

URGENT

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2020/33700

In the matter between:

THE KINGDOM OF LESOTHO

Applicant

and

FRAZER SOLAR GMBH

First Respondent

TRANS-CALEDON TUNNEL AUTHORITY

Second Respondent

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY

Third Respondent

STANDARD BANK OF SOUTH AFRICA

Fourth Respondent

**THE SHERIFF OF THE COURT:
JOHANNESBURG CENTRAL**

Fifth Respondent

**THE SHERIFF OF THE COURT:
CENTURION-EAST**

Sixth Respondent

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DATE AT JOHANNESBURG ON 18 June 2021



EDWARD NATHAN SONNENBERGS INC

APPLICANT'S ATTORNEYS

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URGENT

1

**IN THE HIGH COURT OF SOUTH AFRICA
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Case Number: 2020/33700

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LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY

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STANDARD BANK OF SOUTH AFRICA

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**THE SHERIFF OF THE COURT:
JOHANNESBURG CENTRAL**



Fifth Respondent

**THE SHERIFF OF THE COURT:
CENTURION-EAST**

Sixth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicant will apply on **Tuesday 29 June at 10:00** or so soon thereafter as counsel may be heard for an order in the following terms:

- 1 The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
- 2 Pending the final determination of the proceedings referred to in paragraph 3 below:

- 2.1 The execution of the order granted by this Court in case number 2020/33700 on 3 May 2021, and any writ of execution issued pursuant to that order, including but not limited to those specifically referred to in paragraphs 2.2, 2.4, 2.5, and 2.5 below, is suspended.
 - 2.2 The execution of the writ of execution in respect of monies due to the applicant by the Trans-Caledon Tunnel Authority SOC Limited, issued by this Court dated 11 May 2021 under case number 2020/33700 and attached to this application as FA5.1 is stayed.
 - 2.3 The execution of the notice of attachment issued out of this Court under case number 33700/20 served on the Trans-Caledon Tunnel Authority SOC Limited on 17 May 2021 and attached to this application as FA5.2 is stayed.
 - 2.4 The execution of the writ of execution in respect of the monies in the bank accounts of the applicant's Lesotho Highlands Development Authority, issued by this Court dated 26 May 2021 under case number 2020/33700 and attached to this application as FA5.3 is stayed.
 - 2.5 The execution of the notice of attachment issued out of this Court under case number 33700/20 served on the Attorney General of Lesotho on 8 June 2021 and attached to this application as FA5.4, is stayed.
- 3 The applicant is ordered to instate the following proceedings within 30 days of this order, failing which this order will lapse and be of no force or effect:

- 3.1 An application in the High Court of Lesotho to declare invalid and review and set aside the Supply Agreement purportedly concluded between the first respondent and the applicant, dated 24 September 2018.
 - 3.2 An application to rescind the order granted by this Court in the applicant's absence under case number 2020/33700 on 3 May 2021.
 - 3.3 An application to review and set aside the arbitration award granted in the applicant's absence by Advocate Vincent Maleka SC, dated 28 January 2020.
- 4 In the alternative to prayers 2 and 3 above, pending the final determination of prayers 2 and 3 above:
- 4.1 The execution of the order granted by this Court in case number 2020/33700 on 3 May 2021, and any writ of execution issued pursuant to that order, including but not limited to those specifically referred to in paragraphs 2.2, 2.4, 2.5, and 2.5 below, is suspended.
 - 4.2 The execution of the writ of execution in respect of monies due to the applicant by the Trans-Caledon Tunnel Authority SOC Limited, issued by this Court dated 11 May 2021 under case number 2020/33700 and attached to this application as FA5.1 is stayed.
 - 4.3 The execution of the notice of attachment issued out of this Court under case number 33700/20 served on the Trans-Caledon Tunnel Authority SOC Limited on 17 May 2021 and attached to this application as FA5.2 is stayed.

- 4.4 The execution of the writ of execution in respect of the monies in the bank accounts of the applicant's Lesotho Highlands Development Authority, issued by this Court dated 26 May 2021 under case number 2020/33700 and attached to this application as FA5.3 is stayed.
- 4.5 The execution of the notice of attachment issued out of this Court under case number 33700/20 served on the Attorney General of Lesotho on 8 June 2021 and attached to this application as FA5.4, is stayed.
- 5 The costs of this application are to be paid by any respondent that opposes them; alternatively, shall be costs in the proceedings referred to in paragraph 3.

TAKE FURTHER NOTICE THAT the applicant intends to rely on the affidavit of Dr Majoro Moeketsi and annexures thereto in support thereof.

TAKE FURTHER NOTICE THAT the applicant has appointed **EDWARD NATHAN SONNENBERGS (WITH ZIMRI ATTORNEYS)** at the address set out below as their attorneys of record, at which address they will accept service of all notices and process in these proceedings.

TAKE FURTHER NOTICE THAT if you oppose this application, you are required to:

Serve and file a notice of opposition by email dlambert@ensafrica.com;
sharne@zimriattorneys.co.za; wndabambi@ensafrica.com; ngilfelleon@ensafrica.com;
asarfo-adomah@ensafrica.com by **17h00 on Monday, 21 June 2021**;

- a) In the notice of opposition to appoint attorneys with an address within 15 (fifteen) kilometres from the High Court, as envisaged by Rule 6(5)(b) of the Uniform Rules of Court including email addresses;
- b) File your answering affidavit by **22 June 2021**.
- c) The applicant will file its replying affidavit, if any, by 24 June 2021.

KINDLY enrol the matter accordingly.

DATED at Sandton on this 18th day of June 2021.


EDWARD NATHAN SONNENBERGS
(with ZIMRI ATTORNEYS INC.)

Per: Deon Lambert / Sharné Zimri
Applicant's Attorneys

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Sandton

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Ref: D Lambert / W Ndabambi /

TO: THE REGISTRAR OF THE ABOVE

HONOURABLE COURT
JOHANNESBURG

AND TO: **FRAZER SOLAR GMBH**
First Respondent
Birchwood Court,
43 Montrose Street,
Vorna Valley
Gauteng.
Email: robert.frazer@frazersolar.com
stephan.fintelmann@frazersolar.com

SERVICE BY HAND & EMAIL

C/O PETERSEN HERTOG & ASSOCIATE
Attorneys for the First Respondent
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18/6/2021

SERVICE BY HAND & EMAIL

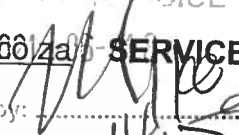
AND TO: **TRANS-CALEDON TUNNEL AUTHORITY**
Second Respondent
Email: YMoodley@tcta.co.za
psechemane@tcta.co.za
vgreen@tcta.co.za

SERVICE BY EMAIL

AND TO: **LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY**
Third Respondent
Email: bebe@molefedlepu.co.za
stanleyb@molefedlepu.co.za

SERVICE BY EMAIL

AND TO: **STANDARD BANK OF SOUTH AFRICA**
Fourth Respondent
Email: Helene.SpeelmanRose@standardbank.co.za

THE STANDARD BANK OF
SOUTH AFRICA LIMITED
WITHOUT PREJUDICE
Received by: 
Time: 14:57

SERVICE BY EMAIL

AND TO: **THE SHERIFF OF THE COURT:
JOHANNESBURG CENTRAL**
Fifth respondent
Email: sheriffjoburgcentral@gmail.com
melany@sheriffjc.co.za

SERVICE BY EMAIL

AND TO: **THE SHERIFF OF THE COURT:**

7⁷

CENTURION-EAST

Sixth respondent

Email: admin@sheriffcenturioneast.co.za

Movables@sheriffcenturioneast.co.za

SERVICE BY EMAIL

**IN THE HIGH COURT OF SOUTH AFRICA
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Case Number: 2020/33700

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THE KINGDOM OF LESOTHO

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JOHANNESBURG CENTRAL**

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CENTURION-EAST**

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FOUNDING AFFIDAVIT IN STAY APPLICATION

TAS 

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I, the undersigned,

MOEKETSI MAJORO

do hereby make oath and say:

- 1 I am an adult male and am the Prime Minister of the Kingdom of Lesotho with the office situated at Government Office Complex, Phase 1, Qhobosheaneng PO Box 527, MASERU 100 Lesotho. I was sworn in as Prime Minister on 20 May 2020, after serving as the Minister of Finance from 23 June 2017 to 19 May 2020. I have the responsibility as the Head of the Government of the Kingdom of Lesotho to depose to this affidavit on behalf of the applicant. I am therefore duly authorised to do so.
- 2 The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true.
- 3 Where I make legal submissions, I do so on the advice of the Kingdom's legal representatives, which advice I believe to be true and correct.
- 4 In this affidavit, I refer to the law of the Kingdom. A confirmatory affidavit by Albertus Kleingeld, an attorney practising in the Kingdom, will be filed together with this affidavit (or as soon as possible thereafter), confirming that the legal position in the Kingdom is as I have explained it.

THE PARTIES

- 5 The applicant is the **KINGDOM OF LESOTHO** (“**the Kingdom**”), a sovereign country duly represented by the office of Attorney-General of the Government of Lesotho in terms of the Government Proceedings and Contract Act 4 of 1965, and situated at the Government Office Complex Phase 1 Qhobosheaneng, PO Box 527, Maseru 100, Lesotho.
- 6 The first respondent is **FRAZER SOLAR GMBH** (“**FSG**”), a company incorporated under the laws of the Federal Republic of Germany with its principal place of business at Bruno-Bürgel Weg, 142-144, D-12439 Berlin, Germany. FSG is served care of its South African attorneys, **PETERSEN HERTOOG & ASSOCIATE** situated at 2nd Floor, Four On Anslow, Anslow Crescent, Bryanston, Gauteng, South Africa who have being its attorneys of record for the full duration of the dispute with the Kingdom, as well as on its South African business, Frazer Solar (Pty) Ltd, with its registered address at Birchwood Court, 43 Montrose Street, Vorna Valley, Gauteng. In addition, these papers will also be emailed to all relevant email addresses.
- 7 The second respondent is **TRANS-CALEDON TUNNEL AUTHORITY SOC LIMITED** (“**TCTA**”), a state owned company established in terms of the notice of establishment published on 12 December 1986, with registered address at Tuinhof Building, Ground Floor, Stinkhout Building, 265 West Avenue, Centurion.
- 8 The third respondent is the **LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY**, is a juristic person established in terms of the Lesotho Highlands

Development Authority Order 23 of 1986 , with registered address at Public Relations, 3rd Floor Tower Building, Kingsway Maseru, Lesotho.

- 9 The fourth respondent is **STANDARD BANK OF SOUTH AFRICA LIMITED**. Standard Bank is a public company with registration number 1962/000738/06, incorporated and registered in accordance with the company laws of South Africa, situated at 5 Simmons Street, Johannesburg.
- 10 The fifth respondent is **THE SHERIFF OF THE COURT: JOHANNESBURG CENTRAL** duly appointed as a Sherriff for the area, Johannesburg Central, in terms of sections 2 and 3 of the Sherriff's Act 90 of 1986, with his principal place of business at 21 Hubert Street, Johannesburg, Gauteng.
- 11 The sixth respondent is **THE SHERIFF OF THE COURT: CENTURION-EAST** duly appointed as a Sherriff for the area, Johannesburg Central, in terms of sections 2 and 3 of the Sherriff's Act 90 of 1986, with his principal place of business at 33 Kersieboom Cres, Zwartkop, Centurion.
- 12 The second to sixth respondents are cited for their interest in these proceedings. No relief is sought against them, save for an order for costs in the event of opposition.

INTRODUCTION

- 13 This is a matter of the utmost importance to the Kingdom of Lesotho, and which has far-reaching consequences for the country's economy. The Kingdom requires an urgent stay of writs of execution against its assets.
- 14 The judgment debt that underpins the writs of execution is the result of an arbitration award (given in the absence of the Kingdom) in the sum of €50 million, together with interest and loss of profits for alleged breach of contract. Payment of this sum would cripple the Kingdom's economy.
- 15 As I explain in detail below, the judgment debt arose as follows:
- 15.1 On 24 September 2018, a Supply Agreement, purportedly between FSG and the office of the Prime Minister for and on behalf of the Government of Lesotho, was signed ("**the Supply Agreement**"). I attach a copy as "**FA1**".
- 15.2 The Supply Agreement appears to require the Kingdom to procure loan funding, through FSG, from German financiers, to be used to procure energy-efficient products from FSG. It appears to require the Kingdom to agree to a "Finance Agreement", defined as a loan agreement between the Kingdom and the Finance Providers and attached to the Supply Agreement as Annexure A, but which is not attached to that Agreement.

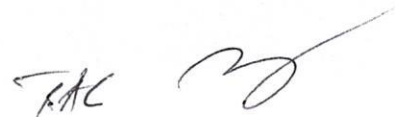
- 15.3 The quantum of the loan funding envisaged in the Supply Agreement is staggering in the context of the Kingdom's economy: €100 million.
- 15.4 The Supply Agreement appears to have been signed by former Minister Ts'olo on behalf of the Kingdom of Lesotho. At that time, Minister Ts'olo was a Minister in the office of the Prime Minister. Though he is no longer a Minister, in this affidavit, I refer to him as "**Minister Ts'olo**", as he was a Minister at the time of the events relevant to this affidavit.
- 15.5 The then-Prime Minister, Mr Thomas Motsoahae Thabane, resigned in 2020 and I was appointed as Prime Minister.
- 15.6 There is an ongoing criminal investigation into the circumstances of the signature on the Supply Agreement, which is being conducted by the Kingdom's Directorate on Corruption and Economic Offences ("**DCEO**"). In addition, I have set up a Commission of Inquiry pertaining to this precise matter. Minister Ts'olo denies that he ever signed the agreement and alleges that Mr Frazer, the managing director of FSG, and Minister Ts'olo's secretary fraudulently placed Minister Ts'olo's signature on the agreement. Minister Ts'olo's secretary, on the other hand, says that she was asked to sign the agreement as a witness by Minister Ts'olo in the presence of Mr Frazer.
- 15.7 At the time the Supply Agreement was signed, no member of the Lesotho Government, apart from Minister Ts'olo and his secretary (and the second witness, Mr Hlophe Matla ("**Mr Matla**"), the personal aid to the then-Prime Minister) had any knowledge of the signing and

existence of the Supply Agreement. Though I was subsequently (in November 2018) informed, by FSG's Mr Fintelmann, that a "supply contract" had been concluded, my understanding was that this could not be the case, as the proper processes had not been followed. I explain this in more detail later in this affidavit.

- 15.8 Minister Ts'olo was not authorised to sign the agreement on behalf of the Kingdom and had no power in law to bind the Kingdom to any agreement.
- 15.9 The Supply Agreement was never approved by Cabinet.
- 15.10 There was no procurement process conducted before the signature of the Supply Agreement, as required by the Kingdom's procurement law.
- 15.11 There are accordingly serious questions about the signature of the Supply Agreement by Minister Ts'olo. The overwhelming probability is that the entire transaction was tainted by corruption.
- 15.12 The DCEO has confirmed that its preliminary view, following its investigations thus far, is that this is a clear case of corruption and fraud perpetrated against the Kingdom by some officials working in collaboration with individuals from abroad.
- 15.13 In March 2019, FSG wrote a letter of demand to the office of the Prime Minister contending that the Kingdom had breached various terms of the Supply Agreement and demanding that it remedy the breach within 30 days. A series of such letters of demand were addressed to the office of the Prime Minister copying certain individuals, notably Minister

Ts'olo and his secretary. None of these letters of demand came to the attention of any of the relevant officials in the Kingdom's government; in particular, none of these documents were brought to the attention of the Office of the Attorney-General, which is responsible for dealing with litigation against the Kingdom.

- 15.14 On 29 July 2019, FSG sent a letter of termination of the Supply Agreement. The letter was addressed to the office of the Prime Minister and copied to both Minister Ts'olo and his secretary, Ms Ntobaki. Again, this letter did not reach the Office of the Attorney-General.
- 15.15 On 30 July 2019, FSG instituted arbitration proceedings by way of a notice of arbitration. Once again, the notice of arbitration did not come to the attention of the relevant government officials but was directed to Minister Ts'olo and his secretary. It appears that Minister Ts'olo concealed the fact of the arbitration proceedings from the Government of Lesotho.
- 15.16 FSG's purported service of legal process on Minister Ts'olo and the Office of the Prime Minister is a breach of legislation in Lesotho, which provides that the Office of the Attorney-General represents the Kingdom in all litigation.
- 15.17 As a result of the defective service and Minister Ts'olo's concealment of the legal process, the arbitration was conducted in the absence of the Kingdom and an award was made against it by default, in the amount of €50 million. I attach a copy of the arbitration award as "**FA2**".

Handwritten signature and initials, possibly 'FAC' and a stylized 'S' or 'D'.

- 15.18 In October 2020, FSG approached this Court for leave to institute motion proceedings to make the arbitration award an order of court by way of edictal citation. That order was granted, and the requirements of edictal citation were duly complied with by FSG. I attach a copy of the order for edictal citation as "**FA3**".
- 15.19 Once again, despite FSG apparently complying with the requirements of the order for edictal citation, the process did not come to the attention of the relevant officials in the Kingdom. The investigation has not been able to determine precisely how this occurred, but the DCEO has informed me that it has prima facie evidence which points in the direction of this process having been deliberately kept from the relevant officials, for a corrupt purpose.
- 15.20 As a result, and again in the absence of the Kingdom, this Court granted an order making the arbitration award an order of court on 29 April 2021. I attach a copy of the order of this Court as "**FA4**".
- 15.21 In reliance on the order of this Court, FSG has issued writs of execution and notices of attachment against the Kingdom's assets in a number of jurisdictions, including South Africa, the United Kingdom, the United States of America and Mauritius. I attach a copy of the South African writs of execution and notices of attachment as "**FA5.1**" to "**FA5.4**".
- 15.22 The existence of the judgment of this Court first came to my attention on or about 18 May 2021, through media platforms.

- 15.23 Any attachment of the Kingdom's assets to satisfy a judgment debt of this size would be catastrophic for the finances of the Kingdom.
- 15.24 I therefore immediately ordered an investigation to determine the true position, which investigation has resulted in the need for this application to stay the writs of execution pending challenges to the legality of the Supply Agreement, a review of the arbitration award and rescission of the judgment of this Court.
- 16 Due to the urgency with which this application has had to be brought, not all of the necessary investigations have been completed. However, I submit that the evidence set out below demonstrates that the Kingdom is entitled to a stay of the writs of execution pending applications to:
- 16.1 review the Supply Agreement, to be brought in the Lesotho High Court,
- 16.2 review the arbitration award, due to *inter alia* the arbitrator's lack of jurisdiction, and
- 16.3 rescind the order of this Court making the arbitrator's award an order of court.
- 17 The Kingdom seeks an order requiring it to institute these proceedings not later than 30 days from the date of the order of this Court, failing which, the stay will lapse.
- 18 This is clearly a case of the utmost urgency. If this Court were to refuse the stay, it would result in real and substantial injustice to the Kingdom, its economy and

all of its citizens. Without the stay, FSG will extract € 50 million worth of funds and assets from the Kingdom, in circumstances where there was never any lawful contractual relationship between it and the Kingdom. Once the writs are executed, the Kingdom will not be able to recover the funds, as they will almost certainly be dissipated by FSG and placed beyond the Kingdom's reach.

19 The remainder of this affidavit is structured as follows:

19.1 First, I provide the Court with the necessary context and material facts relevant to determining this application.

19.2 Second, I set out the grounds for the stay application. I demonstrate that if the stay is refused, it would result in real and substantial injustice to the Kingdom, its economy and its citizens.

19.3 Third, I demonstrate that this application is urgent.

FACTUAL BACKGROUND

20 In this section of the affidavit, I provide the court with the facts and context it requires to determine the stay application. At the outset, I emphasise that even though I was aware of FSG's proposed project during my tenure as Minister of Finance, my understanding was always that Cabinet had not approved the project, and that no lawful contract could have been entered into with FSG. Cabinet approval for a project estimated at €100 million would be a clear prerequisite for the conclusion of any valid and binding agreement with FSG.

- 21 I only became aware of the fact that a court order had been granted against the Kingdom through media reports on 18 May 2021. At this point, I had already (on 20 May 2020) assumed my new position as Prime Minister. I immediately instructed the then-Acting-Attorney-General, Ms Ntebaleng Morojele, ("**Ms Morojele**") to investigate the matter. She did so by assembling a team of legal advisers in various ministries to assist her.
- 22 I address this investigation in greater detail in the section below, relying on the documentary evidence discovered in the course of the investigation. Although I set out the relevant events in chronological order, it must be emphasised that up until May 2021, when the investigation was conducted, I and the Lesotho Government were not aware of the critical information underlying this matter. It appears that information may have been deliberately concealed in pursuit of a corrupt purpose.
- 23 The investigating team's interviews with each of the key individuals raises a strong and reasonable belief that this is a case of corruption being perpetrated against the Kingdom, and that there was deliberate attempt amongst some or all of these individuals to conceal information concerning the Supply Agreement, the notice of arbitration, the arbitration proceedings, the arbitration award and the High Court application from the former Prime Minister and the former Attorney-General. The former Acting Attorney-General, Ms Morojele was present at those interviews. A confirmatory affidavit by Ms Morejele, confirming the matters stated in this affidavit insofar as they relate to her, will be filed together with this affidavit, or as soon as possible thereafter.



- 24 The DCEO is investigating the matter, and has confirmed its preliminary view that *'this is a clear case of corruption and fraud'* involving *'government officials'* as well as *'foreign individuals.'* The letter from the DCEO, in which this statement is made, is attached as annexure "**FA6**". A confirmatory affidavit deposed to by the Director General who is heading the DCEO's criminal investigation, confirming the matters stated in this affidavit insofar as they relate to the DCEO, will be filed together with this affidavit, or as soon as possible thereafter.
- 25 The Kingdom has also set up a Commission of Inquiry (Purported Supply Agreement Between Frazer Solar GmbH and Government of Lesotho) Notice No. 62 , 2021 in terms of section 3(2) of the Public Inquiries Act 1994 into the transaction with Frazer, and the concealment of the arbitration and court documents. A copy of the Government Gazette is attached as annexure "**FA6.1**".

FSG's Proposal to the Lesotho Government

- 26 In late 2017, FSG approached the Lesotho Government with a proposal for a €100 million renewable project to improve energy efficiency and create employment utilising products and loan finance from Germany. It appears that from that point the then Minister in the Office of the Prime Minister, Minister Ts'olo, was the primary contact point between the Lesotho Government and Mr Robert Frazer ("**Mr Frazer**"), the managing director of FSG. He also appeared to be the primary individual coordinating the process.
- 27 This is clear from the correspondence the Kingdom has recently discovered during its investigations. It is not necessary to attach all of the correspondence

for the purposes of this application. However, we attach the following letters to demonstrate Minister Ts'olo's centrality to the process from the beginning:

27.1 A letter, dated 5 October 2017, from the Minister Ts'olo to kfw-Ipex Bank GmbH regarding the financing of the project is attached as annexure "FA7"; and

27.2 A letter, dated 17 October 2017, from Mr Frazer to Minister Ts'olo requesting formal advice on the suggested next steps is attached as annexure "FA8".

28 The extent of Minister's Ts'olo's involvement, even at this early stage, is irregular. It could never be appropriate for the Minister in the Office of the Prime Minister to attempt to coordinate a renewable energy project of this nature.

28.1 The agreement is in substance a loan agreement on behalf of government, which would ultimately require payment from the Consolidated Fund. In terms of section 28(2) of the Public Financial Management and Accountability Act, 2011, only the Minister of Finance can sign such an agreement, and the Ministry of Finance should have been central to its negotiation and conclusion.

28.2 The Minister of Energy and Meteorology is the appropriate contact point for energy proposals.

28.3 There was no lawful basis for Minister Ts'olo's involvement as the lead negotiator for the project.

29 As the Minister of Finance (a position I assumed on 23 June 2017 and held until 19 May 2020), I engaged with Mr Frazer on a number of occasions regarding the financing of the project over the period between October 2017 and November 2018. We exchanged various emails and we also met in person.

30 In my early engagements with Mr Frazer, I was particularly concerned with the pressure he was putting on the Lesotho Government to sign a memorandum of understanding ("**MOU**"). Even though an MOU would not be a binding agreement, I made it clear that before the Lesotho Government signs the MOU, the officials need to give the project full consideration. More specifically, in Mr Frazer's email, dated 12 November 2017, he once again pushed me to sign the MOU. I responded on 16 November 2017 as follows:

"Dear Robert,

I advise differently. Before we move to MOUs, our officials need to make sense out of this. There are technical aspects of this that we do not have the time or the sense of detail needed."

31 Mr Frazer's email, dated 12 November 2017, and my response, dated 16 November 2017, are attached and marked annexures "**FA9**" and "**FA9.1**" respectively.

32 My major concern was always that the proposed solar Project, estimated at €100 million, was not something that could be entered into without the relevant government departments and Ministers being properly informed and without the requisite approvals. It would also require full consideration of the Prime Minister as well as the Attorney-General. For a project of this scale, the Lesotho

Government would need to have the relevant documentation reviewed by a team of legal representatives and relevant experts. My view was that it was clearly the type of agreement that would bind the Kingdom for many years to come and would have a substantial impact on the country's economy.

Minister Ts'olo and Mr Frazer sign the MOU on November 2017

- 33 On 20 November 2017, Minister Ts'olo signed the MOU with FSG. Mr Frazer was the counter-signatory on behalf of FSG. Although the MOU is a non-binding agreement, Minister Ts'olo had no authority to sign it. Further, my email to Mr Frazer dated 16 November 2017 was clear – the Lesotho Government should not sign the MOU without further information. For this reason, I did not sign the MOU. It is inconceivable that Mr Frazer and Minister Ts'olo would sign an MOU within four days of my email clearly stating that this should not be done.
- 34 This appears to be the start of a series of steps between FSG and Minister Tso'lo to implement a project proposal that had not been properly approved by the Kingdom. To the best of my knowledge, not one other person in the Lesotho Government was informed that Minister Ts'olo signed the MOU. I attach a copy of the MOU as annexure "FA10".
- 35 The purpose of the MOU, as a non-binding agreement, was to give effect to the parties' intention to proceed with the project subject to final approval by the Government. It sets out the parameters of the project proposal, namely, the installation of 36 000 to 40 000 SWHs and up to 1 million LED lights in all Government buildings and homes of public servants over a period of four years.



The MOU also recorded that the project, if approved, would be funded through a German export credit loan procured from a German financing institution in the amount of € 100 million repayable over a period of ten years.

- 36 As I explain below, before the Kingdom could enter into any such agreement, it was a legal requirement for there to be an open and competitive tender process and an evaluation of competing bids. No such process was ever conducted in respect of either the MOU or the Supply Agreement.
- 37 Minister Ts'olo should not have signed the MOU. Important information was still required and lawful procedures needed to be followed before the proposal could be accepted and approved by the Lesotho Government.
- 38 Any MOU of this kind would have had to go through the following processes before it could be entered into on behalf of the Kingdom:
- 38.1 An open and competitive tender process would have to be conducted in terms of the country's procurement laws.
- 38.2 The Ministry of Energy would have had to submit a proposal to the Ministry of Planning.
- 38.3 The Ministry of Development Planning would have had to then convene the Public Sector Investment Committee ("**PSIC**") to evaluate the project proposal.

- 38.4 Thereafter, the Ministry of Development Planning through PSIC would have had to consider and approve the proposal. This would include a viability and bankability assessment.
- 38.5 Then the proposal would have to be submitted to Cabinet for endorsement.
- 38.6 The Ministry of Finance would then have to negotiate and sign the agreement.
- 38.7 Finally, the Ministry of Energy would have to implement the project.
- 39 In the light of the above, it is clear that the Minister of Finance, the Minister of Energy and the Minister of Development Planning play important roles in projects of this nature because they have immense financial implications for the Kingdom. For this reason, Cabinet would need to approve that the MOU should be signed. As already indicated, I did not sign the MOU. It could never be entered into by Minister Tso'lo because obviously in terms of the above stated procedure he did not have the necessary capacity to sign.

Period between 20 November 2017 to 6 June 2018

- 40 After the MOU was signed, it appears that there was little movement in relation to the proposal for the project. This is clear from the letter from Mr Frazer to Minister Ts'olo, dated 8 May 2018, attached as annexure "FA11". The letter records that FSG had been discussing the Project with Lesotho since August 2017 and goes on to address the fact that the project had not progressed. It states as follows:



“Progress on the Project has slowed in recent months. The German government which has already pre-approved the funding has indicated concern at this and has requested I meet with the Right honourable Prime Minister to discuss this matter prior to attending a meeting called by the German Ambassador in Pretoria next week.

I hereby formally request your assistance to help me arrange a meeting with the Right Honourable Prime Minister for a time convenient to him this week. I realise this is short notice but meeting this timing is a critical step for this very important project.”

41 I do not know whether this meeting took place. Nor do I know what transpired in communications between Minister Ts’olo and Mr Frazer at that time. However, I personally engaged with Mr Frazer via email in the early months of 2018, in my capacity as then-Minister of Finance, specifically on the financing component of the proposed Project. The nature and extent of our email exchange can be summarised as follows:

41.1 On 28 February 2018, Mr Frazer addressed an email to me and requested a meeting. This email is attached as annexure “**FA12**”.

41.2 On 6 March 2018, Mr Frazer addressed an email to me again requesting a meeting to discuss the project proposal. He stated that we should convene in anticipation of an internal meeting with the Government of Lesotho, which he anticipated would take place soon. He further wished to advise me on discussions with the German officials regarding the proposed project. This email is attached as annexure “**FA13**”.

41.3 On 10 March 2018, Mr Frazer addressed an email to me and Minister Ts’olo. He provided us with an updated business proposal dated 10

March 2018. This email, dated 10 March 2018, is attached as annexure "**FA14**".

- 41.4 On 16 March 2018, Mr Frazer addressed an email to me for the fourth time noting that he had been waiting seven weeks to meet with me. He requested that I give the Minister of Energy the "green light" to prepare a Cabinet paper in respect of the project proposal. The email is attached as annexure "**FA15**".
- 41.5 On 21 March 2018, Mr Frazer addressed another email informing me that he would extend his stay so that we could meet. This email is attached as annexure "**FA16**".
- 41.6 On 23 March 2018, Mr Frazer addressed an email to me, Minister Ts'olo and the Minister of Energy, informing us that '*the pre-approved German government finance offer*' was due to expire by the end of March 2018. However, the German government had 'remarkably' extended it. He urged me to '*bring this matter to a conclusion.*' I did not take any additional step to 'bring the matter to a conclusion' or to have the project proposal approved. This email is attached as annexure "**FA17**".
- 41.7 On 3 April 2018, Mr Frazer addressed a further email urging me to meet with him. On the same day, Mr Frazer and I agreed to meet on 4 April 2018. Mr Frazer then sent me two letters of intent Kfw-Ipex Bank. The emails are attached as annexures "**FA18**" and "**FA18.1**".



- 41.8 On 7 April 2018, Mr Frazer emailed me requesting me to acknowledge the German KfW Ipex Bank's letter of intent and requested a formal finance offer. The email is attached as annexure "**FA19**".
- 41.9 On 14 April 2018, I replied by stating that I would communicate with the bank when I was in Washington. However, on the same day, Mr Frazer sent an email to me stating that Minister Ts'olo had already written to the bank. At the time, I thought this was strange since Minister Ts'olo should not be engaging with foreign parties on financing issues which is the Minister of Finance's field of authority and expertise. These emails are attached as annexure "**FA19.1**" and "**FA19.2**".
- 42 On 26 April 2018, after my return from Washington, Mr Frazer again requested a meeting with me. The email is attached as annexure "**FA20**". The meeting did not occur.
- 43 As is evident from the above, since I was the Minister of Finance at the time, the emails were chiefly concerned with the financing aspect of the proposed Project. It is clear from these emails that the project proposal was far from being approved. This is especially so when considering the fact that I, along with Minister Ts'olo and the Minister of Energy, received a new business plan, dated 10 March 2018, via email and I had not engaged with the German financiers. I reiterate that, throughout these engagements, I was not aware that the MOU had been signed.

44 Notwithstanding that the Project had not been approved by PSIC, Minister Ts'olo went ahead with preparing a memorandum dated 6 June 2018 requesting Cabinet to approve the Project. He did this even though he was aware that I had not had an opportunity to engage with the German financiers of the project. I am also certain that I did not give the Minister of Energy 'the green light' as per the email dated 16 March 2018.

Minister Ts'olo attempted to get approval for the project through a memorandum dated 6 June 2018

45 Minister Ts'olo and/or his secretary prepared a memorandum dated 6 June 2018 to be submitted to Cabinet. The memorandum is attached as annexure "FA21". In terms of this memorandum, Minister Ts'olo provided his recommendation that Cabinet approve the proposal. The relevant excerpt from the memorandum reads as follows:

"I recommend that Cabinet approve:

The € 100 million (M 1.5 billion) low interest loan project funded by the German Government for Energy Efficiency and Employment Creation in Lesotho.

....

4. The Honourable Ministers of Finance; of public service; of local government and chieftainship Affairs; of Energy; of Public Works and Transport; and of Development Planning have been consulted and they concur.

5. Cabinet is invited to advise in accordance with paragraph 1 above."

46 At the Cabinet meeting on 12 June 2018, the memorandum proposed by Minister Ts'olo dated 6 June was withdrawn. It was withdrawn because it was presented

by Minister Ts'olo and not the Minister of Energy and had not gone through the necessary procedures. The document verifying this is attached as annexure "FA22" to this affidavit.

47 In the light of the above, as at 12 June 2018, it is clear that Cabinet had not approved the proposal for this project. After that, no other formal recommendation was put to Cabinet regarding the approval of this project.

The unlawful "Supply Agreement" concluded on 24 September 2018

48 Notwithstanding the fact that there was no Cabinet approval for the project, Minister Ts'olo, of his own accord and without any authority, signed the Supply Agreement on 24 September 2018.

49 Minister Ts'olo's signature was witnessed by his secretary, Ms Ntobaki, and Mr Matla, the personal Aid to the then-Prime Minister.

50 The Supply Agreement is not a typical Supply Agreement. It does not involve the mere provision of products and services in exchange for a fee. It purports to bind the Kingdom to far greater obligations, which would clearly require the extensive involvement of the Minister of Finance and Cabinet consent or approval. In this regard, the following clauses of the Supply Agreement are relevant:

50.1 Clause 1.1.9 defines "the Finance Agreement(s)" as "*the loan agreement(s) concluded between the [Ministry of Finance of Lesotho] on behalf of GoL and the Finance Providers, and annexed hereto as*

annexure A.” No Finance Agreement is attached to the Supply Agreement.

50.2 Clause 11 of the Supply Agreement binds the Lesotho Government to the following obligations in relation to the Finance Agreement / Finance Providers:

50.2.1 The Government of Lesotho (“**GoL**”) shall be fully responsible for all repayments of the loan funding provided by the Finance Providers.

50.2.2 GoL will on-lend the Project funds that it receives from the Finance Providers to the various non-governmental entities, civil servants, private sector organisations, and individuals to whom the Products will be delivered and Services rendered by FSG in accordance with the requirements of the Project. Irrespective of who GoL on-lends these funds to, GoL shall nevertheless be solely responsible for repaying the loan finance to the aforementioned Finance Providers.

50.2.3 GoL shall be responsible for ensuring that sufficient funds are set aside and at times available for purposes of the loan repayments, and furthermore, will ensure that the Project is included in the Ministry of Finance’s official budget on government income and expenditure, this notwithstanding the electricity savings that will accrue to GoL over times. The Supply Agreement accordingly purports to fetter the power of the Ministry of Finance to determine the national budget.

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50.2.4 GoL undertakes that it will comply with all the Finance Agreements covenants, including but not limited to peremptory terms stipulating that the loan must be separate line item in the budget.

50.3 Clause 12 provides for the consideration payable for the products and services in respect of the project as follows:

50.3.1 FSG will be remunerated during the Term and/or Extended Period, as the case may be, of the Project by way of direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every 6 months on the basis provided for in the Draw-down schedule, as follows:

- (a) On the commencement date – 30% of the Project Value, being € 30 million;
- (b) On the first day of the 6th month after the commencement date – 20% of the Project value, being € 20 million;
- (c) On the first day of the 12th month after the commencement date – 20% of the Project value, being € 20 million;
- (d) On the first day of the 18th month after the commencement date – 20% of the Project value, being € 20 million;

(e) On the first day of the 24th month after the commencement date – 10% of the project value, being €10 million.

50.4 Clause 17.1.3 provides that GoL warrants that *“it will have signed and bound itself to the terms of the Finance Agreement prior to or contemporaneously with the execution by GoL of this Agreement”*.

51 This is no ordinary Supply Agreement. In addition to its supply obligations, it functions as a loan agreement which imposes full responsibility on the Kingdom to repay the loan funding to be provided by the Finance Providers.

52 In addition, the consideration for the Supply Agreement is linked directly to a state draw-down schedule in a Finance Agreement. Since these obligations fall squarely in the scope of the Ministry of Finance, Minister Ts’olo would have no authority to sign an agreement of this nature without my involvement and without me (as then-Minister of Finance) specifically obtaining Cabinet approval.

53 The Supply Agreement is, on its face, unlawful and invalid because it breaches section 28 of the Public Financial Management and Accountability Act, 2011:

53.1 In terms of section 28(1) only the Minister of Finance, with the prior consent of Cabinet, can approve borrowings of funds for public purposes.

- 53.2 In terms of section 28(2), loan agreements on behalf of government must be signed by the Minister of Finance after consultation with Cabinet.
- 54 I was the Minister of Finance at the time. I did not consult with Cabinet, and nor did I approve the borrowing of funds for public purposes contemplated in the Supply Agreement. I did not sign the Supply Agreement.
- 55 On these grounds alone, the Supply Agreement will be reviewed, set aside, and declared void ab initio by the Lesotho High Court.
- 56 In addition, it could never have been reasonable for FSG to believe that Minister Ts'olo was empowered or authorised to sign the Supply Agreement on behalf of the Kingdom.
- 57 To the best of my knowledge, at the time the Supply Agreement was signed, no official in the Lesotho Government except for Minister Ts'olo and his secretary had any knowledge of the Supply Agreement or that it had been signed. Though Mr Matla also witnessed the signature of the document, he has informed the DCEO that he did not know what it was he was signing. He was simply called into the office to witness Minister Ts'olo's signature.
- 58 It is also not clear to me how Mr Frazer himself could believe that signing this agreement on 24 September 2018 would be lawful. His interactions with me, as Minister of Finance, up until April 2018, had not led to anything final on the financing side of the deal. The email correspondence confirming that Mr Frazer

was alive to the fact that Cabinet had withdrawn the Cabinet memorandum are attached as annexures "FA23.1" and "FA23.2".

- 59 Moreover, on 10 December 2018, nearly 3 months after the date of the signing of the Supply Agreement, Minister Ts'olo addressed a letter to Mr Frazer. This letter requested further time so that other government stakeholders could be engaged. The letter makes no reference to the Supply Agreement. It states as follows:

"On behalf of the Government of the Kingdom of Lesotho, I would like to reassure you that we are still committed to pursuing the Energy Efficiency Project as per our previous correspondence. Please note that due to lack of time concerning other stakeholders, I wish to request your indulgence that the Government of Lesotho requires additional time for other stakeholders to have a clear understanding of the project in order to engage in consultation with the Government of the Federal Republic of Germany regarding the finance offer.

I wish to apologise for the extended period of time in which it has taken so far and assure you it will not be much longer for a final decision to be made. This is a project of national importance that will benefit hundreds of thousands of Basotho for decades to come and would wish to commence as soon as a possible, once a consensus has been reached."

(Emphasis added).

- 60 It is clear from the above that the relevant government approvals and consultation processes had not reached completion. In these circumstances, it is inconceivable that Minister Ts'olo and Mr Frazer could have signed the Supply Agreement in the genuine belief that it would result in a lawful agreement in pursuit of a project proposal that had not been approved by Cabinet. This is especially so considering that, as far back as November 2017, I had personally

indicated to Mr Frazer that a project proposal of this magnitude required careful consideration of the Lesotho Government and that due process was imperative.

Interactions with FSG after the unlawful Supply Agreement was purportedly concluded

- 61 I had some interactions with FSG after the Supply Agreement was purportedly concluded (though I was not aware), following on from our earlier engagements regarding the financing of the proposed project.
- 62 On 4 September 2018, Mr Frazer had emailed me expressing his desire to work with the Prime Minister to influence Cabinet to issue a policy clearance. The email is attached as annexure **"FA24"**.
- 63 On 20 October 2018, I replied to Mr Frazer's email, reiterating that the project ought to be initiated and owned by the Ministry of Energy and that it ought to have Cabinet clearance. The email is attached as annexure **"FA24.1"**.
- 64 On 2 November 2018, Mr Frazer's partner at FSG, Mr Fintelmann, emailed me informing me that a "supply contract" had been concluded. The email is attached as annexure **"FA25.1"**. His email reads, in relevant part, as follows:

"Frazer Solar has been working with the government of Lesotho on an Energy Efficiency Project for about a year. In the process, intensive discussions were held with all ministries and stakeholders concerned. The cooperation has been fruitful so far and led to an agreement on what will be implemented. This agreement was concluded in the form of a supply contract between the Government of Lesotho and FSG. It is fully in line with

the goal of renewing the energy system of Lesotho already adopted by the government in 2015.

For the implementation of the project, there is currently a lack of funding, which Germany has offered, but now has to be implemented. Unfortunately it does not seem to me that there is any progress at this time, so I am writing to you today.” (emphasis added)

- 65 Though Mr Fintelmann’s email said that a “*supply contract*” had been “*concluded*” between FSG and the Government of Lesotho, I did not believe that this could be so, or that any contract to which he referred could be lawful, valid and binding on the Kingdom. As I have explained above, the legal requirements for the Kingdom to enter into the Supply Agreement were simply not met. For that reason, I did not consider it possible that a binding agreement had actually been concluded on behalf of the Kingdom, with FSG.
- 66 I emphasise that no official in the Kingdom’s government (including, most notably, Minister Ts’olo) ever informed me of the existence of the Supply Agreement.
- 67 On 28 November 2018, Mr Fintelmann emailed a follow up to his 2 November 2018 email. The email is attached as **annexure “FA25.2”**.
- 68 On the same day, I replied that such a project would have to be financed by the resources of the Kingdom, even if these are to be borrowed. This means that the project is subject to ordinary rules of government investment, including that the project would have to be initiated by the relevant Minister – in this case, the Minister of Energy. The email is attached as **annexure “FA25.3”**.

69 Until the proper processes had been followed, my understanding was that the proposed project remained just that – a “*proposed project*” – and could not lawfully be implemented. That was the tenor of my communication to Mr Fintelmann on 28 November 2018.

Alleged breach and termination of Supply Agreement

70 On 11 March 2019, FSG’s legal representatives, Peterson Hertog, addressed a letter of demand to the Office of the Prime Minister. The letter of demand alleged that the Lesotho Government had breached various terms of the Supply Agreement and demanded that it remedy the breach within 30 days of receipt of such notice. The letter further advised that if this 30-day notice period was unreasonable, the Lesotho Government would have 60 days to remedy the breach failing which FSG would refer the dispute to arbitration. This letter is attached as annexure “**FA26**”.

71 On 11 July 2019, FSG’s legal representatives, Peterson Hertog, sent a further letter to the Office of the Prime Minister. This letter recorded that no response had been received in relation to the earlier demands. It raised further issues relating to information in the public domain regarding a potential solar project by Chinese investors in Lesotho. This letter is attached as annexure “**FA27**”.

72 On 29 July 2019, FSG terminated the Supply Agreement and indicated that it intended to exercise its right to have the dispute resolved by way of arbitration. This letter is attached as annexure “**FA28**”.

- 73 All three of these letters were addressed to the office of the Prime Minister and the following individuals were copied: Government Secretary (Moahloli Mphaka), Minister Ts'olo (the Minister in the Office of the Prime Minister) and his secretary, Ms Ntobaki.
- 74 None of the documents referred to above were sent to or received by the Office of the Attorney-General. They were only discovered by the Kingdom in the course of the investigation it has conducted in the last few weeks.
- 75 Moreover, it is a requirement of law in Lesotho that litigation process against the Kingdom be served on the Office of the Attorney-General, which was never done by FSG.
- 76 The former Acting Attorney-General's recent investigation reveals that none of these individuals took any action in relation to the letters of demand and termination. In fact, the Supply Agreement and relevant letters were not brought to the attention of the most critical officials in the Lesotho Government – most crucially, the Attorney-General, the official who is statutorily responsible for dealing with litigation against the Kingdom.

Arbitration proceedings and the arbitration award

- 77 On 30 July 2019, FSG instituted arbitration proceedings by way of a notice of arbitration. The notice of arbitration has the following unusual features:

77.1 It describes the respondent as follows:

6. The Respondent is:

The Kingdom of Lesotho, whose contact details are:

The Office of the Prime Minister
Government Office Complex
Phase 1 Qhobosheaneng
Maseru 100
Kingdom of Lesotho

Postal address:
PO Box 527
Maseru 100
Lesotho

77.2 This description of the Kingdom of Lesotho as the respondent corresponds with the definition of the Kingdom of Lesotho contained in clause 1.1.13 of the unlawful Supply Agreement.

77.3 It appears that FSG may have purported to effect service on the Office of the Prime Minister at the address set out above. It appears from the arbitrator's award that a series of notices and letters were served on the office of the Prime Minister, and that confirmations of receipt by that office were provided (arbitrator's award paragraphs 15 to 21). I have not been able to confirm the correctness of these findings in the time available.

77.4 But even if the notices were served on the office of the Prime Minister, it is a requirement of law in the Kingdom that such proceedings should have been served on the Office of the Attorney-General, not the Prime Minister.

Handwritten signature and initials, possibly 'TAC' and a stylized signature.


- 77.4.1 In terms of section 3 of the Office of the Attorney-General Act 6 of 1994 (as amended), *“the Attorney-General shall represent the Government of Lesotho in all legal proceedings in which the Government is a party.”*
- 77.4.2 In terms of section 3 of the Government Proceedings and Contracts Act, 1965, in actions against the government, the Principal Legal Adviser (that is, the Attorney-General) is to be the nominal defendant or respondent.
- 77.4.3 I attach copies of these two pieces of legislation as **“FA29”** and **“FA30”**.
- 77.4.4 In terms of Rule 4(1)(h) of the Rules of the Lesotho High Court, service of process is effected *“Where the Government of Lesotho or any Minister of the Government is to be served, by delivering a copy of the process to the Solicitor General”*. The reference to the “Solicitor General” now means the Attorney-General.
- 77.5 The purpose of the requirement that legal process be served on and conducted through the Office of the Attorney-General is to ensure that litigation is responded to by the government department responsible for doing so.
- 78 As a result of the failure to cite or serve on the office of the Attorney-General as required by statute, the only individuals who received the notice are the same ones who failed to inform any other government official of the signature of the

Supply Agreement, letters of demand and termination letter. These individuals are Mr Mphaka (the Government Secretary), Ms Lebusa (Mr Mphaka's secretary), Mr Ts'olo (the Minister in the Office of the Prime Minister) and Ms Masentle Ntobaki (Mr Ts'olo's secretary). Needless to say, to the best of my knowledge, these individuals did not inform anyone else in the Lesotho Government of the arbitration notice.

- 79 It also appears from the correspondence that the Lesotho Government has recently discovered that Minister Ts'olo was directly engaged in relation to the arbitration proceedings. He informed all participants in the arbitration that the Lesotho Government would not be attending the pre-arbitration meeting that took place in early September 2019. This was despite the fact that he had not brought the arbitration notice to the attention of any member of the Lesotho Government and had no authority to conduct the litigation on behalf of the Kingdom.
- 80 The pre-arbitration minutes record the following in relation to the 'participation of the respondent' (the Lesotho Government):

"3. Participation of the Respondent

The arbitrator noted that, with the consent of the claimant, he made contact with a serving member of the executive (cabinet) of the respondent, Minister Ts'olo, to enquire whether the respondent would be appearing at the preliminary meeting. The arbitrator explained that he spoke with Minister Ts'olo who said that the respondent would not be participating in the preliminary meeting. The arbitrator recorded that he indicated to Minister Ts'olo that the preliminary meeting would be proceeding at the schedule time and invited the respondent to participate."

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The pre-arbitration minutes and the covering email dated 17 September 2019 is attached as annexure "FA31".

81 It appears that Ms Ntobaki and Minister Tso'lo were the only ones who were copied in all of the pre-arbitration correspondence. It is simply inconceivable that FSG and its legal representatives could have believed that it was permissible to bypass the office of the Attorney-General for the purpose of conducting the arbitration in this way.

82 When the statement of claim was filed and the Kingdom was required to put up a defence in the arbitration, no statement of defence was filed. A letter from FSG's legal representative to the arbitrator, Advocate Vincent Maleka SC, records the following:

"We note that the Respondent in the above-referenced matter has not filed its statement of defence in accordance with Annex A of Procedural Order No. 1 dated 16 September 2019. Accordingly, pursuant to items 3 and 4 of Annex A of the Procedural Order No. 1, a preliminary procedural call is to be held on 25 November 2019 and the hearing to be held on 2 December 2019 (and if necessary, 3 December 2019)

As anticipated in Procedural Order No. 1, we are writing to confirm the Preliminary Procedural Call scheduled to take place on Monday 25, November."

This letter, dated 22 November 2019, is attached as annexure "FA32" to this affidavit.

83 Thereafter, on 25 November 2019, a procedural call was held. The arbitrator requested FSG to provide documents evidencing that the Lesotho Government

was properly served. FSG, through its legal representatives, responded to the arbitrator on the same day. The letter confirms that service was properly effected and attaches the following documents for the arbitrator's records:

- *“Emails dated 7 October 2019 filing the statement of claim, with representatives of the respondent;*
- *Letter dated 9 October 2019 serving the statement of claim on the respondent with acknowledgment of receipt dated 14 October 2019;*
- *Email dated 22 November 2019 regarding the procedural call with representatives of the respondent in copy;*
- *Letter dated 22 November 2019 regarding the procedural call and confirmation of hard copy service of the same on the respondent dated 25 November 2019.”*

84 This letter of 25 November 2019, as well as the email dated 7 October 2019 and the emails dated 22 November 2019, referred to in this letter, are attached as annexures **“FA33.1”**, **“FA33.2”** and **“FA33.3”**. I have not been able to locate the letter dated 9 October 2019.

85 Again, none of these documents was copied to or served on the Office of the Attorney-General, the only office with the legal power to represent the Kingdom in legal proceedings.

86 It appears from the email dated 7 October 2019 and one of the emails dated 22 November 2019 that Ms Ntobaki and Minister Ts'olo were the relevant persons from the Kingdom who received the correspondence.

87 In relation to the second email of 22 November 2019, the Office of the Prime Minister was copied. I reiterate that the Office of the Prime Minister is the office



where Minister Ts'olo and Ms Ntobaki were employed. These are also the same two individuals who were continually copied in the pre-arbitration correspondence and the same two individuals who did not communicate the fact of the agreement, the breach, the termination letter and the arbitration proceedings to any other individuals within the Kingdom.

88 Since the arbitrator was satisfied that the Kingdom was properly served, the arbitration hearing took place on 2 December 2019 in the absence of the Kingdom. Had the Kingdom been made properly aware of arbitration proceedings through service on the Office of the Attorney-General, it would certainly have defended the claim, including by challenging the validity of the contract purporting to confer jurisdiction on the arbitrator.

89 On 28 January 2020, the arbitrator made the following award:

89.1 The respondent is directed to pay the claimant liquidated damages in the sum of € 50 million;

89.2 The respondent is ordered to pay pre-award interest on the above sum of € 50 million in the amount of € 754 273;

89.3 The respondent is ordered to pay the post-interest award in the sum of € 50 million calculated at 1.7% per annum from the date of the award to date of payment, and payable in the Euro currency;

89.4 The respondent is ordered to pay the costs of the arbitration; and