

Big blow for Frazer Solar

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MASERU – THE High Court this week delivered a massive blow for Frazer Solar, a Germany company trying to impound Lesotho's assets over a botched solar power deal.

The court ruled that the M2 billion contract Frazer Solar signed with former Minister Temeki Tšolo in 2018 violated Lesotho's constitution and procurement regulations.

This, the court said, means the contract the company has been claiming the government breached is null and void.

The contract was for Frazer Solar to install solar heaters,

solar photovoltaic systems, and LED lights in government buildings and civil servants' homes.

The judgement puts the company on the back foot in its aggressive attempt to confiscate Lesotho's international assets.

The company has been pursuing Lesotho's assets in South Africa, the United States, the United Kingdom and Mauritius.

And last week it was granted an order to confiscate the bank accounts of Lesotho's consulate in Belgium. The government says it is challenging the decision.

Lesotho is also challenging the arbitration award granted to the company in South Africa. It is the same award the company is using to go after Lesotho's properties in other countries. The case continues.

The ruling in Lesotho could however turn the tables against Frazer Solar.

The High Court ruling paints a picture of what looks to be an elaborate scheme to fleece the government.

At the centre of that plot was Robert Frazer, Frazer Solar's managing director, and Tšolo who was Minister in Prime Minister Thomas Thabane's office.

The judgement reveals how Tšolo and Frazer aggressively pushed for the contract despite being aware that it had

not been approved by the cabinet and procurement procedures had not been followed.

Tšolo signed the initial Memorandum of Understanding (MOU) with Frazer four days after former Prime Minister Moeketsi Majoro, who was then finance minister, refused to sign it. Majoro told Tšolo that he could not sign the MOU before it was scrutinised by the relevant ministries' officials.

But Majoro's rebuff didn't stop Tšolo from signing the MOU on the government's behalf. Nor did it stop Tšolo from preparing a memorandum requesting the cabinet to approve the deal.

The court said Tšolo lied to the cabinet that he had consulted the Ministers of Finance, Public Service, Local Government, Energy and Development Planning.

Tšolo later withdrew that memorandum before it was approved by the cabinet but continued to push the deal with Frazer.

Although the cabinet did not approve the project and Majoro refused to sign it off, Tšolo told Frazer, in a letter, that the government "agrees and commits" to the project.

Without cabinet approval, Tšolo told Frazer, in the same letter, that the government was looking forward to the implementation of a "transformational project which will greatly benefit all Basotho and create closer bonds

between Germany and Lesotho”.

The court said “Tšolo’s mind was dead set on concluding the agreement regardless of every legal impediment which stood in its way”.

Tšolo and Frazer went ahead to sign the Supply Agreement in September 2018 without cabinet approval.

It is that agreement that has now put Lesotho’s international assets in danger, with the company claiming that the government owes it about M900 million for breach of contract.

The court said the Supply Agreement dishonestly referred to a “financial agreement” which it called annexure A.

That financial agreement, the court noted, was not attached because it had not been signed by Majoro as Minister of Finance.

The absence of that financial agreement, however, did not stop the Supply Agreement from committing the government to making loan repayments and paying Frazer Solar.

The wording in the Supply Agreement also appears to provide a cover for the company’s failure to follow procurement regulations.

One clause says “the Agreement and the Project complies with all the laws of the Government of Lesotho in respect

of procurement, including but not limited to the Regulations and this contract has been approved by the Chief Accounting Officer”.

The court said this was not true and Tšolo was being “mendacious” when he signed the agreement.

Frazer Solar also appears to have tried to insulate itself from the potential risk that Tšolo was not authorised to sign the agreement on the government’s behalf.

One clause says Tšolo had “the power, authority and legal right to sign this Agreement and this Agreement has been duly authorised by all necessary actions of its trustees and constitutes valid and binding obligation on it”.

Tšolo had no authority to sign that agreement on the government’s behalf.

The court said the supply agreement is invalid because it was signed without following an open tendering process as stipulated in the regulations.

During trial Frazer Solar conceded that the agreement did not comply with procurement regulations but claimed this was none of their business. The company argued that it should not be expected to know that the agreement did not comply with the procurement regulations.

The court however said while the company wanted to play victim, it was convinced that it knew that the agreement violated procurement regulations.

It said although the company's proposal was unsolicited, it should have known that procurement regulations should have been followed for it to be considered a preferred supplier.

The court said the Supply Agreement and the arbitration clause in it was "unconstitutional, unlawful and invalid and is reviewed and set aside".

Last night, Frazer Solar issued a statement dismissing the ruling as "irrelevant" and announcing that it was intensifying its efforts to impound Lesotho's international assets.

"The judges have confirmed that the government of Lesotho chose the wrong method with which to proceed with Frazer Solar's renewable energy project.

"We acted in good faith throughout by proceeding with the procurement rules provided by government officials," said an unnamed company spokesperson in the statement.

"If the government thought that the High Court's decision could be used as a further delaying tactic, then they face an unpleasant surprise.

"The Belgium court's recent ruling in Frazer Solar's favour demonstrates our ability to target the Kingdom's assets and bank accounts anywhere in the world."

“The High Court’s decision will only serve to accelerate our plans to launch fresh enforcement proceedings across multiple legal jurisdictions,” he said.

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