

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 2907/2021

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED:
DATE: <u>14/3/2022</u> SIGNATURE: 	

In the matter between:

COMMUNITIES AROUND LABALELO**1ST APPELLANT****PHETHO MARKS MOELA****2ND APPLICANT****MATOME JOEL MOKOENA****3RD APPLICANT****JOSEPH MONGANA LEKWADU****4TH APPLICANT**

And

LABALELO WATER USER ASSOCIATION**1ST RESPONDENT****J.A BIERMAN, CHIEF EXECUTIVE OFFICER****2ND RESPONDENT****MINISTER OF WATER AND SANITATION****3RD RESPONDENT****OFFICE OF THE PUBLIC PROTECTOR****4TH RESPONDENT**

JUDGMENT

MANGENA: AJ

- [1] Sekhukhune district is endowed with minerals and is a home for several mining companies operating in the area. To maximize their operations, mining companies established Lebalelo Water User Association whose objectives is amongst others to establish, operate and maintain a bulk water supply scheme by abstracting raw water from Olifants River and distribute it to its members.
- [2] The association is governed by a constitution approved by the Minister of Water and Sanitation on 22 January 2002 and its founding members are mentioned in clause 7 of the Constitution.
- [3] In addition to the founding members, the Constitution makes provision for the admission of new members by way of application. The application for membership is processed by the Management Committee which is enjoined to consider such application and approve it unless there is a good reason to refuse.
- [4] Membership is categorised into two parts, namely "*industrial members*" whose principal business is mining and require the water for industrial purposes or mining purposes and "Ordinary Members" whose principal business is not mining and require water for non-industrial or non-mining purposes.
- [5] The applicants approached this court for an order compelling the first and second respondents to permit community representation on the membership

of the first respondent "*as provided for in the constitution of the first respondent*". The applicants further seek an order directing the first and second respondents to supply the communities with the water as per the water licence granted to the 1st respondent. There were other ancillary orders prayed for in the notice of motion which I do not deem it necessary to mention given the conclusion I have reached.

- [6] The application is opposed by the first and second respondents who have raised two preliminary points for consideration by the court before determining the merits. At the hearing, the parties agreed to make submissions holistically on an understanding that I would in this judgment make a ruling on the points in limine raised and uphold or dispose of the matter on that basis. I am indebted to counsel for their understanding
- [7] The first point in limine raised is lack of locus standi on the part of the applicants to institute the proceedings. The respondents contend that the applicants are not properly authorised to institute this legal proceedings and attack the resolution attached to the papers on the basis that it has not been confirmed by the respective chiefs/headmen of the affected villages, to the extend that applicants argue that they were authorised to institute the proceedings such authorisation does not appear in the resolution attached.

The resolution only record that a meeting was held on 21 March 2021 and the second, third and fourth applicants were elected to represent the community members at Lebalelo Water User Association.

- [8] Adv Letsoalo, representing the applicants argued fervently that the resolution by the community is sufficient to clothe the applicants with a legal standing to come to court as on the face of it is clear that the members who had gathered in that meeting gave their elected representatives the authority to represent them at all relevant fora for the purpose of discussing water shortage. Indeed, this may well be so, but does it follow automatically that authority to represent include authority to institute legal proceedings? I do not think so.
- [9] The above notwithstanding, I prefer to resolve the issue of standing guided by the relief sought in the notice of motion. The applicants are members of the rural communities affected by the shortage of water in their area. Acting in terms of the provisions of **Section 38 of the Constitution**, they came together to assert their right to be provided with water and cited the Minister of Water and Sanitation, who is the ultimate authority for the supply of water to the communities.
- [10] In **Ferreira v Levin No and Others, Vryenhoek 7 others v Powell, 1996 (1) SA 984 (CC)**, the Constitutional Court cautioned against a restrictive and

SA 984 (CC), the Constitutional Court cautioned against a restrictive and narrow approach to the issue of standing on matters affecting constitutional rights. It urged that a broad and liberal approach should be adopted. The same approach was followed in **Lawyers for Human Rights V Minister of Home Affairs, 2004 (40) SA 125 (CC)** where the court said: The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought.

[11] In my view, the community represented by the applicants are asserting their constitutional rights and have a legal standing to institute the proceedings without the approval of their headmen/ headwomen. There is, therefore no merit in the respondent's submission that community members should have the authority of their traditional leaders before asserting their rights arising out of the Constitution. The point in limine is dismissed

[12] The second point in limine is non-joinder of the relevant and necessary parties with a direct interest on the outcome of the proceedings. The respondents argue that the applicants seek to place an obligation on them to provide drinkable water, an obligation which legally falls on Sekhukhune District Municipality and Lepelle Northern Water. The two entities are the water

services authorities and have a legal obligation to ensure that the communities are provided with drinkable water. The applicants failed to join these entities to this proceedings and such failure is fatal to their case.

[13] The principles governing joinder are trite and are simply that a third party should be joined in proceedings if he or she has a direct and substantial interest in a matter. What constitute a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court.

[14] The Constitution demarcated responsibility for the provision of water to the service authorities and in this instance Sekhukhune District Municipality. The municipality has an obligation to ensure that the water supplied to the communities is purified and suitable for household purposes. In relation to the obligations and the first respondent, there is no duty on its part to supply drinkable water to the surrounding communities. As part of its social responsibility, the first respondent has a duty to supply raw water to the municipality which must in turn process it and distribute to the communities. To the extent that the applicants argued that the first respondent must be ordered to supply drinkable water, such a prayer is bound to create a tension and impact on the constitutional obligations of both Sekhukhune District Municipality and Lepelle Northern Water, which are the water services authorities recognised in terms of the **Water Services Act No 108 of 1997**

- [15] Given the role played by the two entities, it is clear to me that it was necessary that they be joined to this proceedings as their operations will be prejudicially affected by the order made. Both counsel drew my attention to the case of **Judicial Services Commission and another v Cape Bar Council and another, 2013 (1) SA 170 (SCA) at para 12** and the principle stated therein which confirms that the joinder of a party is only required as a matter of necessity as opposed to convenience. In this case and owing to the constitutionality of the obligations placed on Sekhukhune District Municipality, it was incumbent upon the applicants to have joined them to the proceedings. This point in limine is upheld.
- [16] With regard to the merits of the application, particularly prayer 1 for community representation on the membership of the 1st respondent, the applicants have not made out a case. I have set out the provisions of the constitution dealing with membership, and none of the provisions relied upon by the applicants gives them a right to be members of the water user association. Both the Water Act and the constitution of the association prescribe methods through which membership can be obtained and the applicants do not comply with any.

- [17] **Section 93 (2) (b) of the National Water Act of 36 of 1998** provides that the constitution of the water User association should contain procedures and requirements for admitting new members of the association, Clause: 7.5 of Lebelo Water User Association constitution allows admission of new members on application and Clause 7.6 state that the association must allow a person to become a member of the association if directed by the Minister to do so.
- [18] The applicants have not demonstrated compliance with the prescribed requirements for admission either in terms of clause 7.5 or clause 7.6 of the constitution and their application is bound to fail as they have no legal entitlement to membership of the association. Their participation in the meetings of the association is by invitation and occurs as a matter of privilege and not a right. The minister has the power to direct that the community be awarded a membership status and has not done so. Their relief does not lie with this court but within the office of the Minister of Water and Sanitation.
- [19] In the circumstances, the application fails. I intend to make no order as to costs because the applicants are acting in the public interest. Considerations of fairness and equity requires that they be not mulcted with costs as they sought to vindicate their constitutional right.
- [20] For the above reasons, the application is dismissed.


MANGENA AJ.

ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Appellant	:	Adv. JLH Letsoalo
Instructed by	:	PE Mashola Attorneys
Counsel for the Respondent	:	Adv. SARAJULIE SWARTZ
Instructed by	:	Webber Wenzel Attorneys
Date of Hearing	:	07 FEBRUARY 2022
Date of Judgment	:	14 FEBRUARY 2022