our attorney, were completely denied access to them. When the two men were joined as co-applicants in the case, the attorney was permitted by the Prison Regulations to visit them anytime. He was however, on one occasion refused access because he was in the company of the senior Partner in his firm. He was told that he was the only one who could see them. It was not until **March 1999** that DITSHWANELO was allowed to meet the two men. Before that we were told that we could not see the men unless they wished to see us. The problem was that the two men were not aware that they had to ask to see us before we could be allowed to see them. On approval of the Prison Authorities, we asked the attorney/advocate to ask the **two men to make a written request** to meet with us. Until June 1999, we were not entitled to visit the two men, despite their having written a letter expressing their wish to have us visit them. Every time we wished to see them we would either have to accompany our attorney or ask for **special permission from the Commissioner of Prisons**. We then contacted the Commissioner of Prisons in writing as a follow up to previous information given to him. He responded by saying that we were permitted to see the two men within the context of the Prison Regulations allowing for **one visit every three weeks**. The Regulations provide for one visit every 4 weeks. Before we received the letter the Programme Co-ordinator had spoken to the Commissioner on the telephone and he had responded verbally before we received it in writing. We then decided not to use up our visit and instead simply deliver a package to the two men which would not be counted as a visit. The package contained toiletries, cigarettes, playing cards, and photos of their families for each person. When we got to the prison we were **not allowed to leave the playing cards** despite the fact that the two men had asked for them to replace an old set belonging to a fellow prisoner. Also they were uncertain about the **admissibility of the photos** and the officer we were dealing with said he had to get an 'okay' from his superior officer regarding the photos. He could not locate the Officer in charge and so we returned with the cards

and photos. The reason given as to why the cards were returned was that the prison officials would issue them with a pack. They have since been supplied with a new pack of **playing cards** by the prison authorities as requested.

Concerning the consultations that the advocate/attorneys were having with the two men:- An application was filed in the High Court on 14 April 1999, **challenging Prison Regulation 75(1)** because it effectively provided for consultations with legal representatives to be held 'in the sight and hearing of at least two prison officers'. It was argued that having to consult within the hearing of prison officers was a violation of the men's fundamental right to legal advice and therefore to a fair trial and that the regulation was '*ultra vires*' the Prison Act. The Judge ruled that '... in respect of a prisoner under sentence of death, the right to consult with his legal representatives out of the hearing of other persons, including prison officers, is sacred and sacrosanct ...'. Consequently, he ordered that consultations between the two men and their legal representatives are to take place in the sight but beyond the hearing range of the prison officers.

The **Patron of DITSHWANELO**, Archbishop Makhulu visited the two men in Prison in his capacity as a priest. However recently after the Judgement declaring a mistrial, the Archbishop was not allowed to see them. They said that the two men were no longer under sentence of death and therefore did not have a right to see a priest. The Archbishop 'raised a storm' and was eventually permitted to see them.

- 4.2. A visit was planned in March 1999, **to locate the families** of the two men. The information officer together with the DITSHWANELO person manning the Kasane pilot project (up North) **travelled to the village** and were able to locate Maauwe's wife and children, father-in-law, mother-in-law, father and mother. They were also able to locate Motswetla's father, mother and other relatives. They **interviewed the families** and came up with a few startling facts. Especially as regards their **poverty level**. They were also able to **interview the headman and elders** in the village.

Other than the several visits that the advocate has made to the prison, to get a clearer picture of the whole case, he also had **consultations with members of the families of the two men**. He also met and discussed with members of the **family of Gwati Monato** (deceased), who was a suspect in the same case and died while in Police custody. For this purpose, the advocate, attorney and members of DITSHWANELO staff travelled to Francistown, which was the most convenient place at which to hold the consultations; [regard being had to the **air of hostility** existing in the village(s)]. The families were able to clarify some aspects of the mens lives that were not as yet clear. Out of these consultations arose **affidavits** attesting not only to the level of marginalisation faced by the Basarwa but also to the character of the two men.

Families have been brought to attend both hearings. Before the August hearing, we had a **meeting with the Patron** of DITSHWANELO, Archbishop Makhulu as well as with representatives from the Basarwa based NGOs to welcome them and familiarise them with the court process, and introduce them to DITSHWANELO staff. The meeting was held at the end of the October hearing to thank the families and supporters for attending and to discuss their views on the case. After each day of the hearing, the **proceedings in court were explained to them**.

The **Commissioner of Prisons**, despite our entreaties, refused the families permission to speak with Maauwe and Motswetla during the court hearing. His reason was that Maauwe and Motswetla were 'condemned prisoners' and it was a security risk to allow a visit. We even requested whether he would then make

arrangements for a visit to be conducted at the nearby prison instead of at the court premises, but that request was also refused. During the August hearing we were able to arrange for the **families to visit Maauwe and Motswetla** before the hearing. This was not possible during the October hearing as the hearing date was immediately preceded by a long weekend lasting 4 days. The visiting was done after the hearing during which Maauwe saw his **youngest child for the first time**. His wife was pregnant with her when he was arrested.

Advocate Brian **Spilg visited Manxotai** village between 30 August and 2 September 1999. He needed to get a feel of the place, of the people, of their way of life, of their very existence and to examine the scene where the crime was committed. The trip gave him a new angle to his arguments as well as helped him to clearly see and fit in the versions of the incident told to him by Maauwe and Motswetla.

During the October hearing, the Judge was desirous of having the **proceedings relating to the mistrial interpreted** to the two men. The process of interpretation was begun whereby, the counsel would speak in English, the Court clerk would interpret into Setswana and the interpreter would then explain to the two men in Sesarwa. It became a very **lengthy and tedious** process and also the **court clerk was not interpreting the correct thing**. He kept saying Britain instead of Washington in USA, amongst other things. In the end the counsel suggested and the two men agreed that the heads of argument would be interpreted to them and since the submissions in court were based on the heads of argument, there would be no need to further interpret the proceedings to them. Where there was an addition, that too would be explained to them.

As part of the **documentation process** of the whole matter, we had during the August hearing, a **photographer** who took pictures of all the people who attended the hearing, he was not allowed to take photos of Maauwe and Motswetla and had a run-in with the Prison authorities when he tried to do so; an **artist**, who sketched various identified groups of people including the legal counsel Maauwe and Motswetla affidavit givers, etc; a **rappporteur**, who took down notes during the hearing and gave an extensive report on the proceedings of the court. We also intend to obtain court transcripts and if possible the actual recordings during court. We hope to be able to **share our experiences** with our fellow NGOs as well as with legal counsel who are involved in the trial of death penalty case.

- 4.3. This issue was **tackled in the questionnaires for the village**. It has also arisen **during consultations** with the two men and with their families. It is being explored further by **analysis of research work previously done** on the Basarwa detailing their culture and way of life.

The **Basarwa culture and way of life** continued to be brought out in affidavits before the court. The AG objected to a number of these affidavits but even after some parts of them were struck out, the essence of the affidavits remained. And the Judge did rule that these affidavits relating to socio-economic factors could be relevant to the issue of a mistrial. If the Judge rules that there is indeed a mistrial, these affidavits will be useful informing part of extenuating circumstances.

Concerning the issue of **Police intimidation** - this is where the Police visited Manxotai village and were asking the family members of Maauwe and Motswetla who vehicle it was that visited Manxotai often and was it the same vehicle that took the families to the Court Hearing - it is the manner in which these questions were asked and the potential effect of them giving credence to the maginalised nature of

the Basarwa people, that is of concern. We wrote to the Commissioner of Police and to the Attorney General expressing our concern but have not as yet received a reply.

Relation to indicators of achievement

4.1.1. There have been various consultations with the two condemned men and we are learning more about them with each consultation

4.2.1. We have met and spoken to their families

4.3.1. See 4.2. above.

Also, the two men were present in court from 2 - 5 August 1999 as well as from 4 - 5 October 1999. At the last hearing on 29 April 1999, the judge remarked upon the absence of the two men.

5. Looking into ways and means of promoting an equal and fair system of justice

Planned Output

- 5.1. Looking into the workings of the Clemency Committee
- 5.2. Submit a written document raising concern over the current provision of pro-deo services
- 5.3. Initiation of positive steps towards reforming the judicial system in regard to death penalty cases
- 5.4. Submit a recommendation with the effect of ensuring that all death penalty cases are not heard by a single judge but by a Judge sitting with two or more assessors

Indicators of Achievement

- 5.1.1. Report on marked improvement in the pro-deo services
- 5.2.1. Obtaining information regarding the working of the Clemency Committee

Report on planned output

- 5.1. We were informed that all matters relating to the actual **workings of the clemency committee were classified**. We are attempting to go round this block by including it in our Parliamentary question and in the question to the House of Chiefs.

In the Guardian newspaper on Friday 8 October 1999, the reporter reporting on the case stated that the **President had had a meeting** with the Clemency Committee before denying clemency to Maauwe and Motswetla. It is unclear whether he was stating this as a statement of fact or on presumption.

- 5.2. We have discussed ways of **improving the pro-deo system** of representation. We feel that there may be a need to do away with it all together and instead **establish a legal aid fund** out of which these lawyers are paid and out of which the lawyers may be able to obtain funds they may need for research or to instruct senior counsel. Even if they do not do away with the pro-deo system it would be necessary to at least have a provision for extra funding for research work or for instructing senior counsel in any one matter.

Despite the shortcomings of **pro deo representation**, we believe that the **clemency application** should be part of the *pro deo* brief and that it is vital that any condemned prisoner receive legal guidance from counsel in preparation for these proceedings. It would appear that it is not the current practice for *pro deo* counsel to receive further instructions from the Registrar to represent their clients after the Court of Appeal hearing. We have sent letters to the **Law Society** bringing this aspect to their attention but have not as yet received a reply.

- 5.3. We hope that at the end of this case if we have not succeeded in having the death penalty abolished, we will at least have succeeded in **establishing greater safeguards**. Our action is therefore not only aimed at having the death penalty abolished, but also at strengthening the procedural safeguards leading up to the death penalty.

We hope that facts that we uncover in the research referred to in 1.1. would form the basis for our endeavour to **improve the justice system**. We also plan to hold a **seminar on the death penalty**, the purpose of which would be to educate both legal counsel as well as representative NGOs on how best to deal with cases in which the accused person faces sentence of death. Also to encourage counsel to continue to advise their clients and ensure their rights **post Court of Appeal process**.

The Judge has ruled in our favour on the issue of **locus standi** (refer to introduction). This has **set a precedent** not only for Botswana but for the region and even for the continent. This pronouncement on *locus standi* can now be used by various NGOs to protect the interests of those who, whether by reason of ignorance or due to lack of resources, are unable to protect their own interests. It is pertinent to note, however that the **Judge put limitations** on this right there **must be a link** shown between the NGO and the cause.

- 5.4. We have found out as part of our research work that the law provides that a **judge MAY sit with two assessors** but there is no obligation on him to do so. It was however a fairly common practice before 1982. There is no indication as to why this practice stopped/declined.

Relation to indicators of achievement

- 5.1.1. We will challenge the pro-deo system as part of our case.

5.2.1. We have been able to establish the membership of the Clemency Committee. This is described in the Constitution of Botswana. However, information relating to the actual members and to the practical working of the Committee is still termed as classified. Also we could establish as a certainty that the Committee actually met to review cases. We also wished to know whether or not a person is allowed representation before the Committee to bring forth issues which they feel may not have been brought out at the trial. Also Mauwe and Motswetla claim that they had not applied for clemency, but were informed that their appeal for clemency was denied. It seems

as though appeal for clemency may be an automatic process. These are the sort of issues which need clarification.