

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CC/CC/0006/2023

In the matter between

‘MANAKO LETHAKHA

1ST APPLICANT

‘MAMAMELLO MOTHOKOA

2ND APPLICANT

‘MATLOTLISO LENGOASA

3RD APPLICANT

AND

LESOTHO HIGHLANDS WATER COMMISSION (LHWC) 1ST RESPONDENT

LESOTHO HIGHLANDS DEVELOPMENT

2ND RESPONDENT

AUTHORITY (LHDA)

THE CHIEF EXECUTIVE –

LESOTHO HIGHLANDS DEVELOPMENT

3RD RESPONDENT

AUTHORITY

THE DIVISIONAL MANAGER PHASE II -LHWP

4TH RESPONDENT

MINISTRY OF NATURAL RESOURCES

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: ‘Manako Lethakha and 2 others v Lesotho Highlands Water Commission and 5 others [2025] LSHC 231 Const (10TH FEBRUARY, 2025).

CORAM : **S P. SAKOANE CJ, HLAELE J, RALEBESE J.**
HEARD : **23RD AND 24TH SEPTEMBER 2024**
DELIVERED : **10TH FEBRUARY 2025**

SUMMARY:

The Applicants herein claim that the policy of the Respondents is gender bias and therefore contrary to the provisions of the constitution in that it appoints the head of a household as male person. Contrary to the assertion of the applicants, the policy is gender neutral as a result of which, the claim of the Applicants lies not in the Constitution.

ANNOTATIONS:

CITED CASES:

LESOTHO

Democratic Congress v Independent Electoral Commission (Cons. No. 10/2022) [2022] LSHC 101 (8 August 2022).

Khalapa v Commissioner of Police and Another. page number 4 2000-2004 LAC.

Lesotho Medical Association and another v Minister of Health and others (Constitutional Case 19 of 2019) [2020] LSHC 14 (24 June 2020).

Matsoso Ntšihlele and Others v Independent Electoral Commission and Others CC No 01/ 2010.

Nts'ihlele v Independent Electoral Commission (C of A (CIV) 15 of 2019) LSCA 53 (1 November 2019).

Ralekoala v Minister of Human Rights, Justice and Constitutional Affairs and Others (Constitutional Case 3 of 11) [2012] LSHC 8 (30 March 2012).

Sekoati and Others v President of the Court Martial and Others LAC (1995-1999) 812.

Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others (Constitutional Case 5 of 2010) [2013] LSHC 9 (3 May 2013).

Sole v Cullinan NO and Others LAC (2000-2004) 572.

Tau Makhalemele v Board of Enquiry of the National Security Services C of A (CIV) 38/2022.

Theko v Attorney General and Another (CIV/APN 96 of 92) [1994] LSCA 32 (22 February 1994).

SOUTH AFRICA

Prinsloo v Van Der Linde 1997(3) SA 1012

S v Mhlungu 1995 (3) SA 867 (CC)

Zantsi v Council of State, Ciskei & Others 1995 (4) SA 615 (CC)

OTHER JURISDICTIONS

Ashwander v Tennessee 297 US 288

Attorney General for Trinidad and Tobago v Ramanoop (Trinidad and Tobago) [2005] UKPC 15

COD and Another v Nairobi City Water & Sewerage Company (Petition 419 of 2015 (2015) eKLR

Harrikissoon v A-G [1979] 3 WLR 62

STATUES

Constitution of Lesotho 1993

Land Act No.8 of 2010 Land Regulations Legal Notice No.21 of 2011

Legal Capacity of Married Persons Act No.9 of 2006

BOOKS AND ARTICLES

Kago K.Y. Boiki ‘*The Easy Way Out? Constitutional Avoidance And Its Impact On Human Rights Enforcement In Botswana*’ (2019) 13 Pretoria Student Law Review at page 56.

Owade E. ‘*Analyzing the Concept or Doctrine of (Constitutional) Avoidance in Kenyan labor law*’ [2022] University of Nairobi.

Sinclare.J. D. *The Law of marriage. Volume 1.* 1996. Juta and Co Ltd.

page 440.

JUDGMENT

HLAELE J:

[1] INTRODUCTION

The applicants are before court seeking redress for what they term the protection of their property rights in terms of the Constitution.¹ To this extend, they seek the court to order compensation for this perceived violation. The depth of their contestation is better assessed from their prayers as appears in the Notice of motion. The same reads as shown below.

PRAYERS SOUGHT

1. That the decision of the LHWP and LHDA to compensate only the Applicants' husbands in respect of property jointly held by the Applicants and their husbands, be and is hereby reviewed and set aside as irregular and unconstitutional.
2. Declaring the application or implementation of the Lesotho Highlands Water Project Phase 11 Compensation Policy 2016, particularly during the compensation stage disbursement processes, unconstitutional to the extent that it violates the provisions of Section 17(1) (C) of the Constitution of Lesotho 1993 which makes a constitutional condition of "*full and prompt payment of compensation.*"

¹ Paragraph 3.2 of the founding affidavit. P 13 of the record.

3. Declaring the LHWP and LHDA's conduct of compensating Applicants' husbands alone in relation to the property jointly held, as tantamount to arbitrary and compulsory entry, seizure, and taking possession of and/ or acquisition of Applicants' property constitutionally protected under Section 17(1) of the Constitution of Lesotho 1993 and thus unconstitutional, and null and *void ab initio* for being in violation of Section 4(1) (m) read with Section 17(1) of the constitution of Lesotho 1993.
4. Declaring the 2nd and 3rd respondents' conduct of compensating Applicants' husbands alone, in relation to property jointly held, unconstitutional to the extent that it is discriminatory and exacerbates gender inequality and women economic marginalization, in stark violation of sections 18(1), (2), (3) and 19 read with section 28(1) of the Constitution of Lesotho 1993.
5. Directing the Respondents to compensate Applicants for the loss of their affected constitutionally protected property recognized and protected by section 17(1) of the Constitution, which has arbitrarily and compulsorily entered into, seized, taken possession of or acquired, within a period of three months from the date of judgment of the Honourable Court.
6. Declaring the Lesotho Highlands Water Project Phase 11 Compensation Policy 2016, unconstitutional for using permissive and/or vague language under **Article 3.5.2** and **3.6** dubbed "Eligibility for Compensation" and compensation agreements and disbursements, that allows women to be discriminated upon.
7. That the 2nd and 3rd Respondents be ordered to carry out a Gender Impact Assessment to ensure that the LHWP Compensation Policy 2016 adequately addresses issues of marginalized and vulnerable persons whose property rights are being affected by LHWP Phase 11 currently and in future.

Alternatively,

8. Declaring the application and / or implementation of the Lesotho Highlands Water Project Phase II Compensation Policy 2016, particularly during compensation disbursement processes, inconsistent with Section 10 (1) of the Land Act 2010 and Section 3 of the Legal Capacity of Married persons Act 2006, thus null and void to the extent of the inconsistency.

9. Declaring the 2nd and 3rd Respondent's conduct, implementation and/or application of the Lesotho Highlands Water Project Phase II Compensation Policy, of compensating Applicants' husbands alone, in terms of property jointly held, inconsistent with Section 3(7) and (8) of the Legal Capacity of Married Persons Act and Section 10 of the Land Act 2010, thus null and void to the extent of the inconsistency.
10. Directing the 2nd and 3rd Respondents to deliver to the Applicants counsel of Record and to the above-mentioned Honorable Court a progress report quarterly which report shall indicate the progress on the orders made until such time when the orders have been fully complied with.
11. That the Applicants be paid compensation with interest thereon *a tempore morae*.
12. That the Applicants be awarded costs of suit on attorney and client scale
13. That the applicants be granted further and alternative relief.

[2] JURISDICTION OF THE COURT TO ENTERTAIN THE MATTER

2.1 The Applicants averred that this court has jurisdiction to entertain the matter in as much as their claim arose within the sphere of Section 22(1) of the Constitution of Lesotho as a Bill of Rights based case. In turn, the Respondents argued that the court has no such jurisdiction in so far as in this matter there is an alternative and satisfactory remedy that the parties can exploit to salvage their cause, thus evoking the principles of constitutional avoidance.

2.2 The Respondents seem to have taken the stance enunciated by the court in the cases of *Sole v Cullinan NO*² and *Others* and also that of *Ntšihlele v Independent Electoral Commission*³ that:

² *Sole v Cullinan NO and Others* LAC (2000-2004) 572.

³ *Ntšihlele v Independent Electoral Commission* (C of A (CIV) 57 of 2019) [2019] LSCA 53 (1 November 2019)

“The Constitution of Lesotho...specifically authorizes the use of the particular constitutional remedy for which s 22 provides. Notwithstanding this, the proviso to s 22(2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if satisfied that “adequate means of redress for the contravention alleged “are available. In my view, they undoubtedly were so available in the present case...In these circumstances, and given the inherent undesirability involved in the duplication of proceedings, the incurrence of unnecessary costs (both for litigants and the State) and the use of scarce judicial resources, it is not at all clear why the court a quo in this matter did not at least consider the exercise of its power in terms of s 22(2). It is important that in any future invocation of s 22, the High Court should give careful consideration to its powers under that provision.”

2.3 Contrary to the submissions of the Respondents, this court assumes jurisdiction to entertain this matter because the Applicants have raised claims based on discrimination and arbitrary seizure of land protected by the Constitution.

[3] FACTUAL BCKGROUND

3.1 The Applicants case can be gleaned from the prayers sought, accompanied by the affidavits in support of such prayers. These were, of course, amplified during oral submissions. The Heads of argument filed of record were also instructive. Articulated from the affidavits, the Applicants contend:

- i. “That they are three women from Tloha-re-Buoe in the district of Mokhotlong. They share a commonality that they have faced similar hardships in relation to the Respondents’ project, some of which constitute the subject matter of this application. The first applicant is authorized to depose to the main affidavit on their behalf.⁴
- ii. The Respondents can collectively be identified as the commissions, authorities, and personnel who in terms of the 1986 Water treaty between the Republic of South Africa and Lesotho, serve as decision makers in relation to the implementation of the water project. To this end, there is no mis-joinder of parties.⁵ Perhaps it is prudent to note at this stage that the Court is of the view that there is non-joinder. An issue which will form the body of the judgement later on.
- iii. Jurisdiction. They found the jurisdiction of this court upon reliance on the Constitution in the following sections:⁶
 - a. Section 22(1)
 - b. Section 4(1)(m)
 - c. Section 17(1) (C)
 - d. Section 18(1), (2) and
 - e. Section 19 read with 26(2); all of the Constitution of the Kingdom of Lesotho
- iv. On subject matter jurisdiction, the Applicants rely on Section 17(2) and Section 22(1) of the Constitution.⁷

⁴ Paragraph 1 of the founding affidavit. (sub paragraphs 1.1-1.4) pages 10-11 of the record.

⁵ Paragraph 2 of the founding affidavit (sub paragraphs 2.3-2.8) page 12 of the record.

⁶ Paragraph 3.1(i) of the founding affidavit.

⁷ Paragraph 3.1 (ii) of the founding affidavit.

[4] **FACTUAL BASIS OF APPLICANT'S CLAIM**

The factual basis upon which their claim rests is expressed in a nut shell as follows:

4.1 The applicants are part of a community that is affected by Phase II of the Lesotho Highlands Projects (herein after referred to as the LHWP), which entails the construction of Polihali Dam and Reservoir in the valleys and tributary catchments of the Senqu and Khubelu Rivers in Mokhotlong. This issue is indeed common cause as the Respondents make out the same allegation in their answering affidavit.⁸ It is therefore not in issue.

4.2 The construction of the project necessitated the Respondents to acquire land from the communities within the project. As such, individual land communal range-lands and incidental resources were lost to the Respondents, in particular the second Respondent. This issue too forms common cause as it is confirmed by the Respondents in their Answering Affidavit. I find it prudent to hint at this stage that this issue talks to acquisition of land through expropriation a matter that falls within the prescripts of the *Land Act 2010*. It somewhat forms the basis of an argument that has been raised by the Applicants. A further discussion on this will follow in detail.

4.3 It is the contention of the Applicants that sometime in the years 2017 and 2018, the Respondents' agents convened public meetings, the agenda of which was specifically to discuss how the project would negatively affect them individually and collectively, but however, that they would be justly and adequately compensated to mitigate their loss. The Applicants' mention that their fears were allayed when the Respondents relayed their legal framework and policy in relation to their

⁸ Paragraphs 3.1 and 3.2 of the Answering affidavits at page 109-110.

compensation. This issue is also common cause. This concession is noted as a paramount admission. It will later assist the court in making a determination in relation to the prayers sought.

4.4 The modus of paying compensation was, firstly, registration of affected families detailing the area and extend of loss. To this end, families were required to sign a form styled “Asset Registration/Verification Form”, the purpose being to confirm ownership of the affected properties.

4.5 From the onset, so contends the applicants, the Respondents expressed categorically that:

*“...in the case of married spouses, it was mandatory to countersign the form in order to confirm their ownership over their property. We were told that no single spouse would be allowed to sign the register in the absence of another, unless there is proof or consent in that regard, as the position was prohibited by 2nd Respondent’s Legal Framework, specifically the Legal Capacity of Married Persons Act 2006, and the Land Act 2010”.*⁹

Likewise, it becomes imperative to cite this specific allegation even at this stage because it forms the bone of contention of the applicants’ petition to the court.

4.6 The Applicants also allege that:

*“It stressed out that in the case of married persons, title documents had to bear the names of both husband and wife, where a valid marriage exists in keeping with the letter and spirit of its Legal Framework and policies”.*¹⁰

⁹ Paragraph 4.5 of the founding affidavit at page 15 of the record.

¹⁰ Paragraph 4.6 of the founding affidavit at page 15 of the record.

4.7 This allegation too is accepted by the Respondents' deponent as a true reflection of the facts. Thus, making it common cause.

[5] THE INDIVIDUAL CLAIMS OF APPLICANTS.

5.1 In order to assess the claim of the Applicants, I find it vital to particularize the claim of each individual Applicant. This will assist the court to navigate through their claims and get a better perspective of their protestations. Although similar in the ultimate goal sort, the nuances of each individual household elucidate their claim.

1ST APPLICANT.

5.2 The claim of the 1st Applicant rests on the following facts:

She is married by customary rites to her husband and they have been separated for a period spanning twenty years. She and her husband, who has since demised¹¹ owned three properties which were affected by the project.¹²

5.3 The narration continues to state that Respondents' officers assigned to process the forms referred to earlier in the judgement, accosted her with the purpose of executing the compensation in terms of the policies of the 2nd Respondent. It is her version that initially she was reluctant to participate in the signing of the forms due to the long separation with her husband. She stated categorically that due to this separation, the husband and her had not run family affairs jointly. It is her reasoning

¹¹ Paragraph 5.29 of the founding affidavit at page 21 of the record.

¹² Paragraph 5.3 of the founding affidavit at page 16 of the record.

that the officials of the 2nd Respondent “insisted” that she sign the documents in line with the policy because this was mandatory.

5.4 She states that it was her expectation that, post the signing of the documents, she would be entitled to a share of the compensation.

5.5 To her surprise, after she had learned through the grapevine of the disbursement of compensation, it transpired that, contrary to the undertakings made by the officers of the 2nd Respondents, her share, (presumably half of the compensation) never surfaced. She then engaged her daughter on a fact-finding mission to ascertain whether her erstwhile husband had received the compensation. Unsurprisingly, indeed her husband had received the first batch to the tune of M52,000.00. After interventions from the daughter, her husband agreed to give her half share which amounted to M26,000.00.¹³

5.6 It is the second instalment that did not proceed as anticipated regard being had to the fact that the first instalment had yielded positive results after the intervention of their daughter. Despite the intervention of their daughter, her husband, “...as he arrogantly told us, before warning that he had invested all of it and therefore there was nothing left to share with me.”

¹³ Paragraph 5.14-5.15 of the founding affidavit at page 18 of the record.

5.7 Realizing that no funds were coming her way, premised from her husband's response to their request, she alleges that she sought the intervention of the officers of the 2nd Respondent, who she states did not come to her rescue.¹⁴ A fact not denied by the Respondents whose take on these allegations is premised on their legal and social responsibilities.¹⁵ Although stated in a sweeping the gist of the response is a denial that the expectation of the Applicant had no basis as it is not the obligation of the Respondents to intervene in family affairs. More of this will be said in the body of the judgment as this is the hub of the case.

5.8 She concludes her narration in essence by alleging that the Respondents' policies had caused harm in her family, leaving her in squalor for she had relied for her livelihood on these fields. This does not reconcile with her earlier allegation that since her separation with her husband she had somewhat dissociated herself with these properties. Nothing turns on this, just an observation.

[6] 2ND APPLICANT

6.1 Her version is not dissimilar to that of the 1st Applicant in most respects. Specifically on the bone of contention hence she preambles her story by a bold allegation that "The 2nd Applicant has also undergone similar hardships, birthed by the methodology adopted by the 2nd Respondent in disbursing compensation funds to affected households."¹⁶

¹⁴ Paragraph 5.19, 5.20,

¹⁵ Paragraph 4.3 of the Answering Affidavit at page 118 of the record.

¹⁶ Paragraph 6.1 of the founding affidavit, at page 21 of the record.

6.2 From thence on, the facts are similar but the difference is, the 2nd Respondent had two (2) fields, both affected by the project. In similar fashion, her claim is that she signed the compensation forms with her husband. Also, when compensation funds were disbursed, they were deposited into an account which could only be accessed by her husband to her exclusion.¹⁷ This is exacerbated by the fact that she is no longer enjoying good relations with her husband.¹⁸ To this end, she professes that the 2nd Respondents' compensation policy is the cause of her hardships.

6.3 She also makes a bold allegation that the 2nd Applicant had advised her that compensation would be paid out into the bank account of her husband "because he was the head of the household." This has a bearing on the prayers sought as will hereunder appear.

[7] **3RD APPLICANT**

7.1 Similarly, this applicant co-signed the necessary compensation agreements. She somewhat alleges that she signed documents authorizing deposit into an account held solely by her husband as a result of instructions from officers of the 2nd Respondent.

¹⁷ Paragraphs 6.8,6.9 6.11,6.12 and 6.13 of the founding affidavits at page 22 of the record.

¹⁸ Paragraph 6.18 of the founding affidavit at page 23 of the record.

7.2 Her apprehension stems from the fact that she does not have access to the account to which the 2nd Respondent deposited the funds for the compensation. She is afraid that, despite her husband's assurance that M13,000.00 (Thirteen Thousand Maloti) remain as a credit balance in the account, he might be economical with the truth.

7.3 It is her submission that the land which was lost to the Respondents, compares to robbery due to the fact that the project will cause economic hardships for her family as this was their means of income.

7.4 She concludes by stating that her property has been compulsorily and arbitrarily taken without any form of compensation.

[8] RESPONDENTS' RESPONSE

8.1 The deponent to the answering affidavit contends that he responds on behalf of all the Respondents and alleges misjoinder in that there is a duplication of parties by implication.¹⁹I will address the misjoinder issue in the body of the judgement at a later stage.

8.2 The factual basis upon which the Respondents base their opposition is stated as illustrated hereunder. I will commence with common cause facts.

8.3 The Respondents share common cause with the Applicants in relation to;

8.4 The villages affected by the project. They are in agreement that it includes the area where all three applicants live. That the Project is in relation to the construction of Polihali Dam and Reservoir.

8.5 They are also in agreement that in February 2018, meetings were held with affected households whose fields were to be affected.

8.6 That each household was to elect or nominate their 'head' of the household.

¹⁹ Paragraph 1.2 of the Answering affidavit at page 103 of the record.

8.7 In 2019, the first disbursements were paid out. These were paid into their husbands' bank account.

[9] **DISPUTED FACTS**

Having established facts that are common cause, it becomes essential that I explore facts which are in contestation for this will form the issues for determination.

9.1 Whilst both parties agree on:

9.1.1 the purpose of the Project;

9.1.2 area of the implementation of the project;

9.1.3 the villages affected, that the Applicants are all affected;

9.1.4 all the Applicants are affected by the implementation of the project;

9.1.5 all Applicants' households have been compensated;

9.1.6 the husbands were appointed as heads of the household;

9.1.7 the payment for compensation was deposited into bank accounts held in the name of the husbands as a result of which they accessed the funds to the exclusion of the Applicants;

9.2 **The contestation lies in:**

9.2.1 the method/interpretation of determining who the head of the household is as gleaned from the policy of the 2nd Respondent.

9.2.2 whether the land or properties of the Applicants were lawfully removed from them by the 2nd Respondent.

[10] In their Answering affidavit, the deponent states that the Applicants were educated about the projects and its effect on their land. This was through public gatherings.²⁰ He states that the Compensation Policy of LHWP obligates them to ensure that both spouses co-sign asset verification forms. This he states is in compliance with the Legal Capacity of Married Persons Act 2006 which provides that the owner of a household shall be both a husband and a wife.

[11] The deponent reiterates that officials of the Respondents give each household an option to determine to whom the compensation disbursements will be paid regardless of gender. He reinforces this by stating that, where there is a dispute between husband and wife, an option to split their proportions for compensation disbursement is also given.²¹

[12] **ISSUES FOR DETERMINATION.**

The issues for determination flowing from the outlined facts of the case and the submissions before Court are:

- 12.1 Is the Compensation Policy at loggerheads with the prescripts of the Constitution of Lesotho 1993 in that it violates;
- 12.2 the equality of married persons.
- 12.3 discriminates persons on the basis of gender contrary to Section 18.
- 12.4 promotes arbitrary seizure of land without adequate compensation contrary to Section 17.

²⁰ Paragraph 3.18 of the answering affidavit at page 115 of the record.

²¹ Paragraph 3.19 of the Answering affidavit at page 115 of the record,

[13] THE LEGAL FRAMEWORK

It is prudent to cite the section of the Constitution and of texts of the statutes which the Applicants rely on to formulate their case.

13.1 The Constitution of Lesotho 1993.

The specific sections of the Constitution they rely on are:

Section 4. Fundamental human rights and freedoms

(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following:

(a)...

(m) freedom from discrimination

Section 17. Freedom from arbitrary seizure of property.

(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 utilization 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. (own emphasis)

Section 18. Freedom from discrimination.

(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(own emphasis)

Section 19.

Right to equality before the law and the equal protection of the law

Every person shall be entitled to equality before the law and to the equal protection of the law.

Section 26. Equality and justice

- (1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*
- (2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in the society to enable them to participate fully in all spheres of public life.*
(own emphasis)

13.2 Legal Capacity of Married Persons no. 90 of 2006

Section 5. Equal powers of spouses

Spouses married in community of property have equal capacity to do the following in consultation with one another

- (a) dispose of the assets of the joint estate;*
- (b) contract debts of which the joint estate is liable; and*
- (c) administer the joint estate.*

(own emphasis)

13.3 THE LAND ACT 2010

Presumption of joint title in marriages

Section 10. (1) Where persons are married in community of property, either under civil, customary, or any other law and irrespective of the date on which the marriage was entered in to, any title to immovable property allocated to or acquired by

anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both.

Principles behind expropriation.

Section 52 An expropriation under sections 49 and 51 shall be subject to the following principles:

- (a) the Government shall first negotiate with the holder of land rights which are the subject of potential expropriation and resort to expropriation only upon failure of the negotiations due to the unreasonableness of the holder of the rights to the land;
- (b) prior adjudication of the land proposed for expropriation and other lands, whether adjoining or not as may be affected by the expropriation;
- (c) payment or settlement of compensation as provided for in Part X of this Act and under the regulations;
- (d) a party whose land rights are the subject of expropriation by the Government shall have the right to seek review from the Land Court against any decision of the Government in this regard.

Deprivations of land to be compensated for

56. In all cases in which the implementation of this Act results in compulsory acquisition of property, the person deprived of such property shall be entitled to compensation at market value. Obligation for compensation

57. The obligation to compensate shall lie with the body conducting the expropriation.

(own emphasis)

[14] ANALYSIS OF THE LAW

What constitutes discrimination?

14.1 It is the case of the Applicants that the policy implementation applied by the Respondents discriminates against them, in that it favors patriarchy. A practice or a system of society or government in which the father or eldest male is head of the family and descent is reckoned through the male line. Our courts have had occasion to unpack what constitutes discrimination.

14.2 In the case of Monaphathi AJ (as he then was), gave a proffered dictionary meaning of discrimination as he stated that discrimination or to discriminate constitutes:

To discriminate is defined by the Concise Oxford Dictionary as "1. To make or see a distinction 2. Differentiate 3. Make a distinction especially unjustly on the basis of race or colour or sex 4. Select for unfavourable treatment," There are other additional definitions. It is the latter (underlined) definition of 10 discrimination which Applicant finds apposite and applicable.²²

²² Theko v Attorney General and Another (CIV/APN 96 of 92) [1994] LSCA 32 (22 February 1994) P9

14.3 The importance of the recognition that a person should not be discriminated against others or receive different treatment from others is that discrimination has a negative impact against the dignity and self regard of a human being. Aptly put by **Musi AJ** in the case of *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others*²³ where he stated:

The right to freedom from discrimination is a very important right. Unfair discrimination demeans people's self-worth and human dignity. It denies people the equal enjoyment of rights and privileges to which they are entitled.

In *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others*²⁴ Monaphathi J (with Mahase J and Molete J concurring) cited with authority the case of *Prinsloo v Van Der Linde*²⁵ where the rule against discrimination was stated, that:

"The essential notion of equality jurisprudence is that persons similarly circumstanced should be similarly treated."

14.4 In the international arena, specifically in relation to discrimination on the basis of gender, Lesotho has ratified international conventions in order to align itself with international standards. This is an indication that Lesotho has positioned itself with the provisions which advocate against discrimination on the basis of gender. These Conventions are the

²³ *Ralekoala v Minister of Human Rights, Justice And Constitution Affairs and Others* (CONSTITUTIONAL CASE 3 of 11) [2012] LSHC 8 (30 March 2012)

²⁴ *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others* (CONSTITUTIONAL CASE 5 of 2010) [2013] LSHC 9 (3 May 2013)

²⁵ *Prinsloo v Van Der Linde* 1997(3) SA 1012 at Para 23-2

International Covenant on Civil and Political Rights (ICCPR), 1966; the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 1981; and the *African Charter on Human and Peoples' Rights*, (ACHPR)1981.

14.4.1 The *ICCPR* provides in article 3 that:

“The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.

Furthermore, it provides in article 26 that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

14.4.2 Article 1 of CEDAW reads:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

14.4.3 Article 18 of the African Charter reads:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

14.4.4 *Needless to say, the discrimination of women is a violation of Human Rights. All these legal instruments are unanimous when they condemn this form of discrimination. This form of discrimination (of women) falls under the wider category of Gender discrimination.*

14.4.5 *An analysis these Conventions point towards is the fact that gender discrimination is the act of giving unequal rights, treatment and opportunities to a person or a group based on their gender. Further that, anyone can be a target of gender discrimination, but girls and women are primarily affected. This is so because traditionally, they are viewed as the “inferior sex.” The needs and interests of girls and women have been systematically oppressed and dismissed for centuries. Entrenched prejudices, restrictive gender norms and institutionalized discrimination have led to widespread gender inequality. Needless to say, these norms have a negative impact on the socio-economic rights of women as they hamper them from participating in spaces such as the labour market, the corporate and industrial world, the sports field and other activities which minus discrimination, they would be at liberty to participate in.*

14.4.6 *It is this form of discrimination that the Applicants seek to address. They however bear the onus of demonstrating that indeed their rights have been so violated by the respondents.*

14.4.7 *The undertakings of Lesotho to ensure the eradication of discrimination against women as advocated for by the cited international instruments is reflected in the Constitution 1993 and Legal Capacity of Married Persons 2006 and other legislative enactments not relevant herein.*

14.4.8 *These definitions and the cited International Instruments will be the basis upon which the court will mirror the claims of the Applicants that they are indeed discriminated upon.*

[15] IS WHAT CONSTITUTES ARBITRARY DEPRIVATION OF PROPERTY

15.1 In prayers sought, the Applicants lament the arbitrary seizure of their land without adequate compensation. This they claim, is against the rights to property guaranteed in the Constitution under Section 17 thereof. Presumably, they are protesting that their right to property, which protects against arbitrary or disproportionate forms of interference, has been affected. Such interference can take the form of deprivation or the form of limitation of rights. It can even take a third form when the interference affects the enjoyment of the right to property.

15.2 There is, however, deprivation of land that is state sanctioned. This is envisaged under *section 49* of the *Land Act 2010* and *S17 of the Constitution*. In *Lesotho Medical Association and Another v Minister of Health and Others*²⁶ Mokhesi J (with Monaphathi J and Peete J concurring), had this to say about what constitutes Section 17 rights:

“s.17, refers to the formal interference with property at the instance of Government, and which of necessity require compensation for assuage, while other interferences which do not necessarily attract compensation are not catered for thereunder”.

15.3 Vinti²⁷ puts it more succinctly by stating:

²⁶ *Lesotho Medical Association and Another v Minister of Health and Others (CONST. CC 19 of 2019) [2020] LSHC 14 (24 June 2020)*

²⁷ Clive Vinti. An Evaluation of Lesotho's Right To "Expropriate" The Water in The Treaty on the Lesotho Highlands Water Project in a "Conflict of Uses" OBITER 2022 p 79-103 @p 87

“In this regard, the Constitution of Lesotho guarantees the right to “freedom from arbitrary seizure of property” provided this right does not deny the rights of others. More specifically, section 17 of the Constitution of Lesotho provides that there are three conditions for a valid expropriation under Lesotho law: first, the expropriation must be for “public benefit”; secondly, the “hardship” caused must be reasonably justifiable and lastly, it is subject to the payment of full compensation. However, it has been held that freedom from arbitrary seizure of property is not an absolute right. In short, expropriation is allowed in Lesotho law”.

15.4 In a nutshell, where provisions of the Land Act are adhered to and compensation is guaranteed within the transaction, expropriation of land is not unconstitutional. The converse is true. Thus, where land is forcefully taken without due process, or against the dictates of the *Land Act 2010*, such constitutes an unlawful appropriation and cannot be sanctioned by the law.

[16] THE LAW AND THE FACTS

16.1 In the case of *Sechele v Public officers’ Defined Contribution Pension fund and others Ramodibedi P* said that;

“[10] In determining these issues it is of fundamental importance to recognise that the Court is enjoined to uphold the supremacy of the Constitution in the event of inconsistency (if any) between the impugned Act and the Constitution. In this regard s 2 of the Constitution reads as follows

‘2. This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.’

[11] As a starting point the applicant in a matter such as this bears the onus to establish the alleged infringement of the Constitution. If there is no infringement, then the enquiry ends there and then. The applicant falls to be dismissed. If on the other hand, there is infringement the next question is whether the infringement in question is

justified. See for example Attorney General v 'Mopa LAC (2000-2004)427 at 433. Equally of importance in a matter such as this is the need to bear in mind the presumption of constitutionality, which of course is rebuttable.

[12] Insofar as the appellant relies on s 17 (1) of the Constitution on the right to freedom from compulsory acquisition of property it is instructive, too, to bear in mind that the interpretation of rights provisions requires a generous and purposive approach aimed at realising the full measure of the protection guaranteed in the Constitution. In this regard one must caution against what Lord Wilberforce famously called 'the austerity of tabulated legalism.' Minister of Home Affairs (Bermuda)v Fischer 1980 AC 319 (PC) at 328H). See also such cases as Sekoati and Others v President of the Court-Martial and Others LAC (1995-99)812 at 820-822; Lesotho National General Insurance Co Ltd v Nkuebe LCA (2000-2004)877. It is upon these principles that I approach the matter”.

16.2 The question to be answered here is, whether the applicants have made out a case and proved that the policy of the LHWP and LHWA disproportionately usurped their land contrary to the Land Act or the constitution.

16.3 In essence, what the Applicants are alleging is that the policy of the 2nd Respondent is discriminatory in that it prefers the dispatching of the compensation disbursements into the bank accounts of the Applicants' husbands. The basis of this preference, so the applicants argue, is based on gender.

16.4 This is telling from the order that they have sought. Under prayer 6 the Applicants have asked that this court declares:

“[T]he Lesotho Highlands Water Project Phase II Compensation Policy 2016, unconstitutional for using permissive and/vague language, especially under Articles 3.5.2 and 3.6 dubbed eligibility for Compensation” and Compensation Agreements and Disbursements”, that allows women to be discriminated upon²⁸”.

16.5 To amplify their argument they state, we are advised by our counsel of record and verily believe same to be true that the application and /or implementation of the LHWP Phase II Compensation policy, particularly during the compensation disbursement process to affected households, seems to follow the customary law patriarchal lines, for suggesting that compensation be disbursed to our husbands because they are the heads of the household.

16.6 Advocate Khesuoe also made this point during submissions that their dissatisfaction with the policy is that it refers to “head of household” which traditionally and usage through passage of time, refers to males to the exclusion of females. Her contention is that the policy prefers that funds for compensation should automatically be dispatched into bank accounts held by men. She over emphasized that this can be derived from the use of “head of household.”

Two arguments that emanate from this are(i) that the policy follows customary law patriarchal lines(ii) it favours husbands or the male gender.

²⁸ Prayer 5 of the Notice of Motion page 8 of the record

16.7 It therefore becomes imperative that the court interrogates the policy. Particularly articles 3.5.2 and 3.6. of the LHWP Policy.

Article 3.5.2 reads:

“The unit of entitlement for compensation against the loss of private property and assets will be the owner or household, including orphaned minors who are entitled to their parents’ estate. In the determination of compensation eligibility, LHDA will ensure compliance with the regulations of the Land Act (2010) and the Legal Capacity of Married Persons Act (2006)”.

Article 3.6 reads:

“Compensation agreements will be signed between LHDA and affected owners/households, which will describe all the entitlements and forms of payment. Where persons are married in community of property (under civil, customary or any other law, the stipulations of the Legal Capacity of Married Persons Act (2006) and the Land Act (2010) pertaining to the administration of joint estates and immovable property will be adhered to in the signing of the agreements”.

The policy defines “head of household” as:

“[T]he person who generally runs the affairs of the household and is looked on by other members of the household as the main decision maker.”

(own emphasis)

16.8 My understanding of the reading of the provisions of the policy read in totality, even if one were to read them in isolation, is that the compensation policy is not gender biased. The definition of head of household is gender neutral in that it does not identify such ‘head’ by gender. It leaves the determination of such a person in the province of each household according to its own dynamics. Hence the recognition of child-headed home, or deceased estates under clause 3.5.2. Earlier in this judgement I alluded to what constitutes discrimination - according to national and international instrument. The policy defines the envisaged prohibition against discrimination.

16.9 The Applicants themselves concede, although reluctantly that this policy is compliant with the Legal Capacity of Married Persons Act in that it fosters equality of married persons. This they state, is realized through the obligatory co-signing of spouses to the disbursement form.²⁹ They are however quick to add that:

“[The] Actual implementation and application of the compensation policy is however, and unfortunately so, a far cry from this, as clearly articulated.”

(own emphasis)

16.10 Fundamentally therefore, the Applicants’ keening lies in the implementation of the policy. In fact, a microscopic view further reveals that it is not with the implementation of the policy, but rather with how their households behaved once the Respondents have discharged their duty of compensation. It is at this stage that the source of their grieve begins.

²⁹ Paragraph 9.5 of the founding affidavit at page 27 of the record.

16.11 It is not the theory of the Applicants' complaint that the land was seized without compensation. This would immediately attract Section 19 of the Land Act and 17 of the Constitution. Neither is it that disbursements are disproportionate to the land seized. Nor is it that they co-signed the forms of discharging the funds under duress. Or that they involuntarily gave the details and banking accounts of their husbands. The rules against duress in the law of contract would kick-in in such circumstances. The cumulative effect of their failure to prove existence of these is that they have failed to make out a case against the Respondents on the prayers sought.

16.12. Rather, their grief is that they are married to delinquents that squander the money without consultations with them. Some even show that it is to the detriment of the household. This may be so, that is, the latter part. The question for disposition is whether their query is within the purview of this court to make orders against errant husbands. This in turn attracts the issue of misjoinder. For even if the court was inclined to make such an order, which it is not, the husbands are not cited as parties, making this application defective.

16.13 As has been said, the prayers sought, camouflage the real issues for disposition. Errant husbands are at worst the responsibility of the court sitting in its ordinary jurisdiction. Probably under the auspices of family law. Sinclair writes:

*“If he decides upon a lifestyle of living which, having regard to the means of the spouses, is extravagant and likely to reduce the family to penury, the wife may have him interdicted as a prodigal. And if, conversely, he fixes a standard of living which is unreasonably low, she may force an improvement by suing him for support”.*³⁰

16.13 It should be pointed out that in this instance the author was referring to a husband who had marital power, a situation which no longer occupies the administration of families in that it was repealed by the statute. However, the quoted text is still relevant to demonstrate how errant husbands can be treated.

16.14 The Respondents are alive to this state of affairs. This is glaringly stated in their answer where the deponent clearly states that the practical shortcomings of the policy have no bearing nor legal obligation on the Respondents.³¹ This state of affairs finds meaning in the case of *Khalapa v Commissioner of Police and Another*³² where the court had this to say;

“[22] In these circumstances the challenge to the constitutionality of s60 of the Police Order advanced by the appellant becomes moot. it is against an important principle of constitutional litigation that a court will not determine a constitutional question where a matter may properly be adjudicated on another basis. Its African genesis is a single sentence by Kentridge AJ in Av Mhlungu 1995 (3) SA 867 (CC) at 895 E:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed”.

³⁰ Sinclair, J. D. *The Law of marriage, Volume 1*, 1996. Juta and Co Ltd. Page 440.

³¹ Paragraph 3.10 of the answering affidavit.

³² *Khalapa v Commissioner of Police and Another* LAC (2000-2004) Page 159 Para 22

[17] **CONCLUSIONS**

From the aforementioned discussions, the court makes the following conclusions:

- a. The prayers 1,3,4,5 sought by the Applicants, have no merit in that the policy of the Respondents is in line with the provisions of Section 17(1) of the Constitution. The process of land appropriation as outlined by the Policy aligns itself with the provisions of the Constitution in as far as land appropriation is concerned. In any case, it is not the contention of the Applicants that the compensation is inadequate.
- b. The prayer sought under 4, and 6 is devoid of merit in that the text of the Policy is gender neutral. The draftsmanship is unambiguous and leaves no room for any other interpretation other than the intention was for each affected household to choose its 'head' according to its own circumstances. The intention of the policy is not to regulate the behaviour of those it affects.
- c. Prayer 7, as stated by the Respondents, is polycentric and falls within the exclusive purview and competence of the policy makers and not the courts.

[18] **COSTS**

The applicants' have come to Court raising an important Constitutional argument. However, they have not succeeded in persuading this Court to find in their favour. There is no reason to my let them with costs.

[19] **ORDER**

The court therefore makes the following order

1. The application is dismissed
2. There is no order as to costs.

M. G. HLAELE
JUDGE

I concur:

S P. SAKOANE
CHIEF JUSTICE

JUDGEMENT

Dissenting Opinion

RALEBESE J.

INTRODUCTION

[20] I have read the judgment of my Sister Hlaele J. and I am of the opinion that a different approach should be adopted to decide the matter as hereinafter articulated.

[20] The background facts and the claims sought by the applicants have been well captured in the judgment of Hlaele J. and I need not repeat them here. The essence of the applicants' case as discerned from the myriad of reliefs that they have sought in the Notice of Constitutional Motion and the supporting founding affidavits is that the manner in which the 2nd and 3rd respondents implemented the **Lesotho Highlands Water Project Phase II Compensation Policy 2016**, particularly in the disbursement of compensation, was unconstitutional. The applicants complain that by paying the compensation in respect of the landed property which the applicants jointly held with their husbands into the bank accounts held by their husbands, the 2nd and 3rd respondents violated their constitutionally protected rights under Section 17(1)(c) read with Section 4(1)(m), Section 18(1),(2) and (3) and Section 19 read with 26(1) of the **Constitution**. The applicants contend that the 2nd and 3rd respondents discriminated against them in their right to equally and jointly own property with their husbands.

[21] It is appropriate at this stage to look at the assertions made by the individual applicants in support of the constitutional violations that they allege. The 1st applicant avers that during the consultation with the representatives of the 2nd respondent in 2018, she made it clear that she had been estranged from her husband for about 20 years and they no longer ran the family affairs together. She co-signed the necessary documents with her husband as the 2nd respondent's officers undertook to ensure that she and her husband would share the compensation equally. She inquired about the possibility of the compensation being shared and paid to them separately but the officers of the 2nd respondent ruled out that option.

[22] The 1st applicant contends that after the first trench of the compensation was paid to her husband, her daughter intervened and her husband agreed to give her M26,000.00 in cash as her share of the compensation. Regarding the 2nd trench, of M33,000.00, her daughter once again intervened but her husband indicated that he had invested all of it and there was nothing to share with her and he later said he invested the money. She sought intervention from the officers of the 2nd respondent who failed to assist her in getting part of the second trench of the compensation. She ultimately avers that all hope to ever recover the compensation money was 'thrown off the roof' as her husband passed away in 2022 and his brothers have devolved his property including all the compensation left amongst themselves, on the ground that she and their late brother were no longer husband and wife.

[23] The 2nd applicant's case is that two trenches of compensation were paid to her husband and there were no challenges in the management and use of money until 2022 when they received the compensation of M41,592.00 as the final compensation. Her relations with her husband thereafter went sour as they no longer managed the compensation payout together. Her husband manages the funds alone and no longer consults her. Her husband eventually built a one-room house without consulting her. Their field situated along the Khubelu river is yet to be affected by the project and she is apprehensive that if the compensation will be paid into the bank account of the husband, she may never benefit from it.

[24] The 3rd applicant was aware that two cheques of M12,000.00 and M13,000.00 were issued in her husband's name as compensation for their property. She did not enjoy most of the compensation as her husband would not consult her on the use

of some of the money in the account. She and her husband would agree that he withdraws a certain amount of money towards household necessities, which he would, only for her to learn later that he had withdrawn more money than agreed. This, she came to realise after her husband informed her there was no money left, when she sought to use same. Upon confrontation, her husband confessed to withdrawing some of the money to pay out his personal debts. Her husband informed her some M13,000.00 from the second compensation remains in the account but she does not trust him due to their history with the first compensation.

[25] The application is opposed by the 2nd, 3rd and 4th respondents only and reference to the respondents hereinafter is to these respondents. The respondents raised two preliminary points and they also pleaded over in the merits.

[26] The first preliminary point is that there is misjoinder of the Chief Executive- Lesotho Highlands Development Authority (3rd respondent) and Divisional Manager of Phase II - Lesotho Highlands Development Authority (4th respondent) as their joinder is unnecessary where the Lesotho Highlands Development Authority has been joined. They further submit that the citing of the Ministry of Natural Resources (5th respondent) also constitutes a misjoinder as it is irregular to cite the ministry as opposed to the functionary being the minister.

[27] The second preliminary point raises the issues of constitutional avoidance and subsidiarity. The respondents contend that this is the fitting case where this court should invoke the proviso to section 22(2) of the *Lesotho Constitution* as the nature of the applicants' causes of action are remediable under private law by the High Court exercising its ordinary civil jurisdiction. *Section 22(2) of the Constitution* in extenso provides that:-

“(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 sections 4 to 21 (inclusive) of this Constitution:

Provided that the 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.” (My emphasis).

[28] I find it apposite to first deal with the objection relating to constitutional avoidance as a positive finding thereon will put paid to this case without the need to address the misjoinder issue.

THE ISSUE

[29] That this court has the jurisdiction to deal with this matter in terms of section 22(1) and (2) of the Constitution is without question since the applicants complain about violation of their Chapter II constitutional rights. The issue however is whether this is an appropriate case where this court should exercise its constitutional jurisdiction for “enforcing or securing the enforcement” of the rights that the applicants allege to have been violated, or whether there are adequate alternative means of redress available to the applicants in respect of the constitutional contraventions that they have alleged.

[30] Since this court has already assumed jurisdiction over the instant matter, it will not confine itself to the founding papers, but will interrogate the merits of the case to determine the gist of the applicants’ causes of action and whether there are adequate means of redress available to the applicants for the contraventions that they have alleged.

THE SUBMISSIONS

[31] The respondents argue that the applicants should not have litigated under a constitutional motion as there are adequate means of redress available for the contraventions that they have alleged. They submit that this is a best-fitting case where the court must decline to exercise its constitutional jurisdiction.

[32] The respondents’ submission is that the essence of the applicant’s case as deduced from their prayers is that the Compensation Policy of the 2nd respondent is biased in favour of their husbands to their exclusion as women. The

respondents contend that the applicants' complaint is that their husbands are being advantaged from the proceeds of the compensation to their prejudice. The remedies available to the applicants in that regard lie not in public law but private law, so contend the respondents. They argue that apart from an ordinary review relief, the applicants further have adequate relief measures that they can explore under the common law and the **Legal Capacity of Married Persons Act**³³, specifically section 12 thereof which reads that:-

“A court may, on the application of a spouse, if it is satisfied that it is essential for the protection of the interest of the spouse in the joint estate, suspend for a definite period any power that the other spouse may exercise under this Part. In general or in relation to a particular act, as the court may specify in its order.”

[33] The applicants on the other hand assert that the alternative reliefs suggested by the respondents are not adequate to address their case which is that, their half share of the joint immovable property has been acquired by the 2nd respondent without compensation. Regarding the review relief, the applicants submit rather cryptically that it is inadequate because the decision has already been implemented as the compensation has already been paid to their husbands to the exclusion of the applicants.

[34] Concerning the alleged remedy under section 12 of the *Legal Capacity of Married Persons Act*³⁴, the applicants, correctly in my view, submit that the provision does not constitute a remedy as it speaks to the suspension of marital power, and the applicants are not complaining about misuse of marital power by their husbands. The alleged remedy under section 12 of the *Legal Capacity of Married Persons Act* cannot be adequate to redress the violations alleged by the applicants because the applicants have not, in these proceedings, elected to proceed against their errant husbands but the respondents. The remedy under section 12 of the *Legal Capacity of Married Persons Act* would be adequate if the applicants' claims were directed against their husbands. In terms of the proviso to section 22(2) of the *Constitution*, the viable alternative remedy should be adequate to address the violations alleged by the applicants in their founding papers, not some abstract claim which the applicants have not pleaded.

THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE

[35] To determine whether there are adequate means of redress under any other law for the constitutional contraventions alleged by the applicants, it is appropriate at this stage to analyse the law on constitutional avoidance before looking at the totality of the founding papers to decipher the constitutional contraventions alleged by the applicants³⁵.

³⁴ Legal Capacity of Married Persons Act

³⁵ *Tau Makhalemele v Board of Enquiry of the National Security Services C of A (CIV) 38/2022* where it was held held that not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be perused to establish the legal basis of the applicant's claim.

[36] The doctrine of constitutional avoidance means that although the court may have the jurisdiction over a matter involving a constitutional issue or an interpretation of a constitutional provision, the court can decline to deal with the matter if there is an alternative mechanism through which the dispute can adequately be resolved³⁶. The justification being given for this approach being that “*constitutional law should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time*”.³⁷ The constitutional avoidance rule presupposes that constitutional decisions are of great moment as they may have far-reaching implications and should only be made in exceptional cases where the fundamental human rights or the tenets of a constitution are at stake³⁸. The run-of-the-mill disputes that do not impact human rights or the interpretation of the Constitution should be resolved and determined by reference to the common law, the statutes, or the customary law³⁹. I believe it was in recognition of the foregoing factors that the draftsman of our **Constitution** inserted the proviso to Section 22(2) which gives recognition to the doctrine of constitutional avoidance in the following terms -

“...the 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.”

³⁶ Nts'ihlele v Independent Electoral Commission (C of A (CIV) 57 of 2019) [2019] LSCA 53 (1 November 2019)

³⁷ Sekoati and Others v President of the Court Martial and Others LAC (1995-1999) 812 at 820

³⁸ Zantsi v Council of State, Ciskei & Ors 1995 (4) SA 615 (CC) at 618 C-E

³⁹ In terms of section 154 of the Constitution, the law in Lesotho includes the statutory law, the customary law and the unwritten rules of the common law in force.

[37] It is the applicants' submission that this court should be loathe to exercise its discretion to decline the exercise of its power under the proviso because; (a) it would be costly and time consuming to assume jurisdiction only to decline it, and (b) the statutory law and the common law are not separate and distinct bodies of law from the Constitution. These submissions undermine the very essence of the principle of constitutional avoidance and of course the twin principle of subsidiarity, and they are thus unfounded.

[38] The Court of Appeal in *Sole v Cullinan NO and Others*⁴⁰ acknowledged the principle of constitutional avoidance and cautioned the High Court, whenever its constitutional jurisdiction is called into play, to always heed the principle in the following terms -:

“...the proviso to s 22(2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if satisfied that ‘adequate means of redress for the contravention alleged are available.’ ... In these circumstances... it is not at all clear why the court a quo in this matter did not at least consider the exercise of its power in terms of s 22(2). It is important that in any future invocation of s 22, the High Court should give careful consideration to its powers under that provision.”

[39] The exercise of the High Court's jurisdiction under section 22 (2) is meant to uphold or vindicate real constitutional issues or violations that cannot be vindicated through any other mechanism and where there would be grave constitutional

⁴⁰ LAC (2000-2004) 572 at 594 F-H

injustice unless the court intervenes. The Privy Council in the case of *Attorney General for Trinidad and Tobago v Ramanoop*⁴¹ indicated that:-

“where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or, abuse, of the court's process.”

[40] In *Rethabile Setlojoane v Commissioner of Police and Others*⁴², the Court of Appeal has also warned that the court faced with a section 22(1) and (2) constitutional challenge should exercise its discretion to decline jurisdiction under the Proviso only in exceptional circumstances where adequate alternative remedies are truly available. The apex court further stressed that while the principle of subsidiarity, and I guess of constitutional avoidance too, are important, they should not be applied in a way that undermines the protection of fundamental rights or the court's role as the guardian of the Constitution.⁴³

Analysis of the Alleged Constitutional Violations

[41] It is appropriate at this stage to look at the gist of the constitutional violations that are alleged by the applicants and whether they can only be justiciable through a constitutional challenge.

⁴¹ *Attorney General for Trinidad and Tobago v Ramanoop* (Trinidad and Tobago) [2005] UKPC 15 at para 25

⁴² *Rethabile Setlojoane v Commissioner of Police and Others* C OF A (CIV) NO.69/2023 at para 19

⁴³ *Rethabile Setlojoane v Commissioner of Police and Others* (Supra) at para 41

[42] In prayer 1, the applicants seek that the decision of the 1st and 2nd respondents to compensate only their husbands in respect of the joint marital property be reviewed and set aside as irregular and unconstitutional.

[43] In terms of prayer 2, the applicants are seeking the declarator that the application or implementation of the *Lesotho Highlands Water Project Phase II Compensation Policy 2016* (the Compensation Policy) particularly during the compensation disbursement processes was unconstitutional to the extent that it violated the provisions of section 17(1)(c)⁴⁴ of the **Constitution** which makes a constitutional condition of full and prompt payment of compensation.

[44] Closely related to prayer 2 is the third prayer in terms of which the applicants are seeking a declarator that the 2nd and 3rd respondents' conduct of compensating the applicants' husbands alone in relation to the joint landed property, is tantamount to arbitrary and compulsory entry, seizure, and taking possession or acquisition of the applicants' property which is constitutionally protected under Section 17(1) of the **Constitution** and is thus unconstitutional, and null and void *ab initio* for being in violation of Section 4(1) (m)⁴⁵ read with Section 17(1) of the Constitution. Section 17(1)(c) of the Constitution provides as follows:-

⁴⁴ Freedom from arbitrary seizure of property and specifically the right to prompt payment of full compensation upon compulsory acquisition of property.

⁴⁵ Freedom from arbitrary seizure of property.

“ Freedom from arbitrary seizure of property

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) ...

(b) ...

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

[45]The applicants' complaint regarding the foregoing three prayers is that the payment of compensation to their husbands exclusively concerning their joint property is tantamount to arbitrary seizure of their property without compensation. It is their case that the Compensation Policy and its implementation seems to follow the customary patriarchal lines for suggesting that compensation be disbursed to their husbands' bank accounts because they are heads of households. They submit that the practice is unconstitutional to the extent that it fails to protect their constitutionally protected property rights as enshrined in sections 17(1) (c) and 4(1) (m) of the **Constitution**.

[46] It is worth noting that a common feature in the individual cases of the three applicants as earlier outlined is that after they co-signed the Assets Verification Forms⁴⁶, the Compensation Entitlement Forms⁴⁷ and the Value of Compensation Forms⁴⁸ with their husbands; the due compensation was promptly paid into the bank accounts held by their husbands around 2018; the applicants had no qualms as they either got a share of the compensation or used it collaboratively with their husbands; and the problems arose later on when their respective husbands began to either exclusively misuse the monies to the detriment of the families or deny the applicants a share of the compensation.

[47] The question is whether the applicants' plight can be resolved through the constitutional challenge that their rights under sections 4(m) and 17(2)(c) have been violated.

[48] In terms of the impugned compensation policy, the respondents undertook to comply, among others, with section 10 of the *Land Act* and the *Legal Capacity of Married Persons Act* in effecting compensation for the land acquisitions. Section 10 of the *Land Act* provides that persons married in community of property shall jointly hold title to immovable property allocated or acquired by them. It further provides that persons married in community of property shall jointly conduct transactions concerning land that they jointly hold. Section 5(c) of the *Legal Capacity of Married Persons Act* provides that spouses married in community of property have the equal capacity to administer the joint estate. The gist of the applicants'

⁴⁶ Confirmation of ownership of the property affected by the Project.

⁴⁷ Confirmation of receipt of the compensation amount stated in the form as the full and final compensation.

⁴⁸ Confirmation that rights in the property are relinquished to the Lesotho Highlands Development Authority and that no other compensation will ever be claimed or paid.

complaint in terms of prayer 1 is that by paying compensation to their husbands only, the 2nd respondent failed to comply or honour the provisions of the foregoing two laws and further that the 2nd respondent's decision to pay the compensation into the bank accounts of their husbands was either unreasonable or irrational. The applicants should have sought the review of the decision of the 2nd respondent to compensate only their husbands in respect of their joint property before the High Court exercising its revisionary jurisdiction. They would in that regard rely on the grounds of illegality for not complying with section 10 of the *Land Act* and section 5(c) of the *Legal Capacity of Married Persons Act* or on the unreasonableness or irrationality of the decision. Alternatively, the applicants could have sought a declaratory order that the 2nd respondent's decision to compensate only their husbands in respect of their joint property be declared null and void.

[49] As regards prayers 2 and 3, the applicants' complaint is that the implementation of the impugned Compensation Policy, particularly the disbursement of compensation failed to comply with the 'full and prompt payment' condition. The applicants further complain that the manner in which the 2nd respondent paid out the compensation to their husbands was tantamount to acquisition of their joint property without compensation to the applicants. In terms of clause 3.2 of the 2nd respondent's Compensation Policy, where permanent land acquisitions will occur for the exclusive occupation and use by the 2nd respondent, full compensation shall be paid to the eligible households for the respective losses. In Clause 3.5.2 of the Compensation Policy, the 2nd respondent undertakes that:-

“In the determination of compensation eligibility, LHDA will ensure compliance with the regulations of the Land Act (2010) and the Legal Capacity of Married Persons Act (2006).”

Regulation 42(5) of the **Land Regulations**⁴⁹ provides that:

“Where the Minister or the authority responsible for compensation and the person claiming compensation as a result of land acquisition or as a result of operation of the Act which gives rise to a claim for compensation fail to agree on the amount or nature of compensation, or where the Minister or such authority have failed to make any award for compensation within 6 months after the submission of the claim, the person claiming compensation may pursue his claim before the district land court.”

[50] It is apparent from the foregoing Regulation that the applicants should have approached the District Land Court having jurisdiction to contest the manner in which the 2nd respondent paid out the compensation. Alternatively, the applicants could seek the review of the act or conduct of the 2nd respondent in implementing the Compensation Policy and paying out the compensation on the ground that it was either illegal for non-compliance with section 56 of the **Land Act** read with clauses 3.2, 3.5.2 and 3.6 of the 2nd respondent's Compensation Policy. Section 56 of the Land Act provides that in all cases in which the implementation of the Act results in compulsory acquisition of property, the person deprived of such property shall be entitled to compensation. The applicants could also seek a review of the 2nd respondent's disbursement of the compensation on the ground that it was unreasonable or irrational to the extent that it denied the applicants the full and prompt compensation for the property that they jointly held with their husbands and was as such tantamount to arbitrary acquisition of their joint landed property without compensation.

⁴⁹ Land Regulations Legal Notice No.21 of 2011

[51] In prayer 4, the applicants seek the declaratory order that the 2nd and 3rd respondents' conduct of compensating their husbands alone in relation to the joint property is unconstitutional the extent that is discriminatory exacerbates gender inequality and women's economic marginalisation in violation of sections 18(1), (2) and (3)⁵⁰, section 19⁵¹ and section 26(1)⁵² of the **Constitution**. The gravamen of the applicants' case in terms of this prayer is that by paying the compensation to their husbands, the 2nd respondent marginalised them as married women and failed to treat them equally with their husbands over their joint marital property in as much as it assumed that their husbands are the heads of their households to whom payment should be made. They contend that by paying compensation to their husbands, the 2nd respondent promotes the patriarchal ideology and minority status of women⁵³.

[52] Closely related to prayer 4 is prayer 6 wherein the applicants seek that the Lesotho Highlands Water Project Phase II Compensation Policy 2016 be declared unconstitutional and in violation of sections 18(1), (2) and (3), 19 and 26(1) of the **Constitution** for using the language that allows for discrimination against women based on their marital status. The applicants contend that though the impugned policy does not specifically state that a husband shall be the head of the household, the interpretation of the 'head of household' in the policy is suggestive that there should be a head of the household who shall be

⁵⁰ Freedom from discrimination

⁵¹ Right to equality before the law and the equal protection of the law

⁵² The right to equality and justice for all.

⁵³ Paragraph 10.8 -10.10 of the founding affidavit.

the husband and this follows the repealed customary patriarchal laws. They argue that this becomes apparent when the 2nd respondent pays the compensation to the husband whom they consider to be the head of the household.

[53] The crux of the applicants' case is that the impugned policy and the 2nd and 3rd respondents' conduct of paying the compensation to their husbands perpetuated the constitutionally and statutorily abolished gender disparity, male supremacy and marital power. The applicants argue that the 2nd and 3rd respondents through their conduct and the compensation policy accorded their husbands superior treatment while they were accorded inferior treatment based on their gender.

[54] In terms of section 3(1) of the **Legal Capacity of Married Persons Act**, the historical marital power of a husband over the person of the wife and the administration of the joint estate has been abolished. Section 5 of the same Act provides that spouses married in community of property have the equal capacity to administer and dispose of the property in the joint marital estate. The applicants acknowledge this development in their founding papers and they contend that the respondents must comply with the cited provisions in their compensation payment processes⁵⁴.

[55] The applicants' claims in terms of prayers 4 and 6 are adequately justiciable before the High Court exercising its ordinary jurisdiction. The applicants could seek the declaratory orders that the impugned policy and the respondents' conduct of

⁵⁴ Paragraph 10.8 of the founding affidavit

compensating their husbands alone in respect of the joint property are unlawful and in violation of the **Legal Capacity of Married Persons Act** to the extent that they reinstated the supplanted marital power of their husbands. Alternatively, the respondents could seek review of the 2nd respondent's decision to pay the compensation to their husbands as being illegal for violating the **Legal Capacity of Married Persons Act**.

[56] In keeping with the principle of subsidiarity, and because the applicants are alleging violation of the rights that are protected by the Constitution, but in respect of which specific legislation has been enacted for their protection, the applicants cannot rely on the Constitution directly but must rely on the legislation to enforce the rights. The applicants could rely on the Constitution directly if they were challenging the legislation for being inconsistent with the Constitution.

[57] In addition to the constitutional violations alleged by the applicants, they also seek incidental reliefs in prayers 5 and 7. In prayer 5, the applicants seek that the 2nd and 3rd respondents be directed to compensate them for the loss of their property which is protected under section 17(1) of the **Constitution**, and which was compulsorily seized or acquired by the respondents. In prayer 7, the applicants seek that the 2nd and 3rd respondents be ordered to carry out a comprehensive gender impact assessment to ensure that the LHWP Phase II Compensation Policy 2016 adequately addresses issues of marginalised and vulnerable persons whose property rights are affected by LHWP Phase II currently and in the future. These two prayers can adequately be ventilated as incidental prayers to the review or declarators that the applicant can seek before the High Court.

[58] Apart from the analysis of the specific constitutional violations that the applicants allege, it is worth mentioning that the gravamen of their complaint and what they are actually seeking is that they suffered prejudice or damages consequent to the decision of the respondents in terms of which they paid the compensation into the bank accounts of their husbands. The applicants' quest is not hard to fathom from the founding and supporting affidavits as they stress the economic hardships they are going through consequent to their errant husbands misusing or denying them the share of the compensation funds that the 2nd respondent paid into their bank accounts. Counsel for the applicants straightforwardly and without any reserve stated during oral arguments that what the applicants actually want is that the 2nd respondent should be ordered to compensate them for the damages occasioned by payment of compensation into their husbands' bank accounts.

[59] The supplementary heads of argument of the applicants also elaborately show the applicants' complaint to be that they suffered patrimonial losses consequent to the 2nd respondent's intentional, wrongful and/or negligent payment of compensation into the bank accounts of their husbands who in turn failed to share the said money with the applicants. The applicants actually want the 2nd respondent to compensate them for the patrimonial losses that they allege to have suffered. The applicants' supplementary heads of argument plainly state that "*The applicants have to claim their economic loss from*

*the respondents under actio condictio furtiva ...*⁵⁵ and further that “*All elements of the common law of delict justifying Applicants to recover the aforesaid funds from the Respondents have been fulfilled ...*”⁵⁶

[60] While the constitutional complaints and incidental claims raised by the applicants might be valid, there are alternative viable means of redress through which the complaints can adequately be ventilated than through the constitutional litigation. It is my considered view that the alternative means of redress highlighted earlier in this judgment can afford the applicants adequate remedies and reliefs for their complaints. There are no particular and special features of their complaints indicating that the highlighted alternative means of redress will be inadequate.

[61] Looking at the alternative prayers that the applicants have sought in prayers 8 to 11, they are manifestly aware that they have alternative and adequate relief measures for the constitutional violations that they are alleging. In terms of these alternative prayers, the applicants seek reliefs that have no constitutional implications whatsoever and that are ordinarily justiciable before the High Court in its ordinary jurisdiction. If the applicants feel that the alternative reliefs can offer adequate redress for their complaints, that is clear proof that alternative and adequate legal redresses are available for their alleged

⁵⁵ Paragraph 5.7

⁵⁶ Paragraph 5.3

constitutional violations. It was unnecessary therefore for the applicants to have instituted the instant constitutional motion as they could have sought adequate redress before other forums.

[63] The constitutional violations alleged by the applicants are just a mask of the actual reliefs that the applicants are seeking, and for which redresses are available otherwise than through a constitutional motion. As counsel for the respondents correctly puts it in heads of argument, the principle of constitutional avoidance dictates that a court should not dispose of a case on a constitutional basis if it is possible to decide it on any other basis. The mere allegation that a fundamental human right or freedom of an applicant has or is likely to be violated is not itself sufficient to entitle the applicant to invoke the constitutional jurisdiction of this court under section 22 if it is clear that the alleged constitutional violation is justiciable otherwise than through a constitutional motion.⁵⁷

[64] The constitutional avoidance approach as enunciated in the proviso to section 22 is an internationally accepted one. In the Kenyan case of *COD and Another v Nairobi City water & Sewerage Company*⁵⁸ the court following the approach of the

⁵⁷ Matsoso Ntšihlele and Others v Independent Electoral Commission and Others CC No 01/ 2010

⁵⁸ COD and Another v Nairobi City water & Sewerage Company (Petition 419 of 2015 (2015) eKLR at para 15

United States⁵⁹, Trinidad and Tobago⁶⁰ and South African⁶¹ courts held that a constitution cannot be used as a general substitute to resolve the everyday normal and run-of-the-mill cases. A court exercising constitutional jurisdiction must steer clear of determining everyday civil and criminal disputes that are disguised as if constitutional questions are being raised.

[65] I further find the following remarks of the Privy Council in *Attorney General of Trinidad and Tobago v Ramanoop*⁶², apposite in the circumstance of this case:-

“[25]...where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process...”

[26] That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional redress is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled.

⁵⁹ Ashwander v Tennessee 297 US 288

⁶⁰ Harrikissoon v A-G [1979] 3 WLR 62

⁶¹ S v Mhlungu 1995 (3) SA 867 (CC)

⁶² Supra at para 25

But 'bona fide' resort to rights under the Constitution ought not be discouraged' Lord Steyn in Ahnee v Director of Public Prosecutions [1999]2 AC 294, 307."

[66] In my considered view, this is a typical case where this court should exercise its constitutional avoidance discretion under the Proviso to section 22(2) of the **Constitution** as there are alternative adequate means of redress for the constitutional violations that the applicants are alleging. The applicants in their supplementary heads of argument concede that the gravamen of their complaints are delictual in nature, and the High Court in its ordinary jurisdiction is an appropriate forum to adequately adjudicate these grievances.

[67] Looking at the constitutional violations alleged by the applicants, and the gist of their complaint, being that they were denied their share of the compensation in respect of the joint property, no injustice would arise if this court were to avoid dealing with their case. Rather, their complaints can adequately be addressed by the High Court through a review or a declarator with incidental prayers for payment of the compensation or a delictual claim. We are not, in this case, faced with claims or violations whose remedies strictly and of necessity depend on the interpretation of the Constitution. This is not a case where the alleged violations can of strict necessity be interpreted, protected or enforced only through constitutional litigation.

[68] It has been said that the constitutional avoidance doctrine is attributed to the court's prudential desire not to needlessly reach constitutional determinations and further that the doctrine provides the courts with a method of preserving constitutional values without making unnecessary binding constitutional decisions.⁶³ The applicants have approached this court seeking review, declaratory orders and delictual claims disguised as a constitutional challenge. Realising this fact, they claim that his court in its constitutional jurisdiction has the universal powers to entertain their claim as the **Constitution** is the supreme law and all laws, be it the common law, statutory law, or customary law should ultimately be interpreted in sync with the Constitution. Needless to say, this approach will undermine the provisions of the Proviso to section 22(2) of the **Constitution** and the very spirit of the doctrine of constitutional avoidance, with the risk that we will end up with the undesirable results of having opened flood gates of frivolous constitutional litigation.

[69] At this juncture, it becomes important to speak to the twin doctrines of constitutional avoidance and subsidiarity, their objectives, and their importance. This, in an attempt to discourage lawyers from misusing the constitutional jurisdiction which is frequently done on account that filing constitutional motions is advantageous due to the expeditious hearing of such applications by the courts, and the general attitude that the overall legal costs of filing constitutional motions are lower as

⁶³ Kago K.Y. Boiki 'The Easy Way Out? Constitutional Avoidance And Its Impact On Human Rights Enforcement In Botswana' (2019) 13 Pretoria Student Law Review at page 56.

parties are hardly ever mulcted with costs.⁶⁴ Constitutional avoidance dictates that the Constitutional Court should be reluctant to adjudicate over disputes where there are alternative remedies or mechanisms for resolving the dispute in issue. Subsidiarity on the other hand dictates that where Parliament has enacted the law to enforce a particular constitutional principle, such law, as opposed to the Constitution should be used to enforce and give effect to such principle unless the constitutionality of the law itself is being challenged⁶⁵. These twin doctrines flow from the need to maintain a harmonious constitutional and statutory framework and ensure efficiency in judicial processes through the elimination of premature and or frivolous constitutional litigation or interpretation of the Constitution.⁶⁶ The interpretation of the Constitution, being the supreme law of the land, has far reaching implications and should not be open to the general run-of the-mill claims. Constitutional interpretation should be engaged only when it is a strict necessity, that is, where it is indispensable to interpret, protect or enforce constitutional rights, principles or values. The doctrines of constitutional avoidance and subsidiarity as enshrined in the Proviso to Section 22(2) of our Constitution serve as watch dogs in that regard and the court should, in deserving cases uphold these doctrines.

DISPOSITION

⁶⁴ Attorney General of Trinidad and Tobago v. Ramanoop [2006] 1 AC 328

⁶⁵ Democratic Congress v Independent Electoral Commission (Cons. No. 10/2022) [2022] LSHC 101 (8 August 2022) at paragraph 11.

⁶⁶ Owade E, “*Analyzing the Concept or Doctrine of (Constitutional) Avoidance in Kenyan labour law*” [2022] University of Nairobi

[70] Premised on the foregoing considerations, this court should uphold the preliminary point raised by the respondents and decline to exercise its powers under Section 22 (1) and (2) of the **Constitution** as the applicants have alternative and adequate means of redress for their alleged violations. This court will not, by so doing, renege on its responsibility as the guardian of the Constitution to interpret, protect and enforce the applicants' alleged rights as warned in **Rethabile Setlojoane v Compol**⁶⁷. By entertaining this matter notwithstanding the alternative and adequate redresses open to the applicants, the court will be condoning their abuse of the court process enshrined in section 22 of the **Constitution**. It will further undermine the doctrine of constitutional avoidance entailed in the proviso to section 22(2) of the **Constitution**.

[71] Having taken the foregoing approach, It becomes unnecessary and of no consequence to deal with the misjoinder objection raised by the respondents.

[72] In the circumstances, I would make the following order:

- (a) The preliminary point raised by the respondents that this court should decline to exercise its jurisdiction is upheld.
- (b) The court consequently declines to exercise its jurisdiction pursuant to the Proviso to section 22(2) of the **Constitution**.
- (c) Each party should bear its own costs.

⁶⁷ Supra

RALEBESE J.

For Applicants: Adv. M.V Khesuoe

For Respondents: Attorneys M.S. Rasekoai, Rampai & Lebakeng.