LESOTHO

IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0113/2018**

In the matter between –

LAKABANE MOKOATSI	**1ST APPLICANT**
'MALEBOHANG MOQEKELA	**2ND APPLICANT**
'MAKOPANO MOKEKI	**3RD APPLICANT**
TSOTANG MOQEKELA	**4TH APPLICANT**
'MAHALIO SENNE	**5TH APPLICANT**

And

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**1ST RESPONDENT**
SENEKANE COMMUNITY COUNCI	**2ND RESPONDENT**
MINISTER OF NATURAL RESOURCES	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral Citation: Lakabane Mokoatsi and 4 others Vs. Lesotho Highlands Development Authority and 3 others [2025] LSHC 229 Comm. (21st August 2025)

CORAM: M. S. KOPO, J

HEARD: 22ND May, 2025

DELIVERED: 21st August, 2025

SUMMARY

Practice – There is no non-joinder in a situation wherein the interested party consciously elected not to join proceedings after being aware of them. – An interested party herein was served with the matter and elected not to join – Held – There is no non-joinder

Merits – The Applicants herein have been resettled at the rural area from their village that was affected by the development of the dam – in a claim for payment of compensation for loss of communal assets directly to them as opposed being shared with the Host Community – Held the LHWDP – has complied with the law and their policy in concluding that the Applicants should share the compensation with the host community.

Annotations

Cases

Lesotho

Basutoland Congress Party and Others v Director of Elections and Others (1995-1999) LAC 587

I Kuper (Lesotho) (Pty) Ltd v Maphathe & Ors (2011-2012) 19

Lesotho National Olympic Committee and Others v Morolong (2000-2004) LAC 449

Masopha v Mota 1985-1989 LAC 58

Matime And Others v Moruthoane and Another (1985-1989) LAC 198

Theko And Others v Morojele and Others (2000-2004) LAC 302

Eswatini

Commissioner Of Police and Another v Maseko (3 of 2011) [2011] SZSC 15 (31 May 2011)

South Africa

Amalgamated Engineering Union v Minister of Labour 1949 (3) 637

Collin v Toffie 1944 AD 456 at p. 464

Logbro Properties cc v Bedderson NO & Ors 2003 (2) SA 460

Legislation

Lesotho Highlands Development Authority Order No. 23 of 1986

Lesotho Highlands Water Project Compensation Regulations No. 50 of 1990

Lesotho Highlands Water Project Compensation Regulations No. 9 of 2017

JUDGMENT

[A] INTRODUCTION

[1] In 1986, the Governments of the Kingdom of Lesotho and the Republic of South Africa entered into a bilateral treaty[1] (The Treaty). The purpose of the Treaty was, mainly, specified in **Article 4 (1)** as follows;

> *The purpose of the Project shall be to enhance the use of the water of the Senqu/Orange River by storing, regulating, diverting and controlling the flow of the Senqu/Orange River and its affluents in order to effect the delivery of specified quantities of water to the Designated Outlet Point in the Republic of South Africa and by utilizing such delivery system to generate hydro-electric power in the Kingdom of Lesotho.*

[2] As part of the implementation of the project, dams were built in Lesotho. One of the said dams was built at Ha Mohale in the rural and highlands of the Maseru district. As a result of this massive project, some communities and families were affected and as a result had to be relocated. There were laws and policies set up to compensate the communities that had to be relocated or resettled. The main legislation dealing with the compensation for of the relocated communities is the **Lesotho Highlands Development Authority Order[2] (the Order)**. This matter concerns the process of relocation herein mentioned and the dissatisfaction of the Applicants herein as some of those who were relocated.

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[1] The Treaty on the Lesotho highlands Water Project
[2] Order No. 23 of 1986

[B] FACTUAL BACKGROUND.

[3] The applicants herein were the residents of Ha Seotsa, Ha Mohale. This village is one of the villages that were affected by the building of the dam at Ha Mohale and as a result, they were resettled from the said village to Thuathe in the District of Berea at the outskirts of the capital city in the year 2002 or 2004 (parties are not agreed on the exact time).

[4] The Applicants were granted a tour of the areas that they could be relocated to by the 1st Respondent and chose Thuathe as the place they could be resettled at. They were successfully resettled at Thuathe and compensated for houses and fields. However, the deadlock ensued relating to communal compensation. It is as a result of this impasse that the Applicants instituted the present application for the following prayers;

> *(a) An Order declaring that the Applicants have a right to receive compensation in terms of Lesotho Highlands Development Authority Regulation 1990 and the Compensation Policy of 1997 as refined in October 2002;*
>
> *(b) An order declaring that compensation payment be paid to Applicants as representatives of each individual household resettled;*
>
> *(c) An order directing the Respondent to pay Applicants the sum of* ***Eighty-Two Thousand Five Hundred and Ten Maloti Twenty Lisente (M82, 510.20)*** *each; within one (1) month of the grant of this Order; Alternatively, to order the Respondent to disclose the current approved rates together with method of calculation and thus pay accordingly the correct amount due in the light of paragraph 7(b) in my founding affidavit.*

(d) *Directing the Respondent to Pay Applicants 18% interest tempore Morae (sic) and/or any other interest that this Honourable Court may deem fit;*

(e) *Directing the Respondent to pay the costs of this application at an Attorney and Client scale or at the scale this Honourable (sic) may deem fit;*

(f) *Granting the Applicant (sic) such further and/or alternative relief as this Honourable Court may deem fit.*

The Applicants later entered a Notice of Amendment of the Notice of Motion. In turn the 1st Respondent entered the Notice of Objection to the Proposed Amendment. This caused the Applicant to enter application for amendment. On the 23rd day of October, 2023 the parties in essence consented to the amendment that a prayer in the following manner be included as an additional prayer;

> *That it be declared that the distinction in payment policy between persons resettled in communal/rural areas and those in urban areas is unlawful and or illegal.*

I allowed their consent but ruled that I hear the entire matter holistically. The amendment is therefore not contested and for that reason it is grated. This amendment is an addition to the prayers of the applicants.

[5] It is apposite to show that on the 16th day of May, 2024, this Court, by consent ordered the Joinder of the 2nd, 3rd, and 4th Respondents. Initially, the 2nd Respondent appeared as Senekane Community Council. It however became apparent, and it was common cause, during arguments that the Applicants were resettled at Kanana Community Council. It will be realised, later in the judgment, that there has been a challenge on non-

joinder of the host community, and it refers to the Kanana Community Counsel or the host community as opposed to Senekane Community Council.

[C] THE APPLICANTS' CASE

[6] On Condonation, the Applicants contend that the delay was occasioned by the attempt to settle the matter. They contend further that the Respondents have not suffered any prejudice and therefore pray that the lateness be condoned.

[7] On the point of non-joinder of the Community or the Community Council of the hosts, the Applicants argue that they have known about the application but have expressly elected not to join. Secondly, they argue that the said community does not have substantial interest in the matter.

[8] It is the Applicants' case that per **Clause 11.5.1** of the **Compensation Policy of 1997 as refined or amended in 2002** (**The Policy**), all households resettled, and households of host communities shall be entitled to annual cash payments or lump sum payments. They pleaded further that the Respondents provide different modes of compensation to the households resettled in rural areas and those resettled in urban areas. The policy is to the effect that households resettled in rural areas have to share their compensation with their host communities while those resettled in urban areas are entitled to individual compensation. This is because in urban areas there are no communal natural resources to share.

[9] The Applicants pleaded that the Respondents refuse to pay them their compensation as individual households. They pleaded further that the

Respondents tried to force them to share their compensation, that was to be granted through community projects, but they refused to accept that since they felt that it was unfair for them to share their compensation with the host community when there were no resources in the community to share. According to the Applicants, the existence of the communal resources is the basis for allowing the sharing of the compensation money with the hosts. They argue that in Thuathe, there is no more grazing land and other natural resources.

[10] Finally, the Applicants argue that The Policy differentiates between those resettled to urban areas and those resettled to rural areas. They therefore contend that to that end the policy is unlawful in that it is not aligned to the primary legislation.

[D] THE 1ST RESPONDENT'S CASE

[11] The 1st Respondents commence their challenge to the application by raising a preliminary point of non-joinder. They argue that the host community has a direct and substantial interest in the proceedings because they may be deprived of the amount due to them which could be used for development in their community.

[12] The 1st Respondent accept that the Applicants are due to be compensated for the communal assets in the sum of **One Million, Fifty Thousand, Five Hundred and Ninety-seven Maloti and Eighty-seven Lisente (M1, 050, 597.87).** They also contend that the Applicants have been resettled to Thuathe, which is a rural area within the Senekane Community Council.

[13] It is further the case of the 1st Respondent that according to **Clause 11.5** of The Policy the mentioned communal compensation should be used for developmental purposes within the host community. This, they argue further, should be distinguished from the compensation to those resettled to urban areas where compensation is made to them personally. In rural areas, the host community stands to benefit from the compensation. They argued that this was a departure from the **1997 Policy** and was also made consequent to a recommendation of the Ombudsman.

[14] The 1st Respondent denies that there are no natural resources at Thuathe for the Applicants to use. They aver that while they may not be the same due to different natural habitats, they are there for the Applicants to use with the host community.

[15] On the same point, the 1st Respondent argue that this raises a dispute to the effect that this case is not fit for motion proceedings. It is apposite at this stage that I show that this was raised as a preliminary issue. As to whether it should have been, it will be considered when the analysis of this matter is undertaken.

[16] Another point upon which the 1st Respondent challenges the claim on is that this Court cannot interfere with the matter in which it compensates the resettled communities. They argue that the legislature has allocated the power to assess how much the resettled communities should be compensated under the executive arm of government. Relying on the South African Supreme Court of Appeal case of **Logbro Properties cc v Bedderson NO & Ors**[3], they argued that the judiciary should be slow to

[3] 2003 (2) SA 460

interfere with the powers of the administrative agencies and be conscious not to usurp the functions of the legislature.

[E] ISSUES

[17] This court has to decide if there has been the non-joinder of the host community in this matter. In doing so, I will have to decide if the community has the substantive interest, and if it does, whether it knows about the present proceedings. And finally, if it does, has it waived its right to be involved in the proceedings.

[18] The second issue is whether the applicants have to be paid the compensation personally and individually or whether they have to share the compensation with the host community.

[F]ANALYSIS

I. NON-JOINDER

[19] As a general rule, a party who has direct and substantial interest in the matter must be joined to the proceedings. This is trite law. Failure to join such a party cannot be ignored by the Court even in advanced stages of the proceedings (See **I Kuper (Lesotho) (Pty) Ltd v Maphathe & Ors (2011-2012) LAC 19**, **Theko And Others v Morojele And Others (2000-2004) LAC 302**, **Lesotho National Olympic Committee And Others v Morolong (2000-2004) LAC 449**, **Basutoland Congress Party And Others v Director of Elections And Others (1995-1999) LAC 587**, **Masopha v Mota 1985-1989 LAC 58**, **Matime And Others v**

Moruthoane And Another (1985-1989) LAC 198)[4] . There is a legion of authority to this effect in our jurisdiction.

[20] It may be safe to conclude that the South African *locus classicus* that has crisply elucidated the law on this subject and cited in the earliest cases mentioned above in our jurisdiction, and most others that followed, is **Amalgamated Engineering Union v Minister of Labour**[5]. This case considered previous cases in that jurisdiction and concluded that rather than taking subject to subject law in trying to decipher in which ones joinder may be necessary, the overarching principle is that a party who has a direct and substantial interest (and on that note adopted this phrase that had already been used on **Collin v Toffie**[6]) in the order that may be made by the court is a necessary party to be joined. The following words from the judgment bare me out on this conclusion;

> *"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the*

[4] A similar list was recognised by Ramodibedi CJ in Eswatini in Commissioner of Police and Another v Maseko (3 of 2011) [2011] SZSC 15 (31 May 2011)
[5] 1949 (3) SA 631 at 637
[6] 1944 AD 456 at p. 464

opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both."[7]

[21] The waver must be unequivocal[8]. In *casu*, as has been seen, I ordered the joinder of Senekane Community Council. It however became apparent that the Applicants have been resettled to Kanana Community Council and not Senekane. Kanana was then send the dossier of present matter. Advocate Semano argued that Senekane answered that they are aware of the matter. I ordered Advocate Semano to present me with the said letter. The letter was indeed handed over and it shows that Kanana is aware of the dispute and the letter showing that the communal compensation is available meant for the entire community (as reflected in Annexure T1).

[22] The letter does not sound like an unequivocal waiver of the rights being contested. It does not seem to be saying that Kanana will abide by any order of this Court. It, however, seems to be taking the side of the 1st Respondent. Perhaps, Kanana, was consciously saying so because it was aware that the 1st Respondent was going to advance its case. However, there is a possibility that it was of the view that the **One Million, Fifty Thousand, Five Hundred and Seventy-five Maloti and Eighty-seven Lisente (M1, 050, 575.87)** was the communal compensation in issue. Whatever could have been the intention of Kanana, its response does not inspire confidence that it was unequivocally waiving its rights. Be that as it may, there is no doubt that Kanana unequivocally, waived its right to join the proceedings. It was aware that there is a case in which the Applicants were seeking that the communal compensation be paid to them. They were

[7] Ibid at 659-660
[8] Collin v Toffie supra.

aware that this Court ordered that the Council, be joined even though the order was directed, mistakenly so, to Senekane. They consciously decided not to join the proceedings or to defend the matter. It is on that note that the challenge of non-joinder does not succeed.

II. MERITS

[23] **Part IX** of **the Order** is headed compensation and has in it provisions guiding or mandating the 1st Respondent to compensate the affected parties. **Section 44** therein provides as follows;

> *44. (1) Compensation in respect of rights or interests in land, servitude, wayleaves, fisheries, fishing rights, water rights or other rights whatsoever shall be paid by the Authority in accordance with the laws of Lesotho.*
> *(2) The Authority shall,*
> *(a) ensure that as far as is reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons; and*
> *(b) submit to the Minister for approval, proposals for assisting such persons and expeditiously execute such proposals when approved.*

[24] In the year 1990, a subordinate legislation in the form of the **Lesotho Highlands Water Project Compensation Regulations**[9] **(the 1990 Regulations)** was promulgated. These Regulations had nine (9) headings dealing with compensation. Of all the nine (9) headings, **Compensation**

[9] Legal Notice No. 50 of 1990

for other improvements and **Compensation in other cases** (**Regulation 10** and **11 respectively**) are the only cases in which the claim by the Applicants (Claim for loss of communal asserts) may be covered. The closest to the Applicants' claim is **Regulation 11**. Since it is general, it takes us back to the parent legislation.

[25] It is common cause that in operationalising the mandate enunciated in the parent legislation, the 1st Respondent came up with the **Policy in 1997**. The said **Policy,** as refined in 2002, provides as follows in **Section 8**;

> *"**ELEGIBILITY FOR COMPENSATION***
> *The compensation programme is directed primarily at affected households and communities.*
> *Affected households will be eligible for compensation for the loss of:*
> - ...
> - ...
> - *Rights and access to communal assets including grazing, brushwood fuel, useful grasses, and medicinal plants;*
> - ..."

[26] On the 17th day of February 2017, the Minister responsible for water made the **Lesotho Highlands Water Project Compensation Regulations**[10] **(the 2017 Regulations)**. **Regulation 8** therein provides as follows;

> ...
> *(3) The communal compensation –*

[10] Legal Notice No. 9 of 2017

(a) shall be dispensed by the Authority in building such development projects; and

(b) to be dispensed by the Authority for loss of assets shall be calculated in terms of the approved compensation rates.

(4) Where some physically displaced households move outside their local community or village to other host communities or villages, the funds shall be apportioned between the concerned communities or villages based on the number of households relocating.

(5) A household relocating to urban or peri-urban area with no communal natural resources may qualify for cash compensation for loss of access to natural resources. Eligibility shall be assessed on a case by case basis and where approved, compensation shall be paid as once off lump sum.

[27] These **2017 Regulations** repealed the **1990 Regulations**. With the repeal of the 1990 Regulations, the relevant law is the **Order** read with the **Policy**. It is apposite to show that the **1990 Regulations** provided that any person dissatisfied with the compensation could appeal to the Chief executive and further to the Minister. The decision of the Minister was to be final. With the repeal of the **1990 Regulations**, I need not worry about whether the matter is rightly before Court.

[28] The case of the Applicant is based on the **Order** and the repealed **1990 Regulations**. Since the **1990 Regulations** have been repealed, we only have to look at the **Order** and the **Policy**. **Section 44** of the **Order** is not very elaborate, but it is general. However, the **Policy** is clear that resettled communities will be compensated for loss of communal assets. It also elucidated that;

"All communal assets mentioned below will be compensated to the communities as a whole in the form of lump sum or annual cash payments. These funds shall be used for development purposes within the communities.

The funds provided under the communal assets shall be calculated on the basis of the number of households resettled or relocated."[11]

[29] The specificity on the location of the resettled households only came about with the **2017 Regulations**. The said **2017 Regulations** came with the approach of differentiating between those resettled at urban and peri-urban areas from those being resettled to rural areas.

[30] It is common cause that the place in which the Applicants are relocated to is a rural area. This is if we were to accept that the matter was instituted prior to the era of the 2017 Regulations. The Applicants' case is that there are no communal assets at the place in which they have been resettled to. It is not their case that the place is peri urban. Even if I were to accept that they aver that there are no communal assets, there is clearly a dispute of fact since the 1st Respondent argues otherwise. This clearly should work in favour of the 1st Respondent. From the negotiation stage, the Applicants could foresee or should have foreseen a possibility of the dispute.

[31] In rural areas, members of the community are still permitted to rear livestock. The situation is not the same as in suburbs where livestock rearing may be prohibited. Indeed, as the Respondents argue, the communal assets at Thuathe may not be the same as those at Ha Mohale. However, the very compensation intended by the Respondents is geared towards providing communal assets for both the host community and the

[11] Section 11.5

decision of the 1st Respondent to follow its policy and direct the compensation to the entire community that includes even the applicants.

[G] DISPOSITION

[32] The Community council was aware of this matter. It consciously decided not to join. There cannot therefore be an issue of non-joinder.

[33] The place that the Applicants have been relocated to is a rural area. The Policy of the 1st Respondent is that the host community together with the resettled households will share the compensation. This is not against the parent law. It amplifies the parent law. For this reason, therefore, I make the following order;

ORDER

The application is dismissed with costs.

Kopo J.

For the Applicants : Adv. Semano Instructed by Rasekoai, Rampai & Lebakeng Attorneys

For the 1st Respondent: Adv. Suhr Instructed by Webber Newdicate Attorneys