



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CIV) 28/2025

In the matter between:

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY**

APPELLANT

AND

U KHOPO MALIBA-MATŠO SOCIETY

RESPONDENT

CORAM: MOSITO P
SAKOANE CJ
MUSONDA AJA

HEARD: 13 OCTOBER 2025

DELIVERED: 7 NOVEMBER 2025

FLYNOTE

Constitutional and Administrative Law — Compensation for deprivation of property — Lesotho Highlands Water Project — Statutory obligation of Lesotho

Highlands Development Authority (LHDA) to compensate affected communities — Whether LHDA could rely on In-Stream Flow Requirement (IFR) Policy to deny payment — Failure to consult affected communities — Rule of law and administrative fairness — Duty arising ex lege, not ex consensu.

Held:

The obligation of the Lesotho Highlands Development Authority to compensate communities affected by the Lesotho Highlands Water Project is a constitutional and statutory one, arising directly from section 17(1)(c) of the Constitution, Article 7(18) of the Lesotho Highlands Water Project Treaty, and sections 44–46 of the Lesotho Highlands Development Authority Order 1986. Such duty cannot be negated or deferred by administrative policy.

The In-Stream Flow Requirement (IFR) Policy, developed under section 44(2) of the Order, must operate in furtherance of—not in derogation from—the Authority’s statutory mandate. Where its implementation deprives affected persons of compensation guaranteed by law, it becomes of no legal force or effect. The decision to discontinue compensation without meaningful consultation of the Bobete community was procedurally unfair and substantively unlawful. Public authorities must act fairly, consultatively, and within the boundaries of legality; policy cannot supplant statute.

The Society representing the affected community was entitled to enforce the Authority’s statutory obligation by way of specific performance, since the duty to compensate arises ex lege and not ex consensu. The principle of prompt and adequate compensation under the Constitution demands timely payment; compensation delayed for over a decade amounts to compensation denied.

Appeal dismissed. Order of the High Court compelling payment of the second and final tranche of compensation confirmed. LHDA directed to commence payment within ninety days of judgment.

Per Sakoane CJ (Mosito P and Musonda AJA concurring):

Fairness requires that affected communities be consulted before decisions are made that impact their livelihoods. LHDA’s unilateral reliance on technical

reports, without dialogue or ministerial approval as required by section 44(2)(b) of the Order, violated both procedural fairness and statutory duty. The rule of law demands accountability in the exercise of public power.

Per Mosito P (concurring):

The appeal raises issues central to constitutional governance: administrative authorities must act transparently and accountably. The obligation to compensate is not a matter of grace or discretion but a constitutional imperative. The Court's intervention compels compliance with the law, not the creation of new obligations.

Result: Appeal dismissed with costs; payment to commence within 90 days.

JUDGMENT

SAKOANE CJ

INTRODUCTION

[1] The issue in this appeal is whether Lesotho Highlands Development Authority (LHDA) is right in law to refuse compensation to communities affected by the Lesotho Highlands Water Project (LHWP). In the High Court *Makara J* decided the issue against LHDA and granted an order for compensation in favour of the respondent (who represents the affected communities). The order reads as follows:

- “1. The Respondent [Appellant in the appeal] is ordered and / or compelled to comply with Lesotho Highlands Water Project Phase 1 Policy for In-Stream Flow Requirement (IFR) by making a second and final

payment of compensation due to the Applicant
[Respondent in the appeal].

2. The Respondent [Appellant] is ordered to pay costs of the Application.”

Parties

- [2] The appellant is a statutory body created in terms of the Lesotho Highlands Development Authority Order No.23 of 1986 (the Act¹). Its responsibility is defined in section 20 as follows:

“The Authority is entrusted with the responsibility for the implementation, operations and maintenance of the Lesotho Highlands Water Project as defined in the Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, and shall give full effect to the rights and duties of the Joint Permanent Technical Commission provided for in the Treaty.”

- [3] The respondent is a Society of over six hundred members registered in 2003 to receive compensation of its members affected by LHWP. It will be referred to as the Society. Its members are part of the community of *Bobete* in the district of Thaba-Tseka.

Litigation history

- [4] The Society instituted motion proceedings against LHDA in the High Court seeking an order:

¹ “Order” means “Act” according to the Interpretation (Amendment) Act No. 4 of 1993

- (a) compelling LHDA to pay a second and final tranche of compensation in compliance with the Lesotho Highlands Water Project Phase 1 Policy for In-Stream Flow Requirements (IFR), 2003 (IFR Policy);
- (b) costs of suit.

[5] The Society's case was that the IFR Policy is a mechanism in terms of which villagers affected by the building of the *Katse* and *Mohale* dams are compensated. The compensation would be for "riverine recourses, firewood and construction, timber, fish resources, wild vegetables, medical plant resources and animal forage".²

[6] The first payment of compensation by LHDA was made in 2003. The second should have been made in 2013, but to date none has been received.³

LHDA'S defence

[7] LHDA's answer to the case of the Society was as follows:

7.1 The statutory obligation to provide compensation for losses to affected communities is in terms of Article 7(18) of the Treaty which is domesticated in terms of section 44 of the Act.

² Founding affidavit paras 4 and 5

³ Op.cit paras 7 and 8

- 7.2 The IFR Policy was developed in terms of section 44(2) of the Act.
- 7.3 The IFR Policy must be read together with the Lesotho Highlands Compensation Regulations, 2017 published per Legal Notice 9 of 2017 in terms of section 59 of the Act.
- 7.4 The applicable Regulation on compensation for loss of communal assets is Regulation 8.
- 7.5 The first tranche of compensation was made in 2003/4. Compensation “*was made against presumed losses owing to inadequate baseline data to predict adequately ecosystem service losses like woody vegetation and fish as a result of reduced flows*”.
- 7.6 After the 2003/4 payment, LHDA conducted a monitoring programme between 2003 and 2013 to determine payability of the second tranche of compensation. Consultants were engaged in 2013 to collect complementary biophysical monitoring data on fish and riparian vegetation to determine justifiability of the second tranche of compensation.
- 7.7 The consultants produced a report on 24 June 2014. The report was reviewed by LHDA experts who confirmed the consultants’ report that there was no evidence to support payment of further compensation.
- 7.8 LHDA also engaged LHWP which came to the conclusion that “*despite the community discontent, there was insufficient justification to warrant a further study.*”

7.9 In the circumstances, LHDA made the decision that there was no justification to pay the second tranche of compensation.

7.10 An order for specific performance to pay can only be legitimately sought if the Society can demonstrate that payment of compensation had in fact been determined by LHDA as payable per the IFR Policy but refused.

7.11 The Society had not sought to review the decision not to pay, which review application should have been brought within a reasonable time of the making of the decision.

The High Court's judgment

[8] The court *a quo* identified the following three issues for determination⁴:

- a) whether LHDA has an obligation to compensate the Society;
- b) whether LHDA can unilaterally determine whether compensation is due to the Society; and
- c) whether the Society ought to have come to court by way of review to challenge LHDA's decision instead of enforcement of compensation by specific performance.

Is LHDA obliged to pay?

[9] The court *a quo* answered the question by referencing Clause 7.7 of the IFR Policy. The Clause says:

⁴ Judgment para [13]

“The method of payment will comprise two payments: the first will be for the period from the effectiveness of this policy to 2013; the second and final payment will comprise the balance of compensation owing (as calculated for the present value over 50 years, taking into consideration the findings of the 10-year review policy implementation.”

[10] The learned Judge reasoned that the Society was enforcing payment by way of specific performance which is “*an order to perform a specific act or to pay money (ad pecuniam solvendam) in pursuance of a contractual obligation.*”⁵ Thus, the Society was within its rights to assert that LHDA be ordered to discharge its Clause 7.7 obligations.

Can LHDA unilaterally decide not to pay compensation?

[11] The learned Judge answered this question by referencing the preambular part of the IFR Policy that says “*A vital component of policy development is the involvement of affected parties to the process.*” LHDA was enjoined to ensure participation by the Society’s members in matters that called for policy review. Therefore, the members had a legitimate expectation to be consulted.

Should the Society have reviewed LHDA’s decision instead of claiming specific performance?

[12] The court *a quo* held that failure to involve the Society in the process of determining the justifiability of payment of the

⁵ Quoting Christie The Law of Contract 5th edition p.522

second payment and the decision reached not to pay precluded a review of the decision because the decision was only known when LHDA filed the answering affidavit.

Order

[13] In the result, the court *a quo* upheld the Society's claim and made the following order:

- “1. The Respondent is ordered and / or compelled to comply with the Lesotho Highlands Water Project Phase 1 Policy for the In-Stream Flow Requirements (IFR) by making a second and final payment of compensation due to the Applicant.
2. The Respondent is ordered to pay costs of the Application.”

II THE APPEAL

Grounds of Appeal

[14] LHDA is appealing on the following grounds:

- “1. The court erred in finding that the Respondent had a claim for payment arising out of a contract between the parties, when no such contract was pleaded by the Respondent and the Respondent's claim could only arise out of statute and the relevant subordinate legislation.
2. The court erred in not having regard to the rule that in motion proceedings the case is to be decided on the Respondent's (in *casu* the Appellant's) factual version, together with so much of the Applicant's (present Respondent's) version as is not disputed by the Respondent.
3. The court erred in not having proper regard to the uncontested body of evidence presented by the appellant demonstrating that there was no rational

basis for making a further payment to the Respondent in terms of the applicable IFR Policy.

4. The court erred by invoking the doctrine of legitimate expectation when the elements of that doctrine had not been pleaded by the Respondent.
5. To the extent that it may have been relevant, the court erred in dismissing the evidence regarding the consultations held to explain the Appellant's finding that no further compensation was payable, when those consultants were not challenged in reply by the Respondent. In particular, the court erred in making a finding that the Appellant acted dishonestly.
6. The court erred in not holding that, in the absence of a determination by the Appellant that any further sum was payable to the Respondent in terms of the IFR Policy, the Respondent's remedy was a review of the Appellant's decision, which remedy the Respondent had elected not to pursue.
7. The court erred in making what it described as an order for specific performance, in the form of an order for an unspecified sum of money, which order is not capable of performance by the Appellant.
8. The court ultimately erred in not making an order dismissing the application with costs".

Submissions

[15] In written heads of argument, Mr *Suhr* for the appellant, contends as follows:

15.1 The Society did not seek to review LHDA's decision not to make any further compensation and further that such a review could, in any event ought to have been brought within a reasonable time.

15.2 The order sought would only have been feasible if LHDA had in fact determined that a second payment was due

to the Society but refused to pay for some invalid reason.

15.3 The 2003/2004 payment was made against presumed losses due to unavailability of adequate baseline data to predict ecosystem losses for downstream communities such as loss of woody vegetation and fish as a result of reduced flows.

15.4 Following the Society's receipt of the first payment in 2003/2004, LHDA conducted a monitoring programme and engaged consultants in 2013 to determine whether a second payment was justified. The Consultants' report (dated 4 June 2014) concluded that there was no justification to make the second payment.

15.5 The report was reviewed by the LHDA's Environmental Panel of Experts and confirmed that there was no evidence to support further compensation.

15.6 As no second payment has been determined to be due, there was no basis for the High Court's order that payment be made.

Society's submissions

[16] Counsel for the Society Mr *Sepiriti*, submitted that:

16.1 The preamble of the IFR Policy states that “*a vital component of policy development is the involvement of affected parties in the process.*”

16.2 The communities of *Bobete* where members of the Society live, were not consulted by LHDA in the review of the IFR Policy. He referenced the consultant’s report relied upon by LHDA to support his argument. The report shows that although there was a plan to consult the communities, this was not seen through by LHDA.

16.3 The decision to stop payment was never communicated to the Society. The Society only got to know about the decision when LHDA filed its answering papers.

16.4 The order of the High Court is correct in law and fact because the IFR Policy constitutes a contract to pay on the due date of 2013 and the communities had a legitimate expectation that compensation would come like it did in 2003/2004.

Compensation Laws

[17] The controlling laws on compensation for deprivation of property and resources of the affected communities are:

- the Constitution of Lesotho, 1993;
- the Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, 1986;
- the LHDA Act; and

- the Lesotho Highlands Water Project Compensation Regulations, 2017.

The Constitution

[18] Section 17(1) guarantees “Freedom from arbitrary seizure of property” as follows:

“17. (1) No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –

- (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and
- (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
- (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

The Treaty

[19] Article 7(18) reads:

“The Lesotho Highlands Development Authority shall effect all measures to ensure that members of local communities in the Kingdom of Lesotho, who will be affected by flooding, construction works, or other similar Project related causes,

will be enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance: Provided that such Authority shall effect compensation for any loss to such member as a result of such Project related causes, not adequately met by such measures.”

The Act

[20] Sections 44, 45, 46 and 59 read 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.

45. All claims for compensation in respect of any right or interest in land, servitude right or other property whether corporeal or incorporeal acquired or interfered with by the Authority under this Order shall be made within one year after such land, servitude, right or property is first entered or exercised or interfered with by the Authority under the Order.

46. Where a person is entitled to compensation in respect of anything lawfully done or intended to be done by the Authority under this Order, the Authority may execute for the benefit of such person such works as may be reasonable in all the circumstances of the case.

...

59. The Minister may, by notice published in the Gazette, make regulations:

(a) ...

(b) conferring powers and imposing duties to the Authority; and

(c) generally for carrying into effect the principles and purposes of this Order.”

Compensation Regulations

[21] Pursuant to the power to make Regulations under section 59(c) of the Act, the Minister promulgated the LHWP Compensation Regulations, 2017 gazetted on 17 February 2017. They replace those of 1990.

[22] The Regulations are an improvement of those of 1990 in the following respects:

- a) they define “compensation” to mean “a payment in kind or other legal payment tendered for the **property or resource** that is acquired or affected by the Project;
- b) they introduce the concept of “approved compensation rates” by the Minister that are escalated by the Consumer Price Index (CPI) at the end of March of each year;
- c) they also cover compensation for rights and access to communal assets; and
- d) compensation is available for communities whose water supply from an established source is reduced.

LHDA’s failure to consult

[23] The Constitution, the Treaty, the Act and the LHWP Regulations, are referenced to underscore the fact that the obligation of LHDA to compensate the Society is not merely a

matter of IFR Policy. The obligation is constitutional and statutory. This means that communities affected by LHWP cannot be denied compensation through the instrumentality of a policy. Where the rights of the members of the Society to receive compensation by operation of law are violated by the operationalisation of the IFR Policy, the Policy must yield to the Constitution, the Act and Regulations.

[24] That the communities of *Bobete* were not consulted in the process of reviewing the IFR Policy is evident from the report of the consultants engaged by LHDA. In its conclusions the report states:

“Two meetings were not held: 1) *Kolberg* village, which was re-scheduled twice and then finally cancelled due to lack of interest by the community and 2) *Bobete* village, which was not held because the community had not been properly informed by the Chief. The *Bobete* community therefore remains uninformed about the consultant’s study.”
[emphasis added]

[25] This is evidence that members of the Society were not engaged by LHDA in the policy review and the decision not to compensate was not brought to their attention. LHDA was wrong to proceed with the implementation of the recommendations in the report without engaging the villagers of *Bobete*. LHDA was bound to follow the dictates of the policy as originally envisaged. As said in *Ng Yuen Shiu*⁶:

⁶ A-G of Hong Kong v Ng Yuen Shiu [1983] 2 ALL ER 346 (HL) at 351

“...when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”

[26] Implementation of the IFR Policy must be in furtherance of, and not deviation from LHDA’s statutory duty to compensate. LHDA is obliged to carry out this duty fairly. Fairness demands that the *Bobete* villagers should have been heard. As pointed out by Lord *Mustill* in *Doody*⁷:

“(1) Where an Act of Parliament confers an administrative power there is a presumption that it be exercised in a manner which is fair in all the circumstances. ... (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

[27] Another reason that obliged LHDA to enter into meaningful consultations and dialogue with the communities is that the decision not to compensate is based on high level technical reports by its consultants and experts. Fairness dictates that these rural villagers should have been provided with an

⁷ R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 at 560

opportunity and wherewithal to study, interrogate and even engage, with assistance their own or neutral experts, to challenge the consultants' report. LHDA did not do anything of the sort. It is, therefore, justifiably open to the criticism of making elitist and unilateralist decisions.

[28] What is very wrong with the implementation of the IFR Policy is that it deprives members of the Society of their statutory right to be compensated. There is nothing on record to indicate that the decision to stop paying was even put to the Minister for approval as required by section 44(2)(b) of the Act. Therefore, by developing the policy, adopting it and deciding on its basis not to make the second tranche of compensation, LHDA failed in its compensation duties under sections 44 of the Act.

Principles of Compensation

[29] Article 7(18) of the Treaty and section 44(2)(a) of the Act provide for the principle that compensation should maintain the affected person's standard of living not inferior to that which existed at the time of loss of property or resources.

[30] Section 45 directs that compensation "*be made within one year after such land, servitude, right or property is first entered or exercised or interfered with*". This resonates with section 17(1)(c) of the Constitution which provides for prompt payment of compensation.

[31] Another principle is prompt payment of compensation. Its purpose is that affected communities should not lose their current standard of living because of the negative impact by the Project. *Darroch et al*⁸ argue, persuasively so, that:

“... 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 must be read in context, and as a whole mean that the affected communities must be placed in the position that they were before displacement, all factors and circumstances considered. This requires compensation to include:

- rebuilding sense of place and wellbeing;
- restoration of livelihoods;
- skills development to enable people to replace the occupations they have lost.”

[32] It is not for LHDA to make a policy that deviates from its statutory duties. Where the rights of the members of the Society to receive compensation by law are violated by the operationalisation of the IFR Policy, the Policy becomes of no force and effect. Compensation should be made as a matter of law and not policy.

[33] In its answering affidavit, LHDA accepts that it is duty-bound in law to pay compensation to affected communities per the prescripts of Article 7(18) of the Treaty and section 44 of the Act. It avers that the IFR Policy is developed in terms of section 44(2) of the Act.

⁸ “Dams, Displacement And Communal Compensation: A Lesotho Highlands Legal Case” University of Botswana Law Journal June & December 2020 pp.122-175

[34] Section 44(2)(b) requires LHDA to submit to the Minister for approval of proposals for assisting affected persons and to execute expeditiously such proposals once approved. I do not find anything in the section that authorises LHDA to make policies. Its mandate is to submit proposals to the Minister for approval and not to action, without the Minister's approval, recommendation in reports submitted by consultants and experts.

Specific performance

[35] Specific performance is a remedy for payment of money (*ad pecuniam solvendam* (orders for payment of a sum of money) in pursuance of a contractual obligation. It is granted subject to the court's discretion and can be refused where⁹:

- (a) it is impossible for the defendant to comply;
- (b) it brings undue hardship;
- (c) the contract is for personal service; and
- (d) the contractual obligation is imprecise.

[36] Parliament has decreed that affected communities be compensated. None of the exceptional grounds to deny the relief appears in the papers. The interests of justice dictate that LHDA should not be permitted to refuse payment of the second tranche of compensation to the Society.

[37] The duty of LHDA to compensate arises *ex lege* (by operation of law) and not *ex consensu* (by agreement). The Society is within its rights to enforce performance of this statutory duty

⁹ RH Christie The Law of Contract in South Africa 3rd edition pp. 578, 580-586

in *forma specifica* (performance of precisely that which is provided by law).¹⁰

[38] There is no evidence on record to indicate or suggest that the order for specific performance will produce a result that is unjust or contrary to the law or public policy. The contention that the reports of the consultants and experts indicate that there are no losses down-stream to justify compensation must be rejected because these reports made after 2013 when LHDA should have paid the second tranche of compensation.

Disposition

[39] LHDA did not engage members of the Society in the review of the IFR Policy and in deciding to stop payment of the second tranche of Compensation. Payment should have commenced in 2013. This date had passed at the time of adoption of the policy in 14 June 2014. No explanation is given by LHDA why so late. There is also no acceptable reason given for not timeously informing the villagers about the decision thereafter. Grounds 1, 3 and 4 of the appeal cannot succeed.

[40] The *Bobete* villages only got to know about the stance of LHDA in the matter of non-compensation when they brought an application in the High Court. Had they not sued, they would still be in the dark. Grounds 5, 6 and 7 of the appeal must also fail.

¹⁰ LAWSA Vol.9 3rd edition paras 404, 420

[41] In its own papers, LHDA concedes that it is its statutory duty to compensate affected communities but it has deviated therefrom by adopting a Policy that is contrary to the tenets of the Act. Grounds 2 and 8 must also fail.

[42] Considering that payment of the second tranche of compensation was due in 2013 and failure to pay is contrary to the principle of prompt payment provided in section 17(1)(c) of the Constitution read with section 44(2)(b) of the LHDA Order, 1986; also bearing in mind that compensation should ensure maintenance of the standards of living in existence before the negative impact of LHWP, justice dictates that there should not be any further delays.

[43] It is over a decade since LHDA stopped payment of compensation to the Society. This should have impacted the living standard of its members. It is, therefore the duty of this Court to come to their rescue. I consider that LHDA should be pinned down to a definite time frame within which to commence payment of compensation. Ninety days from the date of judgment will do.

Order

[44] In the result, the following order is made:

1. The appeal is dismissed.
2. The order of the court *a quo* is confirmed.

3. The appellant must commence payment of the second tranche of compensation within ninety days from the date of this judgment.
4. The appellant must pay the costs of the appeal.



S. P. SAKOANE
CHIEF JUSTICE

MOSITO P

Introduction

[45] I have had the advantage of reading in draft the illuminating judgment prepared by my brother, the learned Chief Justice, with whose reasoning and conclusion I am in full agreement. I concur entirely in the order he proposes. Yet, in view of the constitutional and statutory significance of the questions raised by this appeal, and in deference to the arguments advanced before us, I venture to set out my own complementary reasons for reaching the same conclusion.

Issues for Determination

[46] The following questions arise in this appeal:

- (i) Whether the LHDA's obligation to compensate communities affected by the LHWP arises *ex lege* under section 17(1)(c) of the Constitution, Article 7(18) of the Treaty and sections 44–46 of the LHDA Order, 1986, or whether it may be confined or displaced by the IFR Policy.

(ii) Whether, properly construed, the IFR Policy (including cl 7.7 and the ten-year review) could lawfully be invoked to defer or deny payment of the second tranche due after 2013.

(iii) Whether LHDA's decision-making complied with the requirements of procedural fairness, including meaningful consultation of the Bobete community and ministerial approval contemplated by section 44(2)(b) of the Order; and whether a legitimate expectation to be consulted arose.

(iv) Whether the respondent's recourse lay in review of LHDA's non-payment decision (with any attendant timeliness bar), or whether specific performance of the statutory duty was competent.

(v) Whether, applying the motion-proceedings rule, the uncontested facts disclosed a rational basis to decline further compensation.

(vi) Whether an order compelling payment of the "second and final tranche" is competent notwithstanding the absence of a quantified sum in the order.

(vii) Whether the principles of prompt and adequate compensation, including section 45 of the Order and section 17(1)(c) of the Constitution, bear upon both liability and the form of relief.

(viii) What relief and costs order are appropriate, including whether to direct commencement of payment within a defined timeframe.

Judicial Analysis

[47] The Chief Justice has, with great clarity, traced the statutory and treaty framework governing the Lesotho

Highlands Development Authority (LHDA) and demonstrated that the obligation to compensate communities affected by the Lesotho Highlands Water Project (LHWP) does not rest merely on policy but arises *ex lege* — by direct operation of law. I agree. Indeed, to construe the IFR Policy as capable of displacing the rights of affected communities under the Constitution, the Treaty, and the enabling statute would be to invert the constitutional hierarchy of norms. Policy must yield to law, not law to policy.

[48] The appeal, in my judgment, is not merely about the payment of compensation; it goes to the very heart of the rule of law in administrative governance. The LHDA, as a public authority, was under a legal duty to act fairly, consultatively, and consistently with its statutory mandate. Its decision to discontinue compensation without meaningful engagement of the affected communities was, therefore, not only procedurally unfair but also substantively unlawful. Public power, however benevolent in motive, must be exercised transparently and accountably. Where it is not, the courts must intervene — not to usurp the functions of the administrative agency but to ensure that the boundaries of legality are respected.

[49] Furthermore, the principle of prompt and adequate compensation entrenched in section 17(1)(c) of the Constitution and reaffirmed in Article 7(18) of the Treaty is not a matter of administrative discretion. It is a constitutional imperative. Compensation delayed for over a decade is, in practical terms, compensation denied. The hardship thereby

inflicted on vulnerable rural communities is precisely the injustice which the framers of our Constitution sought to preclude.

[50] I also find compelling the Chief Justice's observation that the duty to compensate arises *ex lege* rather than *ex consensu*. This distinction is not merely semantic. It underscores that what the Society seeks is not a contractual benefit but the enforcement of a statutory and constitutional right. The remedy of specific performance is, in this context, an appropriate judicial response to the Authority's dereliction of duty. The Court is not creating a new obligation; it is compelling the performance of one long recognised by law.

[51] Finally, I would stress that the LHDA's failure to consult the affected communities before adopting and implementing the consultants' recommendations represents a serious breach of administrative fairness. The right to be heard, as Lord Mustill observed in *Doody v Secretary of State for the Home Department*¹¹, lies at the core of good administration. It is not an embellishment of procedure but an instrument of justice. The villagers of Bobete, whose livelihoods and environment were directly impacted by the LHWP, were entitled to participate in the process leading to decisions that so profoundly affected their lives.

Disposal

[52] For all these reasons, and for those so ably articulated by my brother, the Chief Justice, I too would dismiss the

¹¹ *Doody v Secretary of State for the Home Department* [1994] 1 AC 531.

appeal, confirm the order of the High Court, and endorse the directive that the appellant commence payment of the second tranche of compensation within ninety days of this judgment.



K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P. MUSONDA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV R. A. SUHR

FOR THE RESPONDENTS: ADV R. SEPIRITI (with ADV
M. MOTLOUNG)