

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 61/2015  
CCT/92A/2012**

**In the matter between:**

**XING LONG ENTERPRISE  
(PTY) LTD**

**APPELLANT**

**AND**

**ZHONG SING (PTY) LTD  
GROUP TWO (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**CORAM:                   CLEAVER AJA  
                                  MUSONDA AJA  
                                  MOILOA JA**

**HEARD:                   20<sup>th</sup> APRIL, 2016  
DELIVERED:           29<sup>th</sup> APRIL, 2016**

**SUMMARY**

*Pleadings define boundaries of legal dispute between litigants. A party is bound by its pleadings.*

*A cardinal rule of interpretation of documents is that words used in the document express the intention of the parties and must be given their ordinary grammatical meaning unless doing so leads to some absurdity or inconsistency with the rest of the instrument.*

*There being no statutory or legal mora interest rate in Lesotho, mora interest rate must of necessity be determinable by reference to published Central Bank of Lesotho Repo Rate and savings investment rates of interest on offer from time to time by commercial banks operating in Lesotho.*

## **CASES**

1. Frasers (Lesotho) Ltd vs Hata-butle Pty Ltd  
LAC(1995-1999)698
2. Crispette & Candy Co. Ltd. vs Oscar Michaelis N.O.  
and Another 1947(4) SA 521 AD
3. Gray vs Pearson 6 H.L.C. 106
4. Tlebere vs Lesotho Tourist Board LAC (1995-  
1999)457
5. Attorney General vs Bolepo and Another LAC (2000-  
2004)522 at 527
6. Lesotho Marketing Enterprises (Pty) Ltd. vs Minister  
of Commerce and Trade and Another LAC (2000-  
2004)62
7. Commissioner of Police and Another vs Ntlo-Tšoeu  
LAC (2005-2006)156

## **JUDGMENT**

## **MOILOA JA**

[1] Appellant is a company registered in terms of the Company laws of Lesotho and operating trading businesses at Mokhotlong. Respondents are also companies registered in accordance with company laws of Lesotho and having their registered offices at Mokhotlong Town.

## **FACTUAL BACKGROUND**

[2] In January, 2011 Appellant bought from Respondents their businesses which traded at Mokhotlong Bus Stop and at Salang, respectively in the Mokhotlong district. A purchase price of M5,150,000.00 was agreed and a Deed of Sale was entered into by parties dated January, 2011. No date of signature of the Agreement is specified in the Deed of Sale, but it does not really matter for our purposes here. Appellant paid an initial amount of M4,800,000.00 to Respondents leaving a balance M350,000.00. The dispute between the parties at the trial before the High Court concerned non-payment of this later amount of M350,000.00, which the

Appellant refused to pay despite demand to pay made by Respondents.

## **PLEADINGS**

- [3] In their declaration to the Summons the Respondents who were Plaintiffs in the Court below averred that in terms of the sale agreement between the parties the Plaintiffs had discharged their obligations in full as set out in the said agreement. They averred in particular that they delivered the property subject matter of the agreement to the Defendant and the Defendant had received same. Furthermore, the Plaintiffs averred that Defendants had paid part of the purchase price leaving a balance of M350,000.00. Plaintiffs averred that this balance was still owing, due and payable by Defendant to Plaintiffs. They concluded their pleading by alleging that despite their demand to Defendant that he pays up the M350,000.00 balance still due and owing to Plaintiff, the Defendant refused or neglected to do so.
- [4] In its defence plea the Defendant admitted that the Plaintiffs had discharged their obligations in full as set out in Sale Agreement entered into by the parties

in January, 2011. Defendant further admitted that in particular the Plaintiff's had delivered the property subject matter of the Sale Agreement and that it (Defendant) had received all such property. As to Plaintiffs' averment that Defendant had paid part of the purchase price leaving a balance of M350,000.00 which was still due and payable, Defendant admitted that it was so. In other words this balance of M350,000.00 was admitted by Appellant to be still owing and payable.

- [5] Appellant's plea as to its refusal to pay the M350,000.00 balance to Plaintiffs is alleged to be on the basis that in terms of the Sale Agreement between the parties that amount was payable on condition that "Plaintiff had cleared all its tax liabilities with the Lesotho Revenue Authority". This defence was further amplified by Appellant, by alleging that since "Plaintiff has not cleared the said tax liabilities with the LRA as per agreement and [therefore] as a result Plaintiffs have not complied with their obligations in terms of the agreement relating to payment of the aforesaid tax liabilities the M350,000.00 is not payable." It is a well established principle of pleading that pleadings define the boundaries of legal dispute

between litigants. A party is bound by its pleadings. See **Frasers (Lesotho) Ltd vs Hata-butle Pty Ltd. LAC (1995–1999) 698 per Gauntlett J.A.** It is clear from the manner in which the Appellant’s defence was pleaded that the foundation of its defence was the Contract of Sale between the parties though not elegantly pleaded as such. Indeed in a spirited submission addressed to us by Ms. Pheko for Appellant, she repeatedly referred us to clause 3.2 of the Agreement of Sale between the parties. It is therefore useful for us to examine that document and in particular the clause 3.2 to which she relied in order to discover if indeed it sustains her contention.

[6] Clause 3.2 of the Agreement of Sale reads:

*“3.2. The Seller shall have the responsibility to settle all the debts that it had prior to the sale and signing of this agreement including all requisite taxes.”*

There were two ways in which Ms. Pheko attributed meaning to this clause. The primary one was that this clause entitled Appellant to refuse to pay the balance of purchase price if there were alleged taxes owing to the tax authorities. She viewed it as a conditional clause entitling Appellant to refuse payment of balance of purchase price. In my view if

the intention of the parties had been that purchase price was to be payable only if all taxes owing to LRA had been paid by the sellers the contract of sale would have expressly said so. A secondary meaning she attributed to this clause was that it gave Appellant the right to refuse to pay the balance of purchase price due and still owing on the alleged grounds that the sellers were in breach of their Sale Agreement between the parties anyway. I hasten to add that this secondary oral submission was not pleaded in Appellant's pleadings before the trial court.

- [7] The cardinal rule of interpretation of commercial documents is that words used in the document to express the intention of the parties are to be given their ordinary grammatical meaning unless doing so leads to some absurdity, repugnancy, or inconsistency with the rest of the instrument. See **Crispette & Candy Co. Ltd. vs Oscar Michaelis N. O. 1947(4) S.A. 521 A.D per Greenberg J.A.** which followed Lord Wensleydale's so called "Golden Rule" for the interpretation of instruments enunciated by him in **Gray vs Pearson 6 H.L.C. 106.** See also **Tlebere vs Lesotho Tourist Board LAC (1995-1999) 457 per Leon J.A.** On a proper reading of clause 3.2

in its ordinary meaning it is clear to me that it is not a conditional clause at all. It is merely a condition of the agreement. It does not confer any right on Appellant to refuse payment of any portion of the purchase price on the grounds that any taxes are allegedly owing by the businesses they sold to Appellant. If that were the intention of the parties the contract of sale would have said so expressly. On this ground alone I would dismiss this appeal with costs to Respondents.

## **ON FACTUAL MERITS**

[8] In any case on the merits and especially on the evidence of DW2 (Mr. Phekonyane Mpitso) of the LRA it is clear that Respondents were in fact de-registered as tax payers at the beginning of January, 2011 when their business were sold. DW2 had explained at the trial that he was the author of the LRA letter dated 8<sup>th</sup> November, 2011. He had derived the figure of M350,000.00 from an estimate spewed out by faulty LRA computers which were in the process of being rectified. Mr. Mpitso was at pains throughout his testimony to explain that these computers continued to spew out estimates even with respect to client's



accounts which had been closed, such as Respondents' accounts. He testified that the standard procedure of LRA was that before a client's account could be closed and such client be de-registered LRA would have received an application from such client for de-registration. LRA would have then audited such client's account to ensure that any outstanding tax amounts were settled and that the account concerned reflected a nil balance whereafter tax clearance certificate would be issued. In the instant case LRA records indicated that Respondents were de-registered in January, 2011. He explained the meaning of the note "pending de-registration" appearing on the ledger of First Respondent (Exbt. F) in his office as meaning that the tax payer had been "de-registered." The balance would have been "nil" before that status could be conferred. It was hardly in dispute that Respondents had been issued with "Tax Clearance Certificate when the businesses were sold to Appellant in January, 2011 and that the licences of the businesses and vehicles were transferred to Appellant with the assistance of the Respondents.

[9] In her last ditch attempt to persuade the Court on her client's appeal, Ms. Pheko submitted that Appellant was entitled to be upheld at least to the extent of M85,000.00 on the grounds that at least that was an amount which Mr. Mpitso suggested Respondents owed in taxes to LRA. But in my view even this amount is predicated by Mr. Mpitso's testimony throughout that it is an estimate derived from faulty LRA computers to which he frequently referred to in his evidence as "problematic". In the end Mr. Mpitso acknowledged that the M85,000.00 that he tentatively came up with could be wrong and the real balance of Respondents' tax accounts could be "nil". In short it was not a reliable figure and I am not able to fault the trial Court for not placing value on it on that score. In any case the real issue in this case was whether or not clause 3.1 of the contract is conditional in the sense proposed by Ms. Pheko. In conclusion on this topic Ms. Pheko was not able to satisfy us that on the facts of the case Appellant had established that the LRA was owed any taxes let alone M350,000.00. Accordingly, the submission on behalf of the Appellant that the learned judge had found for the Respondents against the evidence and the weight of evidence cannot be sustained.

## **ON MORA INTEREST**

[10] There is no legal or statutory rate of interest relating to mora interest in Lesotho. Accordingly the principle governing mora interest in Lesotho is that the rate of interest to which a judgment creditor may be entitled to is determined by reference to market conditions prevailing in respect of offers of interest on funds invested with commercial banks operating in Lesotho. In the present case Plaintiff had claimed 18.50% from Appellant and the trial court had awarded Plaintiffs 18.50% mora interest. It was put to Mr. Setlojoane by the Court to justify why Respondent's judgment in regard to mora interest should be confirmed by this court at 18.50% in the light of the fact the Repo Rate published by Central Bank of Lesotho's Monetary Policy Committee on 22<sup>nd</sup> March, 2016 is 7% and that interest rate has a direct bearing on investment rate which commercial banks in Lesotho are able to offer members of the public in respect of funds invested with them. The Court referred Mr. Setlojoane to three decisions of this Court on the issue. In **Attorney General vs Bolepo & Another LAC (2000-2004) 522 at 527** it was held that a fair and just amount of mora

interest was 6% p.a. In **Lesotho Marketing Enterprises (Pty) Ltd vs Minister of Commerce and Industry & Another LAC (2000-2004) 62** again the Court awarded judgment creditor 6% mora interest as opposed to 15% interest that had been claimed and awarded by the trial Court. In **Commissioner of Police & Another vs Ntlo-Tšoeu LAC (2005-2006)156** again this Court altered the 15% p.a. interest awarded by the Court a quo and allowed mora interest at 6%.

Mr. Setlojoane's response was that he would abide such mora interest rate as the Court would determine was fair in the circumstances.

[11] As indicated above Repo Rate was fixed at 7% by the Central Bank of Lesotho Monetary Policy Committee and published as such on 22<sup>nd</sup> March, 2016. This is the rate of interest at which CBL lends funds to commercial banks operating in Lesotho. It directly influences the rate (Prime Rate) at which Banks in turn lend to their clients. It also influences the interest rate at which commercial banks are willing to offer customers who invest their funds with them. Prime Rate in Lesotho is published at 11.25% p.a.

following the change in the Repo Rate published by CBL in March, 2016. Ordinary savings accounts at commercial banks earn 2% on average. Fixed Deposits Rate range between 4 and 7.58% p.a. depending on amounts invested and the period for which they are invested. Call Deposits rates are currently 7.58%. All this information concerning various rates of interest is readily available to the public as it is published from time to time when rates of interest change following a change in the Repo Rate. These are facts incapable of dispute among reasonably informed and educated people. They are readily available. It was against this background of prevailing conditions bearing on interest rates in Lesotho and the Courts' decisions referred to above that the Court posed the question to Mr. Setlojoane mentioned above.

[12] **CONCLUSION**

In my view therefore, there being no statutory or legal mora interest rate in Lesotho, mora interest rate must of necessity be determinable by reference to published Central Bank of Lesotho Repo Rate ruling from time to time and in turn to savings investment

rates of interest on offer from time to time by commercial banks operating in Lesotho.

The following orders are made:

- (a) Appeal is dismissed with costs to Respondents.
- (b) 7% per annum interest is substituted for the 18.50% originally awarded to judgment creditor by the court a quo.

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**J. T. M. MOILOA**  
**JUSTICE OF APPEAL**

**I agree**

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**R. B. CLEAVER**  
**ACTING JUSTICE OF APPEAL**

**I agree**

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**P. MUSONDA**  
**ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:**  
**FOR RESPONDENTS:**

Adv. S. Setlojoane  
Adv. N. B. Pheko