



LESOTHO

**IN THE HIGH COURT OF LESOTHO**

HELD AT MASERU

CONSTITUTIONAL CASE NO. 0010/25

In the matter between:

MOKHOTLONG BUSINESS FORUM

DEVELOPMENT TRUST

COMMUNITY RESOURCES DEVELOPMENT TRUST

KOSE SEKONYELA

LEBOHANG LENGOASA

‘MAOETSI TEKANE TEKANE

‘MALEBOHANG MOQEKELA

LAKABANE MOKOATSI

MANKOPANE MOEKETSI

MABATHO SENNANA

TSOTANG MOQEKELA

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY

SUN JV

KOPANO KE MATLA JV

WRES SENQU BRIDGE JV

HSPY JV

RUMDEL/AC JOINT VENTURE

SINOHYDRO SA/ NTHANE BROTHERS JV

L & M JOINT VENTURE

UNIK CONSTRUCTION ENGINEERING LESOTHO (PTY) LTD

ECONET AND CBS JOINT VENTURE

1<sup>ST</sup> APPLICANT

2<sup>ND</sup> APPLICANT

3<sup>RD</sup> APPLICANT

4<sup>TH</sup> APPLICANT

5<sup>TH</sup> APPLICANT

6<sup>TH</sup> APPLICANT

7<sup>TH</sup> APPLICANT

8<sup>TH</sup> APPLICANT

9<sup>TH</sup> APPLICANT

10<sup>TH</sup> APPLICANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

3<sup>RD</sup> RESPONDENT

4<sup>TH</sup> RESPONDENT

5<sup>TH</sup> RESPONDENT

6<sup>TH</sup> RESPONDENT

7<sup>TH</sup> RESPONDENT

8<sup>TH</sup> RESPONDENT

9<sup>TH</sup> RESPONDENT

10<sup>TH</sup> RESPONDENT

<b>MKHULU ELECTRO DISTRIBUTION PROJECTS (PTY) LTD</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>LSP CONSTRUCTION (PTY) LTD</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>CLM JOINT VENTURE</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>SCLC POLIHALI DIVERSION TUNNEL JOINT VENTURE</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>CONCOR-NTHANE BROTHERS M &amp; K BRIDGES JV</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>MATLA A METSI JV</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>METSI A SENQU-KHUBELU CONSULTANTS JV</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>AECOM SA (PTY) LTD</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>AURECON CONSOTIUM</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>CHINA'S SINOHYDRO BUREAU 8 CO. LTD</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>SINOHYDRO BUREAU 14 CO, LTD</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>UNIK CIVIL ENGINEERING (PTY) LTD</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>NTHANE BROTHERS (PTY) LTD</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>YELLOW RIVER COMPANY</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>SINOHYDRO BUREAU 3 CO. LTD</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>UNIK CIVIL ENGINEERING</b>	<b>26<sup>TH</sup> RESPONDENT</b>
<b>WEBUILD S.P.A</b>	<b>27<sup>TH</sup> RESPONDENT</b>
<b>RAUBEX CONSTRUCTION (PTY) LTD</b>	<b>28<sup>TH</sup> RESPONDENT</b>
<b>ENZA CONSTRUCTION (PTY) LTD</b>	<b>29<sup>TH</sup> RESPONDENT</b>
<b>SIGMA CONSTRUCTION (PTY) LTD (LESOTHO)</b>	<b>30<sup>TH</sup> RESPONDENT</b>
<b>HILLARY CONSTRUCTION (PTY) LTD (SA),</b>	<b>31<sup>ST</sup> RESPONDENT</b>
<b>POLOKWANE SURFACING (PTY) LTD (SA)</b>	<b>32<sup>ND</sup> RESPONDENT</b>
<b>YA RENA CIVILS (PTY) LTD (SA)</b>	<b>33<sup>RD</sup> RESPONDENT</b>
<b>STRUCTURETONE CONSTRUCTION (PTY) LTD (LESOTHO)</b>	<b>34<sup>TH</sup> RESPONDENT</b>
<b>RUMDEL CONSTRUCTION (CAPE) (PTY) LTD (SA),</b>	<b>35<sup>TH</sup> RESPONDENT</b>
<b>A &amp; C HOLDINGS (PTY) LTD (LESOTHO)</b>	<b>36<sup>TH</sup> RESPONDENT</b>
<b>SINOHYDRO SA (PTY) LTD</b>	<b>37<sup>TH</sup> RESPONDENT</b>
<b>NTHANE BROTHERS (PTY) LTD</b>	<b>38<sup>TH</sup> RESPONDENT</b>
<b>PLANTECH CONSULTING ENGINEERS CC</b>	<b>39<sup>TH</sup> RESPONDENT</b>
<b>SM CONSULTING ENGINEERS (PTY) LTD</b>	<b>40<sup>TH</sup> RESPONDENT</b>
<b>LSP CONSTRUCTION (PTY) LTD</b>	<b>41<sup>ST</sup> RESPONDENT</b>
<b>MOFOMO CONSTRUCTION</b>	<b>42<sup>ND</sup> RESPONDENT</b>

ECONET TELECOMS LESOTHO (PTY) LTD	43 <sup>RD</sup> RESPONDENT
COMPUTER BUSINESS SOLUTIONS (PTY) LTD	44 <sup>TH</sup> RESPONDENT
CONSOLIDATEDPOWER PROJECTS (PTY) LTD	45 <sup>TH</sup> RESPONDENT
LSP CONSTRUCTION (PTY) LTD	46 <sup>TH</sup> RESPONDENT
MOFOMO CONSTRUCTION CC	47 <sup>TH</sup> RESPONDENT
SALINI IMPRELIGO S.P.A	48 <sup>TH</sup> RESPONDENT
COOPERATIVA MURTORI CEMENTISTI CMS DI RAVENNA	49 <sup>TH</sup> RESPONDENT
LSP CONSTRUCTION (PTY) LTD	50 <sup>TH</sup> RESPONDENT
CMI INFRASTRUCTURE (PTY) LTD	51 <sup>ST</sup> RESPONDENT
NTHANE BROTHERS	52 <sup>ND</sup> RESPONDENT
CONCOR CONSTRUCTION (PTY) LTD	53 <sup>RD</sup> RESPONDENT
GIBB (PTY) LTD	54 <sup>TH</sup> RESPONDENT
MOTT MACDONALD AFRICA (PTY) LTD	55 <sup>TH</sup> RESPONDENT
TRACTEBEL ENGINEERING/COYNE ET BELLIER	56 <sup>TH</sup> RESPONDENT
LYMA CONSULTING ENGINEERS	57 <sup>TH</sup> RESPONDENT
FM ASSOCIATES (PTY) LTD	58 <sup>TH</sup> RESPONDENT
AURECON SOUTH AFRICA (PTY) LTD	59 <sup>TH</sup> RESPONDENT
HATCH GOBA (PTY) LTD	60 <sup>TH</sup> RESPONDENT
KNIGHT PIESOLD (PTY) LTD	61 <sup>ST</sup> RESPONDENT
SMEC SOUTH AFRICA (PTY) LTD	62 <sup>ND</sup> RESPONDENT
AURECON LESOTHO (PTY) LTD	63 <sup>RD</sup> RESPONDENT
AURECON SOUTH AFRICA (PTY) LTD	64 <sup>TH</sup> RESPONDENT
COMMISSIONER OF COOPERATIVES	65 <sup>TH</sup> RESPONDENT
COMMISSIONER OF POLICE	66 <sup>TH</sup> RESPONDENT
ATTORNEY GENERAL	67 <sup>TH</sup> RESPONDENT

**Neutral Citation:** Mokhotlong Business Forum v Lesotho Highlands Development Authority and 66 Others Civ 160 [2026] (18<sup>th</sup> May 2026)

**CORAM** : MOKHESI J, BANYANE J AND MOKHORO JJ  
**HEARD** : 18 FEBRUARY 2026  
**DELIVERED** : 18 MAY 2026

## Summary

Human Rights-enforcement of- exercise of powers conferred by section 22 of the Constitution 1993- If there are adequate means of redress for the alleged contravention of a constitutional right, the High Court may decline to exercise its powers under this section- The applicants have alternative and adequate means of redress for the alleged Violation-Court declines to exercise its powers under section 22 of the Constitution.

### ANNOTATIONS

#### Legislation and Subordinate Legislation

1. The Lesotho Constitution 1993
2. Interpretation(Amendment) Act No. 4 of 1993
3. The Lesotho Highlands Development Authority Act No. 23 of 1986
4. The Human Rights Act No. 24 of 1983
5. The Land Act No. 17 of 1979
6. The Land Act No.8 of 2010
7. Lesotho Highlands Water Project Compensation Regulations, 1990
8. Lesotho Highlands Water Project Compensation Regulations, 2017

#### Caselaw

##### Lesotho

1. Moneuoa v Moneuoa LAC (2015-2016) 178
2. Khalapa v Commissioner of police and another LAC (2000-2004) 159
3. Rethabile Setlojoane v Commissioner of Police C of A(CIV) 69 of 2023
4. Molefi v Independent Electoral Commission LAC (2005-2006) 169
5. Ntsihlele v Independent Electoral Commission C of A (CIV) 57 of 2019
6. Democratic Congress and another v Independent Electoral Commission and others CC 10/2022) [2022] LSHC 1 (8 August 2022)
7. Manako Lethakha v Lesotho Highlands Water Commission and 5 others (CC0006/2023) [2025] LSHC 231(10 February 2025)
8. 'Mei v Mr Justice Thamsanqa Nomngcongong NO (CC 6/2018) [2021] LSHC 50 (21 October 2021)
9. Sole v Cullinan No and other LAC (2000 – 2004) 572
10. Director of Public Prosecutions v Ramoepana C of A (CIV) 49 of 2020[2021] LSCA 25(14 May 2021)

##### South Africa

1. Lipschitz v Wattrus NO 1980(1) SA 662
2. kaputnaza v Executive Committee of the Administration for the Heroes and others 1984(4) SA 288

##### Books

1. L Baxter: Administrative Law, (1<sup>st</sup> edn, 1984, Juta & Co)

## JUDGMENT

**BANYANE J**

### **Introduction**

[1] On 24 October 1986, the Government of Lesotho and the Government of South Africa concluded a treaty on the Lesotho Highlands Water Project (LHWP). The project is designed to effect the delivery of water by Lesotho to South Africa and to utilise such a delivery system to generate hydro-electric power in Lesotho. The LHWP was to be implemented in various phases.

[2] The treaty provides for the establishment of the **Lesotho Highlands Development Authority (LHDA)** as an autonomous statutory body under the Laws of Lesotho.<sup>1</sup> The Government of Lesotho established the LHDA under section 4 of the LHDA Act 23 of 1986.<sup>2</sup> In terms of section 20 of the Act, the LHDA is entrusted with the responsibility for the implementation, operation, and maintenance of LHWP.

[3] **Section 39(1)** of the Act authorises the LHDA to take possession or acquire any land, or interest therein, for purposes of carrying out the project. It reads as follows;

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<sup>1</sup> Article 6(4) of the Treaty

<sup>2</sup> See section 2 of the Interpretation(amendment) Act No 4 of 1993. This section provides that Act means any Act of the Parliament of Lesotho and any Proclamation, Law, Act or Order continued to be in force by virtue of section 156(1) of the Constitution of Lesotho.

39(1) Notwithstanding anything to the contrary in any other enactment, the LHDA may, at any time after the making of an approval order and before the conveyance or ascertainment of the price or compensation;

- a) enter on and take possession of any land, or exercise any right which the LHDA is authorised by this Act to acquire for the purpose of carrying out the approved scheme to which the approval Act relates
- b) terminate, restrict or otherwise interfere with any servitude or other property or right which the LHDA is authorised by this Act to terminate, restrict or otherwise interfere with for the purpose of carrying out the approved scheme.
- c) Divert, close, remove, submerge or otherwise interfere with any road, way or bridge or any canal or other artificial waterway, or any artificial watercourse which the Authority is authorised by this Order to divert, close, remove, submerge or otherwise interfere with for the purpose of carrying out the approved scheme.

[4] In the exercise of its powers under subsection (1), the LHDA is liable to pay compensation to the occupier of land or the owner of the servitude, right or other property entered upon, exercised or interfered with from the date of such entry, exercise or interference. Interest on the compensation amount is payable to such owner or occupier at the commercial lending rates of Lesotho Bank from the date of entry or interference until payment of such compensation or price<sup>3</sup>.

[5] Part IX of the Act deals with compensation. Section 44 under this part 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.

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<sup>3</sup> In terms of section 39(2)

2(a) The Authority shall ensure that, as far as reasonably possible, the standard of living and the income of persons displaced by the construction of the 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.

[5.1] Section 45 provides that;

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 Act shall be made within one year after such land, servitude, right or property is first entered on, exercised or interfered with by the Authority under this Act.

[5.2] Section 46 provides that;

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

[6] Pursuant to Section 59 of the LHDA Act of 1986, the Minister responsible for Lesotho Highlands Water and Energy Affairs made Lesotho Highlands Water Project (LHWP) Compensation Regulations, 1990<sup>4</sup>.

[7] These Regulations outline the formula or criteria to be applied for assessment or computation of compensation due to individuals or communities whose property (ranging from fields, residential sites, gardens, houses,

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<sup>4</sup> published in Legal Notice No. 50 of 1990

commercial buildings, trees and graves, etc.) was adversely affected by the infrastructural activities of the LHWP.

[8] Pursuant to section 35(2) of the LHDA Act, 1986, the Minister responsible issued the approval Act of the LHWP Phase 1A Scheme through Legal Notice No. 14 of 1990. In 2015, the minister approved the proposed Phase II scheme.<sup>5</sup>

[9] In 2017, the Minister issued the Lesotho Highlands Water Project Compensation Regulations, 2017.<sup>6</sup> They repealed the 1990 Regulations. They prescribe the compensation rates for phase II of the LHWP according to the type of land acquired by the Authority (arable land, gardens, trees and thickets, communal assets, houses, and commercial buildings, etc.).

## Relief

[10] The applicants have approached this Court through the machinery of section 22 of the Constitution, alleging that the 1<sup>st</sup> respondent failed to comply with its statutory obligations to pay them compensation. They are seeking the following reliefs;

1. Declaring the execution of **PHASE 1A, PHASE 1B and PHASE II** of the Lesotho Highlands Water Project by the 1<sup>st</sup> respondent and its agents as unconstitutional and in violation of section 9 (1) and (2) of the Human Rights Act 1983, read with section 56

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<sup>5</sup> Legal notice 64 of 2015

<sup>6</sup> Legal notice 9 of 2017

of the Land Act 1979, section 17 of the constitution 1993, sections 44(1) and 39(2) of the LHDA Order 1986, sections 56, 57 and 58 of the Land Act 2010, in so far as they have failed to pay applicants and their members **prompt and full compensation**, together with **interest** at commercial lending rate of Lesotho Bank from the date of entry, exercise or interference until payment of such price and compensation, after **compulsorily acquiring and extinguishing property rights** and interests of applicants and their members.

2. Declaring the execution of **PHASE 1A, PHASE 1B and PHASE II** of the Lesotho Highlands Water Project by the 1<sup>st</sup> respondent and its agents as unconstitutional and in violation of section 9 (1) and (2) of the Human Rights Act 1983, read with section 56 of the Land Act 1979, section 17 of the Constitution 1993, sections 44(1) and (39)(2) of the LHDA Order 1986, sections 56,57, and 58 of the Land Act 2010 read with section 29 of the Constitution and sections 44(2) of the LHDA Order 1986 in so far as they have failed to pay **applicants' development fund and thus denying applicants and their members opportunity to gain their living and livelihood**, contrary to the said Constitutional provisions.

**An Order of Mandamus as follows:**

3.1 Ordering the 1<sup>st</sup> respondent and its agents to pay applicants and their members **compensation and development fund**, styled "*community infrastructure development fund*", with interest at commercial lending rate of Lesotho Bank from the date of entry, exercise or interference until payment of such price and compensation, which is due to applicants in terms of sections 17 and 29 of the Constitution read with sections 44(1), 44(2) and 39(2) of the LHDA Order 1986 and sections 56 and 58 of the Land Act 2010, accordingly.

3.2 Ordering 1<sup>st</sup> respondent to pay **compensation and development fund** to the 6th, 7th, 8th, 9th, and 10th applicants as promised in their letter dated 28<sup>th</sup> January 2019 per **CONS8** in terms of sections 17 and 29 of the Constitution, read with sections 41(1), 44(2), and 39(2) of the LHDA Order as aforesaid.

3.3 Ordering the 1<sup>st</sup> respondent and its agents to pay applicants and their members monies summarized in **CONS10**, being **contract percentages** in terms of **clause 3.4.2** of the conditions of contracts spelled out in **CONS9**, as well as granting such **benefits**,

so specified in CONS10 as aforesaid which are percentages of the contract prices of all of 1<sup>st</sup> respondent's contractors on phase II of the Lesotho Highlands Water Project, thereby giving **applicants and their members rights and opportunity to gain their living and livelihood** in terms of sections 17 and 29 of the Constitution read with sections 44(1), 44(2) and 39(2) of the LHDA Order 1986.

4. Declaring the arrest, detention, torture, and prosecution of the applicants and their members by the 66<sup>th</sup> respondent and his officers working together with the 1<sup>st</sup> respondent and its agents in **CRI/T/TT/109/2022 and CRI/T/MKG/20/2025** as unconstitutional under the circumstances.

5. Costs of suit.

6. Further and/or alternative relief

### **The preliminary objections**

[11] The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 27<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 48<sup>th</sup>, 66<sup>th</sup>, and 67<sup>th</sup> respondents opposed the application. In their respective answering affidavits, they raised several *in limine* objections, namely, lack of jurisdiction or delayed jurisdiction, *locus standi* of the 1<sup>st</sup> and 2<sup>nd</sup> applicants, non-joinder of the Government of South Africa and other interested parties, and misjoinder of some of the respondents.

[11.1] The first objection relates to the jurisdiction of this Court. The respondents assert that the court should invoke the principle of constitutional avoidance because the applicants have adequate remedies available under the LHDA Order, 1986, the LHDA compensation policy, and the compensation Regulations.

[11.2] The second preliminary objection of *locus standi* of the 1<sup>st</sup> and 2<sup>nd</sup> applicants to institute the claim is based on the ground that a trust can only be sued through its trustees.

[11.3] The third is misjoinder of the 4<sup>th</sup>, 5<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 14<sup>th</sup>, 27<sup>th</sup>, and 48<sup>th</sup> respondents. They assert that the applicants' claims, if proven, lie against the 1<sup>st</sup> respondent.

[11.4] The fourth is non-joinder of the Government of the Republic of South Africa since the LHDA was a result of a bilateral treaty between two states. The respondents deposed that other LHDA contractors having a direct and substantial interest in the matter, the Lesotho Highlands Commission, and the Trustees of the 1<sup>st</sup> and 2<sup>nd</sup> applicants also ought to have been joined.

[12] The Court directed that these points be argued separately from the merits, and only in the event of their dismissal, the merits will be considered.

### **Submissions on the jurisdictional issue**

[13] The proper approach is to address the jurisdictional issue first since it is dispositive of the matter.<sup>7</sup> The essence of the respondents' submissions under this objection is as follows.

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<sup>7</sup> See *Director of Public Prosecutions v Ramoepana* C of A (CIV) 49 of 2020[2021] LSCA 25(14 May 2021) Para 42,43

[13.1] Mr. Rasekoai for the 1<sup>st</sup> respondent commenced his submissions by characterizing the applicants' claims. In his view, the applicants' claims are premised on alleged breaches in the implementation of the bilateral treaty giving birth to **PHASES 1A, 1B, and II** of the following statutes: **Constitution of Lesotho 1993 (As amended)**, **Human Rights Act No. 24 of 1983**, **Land Act No. 17 of 1979 (As amended)**, **LHDA Act No. 23 OF 1986 (As amended)**, and the **Land Act No. 8 of 2010 (As amended)**.

[13.2] He argued that the applicants' case is defective because, firstly, the two main reliefs place reliance on two repealed laws without any indication as to which law and persons are affected and by which project specifically. The impugned **PHASE II** came long after the repeal of the statutes mentioned. Secondly, the first two projects, **PHASES 1A and 1B**, have since been concluded, and the applicants have not been able to draw a causal link between those projects and how their land rights flow from them.

[13.3] He further argued that the applicants' founding affidavit lacks specificity and materiality. They lumped up reliefs without the supporting jurisdictional facts, which inform a compensation claim by the two categories of applicants before Court. It is difficult to discern which of the cited applicants are affected by any of the impugned two phases of the LHDA project because each of them was in a different geographical area, implicating different persons and communities.

[13.4] Mr. Rasekoai further argued that there is no attack against the constitutional validity of the LHDA Act of 1986, the LHWP compensation policies, and the Lesotho Highlands Water Project compensation Regulations of 1990, which were succeeded by the 2017 LHWP Compensation Regulations published under Legal Notice No. 9 of 2017.

[13.5] Based on this understanding of the applicants' claim, Mr. Rasekoai argued that this is not a constitutional petition. Alternatively, the principle of constitutional avoidance must be invoked because there are processes and remedies available in the subordinate legislation that operationalize section 44 of the LHDA Act.

[14] Advocate Cronje for the 4<sup>th</sup>, 5<sup>th</sup>, 14<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 36<sup>th</sup> and 48<sup>th</sup> respondents similarly argued that the applicants' claims are primarily based on compensation provisions of the LHDA Act of 1986, and the LHDA policies. In his view, the processes in the High Court, especially the commercial Division, provide ample avenues for enforcing rights or claims derived from this legislation and policies.

[15] He further argued that a party seeking relief in any forum must set out the facts necessary to establish that the forum has the power to give effect to the relief sought. The applicants have not presented facts that invoke the jurisdiction of this Court. The First and Second applicants are not natural persons, do not possess human rights, and any reliance on an infringement of such rights is untenable.

[15.1] In addition, the pleadings do not disclose a protected right allegedly infringed by the implementation of the project. The applicants' reliance on section 17 of the Constitution is misplaced. The section deals with protection against the arbitrary seizure of property. The reliance on section 29 is equally misplaced. The section deals with opportunities to work, which the applicants do not rely on.

[15.2] They further argued that the relief in prayer four (4) does not establish this Court's jurisdiction. In addition, the issues raised by the applicant in respect of the civil litigation filed by aggrieved individuals are either subject to ongoing litigation or have already been resolved. In the circumstances, the applicants have standard criminal and civil remedies available.

[15.3] The applicants do not seek the Court to determine and declare that any of the relevant legal instruments are unconstitutional, so this is not a rule of law review. They further argued that the applicants' claims are primarily based on the compensation provisions of the Lesotho Highlands Development Authority Act 1986 (the Act) and its policies.

## Enforcement of fundamental rights

[16] Section 22 of the Constitution sets out the procedure for enforcing the fundamental rights guaranteed in sections 4 to 21.<sup>8</sup> It endows the High Court with jurisdiction to adjudicate any application in which it is contended that any of the provisions of Sections 4 to 21 have been, are being, or are likely to be contravened.<sup>9</sup> It reads as follows;

22. (1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such Orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 4 to 21 (inclusive) of this Constitution:

Provided that High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

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<sup>8</sup> Ntsihlele v Director of Elections C of A (CIV) 57 of 2019, para 10

<sup>9</sup> Molefi v Independent Electoral Commission C of A(CIV) 11/05 para 4

[17] The exercise of powers conferred under this provision has been discussed in several decisions of this Court and the Court of Appeal. These authorities are to the effect that the proviso in section 22(2) accords the High Court the power to decline to hear a claim filed under these provisions where it is satisfied that adequate means of redress for the contravention alleged are available. In **Sole v Cullinan NO and Others**<sup>10</sup>, Gauntlett JA said;

The Constitution of Lesotho specifically authorises the use of the particular constitutional remedy for which s 22 provides. Notwithstanding this, the proviso in section 22(2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if it is satisfied that 'adequate means of redress for the contravention alleged are available.'

[18] The respondents argued that the applicants' constitutional complaints are remediable in the High Court exercising its ordinary jurisdiction. It is therefore necessary to consider whether the applicants have adequate means of redress for the alleged violation of their rights.

### **The pleadings**

[19] I now examine the applicants' founding papers in order to determine the legal basis of their claim and the availability of redress contemplated in section 22(2) proviso.

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<sup>10</sup> LAC (2000-2004) 572. See also 'Mei v Mr Justice Thamsanqa Nomngongo NO, CC 6/2018) [2021] LSHC 50 (21 October 2021)

[20] The essence of the applicants' case is that the execution of **PHASE 1A, PHASE 1B and PHASE II** of the Lesotho Highlands Water Project by the 1<sup>st</sup> respondent and its agents is unconstitutional and in violation of section 9 (1) and (2) of the Human Rights Act 1983, read with section 56 of the Land Act 1979, section 17 of the constitution 1993, sections 44(1) and 39(2) of the LHDA Act 1986, sections 56, 57 and 58 of the Land Act 2010, because the 1<sup>st</sup> respondent failed to promptly and fully pay them compensation with the prescribed interest.

[21] Their complaints may be summed up as follows;

- i) The 1<sup>st</sup> Respondent has failed/refused and neglected to pay the applicants and their members prompt and full compensation for the compulsory acquisition of their landed property as required by section 17 of the Constitution 1993.
- ii) The refusal to pay is also violative of section 29 of the Constitution because it denies them their right to gain a living and livelihood.
- iii) The 1<sup>st</sup> respondent's failure to compensate the applicants upon expropriation of their property for PHASE 1 of the project is violative of section 9(1) of the Human Rights Act No. 24 of 1983 and the Land Act, 1979.
- iv) The 1<sup>st</sup> respondent acted contrary to its obligation under 44(2) of the LHDA Act, 1986, to ensure that the standard of living and income of persons affected by the project works should not be lower than the

standard of living and the income prevailing before they were affected by the 1<sup>st</sup> respondent's project works. As a result of the 1<sup>st</sup> respondent's failure to pay the applicants' compensation under section 44(1) and 44(2) of the LHDA Act, the applicants' livelihood and income are worse off than they were before acquisition of their property and their relocation because they no longer have grazing land, money to buy fuel, or medicinal plants, etc.

- v) The 1<sup>st</sup> respondent is unlawfully withholding payments of compensation for communal land and, in some cases, indiscriminately making compensation payments. It withheld payment in favour of the applicants while other persons who were also affected by the project works and relocated to Maseru, like these applicants, have been paid communal compensation.
- vi) Although their properties were compulsorily acquired around 1986 and 1987, the compensation rates were only approved and applied from 1997. These rates were not market-based as required by section 56 of the Land Act 1979. They were therefore unlawful.
- vii) The LHWP Compensation Policy 1997 and LHWP Compensation Rates 1997 are also ultra vires section 44 (1) of the LHDA Act 1986, insofar as they force the applicants to enter into development projects with communal compensation money paid, while the development is

supposed to be carried out under section 44 (2) of the LHDA Act for the improvement of their livelihood.

- viii) The execution of phase II of the project was unlawful because it was made before the publication of the Approved Scheme of 2017 and before any publication of the Compensation Regulations.
- ix) The 1<sup>st</sup> respondent's refusal to pay the applicants also violates the LHWP Phase II Compensation Policy, 2016.
- x) The applicants and their members were not compensated in terms of the Land Act 2010, which requires that three valuers be engaged when computing the compensation payable.
- xi) The 1<sup>st</sup> respondent has not only failed to pay the individual and communal compensation promptly and fully, but it has also failed to pay businesses that were displaced by the project.
- xii) The 1<sup>st</sup> respondent has failed to pay the applicants and their members, in particular, the 4<sup>th</sup> Applicant, Lebohang **Lengoasa**, and the 5<sup>th</sup> Applicant's husband, **Tekane Tekane**, the lawful full compensation for their arable land. In addition, the rates used to pay them under Phases 1 and 2 of the Project are contrary to the Constitution, the Land Act 1979, and sections 56 and 58 of the Land Act 2010, respectively.
- xiii) Moreover, instead of compensating the applicants promptly and fully in accordance with provisions of the Constitution, the 1<sup>st</sup> respondent has forced the applicants to join Cooperatives in violation of section 16 of

the Constitution and the Cooperatives Societies Act, 2000, under which the 1<sup>st</sup> and 2<sup>nd</sup> applicants have been registered.

xiv) The 1<sup>st</sup> respondent bundled their villages together and forced them to use the compensation monies for payment of costs for the installation of electricity and water. The full details are to be found in the application in **CIV/APN/0123/24 Mothapo oa Loti v LHDA**.

xv) The 1<sup>st</sup> respondent refused to compensate some of the applicants for their individual trees. Those affected had to file an application under **CIV/APN/123/24**. The 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> applicants in **CIV/APN/0123/24** have been struggling for years to get compensation for their individual trees, as elaborated in that application. Their claims were rejected on the grounds of inordinate delay.

[22] A closer examination of these complaints shows that the applicants' dissatisfaction stems from non-payment, under-payment, and delayed payment of compensation. Failure to pay them in accordance with the requirements outlined in the relevant laws, the 1<sup>st</sup> respondent violated their constitutional right to property, so they allege.

[23] As stated in the prelude of the judgement, section 44(1) and 44(2) of the LHDA Act 1986 provide that 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.

Section 44 (2) of the Act obligates the Authority to 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.

[24] Section 9(1) of the Human Rights Act, 1983 provides that;

(1) The right to property, either alone or in association, shall be guaranteed.

(2) The right to property shall be encroached upon only in the interest of public need or in the general interest of the community in accordance with the provisions of appropriate laws.

[25] Section 17 of the Constitution, 1993 provides that;

(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 interest of defence, public safety, public order, public morality, public health, town and country planning or development or utilisation of any property in such manner as to promote the public benefit; and

(b)...

(c) provision is made by any law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

[26] Section 56 (1) of the Land Act, 1979, deals with claims for compensation.

It reads;

“Any person who claims to have an interest which, by reason of section 54 (3), ceases to subsist may, within three months from the date of publication of the declaration notice, **claim compensation** from the Minister.

[27] The Land Act 2010 repealed the Land Act 1979. Section 56 of the Land Act 2010 provides that in all cases in which the implementation of this order results in compulsory acquisition of property, the person deprived of such property shall be entitled to compensation at market value.

[27.1] Section 57 of the Land Act 2010 provides that the obligation to compensate shall lie with the body conducting the expropriation.

[27.2] Section 58 of the Land Act 2010 deals with the periods for lodging of compensation claims and the criteria for assessment of compensation.

[28] Implicit in the quoted provisions is that a person whose rights and interests in land were affected by the project works is entitled to compensation. In terms of section 39 (2) read with section 44 of the LHDA Act, the LHDA is liable to pay this compensation to the occupier of the land or owner of the right or

interest.<sup>11</sup> The rates for assessment of compensation for the Phases of the project are set out in the Compensation Regulations, 1990, and 2017, respectively.

[29] Since their complaint is solely about non-payment, delayed payment, and underpayment of compensation, the question is whether the dispute can be resolved and determined on non-constitutional grounds.

[30] The answer lies in two principles of constitutional litigation. The first is the principle of subsidiarity. It means that where Parliament has enacted a law to give effect to a right, a litigant should enforce the right through that law if he does not challenge its constitutionality. The second is the principle of constitutional avoidance, which dictates that a court should not determine a constitutional question if it is possible to determine the dispute on another basis.<sup>12</sup> For instance, if it can be resolved and determined by reference to the common law, the statutes, or the customary law.<sup>13</sup> So, where it is possible to decide any case without reaching a constitutional issue, that course must be followed.<sup>14</sup>

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<sup>11</sup> *Moneuoa v Moneuoa* LAC (2015-2016) 178 at 183.

<sup>12</sup> *Democratic Congress and another v Independent Electoral Commission and others* CONST 10 OF 2022 [2022] LSHC 1 (8 August 2022) para 11 and 12

<sup>13</sup> *Manako Lethakha v Lesotho Highlands Water Commission and 5 others* (CC0006/2023) [2025] LSHC 231 (10 February 2025) para 36

<sup>14</sup> *Khalapa v Commissioner of police and another* LAC (2000-2004) 159. See also *Manako Lethakha v Lesotho Highlands Water Commission and 5 others* (CC0006/2023) [2025] LSHC 231 (10 February 2025) para 36

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[31] In the instant case, the applicants' claim can also be resolved by reference to the common law and the quoted pieces of legislation. As stated earlier, the applicants' case is premised on the 1<sup>st</sup> respondent's alleged non-compliance with its statutory obligations to pay compensation to persons dispossessed of their land rights and interests.

[32] Under prayer 3, the applicants seek an order compelling the LHDA to pay the compensation in accordance with the criteria set out in the relevant legislation. This is an order of mandamus. Mandamus is a mandatory interdict against a public authority that requires an authority to comply with a statutory duty imposed on it or perform some act that remedies a state of affairs brought about as a result of its unlawful administrative action.<sup>15</sup>

[33] We are alive to the decision of the Court of Appeal to the effect that the principle of subsidiarity should not be applied in a way that undermines the protection of fundamental rights.<sup>16</sup> However, on the facts of this matter, we conclude that the applicants can adequately pursue their claims for non-payment, under-payment, and delayed payment in the High Court exercising its ordinary

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<sup>15</sup> Baxter: Administrative Law (1<sup>st</sup> edn, 1984), p 687

<sup>16</sup> Rethabile Setlojoane v Commissioner of Police C of A(CIV) 69 of 2023.

jurisdiction. Since mandamus is a mandatory interdict, all the requirements of an interdict must be established in those proceedings.<sup>17</sup>

[34] Concerning the relief (prayer 4) relating to the criminal charges pending before the Mokhotlong and Thaba-Tseka Magistrate's Court, their complaints can properly be addressed by the Courts before which they are charged. If any constitutional issues arise in those proceedings, those courts will then exercise the powers conferred by section 22(3) and 128 of the Constitution, if so persuaded. We therefore accept the respondents' argument that criminal remedies are available to the applicants.

### **Disposal**

[35] For reasons stated in this judgment, we conclude that if the LHDA is implementing the project contrary to the compensation policies and relevant legislation, the matter need not be decided on a constitutional basis but by reference to the common law and the relevant statutes under which the project is implemented. So, the alleged constitutional violations or complaints can be vindicated in the High Court exercising its ordinary jurisdiction. The applicants, therefore, have adequate means of redress in the High Court and the Magistrates' Court for the alleged violation of their human rights. Accordingly, the Court

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<sup>17</sup> *Lipschitz v Wattrus* NO 1980(1) SA 662, *kaputnaza v Executive. Committee of the Administration for the Heroes and others* 1984(4) SA 288 at 317

upholds the respondents' objection and declines to exercise its jurisdiction under Section 22(2)(a) of the Constitution.

### Order

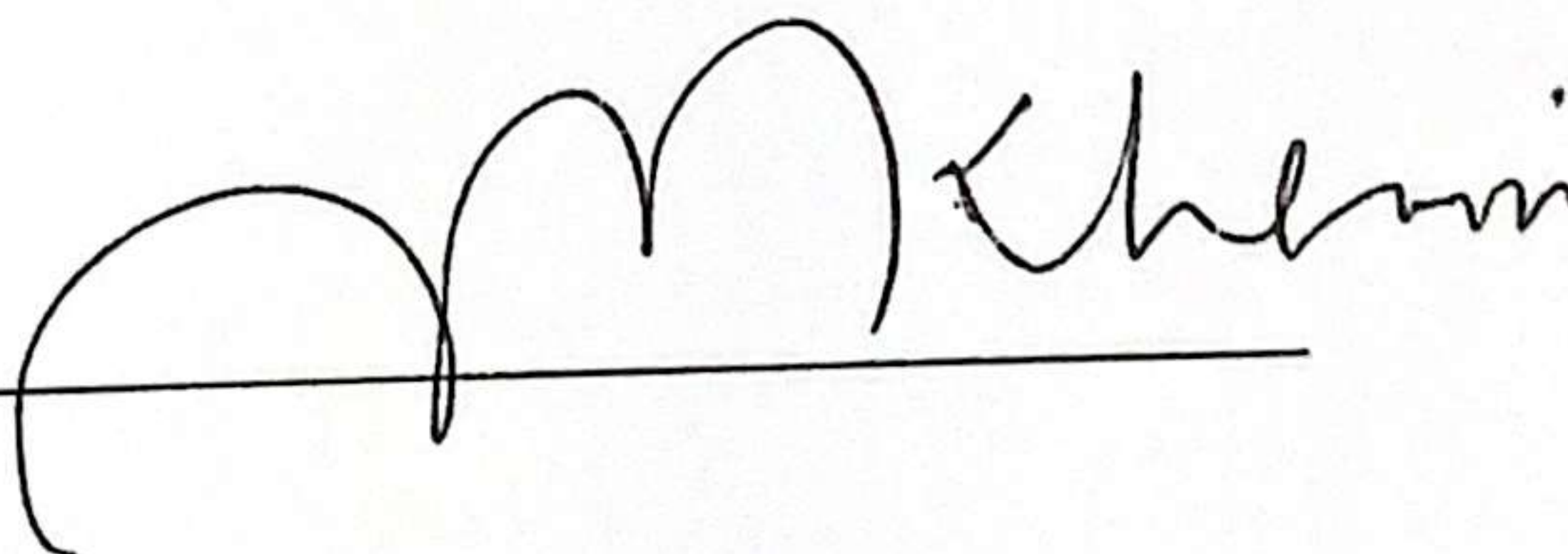
[36] In the result, this Court upholds the preliminary objection and declines to exercise its jurisdiction/powers under Section 22(2)(a) of the Constitution.

There is no order of costs.




**BANYANE J**

I AGREE



**MOKHESI J**

I AGREE



**MOKHORRO J**

For applicants	:	Advocate H. Sekonyela
For 1 <sup>st</sup> respondent	:	Mr. Rasekoai
For 5 <sup>th</sup> , 31 <sup>st</sup> , 32 <sup>nd</sup> , 33 <sup>rd</sup> respondents	:	Advocate Cronje
For 16 <sup>th</sup> respondent	:	Advocate Roux
For 66 & 67 <sup>th</sup> respondents	:	Advocate Khoboko