

CARMEL RICKARD: Lesotho's ministerial malfeasance may affect South African water supply

If a German alternative energy company continues its legal action against Lesotho over a disputed €100m contract, South Africa may feel the fallout

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Could a new decision by three judges of Lesotho's high court help temper the dispute between Maseru and Frazer Solar, a German manufacturer of alternative energy systems? South Africa will certainly be hoping so: if not, Lesotho's supply of millions of cubic metres of water to the country could be at risk.

The dispute dates back to 2018, when Temeki Tšolo, then minister without

portfolio in the Lesotho prime minister's office, signed a supply agreement with Frazer Solar. That contract was for the company to supply solar heaters, lights and other systems for Lesotho. In terms of the contract, Maseru was obliged to borrow €100m (about R1.78bn in today's terms) from German financial institutions to pay for the lights and other costs.

However, Lesotho subsequently reneged on the deal. Frazer Solar then obtained an arbitration order to the effect that Maseru owed it €50m in damages, plus costs and interest. The company has since begun the process to seize assets of the Lesotho government — including steps to attach the bank account of the Trans-Caledon Tunnel Authority, which pays millions of rand a month to Lesotho for water provided to South Africa.

That attachment is still winding its way through the courts but the consequences, if it is successful, could be serious for South Africa as well as Lesotho.

Against this background, the judgment by a full bench of Lesotho's high court was always going to be crucial, as it had to decide whether the contract was valid in the first place.

The court had little doubt about the matter. "Minister Tšolo had no authority at all to conclude the agreement" on behalf of the Lesotho government, the judges found.

Moroke Mokhesi, who wrote the decision with the unanimous agreement of chief justice Sakoane Sakoane and Realeboha Mathaba, trawled the documentation and other evidence showing, step by step, how the contract came to be in existence. They said it was "clear" that Tšolo's "mind was dead set on concluding the agreement, regardless of every conceivable legal impediment which stood in its way".

They pointed out "deliberate misrepresentation" leading up to the signing, "dishonest" statements, and that Tšolo had been "mendacious". (The former minister, since charged with corruption, says his signature on the

documents is forged.)

An invalid agreement

Strangely, Lesotho has, until relatively recently, shown little alacrity in handling the matter. For example, the South African arbitrator, senior counsel Vincent Maleka, noted in his award that he was satisfied Lesotho had been given proper notification that the matter was to be heard. Maseru, however, sent no representatives to attend the matter before Maleka.

Still, the government put up a spirited case before the high court in Lesotho, arguing that the contract breached regulations, the law and the constitution. The judges agreed, saying that the many procurement breaches led to the inescapable conclusion that the agreement was invalid, should be reviewed and set aside, and declared void from the start.

They said the country's procurement regulations are based on ensuring competitiveness around tendering and fostering accountability and transparency, and are meant to ensure that "legality is not sacrificed at the altar of patronage and nepotistic behaviour on the part of those entrusted with exercising this important public power".

The court also referred to the serious impact it would have on the economy of Lesotho if it had to pay the €50m award. Reacting to the "overwhelming evidence" about the economic impact of the award, Frazer Solar argued Lesotho has alternative sources of funding — Chinese food aid, for example, and loans and donor grants.

What happens next? Earlier this month, Frazer Solar said it had seized the bank account of Lesotho's embassy in Belgium. And after the new judgment, it said Maseru was in for "an unpleasant surprise" if it thought the high court decision could be used as a further delaying tactic. This, the company said, would only accelerate its plans "to launch fresh enforcement proceedings across multiple legal jurisdictions".