

**IN THE HIGH COURT OF LESOTHO**  
**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA (A) No. 0002/2019**  
**[RAT/05/2016/2017]**

**In the matter between:**

**LESOTHO REVENUE AUTHORITY  
COMMISSIONER-GENERAL LRA**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**MARTHINUS CHRISTOFFEL BOTHA**

**RESPONDENT**

**Neutral Citation:** Lesotho Revenue Authority & Another vs Marthinus Christoffel Botha [2022] LSHC 61 Comm. (12 MAY 2022)

**CORAM:** MOKHESI J  
**DATE OF HEARING:** 02 MARCH 2022  
**DATE OF JUDGMENT:** 12 MAY 2022

## SUMMARY

**TAXATION:** *Appellants appealing against the judgment of the Revenue Appeals Tribunal to recognise the respondent as an expatriate within the meaning of the term in the Income Tax Act 1993 (as amended) and Agreement on Phase II the Lesotho Highlands Water Project- Held, upon interpreting the legal provisions implicated, that the respondent is an expatriate- Appeal accordingly dismissed with costs.*

### **ANNOTATIONS:**

#### **Books:**

Blackman et al Commentary of Companies Act (Volume 1) Chapter IV  
'Registration and Incorporation [Revision Service 6, 2009]

#### **Treaties:**

Vienna Convention on the Law of Treaties (1969)  
Agreement on Phase II of the Lesotho Highlands Water Project

#### **Statutes:**

Income Tax Act 1993 (as amended)

#### **Cases:**

Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea and Others (C of A (CIV) 29/2013 [2014] LSCA 22 (17 April 2014).

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] (4) SA 593 (SCA)

## **JUDGMENT**

### **[1] Introduction.**

The Lesotho Highlands Water Project (LHWP) is a bi-national project between the Kingdom of Lesotho and the Republic of South Africa. It is a multi-phased project whose three main aims is to generate hydroelectricity for the Kingdom of Lesotho, to transfer water from the highlands of Lesotho to the Republic of South Africa and to make incidental developments in the two countries. The LHWP was established by means of a Treaty in 1986. Phase I of the project was completed in 2003. In terms of the Lesotho Highlands Development Authority (LHDA) Order no.23 of 1986, the LHDA was birthed. Its main purpose being to implement, operate and maintain LHWP in Lesotho. Phase II of LHWP came into effect on the 22 May 2013 and is currently underway. The current matter is an appeal against judgment and order of the Revenue Appeals Tribunal (RAT) which ordered that the respondent is entitled to be taxed at the rate (i) of 25% for part of the financial year of 2013 when Protocol V (Income Tax Amendment Act 2000) was in force, and (ii) of 22% from the 22<sup>nd</sup> May 2013 when Phase II Agreement came into force.

### **[2] Factual Background and the Parties.**

The appellants are the Lesotho Revenue Authority (LRA) and the Commissioner General of the same institution. They were the respondents before RAT. Around 28 April 2016 the appellants initiated a process to conduct audit of the company by the name Emseebee (Pty) Ltd, in which the respondent, a South African citizen, is the only shareholder and a director, in respect of tax years ended 03/2013, 03/2014 and 03/2015.

- [3] The said audit exercise was concluded on the 21 September 2016, and of importance and relevance to the present matter is the conclusion which was reached on its completion, in relation to the respondent's salary and allowances:

*“The company used the terms of annexure IV of the agreement of Phase II of the Lesotho Highland Water Project between the government of the Kingdom of Lesotho and the government of the Republic of South Africa. However, the audit team find it inappropriate for the company to categorise Appellant as an expatriate per the agreement because Appellant is an employee of a resident company and he is not solely engaged for Phase I and II of the Lesotho Highlands Water Project. This is evidenced by the fact that he is engaged by Lesotho Highlands Development Authority as a Finance Branch Manager and is expected to perform all other duties specifically by LHDA in work programme and manpower under the agreement between LHDA and Emseebee (Pty) Ltd.”*

*“Therefore, allowances given to Appellant have been added back to employment income (salary plus allowances) and added using marginal rates.”*

- [4] A Final Assessment in the amount of M659,007.80 was then issued on the 22 September 2016, and in it, the appellants maintained the posture that they had initially that the respondent is not an expatriate because he was employed by a company incorporated in Lesotho. The respondent, consequent to this Final Assessment, raised an objection to it, which objection was not responded to by the appellants within 90 days in terms of s. 137(6) of the Income Tax (as amended) Act 1993 ( hereinafter ‘the Act’),

hence the appeal before RAT because the appellants were deemed by the Act to have objected.

[5] It is important that the interplay between the Emseebee (Pty) Ltd (hereinafter ‘Emseebee’), the respondent and the Lesotho Highlands Water Authority (LHDA) is understood. Mr. Botha, a South African citizen, as stated earlier, was a consultant with a well-known accounting firm KPMG and had during his engagements with the LHDA attracted its interest in him for his financial skills. LHDA wanted to hire him, but because the LHDA was desirous of cutting costs of hiring him, he was urged by the former to float a company so that he could be engaged through it, as the LHDA preferred to work with the contractors. This led to incorporation of Emseebee with the respondent being the sole shareholder and a director. It was incorporated on the 17 November 2011. On the 01 April 2012 it concluded a written contract with the LHDA for provision of specialist service as Finance Manager. Emseebee was a contracting party in terms of Protocol V and Phase II Agreement. The services to be provided by Emseebee were, in terms of Assignment clause of the same Agreement, specifically to be performed by the respondent (Mr Botha). The respondent was to be paid a monthly fee in the amount of M94,214.00 for services provided by it through Emseebee to LHDA. Emseebee was on the 20 of each calendar month, to invoice the LHDA on this fixed monthly fee.

[6] On the 31 March 2022, a day before Emseebee concluded the above Agreement with the LHDA, the respondent entered into a contract, termed “Independent Service Agreement,” with Emseebee (hereinafter “sub-

contract]) in terms of which he agreed to provide consulting services of Manager: Financial Branch at LHDA.

[7] **Before the RAT**

Aggrieved by the deemed decision of the appellant not to recognise his status as an expatriate, the respondent launched an appeal to the RAT. It will be recalled that the appellants' initial stance was that the respondent is not an expatriate because he was an employee "of a resident company and he is not solely engaged for Phase I and Phase II of the Lesotho Highland Water Project..." However, by means of an amendment to its Opposing Statement, in answer to the appeal, the appellants contended that their "... refusal to consider Appellant as an expatriate was premised on the ground that the Appellant through Emseebee was not engaged by the LHDA solely for Phase I and Phase II of the LHWP. As Finance Branch Manager of the LHDA he was expected to perform all other duties in the LHDA work programme and manpower under Emseebee/LHDA agreement."

[8] At para. 29.1 of the amended opposing statement the appellants aver that:

*"It is denied that Appellant is an Expatriate within the meaning of article 1(4) of the 2011 Agreement [i.e. the Phase II Agreement with tax advantages accorded to an Expatriate. Since incorporation of Emseebee, Appellant was at all material times a director and employee of Emseebee and employed as such by Emseebee not exclusively for or solely in respect to the operation and maintenance of Phase I and implementation, operation and maintenance of Phase II of the LWHP."*

[9] Having heard evidence, the RAT held that the tripartite relationship between the respondent, Emseebee and LHDA “fits into the definition of subcontractor as defined in the meaning of a contracting party.” On the question whether the respondent was an expatriate taxpayer, the RAT held that the respondent was an expatriate taxpayer and “his activities of filing tax returns of Emseebee, responding to audit queries, issuing invoices on behalf of Emseebee to the LHDA did not remove the exclusivity as that is captured in the definition of expatriate as all activities related thereto were in connection with and with respect to the activities of the contract.”

[10] The appellants, dissatisfied with the judgment and the consequent orders of the RAT, appealed to this court. The matter was heard by My Sister Chaka-Makhooane J, who while in the process of writing judgment, met her unfortunate and untimely death. The matter proceeded *de novo* before me.

[11] **Grounds of Appeal**

The appellant appealed to this court and raised a number of objections to the RAT’s judgment: (i) that RAT misdirected itself in holding that the respondent was an expatriate within the meaning of the provisions of article 1 of Protocol V to the Treaty on the Lesotho Highlands Water Project, alternatively, of the Income Tax (Amendment) Act 2000 and article 1(4) of the Phase II Agreement or article 1.2 of Annexure IV to the Agreement on Phase II of the Lesotho Highlands Water Project between the Government of Lesotho and the Government of the Republic of South Africa. This holding, therefore, led to the wrong order that the respondent was eligible for a favourable tax rate.

[12] The appellants complain further that the RAT gave an extensive rather than restrictive interpretation of the words “solely employed with respect to or engaged in activities in connection with the operation and maintenance of Phase I and the implementation, operation and maintenance of Phase II” in the definition of “Expatriate” in article 1(4) of the Phase II Agreement and in article 1.2 of Annexure IV to the Phase II Agreement, and to the words “solely employed or engaged on the LHWP” in the definition of “Expatriate” in article 1 of Protocol V. The appellants further complain that the RAT used this extensive interpretation to erroneously conclude that the administrative work performed by the respondent for Emseebee, was in connection with the activities of the of Phase II.

### **In this Court**

#### **[13] Issues for determination**

Whether the RAT erred and misdirected itself in regarding the respondent as an expatriate, and therefore, entitled to favourable tax treatment.

#### **[14] The Law**

The determination of this case turns on whether the respondent is an expatriate for purposes of receiving favourable tax treatment. Ultimately, it is to the definition of that term as provided in various laws, to which this court should resort in order to determine this appeal. There are two aspects to this case. The first relates the tax rate applicable to an expatriate’s chargeable income in terms of Article 4(1) of the Income Tax (Amendment) Act 2000, which is limited to twenty five percent (25%) and on the other aspect, a tax rate which is applicable on the chargeable income of an



expatriate, in terms of Article 4(1) of Annexure IV to the Phase II Agreement, which is capped at twenty-two percent (22%).

- [15] Both laws provide that the tax rate on that portion of chargeable income of an expatriate which represents compensation for services rendered in respect of a contract or any sub-contract on such a contract, shall be limited to twenty five percent (25%) and twenty-two percent (22 %) respectively. Both laws define what an expatriate is: The Income Tax (Amendment) Act 2000, in terms of Article 1 (Definition) defines an expatriate as:

*“..[A] resident individual, other than a citizen of Lesotho, who in relation to services provided in the Kingdom of Lesotho, is solely employed or engaged on the LHWP [Lesotho Highlands Water Project].”*

- [16] Article 1 of the Phase II Agreement defines an expatriate thus:

*“[A] resident individual, other than a Lesotho National, who in relation to services provided in Lesotho, is solely employed with respect to or engaged in activities in connection with the operation and maintenance of Phase I and the implementation, operation and maintenance of Phase II;”*

- [17] Germane, further, to the determination of this appeal, are definitions of the words “contract”, “contracting party” and “sub-contract”, as they appear in the Article 14 of the Phase II Agreement and Article 4(1) of Annexure IV. In terms of Article 1(2) of Annexure IV, the word “contract” thus:

*“[A] contract entered into with the Lesotho Highlands Development Authority, the Trans-Caledon Tunnel Authority or the Lesotho Highlands*

*Water Commission, as the case may be, in connection with the operation and maintenance of Phase I and the implementation, operation and maintenance of Phase II;”*

[18] The words “Contracting Party” have been defined in Article 1(4) of the Phase II Agreement and in Article 1(2) of Annexure IV as:

*“[A] natural or legal person who or which has entered into:*

*(a) a contract or sub-contract to such a contract entered into with the Lesotho Highlands Development Authority; or*

*(b) a contract or sub-contract to such a contract with the Lesotho Highlands Water Commission or the Trans-Caledon Tunnel Authority, as a result of which the Contracting Party is subject to Lesotho tax legislation;”*

[19] “Sub-contract” is defined in Article 1(4) of the Phase II Agreement and in Article IV as follows:

*“(a) in relation to a contract providing for the construction of physical works or for services as defined therein, a contract entered into with the contracting party to perform the construction of any part of such works; or*

*(b) in relation to a contract providing for the provision of consulting services as defined therein, a contract entered into with the contracting party to perform any part of such services;”*

[20] Article 14(15) of the Phase II Agreement provides that:

*“A Contracting Party or an Expatriate employee of such a contracting party shall be liable for Lesotho income tax in accordance with the applicable legislation, as modified and supplemented by the applicable provisions of Annexure IV to this Agreement.”*

[21] RAT judgment is based on two grounds; the first one is related to the impropriety of the appellant introducing a ground which was not the basis of its audit report, and secondly, the interpretation of the above laws with regard to the question whether the respondent is an expatriate for purposes of enjoying a favourable tax treatment. As regards the first ground. I find it unfortunate that the RAT posits as the basis of its decision the fact that the appellants were relying on the ground which did not form the basis of the audit report, in its Opposing Statement, when in actual fact the new ground was added by means of an amendment which was granted by the same Tribunal. This new ground was fully canvassed before it. I do not readily appreciate why this formed the basis of RAT’s reasons for dismissing the appellants’ opposition to the appeal. In that regard it erred. I turn now to the second leg on which the RAT judgment was based, that is, whether the respondent is an expatriate within the meaning of the Articles quoted above. This entails interpreting the words used in the relevant provisions of the Treaty and the Income Tax (Amendment) Act 2000, for which aid should be sourced from the provisions of the Vienna Convention on the Law of Treaties (1969) and approach to interpretation which is commonly deployed in this country (**Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] (4) SA 593 (SCA) ( Endumeni) ).**

## Respective Parties' Arguments

[22] Mr Dichaba, for the appellant, argued that the respondent was not solely employed or engaged with Emseebee as the contracting party with respect to operation, implementation and maintenance of Phase II, because over and above his duties as Finance Manager, he attended to administrative duties of Emseebee as its director, such as preparing and filing its tax return and answering to its tax queries. He argued that the roles of the respondent as the director of Emseebee and Finance Manager in terms of Emseebee/LHDA Agreement were mutually exclusive, as he puts it, the respondent needed not to be a director of Emseebee in order for him to be LHDA Finance Manager, and further that, the Emseebee/LHDA Agreement did not provide that the respondent be Emseebee director in order for him to discharge the functions entailed in the Emseebee/LHDA Agreement's scope of work. He argued that the motive behind floatation of Emseebee is irrelevant, as what matters is that it is an incorporated entity with a personality separate from its shareholders. Its objectives as outlined in the Memorandum of incorporation are not restricted to rendering services only to LHWP & LHDA. In support he cited the authors **Visser et al in South African Mercantile and Company Law by GTR Gibson 8<sup>th</sup> Ed.** at p. 260 citing **Estate Kootcher v Commissioner for Inland Revenue 1941 AD 256**, where it was said;

*“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are ... A company [has] a legal existence with ... rights and*

*liabilities of its own...’ Salomon v Salomon & Co. Ltd [1897] AC  
22 (HL) at 30.”*

[23] The respondent contend that Emseebee was floated at the instigation of the LHDA as a vehicle through which the latter entity could employ him, Mr Dichaba argued that this contention overlooked certain considerations, such as:

(i) Emseebee was incorporated four months before the conclusion of Emseebee/LHDA agreement, and that from the date of its incorporation, the respondent was its director, and that, for all this time it could not be said that the respondent was solely employed by Emseebee with respect to activities in connection with the maintenance, operation and implementation of Phase II. He argued that, the fact that the respondent was not paid for his role as the director of Emseebee and that his source of income came from the services he provided to LHDA through Emseebee, was immaterial, as none of the provisions under consideration define an expatriate with reference to where he derived his income. He argued that the provisions “ *do not define an ‘expatriate as a person whose income arises or is connected to activities in connection with the operation and maintenance of Phase 1 and implementation, operation and maintenance of Phase II.’*”

[24] Mr Farlam SC on the other hand, on behalf of the respondent, argued that the appellants’ argument that the respondent was not an expatriate as he

attended to Emseebee's administrative tasks did not consider "common sense and business reality" as borne out by the following facts:

- (i) That the Emseebee was incorporated on the instigation of the LHDA and that the respondent's technical assistance contract be concluded through a vehicle of a company.
- (ii) That the Emseebee/LHDA Agreement assigned the carrying out of the responsibilities in terms of the scope of work only to the respondent;
- (iii) Emseebee was the respondent's alter ego, as anything done for Emseebee was done in connection to the LHWP and LHDA, and that any administrative duties he discharged in relation to Emseebee was in fulfilment of the contractual obligations between Emseebee and the LHDA, that in order to the agreement to remain valid the former had to be tax compliant. He argued that even though the respondent's remuneration was reflected by Emseebee as being for his role as a director, such remuneration was for the consultancy work he did to the LHDA and this is undisputed. He further argued that Emseebee's tax returns and queries to the 1<sup>st</sup> appellant were attended to by the respondent after the 31 March 2015, when he was no longer engaged with LHDA through Emseebee.

[25] **Discussion**

Lesotho is a dualist State, in that treaties have no formal status of law domestically unless the legislature enacts a statute incorporating the treaty

into domestic law (see: **Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea and Others (C of A (CIV) 29/2013 [2014] LSCA 22 (17 April 2014))**. This position, for present purposes, is mirrored by section 112(1) of Income Tax 1993 (as amended) (hereinafter ‘the Act’) which provides that in case of inconsistency between the Act and the international treaties to which Lesotho is a party, the terms of the international treaties should take precedence.

[26] Article 31 of the Convention, on interpretation of Treaties, provides that:

*“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its objects and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes;*

*(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

*(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

*3. There shall be taken into account, together with the context:*

*(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*(b) any subsequent practice in the application of the treaty which establishes the agreement for the parties regarding its interpretation;*

*(c) any relevant rules of international law in the relations between the parties.*

*4. A special meaning shall be given to the if it is established that the parties so intended”*

[27] The interpretative exercise therefore should embrace a triad of the language or words used, context and purpose of the provisions. This approach is similar to the approach in *Endumeni*. As I see it, the purpose of the provisions now in contention was to cater for the situation where skills and expertise on key aspects of the implementation, operation and maintenance of the LHWP, would have to be sourced from outside the country. Consequently, importation of such skills and expertise into the Kingdom should be commensurated with a favourable tax treatment of those expatriates. That is the spirit which animated the tax arrangement which now brings the respondent’s tax affairs into focus.

[28] RAT based its judgment on the fact that the respondent was sub-contracted to Emseebee and concluded that he was an expatriate as defined by Article 2 of the Protocol V and Article 1(4) of the Phase II Agreement. It is trite that in terms of section 3 of the Act, the respondent, as the director of Emseebee is regarded as being its employee. Whether the point of departure is the fact of his sub-contractual or employment reality, in my view, makes no difference, as in terms of Article 4(1) of Annexure IV, the capping of tax rate to twenty-two percent and twenty-five percent in terms of Article 4.1 of



Annex B, respectively, is extended to compensation for expatriates who rendered their services to LHWP and LHDA in respect of a contract or sub-contract. The enquiry, therefore, turns on whether the respondent is an expatriate within the meaning of the provisions in question.

- [29] When Article 2 of Protocol V to LHWP Treaty and Article 1(4) of Phase II Agreement define an expatriate as a resident individual, other than Lesotho citizen, who in relation to the services she/he provides in Lesotho is “solely employed or engaged on LHWP” and “is solely employed with respect to or engaged in activities in connection with the operation and maintenance of Phase I and implementation, operation and maintenance of Phase II,” respectively, the two contracting countries were setting outer limits or parameters of the expatriate’s engagements which would fall within the ambit of the aforesaid favourable tax treatment. As I understand it, once a foreign national who is employed or engaged with the LHWP or LHDA involves herself or himself in other remunerated activities which do not have anything to do with the LHWP or LHDA, for tax purposes, he/she is no longer regarded as an expatriate within the meaning of that term in the legal provisions mentioned above, in order for him/her to attract a beneficial tax treatment. I agree with RAT that the words “solely employed or engaged” imports with them exclusively, by which it is meant that, for a person to be regarded as an expatriate he/she should only be gainfully employed or engaged with respect to activities connected with the implementation, operation and maintenance of the LHWP.

- [30] Mr Dichaba’s technical argument that Emseebee is a separate legal person from the respondent and that the motive its floatation is irrelevant as to the

question whether the respondent should be treated as an expatriate, is not sustainable in the circumstances of this case, for the following reasons: It is without doubt that the respondent and Emseebee are two separate legal persons, however, the situational reality of the relationship between LHDA, Emseebee and the respondent should be appreciated and not lost sight of. It is common cause that Emseebee was incorporated at the instigation of LHDA upon being attracted to the respondent's skills and was therefore desirous of employing him. The LHDA insisted that he be engaged through a company. The money which were paid by the LHDA to Emseebee and transmitted to the respondent as directors' remuneration, were his fees for the consultancy work he did for LHDA on behalf of the latter company as per the Assignment clause in the LHDA/Emseebee Agreement. The LHDA/Emseebee Agreement provided that the services which the company was contracted to do for the LHDA, should be executed by the respondent only.

- [31] Moreover, the LHDA/Emseebee Agreement provided that Emseebee should comply with the tax laws of the Kingdom, and that failure to do so would entitle the LHDA to terminate the contract. The rendering of VAT invoices for payment by LHDA was part of Emseebee's obligations in terms of the contract. Mr. Dichaba's argument that the said contract did not provide that Emseebee's administrative duties be performed by the respondent only, is attractive but not sustainable ignores the factual reality of the triad relationship between the LHDA, Emseebee and the respondent. It is a fact that Emseebee did not do any other work in Lesotho apart from the services it rendered to LHDA through the respondent in terms of its agreement with the LHDA.

[32] Despite Mr Dichaba's arguments to the contrary, I am persuaded by Mr Farlam SC, that upon the conspectus of all facts, Emseebee was the respondent's alter ego. Anything which was done by the respondent as the only director, shareholder and employee of Emseebee was done for the respondent through the instrumentality of Emseebee, and was done solely in connection with the operation, and maintenance of Phase I and implementation, operation and maintenance of Phase II. Emseebee being a legal construct, the respondent could only act through it as its only shareholder, director and employee, in rendering the services of a Finance Manager to the LHDA. I, therefore, consider that the administrative duties which the respondent discharged for Emseebee were incidental to the LHDA/Emseebee Agreement.

[33] As I understand the thrust of Mr Farlam's argument with regard to Emseebee being the respondent's alter ego: it is that the respondent should be regarded as an expatriate despite performing the administrative duties for Emseebee; that his expatriate status should not be seen through a technical prism of him and Emseebee being separate legal persons, but rather for this court to recognise him as an expatriate in view of Emseebee being his alter ego. Mr Farlam S.C is in fact arguing for the piercing of corporate veil in order to confer the status of an expatriate on the respondent. This argument is not novel in company law, though rarely advanced. Piercing of corporate veil based on alter ego or instrumentality is stated by the learned authors **Blackman et al Commentary of Companies Act (Volume 1) Chapter IV 'Registration and Incorporation [Revision Service 6, 2009] at p. 4 – 140-2, thus:**

*“Another basis on which the Courts have pierced the corporate veil is when a Corporation is found to be the ‘instrumentality’ or ‘alter ego’ or ‘agent’ or ‘puppet’ or ‘mask’ of its shareholders, i.e. where a sole owner or several owners of shares have managed their corporation in such a way as not to separate their personal affairs from those of their Corporation. The company does not, in truth, carry on its business or affairs, but acts merely in the furtherance of the business or affairs of its shareholders. Its controllers do not treat it as a separate entity, at least not in the full sense. Although the form is that of a separate entity carrying on business to promote its stated objects, in truth the company is a mere instrumentality or business conduit for promoting, not its own business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one ....”*

- [34] The above statement resonates with the circumstances of the present matter. The fact that Emseebee was floated four months prior to it concluding the contract with LHDA and the fact that the respondent performed the stated administrative functions on behalf of Emseebee does not detract from the fact that Emseebee was formed in order to effectuate the LHDA desire to engage the respondent its Finance Manager. Even though the consultancy agreement was between Emseebee and LHDA, provided that only the respondent should carry out the scope of work annexed to the contract, the payment which the latter received as director’s remuneration was payment to him for the services he rendered to LHDA as its Finance Manager. It is evident that the respondent had a full ownership, control and dominance over Emseebee, evidenced, of course, further, by the fact that the only services the company provided in Lesotho were only in relation to the contract it had with LHDA. Despite the fact that the company was

incorporated four months prior to concluding the contract with LHDA and the fact that the respondent had to perform certain incidental administrative functions for Emseebee, I am prepared, these notwithstanding, to recognize the respondent as an expatriate who was solely employed by Emseebee with respect to activities in connection with the operation and maintenance of Phase I and the implementation, operation and maintenance of Phase II, and was also solely employed or engaged on the LHWP.

[35] In the result:

(a) The Appeal is dismissed with costs.

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**MOKHESI J**

**For the Appellant: Mr. M. Dichaba**

**For the Respondent: Adv. P. B. J. Farlam SC instructed by Webber  
Newdigate Attorneys**