

IN THE HIGH COURT OF LESOTHO

Held at Maseru

In the matter between:-

Martinus Christoffel Botha

1st Applicant

Emseebee (PTY) LTD

2nd Applicant

Vs

Lesotho Revenue Authority

1st Respondent

Commissioner – General, LRA

2nd Defendant

Attorney – General

3rd Respondent

JUDGMENT

Coram : Hon. Monapathi J.

Date of Hearing : 5th August 2019

Date of judgment : 16th March 2022

Neutral Citation: Botha & other vs LRA & 2 others [2022] LSHC 62 Civ
(16th March 2022)

SUMMARY

[1] The Applicants approached this Court for an order in the following terms:

1. An order declaring the Applicants interested persons in the application in that they have an existing, future or contingent right or obligation relevant to the proceedings.

2. An order declaring the Specified Rates published by the Second Respondent in the Legal Notice 130 of 2004 and 65 of 2015 in excess of the normal Commercial lending rates in Lesotho during the period 2004 to 2016, and therefore unlawful by not being compliant with the powers conferred by the provisions of Section 192 of the Income Tax Act of 1993.

3. An order setting aside the Specified Rates published or such and substituting it with rates of 6% per year, compounded annually, in relation to Legal Notice 130 of 2004, and 7% per year, compounded annually, in relation to Legal Notice 65 of 2015.

4. An order in terms of which the First & Second Respondents are to pay the costs of the application, but only the costs of the opposing the application.

5. An order in terms of which such further and /or alternative relief be granted to the Applicants as may be deemed appropriate.

[2] This application is opposed.

[3] Emseebe (Pty) Ltd is a company duly registered in terms of the laws of Lesotho with its registered address at House B7, Tsapane Street, Mohale Town sites, Mohale Lesotho. It is registered as a resident

taxpayer with Lesotho Revenue Authority and Martinus Christoffel Botha is its Director and Shareholder.

[4] On the 21st September 2016, the division of Domestic Taxes, Lesotho Revenue Authority authored a letter to the Director Emseebee (Pty) Ltd whose postal address is 612 Maseru 100.

[5] The letter advised that if Mr. Botha was dissatisfied with the assessment he may file objection with the Commissioner Domestic Taxes within four (4) years for Income Tax and Thirty (30) days for VAT after the service of notice of assessment, and such objection should be in writing and specify in detail the grounds upon which it is made. However, objection to the assessments does not suspend the obligation to pay liability – the letter continued to advise. To the letter is attached; a four-audit report.

[6] On the 22nd September 2016 the Commissioner addressed another letter to the Applicant which was final assessment for the year 2013 to 2015 in which 2nd Respondent included additional tax 3% per month.

[5] In 2015, Legal Notice No 65 of 2015 was published. It revoked the Income Tax (Specified Rate) Legal Notice No 130 of 2004. The 2015 Legal Notice set the specified rate for additional tax for (a) failure to file a tax return, (b) failure to pay tax on due date, (c) under estimation of tax payable, and (d) failure to withhold or pay tax

withheld at 22% per twelve months, compounded annually, apportionable per month, where a month includes part of the month. The 2004 Legal Notice – the revoked Notice provided that the specified rate would be 3% compounded on a monthly basis as ‘specified rate’ for the purposes of Sections 193 to 196 of the Income Tax Act.

[6] Applicant was issued Notice of Final Assessment for the 2013 to 2015 years which included additional tax at 3% per month. Additional tax in respect of PAYE was imposed in the amount of M864,581.00 for 2013, M469,502.00 for 2014 and M192,696.00 for 2015. Legal Notice No 65 of 2015 came in effect on the 19th June 2015.

[7] In 2016 Applicant was assessed for income tax in the amount of M659,007.80. This assessment did not include imposition of apprehensive that the Commissioner may impose such additional tax at 3% per month and in future, impose additional at 22% per month in respect of the 2016 and future years.

[8] Therefore, it is Applicant`s case that the rates so imposed by the Commissioner are “unlawful.” He states at para 8 of his founding affidavit “the rates of 3% per month from 2004 to 2015 and 22% per annum from 2016 onwards can only be clothed with lawfulness and legal admissibility if they were based on the normal commercial lending rates in force in Lesotho during the said periods.” According to Applicant, interest rates are regulated by the Money Lenders Act.

In terms of Section 6 of the Money Lenders Act, any interest rate in excess of 25% is deemed harsh and unconscionable.

[9] Applicant contends that where a debt is due and payable, as in the case of assessed tax, the interest thereon is referred to as *morae* interest. According to Applicant the correct rate at *morae* interest, or legal rate is 6%. Authority for this assertion is the Court of Appeal judgement in **Lesotho Marketing Enterprises Pty Ltd v Minister of Commerce and Others**¹, **Attorney General Bolepo & Anor**,² and **the Case of Xing Long Enterprise Pty Ltd v Zhingsing Pty Ltd**³ which held the lending rates in 2015 were 7% based on the commercial repo rate.

[10] Commercial lending rates are meant to protect consumers usury or to make credit cheaper and more accessible. They are a government` intervention in the market place and a response to perceived market failures. Interests` rates are meant to cover (a) profit, (b) risk premium, (c) overhead cost, (d) costs of funds and (e) taxation. Different caps or rates are used for different types of credit e.g mortgage agreements, credit facilities, unsecured credit transactions among others. Each credit facility or agreement would attract its own interest rate or cap to be used depending on the risk and other factors. That is, there is no fixed rate for all types of credit, others attract a higher rate than others and vice versa.

¹ (CIA (CIV) 61 of 2015 [2016] LSCA 16 (29 April 2016)

² LAC (2000 - 2004) 522

³ LAC (2000 - 2004) 62.

- [11] Tax rates in Lesotho are set by the law and overseen by the Lesotho Revenue Authority. There are five (5) main tax brackets in Lesotho; Personal Income Tax (P_iT) (employees and sole traders – Two marginal rates are applicable for P_iT 20% and 30%, (b) Company Income Tax (for manufacturing companies and commercial farming 10%) and other companies 25%, (c) Withholding tax and non-resident technical services 7.5 (RSA only)), (d) fringe benefit taxable at the rate of 40%, (e) value added tax (0% - exports and basic commodities, 9% electricity, 12% - telecommunications, 15% other goods and services).
- [12] The law has further specified rates for additional tax for (a) failure to file a tax return, (b) failure to pay tax on due date, (c) under-estimation of tax payable, and (d) failure to withhold tax or pay tax withheld at 22% per twelve months, compounded annually, apportionable per month where a month includes part of the month.
- [13] It is Applicant's contention that Section 192 of the Income Tax Act refers to lending rates in Lesotho as a basis for specified rates. They argue that 22% specified rates are outside or higher than the lending rate. Therefore, Applicant prays for an order: as appears in the Notice of Motion.
- [14] Section 192 of the Income Tax Act provide "in this Division, the "specified rate" is the rate as published from time to time by the Commissioner General based on the normal commercial lending rates in Lesotho." Section 193 – 198 deal with provision on

additional taxes. Section 199 of the Act deals with recovery of additional tax.

[15] Repo rate is the rate at which the Central Bank of a country lends money to commercial banks in the event of any shortfall of funds. According to the Central Bank of Lesotho repo rate was 8.9756% in 2020. So, these banks will charge interest when lending money to the client. Interest charged to clients is variable depending on the type of local credit agreement and client. The commercial banks` prime lending rate is usually 4% to 5% above the report rate. It can even go higher than that in 2014 the maximum prime lending rate was 20.61% while was 26.19%.

[16] A tax debt is an amount of tax liability due in terms of the Income Tax Act to the Lesotho Revenue Authority. It arises by operation of statute and not by way of credit agreement or contract as in the case of commercial banks of individuals. On the other hand, the report rate (Central bank) and the commercial lending rate (Commercial banks) is not regulated by any law. The latter are enacted by act of Parliament. They are rather regulated by the Central Bank of the country in order to protect vulnerable debtors and to make credit cheaper.

[17] Tax debt on the other hand is by the result of operation of the law. Public policy may not require the taxpayer to be protected. Setting and regulating the repo rate and commercial lending rate is

important for public policy considerations, i.e protection of vulnerable debtors among others.

Can policy override the law? No matter how important

[18] At para 5 of the founding affidavit Applicants contend that the setting of specified rate at 3% per month, compounded monthly in terms of Legal Notice 130 of 2004 and subsequent setting of the specified Rate from 19 June 2015 per annum, compounded annually, is unlawful and should be substituted with interest rate based on normal commercial rate.

[19] At para 18.2 of the answering affidavit 1st and 2nd Respondents in pot concede to the contention above as follows:

“Whilst the repeated Legal Notice No 130 of 2004 cannot be declared null and void because it is no longer in existence; given that the published specified rate of the afore-stated Legal Notice No 130 was well beyond contemplated rates, the LRA will concede in the pending Revenue Appeals Tribunal proceedings between the second Applicant and 1st and 2nd Respondents, to the amendment of the assessment which made on the second Applicant. This concession was well accepted by Applicant who advisedly state they would await the assessment when its done and respond accordingly.”

[20] For the time being the thrust of the issue remains on additional tax rate 22%. Previous paragraphs of this judgement attempt to explain different type of rates and rational economic or whatever for setting rates. This was done with a view also to distinguish between rates.

[21] The issue is whether additional tax rate ought to be married at the hip with the tied to the repo rate or the commercial lending rate, whichever is lower. This is the basis of the Applicant`s case. Further, the other issue centres on the import or the meaning of the words/phrase. "...the specified rate" which is the rate as published from time to time by the Commissioner based on the normal lending rates in Lesotho."

[22] Additional tax rate is a penalty imposed on a defaulting taxpayer. It is penal in nature. This is because taxes are a compulsory contribution to the fiscal to finance government activities. ¹ Failure on the part of LRA to collect taxes in each period affects the parliamentary budgetary process and allocation of funds to various government departments and ministries. ²

[23] Commercial lending rates on the other hand are meant to protect consumers usury and to make credit cheaper and more accessible. Additional tax is a rate levied upon a tax payer`s failure to comply with Section 198 of the Act. Commercial lending rates

¹ ABC Pty Ltd v Commissioner for SARS case NO: IT 14247 at para 43

² See above a reason that additional tax can be imposed at any rate. In Commissioner for the South African Revenue Services v Afriguard additional tax rate was imposed at 200% against Respondent in terms of Section 60 (1) of the Value Added Tax Act.

are not fixed and are regulated by the Central Bank. They are determined by several factors, such as:

1. Appeal case A5017/15 'Tax Court' VAT 1132
2. Appeal case A5017/15 'Tax Court' 1132
3. Act 89 of 1991

[24] In the end the Court finds that the rate of 22% imposed by the Act is not excessive, considering the type of mischief committed by the defaulting taxpayer. The failure of the Revenue Authority to collect moneys due and its effect on the government budgetary process and allocation of funds. This rate is even lower than the rate imposed by money lenders under the law. Therefore, the penalty levied at 22% is neither excessive nor unreasonable for reasons given.

[25] In the end, the Court makes the following order:

- (a) The application is dismissed.
- (b) Costs of suit are awarded to the Applicants.

T. E. MONAPATHI

JUDGE

FOR APPLICANTS : ADV. SAKOANE

FOR RESPONDENTS : ADV. MOFILIKOANE