IN THE HIGH COURT OF LESOTHO
(HELD IN MASERU)

Case no: CIV/APN/332/2021

In the matter between:

ATTORNEY-GENERAL Applicant

and

FRAZER SOLAR GMBH First respondent

FRAZER SOLAR (PTY) LTD Second respondent

MINISTER IN THE OFFICE OF THE PRIME MINISTER OF THE KINGDOM OF LESOTHO Third respondent

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FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

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A. Introduction

1. This application asks this Court to entertain an application which goes against Lesotho's international-law obligations and binding precedent governing *inter alia* judicial review.

2. Factually, the applicant's case is fatally flawed. The question recurring throughout this case is this: Can the Court conclude that corruption, conspiracy and similar criminality had been perpetrated by a Cabinet member on his own colleagues, Cabinet and Government?

3. The applicant's case turns at every juncture on a contrived conspiracy/corruption/criminality construct. It contends that Minister Tšōlo (an erstwhile political opponent of the deponent to the founding affidavit, Minister Majoro) somehow secretly perpetrated a serious and continuous crime. The supposed secrecy allegedly spans several years. Somehow the extensively workshopped project remained secret especially since September 2018, when the contract was concluded.

4. This despite Minister Tšōlo formally informing his Cabinet colleagues of precisely the project now said to be the subject-matter of the "corruption". The project (whose proposer is not even accused of corruption) was approved not only by Minister Tšōlo, the supposed "corruptee", but also supported by the majority of the Lesotho government. The general governmental support was unsurprising: the project intended important improvements, and fitted perfectly within the Lesotho

Government's extant published policy. The project's business plans and commencement date, too, were disclosed to various Government officials and Cabinet members. Extensive further publicity was provided to the project by both parties to the transaction.

5. Shortly stated, the project and resulting contract was no secret. Significantly, it is nowhere suggested that Minister Tšōlo or anyone else received any kickback, undue incentive or other form of gratification. The contract was 1.6 times cheaper than a competing contract. It provided for superior international technology protected by intellectual property rights, installed by a reputable and experienced contractor. The contractor concerned holds exclusive distribution rights, and has an unblemished record. It continues to implement similar projects in the rest of the region, and previously installed similar infrastructure in Lesotho itself.

6. There is therefore no factual – and far less any *evidential* – foothold for this extraordinary and crucial, but flawed and refuted, foundation for the applicant's entire case.[1] The Cabinet member in question (Minister Tšōlo) personally disclosed the transaction to all his Cabinet colleagues. The Minister of Finance, Minister Majoro, was specifically *informed* of and *engaged* in and extensively *involved* throughout the entire process.

[1] In the words of the Court of Appeal, the "far-reaching inference that the [applicant] seeks to draw" is simply not justified, least of all since "a dispute of fact" must be resolved by applying "the rule in *Plason-Evans* … and the respondents' version must prevail" (*Matsoetlane v Commissioner of Correctional Services* LAC (2009-2010) 66 at paras 14-15). Comparable courts have consistently cautioned that contentions of corruption, fraud and similar criminality cannot be pursued in motion proceedings in the teeth of known disputes of fact. See e.g. *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* 2021 (5) SA 115 (SCA) at para 39; *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at paras 19-20, quoting with approval *Sewmungal v Regent Cinema* 1977 (1) SA 814 (N) at 819A-C.

7. In fact Minister Majoro also supported the project for many months before defecting. Thereafter the ultimate conclusion of the contract was specifically and directly brought to the personal attention of Minister Majoro. He elected to ignore this information, having decided for himself at the time (so it is now implausibly suggested) that any such transaction was seriously irregular, unlawful and invalid; *ergo* (so he decided) it in fact could not have occurred. Hence, flying in the face of the evidence, which shows consistent correspondence was addressed to Minister Majoro personally (concerning the transaction, the contract's conclusion and evidently the prior decision to conclude it), the applicant avers inertia is in order. The information directed to the Minister of Finance needed no reaction by him; he did not even have to note it, investigate the facts, or consider taking any recourse. Minister Majoro's own undisclosed conclusion on the legal validity of the Supply Agreement somehow sufficed. So the applicant's founding affidavit avers, and his case contends.

8. Now, almost a full three years after the event, the applicant somehow attempts before this Court to impugn the Lesotho Government's decision in 2018 to *conclude* the contract. Simultaneously the applicant also attacks the contract itself, and the all-important arbitration agreement it contains. However, the contract had been cancelled long since; the arbitration pursuant to the arbitration clause concluded years ago; and the resulting Award has already received recognition and enforcement by the South African High Court. Thus the impugned decision, contract and arbitral clause have all run their course.

9. Recourse, if any, lies before the South African courts to rescind its own order. Such recourse proceedings are indeed already pending. Any recourse before this Court against antecedent conduct is academic, overdue, untenable (both factually and legally), and in any event otherwise inappropriate in multiple respects.

10. Most immediately, the application is legally misconceived for "disregard[ing] binding precedent and statutory precepts", as the Court of Appeal held in *Kompi v Government of the Kingdom of Lesotho*.[2] To the extent that this application is at all properly pursued before this Court (which is not accepted), the arbitration legislation applicable to this Court's exercise of jurisdiction in the context of arbitration proceedings and arbitration agreements applies against the applicant.

11. Yet the applicant seeks, as in *Kompi*, "public law remedies of a declarator and review",[3] and makes no "reference to Lesotho's Arbitration Act 12 of 1980" (raised *mero motu* by the Court of Appeal in *Kompi*).[4] The Court of Appeal held that the Arbitration Act "remains in force and thus binding on litigants and the courts."[5] Accordingly, *Kompi* concludes, it is "a matter of grave concern"[6] that the applicant's whole "litigation theory" requires this Court to "disregard binding precedent and statutory prescripts which have a direct bearing on the cause of action pleaded by the [the applicant]."[7]

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[2] C of A (CIV) 43B/2021 at para 44.
[3] *Id* at para 1.
[4] *Id* at para 44. It is indeed "it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings" (*Cape Town v Aurecon* 2017 (4) SA 223 (CC) at para 51 fn 42, citing *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A)).
[5] *Id* at para 44.
[6] *Ibid*.
[7] *Id* at para 46.

12. As in *Kompi*, the applicant's "argument goes that … an abuse of power by officialdom … can only be remedied by means of a declarator and review".[8] The Court of Appeal held that the rule of law requires that litigants and courts adhere to the governing legislation which provides the statutory remedy against an arbitration agreement alleged to result from an invalid exercise of public power.[9] It condemned the application for failing to comply with the Arbitration Act, since the applicant did not attempt to acquit itself of the onus to establish an exemption under the Arbitration Act.[10]

13. Precisely the same "subversi[on] of the rule of law" is perpetrated in the current application:[11] non-compliance with the Legislature's legal regime, without any attempt to seek condonation under it, or any attack on the constitutionality of the Act – as is required.[12] The applicant has failed, as in *Kompi*, to approach the Court to take recourse against the arbitration agreement at the appropriate time; and instead now pursue public law remedies.[13]

14. Since the arbitration agreement has long since run its course, resulting in an extant arbitration award, the recourse required by the Arbitration Act is to set aside the arbitration award. The Act provides a six-week period in which this had to be done. It has long since expired. The applicant makes no attempt to seek condonation under

[8] *Id* at para 48.
[9] *Id* at para 79.
[10] *Ibid*.
[11] *Ibid*.
[12] *Id* at para 80.
[13] *Id* at para 82.

this Act. The applicant's case is indeed directly inconsistent with this binding legislation. In it Parliament pronounced national public policy consistently with international public policy codified in an international Convention to which Lesotho acceded. As the Court of Appeal held, both litigants and the courts are bound by this statutory codification of public policy.

15. Therefore in the circumstances of the current case both national and international law precludes – for sound reasons of public policy – oblique recourse against an arbitral award at this stage and before this Court and in judicial review proceedings brought outside the applicable arbitration law. Furthermore, this Court is neither the court of the seat of the arbitration (the forum court), nor the court before which the arbitration award is sought to be enforced (the enforcement court). Appropriate legal recourse exists before the forum court and enforcement court, and cannot appropriately be sought before this Court.

16. Crucially, the relief required at this stage as contemplated by the Arbitration Act is not even sought *before this Court*. The recourse contemplated by section 34 of the Arbitration Act and Article V of the New York Convention is not part of this application at all. Such recourse is sought *before the Courts of South Africa*, in a pending application lodged by the applicant.

17. Accordingly the award will remain intact irrespective of the outcome of this application. The misdirected relief sought in this application cannot in law or in practice impact on the effect of the award or its enforcement abroad. The enforcement order issued by the High Court of South Africa has an independent

existence, and the relief sought in this application has no practical effect on enforcing the arbitral award.

18. Thus this is either (at best for the applicant) a misconceived moot and academic application. Or (more probably, in the light of the lack of *bona fide* review grounds) it is a tactical litigious attempt to stymie *sub judice* the execution of extant writs. And in the meantime to continue the self-help to which the Government of Lesotho has secretly resorted pending an unresolved application for interim relief to release attached funds pursuant to the High Court order in South Africa.

19. On either scenario, however benignly construed, the applicant's attempt to attack the *antecedent* decision to enter into the agreement (and consequentially the agreement itself; and the arbitral clause it contains) is academic, misdirected, and misconceived at every level: factual, legal, constitutional and conceptual.

20. Therefore, the "merits" are not properly reached. But even if they are, then the applicant's case is clearly contrived. At the very least substantial compliance with the three instruments invoked in the only three surviving review grounds were achieved, even if such instruments apply on the facts and were to be applied in law; and their purpose served by FSG's superior and more cost-effective project, which received wide publicity. Effective relief, in any event, cannot be granted, even if the issue of remedy arises. Binding precedent dictates the judicious exercise of this Court's remedial discretion: relief falls to be refused.

21. In amplifying the above bases on which the first and second respondents (collectively "FSG") oppose this application, our submissions follow the scheme set out in the above index. In doing so we shall also address (in the sequence in which we submit they properly arise for consideration) the applicant's heads of argument. They are excessive, spanning some 170 pages.

22. Judicial economy militates for a dismissal of the application within correct confines of fact and law,[14] deciding no more than is absolutely necessary for the determination of the case and avoiding a constitutional issue if the case is capable of adjudication on another basis.[15] We shall attempt to facilitate the Court's task in this regard as concisely as circumstances permit.

B. Factual and procedural overview

23. It is necessary, regrettably, to correct at the outset – even before reaching the dispositive *in limine* issues (which cut through this laboured and tortuous application) – serious factual inaccuracies advanced in the applicant's conception of its case. In doing so we shall not reproduce the contents of FSG's answering affidavit, which we respectfully ask the Court to read separately.[16] Instead, we shall seek for the assistance of the Court to identify the salient facts – to be determined, as is required, on "the respondent's version"[17] in motion proceedings – for the purpose of determining the more material and dispositive issues.

[14] *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 18: determining a case on a dispositive issue renders it unnecessary to determine other questions.
[15] *Sekoati v President of the Court-Martial* LAC (1995-1999) 812 at 820C-F.
[16] FSG's answering affidavit is at Record pp 597-725.
[17] *Sekoati v President of the Court-Martial supra* at para 40.

(1) <u>The project's transparency</u>

24. The first factual feature of this case is the wide publicity provided to the transaction, the contract, its cancellation, the resulting arbitration, and the enforcement of the consequent Award. The applicant attempts to avoid this fact, which clearly contradicts the factual premise underlying its theory of clandestine criminality, interception, collusion and secrecy.[18] But in truth the founding affidavit *failed to <u>disclose</u>* facts which are inconsistent with its untenable factual theory. Ironically the applicant attempts to accuse the third respondent of non-disclosure somehow amounting to criminality.

25. The correct facts are as follows.

26. Since at least 2 November 2018 the deponent to the applicant's founding affidavit had already been aware of the conclusion of the contract impugned in this application, lodged only on 20 September 2021.[19] Minister Majoro did not discover this by accident, the fact was specifically conveyed to him by FSG itself.[20]

27. FSG informed Minister Majoro personally and in writing that the Supply Agreement had been concluded, pursuant to the fruitful cooperation and intensive discussions held between itself and "all ministries and stakeholders concerned" in the

[18] Secrecy is the crucial component of the applicant's case, through which it attempts to retrofit this matter into caselaw from South Africa. See e.g. paras 100 and 106 of the applicant's heads of argument.
[19] Record p 598 para 5.
[20] Record p 30 para 69.

Government of Lesotho spanning "about a year".[21] The agreement was, FSG's contemporaneous (and uncontradicted) letter records, "fully in line with the goal of renewing the energy system of Lesotho already adopted by the government in 2015."[22]

28. Minister Majoro never refuted the fact that extensive engagements with government representatives – including himself[23] – have indeed occurred over an extensive period.[24] Indeed, already on 4 April 2018 Minister Majoro himself confirmed in person to FSG that he supported the project and wanted it to proceed.[25] He only attempted to excuse himself by saying that "no official" had informed him of "the existence of the Supply Agreement".[26]

29. However, at best for the applicant, Minister Majoro was, he concedes, informed of the existence of the Supply Agreement *by FSG* itself.[27] He was, in fact, aware of the extensive engagements preceding the conclusion of this contract. In his own words:

[21] Record p 30 para 69; Record p 245.
[22] Record p 30 para 69; Record p 245.
[23] Apart from Mr Fintelmann's 2 November 2018 letter informing Minister Majoro of the conclusion of the contract, Mr Fraser also at that time informed Minister Majoro of the approval of the project itself (Record p 671 para 199). On 22 October 2018, for instance, Mr Fraser per email pertinently disclosed to Minister Majoro (who by then in any event must have known the state of affairs) his Cabinet colleagues' stance. *Inter alios* the Minister of Energy was involvement in and supportive of the project. The email recorded without contradiction that workshops were attended over the preceding weeks, attended by civil servants from various departments of the Lesotho Government, after months and years of engagement and preparations since 2016; identified stakeholders which had always been involved in the project (including Germany and the European Union); all key stakeholders were continuously updated as regards the project at meetings; internal political turf fights in the Lesotho government is something in which FSG cannot involve itself, and from which the project must be protected. Mr Fraser's email recorded Minister Majoro's posture that he (Minister Majoro) would only act on the instruction of the Prime Minister. Mr Fraser thereupon recorded (without contradiction) in his email that the Prime Minister had indeed confirmed that he requires the project to proceed.
[24] Record p 640 para 113, pointing out that Minister Majoro's own founding affidavit in fact concedes extensive engagements by FSG directly with Minister Majoro (Record p 18 para 32).
[25] Record p 612 para 45.
[26] Record p 31 para 71, emphasis added.
[27] Record p 31 para 70.

"between October 2017 and November 2018" FSG engaged with Minister Majoro regarding the project.[28]

30. Even Minister Tšōlo informed and involved Minister Majoro.[29] For its part, FSG repeatedly engaged with Minister Majoro and informed him also of the Prime Minister's approval of the project.[30] Minister Majoro expressed no reservations; undertook to complete the finance agreement; and only needed "policy clearance" from the Prime Minister.[31]

31. Similarly many other Government representatives were, in fact, aware of all material events leading to and including the conclusion of the contract. Cabinet itself was apprised of the developments.[32]

32. The contract and the project itself also received extensive wider publicity.[33] Not only Government itself, but the public in general were well aware of the project and the lack of progress.[34] The failure to progress with the implementation of the contract was widely reported in the media already in November 2018.[35] It resulted in several death threats directed by supporters of Minister Majoro against FSG's director and deponent, Mr Frazer.[36] It was social-media comments by supporters of

[28] Record p 18 para 32.
[29] Record p 613 para 46.
[30] Record p 618 para 59, referring to a meeting on 3 September 2018 and correspondence on 4 September 2018.
[31] Record p 618 para 59; Record p 647 para 130.
[32] Record p 613 para 47, referring to the Cabinet memorandum which was withdrawn on technical grounds. It recorded the concurrence of the Ministers of Finance, Energy, Public Service, Local Government and Chieftainship, Public Works and Transport, and Development Planning.
[33] See e.g. Record p 621 paras 65-66.
[34] Record p 624 para 74.
[35] Record p 624 para 74.
[36] Record p 624 para 74.

Minister Majoro, commenting on national news – broadcasting Government's failure to implement the contract – that resulted in Minister Majoro's own political party and Government advising Mr Frazer to exit the country (for fear of his personal safety).[37] Also this material fact was not disclosed to the Court in the founding affidavit.[38] In the teeth of *inter alia* this undisclosed fact he claimed ignorance of the conclusion of the contract.[39] His claimed ignorance is not merely improbable, it is demonstrably false.[40]

33. Likewise, FSG's attempts to achieve compliance with the contract was open and transparent. It addressed correspondence to Minister Majoro himself in this regard. In fact, the vast majority of the correspondence exchanged even *prior* to the conclusion of the Supply Agreement was with Minister Majoro himself.[41] Third parties also corresponded directly with Minister Majoro on the project.[42]

34. For instance, Kfw-Ipex Bank informed Minister Majoro of the conclusion of the memorandum of understanding ("MoU") already on 13 December 2017.[43] Kfw-Ipex Bank again wrote to Minister Majoro on 22 March 2018.[44] And again on 28 June 2018.[45] Mr Majoro did receive these letters.[46] He read them.[47] He himself

[37] Record pp 624-625 paras 74-75.
[38] Record p 635 para 75.
[39] Record p 650 para 139.
[40] Record p 719 para 372.
[41] Record p 642 para 117, reflecting that 24 of the 29 letters in question were addressed to Minister Majoro. Minister Tšōlo received only five of the 29 letters.
[42] Record p 642 para 117.
[43] Record p 644 para 123.
[44] Record p 644 para 123.
[45] Record p 644 para 123.
[46] Record p 644 para 123.
[47] Record p 644 para 123.

deposed accordingly.[48] But he did not disclose this fact to this Court.[49] His failure to do so was specifically pointed out in FSG's answering affidavit, noting that this was an unaccountable nondisclosure of material facts.[50] The replying affidavit does not traverse this.[51] Thus the initial non-disclosure now stands exacerbated by the subsequent failure to account for what was clearly a calculated elision of the true facts.[52] Once disclosed the facts defeat any suggestion that there was some attempt to circumvent Minister Majoro. There was no such attempt, and certainly no "interception".

35. The full facts in truth confirm extensive exchanges with, and disclosures to, Minister Majoro by FSG in the many months preceding the conclusion of the contract.[53] FSG invited Minister Majoro to meet with FSG, and even facilitated independent direct inquiries from third parties should Minister Majoro so require.[54] FSG also presented Minister Majoro with an updated business plan.[55] It prominently pointed out that the project was ready to commence in October 2018.[56]

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[48] Record p 644 para 123.
[49] Record p 644 para 123.
[50] Record p 644 para 123.
[51] Record pp 2337-2338, traversing paras 120, 121 and 122, skipping *inter alia* paras 123 and 124, and continuing by traversing only para 127 and further paragraphs in the answering affidavit. Paragraph 124 of FSG's answering affidavit specifically pleaded that the non-disclosure to which paragraph 123 referred is fatal to this application.
[52] Subsequently Minister Majoro's replying affidavit simply states (in traversing para 133 of FSG's answering affidavit) that "FSG's project was not considered seriously by government given that the requisite procurement and approvals processes had not been followed", and that "I [Minister Majoro] had not received credible confirmation that the MOU had been signed". Both legs of this retort are untenable. As the answering affidavit shows, Minister Majoro's contemporaneous response was that all that was required was "the green light from the Prime Minister", which he had been informed had indeed been provided (Record p 647 para 130). Thus Government had indeed taken FSG's proposal seriously. Secondly, Minister Majoro received extensive and repeated independent confirmation regarding the signing of the MOU from an international bank, KfW IPEX Bank Gmbh (Record p 648 para 133). No minister of finance could have considered three formal notices from an investment bank working with the Development Bank of Southern Africa as *not* "credible".
[53] Record pp 645-646 paras 125-127.
[54] Record p 646 paras 127-128.
[55] Record p 646 para 129. This email is referred to in paragraph 45.3 (p 22) of the founding affidavit and attached as FA10 (p 192).
[56] Record p 647 para 129.

36. FSG's letter of demand and its subsequent exercise of its contractual remedies were also addressed openly – not only to the Minister in the office of the Prime Minister, but also to the Prime Minister himself and the Government Secretary.[57] The letter of demand was duly received by the Office of the Prime Minister and the senior private secretary in the Prime Minister's Office and the Office of the Government Secretary.[58] This occurred already on 28 February 2019,[59] some two years and seven months prior to the institution of this application.

37. On 15 March 2019 the letter of demand was served by the Sheriff on the Prime Minister at the Office of the Prime Minister.[60] Thus service occurred publicly by the independent officer of court responsible for giving notice to opponents. This is, again, inconsistent with the applicant's conspiracy, secrecy and interception theory.

38. On 11 July 2019 a notice requesting information pursuant to clause 18 of the Supply Agreement was hand-delivered to the Prime Minister at the Office of the Prime Minister.[61] The request was also sent to the Minister in the Office of the Prime Minister, his secretary, his office, and to the office of the Government Secretary.[62]

39. On 29 July 2019 FSG hand-delivered the letter terminating the Supply Agreement to the Prime Minister.[63] It was also sent by registered post to the Prime Minister,

[57] Record p 637 para 105; Record p 655 para 155. Annexures FA32 p 252/FS42 p 1029; FA33 p 258/FS43 p 139; FS34 p 260/FS48 p 1046.
[58] Record pp 655-656 para 156; annexure FA32 p 252
[59] Record p 674 paras 206-209. See emails and telefaxes annexures FS38 p 1008 – FS41 p 1022
[60] Record p 674 para 210; annexure FS42 p 1029.
[61] Record p 675 para 211; annexure FS43 p 1036.
[62] Record p 675 paras 212-215; annexures FS44 – FS47 pp 1038-1045.
[63] Record p 675 para 216; annexure FS48 p 1046.

emailed to the Minister in the Office of the Prime Minister, and also to his secretary; and faxed to his office and to the office of the Government Secretary.[64]

40. The applicant implies it did not have sufficient notice of the arbitral proceedings.[65] This is contradicted by the substantial evidence on record, and by the applicant's own admissions. On 30 July 2019,[66] the notices and papers in the arbitration proceedings were served properly and competently by officers of court on two or more government offices in accordance with international best practice.[67] Multiple further notifications regarding arbitral processes were hand-delivered and emailed respectively to the Prime Minister and to the Minister in the Office of the Prime Minister (and his secretary) during August 2019.[68] Extensive further notices concerning the arbitration were hand-delivered and emailed to the same Government recipients during the ensuing three months.[69]

41. The arbitrator himself, Adv Maleka SC, even afforded further opportunities to the Kingdom to participate in the arbitration.[70] Adv Maleka SC confirmed in the Award that proper service had been effected: "I am satisfied that the office of the Prime Minister did receive the notice on 26 August 2019",[71] and "I was satisfied that the respondent had due notice of the time, date and place of the hearing and that there was no sufficient cause shown to explain its failure to attend the arbitration

[64] Record pp 675-676 paras 217-221; annexure FS49 – FS53 pp 1047-1054.
[65] Para 69 applicant's heads of terms.
[66] Record p 676 para 222; annexure FS54 p 1056.
[67] Record p 657 para 160; Record p 658 para 163; Record p 658 para 164.
[68] Record pp 676-677 paras 223-232.
[69] Record pp 677-679 paras 233-249; annexures FS65 – FS81 pp 1079-1097.
[70] Record p 658 para 164.
[71] Award para 15. See also paras 18 and 19.

proceedings."[72] There is no doubt that the arbitration proceedings were brought to the attention of various high-level government representatives.[73]

42. The arbitration itself was conducted by Adv Maleka SC transparently and in accordance with due process. The applicant was invited to participate and failed to do so of its own volition. As stated above, the applicant was provided with proper notice of the proceedings and of the in-person oral hearing. During the arbitral proceedings, Adv Maleka SC received written submissions and evidence. At the hearing in Johannesburg, he heard oral submissions from counsel, witness evidence from Mr Robert Frazer, and evidence from two economic experts of international economic consulting firm FTI. Adv Maleka SC questioned the witness on his evidence and noted in the Award that he had "no reason to doubt the evidence of Mr Frazer … his evidence derives corroboration and is supported by documentary evidence of a contemporaneous nature, and generated over a reasonably long period of time."[74]

43. He also questioned the two expert witnesses on their evidence, including Professor Mncube, the former Chief Economist of the Competition Commission of South Africa and an adviser on the Economic Advisors on the Presidential Economic Advisory Council set up by the President of South Africa. In the Award, Adv Maleka did not accept all of FSG's arguments and rejected certain claims. It is clear, therefore, that the Award is the result of a full and fair arbitration process conducted by an eminent arbitrator, and not a default process, as alleged by the applicant.

[72] Award para 21.
[73] Record p 637 para 106.
[74] Award para 95.

44. The Award was properly served on the applicant.[75] On 4 December 2020, the UK enforcement proceedings of the Award were hand-delivered to Prime Minister Majoro, alerting him not only of the Award but also once again of the Supply Agreement.[76]

45. The same occurred on 8 December 2020 in respect of the South African enforcement application, served strictly in compliance with the relevant legislation.[77] The Award was also hand-delivered to the Prime Minister at his office on 31 January 2021.[78]

46. Similarly, the enforcement proceedings were, as the applicant correctly concedes, notified to the Kingdom of Lesotho according to law and court directive.[79] The relevant recipient (the Ministry of Foreign Affairs) indeed "did receive the notice of motion and founding affidavit in the application to make the arbitration award an order of court", as the founding affidavit explicitly acknowledges.[80]

47. Minister Majoro himself received notice of the enforcement proceedings on 20 March 2021.[81] The notice gave Minister Majoro electronic access to the *entire repository* of documents filed in the enforcement application.[82] The applicant does not dispute this.[83] It is therefore misleading and wrong for the applicant to suggest

[75] Record p 627 para 83.
[76] Record p 679 para 250; annexure FS82 p 1098.
[77] Record p 680 para 251; annexure FS92 p 1108.
[78] Record p 680 para 252; annexure FS93 p 1109.
[79] Record p 43 paras 106-108; annexure FA39 p 282; Record p 638 para 107.
[80] Record p 43 para 109.
[81] Record p 659 para 168; Record p 680 para 253.
[82] Record p 662 para 177.
[83] Para 233.18 applicant's heads of argument.

that Minister Majoro did not know of the existence of the Supply Agreement until 18 May 2021.[84] The Government Secretary received the same notice.[85] The documents were also contained in a physical dossier delivered to and received by the Ministry of Foreign Affairs, which forwarded it to the Office of the Attorney-General.[86]

48. The applicant speculates that between the latter two offices something went amiss. But this without disclosing to the Court that Minister Majoro himself had received personal and direct notice of the enforcement proceedings and electronic access to the papers filed in the enforcement proceedings.[87] He sent this notice to the Government Secretary, who, too, could and should have acted on it.[88]

49. Likewise they could and should have acted also on the notice of set-down of the South African enforcement application. It was emailed to Minister Majoro personally (as directed by the presiding judge), and received and read by Minister Majoro.[89] It was also emailed to the Government Secretary.[90] And hand-delivered to the Office of the Government Secretary.[91] The Office of the Prime Minister refused to accept service of the notice (already received and read by the Prime Minister himself).[92] A clear case of consummate willful "ignorance".

[84] Para 233.20 applicant's heads of argument.
[85] Record p 681 para 254; annexure FS95 p 1112.
[86] Record p 663 para 175; p 43 para 109.
[87] Record p 662 para 177.
[88] Record p 662 paras 178-179.
[89] Record p 681 para 255; annexures FS96 p 1114 and FS97 p 1117.
[90] Record p 681 para 256; annexure FS98 p 1118.
[91] Record p 681 para 257 annexure FS99 p 1121.
[92] Record p 681 para 257.

50. There is therefore no factual basis for the crucial contention underlying the all-important factual substratum of the applicant's entire case: clandestine conduct intended to keep a conspiracy under cover.[93]

51. Despite the trite principle that "[f]raud is inherently improbable, and brings serious consequences, so evidence sufficient to overcome the starting point of improbability will be required to justify a finding of fraud, even on the civil standard",[94] the applicant has failed to establish the essential factual proposition required for each element of its case.[95]

52. The applicant's conspiracy and clandestine conduct construct stretches from the entry-level condonation inquiry to the ultimate question concerning the appropriate remedy. It is *because* the applicant avers variously that fraud (or other equally or even more serious and devious deceptive criminality) had been perpetrated that it contends for condonation to excuse its extraordinary three-year delay.[96] And it is *because* fraud and related criminality must not be rewarded that the remedy for which the applicant contends is, it argues,[97] appropriate. Its legal demerits apart, for present purposes the point is simply that the applicant's case collapses already at the factual level.

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[93] Record p 683 para 263.
[94] *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) (17 May 2022) at para 551.
[95] Record p 607 para 33, identifying this defect in the applicant's case and explaining that already for purposes of interim relief before the South African High Court it was correctly accepted that the selfsame factual averments did not establish a case even at the lower *prima facie* level sufficing for interim relief. *A fortiori* final relief cannot be granted on the same – unimproved – papers. It is particularly significant that despite the initiation of fully-fledged criminal investigations not a shred of evidence has been unearthed since May 2021 (Record p 661 para 173). Thus the applicant's express expectation that evidence would be generated by instituting two investigations came to naught (Record p 99 para 240).
[96] Significantly the case for condonation concerns exclusively "rogue" conduct by "Government employees and officials" (Record pp 101-102 para 247).
[97] See e.g. para 215.4 of the applicant's heads of argument.

(2) <u>The project 's benefits and government support</u>

53. The project proposed by FSG, and the contract concluded pursuant to its widely-publicised proposal, involved transformational renewable energy systems to be installed throughout Lesotho.[98] FSG is a provider of such systems to governments, and has – it is common cause – an exclusive right to supply solar energy products manufactured by leading German manufacturer KBB Kollektorbrau GmbH.[99]

54. The project FSG proposed directly responded to the energy needs of the Government of Lesotho.[100] These needs are recorded already in the Lesotho Energy Policy 2015 to 2025.[101] The policy is not impugned, and no basis is alleged by the applicant for deviating from it. In such circumstances it is irrational to disregard a needs assessment already recorded in an extant policy.[102]

55. FSG's *de facto* predecessor has previously installed 180 solar systems for public health facilities in Lesotho.[103] It was based on the successful installation of these systems that FSG proposed the present project.[104] The project was supported by the then Prime Minister.[105] FSG was brought to understand that the project indeed

[98] Record p 609 para 39.
[99] Record p 610 para 39.
[100] Record p 610 para 40.
[101] Record p 610 para 40; annexure FS9 p 797.
[102] *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) at para 19, holding that it is for a party contending for a *deviation* from a policy "to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy" since "a court should in these circumstances [involving complexity and requiring the balancing of a range of competing interests or considerations] give due weight to the policy decisions and findings of fact of such a decision-maker".
[103] Record p 610 para 41.
[104] Record p 610 para 41.
[105] Record p 611 para 42.

enjoyed general government support (including Minister Majoro's),[106] and was further affirmed in this view by a very public meeting involving some 27 representatives from various Ministries, including the Ministry of Finance (headed at the time by Minister Majoro).[107]

56. On the strength of Government's representations to FSG, extensive fulltime preparations were undertaken by FSG from July 2017 to November 2018 to implement the project.[108] It became apparent during this period that political instability was rife.[109]

57. Different factions of the ruling political party had at their respective helms the then Prime Minister and the then Minister of Finance (who is the current Prime Minister).[110] This is well-documented by contemporaneous media reports, read by FSG at the time and included in the answering papers.[111] Courts, too, have taken judicial notice of this state of affairs.[112]

58. FSG was therefore justified in heeding the Prime Minister's request to address correspondence regarding the project to the coordinator of Cabinet:[113] the Prime

[106] Record p 611 para 42.
[107] Record p 611 para 42.
[108] record p 611 para 43.
[109] As the Court of Appeal acknowledged, there is indeed "the potential to destabilise a country which is already plagued by political instability" particularly since a "coalition government" which includes politicians prosecuted by one another or whose prosecution is instigated by one another (*Manyokole v Prime Minister* C of A (CIV) No: 15/2021 at paras 59-60).
[110] Record p 611 para 43.
[111] Record p 611 para 43, annexure FS13 p 833.
[112] The Court of Appeal recognised in *Attorney-General v His Majesty the King* C of A (Civ) 13/2015 at paras 20 and 30 that in the Cabinet the Prime Minister is "the most important person" "who is primarily concerned with … the co-ordination of the machinery of government" (citing Jennings *Cabinet Government* 3rd ed at 1), and the Prime Minister's constitutional capacity to remove a sufficient number of dissentient ministers who do not support projects preferred by the Prime Minister.
[113] Record p 614 para 51.

Minister himself, and the Minister in the office of the Prime Minister (then Minister Tšōlo).[114] FSG's rationale for doing so was fully disclosed already at the time, and cannot be criticised.[115] Accordingly the applicant's new contention now advanced – in *argument*,[116] without a proper ventilation of the point[117] –that this somehow suggests some stratagem of subterfuge is as inaccurate[118] as it is improper.[119]

59. The facts are that FSG engaged directly and personally with Minister Majoro himself (in his capacity as Minister of Finance) in respect of financial aspects.[120] This occurred from February 2018 to April in 2018.[121] At the same time that the financial (i.e. costs) aspects were discussed directly with the Minister of Finance, the project's benefits were being discussed with and considered by the Prime Minister.[122]

60. FSG's project would have produced significant efficiencies, benefits and overall value for money, as the contemporaneous documentation (including the business plans) and independent, expert economic evidence by two economists serving before the Arbitrator

[114] Record p 612 para 43.
[115] See e.g. Record p 615 para 55, mentioning "mixed messages … from the Ministry of Finance and Prime Minister's office"; and Record p 617 para 57, referring to "divisions within [the Prime Minister's] own party which we don't want to get mixed up in".
[116] See e.g. para 16 of the applicant's heads of argument.
[117] Para 34.1 of the applicant's heads of argument, citing a 1 August 2018 letter annexed to FSG's answering affidavit (fn 25, referring to annexure FS20 at Record pp 866-867).
[118] The founding affidavit's treatment of the 1 August 2018 letter did not attempt to attribute to this letter what the applicant now argues in his heads of argument is "significant" (Record p 26 para 54). It is spurious to suggest now that Minister Tšōlo's statement regarding the "primary" points of contact being the office of the Prime Minister can be construed as intentionally circumventing Minister Majoro for nefarious purposes. As the answering affidavit demonstrates, 24 of the 29 material letters were, in fact, exchanged between FSG and the Minister of Finance, who at the time was Minister Majoro himself (Record p 642 para 117).
[119] See e.g. *National Executive Committee of the Lesotho National Olympic Committee v Morolong* (26/2001) [2002] LSCA 7 (12 April 2002), reiterating and confirming the extensive Lesotho caselaw concerning the Theletsane principle, articulated by the-then South African Appellate Division in *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A).
[120] Record p 611 para 44.
[121] Record p 612 para 44.
[122] Record p 612 para 44.

confirm.[123] The expert report by FSG's experts testifying before Adv Maleka SC reflects the following facts, which FSG's answering affidavit invoked[124] (and the applicant failed to refute).[125]

61. Firstly, FSG's project was cashflow positive. At least 200 million KWh of electricity would be saved every year for 14 years and more. This at no additional cost. Thus an annual saving of M284 million (€18.93 million) for at least 14 years would be achieved. The saving amounts to approximately M4 billion over the life of the project, amounting to M200 million net savings annually, conservatively calculated over twenty years.[126]

62. Second, FSG's project was self-funded. The €100 million German export credit facility was repayable over a period of six to eight years. This would be funded by the savings in electricity imports, because the electricity savings exceeded the repayments (including costs and interest). The project would annually save 200 million KWh, and generate positive cashflow of M34 million year-on-year for two decades.[127]

63. Third, FSG's project balanced the budget. The net M4 billion savings over 20 years amount to net savings of M200 million per year (or €13,3 million per year). This sum would have extinguished Lesotho's budget deficit within four and a half years, and would have extinguished its IMF loan in three years. Furthermore, the sum saved could cover any of the following budgeted capital expenses of the Kingdom in terms of the Kingdom's 2020/2021 budget: 55% of the €24 million for food security; a further €7,7 million for health infrastructure; 100% of the annual education budget; and a substantial

[123] Record p 695 para 294.
[124] Record pp 695-697 paras 294-295.
[125] Record p 2341 paras 183-184.
[126] Record p 695 para 294(1).
[127] Record pp 695-296 para 294(2).

portion of the donor grants and loans to cover capital budgets for food security, health and education.[128] Thus the M200 million per year generated by FSG's project would have been available to fulfil each of the socio-economic concerns identified in the founding affidavit.[129]

64. Furthermore, FSG's project contemplated the creation of 1 000 jobs.[130]

65. The-then Prime Minister's assessment of the benefits of the project proposed by FSG therefore cannot be faulted. It is correctly not impugned. The benefits were overwhelming, and the costs were self-funded.

66. Thus the analysis of the project's costs and benefits at the highest level of Government admitted of no rational basis for repudiating the project. Hence the overwhelming Government support for FSG's project, which Minister Majoro himself supported (until his *volte face*). Government also already by that time adopted in its 2015-2025 government policy a needs assessment, as mentioned. The project also received, we reiterate, extensive publicity. And it apparently stimulated, as we shall show, keen competition even from the farthest corners of the world.

67. This demonstrates, firstly, that the material objectives sought to be attained by a public procurement process have indeed been substantially achieved by the extensive arduous vetting to which FSG's project was subjected. FSG was, furthermore, an exclusive supplier of patented products previously installed in public

[128] Record p 696 para 294(3).
[129] Record pp 696-697 para 294(4)(a)-(f).
[130] Record p 622 para 69; clause 5.9.1 of the Supply Agreement (Record p 121).

facilities in Lesotho. As we shall show, a competitive public procurement process was not required. Moreover, Lesotho warranted to FSG that the procurement requirements had been complied with. If, as the applicant suggests, the proper procurement process had not been followed, this in itself was a breach of the Supply Agreement and cause for arbitral proceedings.

68. Secondly, the applicant's refrain that FSG made fanciful proposals when in fact it only proposed "to replace the lightbulbs",[131] and that FSG obtained a "massive windfall",[132] is factually false. FSG proposed a comprehensive sustainable energy solution resting on solar energy, and *including* energy efficient alternatives (of which lightbulbs were just one component).[133] FSG had to expend more than sixteen months on the unpaid preparation for a project which was intended to be installed over a mere 24-month period, precisely because prior preparation was presupposed.[134] FSG's project furthermore envisaged providing services and goods directly to members of the public, it included providing goods free of charge to qualifying impoverished households, created employment, and alleviated poverty.[135] It offered extensive public benefits, for which FSG had to expend considerable prior investment in time, resources, funding and opportunity cost.[136]

[131] Para 38.1 of the applicant's heads of argument.
[132] Para 217 of the applicant's heads of argument.
[133] Record p 108 clause 1.1.19: the products to be installed included *but <u>not</u> limited to* solar water heating systems, solar photovoltaic systems, LED lighting products, electricity storage batteries and accoutrements. See similarly Record p 111 clause 3.4: the project concerned a large-scale installation of a large volume of solar water heaters, solar photovoltaic systems and LED lights amongst other things across a range of sectors, buildings, facilities and infrastructure, including non-electrified households reliant on paraffin and candles.
[134] Record p 611 para 43.
[135] Record p 617 para 58.
[136] Record pp 62-63 paras 81-82.

69. Therefore also this second factual feature of the applicant's case fails already at the factual level.

(3) <u>The project's undisclosed Chinese competition</u>

70. The third factual feature on which this application self-destructs concerns a yet further nondisclosure. Entirely absent from the applicant's affidavits is any explanation for a fact withheld at the time from both FSG and the public by Minister Majoro in 2018,[137] and not disclosed to the Court in his founding affidavit.

71. Despite the allegation that the impugned decision and contract concluded by Minister Tšõlo with FSG should have been preceded by a competitive procurement process, a comparable contract for similar goods and services suffers the same suggested defect.[138] Minister Majoro himself concluded a similar transaction with a Chinese contractor six months prior to the approval of FSG's project.[139] Minister Majoro moreover concluded a competing contract which was 1.6 times more expensive than FSG's proposal, preferring an entity entirely inexperienced in providing the services in question, and this when no funding had even been secured for the competing contract.[140]

[137] Record p 635 para 98.
[138] Record p 622 para 69.
[139] Record p 643 para 120.
[140] Record p 701 para 307, not denied at Record p 2342 para 186; Record p 713 para 351, not traversed at Record p 2344 paras 192-193.

72. Minister Majoro has still not explained why "the more expensive and less advantageous Chinese competing contract" was preferred by himself.[141] Nor has he applied to review and set aside the latter contract or his decision to enter into it. Like the contract with FSG (and Minister Tšōlo's decision to appoint FSG), the Chinese contract (and Minister Majoro's decision to appoint the Chinese contractor) was also not concluded pursuant to an open tender process.

73. Crucially, it was the emergence of the Chinese competitor which coincided with Minister Majoro's changed attitude towards FSG's project.[142] As FSG's contemporaneous correspondence records, Minister Majoro "has always been very supportive" of FSG's project.[143] It came therefore as a surprise that he suddenly obstructed the project.[144] Media reports of the same period reveals a close relationship between Minister Majoro and Chinese investors.[145] This explained Minister Majoro's change of heart. He himself provided no explanation, and disclosed none to the Court.[146] As the Court of Appeal's caselaw confirms, this is a serious defect in the applicant's case.[147] It is indeed inexplicable: the Chinese contract was, as mentioned, substantially more expensive and less beneficial than FSG's proposal.[148]

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[141] Record p 609 para 37.
[142] Record p 613 para 49.
[143] Rcord p 613 para 48.
[144] Rcord p 613 para 48.
[145] Record p 613 para 49.
[146] Record p 622 para 69.
[147] *Manyokole v Prime Minister* C of A (CIV) No: 15/2021 at paras 105-108, referring to an applicant's failure to disclose facts concerning selectively prosecuting "a former minister of finance for corruption", and choosing not to engage with such "very serious allegation".
[148] Record p 622 para 69.

74. It is therefore unsurprising that FSG's project was preferred and supported by the majority of Government. This was confirmed by a meeting between FSG and His Majesty King Letsi III himself on 12 July 2018.[149]

75. Contrary to Cabinet colleagues and government generally (including the head of State), Minister Majoro preferred and supported the competing Mafeteng project sponsored by the Chinese Government.[150] This is – as the arbitrator found as a fact, and the applicant and its deponent (Minister Majoro himself) do not contest – the reason for Minister Majoro's refusal to conclude the finance agreement.[151]

76. He had no legitimate basis for his change of attitude towards FSG and for failing to sign the finance agreement. His only concern expressed at the time was to impart "the most important message", which was that the project "should have leadership in the energy minister".[152] This is a typical instance of an impermissible attempt, as the Court of Appeal put it, "to obscure the neglect of their duties behind the formalistic smokescreen of the non-compliance with an irrelevant rule".[153]

77. No legal rule supporting the stance adopted at the time (asserting the significance of identity of the minister supposedly required to take "leadership") has ever been identified by the applicant. None of the review grounds invokes any *vires* vesting exclusively in the Minister or Ministry of Energy and Meteorology.

[149] Record p 614 para 50.
[150] Record p 622 para 68.
[151] Record p 622 para 68.
[152] Record pp 620-621 para 64.
[153] *Teaching Service Commission v St Patricks High School* LAC (2005-2006) 38 at para 16.

78. Quite rightly so: the factual position is that the Minister of Energy supported FSG's project. It was he who initially invited private investment for the project.[154] Thus the Minister in whose portfolio the project fell had, in fact, taken the lead; was involved throughout;[155] and he supported FSG's project.[156] He indeed had already received the *signed* Supply Agreement by the time of Minister Majoro's "most important message".[157] Thus Minister Majoro's "most important message" (whatever its merits) was manifestly met.

79. Minister Majoro imparted no more impediments,[158] and raised no further issue or query.[159] This despite FSG's explicit invitation to ask "any questions" he might have had.[160] There was therefore every reason for FSG to rely on the recordal in the Supply Agreement that the finance agreement would be signed "contemporaneously" by the Minister of Finance.[161]

80. In any event, contrary to the applicant's incorrect factual construction,[162] the Supply Agreement did *not* require or record that the finance agreement had already been

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[154] Record p 654 para 150.
[155] Record p 671 para 199.
[156] Record p 621 para 64.
[157] Record p 621 para 64; annexure FA28 p 244.
[158] Record p 620 para 64.
[159] Record p 618 para 60.
[160] Record p 618 para 59; annexure FA27 p 242.
[161] Record p 619 para 61.
[162] Para 49 fn 38 argues that "FSG does not deny that to Frazer and Tšōlo's knowledge the warranty was false at the time of conclusion of the Supply Agreement", citing "FA p 66 para 154". But the founding affidavit did not plead this, and therefore there was no knowledge of falsity to deny in traversing para 154 of the founding affidavit. It only averred that "[t]he Kingdom never did conclude a finance agreement separately from the Supply Agreement" and that "[t]his was known to Mr Frazer and Minister Tšōlo when the Supply Agreement was purportedly signed." This does not plead what is now argued: falsity of the warranty, to the knowledge of the signatories. The warranty did not require the *prior* conclusion of a finance agreement; and FSG extensively and contemporaneously implored Minister Majoro to conclude the finance agreement. It is FSG's attempts to achieve the conclusion of a finance agreement which the applicant's heads of argument now attempt to describe as "harassment" (para 61.3 of the applicant's heads of argument).

concluded.[163] There is therefore no merit in the suggestion that FSG and Minister Tšōlo knew that by signing the Supply Agreement the Government would immediately be placed in breach and become liable for liquidated damages.[164] Thus also this aspect of the applicant's conception of its case is inconsistent with the facts: the clause invoked in support of the applicant's contention does not even exist.[165]

81. Indeed, in each material respect the applicant's approach to the facts is untenable. Demonstrably many material factual disputes exist, and they must be resolved on the basis of FSG's affidavits.[166] The applicant elected to proceed on this basis, and disavows any aspect of the matter being referral to oral evidence to resolve factual disputes.[167] The legal consequences of this binding[168] election is clear and

[163] Para 49 of the applicant's heads of argument.
[164] As paras 49*ff* of the applicant's heads of argument (headed "the Supply Agreement immediately placed the Kingdom in breach") attempt to convey.
[165] Para 50 of the applicant's heads of argument, citing in fn 39 "clause 17.9.1 of the Supply Agreement, Annexure FA1.2 of the FA, p 130". Page 130 in fact contains clauses 17.1.4-5 of the Supply Agreement, which reflect the savings generated by FSG's project and its compliance with the Government of Lesotho's Energy Policy.
[166] The rule in *Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C has consistently been applied by the Court of Appeal. See e.g. *MNM Construction Co. (Pty) Ltd v Southern Construction Co (Pty) Ltd* LAC (2005-2006) 112 at 116E-G; *Tsehlana v National Executive Committee of the LCD* LAC (2005-2006) 267 at 278 F); *Directorate on Corruption and Economic Affairs* (C of A (CIV) 21/2009, CIV/APN/297/2008) [2009] LSCA 10 (23 October 2009) at para 17. It has most recently been confirmed and applied in *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 40, to which we have already referred.
[167] See e.g. para 291.3 of the applicant's heads of argument.
[168] Record p 665 para 183.

unavoidable:[169] the applicant's *necessary* reliance on fraud, corruption and similar allegations must be rejected outright.[170]

82. As the Court of Appeal confirmed, it is "not proper … to seek to prove the alleged fraud (which was denied) by way of affidavit in an application as opposed to action."[171] At the very least it was incumbent on the applicant to seek a referral to oral evidence, and its election not to do so requires the refusal of final relief.[172]

[169] As this Court explained in *Du Preez v Pheko* (CIV/APN/151/18) [2019] LSHC 24 (14 February 2019) at paras 10-12:

> "Where dispute of facts arise on papers the court has a variety of options available to it in terms of the provisions of Rule 8(14) of the Rules of this Court. The said Rule provides that:
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> > 'If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems appropriate with a view to ensuring a just and expeditions decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact… or definition of issues, or otherwise as the court may deem fit.'
>
> It is common cause that the applicant did not apply that the application be converted into trial to resolve these disputes. It is trite that application procedure is designed for the resolution of legal issues based on common cause facts. It follows therefore that because applications are not meant for resolution of factual issues they cannot be used to determine probabilities. (*NDPP v Zuma* (573/2008) [2009] ZASCA 1 at para 26) It is indeed true that application procedure provides an expeditions way of resolving disputes between litigants, however, where the litigant, (applicant) chooses to proceed by way of notice of motion when the issues could be resolvable through action proceedings, such a litigant takes a huge risk. The risk attendant in the wrong choice of proceedings is that where the applicant, as in the present case, should have reasonably foreseen in advance that a dispute of fact will arise, but nevertheless proceeds by way of motion proceedings, he runs the risk of his application being dismissed with costs (*Mineworkers' Union of Namibia v Rossing Uraniam Limited* 1991 NR 299; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398(A)).
>
> Where dispute of facts arise in affidavits, the general rule is that relief should only be granted if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order (see *Stellenbosch Farmers' Winery (Pty) Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E-G and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) 634E-I)."

[170] *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at paras 19-20; *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* 2021 (5) SA 115 (SCA) at para 39.

[171] *Motake v Moqhoai* LAC (2009-2010) 89 at para 17.

[172] *Lesotho Hotels International (Pty) Ltd v Minister of Tourism* LAC (1995-1999) 578 at 585H-I, 586D-E.

C. ***In limine* issues**

83. For present purposes it suffices to address at the outset two of the four *in limine* issues invoked in FSG's answering affidavit. They are, as the answering affidavit notes, the most important, immediate and dispositive.[173] The other *in limine* issues either buttress the two *in limine* issues addressed at this juncture, or further support FSG's case regarding remedy or other grounds of opposition.[174]

(1) Undue delay

84. On the applicant's own version a delay of 20 months endured prior to the institution of this application.[175] In fact, Minister Majoro had had the requisite knowledge already 34 months prior to deposing to the applicant's founding affidavit filed in purported support of this application.[176] There is therefore factually a clear instance of undue delay.

85. In law the position equally clear: as the Court of Appeal confirmed, undue delay is detrimental to the interests of justice.[177] Therefore compelling public policy considerations require that effect be given to statutory provisions and common law

[173] Record p 606 para 27.
[174] For instance, the first two *in limine* issues (involving, firstly, the deposition of the founding affidavit, and the refusal to respond appropriately to FSG's request to regularise it; and, secondly, the applicant's abuse of process and procedural non-compliance) militate against exercising a discretion to condone undue delay *and* against granting discretionary relief to a State litigant litigating like a rogue. The latter *in limine* issue (abuse of process in the form of multiple transnational litigation forays at the same time) in turn further supports the third (jurisdiction and *forum non conveniens*). And the third *in limine* issue impacts for its part on the issue of mootness, which results from the delay.
[175] Record p 719 para 371, not traversed at Record pp 2344-2345.
[176] Record p 706 para 322, not denied at Record p 2342 para 187.
[177] *Lesotho National General Insurance v Nkuebe* LAC (2000-2004) 877 at para 13.

principles imposing a specific or reasonable time in which recourse is to be taken against administrative action or consequent contracts.[178] Statutory time periods must be successfully impugned before they may be disobeyed.[179]

86. In the case of recourse against an arbitration awards before a Court in Lesotho, the Lesotho legislature imposed a clear and express time period for recourse against an arbitral award.[180] It is six weeks.[181] Such limited recourse as may be taken against an arbitration agreement (if an applicant establishes the onerous test: good cause) must be taken prior to the exhaustion of the arbitral process pursuant to such arbitration agreement.[182]

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[178] In *Lechesa Lets'ela v Director of Public Prosecutions* (C of A (CRI) Case no. 1/2013) [2013] LSCA 19 (18 October 2013) at para 6 the Court of Appeal confirmed that in the absence of a "fixed time limit for the institution of review proceedings … a review must be brought within a reasonable time after the decision which is sought to be reviewed". In that case a ten-month period was considered "a long time," i.e. excessive (*id* at para 9).

[179] Hence it was necessary in *Lesotho National General Insurance v Nkuebe* for the Court of Appeal to declare unconstitutional section 10(2) of the Motor Vehicle Insurance Order.

[180] Section 34 of the Arbitration Act. It provides in pertinent part:

> "(1) Where –
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire: or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
>
> 2. An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: provided that when the setting aside of the award is requested on the ground of corruption, such application be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published."

[181] Section 34(2) of the Arbitration Act.

[182] Although section 4(2)(a) provides that the court may at any time on application of any party to an arbitration agreement, on good cause shown set aside the arbitration agreement, it has been held that this formulation means "at any time before the *conclusion of the arbitration process*": *Balaram v CCMA* [2000] 9 BLLR 1015 (LC), applying section 191(2) of the South African Labour Relations Act 66 of 1995. Similarly, for purposes of condonation, the words "at any time" mean "at any time during the conciliation process": *Gianfranco Hairstylists v Howard* [2000] 3 BLLR 292 (LC). The Constitutional Court referred to both judgments with approval in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (5) BCLR 527 (CC) at paras 190-193, and held that the words "at any time" connotes "no more than the timing of the good cause application *within* the dispute-resolution process" (*id* at para 192, emphasis added), and did not have the effect of extending the mandatory time periods contained in the rest of the statute (*id* at para 193). Therefore the mandatory periods imposed under section 34 of the Lesotho Arbitration Act is not undermined

87. In this case, on the applicant's own version, it had discovered the "true facts" already in June 2021,[183] even though already on 31 January 2020 the Award had been hand-delivered.[184] Therefore, even if Lesotho was the seat of the arbitration, which it is not, the applicant would have needed to institute an application within six-weeks under the Lesotho Arbitration Act.

88. In the South African proceedings the applicant accepted the need for very urgent recourse. It undertook to launch this application within 30 days of the court order sought ultra-urgently from the South African High Court on 29 July 2021.[185] It accepted the need to take recourse "immediately" and was eminently in a position to do so imminently.[186] Yet this application was instituted only on 20 September 2021.[187]

89. No justification exists for this failure to honour its undertaking to Court and its obligation under Lesotho legislation. The application is in substance a reproduction of the same founding affidavit filed before the High Court in South Africa many months earlier.[188] Thus, at best for the applicant, it failed to honour its own undertaking to the forum and enforcement court to institute this application within 30 days,[189] apart from failing in its statutory obligation under the law of

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by section 4(2), and recourse against the arbitration agreement cannot be sought after the arbitration proceedings have been finally concluded, least of all when the award had already received recognition by court order abroad.

[183] Para 234.6 of the applicant's heads of argument.
[184] Para 233.15 of the applicant's heads of argument.
[185] Record p 628 para 84.
[186] Record p 41 para 101; Record p 661 para 174.
[187] Record p 661 para 174.
[188] Record p 628 paras 84-85.
[189] Record p 639 para 109.

Lesotho to do so within six weeks. A four-week period was, on the applicant's own deposed version, sufficient. It clearly was: the selfsame deposed version was simply reproduced for purposes of the current application. Hence the three-month delay is demonstrably unreasonable.

90. This is the short and simple basis for disposal of the undue delay issue, since no condonation under the Arbitration Act is sought. Instead, the applicant argues that "there was no unreasonable delay".[190] This is consistent with its affidavits,[191] which nowhere attempt to make out a case for condonation under the Act. But it is legally misconceived, and renders the entire application fatally defective.

91. The fatal defect is, in fact, far more momentous. The applicant's delay is, in truth, much longer. Minister Majoro's delay has endured since 2 November 2018, being a staggering and patently unreasonable delay of almost three years.[192] He was informed already some three years before this application was eventually lodged about the conclusion of the Supply Agreement purportedly impugned in this application.[193] In such circumstances there was a legal duty on Minister Majoro to approach this Court diligently, without undue delay.[194]

[190] Para 234 of the applicant's heads of argument.
[191] Record p 2290 para 27.
[192] Record p 634 para 97.
[193] Record p 622 para 69; Record p 633 para 97.
[194] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 26, quoted with approval by this Court in *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology* (CIV/APN/126/214) [2021] LSHC 28 (17 June 2021) at para 14.

92. It is no excuse to contend, as the founding affidavit does,[195] that Minister Majoro formed his own view on the illegality.[196] Only this Court is the arbiter of legality.[197] Even the Prime Minister has, the Court of Appeal cautioned, an obligation to respect the independence of the courts and not to pre-empt their exercise of their exclusive jurisdiction to determine the legality of government conduct.[198]

93. Therefore, as this Court itself confirmed,[199] a government official who takes it upon himself to give effect to (or ignore) what he considers an irregularity, and to conclude or appoint his own preferred contractor or candidate, perpetrates a "manoeuvre" outlawed "by the *Oudekraal* and *Kirland* principle".[200] For "rule of law purposes" the principle requires that Minister Majoro "must" have "challenge[d] the … appointment/contract before the courts of law in review proceedings".[201] He could not act "outside of review processes, as that in essence amounted to taking the law into his own hands."[202] Since "[t]he final arbiters on the questions of legality

[195] Record p 31 para 70.
[196] Minister Majoro incanted in his affidavit precisely the words which *Oudekraal* held is fatal: having "believed" that the conduct and contract was "invalid". Where a government official forms such belief, even if honestly held (and, in fact, *precisely* when honestly held), then a court must be approached to make the necessary order, otherwise the decision "exists in fact and it has legal consequences that cannot simply be overlooked" (*Oudekraal id* at para 26). The Court of Appeal confirmed this paragraph in *Oudekraal* in *Mothobi v The Crown* LAC (2009-2010) 465 at para 14.
[197] *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology* (CIV/APN/126/214) [2021] LSHC 28 (17 June 2021) at paras 14-22, confirming (as the courts of Lesotho have done consistently) that the so-called "*Oudekraal* principle" is part of the law of Lesotho too. This Court accordingly confirmed the application of this principle by the Constitutional Court of South Africa in cases like *Kirland* and *Merafong.* Similarly, in *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 74 the Constitutional Court of South Africa reiterated that the rule of law precludes officials from ignoring conduct that is vulnerable to legal challenges (e.g. for any irregularity or failure to comply with applicable procedures); and only courts can determine the legality of government conduct – not government officials. It is therefore impermissible to adopt the applicant's approach, arguing that Government may ignore a decision or a step "based purely on a contrary view" as regards the legality of the step or decision (*EFF v Speaker, National Assembly supra* at para 75).
[198] *Manyokole v Prime Minister* C of A (CIV) No: 15/2021 at para 119.
[199] *Nthulenyane v Principal Secretary, Ministry of Education* CIV/APN/52/2019 at paras 11-19.
[200] *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology supra* at para 21.
[201] *Ibid*.
[202] *Ibid*.

are the courts of law and nobody else", therefore "[a]nything done outside these set parameters can only be a recipe for anarchy."[203]

94. Hence Minister Majoro could not, as he claimed to have done,[204] treat the decision to conclude the contract as a non-decision,[205] and could not have "believed" the decision or the contract to be "invalid".[206] This *post hoc* construct is not only improbable in the extreme. It is also impermissible, and incognisable in law.

95. We have already shown that the basis invoked for Minister Majoro's alleged views on legality is contrived. The only consideration contemporaneously expressed by Minister Majoro was that the project must be promoted by the Ministry of Energy.[207] This is not a legal requirement, and there is still no legal basis suggested for any such labyrinthine smokescreen.[208] Factually the position is that the Minister of the relevant portfolio indeed invited private investment and proposals, and FSG's supposedly "unsolicited" proposal was in truth entirely consistent with the Minister of Energy's invitation and the Lesotho Energy Policy 2015-2025.[209]

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[203] *Ibid*.
[204] Record p 31 para 70.
[205] *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology supra* at para 22.
[206] *Oudekraal supra* at para 26; *Mothobi v The Crown supra* at para 14.
[207] Record p 31 para 73.
[208] Para 233.5 of the applicant's heads of argument merely alludes elliptically to Minister Majoro's "knowledge of "proper processes". The "proper processes" to be followed was *not* procurement processes, but some unexplained process allegedly contained in some unidentified "rules of government investment" entirely extraneous to any legal source cited. It is correctly not a review ground that the "project" had to be "initiated" by "the Minister of Energy and Meteorology". Yet this is, in fact, the so-called "proper process" pleaded (Record p 31 paras 73-74) and now invoked in argument in the context of condonation.
[209] Record p 654 para 150.

96. It is in any event no excuse to argue now that FSG's formal correspondence to Minister Majoro notifying him of the conclusion of the contract was fanciful.[210] Minister Majoro himself supported the transaction until his unilateral U-turn (yielding to the Chinese competitor).[211] If the transaction with FSG had indeed been concluded contrary to some formality which according to Minister Majoro had rendered the decision to enter into the contract reviewable, then he had a duty to investigate the facts further at that time and to approach the Court duly for what is now alleged to constitute appropriate relief.[212]

97. Yet, on his own version (featuring another contradiction in the applicant's case) Minister Majoro was already aware in November 2018 of the alleged non-compliance with procedures now invoked as review grounds.[213] Minister Majoro merely advances as attempt to exculpate himself for his inaction this: he himself did not "consider" that a "binding" agreement had been concluded.[214] Why was the contract which was *in fact* concluded not *in law* (according to Minister Majoro's view) "lawful, valid and binding"? Because, so the founding affidavit avers, "legal requirements … were simply not met".[215]

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[210] Para 233.5 of the applicant's heads of argument. Logic dictates that the alleged "harassing habits" of FSG in requesting Minister Majoro to conclude the finance agreement would in itself have been a basis for Minister Majoro at the very least to inquire instead of ignore. The artificial excuse now manufactured is that some of FSG's sales talk was too good to be true. But this is not a basis for ignoring the crucial communication confirming the conclusion of a contract signed by the second most senior Cabinet member.
[211] Record p 612 para 45, not traversed at Record pp 2314-2315.
[212] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) at para 32, confirming that "[o]btaining any information that gives rise to a reasonable suspicion" triggers the duty to investigate non-compliance with procurement processes.
[213] Record pp 30-31 paras 69-72; annexures FA29 p 245 and FA31.1 p 248; Record p 636 para 102.
[214] Record p 31 para 70.
[215] Record p 31 para 70.

98. What this means is that Minister Majoro knew the facts at the time (which *per se* suffices for purposes of delay),[216] and even had knowledge of what he contended was the legal status of the transaction too (which eliminates any excuse for his delay, and renders his inertia irregular and inexplicable in the extreme).[217] But because the alleged invalid and unlawful exercise of public power required correction by this Court in review proceedings properly lodged (so the applicant insists), Minister Majoro could not usurp the Court's function as arbiter of legality.[218]

99. He could not remain inert, and could not assert his own views on the binding nature of public power exercised by another Cabinet Minister.[219] The law is quite clear: signature by a Minister of a contract indeed binds.[220] The facts are equally clear: the contract in question was indeed signed by a Cabinet Minister.[221] The applicant's heads of argument correctly concede this in the first sentence.[222]

100. Therefore whether the 30-day period promised by the applicant itself, the six-week period imposed by the Arbitration Act, the two months afforded by the Foreign States Immunity Act for purposes of entering opposition against the enforcement

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[216] See e.g. *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at para 51; *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) at paras 10 and 32.
[217] The rule of law review now invoked afforded a "direct and immediate" remedy, which only a Court could grant (*Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at paras 9 and 14).
[218] *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology* (CIV/APN/126/214) [2021] LSHC 28 (17 June 2021) at para 21.
[219] *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 41.
[220] Section 10 of the Government Contracts and Proceedings Act; Regulation 3(2)(a) read with Regulation 1 s.v. "chief accounting officer" and Regulation 30(3) of the Procurement Regulations, which authorise a procurement unit to sign a contract, designate ministries as procurement units, and make by clear implication the Minister heading a ministry in question the final decision-maker.
[221] Record p 11 para 21, confirming the applicant's own factual version: Minister Tšōlo had indeed signed the contract and he "appears to have represented himself as acting on behalf of the Kingdom when he signed the Supply Agreement."
[222] The concession is correct: the founding affidavit formally concedes the same fact (Record p 26 para 55).

application (in respect of which Lesotho received five months),[223] the three-month period imposed by the Procurement Regulations to complain after the conclusion of a contract;[224] or the three-month period imposed under the international Model Law giving effect to the New York Convention is applied,[225] even the four-month period spanning from 18 May 2021 to 20 September 2021 *per se* represents undue delay.[226]

101. The date 18 May 2021 is the day by which the applicant itself accepts the game was up and the clock started ticking against it. Thus even on the applicant's most creative and ambitious approach to the facts this application is out of time.

102. But the applicant's approach does not accord with the actual facts. For instance, it fails to account for Minister Majoro's taking office as Prime Minister already in May 2020.[227] By December 2020 multiple communications relating to the UK enforcement proceedings of Award were served on the Office of the Prime Minister.[228] In January 2021 notices of the enforcement proceedings were similarly served on his office in relation to the South African enforcement proceedings.[229] Even according to his own version of events, there is at least a full five month period for which he does not account.[230]

[223] Record p 682 para 260.
[224] Regulation 54.1 of the Procurement Regulations.
[225] Article 34(3) of the UNCITRAL Model Law on International Commercial Arbitration.
[226] Record p 661 para 174.
[227] Record p 621 para 67.
[228] Record p 665 para 187.
[229] Record p 665 para 187.
[230] As the applicant correctly accepts in para 232.3 of its heads of argument.

103. Thereafter a further four-month period elapsed before filing this application.[231] During this full four months a founding affidavit was finessed.[232] It *verbatim* reproduced an affidavit, prepared previously within one month.[233] This for purposes of an urgent application affording FSG only one court day's notice.[234]

104. A two-year period was held to be sufficient by the Court of Appeal in *Lesotho National General Insurance v Nkuebe* for lodging an insurance claim. The Legislature similarly imposed the same period for government contracts generally.[235] And a period of six months is the norm under the most closely comparable jurisdiction for conventional judicial reviews.[236] Even in the context of a collateral challenge a 15-month delay was held to be a long delay requiring a proper explanation.[237]

105. The 34-month (almost three years) delay in purporting to impugn the decision forming the subject-matter of the first prayer in the notice of motion is therefore demonstrably excessive.[238] It severely prejudices FSG,[239] *inter alia* because FSG cannot after all these years gain access to material located in Lesotho. Such material is in fairness to FSG required for conducting a full defence to the extensive factual

[231] Para 233.26 of the applicant's heads of argument, giving the date on which this application was lodged as 20 September 2021.
[232] Record p 639 para 109.
[233] Record p 600 para 9.
[234] Record p 642 para 117.
[235] Section 6 of the Government Contracts and Proceedings Act imposes a two-year period "from the time when the cause of action … first accrued" in which any proceedings must be brought against Government.
[236] *Cf Cape Town v Aurecon* 2017 (4) SA 223 (CC) at para 51 (cited in para 232.10 of the applicant's heads of argument), which refers to the 180-day period under the South African Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and holds that also under legality review (when PAJA does not apply) legal proceedings must be instituted without undue delay. In *Cape Town v Aurecon* the City's self-review "application was nearly a year late" (*id* at para 48). This was undue, the Constitutional Court held.
[237] *Nthulenyane v Principal Secretary, Ministry of Education* CIV/APN/52/2019 at para 19.
[238] Record p 706 para 322.
[239] Record p 639 para 110.

allegations advanced by the applicant. These material and information are within the applicant's and the Kingdom's officials' exclusive knowledge and control.[240]

106. Condoning the extensive delay will also inherently prejudice the public interest and the interests of justice.[241] Strikingly, despite all the delay, to this day the investigations initiated already in May 2021 has still not yielded an iota of evidence supporting the factual substratum of the applicant's case.[242] Yet FSG is somehow expected to defend (whether directly or indirectly) itself and its vested interests against serious but oblique accusations of criminality.[243] This when, unlike the applicant, FSG has no access to witnesses, evidence, documents or institutional knowledge or local resources.[244]

107. Thus FSG clearly stands to suffer serious prejudice if condonation is granted. The allegation that it received a "windfall" and therefore cannot complain is inconsistent with the facts. It is not disputed that FSG's independent expert evidence established that the liquidated damages awarded by the arbitrator was even less than the actual damage which FSG in fact suffered.[245] There is therefore no "windfall". Yet this is

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[240] Record pp 721-722 para 380.

[241] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para 160:

> "a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."

[242] Record p 639 para 111.

[243] Record p 721 para 380.

[244] Record p 639 para 110.

[245] Record pp 772-773 paras 110-112. The expert report of Professor Mncube and Mr Henry is at Record pp 1217-1332, comprising annexure "FS104" to the answering affidavit. It is introduced and addressed in the answering affidavit at Record pp 695-697 paras 294-295.

the crucial factual foundation on which the applicant strenuously relies *inter alia* in support of condonation.[246]

108. The other equally contrived contention is that FSG should somehow through all these years have known and expected that three years hence a review may be lodged.[247] This is not the law, and is not consistent with the facts either.[248] The correct legal position is that since Minister Majoro had been informed of the conclusion of the contract, he was under a legal obligation (and in any event could have been expected by FSG, who openly and continuously communicated with Minister Majoro)[249] to take appropriate recourse to Court if there was any legitimate basis to seek to impugn the supply agreement. We reiterate: he could not act as arbiter of legality, and could not simply ignore what he preferred to repudiate (namely FSG's project and contract) in favour of a Chinese competitor (contracted by Minister Majoro himself, without even disclosing this to FSG at the time).

109. Since FSG and its representatives are not the "rogue former government officials and employees" whose conduct is contended to prejudice the Kingdom in instituting this application,[250] and because FSG has fully apprised Minister Majoro of the relevant information already in September 2018,[251] it is not just and equitable to visit the consequences of their conduct on FSG by subjecting FSG to long-delayed

[246] Para 235.4 of the applicant's heads of argument.
[247] Para 235.6 of the applicant's heads of argument.
[248] Record p 722 para 381.
[249] The applicant variously argues that FSG communicated *too* continuously with Minister Majoro (para 61.3 of the applicant's heads of argument). Yet the applicant also argues that FSG somehow simultaneously perpetrated a pattern of exclusive communication with the previous Prime Minister (para 16).
[250] Record p 722 para 380.
[251] Record p 722 para 381.

litigation.[252] Doing so would condone and reward precisely the inertia, self-help and usurpation of the Court's exclusive role as arbiter of legality by other arms of Government. To this separation-of-powers and rule-of-law violation Minister Majoro resorted, despite being informed at the time by FSG itself of the conclusion of the contract and conduct now purportedly impugned.[253] This in itself prejudices the administration of justice, and compellingly militates against granting condonation.[254]

110. Yet it is precisely the "own rogues" rhetoric on which the applicant relies for purposes of condonation. Both in the applicant's affidavits and in its heads of argument it is strenuously contended that it is *because* "some of its <u>own</u> officials and former office-holders" have "hampered" the discovery of "the true facts" that the delay must be overlooked in favour of the applicant.[255] But the Court of Appeal repudiated precisely this type of attempt. In one of the only two Lesotho judgments cited by the applicant in support of its condonation case,[256] the Court of Appeal held that "[a]ny prejudice or potential prejudice which the respondents or the administration of justice may have suffered … is at least in large part attributable to the Crown and its officers and servants."[257]

[252] Record p 723 para 383; Record p 724 para 385.
[253] Record p 723 para 383.
[254] *Lechesa Lets'ela v Director of Public Prosecutions* (C of A (CRI) Case no. 1/2013) [2013] LSCA 19 (18 October 2013) at para 11.
[255] Para 238.1 of the applicant's heads of argument.
[256] Para 230 of the applicant's heads of argument.
[257] *Lechesa Lets'ela v Director of Public Prosecutions* (C of A (CRI) Case no. 1/2013) [2013] LSCA 19 (18 October 2013) at para 13.

111. In that case the delay endured for ten months.[258] The Court of Appeal held that this was "certainly a long time to delay the institution of review proceedings, even for a young, illiterate person who is in prison and lacks funds".[259] Yet Government could *not for purposes of opposing condonation* rely on its own officials' and former office-holders' rogue conduct.[260] The rogue conduct in question involved an unexplained refusal to comply with a court order,[261] violating the separation of powers.

112. In this case it is Minister Majoro himself who violated the separation of powers. He usurped the Court's by deciding for himself in 2018 issues of legality. And thereafter, much more than merely ten months hence (as in *Lechesa Lets'ela*), he attempts to invoke rogue conduct by his own government officials (alleged to occur in 2021). But the *subsequent* rogue conduct – for which the applicant is in any event responsible – would not even have occurred had Minister Majoro approached this Court as he was required to do when FSG informed Minister Majoro already in 2018 of the conclusion of the contract (and the decision to conclude it). The allegedly "patent and flagrant"[262] unlawfulness on which Minister Majoro formed his own view in 2018 could and should have been redressed by recourse to court long ago. Failing to do so for so long cannot be condoned in the circumstances of this case.

[258] *Id* at para 7.
[259] *Id* at para 9.
[260] *Id* at paras 13-14.
[261] *Id* at para 4.
[262] Paras 235.1 and 310 of the applicant's heads of argument.

113. None of the applicant's excuses for the delay is tenable.[263] If the contract and conduct was so "flagrantly" unlawful as Minister Majoro says he considered it at the time (in 2018), and again when deposing to his first affidavit deposed in the South African litigation (prepared in May 2021), then the six-week outer limit for taking recourse against the Award (which frames the period within which to attack the arbitration agreement), expired – at best for the applicant – in early May 2021.[264]

114. Demonstrably the applicant's case cannot account for the correct legal approach – neither under the legislation of Lesotho, nor under the precedents articulated by the courts of Lesotho.[265] The principles are clear. They have been summarised (based

[263] Two inconsistent conclusions are contended for by the applicant. On the one hand, the applicant argues that FSG (a foreign lay litigant) should somehow have "know" that the Supply Agreement – which it brought to the attention of Minister Majoro, the-then Minister of Finance (which is the Minister responsible for the administration of the Procurement Regulations, the PFMAA, and any applicable provision in the Constitution governing fiscal affairs and public finance) – "had been concluded in breach of the most basic and fundamental principles of the Kingdom's procurement law and the provisions of the PFMAA and the Constitution" (para 235.6 of the applicant's heads of argument). On the other hand, the applicant argues that Minister Majoro could overlook and ignore the alleged obvious illegality since 2018, and then reasonably defer filing his founding affidavit for a further four months after all the facts had already been discovered, and three months after a virtually *verbatim* version had already been deposed in the South African urgent stay application. This FSG's answering affidavit already pointed out (Record p 722 para 381). The applicant's heads of argument also in this respect fail to meet the pleadings and actual factual position.

[264] Para 233.18 of the applicant's heads of argument correctly concedes that Minister Majoro already received personal notice of the South African enforcement proceedings on 21 March 2021. Calculated from this date, the six-week period imposed by the Arbitration Act expired on 3 May 2021.

[265] Only four short subparagraphs in the applicant's heads of argument attempt to deal with FSG's answering affidavit. The first two claim that no evidentiary or documentary prejudice exists (paras 235.2 and 235.3), asserting that FSG "does suggest that there may be evidence that has become unavailable to it as a result of delay" (para 235.2). It is not quite clear what is intended by this assertion. FSG's stance is evident: it will be "severely prejudiced" by the long delay, much more than the alleged "hampering" that the applicant itself alleges it had suffered as a result exclusively of its own rogue representatives. FSG does not even have the means to verify the correctness or completeness of the record made available by the applicant, who itself claims that records under its control had been "concealed". The second subparagraph claims that FSG "in other words" "only … points" to "proprietary prejudice" in the form of a "windfall". The windfall-version is inconsistent with the facts, and cannot accurately be advanced. The last subparagraph relies on another factual feature on which every aspect of the applicant's case depends: actual knowledge on the part of FSG as regards issues of Lesotho law. Also this crucial factual undercarriage of the applicant's case is contrived. It is also, as indicated, self-defeating. If FSG should have had such knowledge and acted thereon since 2018, then the same applies *a fortiori* to the Minister of Finance during that period. Minister Majoro, the deponent to the applicant's affidavits, was the Minister of Finance at all relevant times.

on caselaw confirmed by the Court of Appeal itself)[266] by a Full Bench of the Labour Court in the specific context of an application seeking to review an arbitration award:[267]

> "The grant of condonation is an indulgence. The Court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with a proper judicial discretion and upon sufficient and satisfactory grounds shown by the applicant. It is necessary in a condonation application for the applicant to show not merely that he or she has strong prospects of success on the merits but to give good reasons why he or she should receive such an indulgence, that is, that he or she acted expeditiously when he or she discovered her delay and advance an acceptable explanation for such a delay."[268]

115. A court must give sufficient consideration to a "respondent's interest in finality", and the avoidance of unnecessary delay in the administration of justice.[269] Other factors to be considered include (i) the degree of lateness or non-compliance with the prescribed timeframe; (ii) the explanation for the failure to comply with the statutorily-imposed timeframes; and (iii) the convenience of the Court.[270] There is a "plethora of authority in support of th[e] principle"[271] that "even if prospects of success were held to be strong, this fact alone is not sufficient to grant condonation".[272]

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[266] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E, confirmed in *Thamae v Kotelo* (CIV) Case no. 16/2005) [2005] LSCA 20 (20 October 2005) at para 13. *Thamae v Kotelo* is the second of the only two Lesotho judgments cited by the applicant for purposes of condonation (fn 241 of the applicant's heads of argument). It is cited by the applicant precisely for confirming *Melane v Santam Insurance*.
[267] *Amanda Mapelaelo Shale v Lesotho Funeral Services* (LC/REV/99/10) [2014] LSLC 1 (6 January 2014) at para 1.
[268] *Id* at para 17.
[269] *Id* at para 9, citing *Melane v Santam Insurance Co Ltd supra.*
[270] *Id* at para 10.
[271] *Id* at para 24, citing *inter alia* the Court of Appeal's judgments in *Molapo Mothunts'ane v Kopano Selomo* C of A (CIV) 16/1992 and *Teba v Lesotho Highlands Development Authority* LAC/CIV/A/06/09 at 10.
[272] *Id* at para 23.

116. We shall show below that the prospects of success are poor. For present purposes it suffices that the period of delay is excessive, that the explanation is inadequate, and that the applicant failed to proceed with sufficient expedition when it discovered the need for condonation. Overlooking the long delay prejudices not only FSG, but also the interests of the administration of justice.[273] Conversely the applicant is not prejudiced, because (as we shall also show, *inter alia* in dealing with mootness) the alleged harm – which is in any event not factually established – cannot be averted by the relief sought before this Court. Hence the relief sought in South Africa, in the preceding and still pending litigation before the proper court: the forum *cum* enforcement court. Only the latter court is competent to take recourse against the extant enforcement order.

117. It follows that the prejudice to FSG's interest in finality and to the administration of justice *per se* constitutes the "insuperable bar" to which the applicant's heads of argument refer in attempting to summarise the "law on delay",[274] but cannot

[273] *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at para 73:
"The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself."

[274] Para 230.2 of the applicant's heads of argument.

surmount in the subsequent subsection seeking to summarise "the facts on delay",[275] and do not even mention in the terse "conclusion on delay".[276]

118. Therefore the entry-level jurisdictional issue concerning undue delay is dispositive of the entire application.[277] Thus the matter falls to be dismissed already on this *in limine* issue alone.

[275] Paras 233-237 of the applicant's heads of argument, which rely almost exclusively on the applicant's own founding affidavit. The applicant's argument does not competently engage with FSG's answering affidavit. The applicant's inability to do so crystallises in the contention that FSG's five-page traversal (Record pp 657-661) of a section in the founding affidavit spanning nine pages (Record pp 34-42) is "a lengthy screed". The applicant's inability to meet the facts is self-evident from the intemperate tone deployed. The applicant's replying affidavit traversed the "screed" without any suggestion that it was "lengthy" or otherwise capable of criticism (Record p 2340 paras 178-179). In doing so the applicant attempted to defer a factual issue "for legal argument" (Record p 2340 para 179). The factual issue is that the deponent to the founding affidavit had repeatedly, falsely and deliberately misquoted Lesotho legislation (Record p 657 para 161; Record p 664 para 182, not traversed at Record p 2341). It is not addressed in argument, even if that had somehow been competent – as implied in the applicant's replying affidavit. It was deposed by the self-same deponent responsible for the intentionally false statement. He deposed on behalf of the Attorney-General, an institutional litigant whose empowering legislation was misquoted, and who has a constitutional duty to the Court not to "persist" – as the replying affidavit records – in points without factual or legal substance.

[276] Para 238 of the applicant's heads of argument.

[277] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at para 13. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) the Constitutional Court held that the Supreme Court of Appeal erred in applying PAJA. However, the Constitutional Court confirmed the Supreme Court of Appeal's approach to undue delay: if it cannot be "overlooked" (applying the two-step approach applicable to condonation applications generally), then no review jurisdiction can be exercised (*id* at paras 49-53). The Constitutional Court further confirmed the need for all reviews – even those outside PAJA's application – to be brought within a reasonable time "from the date that the applicant became aware or reasonably ought to have become aware of the action taken" (*id* at para 49). Therefore, in the words of the Constitutional Court, "the proverbial clock started running" from the date on which FSG informed Minister Majoro of the conclusion of the contract. That was in November 2018. That is the answer to this entire case – even on the application of *Buffalo City* (CC), a judgment on which the applicant relies extensively (paras 232-232.9 of the applicant's heads of argument). Thus the applicant's resort to South African law (which it somehow also wants *not* to be applied, contending that the South African choice of law clause somehow simultaneously makes no difference but is also somehow astounding) is not only self-contradicting but also self-defeating. The South African Constitutional Court repeatedly reiterated the need for a proper *factual* basis to be established by an application before an undue delay may be overlooked (*id* at para 53). In this case the applicant apparently accepts that no factual basis exists for the excuse it conjured: conspiracy and other criminality. (We note that to the extent that other parts of the Constitutional Court's judgment in *Buffalo City* may imply that the merits must always be considered in exercising a court's discretion to overlook undue delay, this is not consistent with Lesotho caselaw. Significantly, the applicant does not ask this Court to depart from Lesotho law in favour of South African caselaw. It argues that the foreign law on which it relies "is essentially the same as that which applies in Lesotho" (para 232.1 of the applicant's heads of argument).)

(2) Mootness

119. The second *in limine* issue is itself self-standing and dispositive. It, too, is not met by the applicant – neither in its pleadings, nor in its heads of argument, which fail to appreciate the actual legal position under the law of Lesotho.

120. As the Chief Justice held for a unanimous Court of Appeal, "[i]t is trite that as a general rule the Courts will not decide moot cases."[278] *Maseru Business Machines* held that "a case is moot when no actual controversy exists and the court cannot grant relief".[279] A controversy does not exist in the required sense if it is common cause that a contract (or, in that case, a hypothec) terminated.[280]

121. The applicant's arguments on mootness misstates and misapplies this test.[281] It attempts to rely on an argument advanced before the Court of Appeal,[282] instead of the Court's conclusion on the correct test for mootness. In doing so the applicant also fails to meet the respondent's case *on the facts*.

[278] *Lesotho National Development Corporation v Maseru Business Machines (Pty) Ltd* C of A (CIV) 38/2015 at para 24.
[279] *Id* at para 25.
[280] *Ibid* at para 25.
[281] Significantly, even the Constitutional Court itself in applying its own caselaw on mootness held that in circumstances where condonation for undue delay is refused, the legal question concerning "prior involvement of a prospective tenderer" (which is a recurring question of considerable importance in procurement law) was moot and therefore not to be entertained (*Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at paras 54-55). The applicant's heads of argument invoke this judgment for purposes of delay (para 232.10), and therefore attempts to argue for its application in the circumstances of this case. Its application demonstrates that even had a more elastic test been applied for purposes of mootness, then the applicant nonetheless still fails.
[282] Para 221 of the applicant's heads of argument quotes *Lesotho National Development Corporation supra* at para 17. In para 17 the Court of Appeal reproduced Mr Selojaoane's argument on behalf of one of the litigants. As the judgment reflects, Mr Selojaoane referred to South African caselaw by the Constitutional Court. The Court of Appeal reverted in para 28 to the quoted Constitutional Court *dictum*. It held that this approach did not apply generally in Lesotho, least of all where the Court is not asked to exercise its constitutional jurisdiction (*id* at para 30). The Court of Appeal accordingly dismissed the matter on the basis of mootness (*id* at para 31).

122. In this case, it is common cause that the Supply Agreement had been terminated; it already formed the subject-matter of concluded arbitration proceedings, culminating in the Award; and the Award had been made an order of court. Hence the Award is now enforceable "as such" (i.e. as a court order, not *qua* contractual debt or arbitral award).[283] Thus the contract, the arbitral clause it contains, and the prior decision to enter into the contract are all academic: they have run their course "fully".[284]

123. Therefore no "actual relief" (in the words of the Court of Appeal,[285] in other words: relief with practical effect) can be granted in respect of the contract, arbitral clause or decision to enter into them.[286] Yet this is the only relief sought by the applicant before this Court.[287] Quite correctly the applicant concedes that also the Award and the South African court order have to be rescinded before any practical effect will be achieved.[288] On this Court's own caselaw there is no prospect of that,[289] and on South African caselaw this Court's pronouncement on the validity of the contract or

[283] *Thabiso Leballo v Cana High School* Lesotho Law Reports (1991-1996) vol 1 at 298, citing *Amlers* at 30.
[284] Para 224 of the applicant's heads of argument, attempting to argue that for there to be mootness the contract had to be *performed* "fully". This is not the correct legal test for mootness, and it is also factually contrived. Equally untenable is the repeated factual averment (invoked throughout the applicant's heads of argument) attributing a "windfall" to FSG. The facts are that FSG has established through independent expert evidence before the arbitrator that the damages it claimed were even *less* than the damage it suffered. It received no windfall.
[285] *Id* at paras 26 and 27.
[286] Thus the applicant's attempt to conjure "practical consequences" or a "practical difference" is contrived (para 222.4 of the applicant's heads of argument). The "award" is not "impugned" before this Court, and none of the prayers in the notice of motion has "consequences" for "the Kingdom's fiscus".
[287] Record pp 1-2 prayers 1-3.
[288] Para 9 of the applicant's heads of argument.
[289] *Ngaka Makepe v Tsele Makepe* Law Reports (1991-1996) vol 1 at 592 this Court held that the sheriff's return of service sufficed (*id* at 530); that failure to defend despite proper service invited default judgment, which serves an important place in the justice system (*id* at 532); that the applicant for rescission of the default judgment failed to make the requisite disclosure of facts defeating the alleged *bona fide* defence (*id* at 531); and that judgment could not be given in favour of the applicant in the teeth of the respondent's denials and disputes of fact raised by the respondent's answering affidavit (*id* at 529). Accordingly the application was dismissed with costs (*id* at 532). The same outcome should follow in this case.

the preceding administrative action is neither "critical" (as the applicant incorrectly argues)[290] nor even relevant.[291]

124. Accordingly this application is academic. This is an *in limine* basis for refusing to entertain the application at all, not a *post hoc* basis for refusing relief after having entertained the application (and in the event of a finding in favour of the applicant on the merits). Courts do not entertain moot review proceedings *or* academic applications for declaratory relief – and therefore do not even enter into the "merits" of such matters. Therefore the ultimate remedial discretion does not even arise. Thus the applicant's reliance on *Just In Time Catering Services* (which it correctly concedes cannot be disapplied unless the applicant can distinguish it) is misplaced. It indeed serves "[a]s an example of the kind of case in which review relief might be refused in the exercise of the court's remedial discretion on the ground of mootness".[292] This correct concession contradict the applicant's argument that this Court "must" grant the review and consequential declaratory relief. The relief sought in this case is indeed "meaningless and academic". This is because the terminated contract has been the subject-matter of a final and conclusive exhaustion of all contractual causes of action before the arbitrator, who also exhausted the arbitration agreement by delivering the Award, which is *res judicata* between the parties, and now enforceable *not* as a contractual cause of action or as an arbitral award, but as an order of a South African court.

[290] Para 8 of the applicant's heads of argument.
[291] It is, as we shall show, only the forum court or enforcement court's pronouncement on grounds for recourse contained in the New York Convention, not national law of the defaulting defendant, which is in law relevant. Therefore arguments like those advanced in e.g. para 222.2 of the applicant's heads of argument are legally misconceived.
[292] Para 223 of the applicant's heads of argument.

125. There therefore are no "issues which are capable of repetition" rendering this matter reviewable despite its evident mootness.[293] No continuing relationship between the parties exists, and in any event should any issue invoked by the applicant "arise in future either between the same appellant and any other parties, it will be premised on different facts and circumstances which will be properly brought before the Court for its consideration" in properly instituted litigation.[294] The current litigation was not instituted when the project, contract, arbitration or resulting Award was still at a stage at which "the Court was able to grant [the applicant] actual relief."[295] Such relief as is now sought from this Court cannot "impact" on the parties' "current" situation.[296]

126. As the Chief Justice observed, resort to South African caselaw concerning the exception to deciding moot matters, in specific cases (despite the Constitutional Court of South Africa itself recognising that moot matters should in principle not be entertained) clearly cannot assist the applicant.[297] The applicant's attempt to apply South African Constitutional Court caselaw in this context is accordingly a revealing departure from the correct position under Lesotho law.

127. The correct legal position is, as the Court of Appeal reiterated, that "[t]he test for mootness which should … be applied in Lesotho" is <u>not</u> a pastiche of South African statutory and Constitutional Court caselaw.[298] The governing law requires the

[293] *Lesotho National Development Corporation v Maseru Business Machines (Pty) Ltd supra* at para 26.
[294] *Ibid*.
[295] *Id* at para 27.
[296] *Ibid*.
[297] *Id* at paras 28-30.
[298] *Hashatsi v Prime Minister* C of A (CIV) 5/2016 at para 15. The Court of Appeal held that the correct test to be applied in Lesotho as "stated by Viscount Simon LC in *Sun Life Assurance Co of Canada v Jarvis*

applicant to establish that an actual controversy exists which requires the Court to consider a live issue.[299] If "a decision on the issue raised by prayers 1(c) and (d) (the invalidity of paragraph 4 of Legal Notice 75 of 2015) would have no practical effect" and if "[a] decision of the court on the point will not alter those facts or have any further effect", then the matter is moot.[300] In this case a decision on prayers 1, 2 and 3 (which concern the continuation in law and in fact of the decision to appoint FSG and to enter into the Supply Agreement; the Supply Agreement itself, and the arbitral clause contained in the Supply Agreement) clearly would have no practical effect.

128. The application therefore falls to be dismissed on the basis of mootness, as the Court of Appeal held.[301]

[1994] 1 All ER 469 (HL) at 471A-B. Significantly, the South African Supreme Court of Appeal applied this test in *Legal-Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA). The case concerned legal aid for an investigation into matters of public, national and international concern arising from the deaths of dozens of people at the notorious Marikana massacre. In applying the test articulated by Viscount Simon LC, in *Magidiwana* Ponnan JA reiterated that it is "trite" that "Courts should and ought not to decide issues of academic interest" (*id* at para 2"), that "[t]he primary question" concerning mootness is whether "any practical effect or result" will be accomplished (para 4), and pointed out that it is a "fallacy" to contend that "a discrete legal issue" arose for determination of the court which could resurrect an academic dispute to surmount mootness, since a case requires consideration on its peculiar facts (*id* at para 16). Ponnan JA held that "the position of the respondents will remain unaltered" (*id* at para 18); and noted that even in constitutional cases an application is not entertained if the timing is inappropriate (*id* at para 18), either on account of the matter being premature or overdue (because of undue delay). Citing Viscount Simon LC's test, Ponnan JA reiterated the need for "practical effect" (*id* at para 20, quoting *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) at para 7 which approved the same *dictum*). Ponnan JA thereupon considered subsequent developments in English law, citing the House of Lords' decision in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL) ([1999] 2 All ER 42). Ponnan JA observed that even in the area of public law courts caution against adjudicating academic matters, and would only do so "when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future" (*id* at para 21, quoting *Ex parte Salem supra* at 488B). In *Magidiwana* Maya JA (as she then was) concurred in Ponnan JA's judgment and approach, applying the same test and reiterating the need for "practical effect" even in public-law litigation (*id* at paras 27-28). Maya JA noted that "no similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future" and that in any event "[a]ny case that may seek to rely on it would be decided on its own merits" (*id* at para 31). The same applies to this case: the applicant failed to identify any other current or future litigation concerning the same issues; and it elected not to review the competing Chinese contract which is similarly affected by the issues contended to render FSG's contract somehow so selectively illegal.

[299] *Hashatsi v Prime Minister supra* at para 15.

[300] *Id* at para 18.

[301] *Lesotho National Development Corporation v Maseru Business Machines (Pty) Ltd supra* at para 31.

129. It is no answer to contend, as the applicant strenuously claims, that the alleged patent or "flagrant" invalidity for which it contends surmounts mootness.[302] If this had been true, then the applicant's dilemma is twofold. First, Minister Majoro could and should have acted on what was so flagrant or patent to him already in 2018. His delay for some three years in lodging this application raises the undue delay *in limine* issue already addressed. Second, if it were true that the invalidity had been patent, then the forum and/or enforcement court can and must make that determination.[303] It must do so for itself,[304] even if this did concern a question of foreign (i.e. Lesotho) law.[305] Therefore the applicant's attempt to rely on the need for judicial review or declaratory relief to that effect in these circumstances is misconceived. Also in this regard the applicant's approach is inconsistent with Court of Appeal caselaw.[306]

130. The relief sought from this Court is also, in fact, incapable of redressing the judgment debt resulting from the enforcement of the Award. The relief is misdirected. The correct target for recourse is the extant court order by the High

[302] See e.g. paras 204, 212.2 and 214 of the applicant's heads of argument.
[303] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at para 36; *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at para 84. The UK Supreme Court held in *Dallah* that the question whether the government concerned agreed to arbitrate in France and whether the French arbitral award was binding in France were only capable of determination by the French courts (*id* at para 29). Lord Collins held that "in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement." These forms of recourse are cumulative; thus "the fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court" (*ibid*).
[304] *Trustees for the time being of the Burmilla Trust v President of the RSA* [2022] ZASCA 22 at paras 30-31 and 33. The latter paragraph is particularly pertinent in the light of the attempt by the applicant to contend for a similar factual construct. Significantly, the applicant cannot press the factual proposition; its far-fetched allegations are factually unfounded. Hence its apparent reluctance to proceed diligently on the course it has set for itself: prior litigation in South Africa.
[305] This is clear even from a judgment cited by the applicant itself (para 256 of the applicant's heads of argument): *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 460*fin*.
[306] *Lesotho Hotels International (Pty) Ltd v Minister of Tourism* LAC (1995-1999) 578 at 584A-F.

Court of South Africa, as the South African Supreme Court of Appeal confirmed.[307] Accordingly "the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order", and only if it is established that there is such ground "can there be any issue regarding the rescission of the [contract]."[308] The court order enforcing the Award will remain standing.[309]

131. This yet further confirms that no practical effect can result from the orders sought in this application. The judgment debt will remain extant. Recourse against it must be sought in South Africa. Similarly, the Award, too, will remain standing. Recourse against it must be sought from the forum or enforcement court.

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[307] *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at paras 10 and 16, in which Wallis JA held (for a unanimous Supreme Court of Appeal) that the correct starting point is *not* the underlying contract, but the extant court order. He held:

> "For so long as that order stood, it could not be disregarded. … It is *res judicata* as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies. The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not, then it had to stand and questions of the enforceability of the settlement agreement became academic."

The Supreme Court of Appeal considered and rejected a contention that "when a judgment is not passed on the merits of a dispute ... but rather derives its existence from an agreement, its continued existence is subject to the validity of the agreement." Wallis JA held that

> "[t]here are two difficulties with this statement. First, the distinction it draws, between judgments 'not passed on the merits of a dispute' and other judgments, lacks any foundation in our jurisprudence. There is no difference in law between an order granted in the case of a default judgment; an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of a trial or opposed application. As the Constitutional Court has said, it is an order 'like any other'. Second, the proposition is overbroad and inconsistent with the authorities discussed above. Were it correct, a material, but non-fraudulent, misrepresentation justifying rescission of the agreement of compromise would also justify the rescission of the judgment granted pursuant to that compromise, but that is not the case. Its defect lies in approaching the question from the direction of the agreement instead of from the direction of the judgment. The latter is the correct approach, because the judgment operates as *res judicata* and precludes a claim based on the agreement. Unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement. It follows that the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order. Only then can there be any issue regarding the rescission of the compromise."

[308] *Id* at para 16.

[309] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at paras 177-183.

132. This is the legal position under international law (the New York Convention)[310] to which Lesotho is a party and bound.[311] South Africa is similarly bound to the same Convention. Accordingly its courts, like the courts in the rest of the world, cannot give effect to a foreign judgment which contradicts the correct recourse regime.[312] The forum and enforcement court is required by the New York Convention to apply a pro-enforcement approach to arbitral awards as a matter of public policy,[313] and

[310] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[311] Article V of the New York Convention provides:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, *proof* that:
>
> (a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid ... ; or
>
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ... ; or
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties ... ; or
>
> (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority ....
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country" (emphasis added).

[312] See e.g. *Industrius DOO v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* (2020/15862) [2021] ZAGPJHC 350 (20 August 2021) at paras 31-33.

[313] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at para 235:

> "The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."

See similarly the Supreme Court of Appeal's subsequent confirmation of a pro-arbitration legal policy in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) at paras 29-30, citing *Bank Mellat v Helliniki Techniki* [1983] 3 All ER 428) at 314G-315C, in which the English Court of Appeal confirmed the same legal and public policy.

must determine "for itself" whether a valid arbitration agreement binding on the party resisting enforcement exists.[314]

133. In a judgment approved by the Lesotho Court of Appeal, the South African Constitutional Court confirmed that the Convention's recourse regime requires an applicant to provide proof before the forum or enforcement court to the satisfaction of that court that the recognition and enforcement of the Award should not be (or should not have been) granted.[315] As a matter of public policy codified in the Convention courts cannot and do not lend themselves to collateral recourse against arbitral awards other than permitted under the Convention.[316]

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[314] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 at para 77. The UK Supreme Court explained that a decision by the foreign court applying its law to determine whether a litigant became a party to an arbitration agreement cannot assist or bind the forum/enforcement court in determining the issue which the New York Convention requires to be determined by the forum/enforcement court under the law contemplated by the New York Convention (*id* at paras 87-90. As the UK Supreme Court confirmed, "[t]he only circumstances in which a decision of the [foreign] court might have assisted would have been if it had decided to annul the award" (*id* at para 91). In this case the applicant is not attacking the award before this Court.

[315] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrew*s 2009 (4) SA 529 (CC) at paras 225-227, citing and applying Article V of the New York Convention, and holding that

> "The basis upon which a court may set aside an arbitration award is a difficult issue which has been the subject of much debate. It should be noted that one of the important questions of modern arbitration law around the world is the extent to which courts may supervise arbitration awards. Both the New York Convention and the UNCITRAL Model Law limit the scope for intervention to a narrow range of complaints.
>
> In approaching this question, it should be borne in mind that arbitration awards are given effect by the ordinary courts. So if a party refuses to obey an award, the law provides for the enforcement of the award by the ordinary courts. Indeed, this is the very purpose of the New York Convention which provides for the recognition and enforcement of arbitration awards in member jurisdictions even where the arbitration has taken place in another jurisdiction. The New York Convention provides only narrow grounds for a court to refuse to give effect to an award."

[316] As O'Regan ADCJ (as she then was) held in *Lufuno supra* at para 235:

> "… Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."

134. It is only if and when and where and *were* the Award to be enforced that the so-called "untold consequences" on which the applicant relies can actually occur. If enforcement is ever sought in Lesotho, then this Court will *become* the enforcement court. It is then that "consequences", untold or otherwise, can be controlled by this Court. The consequences abroad for which the applicant contends cannot be cured, circumvented or countermanded by the relief sought from this Court. It follows that the relief is indeed academic.

135. It is significant that the applicant is driven to an academic construct on harm.[317] Crucially, even in its own terms the applicant's harm theory is abstract and in fact unfounded. Demonstrably the garnishee proceedings through which the judgment debt is to be collected does not have the consequences for which the applicant contends.[318] By now the full judgment debt would have been satisfied through monthly increments, had it not been for the violation of the South African attachment, secured by order of court.[319] Extensive financial aid is and continues to

[317] The applicant goes as far as to invoke an article by an academic commentator: Paparinskis "A Case Against Crippling Compensation in International Law of State Responsibility" (2020) 83(6) *Modern Law Review* 1246. Mr Paparinskis aims in his article to "challenge" what he accepts to be "one of the bedrock principles of international law", namely full compensation (*id* at 1246). The principle has indeed been confirmed by the Permanent Court of International Justice already in 1928 (*Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ Series A no 17, 29, 47). It has been applied ever since, even by the European Court of Human Rights. In doing so the ECtHR awarded compensation of €1.86 billion in 2014 (*id* at 1248, citing App no: 14902/04 *OAO Neftyanaya Kompaniya Yukos v Russia* (Just Satisfaction) 15 December 2014). Mr Paparinskis appreciates that the approach for which he contends is contrary to well-established international law applied for over a century. He also accepts that his approach is contrary to the International Law Commission's decision *not* to adopt such proposition (*ibid*). He acknowledges that "States and other actors" have never sought in the succeeding two decades to challenge the ILC decision to apply the bedrock principle in "its influential Articles on State Responsibility" (*ibid*). This, he acknowledges, "signified its endorsement by the international legal process". But he nonetheless hopes that international law may change to allow "on a case-by-case basis" an exception to the bedrock principle. This is intended to cater for factual scenarios where compensation awards in the order of US$8.7 billion coincide with "one of the most complex situations" ever witnessed by the International Monetary Fund (*ibid*). The facts of the current case simply do not qualify for the extraordinary *de lege ferenda* approach Paparinskis proposes.
[318] Record p 629 para 88.
[319] Record p 683 para 265; Record p 689 paras 281-282.

be available to Lesotho.[320] As a 2020 IMF Report records, Lesotho used only 70% of a loan available to it in that year.[321] Accordingly the Kingdom has significant financial reserves available to it to alleviate any notional cashflow issue, should any improbably arise from the garnishee mechanism.[322]

136. Nowhere in the applicant's affidavit did it show how it had applied the funds to which it helped itself in violation of the garnishee mechanism. It therefore cannot contend for the consequences claimed in abstract and academic terms. They are, firstly, not factually established; and, more importantly, the relief sought in this application cannot assuage the hypothetical harm.

137. Hence the High Court proceedings in South Africa. They demonstrate not only that this application is academic, but also that recourse if any lies elsewhere. The latter reality raises *forum non conveniens* (to which we revert). The former forms the second *in limine* basis on which this application falls to be dismissed.

D. <u>Review grounds</u>

138. Although eight review grounds were initially invoked in the founding affidavit, the applicant presses only three in its heads of argument. None of the surviving review grounds has any merit, which (as we have shown) in any event does not even properly arise for consideration on the merits.

[320] Record p 629 para 88.
[321] Record p 632 para 94.
[322] Record p 632 para 94.

139. We nonetheless address the moribund review grounds in turn, demonstrating that to the extent that any "merits" might arise for purposes of considering condonation, there is evidently no reason to entertain the review.

(1) Procurement Regulations

140. In fact and in law the first review ground is flawed. The Supply Agreement was concluded in accordance with extant legislation (the Government Contracts and Procedures Act), and unimpugned Government policy (the 2018 Lesotho Procurement Policy and the Lesotho Energy Policy 2015-2025). Significantly the founding affidavit fails to establish the contrary, and does not engage with the Act or the policies.

141. Furthermore, there is in any event demonstrably no merit in any suggestion that on the facts of this case the true purpose of the procurement regulations invoked by the applicant have been violated, and that this results in voidness.[323] To the contrary, the 2007 Regulations contradict the applicant's case: they themselves provide that a ministry is a "unit" authorised to conclude contracts,[324] and that the Minister of each ministry is the authorised chief accounting officer of his ministry.[325] This confirms what section 10 of the Government Contracts and Proceedings Act already provides: Ministers are authorised signatories of Government contracts.

[323] Regulation 39(1) itself provides only that the procurement process or contract is "void *or voidable*" (emphasis added) in the event of procedures being breached. The Regulations cannot and do not purport to oust the Court's jurisdiction and discretion to determine the appropriate remedy.
[324] Regulation 1 s.v. "unit" read with Regulation 3(2)(a), listing "ministries" as one of many units established.
[325] Regulation 1 s.v. "chief accounting officer", which is defined as the "officer who is the final decision-maker in the respective bodies under regulation 3(2)".

142. Thus the Regulations already at the level of law defeat the entire conspiracy/corruption/fraud/deception case. FSG could not conceivably have made any "false representation" to the Government of Lesotho that its own Cabinet member and representative (Minister Tšōlo) had authority to "represent and bind the government", as the charge sheet – introduced in reply (but antedating the founding affidavit) – would have it.[326] Minister Tšōlo is, even under the Regulations invoked by the applicant itself, authorised to represent and bind government, and to conclude a contract on its behalf.

143. Factually the correct position is that a highly publicised proposal, pursuant to and congruent with Government's own 2015 policy,[327] was made to Government by Mr Fraser, who was previously involved in a similar Government project in Lesotho.[328] Mr Fraser's firm, FSG, then held and still holds exclusive distribution rights of sophisticated German-engineered infrastructure.[329] The eminence of the manufacturer, and the imminence of the global commitment to renewable energy (to prevent global warming and prevent its effects to particularly vulnerable parts of the world and their people), qualified the project and FSG's proposal for highly beneficial European-sponsored financial support.[330] This, in turn, rendered the project effectively self-funded.[331]

[326] Record p 2356.
[327] Record p 610 para 40; Record p 710 para 338.
[328] Record p 610 para 41.
[329] Record p 610 para 39.
[330] Record p 610 para 39.
[331] Record p 695 para 294(2).

144. The facts are further that not a single competitor – other than the Chinese contractor preferred by Minister Majoro, but not disclosed to FSG by Minister Majoro at the time – has ever been identified as potential bidder interested in participating in any tender process.[332] The Chinese contractor itself apparently participated in no known procurement process.[333] Yet Minister Majoro himself signed a contract (without disclosing this to FSG) with the Chinese contractor at the time FSG was engaging with Government and with Minister Majoro regarding its own project.

145. Minister Majoro, who is the deponent to the founding affidavit, does not attempt to review his own decision to sign the Chinese contract, does not explain his inconsistent approach to FSG's and the Chinese contract, and does not demonstrate why what he alleges applies to FSG's contract somehow does not also apply to the Chinese contract signed by himself.[334] The founding affidavit did not even disclose and account for Minister Majoro's signing the Chinese contract. This in itself is a material defect disqualify this application and at the very least this review ground. If this review ground had been good, consistency requires that it be applied also to the Chinese contract concluded by Minister Majoro.

146. But as Minister Majoro's support for and tolerance of the Chinese contract imply, the review ground is, in any event, also in law unmeritorious. Nothing in the procurement regulations imposes a clear competitive procurement requirement in

[332] Record p 710 para 338.
[333] Record p 622 para 69, stating that the Chinese contract is equally affected by many of the same alleged legal aspects advanced by the applicant in this application apropos the contract concluded with FSG; not denied at Record p 2324 para 130.
[334] Record p 622 para 69.

the circumstances relating to FSG's project and the Supply Agreement.[335] The rule of law requires that any provision imposing such requirement "must in fact exist with some precision".[336]

147. Contrariwise, clause 17 of the Government of the Kingdom of Lesotho's Public Procurement Policy specifically authorises unsolicited proposals. It provides:

> "Unsolicited proposals may be accommodated where a Procuring Entity is approached directly by private sector entities who submit proposals for the development of projects in respect of which no selection procedures have been opened. Unsolicited proposals may result from the identification by the private sector of an infrastructure need that may be met by a privately financed project. They may also involve innovative proposals for infrastructure and services management and offer the potential for transfer of new technology to the country."

148. FSG's proposal and project fell squarely within clause 17's contemplation. Processing its proposal pursuant to this provision, or along similar lines, is

[335] Regulation 7 instead provides that the procurement unit (which includes a ministry per Regulation 3(2)(a)) "shall select a contractor and enter into a contract guided by" (emphasis added) the listed procurement processes. Regulation 7(d) lists "open procedures of procurement" as one such potential procurement process. Regulation 7(d) provides that such open procedure of procurement "may" be used if the advantages of securing competition outweighs the need for expediency. In this case there was no disclosed competition, and the need for speed was acknowledged in the Lesotho policy and is recognised worldwide: counteracting global warming is a worldwide emergency (as e.g. the Paris Accord and the Kyoto Protocol confirm). Regulation 8(1) explicitly provides for exceptional procurement procedures which "may" indeed be used. Regulation 8(2) imposes an obligation to use exceptional procurement procedures (which "shall apply"). Thus an open and competitive procurement process is *prohibited* in certain circumstances. Such circumstances operate where a new contract is concluded that is "directly relevant" to a completed contract by the same contractor, and the contractor is the "single source", *inter alia* by virtue of exclusive intellectual property rights. Similarly, Regulation 36(1) specifically provides for the use of "non-competitive contracting" (and "irrespective of the estimated value of the goods, works or services") *inter alia* where "patents and intellectual property rights results in a contract only being capable of being signed with one body". Regulation 10(1) provides for threshold values, which must distinguish between goods, works and services. It does not provide for the function or effect of the threshold. The thresholds contained in Schedule I to the Procurement Regulations in any event are not suggested to have been determined by the PPAD, and do not distinguish between goods, works, services and consulting services (as Regulation 10(1) requires). The effect of the threshold values specified in Schedule 1 relates to tender security (Regulation 21(1)). Regulation 22(3) simply sets out the languages (*both* official languages) and media (the national press *or* mass media, *and* an online web-based tender notice board) in which an invitation to tender must be published if "the figure stipulated in Schedule 1" is exceeded.

[336] *Attorney-General v Swissborough Diamond Mines No. 2* LAC (1995-1999) 214 at 224B-I and 229H/I-I.

accordingly not only colourless, but quite permissible. Even Regulation 8(2) of the 2007 Procurement Regulations which the applicant attempts to invoke supports the same conclusion. FSG and its project qualified (at least substantially) under this sub-regulation.[337] In such circumstances Regulation 8(2) renders it *mandatory*[338] to apply a procurement process other than open tendering (which is the procurement process for which the applicant contends).[339]

149. Whether a particular procurement process was prohibited, permissible, or appropriate is not something that FSG could or should have known or established for itself at the time. Yet this is the factual proposition on which the applicant's review ground resting on the 2007 Procurement Regulations turns: the applicant contends that FSG knew or should have known that a mandatory competitive tender process was required but not conducted.[340] FSG refuted this factual proposition.[341]

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[337] Record p 610 para 41: FSG holds exclusive distribution rights.

[338] Section 14 of the Interpretation Act provides that the word "shall" must be construed as imposing an imperative requirement, and "may" means that something is "permissive and empowering". See, too, *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 50.

[339] Regulation 8(2) reads:

> "Exceptional procurement procedure shall apply where
>
> (a) the requirement concerns a new contract that is directly relevant to a completed contract, and the added value of the additional work being given to the same contractor outweighs any potential reduction in costs that may be derived through a competitive tender;
>
> (b) the requirement can only be secured from the single source, this may be due to ownership of exclusive design rights or patents; and
>
> (c) there must be convincing and accurate reasons in (a) and (b) for competition to be avoided."

Thus an open and competitive procurement process is *prohibited* if a new contract is concluded that is "directly relevant" to a completed contract by the same contractor, and the contractor is the "single source", *inter alia* by virtue of exclusive intellectual property rights.

[340] Record pp 86-87 paras 192-193.

[341] Record p 710 para 339. Even the so-called presumption that everyone knows the law has its limitations (especially insofar as foreigners, like FSG, are concerned): not even a judge can know all the law, as the Court of Appeal noted (*Tsotetsi v Lesotho Highlands Development Authority* (CIV/APN/445/99) [2000] LSCA 59 (04 May 2000) at 8, citing with approval the Privy Council in *Evans v Bartlam* [1937] AC 473 at page 479 referring to the absence of evidence that a litigant had knowledge of the law at the relevant time).

150. But both in law and in fact FSG was entitled to – and did – rely on the Government of Lesotho at every juncture in the process leading to the conclusion of the contract.[342] Government explicitly confirmed compliance with all legal requirements, including procurement prescripts.[343] FSG was justified in relying on such formal undertakings.[344] It was well within its rights to presume (as the common law does, the Interpretation Act codifies,[345] and international law acknowledges)[346] regularity.[347] Even Minister Majoro himself explained a mere six months before the

[342] Record p 710 para 339.
[343] Record p 669 para 194.
[344] Significantly, as is pointed out by Quinot *State Commercial Activity: A legal framework* (Juta, Cape Town 2009) at 177, legislatures in comparable jurisdictions have given explicit statutory effect to the public policy consideration that even contested contractual capacity cannot defeat a contractual claim against a government. Therefore, as Quinot explains, some "statutory mechanisms … introduced to address capacity issues in state contracting" specifically provide that –

> "a lack of capacity on the part of a local [government] authority to enter into a loan cannot prejudice the lender. The Local Government (Contracts) Act 1997 also shields contracting parties from potential unenforceability of a contract on the grounds of a lack of a local authority's lack of capacity. This Act creates a certification procedure in terms of which the local authority, with the consent of the counterparty, can issue a certificate regarding its capacity to enter into the contemplated contract. On the strength of such certificate the contract will be effective and enforceable in private law irrespective of whether the local authority in fact had the necessary capacity. The Act furthermore provides for a damages claim where a certified contract is set aside on judicial review proceedings."

[345] Section 30 of the Prescription Act provides that where an Act confers the power on a person to exercise any power and the Act conferring the power prescribes conditions constraining the exercise of the conferred power, then those conditions "shall be deemed to have been fulfilled if in the … instrument exercising the power there is a statement to the effect that … the power is exercised subject to the conditions prescribed by the Act".
[346] See e.g. *Trustees for the time being of the Burmilla Trust v President of the RSA* [2022] ZASCA 22 at paras 28. In this judgment the South African Supreme Court of Appeal accepted that *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) provides "a good example" of the correct approach to adopt. In *Southern Pacific Properties* the ICSID Tribunal held that although under domestic law certain acts by government officials may be considered legally non-existent or null and void or susceptible to invalidation, such acts were cloaked with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments (*id* at para 82). Whether legal or not under national law, the acts in question were the acts of Government authorities, including the highest executive authority of the Government (*id* at para 83). Although these acts were alleged by the Government in question to have been in violation of its domestic legal system, they created expectations protected by established principles of international law (*ibid*). Accordingly a determination by a domestic court under the domestic law that the acts are null and void would not resolve the question of liability for damages (*ibid*). The Tribunal noted that "the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law" (*id* at para 85). The Supreme Court of Appeal further referred with approval to *Ioannis Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18) (decision on jurisdiction) paras 193-194 as authority for the same approach.
[347] Record pp 651-652 para 145.

conclusion of the contract which he now seeks to impugn that foreign-financed infrastructural projects like the present do not require a procurement process.[348]

151. Yet the applicant's argument must impute to FSG knowledge of the minutiae of Lesotho procurement regulations, contending that FSG was intentionally complicit in a false contractual recordal concerning compliance with law.[349] This is indeed necessary both for the fraud/criminality construct, and for the civil consequences. The latter is governed by section 30 of the Interpretation Act, which is not impugned. It operates against the applicant, particularly in the light of the applicant's inability to establish its all-important but false factual accusation of fraud on the part of FSG.[350]

152. The facts are that a contract was indeed signed, in FSG's presence (and that of two witnesses) by a Minister serving at that time in His Majesty's Cabinet, acting in his official capacity, signing on behalf of Government. Section 10 of the Government

[348] Record p 643 para 120.

[349] See e.g. para 134.4 of the applicant's heads of argument. See also para 61.6 of the applicant's heads of argument, making a submission for which no part of the motion record is cited. Significantly, the governing principles of inferential reasoning are not applied or cited either (*Govan v Skidmore* 1952 (1) SA 732 (NPD) at 734B-D, cited by the Court of Appeal in *inter alia Joy to the World v Neo Malefane* (C of A (CIV) Case no: 16/13) [2013] LSCA 17 (18 October 2013) at para 10). There is indeed no substantiation for what is simply "submit[ted]". It contradicts the rest of the subterfuge theory.

[350] Significantly, as already FSG's answering affidavit pointed out, the fraud, corruption, conspiracy, subterfuge and/or other conceivable criminality atmosphere which the applicant attempts to create to smear FSG is not even raised as a review ground (Record p 715 para 354, not traversed at Record p 2344 paras 192-193). The review grounds now pressed in the applicant's heads of argument are even fewer: only three of the eight review grounds are retained. None attempts to leverage the atmosphere which the founding affidavit failed to create. Not even in the section of the applicant's founding affidavit dealing with condonation is any reliance placed on fraud, corruption or any criminality (Record p 719 para 374). Least of all any attributable to FSG. Instead, it is allegations concerning legality, irregularity and "rogue government employees" on which the applicant relies for purposes of condonation (Record p 101 para 247). The flimsy inference ("there also appears") that "a deliberate and concerted effort to conceal the nature of the Supply Agreement" (Record p 101 para 246, emphasis added) is speculative, not supported by the test for inferential reasoning, not factually established, and in any event not the fraud or corruption alleged elsewhere.

Contracts and Procedures Act provides that such contract is binding.[351] Similarly, the Procurement Regulations themselves authorise a "ministry" (*qua* "procuring unit") to conclude a contract, and identify the Minister as the "chief accounting authority" and final decision-maker for the ministry he heads. The Procurement Regulations do *not* even state that projects exceeding the thresholds listed in the Schedule 1 must be subjected to a competitive public procurement process. They do, however, explicitly authorise a different procurement process *inter alia* in situations where intellectual property rights subsist.[352]

153. This is such a situation. As mentioned, FSG is a sole provider of German-engineered solar technology, and previously installed similar infrastructure in Government facilities. Therefore even in their own terms the Procurement Regulations do not assist the applicant. More importantly, the Procurement Regulations do not trump section 10 of the Government Contracts and Proceedings Act. The Interpretation Act is clear: "no subsidiary legislation shall be inconsistent with the provisions of any Act".[353] Both in terms of the Government Contracts and Proceedings Act and the Procurement Regulations Minister Tšōlo was an authorised signatory to the Supply Agreement. And the process pursuant to which the contract had been signed satisfied the objects of the Procurement Regulations.[354]

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[351] Section 10 provides:

> "A contract or agreement other than a contract or agreement entered into by virtue of the provisions of section eight and nine purporting to be made on behalf of Her Majesty in Her Government of Basutoland or the Basutoland Government shall be held to be a contract or agreement made by and on behalf of Her Majesty in Her Government of Basutoland if signed by a Minister of Motlotlehi's Government or by an officer authorised by such Minister, and unless so signed shall be of no effect."

[352] Regulations 8(2) and 36(1).

[353] Section 23(b) of the Interpretation Act.

[354] Record p 710 para 338.

154. Accordingly also on this basis the Interpretation Act answers the applicant's reliance on the Procurement Regulations. The Act provides that a liberal interpretation must be afforded to all enactments, and that a purposive approach be applied.[355] Because the objects of publicity, cost-effectiveness, efficiency and other procurement requirements have been achieved, there has been substantial compliance with the Procurement Regulations.[356]

155. It follows that the first review ground falls to be rejected.

(2) <u>Public Finance Management and Administration Act</u>

156. The applicant's reliance on the PFMAA is misplaced. The PFMAA does not apply to the Supply Agreement. It applies, at best for the applicant, to the putative <u>finance</u> agreement, if it indeed somehow would have qualified as a "*loan* agreement" to which the PFMAA applies. This is not, however, the case in law.

157. In fact, the answer is yet more simple. The Supply Agreement explicitly required that a *separate* finance agreement be concluded by the Minister of Finance.[357] There is therefore already for this simple factual reason no basis to impugn the Supply Agreement by contending that it was not signed by the Minister of Finance. Since the Supply Agreement itself explicitly contemplated that the Minister of Finance

[355] Section 15 of the Interpretation Act provides:
"Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
[356] *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 41.
[357] Clause 1.1.17 read with clause 1.19 of the Supply Agreement; Record p 630 para 91.

would sign the finance agreement, it cannot conceivably be considered to offend the provisions invoked by the applicant – least of all as part of some overarching scheme intent on subterfuge.

158. It is correctly not contended by the applicant that a "condition precedent" or suspensive condition (in the form of the Minister of Finance concluding the finance agreement) did not materialise.[358] In any event, such case cannot yield the result for which the applicant contends. Both the arbitration clause and Award survive such non-materialisation.

159. In law, too, it is quite clear that the category of contract in question does not fall within the application of section 28 of the PFMAA. It is this provision which the applicant invokes. It applies to "borrowings and guarantees", and governs *inter alia* "borrowings of funds or other assets". The "borrowing" of *funds* is, as section 28(2) of the PFMAA spells out (and the law always was),[359] a "loan". This is further confirmed by section 28(3), which refers specifically to "funds borrowed in accordance with subsection (2)". Subsection (2), in turn, designates such transactions "loan agreements".[360]

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[358] See e.g. *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at para 161:

> "Where does this leave clause 2.3 of the loan agreement? The clause is not a 'condition precedent' or suspensive condition. It did not suspend the operation of the contract itself, because the loans were advanced. And it did not suspend the exigibility of repayment, because the lender could at any time make demand for repayment on 30 days' notice."

[359] Garner *et al* (eds) *Black's Law Dictionary* 11th (Thomson Reuters, 2019) ed s.v. "loan": 2. "A thing lent for the borrower's temporary use; esp. a sum of money lent at interest".

[360] The words "loan" and the rest of the text in section 28(1) and (2) must, it is well-established, be read in their context (*Basutoland Congress Party v Director of Elections* LAC (1995-1999) 587 at 598E/F-F). Section 28(3) is the immediate context to which effect must be given.

160. It is well-established that a loan is "contract by which a fungible thing is delivered to another who undertakes to return a thing of the same kind, quality and quantity."[361] Therefore a loan of money "is a contract by which money is delivered to another who undertakes to repay an equal sum."[362]

161. Demonstrably this is not the kind of contract which the Supply Agreement itself constitutes or even contemplates. Neither the Supply Agreement nor, for that matter, any finance agreement it envisages, is a contract in terms of which money is provided to one party undertaking to return the money to the provider. The Supply Agreement, for its part, explicitly provides for a separate contract to be concluded, designated a "finance agreement(s)" defined as "the loan agreement(s) concluded between the MFL [the Ministry of Finance of Lesotho] on behalf of GOL [the Government of Lesotho] and the Finance Providers".[363] FSG is not a finance provider, and FSG is not even an intended party to the finance agreement.[364] FSG is a genuine supplier of solar systems with a track record in Lesotho, the rest of SADC and beyond.[365]

162. It is indeed precisely the applicant's point of complaint that the funding of the project is provided by a third party, an international funder, via the Southern African Development Bank *to FSG* to apply directly to the project. The money is *not* paid directly to the Kingdom, and therefore there is naturally no deposit of the money

[361] *Voet* 12.1.1; *Grotius* 3.10.1; *Van Leeuwen* RHR 4.10.1; *Van der Linden* 1.15.4.
[362] *Moser v Meiring* 1931 OPD 74 at 77.
[363] Clause 1.1.9 (Record p 107).
[364] Record p 107 clause 1.1.8: The finance providers are "the organisations providing the loan finance for the project, which includes but is not limited to, KfW-Ipex Bank, Euler-Hermes and the on-lending institution [being the Development Bank of Southern Africa]."
[365] Para 215.1 of the applicant's own heads of argument invoke this fact, contained in FSG's answering papers cited by the applicant.

into Government's Consolidated Fund. Thus neither of the two crucial features of a loan agreement is present. There is, firstly, no flow of funds to-and-fro FSG. Secondly, there is no contractual privity between FSG and the financier.

163. Therefore there is, on the plain language of the provision itself (which, the Court of Appeal held, "may not be ignored")[366] no loan.[367] We reiterate, as the caselaw confirms repeatedly: "A loan of money is … a contract whereby money is delivered to another who undertakes to repay an equal sum at some future time."[368] Money is not delivered to FSG *who undertakes to repay it*; nor is money delivered to the Kingdom at all.

164. Therefore the trite legal conclusion applies: "there is … no loan of money (*not even substantially*) unless there is a contract to pay money to another who undertakes to repay an equal sum".[369] The law is clear: "There can thus be no loan of money, not even substantially, unless there is a contract to pay money to another who undertakes to repay an equal sum."[370]

165. The facts are equally clear: the recipient of the money is FSG. It does not undertake to make any repayment. In the absence of an agreement between FSG and the financier in terms of which FSG *repays* the sum *received by* FSG, "the transaction

[366] *Lesotho National General Insurance v Nkuebe* LAC (2000-2004) 877 at para 12. See similarly *Sekoati v President of the Court-Martial* LAC (1995-1999) 812 at 822D-F, in which the Court of Appeal similarly cautioned against failing to pay respect to the language used (even in interpreting the Constitution itself).
[367] As the Court of Appeal confirmed, it is axiomatical in interpreting legislation to credit the lawgiver with knowledge of the context in which it makes its intention known (*Sekoati v President of the Court-Martial* LAC (1995-1999) 812 at 820F-G). This includes the common law on loans, and courts' pronouncement on what qualifies as loans.
[368] *Western Bank Ltd v Registrar of Financial Institutions* 1975 (4) SA 37 (T) 43E-E/F.
[369] *Moser v Meiring supra* at 78, emphasis added.
[370] *Western Bank Ltd v Registrar of Financial Institutions supra* at 44B-B/C.

is not a loan of money".[371] And in the absence of a finance agreement, there is even less of anything conceivably constituting something capable of being contrived by the applicant as an assimilation of a loan.

166. Significantly, a simulation is nowhere suggested.[372] Less still established by the applicant, who bears the onus.[373]

167. Revealingly, in reply the applicant attempted to introduce "expert" evidence. This by an attorney (whose only qualification is an LL.B from UNISA, practising at a Johannesburg attorneys firm).[374] Her brief was to construe for this Court the contract.[375] (How this was thought competent is not clear.) Crucially, her conclusion was merely that the Supply Agreement is "not typical".[376] She correctly

[371] *Moser v Meiring supra* at 77.
[372] Record p 701 para 305; not denied at Record p 2342 paras 185-186.
[373] *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 4. This judgment demonstrates that a litigant must properly plead and establish a simulation, by claiming that the contract was aimed at disguising the transaction, and do so in action proceedings where a dispute of fact is inevitable (see *id* at para 2). The case concerns a contract between a maize farmer and chicken breeder explicitly for purposes of evading rates on maize. For this purpose it pretended that the maize farmer would raise chickens – which, as he conceded in his evidence, he never did or intended to do (*id* at paras 1 and 4). Yet, even this was not – the Supreme Court of Appeal held – in itself sufficient to establish a simulation (*id* at para 4). The Supreme Court of Appeal confirmed that parties are permitted to arrange their affairs so as to remain outside the provisions of a particular statute (*ibid*). A different, more convenient or, we would add, more typical structure for such transaction does not render it objectionable (*ibid*). It has indeed been held the fact that a contract contains "unusual terms" does not establish a simulation (*Commissioner for Inland Revenue v Conhage* 1999 (4) SA 1149 (SCA) at para 9).
[374] Record p 2418 para 1; Record p 2420 paras 6-7.
[375] Record p 2342 para 186.
[376] Record p 2436 para 48. This conclusion is based on undisclosed "market standards", and on the reasoning that the Supply Agreement is "unduly onerous" *inter alia* because it contemplates that the vast solar panels infrastructure be installed in all government buildings and therefore access to all buildings and personnel are required. This the expert considers "impractical" by virtue of "implications regarding national security", in respect of which she has no qualification, expertise or even factual instructions (Record p 2430 para 25). Significantly, despite the applicant's founding affidavit arguing that clause 22 of the Supply Agreement constitutes an "extraordinary punitive liquidated damages" clause (Record p 65 para 152.14), the applicant's expert did not support any such suggestion. In this case damages were proved before the Arbitrator, and it was well established by expert evidence that the liquidated damages were in fact less than the actual loss suffered by FSG. There is therefore no scope for the applicant's version, which its own witness does not even support. This means that the entire "windfall" argument is factually unfounded.

did not contend that this suggests a simulated transaction.[377] Nor did she suggest that the *Supply Agreement* constitutes a loan. She quite correctly did not even suggest that the *finance* agreement constitutes a loan.[378]

168. In fact, she showed that the transaction, even on her construction, was not a loan. In "set[ing] out her understanding of the financing structure of the project as envisaged in the Supply Agreement", she drafted a diagram. The diagram reflects, correctly, that there is indeed no flow of funds back from FSG to the financier, and that the Supply Agreement creates no contractual privity between FSG and any finance providers.[379]

169. Therefore, even on the applicant's own case, it cannot contend that a loan agreement had been concluded. Any such suggestion is not only in clear conflict with law.[380]

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[377] *Commissioner for Inland Revenue v Conhage* 1999 (4) SA 1149 (SCA) at para 9:

> "Mr Rubens referred us to certain provisions of the agreements which, he submitted, are not usually found in agreements of sale and agreements of lease and militate against an intention to buy and sell and to lease back. But it is by no means unusual to find provisions in a sale and leaseback which do not typically appear in a contract of purchase and sale or in a contract of lease. On the contrary, as Professor Nereus Joubert points out in 'Asset-based Financing, Contracts of Purchase and Sale, and Simulated Transactions' 109 (1992) *SALJ* 707 at 708,
>
> > '(d)espite the fact that new asset-based financing transactions are often carefully drafted to reflect contracts of purchase and sale or contracts of letting and hiring, they almost invariably contain provisions which are not typically found in such types of contract ...'."

[378] Yet this is one of the only two features which the applicant's founding affidavit pleaded for purposes of contending that the Supply Agreement is "no ordinary Supply Agreement" (Record p 65 para 153). The only other feature is the inclusion of an arbitration clause, which the applicant contends is "unusual" because it is "fundamentally at odds with the Kingdom's sovereignty and independence" (Record p 66 para 153.2). This is incorrect, and also not supported by the applicant's expert. Thus neither of the two bases for contending that the Supply Agreement is not an "ordinary" Supply Agreement is supported by the applicant's own expert. Neither feature renders the contract "no ordinary Supply Agreement". But even if it is true that the Supply Agreement is not "ordinary", this does not establish the necessary legal and factual conclusion for which the applicant nowhere contends (namely that the Supply Agreement is a simulation).

[379] Record p 2425 para 18. To the extent that it might be thought that the dotted line framing figure 1 suggests contractual privity between FSG and any of the financiers, this is not supported by any contractual provision or fact. As FSG's answering affidavit records, the contemplated funding (or finance) agreement is a stand-alone agreement, separate and distinct from the Supply Agreement, and this is what the transaction contemplates (Record p 631 para 92).

[380] "If two people, instead of making a contract for a loan of money by one of them to the other, genuinely agree to achieve a similar result through the sale and repurchase of a chattel, there is no room for an

It is also inconsistent with the applicant's own expert's views, FSG's affidavits, and – more materially – the terms of the Supply Agreement itself.

170. Courts have consistently confirmed, in specifically the context of classifying a contract as constituting a loan or some other transaction,[381] that parties are indeed in law at liberty to arrange their transactions to remain outside the field of operation of a statutory stipulation.[382] This is, on clear authority, perfectly permissible and legitimate.[383] Arranging one's affairs accordingly cannot be rendered illegitimate, not even if the facts are that the parties intended to avoid the operation of the law.[384]

171. For such transaction to be struck by the law in issue, the applicant had to establish that the parties to the contract had dishonestly disguised their transaction in an illegitimate attempt to camouflage the true nature of their transaction.[385] This is a

application of the maxim *plus valet quod agitur quam quod simulate concipitur*. The transaction is intended to be one of sale and repurchase, and that, at common-law, is what it is" (*S v Friedman Motors (Pty) Ltd* 1972 (1) SA 76 (T) at 80G-H, upheld on appeal in *S v Friedman Motors (Pty) Ltd* 1972 (3) SA 421 (A), and confirmed and quoted with approval in *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) at para 53).

[381] *Commissioner for the South African Revenue Service v NWK Ltd supra* at paras 40-55. The Supreme Court of Appeal held that "the appropriate question to be asked, in order to determine whether the loan and other transactions were simulated, is whether there was a real and sensible commercial purpose in the transaction" (*id* at para 86). In *this* case a clear purpose was demonstrated: funding a self-financing project on favourable terms through a local development bank and international funders facilitating a transaction to enable environmentally sustainable energy generation. Even a transaction devised purposefully to evade a legal prohibition is not necessarily a disguised one (*id* at para 44, quoting *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 395). If the purpose was indeed to deliver the goods or services, then there is no simulation (*CSARS v NWK supra* at para 58). Therefore unusual or atypical features do not establish a simulation, "several inexplicable aspects to the whole series of transactions" (*id* at para 58) must establish that "the commercial sense of the transaction" (*id* at para 55) "is only to achieve an object that allows the evasion of [law]" (*id* at para 55), and not to conclude an agreement in respect of the goods or services to which the contract refers (*id* at para 89). In this case the facts are clear: FSG is a genuine supplier and installer of the goods and services to which the Supply Agreement relates. Mr Frazer has previously installed similar goods in Lesotho and elsewhere, and is currently engaged in a similar project in Eswatini.

[382] *Western Bank Ltd v Registrar of Financial Institutions supra* at 44*fin*-45*sup*.

[383] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* 2014 (4) SA 319 (SCA) at paras 14, 15, 20 and 26, citing *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 548.

[384] *Dadoo Ltd v Krugersdorp Municipal Council supra* at 545; *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 395-296.

[385] *Maphisa v Lecheko* (CIV\APN\365\93) (NULL) [1993] LSHC 62 (15 November 1993) at 22.

factual inquiry.[386] It requires that the *plus valet quod agitur quam quod simulate concipitur* rule be triggered, hence the applicant must establish on the facts that effect must be given to "the real intention" of the parties which "carries more weight than a fraudulent pretence".[387] The applicant explicitly disavows the crucial factual inquiry, never averred that the contract was a sham,[388] and forewent any attempt to establish the necessary fact for fraud.[389] Fraudulent dishonesty is a desideratum.[390] Before the Court can conclude that it is established, evidence must exist which proves that the parties intentionally disguised or concealed their transaction's intention and that "there is some unexpressed agreement or tacit understanding between the parties" elided from the terms in which their transaction is conveyed to the outside world.[391]

172. Far from camouflaging the financing regime or hiding it, the Supply Agreement explicitly points to the need to conclude a separate contract for this purpose. The Supply Agreement spells out that the finance agreement is to be concluded between *other parties*, and signed by a *different* Cabinet member (the Minister of Finance) on behalf of Government.[392] There is no evidence to the effect that the participants to the Supply Agreement intended the exercise any of their rights on terms other

[386] *Zandberg v Van Zyl* 1910 AD 302 at 309.
[387] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC supra* at para 27.
[388] Record p 701 para 305, pointing out that the founding affidavit never suggested any sham. The replying affidavit did not traverse paragraph 305 of the founding affidavit (Record p 2342 paras 185-186, which specifically traverses paras 304 and 306 but strategically skips para 305 of the answering affidavit).
[389] Significantly, the charge sheet it introduced in reply (unsigned by the unidentified prosecutor) simply asserts that a false misrepresentation was made to the effect that Minister Tšōlo "was authorised to represent and bind the government of Lesotho in the purported and or alleged 'FSG Energy Efficiency & Employment Creation Project for the Government of Lesotho'" (Record p 2356). It is *not* alleged that the Supply Agreement fraudulently misstates or misrepresents the true nature of the transaction.
[390] *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 395.
[391] *Id* at 395-396.
[392] Clauses 1.19 and 17.1.3 of the Supply Agreement; Record p 701 para 305.

than those set out in the Supply Agreement, as is required for purposes of establishing a simulation.[393] The evidence was that FSG specifically and persistently requested the Minister of Finance to conclude the finance agreement.[394]

173. In this light it is unsurprising that the applicant cannot bring itself within the correct legal test.[395] Its case cannot account for the binding precedents confirming that courts must give effect to transactions in their terms, unless *factually* it is established that the transaction is simulated.[396]

174. As the courts' application of the governing principles and precedents demonstrates, factual proof of an allegation that the transaction was *in fraudem legis* invariably envisages evidence that an oral side agreement existed or that a crucial tacit term was intentionally omitted from the written memorial of the transaction for purposes of hiding its true nature.[397] Conversely, where the facts are "plain", as it is in this case, that "an independent agreement … is contemplated" and that it "gives rise to a claim by the supplier against the cardholder [i.e. the party receiving the goods or services]", and "the supplier delivers goods without receiving cash from the cardholder", the *supply* is "on credit".[398]

[393] *Commissioner, South African Revenue Service v Bosch* 2015 (2) SA 174 (SCA) at paras 38-41.
[394] The applicant's heads of argument concede this repeatedly, arguing (without a pleaded basis) that this was too persist and therefore impolite (see e.g. para 61 of the applicant's heads of argument). The *ad hominem*, unpleaded argument is self-destructive.
[395] The applicant only reproduces a *dictum* from *Dadoo* (para 140), but cannot bring itself within the *plus valet quod agitur quam quod simulate concipitur* maxim contained in the quotation.
[396] *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* 2021 (5) SA 115 (SCA) at para 40.
[397] *Ibid*.
[398] *Western Bank Ltd v Registrar of Financial Institutions supra* at 51fin-52B.

175. Such transaction does not constitute a loan, and is not liable to legislation governing loans.[399] "If in form it [the contract] is not a loan, it is not for the Court to say that its object was to raise money for one of them [the parties] or that the parties could have produced the same result more conveniently by borrowing or lending money."[400] If the supply "part of the transaction is not in its essential characteristics or features a lending of money in the sense that the applicant hands over money to the cardholder on the understanding that the cardholder will pay back the applicant an equal sum of money at some future date", then money is not lent and a loan is not concluded.[401]

176. Significantly, the applicant's own heads of argument concede that a loan is "an agreement whereby the one lends and advances money to the other and the latter in turn agrees to repay that loan".[402] They also concede that there was never any intention that money would be borrowed from FSG.[403] Therefore the Supply Agreement demonstrably does not constitute or contemplate a loan.

177. Accordingly even on the applicant's own case section 28 of the PFMAA is not violated. The PFMAA's *purpose* is also not negated. The applicant alleges that the PFMAA's purpose is "to prevent unauthorised government officials from secretively concluding agreements that purport to commit the Kingdom to the borrowing of funds where that borrowing has never been approved or accounted for and is not

[399] *Id* at 55B.
[400] *Id* at 53*fin*-54*sup*.
[401] *Id* at 54C-D.
[402] *Gazit Properties v Botha* 2012 (2) SA 306 (SCA) at para 9, cited in para 152 of the applicant's heads of argument.
[403] Para 150 of the applicant's heads of argument, contending that the Kingdom was "to borrow money from the Finance Providers" (not, of course, from FSG).

properly managed."[404] The Supply Agreement was not concluded *secretively*; it was concluded by an official *authorised* by both section 10 of the Government Contracts and Proceedings Act and even the Procurement Regulations invoked by the applicant itself; and it explicitly contemplates that the finance agreement be concluded by the Minister of Finance, and that the financial arrangements be *approved and accounted for publicly*, and be properly *managed* – even in the budget itself.[405]

178. Therefore on a textual, contextual and purposive approach to the interpretation and application of section 28 of the PFMAA, applied to the actual facts of this case, the second review ground is untenable.

(3) <u>Constitution</u>

179. The third and final surviving review ground retreats to an attempt to apply the Constitutional directly. This is misconceived in multiple respects.

180. Firstly, a declaration of constitutional invalidity is a remedy which can only be obtained from the High Court exercising its constitutional jurisdiction, and pursuant to the principle of subsidiarity.[406] This "means that where Parliament has enacted a law to give effect to a right, a litigant should enforce that right through that law if he does not challenge it for being unconstitutional."[407] Consequently, "a court should

[404] Para 145 of the applicant's heads of argument.
[405] Para 162.5 of the applicant's heads of argument expressly concedes as much.
[406] *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 9.
[407] *Id* at para 11.

not dispose of a case on the basis of the Constitution if it is possible to decide it on any other basis".[408]

181. Yet, in this application the applicant did not institute this case as a constitutional case in the Constitutional Court. It invoked *as primary bases for its review* ordinary national legislation in the form of the PFMAA. It invokes the constitutional review ground only as third and final fallback argument. Its heads of argument concede explicitly that the constitutional provisions invoked "have been given effect to" in the provisions of various statues.[409] The applicant also accepts that its "constitutional grounds of review" squarely "overlaps" with its reliance on section 28(3) of the PFMAA.[410] The applicant's case should accordingly be determined on the basis of section 28 of the PFMAA, which is not impugned. The direct reliance on the Constitution is misplaced, and the "merits" are in any event not even reached – as a consequence of the undue delay, the academic nature of the matter, and the constitutional doctrine of avoidance.

182. Secondly, as mentioned (and also conceded by the applicant), the Supply Agreement specifically contemplates that appropriate budgetary provision be made for financing the project.[411] Thus, to the extent that it applies at all, section 110 of the Constitution is *not* infringed. Section 110 explicitly exempts moneys authorised by or under an Act of Parliament which is intended for defraying the expenses of the

[408] *Ibid*.
[409] Para 166.3 of the applicant's heads of argument: "the constitutional provisions on which we rely have been given effect to in the provisions of various statues, which have also been expressly pleaded and relied upon as independent grounds of review." The reference to "we" must be to Mei & Mei Attorneys Inc, whose director (Q Letsika) is the only author of the applicant's heads of argument (p 168).
[410] Para 155 of the applicant's heads of argument.
[411] Clause 11.3 and clause 11.4 (Record p 126).

authority concerned. It must be presumed for purposes of determining issues of legality that a contemplated competence will be exercised validly.[412] Therefore there cannot *a priori* be any inconsistency between the Supply Agreement and section 110 of the Constitution. The Supply Agreement does not contemplate anything that section 110 of the Constitution does not itself in any event envisage and permit.

183. Therefore FSG's project could clearly be implemented without violating section 110 of the Constitution. Ringfenced funding is not inherently unconstitutional: the Procurement Regulations invoked by the applicant themselves explicitly contemplate precisely such form of funding.[413] They are not contended to be unconstitutional.

184. Minister Majoro himself signed on to just such project in concluding the Chinese road project, which he does not contend to be unconstitutional.[414] If there had been any merit in the legal contention now raised in this case, then – on the approach adopted selectively in this application – the applicant and Minister Majoro would have been under a constitutional and legal duty to institute the same proceedings to attack that contract or at the very least explain to the Court (from which it requires condonation in this case) why double standards should somehow be applied. The rule of law does not permit self-serving selectiveness.

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[412] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at paras 222 and 234; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 72; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at paras 116-117.

[413] Regulation 3(2)(e), which contemplates as a procurement unit "any project implementing authority authorised to carry out public procurement *and funded by foreign loans, grants and assistance*" (emphasis added). The foreign funding is clearly destined directly to the entity implementing the project. In this case the project is implemented by FSG.

[414] Record pp 703-704 para 315.

185. Third, it is "absurd" (as Baxter puts it) to contend that a contract "fetters" a government official and therefore is unlawful or unconstitutional.[415] Yet this is precisely the argument the applicant advances.[416] It is flawed, and has been recognised as such for many decades.[417] It is well-established that "[n]early every country now engages in commercial activities" and "go into the market places of the world".[418] When they do and conclude contracts they are held to their transactions. Therefore the refrain running throughout the applicant's case, pleaded and repeated (in its heads of argument) in respect of each review ground – namely "FSG must have known" – is unfounded. The knowledge imputed to FSG is in fact untrue and in law unsound.

186. Fourth, the applicant's reliance on the Constitution for purposes of contending that the Supply Agreement is unconstitutional is not only inconsistent with the *subsidiarity* principle.[419] It is also contrary to the *separability* principle. The latter

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[415] Baxter *Administrative Law* (Juta, Cape Town 1984) at 422.
[416] Para 162.5 of the applicant's heads of argument.
[417] Significantly, Baxter *op cit* provides an example (dating from the 1920s) of an undertaking relating to electricity tariffs. Such undertaking may indeed be provided by a government entity without constituting an impermissible fettering of the exercise of a discretion. It is precisely in order to reduce electricity tariffs and to provide efficient, reliable and responsible electricity that the Supply Agreement had been concluded. Since this is clearly compatible with a legitimate government objective, there can be no serious suggestion of fettering invalidating the contract. It was, as mentioned, self-funded; and created significant year-on-year savings. Therefore it could not and did not at its conclusion hamper any discretionary power. Hampering arising in future, if factually established, may render a contract liable to termination, but a public authority may not resort to this as pretext for escaping inconvenient or "onerous" clauses (Baxter *op cit* at 423). Yet it is the "onerous" nature of the Supply Agreement which the applicant's expert cites in support of her conclusion (Record p 2430 para 33). Her conclusion is, we stress, not that the Supply Agreement is void, but that it is "not typical" (Record p 2436 para 48).
[418] *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] QB 529 (CA) at 555.
[419] Significantly, the applicant was driven in its replying affidavit to argue that this principle does not form part of Lesotho law. It now finds the need to repeat this, but cites – as the exclusive authority invoked in support of its constitutional review ground – authority by the Court of Appeal to the contrary: *Transformation Resource Centre v The Council of State* C of A (Cons) 26/20 [2020] LSCA 31 (31 October 2020) at para 28. The Court of Appeal explicitly applied the principle of avoidance, which is a manifestation of the doctrine of subsidiarity. It held (in terms entirely consistent with this Court's explicit recent reference to "subsidiarity" and "avoidance" in *Democratic Congress* supra at para 11):

principle is equally clear: requirements applicable to the transaction itself do not apply automatically to the separate arbitration agreement contained in the same contract.[420] We address this further in dealing with the attack on the arbitral agreement itself, which now correctly concedes what the applicant's case previously ignored: the separability principle indeed applies.

187. Similarly, if it had been correct that any constitutional or statutory provision renders either the Supply Agreement itself or the arbitration agreement invalid, then the principle of *severance* applies to such offending clause. This means that the offensive clause in the Supply Agreement would be severed and the rest remain intact. Accordingly if it is, for instance, seriously suggested that the Constitution really requires that German funding for services provided by a German service provider should somehow by circumlocution first flow through the Consolidated Fund, then the contractual position is plain: any provision to the contrary is simply severed.[421] The rest of the contract and particularly the arbitration clause itself continues to operate.

"The Constitution must be the last and not the first resort in the resolution of disputes before court. Litigants must first try to seek remedies under ordinary law before resorting to the Constitution. This principle has been reiterated by this Court in *Sole v Cullinan NO and Others*. The South African Constitutional Court has recognised the same principle in *South African National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* when the court said:

> '(W)here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the cause which should be followed.'"

[420] Joseph *Jurisdiction and Arbitration Agreements and their Enforcement* 3rd ed (Sweet & Maxwell, London 2015) at para 16.68 explains:

> "… An attempt to resist enforcement in Bermuda by reference to article V(1)(a) [of the New York Convention] failed in a case in which the respondent sought to resist enforcement by asserting that it was under an incapacity by reason of a failure to comply with the so-called 'two signature rule' which applied in many Eastern European countries and the Soviet Union for certain types of foreign trade contract. The Court of Appeal in Bermuda enforced the award by drawing a distinction between the separable arbitration agreement and the underlying matrix contract, the latter but not the former requiring compliance with the two signature rule. …"

[421] Clause 26.4 (Record p 136).

188. But there is no such immutable constitutional prohibition. The Constitution itself contemplates an exception to the direct withdrawal regime contemplated in Chapter X of the Constitution.[422] Section 111(6) of the Constitution specifically provides that notwithstanding section 111(1) of the Constitution, provision may indeed be made by or under any legislation for purposes of making repayable advances. There is therefore nothing inherently unconstitutional in a contractual agreement which envisages that a finance agreement be concluded by the Minister of Finance in accordance with law for the repayment of advances. It is if *such* finance agreement falls foul of mandatory constitutional provisions (and *if* such finance agreement cannot be brought within the constitutional exemption contemplated) that recourse against the *finance* agreement's offending clause may be taken.

189. Ultimately the "constitutional review" ground rests on empty rhetoric,[423] a *verbatim* reproduction of averments advanced in the applicant's affidavits,[424] and no caselaw other than the single judgment by the Court of Appeal which – like a recent Full Bench judgment – repudiates the applicant's resistance to the application of the subsidiarity principle. Thus the constitutional argument to which the applicant is driven (demonstrating no confidence in the rest of the review grounds) is simply not advanced at a level which warrants further engagement.

[422] Chapter X contains each of the provisions invoked in the applicant's constitutional review ground.
[423] Para 167 of the applicant's heads of argument.
[424] Para 165.1 of the applicant's heads of argument reveals that the heads of argument is a reproduction of the applicant's affidavits. It still contains the words "I am advised".

190. It follows that none of the surviving review grounds withstands scrutiny. Thus the review relief falls to be refused, and consequential relief consequently collapses.

191. The relief sought against the arbitration agreement constitutes just such consequential relief. The applicant's entire case is that the arbitration agreement "suffers from the same fate as the remainder of the Supply Agreement",[425] which in turn is impugned on the above three review grounds. Whereas the review relief is indeed a *necessary* condition for purposes of so impugning the arbitration agreement, it is not a *sufficient* condition (as we shall show in addressing the attack on the arbitration, to which we now turn). Accordingly, if the review relief fails, then the attack on the arbitration agreement is itself rendered academic also for this *additional* reason.

E. Attack on arbitration agreement

192. The applicant's attack on the arbitration agreement is inconsistent with national law, international law, and the Court of Appeal's repudiation of the "ringingly aggressive" posture previously proclaimed by Government that arbitration proceedings may not be instituted against the Kingdom.[426] The Court of Appeal confirmed that the strong pro-arbitration public policy forming part of international and foreign law applies equally in Lesotho.[427]

[425] Paras 169 and 201 of the applicant's heads of argument.
[426] *Attorney-General v Swissborough Diamond Mines No. 2* LAC (1995-1999) 214 at 225B-C.
[427] *Kompi v Government of the Kingdom of Lesotho supra* at para 53.

(1) Pro-arbitration approach under national and international law

193. It is well-established that arbitration agreements are allowed and are to be encouraged also by courts. As Wessels ACJ in the *Rhodesian Railways Ltd v Mackintosh* held:

> "There is nothing illegal or improper in allowing persons who are *sui juris* to agree upon a reference to arbitration as a mode of settling their disputes, and if such agreement is not illegal it surely ought to be enforced, if it is in the power of the Court to enforce it."[428]

194. This pro-arbitration approach is an early example of the correct inquiry: is the arbitration agreement itself illegal? If not, it is to be enforced. For, as the Court of Appeal held (in a judgment which, like the rest of Lesotho's arbitration law, is elided from the applicant's case), "an arbitration clause survives" the agreement in which it is contained.[429] It "constitutes a self-contained contract collateral or ancillary to the underlying contract itself".[430] It "is a distinct and separate contract".[431]

195. The pro-arbitration legal policy and the principles giving effect to it apply *a fortiori* under modern arbitral law,[432] and it is consistent with customary law in Lesotho as recognised by the Court of Appeal.[433] The Legislature of Lesotho, for its part, specifically codified it to apply particularly also in respect of Government itself.[434]

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[428] 1932 AD 359 at 369.
[429] *Kompi v Government of the Kingdom of Lesotho supra* at para 56.
[430] *Ibid*.
[431] *Id* at para 56.
[432] *Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd* 2007 (5) SA 475 (W) at para 46.
[433] *Moteane v Moteane* LAC (1995-1999) 307 at 311, recognising the primacy of arbitration in even in family law (which often concerns issues of status, generally not considered arbitrable) under the Laws of Lerotholi.
[434] Section 40 of the Arbitration Act 12 of 1980.

The Arbitration Act explicitly binds the State.[435] It imposes no formal or other requirements for the validity or legality of an arbitration agreement.[436] Thus the agreement to arbitrate is not rendered illegal by anything in the unimpugned Act governing it, and recourse under the Act is – the Court of Appeal confirmed – confined to "a very narrow" remit, which in any event is not applicable where Lesotho is neither the seat of the arbitration nor the place of enforcement.[437]

196. Lesotho law, including the Lesotho Arbitration Act, does *not* require that an arbitration agreement be concluded by any particular official following any prescribed procedure. Therefore the general principle under section 10 of the Government Contracts and Proceedings Act applies. It follows that the arbitration agreement is valid and binding. It has also run its course: the award rendered under it is *res judicata*, and no further arbitration can be arbitrated under it. as a matter of Lesotho law, and under South African law (which applies and is to be applied by the South African courts).

197. Yet the applicant retroactively attempts to attack the arbitration agreement. The attack not only misstates the pleadings.[438] It is also legally misconceived for failing to acknowledge the Arbitration Act and Lesotho Court's judgments giving effect to

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[435] Section 40.

[436] The only requirement is to be found in the definition section, which defines an "arbitration agreement" as "a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated thereon or not" (section 2 s.v. "arbitration agreement").

[437] *M & C Construction International v Lesotho Housing and Land Corporation* (C of A (CIV) 9 of 2015) [2016] LSCA 4 (29 April 2016) at para 18.

[438] Para 199 of the applicant's heads of argument, presenting to the Court that FSG's pleaded case is inconsistent with Supreme Court of Appeal caselaw for "conten[ding] … that the fact that the arbitrator has the competence to rule on his own jurisdiction, and has done so, precludes this Court from reviewing that determination." This is incorrect. This Court is, of course, not even asked by the applicant to review the arbitrator's determination or his award. Thus the issue regarding reviewing him does not even arise. In the cited paragraph of FSG's answering affidavit (para 364) FSG simply drew attention to the applicant's failure to account for the *competence-competence* concept in the conception of its case.

the pro-arbitration public policy reflected also in international law to which Lesotho has acceded: the New York Convention.[439] Neither the Convention, nor the Act, nor any Lesotho caselaw is cited anywhere in the applicant's heads of argument. Similarly, the only two pages of the 100-page founding affidavit in which the attempted attack on the arbitration agreement is advanced pleads no case consistent with binding precedent. Indeed, the terseness of the pleaded attack already reveals the presumed domino effect to which the applicant's heads of argument explicitly retreat, arguing that *because* the Supply Agreement is (so the applicant erroneously contends) invalid, *therefore* the arbitration agreement follows the same fate.[440]

198. But this misconception, which constitutes the substratum of the applicant's attack as pleaded in its founding affidavit (and which is demonstrably incapable of realignment in argument), is inconsistent with the law. As *inter alia* the House of Lords (in a case concerning Lesotho) has explained,[441] the applicant's approach is inconsistent with elementary arbitration law.[442] "The independence of the

[439] E.g. the Court of Appeal's judgment in *M & C Construction International v Lesotho Housing and Land Corporation supra* at paras 19-24.

[440] Paras 169 and 201 of the applicant's heads of argument.

[441] Lew *et al Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003) at para 6–9, for their part, explain:

> "The doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa. Therefore the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated."

[442] As was explained in *inter alia Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 at para 232, the separability doctrine applies already "at common law", and it renders an arbitral clause "a separate contract from the main contract" to "ensure that the arbitration agreement is effective despite the non-existence, invalidity, termination or rescission of the main contract. In other words, it stops the argument that the parties have not agreed to arbitration to deal with disputes about the non-existence, invalidity or initial ineffectiveness of the main contract; and it also stops the argument that the arbitration agreement cannot deal with disputes once the main contract has been terminated or rescinded."

arbitration agreement" from the rest of the contract in which it is contained "is part of the very alphabet of arbitration law".[443]

199. Thus quite contrary to the case pleaded by the applicant, the contended invalidity of Supply Agreement does not "equally" or automatically apply to the arbitration agreement.[444] And contrary to the contention advanced in the first and repeated in the final paragraph of the applicant's heads of argument dealing with the attack on the arbitration agreement, the "fate" of an arbitration agreement is not tied to the Supply Agreement.[445] For the same consequence to follow, the legal impediments applicable to the Supply Agreement must also apply separately to the arbitration agreement. In this case the legal impediments invoked are those relating to "the borrowing of funds",[446] "loan agreements"[447] or "public procurement".[448] But the statutory provisions pertaining to borrowing of funds, loans, and public procurement nowhere mentions arbitration agreements, and do not purport to govern arbitration agreements. Arbitration agreements are governed by the Arbitration Act, and the general law governing Government contracts.

200. Yet the selfsame review grounds invoked for impugning the Supply Agreement are the only three bases on which the arbitration agreement is attacked. It is *not* attacked on the basis of any fraud, impersonation. or non-compliance with the Arbitration Act. Nor, for that matter, is any of the latter invoked even as a review ground. And, as mentioned, even the Procurement Regulations invoked for the review reinforces

[443] *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 at para 21.
[444] Record p 97 para 226.
[445] Paras 169 and 201 of the applicant's heads of argument.
[446] Para 171.1 of the applicant's heads of argument.
[447] Para 171.2 of the applicant's heads of argument.
[448] Para 171.3 of the applicant's heads of argument.

what the Arbitration Act and the Government Contracts and Proceedings Act already legislates: Government is competent to conclude arbitration agreements, and a Minister is an authorised representative of Government.[449]

201. Absent impersonation, fraud and similar allegations directed at the arbitration agreement even the judgment by the House of Lords which the applicant's heads of argument now seek to invoke operates against it.[450] *Fiona Trust & Holding Corp v Privalov* demonstrates that "the principle of separability" essentially "means that the invalidity … of the main contract does not necessarily entail the invalidity … of the arbitration agreement."[451] It is only a defect relating directly to the arbitration agreement itself which may render it void or voidable.[452]

202. None of the three grounds on which the applicant attacks the Supply Agreement (and which it argues "apply equally" to "any arbitration clause")[453] affects the arbitration agreement. Even if the Supply Agreement can be construed as a loan agreement or an agreement to borrow money (as contemplated in the PFMAA or the Constitution), then the arbitration agreement clearly cannot.[454] Similarly, the arbitration agreement

[449] This is because the procurement regulations provide that it is the procurement unit which concludes a contract. A ministry is, as mentioned, a procurement unit. The chief accounting officer of a procurement unit is the Minister heading the ministry.
[450] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.
[451] *Id* at para 17.
[452] *Ibid*.
[453] Para 172 of the applicant's heads of argument.
[454] The arbitration agreement is contained in clause 24 of the Supply Agreement (Record pp 133-134). It provides for arbitration in the event that the parties are unable to resolve a dispute amicably (clause 24.1); designates the arbitral rules and legislation intended to govern the arbitration process (clause 24.1); makes provision for the appointment of an arbitrator (clause 24.2); stipulates that the decision of the arbitrator shall be final and binding and may be made an order of court (clause 24.2); chooses Johannesburg, South Africa as the seat for the arbitration (clause 24.3), allows the parties to obtain urgent, interim interdictory relief in the courts pending the outcome of any arbitration proceedings (clause 24.4), and envisages the enforcement of the award in Lesotho and/or South Africa (clause 24.5). Demonstrably it does not concern borrowing money, constitute a loan, or a contract to supply goods or services.

is evidently not an agreement to provide goods, works, services or consulting services (as contemplated in the Procurement Regulations). It is simply wrong, as the applicant attempts to do, to transpose the applicant's reclassification of the Supply Agreement (which is, as we have shown, in any event incorrect) to the arbitration agreement for purposes of arguing that the signatory to the former must be the signatory to the latter. In law and logic it does not follow that if a finance agreement must be signed by a finance minister, then an arbitration agreement relating to a Supply Agreement (not even the finance agreement) must be signed by a finance minister.

(2) <u>No domino effect</u>

203. The attempt to reach this conclusion by arguing for the extension of the domino effect applicable in some instances of administrative action is misconceived.

204. Firstly, it is contrary to every principle of arbitration law. It is well-established that the arbitrator has authority to determine issues concerning the validity of the agreement containing the arbitration clause. There therefore cannot be an automatic domino effect. This is precisely what the principle of separability, which is recognised throughout the world, means: an arbitrator is not divested of jurisdiction by dint of disputing his jurisdiction. The competence-competence principle coupled with separability has the opposite legal effect.[455]

[455] The doctrine of *competence-competence* empowers an arbitrator to decide his own jurisdiction; and the doctrine of separability ensures that he can decide the merits (Lew *et al op cit* at para 6–10). Separability extends the effect of the arbitration clause to cover claims that the main contract is void *ab initio* or never came into existence (*id* at para 6–12).

205. The applicant argues that the arbitrator's determination of his own jurisdiction is not immune from judicial scrutiny.[456] This misses the point. The point is whether it is *this* Court that is the appropriate court to exercise such scrutiny. Under the New York Convention the only courts with jurisdiction to examine and determine the competence of the arbitrator to hear the dispute is the supervising court (i.e. the forum court, being the court of the seat of the arbitration) and an enforcement court (i.e. the court in which the award is enforced). In this instance the South African High Court is both the forum court and the enforcement court. It is also already seized with the matter. It is therefore the South African courts, not the Lesotho Court, that has the jurisdiction to make a ruling in relation to Adv Maleka SC's ability to hear the dispute. Following proper notice to Lesotho, as admitted by the applicant, to Lesotho, the South African High Court already recognised and enforced the award, and confirmed Adv Maleka SC's exercise of this own jurisdiction.

206. Secondly, the conclusion of an arbitration agreement does not constitute administrative action. Such clause is not concluded by an organ of State in the exercise of public power, exercising an administrative discretion; and its conclusion does not have direct external legal effect. It is not liable to judicial review under the common law governing administrative action. It is governed by and liable to recourse under the Arbitration Act.

207. The Arbitration Act makes it clear that the State is bound as is any other contractant. The State enjoys no added privileges, protections or defences under the Act. This is

[456] Para 198.3 applicant's heads of argument.

because the arbitration agreement itself creates none of the "risks" or "consequences" which animate the applicant's argument.[457]

208. Instead, an arbitration agreement allows for each of these defences to be raised before the arbitrator, and thereafter they may again be raised as defence against recognition and enforcement of an adverse award. Therefore the "stringent controls" which the applicant's argument invokes (for purposes of contending for an approach for which not a single precent exists, and none is cited) already exists in law. A triple control mechanism already applies. A defendant may raise each of its points before the arbitrator, and thereafter repeat them before the forum court ***and*** *again* before the enforcement court wherever enforcement is sought.

209. It follows that reading requirements of other legislation into the law governing arbitration clauses; or, conversely, construing other legislation to extend to arbitration agreements (to which the latter legislation makes no reference) is not necessary. Nor is such reading-in otherwise compliant with the law governing reading-in.[458]

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[457] Para 175 of the applicant's heads of argument.

[458] *Attorney-General v His Majesty the King* C of A (Civ) 13/2015 at para 33, confirming the requirements articulated in *Rennie NO v Gordon* 1988 (1) SA 1 (A) at 22E-G:

> "Over the years our Courts have consistently adopted the view that words cannot be read into statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".

The second requirement confirmed in *Rennie* and approved by the Court of Appeal (quoting the *dictum* directly) was articulated in *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E-G:

> "Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious. … I think that the same must apply to implying a term in a statute, for the process is the same … Here there is appreciable difficulty in formulating and locating any such term precisely."

210. Demonstrably the applicant is unable to formulate with the required precision the text its argument requires to be read into every conceivable statute. Such notional reading-in (for which the argument unwittingly contends) must either apply consistently (to qualify as an objective interpretation) or not at all. But how is it to be applied, and how is it to be formulated?

211. This case demonstrates the difficulty. On the applicant's approach the formulation must not only cover an arbitration agreement contained in e.g. a loan or a contract for goods and services regulated by procurement law. It must also apply to any arbitration agreement which in any way might be *contended* to relate to or contemplate or constitute such contract. This renders the scope of the formulation and the potential reading-in interminable.

212. It is therefore untenable to contend for such effect. Yet this is the terminus of the applicant's argument. It contends that "precisely the same harm to the public fiscus may be realised" unless an arbitration agreement is held to the same requirements "of authority, consent, and control" as applies to any contract in which it is contained (or, for that matter, any other contract to which the latter refers). Had this extraordinary proposition been consistent with the legal position anywhere in the world, then the applicant would have been able to cite authority for the proposition. It could not. None exists.

(3) <u>Foreign authorities apply against applicant</u>

213. The applicant clearly cannot bring his argument within such foreign authorities as are cited in his heads of argument. Quite correctly he does not attempt to attack the arbitration agreement on the basis of fraud, and does not contend that Minister Tšōlo's signature was "forged", or that he impersonated anyone. These are the scenarios in which the House of Lords contemplated that a defect in a main contract may equally affect an arbitration clause contained in the main contract. Demonstrably Minister Tšōlo (who was the second most senior Cabinet member at the time) cannot be contended, in the words of Lord Hoffmann, to have had "no authority whatever to conclude *any* agreement on [the Kingdom's] behalf".[459]

214. As mentioned, section 10 of the Government Contracts and Proceedings Act and even the Procurement Regulations themselves establish the converse. The applicant's argument only addresses the former in attempting to contend for a lack of authority to conclude <u>not</u> *any* agreement on behalf of the Kingdom, but specifically the Supply Agreement in question. But the argument is defective in its own terms: it contends that a contract signed by a Minister pursuant to section 10 can be "challenge[d] on procedural or substantive grounds".[460] What this concedes is that in-principle authority indeed exists, but that it might be contended that a procedural or other defect could affect the contract.

[459] *Ibid*, emphasis added.
[460] Para 182 of the applicant's heads of argument.

215. Thus this case does not concern a scenario where the signatory had no authority at all. It concerns the second category of case, described in the next paragraph of the House of Lords' judgment. This is a case where it is alleged that Minister Tšōlo "entered into a main agreement in terms which were not authorised or for improper reasons".[461] The latter (improper reasons) is the spectre of the fraud etc allegation which the applicant attempted at times to conjure for atmosphere. It fell flat on the facts, and is also in law self-defeating. The former (terms not authorised) applies to the only three grounds in which the applicant persists: no authorisation by Cabinet and the Minister of Finance for the conclusion of a loan or borrowing, and an unauthorised departure from tender regulations.

216. As Lord Hoffman held, this does not constitute a competent attack on the *arbitration* agreement.[462] To mount a legally competent attack, the applicant "would have to show that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement."[463] Since the applicant did not and cannot establish this proposition, the position is that there was in fact and in law an arbitration agreement. Therefore the question whether the main agreement had been concluded validly was, as the House of Lords concluded, "to be decided by arbitration."[464]

217. Hence the House of Lords' judgment in which the applicant attempts to find refuge defeats its application.

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[461] *Id* at para 18.
[462] *Ibid*.
[463] *Ibid*, emphasis added.
[464] *Ibid*.

218. The same applies, unsurprisingly, to the judgment by the South African Supreme Court of Appeal applying the House of Lords' judgment.

219. In *North East Finance v Standard Bank of SA*[465] the Supreme Court of Appeal considered the question whether under the South African Arbitration Act (which, like its Lesotho counterpart, allows a party pre-emptively to resist a referral to arbitration by applying to court)[466] a party with a substantive basis for believing that a contract had been induced by fraud could resist being compelled to submit to arbitration.[467] The SCA considered that the question had to be answered "against the factual matrix and context of the contract".[468]

220. Far from supporting even the jettisoned fraud feature of the applicant's case,[469] the SCA held that it was *wrong* to reason that a contract induced by fraud is void from inception, *ergo* an arbitrator cannot consider a defence of fraud.[470] The effect of fraud is to render a contract voidable, not void *ab initio*.[471]

221. Therefore the correct legal position is that if the arbitral agreement's correct interpretation is that a question bearing on validity (even fraud) should be determined by arbitration, then an arbitrator would indeed be competent to

[465] 2013 (5) SA 1 (SCA).
[466] Section 3(2)(b) of the Arbitration Act 42 of 1965.
[467] *Id* at para 1.
[468] *Id* at para 2.
[469] Paras 171, 194 and 196 of the applicant's heads of argument confirm that fraud (and, indeed, no other form of criminality or even dishonesty) is invoked as basis for attempting to impugn the arbitration agreement.
[470] *Id* at para 14.
[471] *Ibid*.

"determine whether the contract was valid and enforceable, or void or voidable."[472] The principle is that the question of validity of the agreement containing an arbitration clause "may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned."[473]

222. Thus the SCA introduced via *North East Finance* into South African law the sea change which the House of Lords affirmed in *Fiona Trust,* and which forms part of the lexicon of arbitration law.[474] The separability principle indeed enjoys the status of a transnational rule of international commercial arbitration law.[475] It forms part of the common law, and does not require statutory codification or recognition.[476] It applies in all comparable jurisdictions, also in the developing world.[477] It results in a robust arbitration law which protects the public interest,[478] caters for constitutional concerns regarding jurisdiction,[479] and guards against abuse.[480]

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[472] *Id* at para 15.
[473] *Id* at para 16.
[474] As Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration articulates the provides:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

[475] Lew *op cit* at para 6–22.
[476] *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 at para 232.
[477] See e.g. the Supreme Court of India's judgment in *Enercon (India) Ltd v Enercon GMBH* Civil Appeal No. 2086/2014 at paras 80-81, and authorities there cited.
[478] Under Article V of the New York Convention both the forum court and enforcement court can provide recourse against an arbitral agreement or award which violates public policy. As the UK Supreme Court held, pursuant to this Convention "the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made" (*Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at para 104).
[479] *Government of the Republic of Zimbabwe v Fick Supra* at para 45, confirming that that jurisdictional objections must generally be raised before the forum of first instance (in that case before the SADC Tribunal, or in that case before the arbitral tribunal).
[480] Lew *op cit* at paras 6–14-15, explaining that it often occurs that "a party alleges that a contract was never concluded" and that "even in those cases the doctrine of separability requires that the question whether the parties consented to the arbitration agreement has to be determined separate from whether they agreed on the main contract."

223. There is therefore no need for the strained and unprecedented "interpretation" to which the applicant is driven.[481] Such interpretation does not satisfy the requirements for reading in; it is inconsistent with international law to which Lesotho is bound; it conflicts with comparative law; it is not supported by national law or legislation; and it is, crucially, contrary to Court of Appeal caselaw.

224. The national law further invoked by the applicant is, ironically, that of South Africa. It cites SCA authority on public policy and the *enforcement* of a contract contended to conflict with public policy: *Pridwin*.[482] This argument is problematic in multiple respects.

225. Firstly, it attempts to apply the SCA's application of the South African Constitutional Court's approach to contracts as articulated in cases like *Beadica*.[483] But in *Ministry of Public Works and Transport v Lesotho Consolidated Civil* the Lesotho Court of Appeal expressed considerable scepticism over this "new, far

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[481] *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] SGCA 9 at para 97:

> "While the very mention of 'fraud' tends to induce an emotive response aimed at avoiding injustice, in the context of arbitration awards substantial injustice may be avoided despite the existence of fraud. It is true that a party who does not act within the time limit will not be able to set aside an arbitration award obtained by fraud but that does not mean that such party will be forced to satisfy the fraudulent award. It will not be bereft of a remedy. The innocent party would be able to take action to resist and set aside the enforcement of the award, like the appellants in this case did."

[482] *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA).

[483] *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC). *Beadica* is cited extensively by the applicant in *inter alia* para 183 of its heads of argument (in support of a public policy argument in the context of sovereign immunity). It is again cited in paragraph 186 of the applicant's heads of argument. In the latter paragraph the applicant notes (fn 172) that *Pridwin* applied *Beadica*. *Beadica* is based, in turn, on the South African Constitutional Court's judgment in *Barkhuizen v Napier* 2007 (5) SA 323 (CC). *Barkhuizen* is the Constitutional Court's *locus classicus* on public policy in the context of contracts under the South African constitution. *Barkhuizen* is cited explicitly by the Court of Appeal in *Ministry of Public Works v Lesotho Consolidated Civil Contractors (Pty) Ltd* in noting the new, wider, and more nebulous approach to public policy by the South African courts. The Court of Appeal questioned whether the same criticised approached should apply under Lesotho law.

wider and seemingly more nebulous criterion for determining public policy",[484] observing that "[t]he criterion so formulated has been criticised for being too radical a departure" from existing caselaw.[485] The applicant's preference for South African caselaw over the caselaw of Lesotho is therefore to be approached with appropriate circumspection in this context.[486]

226. Second, since it contends that it is the "enforcement"[487] of an arbitration agreement that should (so the applicant argues) on public policy grounds be refused, it is the enforcement forum which should so refuse. That forum is the South African High Court, which must grant the required recourse against the enforcement order. This is what both the factual reality (the extant South African enforcement order) and the law (in the form of the New York Convention), and even issues of *forum non conveniens* (since the applicant asks for the application of South African caselaw for purposes of entertaining its public policy propositions), require.

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[484] *Ministry of Public Works v Lesotho Consolidated Civil Contractors (Pty) Ltd* C of A (CIV) Case no. 9/14 [2014] LSCA 11 at para 10.
[485] *Ibid*.
[486] The applicant's citation of *Lengoasa v Proprietor of Kay Cees Primary School* (CIV/APN/18/2021) [2021]LSHC 18 (25 March 2021) at para 11 as a case in which "*Beadica* has been referred to with approval by this Court" (para 170 of its heads of argument) it itself an argument to be approached with circumspection. In *Lengoasa v Proprietor of Kay Cees Primary School* this Court in truth held (*id* at para 11):

> "A survey of decisions espousing this position of the law was approvingly undertaken in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC) for present purposes suffice it to reproduce paragraphs 29-31 of that judgement".

Thereupon the judgment quoted SCA caselaw (*Brisley*, *Afrox HealthCare*, and *York Timbers*) confirming the conventional position: "Courts do not make decisions regarding enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness, fairness", and "freedom of contract is a Constitutional value that aligns with the principle that contracts freely and seriously entered should be judicially enforced", hence "courts should approach their task of striking down, or refusing to enforce contracts, based on public policy with 'perceptive restraint'", and any "[a]cceptance of the notion that Judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty."
[487] Para 188 of the applicant's heads of argument.

227. Third, the correct approach to public policy in this Court is to apply the Court of Appeal's caselaw. It confirms what public policy requires: in principle it is the enforcement of contracts that is required; arbitration is competent; and arbitration agreements are to be honoured.[488] It is only if an arbitration agreement is vitiated by public policy grounds applicable to the arbitration agreement itself that the important *pacta sunt servanda* principle is not applicable. Therefore, if in-principle arbitrable, then an arbitration agreement should be enforced. Under section 3 of the Arbitration Act none of the bases for non-arbitrability applies.

228. Fourth, the argument is in any event in its own terms untenable. It rests on the premise that enforcing (i.e. "giving effect" to) the "attempt to subject the Kingdom to the jurisdiction of a South African arbitrator" was an "attempt to waive the Kingdom's sovereign immunity" and that this "would be contrary to public policy."[489] There is no merit in this suggestion, as caselaw concerning governments' capacity to contract confirmed already decades ago.[490] Any serious concern over sovereign immunity can only arise before the forum and enforcement courts of a foreign state. This is precisely where this argument is currently pending: in the extensive preceding litigation before the Courts of South Africa. Whether the South

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[488] *Ministry of Public Works v Lesotho Consolidated Civil Contractors (Pty) Ltd supra* at paras 9-11; *Kompi v Government of the Kingdom of Lesotho supra* at paras 53, 79, 81 and 82.

[489] Para 183 of the applicant's heads of argument.

[490] *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) at 564F-J, citing with approval the following *dictum* from *Trendtex Trading Corporation Ltd v Central Bank of Nigeria supra:*

> "In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state – or creates its own legal entities – which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*."

African High Court has enforcement jurisdiction over Lesotho is a question only those courts can decide. Again the applicant's argument raises the wrong issue in the wrong court at the wrong time: a clear case of mootness; *forum non conveniens*; and undue delay.

229. Finally, the applicant's extensive block quotations from yet another judgment by the South African Supreme Court of Appeal is equally unavailing.[491] *Canton Trading* concerns a case where the contract in question "was not signed by either of the parties".[492] Thereupon a pre-arbitration agreement was concluded which specifically recorded that the defendant had to obtain the consent of the defendant's insurer to *the arbitration agreement* in the event that the defendant relies on the absence of a signed arbitration agreement.[493] The defendant indeed adopted this defence. Hence the plaintiff approached the High Court, on motion, for relief forcing the defendant to submit to arbitration in accordance with the arbitration agreement.[494]

230. On appeal the SCA confirmed "the enhanced role that arbitration enjoys in the resolution of disputes, both domestically and in transnational law".[495] In this light the SCA noted the importance of the stage at which the question concerning the existence of a dispute and its coverage by an arbitration agreement arises, and whether it is the court or the arbitrator that should resolve this question.[496]

[491] Paras 197-199 of the applicant's heads of argument.
[492] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Nati Bekker Hattingh NO* [2021] ZASCA 163 at para 4.
[493] *Id* at para 9.
[494] *Id* at para 11.
[495] *Id* at para 32.
[496] *Id* at para 31.

231. The judgment further confirms courts' *residual* supervision power over arbitrator's determination of their own jurisdiction "if the arbitrator's award is taken on review or enforcement proceedings are brought".[497] Judicial restraint, the SCA held, is the principle to which the *competence-competence* doctrine gives effect. This principle presupposes that it is "if the award is brought on review or its enforcement is sought" – thus "[o]nce the arbitrator has ruled and rendered an award" – that the courts may finally decide an issue of jurisdiction.[498] Therefore the apparent logic "that the arbitration clause must fail if the contract falls to be impugned" on the basis that the contract containing it "is invalid unenforceable, or … never came into existence" is fallacious, the SCA held.[499]

232. It confirmed its previous judgment recognising the separability principle, holding that "the arbitration clause is a contract distinct from the terms of the agreement of which it formed part", and that the "doctrine of separability" serves "to enforce the arbitration agreement".[500] But in that case a disputes of fact concerning whether the unsigned main agreement included a separate agreement to arbitrate could not be determined in motion proceedings, the SCA held.[501]

233. Thus the issue for determination did not concern the validity of the arbitration agreement, but its factual "existence" (strenuously contested as a matter of *fact* in

[497] *Id* at para 32.
[498] *Id* at para 35.
[499] *Id* at para 34.
[500] *Id* at para 37, citing *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) at para 50.
[501] *Id* at paras 39-40.

opposed motion proceedings in which the party disputing the existence of the arbitration agreement adduced compelling *evidence*).[502] This issue arose before the Courts *because* there was no arbitration process in progress, and less still a concluded arbitration process resulting in an award.

234. The SCA held that "in the face of the dispute of fact"[503] raised by the respondent's "evidence" contesting that a separate arbitration agreement had been concluded (extraneous to the contract which was not signed), the High Court could not "assume the consent of the parties to a referral which is disputed."[504]

235. Therefore, far from assisting the applicant, *Canton Trading* confirms the ordinary approach to disputes of fact in motion proceedings. It held that the High Court erred in determining the merits of the matter instead of either referring it to evidence to resolve the dispute of fact, or to dismiss it.[505]

236. In the current application the applicant disavowed any referral to evidence.[506] Hence the consequence of *Canton Trading* is clear: a dismissal of the current application is the required result.

[502] *Id* at para 41.
[503] *Id* at para 42.
[504] *Id* at para 41.
[505] *Id* at para 43.
[506] See e.g. Record p 2328 para 141; para 291.3 of the applicant's heads of argument.

F. Remedial discretion

237. It is well established that both forms of relief sought by the applicant are discretionary.[507] Therefore, "even if a case is made out that a public functionary acted unlawfully, the court must still exercise its remedial discretion whether or not to grant the relief sought."[508] It follows that the applicant's argument that no other result than granting the relief for which it contends "can be considered" is incorrect.[509]

(1) Applicable principles

238. The correct position is this: in circumstances where the contract concluded pursuant to impugned administrative action had already run its course, Courts regularly refuse to review and set aside the contract in the exercise of their remedial discretion.[510] This applies particularly where the attack on the administrative action is subject to

[507] *Manyokole v Prime Minister* C of A (CIV) Case no: 15/2021 at para 86: "Both declaration and review are discretionary remedies." The applicant accepts that this judgment binds it in this case, and does not seek to distinguish it or meet the quoted *ratio* in para 86. It only contends that "the broader public interest" impacts on the exercise of a court's remedial discretion (para 211 of the applicant's heads of argument). This amounts to a correct concession that the court's remedial discretion cannot be ousted by subordinate procurement regulations. Least of all regulations which themselves provide *not* categorically for voidness but for *voidness or voidability*. It is the court that has the exclusive competence to decide whether or not to declare the impugned conduct and contract void. In exercising this discretion, the broader public interest in *inter alia* finality and the inability of the relief sought in this application to have any actual effect on the execution and enforcement of the arbitration award and extant South African court order militate *against* granting the academic relief so many years after the event, and without taking recourse under the unimpugned Arbitration Act.

[508] *Ibid*. See further *id* at paras 91-92, holding that the High Court had to engage in the inquiry concerning the "appropriate remedy" once it concluded that the administrative action was unlawful. Court of Appeal reiterated that declarators, review and setting aside are all "discretionary remedies".

[509] Para 213 of the applicant's heads of argument. See similarly the incorrect conclusion that this Court "must" declare the Supply Agreement "void *ab initio*" (para 219 of the applicant's heads of argument).

[510] See e.g. *Just In Time Catering Services v Minister of Health and Social Welfare* CIV/APN/213/2010 at para 14. The applicant itself cites this judgment (para 223 of the applicant's heads of argument), and accepts that it is bound by it. See similarly *Buffalo City supra*, also cited by the applicant itself.

considerable disputes of fact,[511] and where the applicant failed to obtain interim relief at the appropriate time to halt the contract running its course.[512]

239. Where an applicant attempts obliquely to defeat the effect of an arbitration agreement or is outcome, particularly by invoking unsubstantiated allegations of criminality (which has become a predicable cynical tactic), courts are astute to withhold discretionary relief.[513] This is such a case: the applicant does not deny that fraud is an afterthought and a cynical stratagem so typically seen in international arbitration proceedings.[514]

240. Therefore what has been held in matters like *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* applies particularly to the current case:

> "There is also the fact that the alleged frauds on the part of Martin Mainz are not convincingly demonstrated, even *prima facie*, in what is before me. Counsel for the respondent were driven, at times, to somewhat tenuous conjecture in their effort to lay the improprieties complained of at the door of Martin Mainz. That is another possible reason for the delay in instituting action. But it would be unwise, in my view, to attach much weight to these assumptions, which may turn out to be ill-founded. There is more cogency, I think, in the submission made on behalf of the applicant, that I should be slow to exercise an equitable discretion in favour of the respondent on the basis of alleged claims which it has not troubled to pursue for so long, and has possibly brought forward only in an effort to defeat the applicant's claim for the appointment of an arbitrator."[515]

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[511] *Id* at para 15.
[512] *Ibid*.
[513] Record p 651 para 143.
[514] The replying affidavit does not traverse para 143 of the founding affidavit (see Record pp 2338-2336 paras 171-173, which traverse up to para 138 of the founding affidavit, and then again from para 145 and further).
[515] 1971 (2) SA 388 (W) 395A/B-C/D.

241. This applies particularly to the current case. Firstly, this application is brought *after* the conclusion of arbitration proceedings (not proactively to prevent the appointment of an arbitrator, as in *Metallurgical*). Secondly, in this matter, much more than in *Metallurgical*, multiple unsupportable "conjectures", blame-shifting, and undue delay and inertia plague the applicant's case.[516] In fact, it is rife with falsities, non-disclosures, failures to take this Court into the applicant's confidence, trifling with FSG, fencing with the facts, and say-so and hearsay – contrary to caselaw by the Court of Appeal.[517]

242. All of this militates against exercising any discretion (were remedy to arise, contrary to our submissions on the merits and the *in limine* issues) in favour of the applicant.[518]

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[516] It is "trite", the Court of Appeal confirmed, that conjectures and the like do not suffice. See e.g. *Makeoane v Phakoane* (CIV/A/6/83) [1985] LSCA 32 (25 February 1985). See similarly *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at para 21:

> "Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:
>
> > 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. ... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'"

See also *Knoop NO v Gupta* 2021 (3) SA 88 (SCA) at para 19 fn 13, in which the South African Supreme Court of Appeal relatively recently cited relevant caselaw, referring particularly to *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) at 75I-76C, reiterating that "evidence does not include contention, submission or conjecture".

[517] *Manyokole v Prime Minister* C of A (CIV) Case no. 15/2021 at paras 94-98, holding that the hearsay allegations were inadmissible; the excuse for advancing it was untenable; that the court is required *mero motu* to reject such assertions; and that advancing unsubstantiated serious accusations (including "[v]ery serious allegations of corruption") justified refusing discretionary remedies and rendered the High Court's approach and order improper.

[518] See e.g. Record pp 648-650 paras 134-140, which refers to the new factual version advanced before this Court (inconsistent with the version advanced on oath in South Africa), unsupported by confirmatory affidavits, and resting on say-so assertions regarding what is suggested to be "typical" but even then failing to meet the actual factual issue – which turns not on *consultation* (in contradistinction to *concurrence*), and destroys the all-important conspiracy/secrecy construct on which the entire application rests. See, too, Record p 668 para 192, referring to the "improbable" and "contradictory" versions advanced in support of the applicant's case. Minister Majoro himself thus describes the versions on which he seeks to rely. Not

(2) Application of principles

243. It is compounding that despite the fatal defects in the applicant's "factual" version being pointed out previously in affidavits filed in the preceding and pending South African proceedings,[519] Minister Majoro merely persists in precisely the same unsubstantiated assertions invoked *verbatim* – despite advancing them previously only in support of a *prima facie* case for interim relief.[520] He had correctly and explicitly conceded that this version was indeed insufficient to acquit the applicant of the onus to establish the serious allegations advanced against the respondents.[521] Nevertheless in this Court the same version is reproduced word-for-word in support of final relief. The only change is a surreptitious deletion of a correct concession: the same averments cannot even sustain interim relief in the South African stay application.[522]

244. The applicant's theory of circumvention and interception in support of a grand scheme of corruption and fraud is fallacious for being inconsistent with the fact that personal service was effected on Minister Majoro himself.[523] He was also personally informed of the conclusion of the contract already in November 2018 and the status of the project in October 2018.[524] He himself asserted (in a document he decided

only are these versions indeed unreliable (as he concedes), they are also hearsay. Despite these notional witnesses' availability, the applicant elected not to obtain any confirmatory affidavits from them (Record p 668 para 192).

[519] *Manyokole v Prime Minister* C of A (CIV) Case no. 15/2021 at para 105.
[520] Record p 720 para 376.
[521] Record p 672 para 200, not traversed at Record p 2341.
[522] Record p 672 para 200.
[523] Record pp 672-673 paras 201-202.
[524] Record p 598 para 5; Record p 30 para 69; Record p 671 para 199.

not to disclose to the Court) that he was one of the "authorities empowered to deal with" the arbitration.[525]

245. Yet he did not take recourse against the arbitration when he received notice of the Award in December 2020.[526] And when he received notice of the enforcement application, he showed no sign of any surprise or lack of knowledge but simply asked the Government Secretary (significantly not the Attorney-General, who the founding affidavit alleges to be key in representing the Kingdom's case) regarding the state of readiness for the litigation.[527]

246. The applicant requires a considerable indulgence to overlook an extensive delay, and thereupon again requires an exercise of the Court's discretion in its favour for purposes of declaratory and review relief (both of which discretionary). But it approaches the court with unclean hands.[528] It has embarked on self-help censored by this Court,[529] in violation of the attachments of its bank accounts by the South African High Court.[530] The applicant's founding affidavit did not disclose this (instead it created the impression that the funds remained attached),[531] and its replying affidavit did not deny it.[532] This, too, does violence to the interests of

[525] Record p 682 para 262.
[526] Record p 659 para 167, which states that Minister Majoro "had received personal notice already on 18 May 2021 (if not December 2020). But of course, he had in fact – many years earlier – been personally and repeatedly informed (*inter alios* by Mr Fintelmann and reputable international banks) of the conclusion of the Supply Agreement and the Memorandum of Understanding." This is not denied or even traversed in the replying affidavit (Record pp 2340-2341).
[527] Record p 682 para 261.
[528] Record p 683 para 265.
[529] *Nthulenyane v Principal Secretary, Ministry of Education* CIV/APN/52/2019 at para 19.
[530] Record p 683 para 265, not traversed at Record p 2341 (which traverses paras 105-257 and thereupon paras 267-301 of FSG's answering affidavit).
[531] Record p 689 para 282, not denied in the traversal at Record pp 2341-2342 paras 183-184.
[532] See, again, Record p 683 para 265. As mentioned, this is not traversed: Record p 2341 forebears any traversal of paragraphs 258-266 of the answering affidavit.

justice, and infringes the rule of law.[533] It also prejudices FSG, and violates FSG's right of access to court and equal protection from the law.[534]

247. Accordingly the applicant is simply not a litigant qualifying for of an indulgence (in the form of condonation) and discretionary remedies (in the form of declaratory and review relief).[535] It is compounding that it is an institutional litigant with a particular constitutional duty towards the Court to litigate responsibly.[536]

(3) <u>Inappropriateness of relief</u>

248. The discretionary relief is in any event inappropriate.

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[533] *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* 2020 (4) SA 375 (CC) at para 51.
[534] *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at para 19.
[535] Significantly, in *Buffalo City supra* at para 59 the South African Constitutional Court confirmed – citing a clutch of Constitutional Court caselaw abjuring self-help by organs of State: *Khumalo*, *Kirland*, and *Merafong* (*id* at paras 59-61) – that the <u>conduct</u> of an organ of state, especially in seeking to self-review government conduct, is "particularly" important for purposes of considering whether despite an undue delay a review should be entertained. As mentioned, the applicant relies heavily on *Buffalo City*. Thus also in this respect the foreign caselaw cited by the applicant is self-defeating. *Buffalo City* confirms the narrow confines in which the criticised (*id* at para 64) so-called *Gijima* principle applies, lest "the valuable rationale behind the rules on delay" (based on the rule of law, the separation of powers, and the prohibition against self-help and usurping the court's competence) be undermined (*id* at para 71). The applicant correctly does not attempt to invoke *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC). It can only be invoked if the impugned "contract was clearly unlawful on undisputed facts" (*Buffalo City supra* at para 101). In this case crucial disputes of fact exist, and the legality of the contract is strenuous contested. It is both in law and in fact far from clear that the applicant's allegations alleging unlawfulness has any merit at all. But *Buffalo City* rebuffs the applicant's case also ultimately on remedy: the Constitutional Court held that "justice and equity dictate that the Municipality should not benefit from its own undue delay", and that the contract should <u>not</u> be set aside; instead, vested rights were preserved (*id* at para 105). The Constitutional Court reiterated: "It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement" (*ibid*).
[536] *Letsie-Rabotsoa v Principal Secretary, Ministry of Communications and Technology* (CIV/APN/126/214) [2021] LSHC 28 (17 June 2021) at paras 14-22, applying Constitutional Court cases like *Kirland, Tasima* and *Merafong* – which require government litigants to litigate according to a higher standard of respect for the law, the rules and the interests of opponents.

249. It is well-established that in the event of a court finding in favour of an applicant contending for invalidity, illegality or unconstitutionality that severance applies.[537] The Supply Agreement itself specifically provides for this.[538] And the principle applies specifically to arbitration agreements.[539] Therefore, if it had seriously been suggested that any clause in that contract had been constitutionally offensive, then the separate recourse taken against the arbitral clause had to be taken against such clause.[540]

250. The same applies to the impugned conduct: it is only to the extent of its alleged inconsistency with the Constitution that it can be declared unconstitutional.[541] The remedy must in all respects be proportionate to the alleged invalidity.[542]

251. It is therefore, for instance, the clause in the contract which is contended to result in payment bypassing the Consolidated Fund which had to be attacked; or the clause in the Supply Agreement which is alleged to violate the law on loans. The applicant's inability to identify and attack, for instance, a clause contended to constitute a loan is of course a clear indication of the demerits of its case: there is no

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[537] *R v Phoofolo* LAC (1990-1994) 1 at 10G-I.
[538] Clause 26.4 (Record p 136).
[539] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews supra* at para 220:

> "as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability)."

[540] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews supra* at para 220. This demonstrates that separability applies to the arbitration clause itself, and severability applies equally to other clauses.
[541] *Democratic Congress v Independent Electoral Commission* [2022] LSHC 10/2022 Const (8 August 2022) at para 70.
[542] *Ibid*.

such clause. But it also renders any notional remedy overbroad and clearly inappropriate.[543]

252. The applicant's heads of argument addresses none of these defects.[544] As mentioned, they incorrectly contend that this Court has no discretion. This when Court of Appeal authority clearly confirms the contrary. The only Lesotho caselaw cited in the applicant's heads of argument is, ironically, the judgment in which the Court of Appeal *contradicted* the applicant's approach; and two other judgments. None of them supports the applicants, as we shall show in addressing each separately below.

(4) <u>Inconsistency with Court of Appeal caselaw</u>

253. We have already referred to the first of the three cases which the applicant invokes, but which defeats its cases: *Manyokole*. It suffices to identify yet further features of this judgment which demonstrate that the applicant's approach is inconsistent with binding caselaw.

254. Firstly, *Manyokole* makes it clear that

- an applicant who does not disclose in its founding affidavit material facts

[543] *Ibid*.

[544] There is no merit in the applicant's attempt to find inspiration for its flawed factual case in the facts of other cases in other countries (see e.g. paras 215.5-216). Neither the state capture to which the *Eskom* matter and related cases refer, nor any other factual analogy (whether in cases of complicity in maladministration or otherwise) applies to the facts of this case. As the answering affidavit demonstrates, there is no crime and no complicity, and FSG's motive and intentions are clear and openly conveyed. Accordingly the "absence of innocence" which could be "inferred" on the facts of some of the South African cases (para 215.5 of the applicant's heads of argument) clearly cannot apply on the facts of this case. It is therefore significant that the applicant is driven to the fallback concerning an innocent tenderer (para 215.7 of the applicant's heads of argument).

- (e.g. in this case that Minister Majoro had concluded the same type of contract which also did not follow the procurement processes contended to apply to the contract impugned in this case, and selectively attempts only to impugn the contract concluded by an exponent of a political rival faction),
- despite this being pointed out in previous litigation
- (by FSG in the pending and preceding South Africa proceedings)

falls to be refused discretionary relief.[545]

255. Secondly, *Manyakole* demonstrates what the "broader public interest" requires. It is that "the serious allegations and counter-allegations made by the parties on affidavit" be pursued under the applicable "statutory process".[546] In this case the applicant did not follow the statutory recourse regime under the Arbitration Act, and the self-serving investigation it instituted in May 2021 has still not been pursued with any apparent appetite.

256. Thirdly, selectiveness is, the Court of Appeal confirmed in *Manyokole*, an issue which the applicant had to address properly in his affidavits.[547] In this case the applicant elected, as in *Manyokole*,[548] not to do so. It did not explain to the Court why it selectively attempts to impugn the contract Minister Tšōlo signed but not the competing contract Minister Majoro signed. It is not tenably disputed that the latter

[545] *Id* at para 105.
[546] *Id* at para 106.
[547] *Id* at para 107.
[548] *Id* at para 108.

is comparable to the former,[549] and is liable to each of the criticism invoked in this case as supposed bases for "flagrant"[550] invalidity.

257. Therefore, as in *Manyokole*, the applicant "ought to [be] … denied the declaratory and review relief he sought".[551]

258. The next judgment invoked by the applicant is *Minet Lesotho v Ministry of Defence*.[552] The applicant argues that this judgment "held that, in the case of flagrant breaches of the Procurement Regulations" a contract should not be preserved *in the exercise of a court's remedial discretion*.[553] This, too, contradicts any suggestion that the Regulations somehow oust the Court's remedial discretion.

259. *Minet* also refutes the rest of the applicant's arguments regarding remedy.[554] The "flagrant" breach in question in that matter was the signing of a contract "in defiance of"[555] a clear directive prohibiting the signing.[556] Under the Procurement Regulations the respondent had no right to defy a directive issued under the

[549] As mentioned, Minister Majoro's attempt in reply for the first time to deal with this issue – long since raised in the preceding South African litigation – is inconsistent with the facts. As we have shown, the bald argument that FSG's and the "competing Chinese project" was "fundamentally different" (Record p 2330 para 145) is unsubstantiated. Contrary to Minister Majoro's assertion, FSG's project did not "consist" in its "entirety" of the supply of "lightbulbs and geysers" (Record p 2332 para 150). It also included generation, storage and arbitrage of surplus electricity. See e.g. Record p 108 clause 1.1.19; Record p 111 clause 3.4; Record p 115 clause 5.1.10.
[550] Paras 204, 212.2 and 214 of the applicant's heads of argument
[551] *Id* at para 109.
[552] *Minet Lesotho (Pty) Ltd v Minister of Defence and National Security* C of A (CIV) 15/2020 [2020] LSCA 27, recited extensively in paras 205-209.
[553] Para 205 of the applicant's heads of argument, emphasis added.
[554] Demonstrably the attempt to retrofit the facts of this case to meet *Minet* is unfounded: the applicant could not do so by citing the motion record (para 212.6). The answering affidavit refutes any "suspicion", because it demonstrates the extensive publicity which FSG's project received and that FSG extensively engaged with Minister Majoro himself.
[555] *Minet Lesotho (Pty) Ltd v Minister of Defence and National Security supra* at para 19.
[556] *Id* at para 13.

Regulations.[557] It could not, the Court of Appeal confirmed, "simply ignore" the ruling.[558]

260. Quite contrary to qualifying as a similar "flagrant" breach of the Procurement Regulations, in this case it was Minister Majoro who simply sought to ignore Minister Tšōlo's exercise of power vested in him by the Procurement Regulations. The Procurement Regulations vested in Minister Tšōlo, as ultimate decision-maker of the procurement unit comprising his ministry, the competence to conclude a contract. There was no directive issued under the Regulations prohibiting the signing of the contract. Minister Majoro had no power *post hoc* to counterman or ignore the conclusion of a contract.

261. Therefore also *Minet* militates against the applicant.

262. The third and final judgment invoked by the applicant is *Drytex*.[559] It similarly involves a failure to comply with a directive by the PPAD.[560] Therefore it, too, defeats the "flagrant" infringement feature of the applicant's case. No such infringement exists on the facts of this case.

263. Importantly, the judgment lists the purpose of both the Procurement Regulations and the objectives of the PPAD acting under it: *inter alia* efficiency, transparency and

[557] *Id* at para 25.
[558] *Id* at para 27.
[559] *Drytex (Pty) Ltd Lesotho v Pyramid Laundry Services (Pty) Ltd* C of A Civ 53/2015 [2016] LSCA 10.
[560] *Id* at para 17.

achieving overall value for money;[561] and applying the key criterion: price.[562] In doing so *Drytex* held that a contract must under the Procurement Regulations be concluded with "the most favourable tender[er]".[563] On the facts of this case FSG's answering affidavit demonstrates that its proposal was the most favourable between the only two potential contestants: FSG and the secret Chinese competitor preferred by Minister Majoro.[564] FSG's price was 1.6 times better, its project was superior, and FSG had a favourable track record both in Lesotho and throughout the region and rest of the world.[565] Therefore the Procurement Regulations' purpose was satisfied by concluding the contract with FSG.

264. Accordingly also *Drytex* defeats the applicant's case.

265. There is therefore no legal or factual basis for the extraordinary relief sought: setting aside conduct and contracts years after the event.[566] The impugned conduct and contracts are long since overtaken by the Award made in December 2020. The Award is not impugned in this application. Its recognition and enforcement are not affected by the relief sought in this application. It already received recognition and enforcement by the South African High Court, which remains extant. Nothing sought before this Court can make any difference to that. The applicant's concession

[561] *Id* at para 11, citing Regulation 6(1).
[562] *Id* at para 12, citing Regulation 29(4).
[563] *Id* at para 12, citing Regulation 30(1).
[564] Significantly, the replying affidavit baldly claims that FSG's and the "competing Chinese project" was "fundamentally different" (Record p 2330 para 145). As mentioned, this attempt turns on Minister Majoro's flawed factual assertion that FSG's project only "consists" in its "entirety" of the supply of products: "lightbulb and geysers" (Record p 2332 para 150). This is, we reiterate, incorrect. FSG's project involved the generation, storage and arbitrage of electricity.
[565] Record pp 609-610 para 39, "note[d]" in reply (Record p 2313 para 103).
[566] For completeness we reiterate that the factual averments concerning the alleged "windfall" received by FSG despite "no performance" on its part are, for the reasons addressed below, unfounded.

that it will be even "less likely" that a South African court will rescind its order recognising and enforcing the Award "if this Court were to keep the Supply Agreement alive" simply serves to confirm the academic nature of this application.[567] It is *successful* recourse *against the South African court's order* that is required for purposes of achieving the practical result for which the applicant contends.

266. Therefore, as Lesotho caselaw confirms, the same considerations applicable to mootness also militate against granting discretionary relief. This applies particularly in circumstances where the applicant's alleged harm is not properly established. If the harm is not properly proved, then *a fortiori* academic relief intended to somehow protect against such harm cannot in the judicial exercise of a Court's discretion appropriately be granted.

(5) No "irreparable harm" to Lesotho

267. The applicant attempts to establish a case for final relief by invoking irreparable harm.[568] This is of course legally misconceived. It is also factually untenable, first, for failing to establish a proper case based on an objective analysis substantiated by actual underlying data.[569] Second, for arguing that the "impact" of "enforcing" the Supply Agreement is adverse.[570] This confirms the mootness of the entire attempt: *enforcement* was sought and obtained – on notice to the applicant by FSG long

[567] Para 218 of the applicant's heads of argument.
[568] Record p 61 para 150.
[569] Record p 684 para 268.
[570] Heading to paras 79*ff* of the applicant's heads of argument.

since – before the South African High Court. Recourse against the South African High Court's enforcement order lies before the South African High Court. This Court cannot avert the harm for which the applicant contends, least of all by granting the relief for which the applicant contends.

268. Therefore the factual position concerning "irreparable harm" does not arise. We nonetheless address this topic to assist the Court's assessment of the inappropriateness of the final relief sought on motion by the applicant.

269. The correct facts are set out in FSG's answering affidavit,[571] which the applicant's replying papers do not refute in the bald two-paragraph traversal.[572]

270. It is not even disputed that there is indeed no truth in the applicant's allegation that the execution of the writs "would more than wipe out the benefits" of emergency pandemic funding received from the IMF. The execution of the writs pursuant to the extant South African order enforcing the Award which is unimpugned before this Court cannot have the effect for which the applicant contend. This is because the attached funds were never allocated for emergency Covid-19 funding, and ringfenced IMF funding cannot be used for unrelated judgment debts.[573]

271. The judgment debt was more than fully committed by Government already in August 2018. In fact, the entire €100 million required for the whole project was

[571] Record pp 684-694 paras 267-292.
[572] Record pp 2341-2342 paras 183-184.
[573] Record p 685 para 271.

committed by Government at that time already. The judgement debt and resulting writs relate to damages of only half this sum, plus interest and costs.[574]

272. This amount, moreover, is quite comparable to similar Government projects, and such other projects are unaffected by the repayment regime pursuant to the writs. The judgment debt is also only a fraction of the value of the project repudiated by the applicant, which would have saved Government M4 billion. This is the equivalent of €235 059 022, thus almost five times the quantum of damages awarded by the arbitrator.[575]

273. The judgment debt is also not disproportionate to the size of Lesotho's economy, as asserted by the applicant. Demonstrably the judgment debt does not even exhaust the attached water royalties derived from the Lesotho Highlands Development Authority. This Government's own 2021 Budget Speech demonstrates.[576] Thus had the self-help not been resorted to, the judgment debt would by now have been satisfied.

274. There is therefore no responsible factual basis for the rhetorical attempt to leverage levels of food security, health and education. The applicant could not provide any factual basis for averring that the people of Lesotho will materially suffer in this or any other respect if this application (which of course does not even affect the execution of the writs, the judgment enforcing the Award, or the Award itself) fails, as it must. In advancing the bare assertions regarding the plight of people (whose

[574] Record pp 685-686 para 272.
[575] Record p 686 para 273.
[576] Record p 686 para 274.

situation is attributable to historical failures by Government to honour its own constitutional duties, *inter alia* by honouring developmental projects like the one repudiated in this case), the applicant does not disclose to the Court considerable continuous humanitarian and other assistance for social and economic advancement. Since 2017 donations of 4 800 tonnes of rice worth M76 million were provided to 500 000 Basotho by 2019, and an additional 3 100 tonnes of rice worth M50 million was expected to be provided in 2019.[577] None of this is affected by the writs or any other enforcement mechanism to satisfy the extant judgment debt. Therefore the applicant's starvation narrative is irresponsibly advanced, and again fails to disclose relevant facts to the Court – despite seeking on this wicket to obtain not only an indulgence but also discretionary relief.

275. The applicant's reliance on its heavy dependence "on donor grants and loans to cover the balance of respective [sic] capital budgets for food security, health and education"[578] is self-defeating. It confirms a fundamental fact: food security, health and education were never dependent on the funds to which the judgement debt and/or writs relate. Therefore executing the judgement debt and giving effect to the writs will not have the effect for which the applicant contends. It will not prejudice any of the funding from donors, and cannot result in reallocating ringfenced funding from donors. Granting the relief for which the current applicant contends can only compromise donor funding. Donor funding depends on the international community's perceptions of adherence to the rule of law, separation of powers, legal

[577] Record p 687 para 275.
[578] Record p 55 para 137.4.

certainly, and compliance with contracts, arbitral awards, and foreign court's enforcement orders.

276. Clearly it is incorrect to contend, as the applicant is driven to do, that "[t]he payment of the judgment debt is likely to result in food scarcity, starvation and ultimately deaths of Basotho citizens".[579] The hearsay PowerPoint "slide" put in aid to show *historical* food insecurity simply does not assist. What it establishes is that satisfying the extant judgment debt cannot remotely be attributable to the pre-existing food insecurity. Regrettably it is Minister Majoro's repudiation of FSG's project which withheld from the nation the M4 billion bounty which the project would have generated for Lesotho to allocate – if indeed desired – towards the alleviation of hunger, poverty, and any other pressing need. In the light of Minister Majoro's persistent failure to explain his preference for a competing project costing 1.6 times more,[580] despite the majority of his Cabinet colleagues preferring FSG's superior project, his self-serving rhetoric must be treated with considerable circumspection if not outright rejection.

277. The same applies to the suggestion that satisfying a foreign judgment debt resulting from an international arbitration would somehow adversely impact on the Kingdom's ability to borrow money.[581] This is contrived. The correct position is that it is, in fact, if the judgment debt *remains <u>unpaid</u>* that it will continue to qualify as an outstanding debt. It is debts which remain unpaid which adversely affects a

[579] Record p 56 para 139.
[580] Record p 701 para 307.
[581] Record p 56 para 141.

country's "ability to borrow".[582] Permitting the execution of the writs will have the opposite effect, resulting in *discharging* the judgment debts and *increasing* Lesotho's ability to incur credit.[583]

278. Similarly the "immediate and grinding halt" which the applicant contends will result from the enforcement of the conceded "indebtedness" is demonstrably contrived.[584] Firstly, the indebtedness is to be discharged pursuant to incremental payments of money flowing in from a source *not* exhausted by the judgment debt. As mentioned, if Lesotho did not resort to self-help, then this source would by now have exhausted the judgment debt and have continued to generate inflow of income unaffected by the judgment debt. Secondly, even the immediate enforcement of the judgment debt would only have impacted on some six weeks' salaries of some public servants.[585] Public servants' salaries have, as the IMF pointed out long since (but Minister Majoro failed to disclose in his affidavit or to address during his tenure as Minister of Finance), historically been the bane besetting Lesotho's fiscal position.[586]

279. Minister Majoro withheld from the Court the true fiscal and budgetary position of the Kingdom. Significantly, this was pointed out by FSG already in its June 2021 answering affidavit filed in the preceding and still pending South African proceedings.[587] The same *modus operandi* was deliberately repeated before this Court, adding only some argumentative averments resorting to "basic"[588]

[582] Record p 57 para 141.2.
[583] Record p 688 para 278.
[584] Record p 59 para 142.
[585] Record p 688 para 279.
[586] Record p 689 para 280.
[587] Record p 689 para 280.
[588] Record p 59 para 143.

propositions regarding pre-existing revenue deficiencies,[589] and figures reflecting the inflated wages and salary expenses.[590] It does not even disclose the two documents which the founding affidavit filed in the interim stay application (filed in the South African High Court) failed to attach, but which the South African rescission application's founding affidavit eventually did disclose.[591]

280. Equally undisclosed is the undenied resort to self-help. In an attempt to accommodate the Kingdom's assertions advanced for purposes of seeking interim relief in South Africa, FSG proposed an interim arrangement.[592] By consent it was made an order of Court in South Africa. Pursuant to this arrangement the writs and attachments remained in place, and no party was permitted to have access to the funds. But the Kingdom breached this arrangement and withdrew funds from the attached accounts. Not only was this not disclosed to this Court. The applicant also withheld from the Court and from FSG the extent to which and purpose for which the Kingdom has helped itself to the attached funds. It is nowhere suggested that the funds were applied for purposes of poverty alleviation, food security or any of the purposes leveraged in the founding affidavit. Had it been, this would of course have been pleaded as part of the necessary factual averments meant to support the applicant's harm theory.

281. In reality the "food scarcity and starvation" narrative is negated by the two supposed "sources" invoked in purported support of this proposition. They reflect that

[589] Record p 59 para 144.
[590] Record p 59 para 145.1.
[591] Record p 689 para 280.
[592] Record p 689 para 281, not traversed at Record pp 2341-2342 paras 183-184.

in 2020/21, Lesotho disbursed M80 million (€4.6 million) to the Food and Agriculture Organisation to distribute agricultural inputs (including seeds and water tanks) to small-scale farmers. This figure does not correspond with Minister Majoro's claim that food scarcity and starvation is a major concern of government. In fact, the Budget Speech does not contain any reference to the food shortages. Thus this is *not* a policy priority, and it in any event cannot be furthered by the relief claimed in this application.[593]

282. Thus the limited data disclosed by the applicant does not support its theory of harm. It is, moreover, untrue that the judgment debt would somehow wipe out the benefits of the €40.3 million emergency support loans received from the IMF to reduce the effects of the Covid-19 pandemic. The supposed "analysis" suggested to support this flawed inference fails altogether to account for the significant projected increase of Lesotho's GDP from -4.8 in 2020/21, to 3.9 in 2021/22 and to 4.3 in 2022/23. Tax deferrals have already been lifted, resulting in one of multiple additional revenue sources not disclosed to Court and directly contradicting the inference for which the applicant argues. Another such source is Lesotho's tourism revenue. It totalled US$24 million in 2018. It is forecast to return to pre-pandemic levels as international border restrictions are abolished.[594]

[593] Record pp 693-294 para 291, not addressed in reply at Record pp 2341-2342 paras 183-184.
[594] Record pp 690-691 para 284. This, too, is not addressed in reply (Record pp 2341-2342 paras 183-184). The replying affidavit's two-page traversal simply asserts that FSG provided no expert evidence. This is not the point, as FSG explained already in its answering affidavit preceding the replying affidavit by four months (Record p 685 para 268). The point is that the applicant's inhouse (*not* independent) "expert" evidently did not address multiple material facts. This renders his attempt to support his employer's case of no assistance to the Court. See e.g. *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) at para 50, referring to the independence of an expert witness, and the need to present expert evidence "for the benefit of the court. It is not the function of an expert witness to advocate the client's cause".

283. Additional revenue apart, Lesotho commands significant financing resources. It accessed $130 million in international financing during 2020/21. The terms of such financial assistance are very favourable: they are interest free; repayable over 3.25 to 5 years; and have a final maturity of 10 years. The IMF Report notes that a further IMF loan may be available, and that Lesotho's total available financing is $186 million for the financial year 2020/21, which increases to $303 million for 2021/22 and $537 million for 2022/23.[595] This yet further defeats the applicant's sudden "grinding halt" construct.

284. The debt on which the Kingdom was always dependent for purposes of spending towards the aspects invoked in the founding affidavit will continue to be accessible if the South African judgment debt is honoured. There is no merit in the allegation that Lesotho's ability to borrow funds (allegedly on the basis of increasing debt ratios above the approved 60% threshold of sustainability for the Southern Africa Development Community) will be jeopardised. The IMF's own analysis confirms that the present value of Lesotho's public debt-to-GDP is expected to reach close to 50% in FY 2021/22, before falling below 40% in the long run. There is thus appreciable additional financing available to Lesotho. Lesotho's ability to borrow is not compromised by servicing extant judgment debts. It is the non-payment of judgment debts which would make Lesotho uncreditworthy.[596]

285. Utterly uncreditworthy is the applicant's bald allegation that Lesotho can only cover a small percentage of its food security, health, and education capital expenditure.

[595] Record p 691 para 285. Again, the replying affidavit does not contest these facts, and does not suggest a basis for any different conclusion (Record pp 2341-2342 paras 183-184).
[596] Record p 691 para 286.

This argument, too, is contradicted by such "source" documents as the applicant eventually disclosed. In contrast to Minister Majoro's contention, Lesotho's revenue is described by the IMF as "substantial". Indeed, Lesotho's tax revenue was M6,161.2 million (€359.5 million) in 2020/21, which is projected to increase to M7,340.1 million (€428.3 million) in 2021/22, and M8,123.7 million (€474 million) in 2022/23. Water royalties are M1,036.9 million for 2020/21 (€60.5 million, being 3.1% of the GDP), and are projected to rise to M1,174.1 million in 2021/22 (€68.5 million, being 3.2% GDP). Government revenue is over 45% of Lesotho's GDP. Thus Lesotho's revenue far exceeds the OECD's average of 35%. In comparison, South Africa's government revenue is only 30% of its GDP. Government revenue of low-income countries is 15% of GDP. It is therefore not revenue that is required, but – as Lesotho's own annexure (which its current Minister of Finance authored) records – the implementation of "policy measures to curb waste and control expenditure".[597] FSG's project is compliant with just such a policy (the Lesotho Energy Policy 2015-2025), intended to curb wasteful expenditure and generate substantial government revenue.[598]

286. Contrariwise, a prime example of exorbitant expenditure to be brought under control, as the IMF confirms, is Lesotho's wage bill. Unaccountably Minister Majoro attempts to invoke the excessive wage bill before this Court. Lesotho's wage bill is, the IMF report reveals, already among the highest in the world. It is set to increase by approximately 8% in 2021/22. The IMF notes that the inflated wages "will have to be addressed notwithstanding elections in 2022". The IMF report

[597] Record p 692 para 287.
[598] Record p 686 para 273.

highlights the wage bill and various other areas in which Lesotho's spending can and should be curbed, and this is acknowledged in the letter by Lesotho's Minister of Finance to the IMF already in July 2020.[599] Minister Majoro, who is the previous Minister of Finance, therefore cannot responsibly invoke the wage bill before this Court. His attempt to do so without disclosing the relevant facts is unfortunate.

287. Further undisclosed facts relating to fiscal matters concern, firstly, the reduction of expenditure falsely presented in the applicant's founding affidavit as constant; secondly, an additional $86 million held in Lesotho's account, and $31 million in "other investments"; and, thirdly, various recent additions to Lesotho's income streams. They are forecast to increase Lesotho's revenue by approximately €40.5 million. Lesotho itself estimates that M200 million (€11 million) will be raised by curbing perpetual VAT refunds due to zero-rating of mining exports. Lesotho likewise estimates that M232 million (€13.5 million) will be raised from royalties generated from export tax on diamonds. Lesotho is also legislating to impose alcohol and tobacco products levies, which it estimates will generate a further M286 million (€16 million). And it will receive significant additional cash inflows from the Lesotho Highlands Water Project 2 project.[600]

288. It is specifically from this revenue stream (the Lesotho Highlands Water Project) that the judgment debt is to be repaid as and when funds become available pursuant to the extant attachment regime. Far from being debilitating, honouring the judgment debt by repayment through this incremental repayment regime is

[599] Record p 692 para 288.
[600] Record p 693 para 289.

imperative to Lesotho's economy and its reliance on international investment. And it is entirely possible to do so through this new revenue stream. The new revenue stream evidently has never been used before for the purposes now sought to be invoked for the "grinding halt" hypothesis.

289. Lesotho itself has acknowledged the importance of attracting international investment for purposes of improving the country's economic conditions. As the 2021/22 Budget Speech records: "[r]ed carpet treatment for 'real' investors should be a reality in Lesotho". The Budget Speech further recognises that Lesotho "need[s] to explore ways of strengthening existing and creating new partnerships locally, regionally, and internationally to improve service delivery". As an example of this, the AGOA Response Strategy and Action Plan "provides a comprehensive plan to … attract more US investment into Lesotho". In order to secure foreign investments, Lesotho must honour and be seen to honour internationally recognised judgments, arbitral awards, and foreign investment contracts.[601]

290. Foreign investment depends on financial security which can only be provided by countries which adhere to the rule of law, with fair and transparent domestic justice system which enforce international standards of treatment.[602] Foreign investment is repelled by the tactics invoked by the applicant in this application: ignoring a contract since November 2008, and refusing to take recourse as required under the New York Convention in time before the correct forum.[603] The applicant's *modus*

[601] Record p 694 para 292.
[602] See e.g. *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at paras 1-2.
[603] See e.g. Alexander "The Rule of Law and Foreign Direct Investment in the Developing World" PhD dissertation (University of California, Irvine 2014). The dissertation confirms that "[f]oreign direct

operandi is obstructive, counter-productive and prejudicial to international investment and trade.[604]

291. Therefore the applicant's "irreparable harm" allegations are unproductive for failing to establish what the applicant avers, and self-destructive for failing to refute the harmful effect precipitated by the applicant's approach.

(6) No "windfall" for FSG

292. A final factual contortion advanced in this context (and raised throughout the applicant's heads of argument) relates to "lightbulbs" and "windfall". The applicant strenuously contends that FSG would receive a "windfall", that it did not perform any part of the contract, and that it therefore suffered no harm.[605] There is no responsible factual basis for this argument.

293. The argument affects "astonishment" at the bogey the applicant itself conjures. It is the contention, on which its whole attempt to balance prejudice rests, the project and Supply Agreement merely meant that FSG would change the lightbulbs.[606]

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investment (FDI) is an increasingly important part of the world economy"; notes that "[f]oreign investment is especially important in developing countries where it can make up for a lack of domestic capital, increase tax receipts, improve employment, and hopefully lead to economic development"; and "examines the role a country's respect for the rule of law plays in its ability to attract FDI", and finds that "investors prefer countries that protect contract, property, and physical integrity rights" (at p xi). The dissertation identifies governments' compliance with court orders as a particularly important indication of compliance with the rule of law from a FDI perspective (*id* at p 79). Misplaced attempts to resort to juridical review is clearly not conducive to FDI (*id* at p 80).

[604] *Industrius DOO v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* (2020/15862) [2021] ZAGPJHC 350 (20 August 2021) at para 34.

[605] See e.g. paras 38, 219, 224 and 235.4 of the applicant's heads of argument.

[606] Para 38 of the applicant's heads of argument.

294. We have already shown that this is another incorrect factual aspect of the applicant's case. To summarise shortly, the correct position is this: FSG was required under the project to install extensive photovoltaic infrastructure capable of generating and storing excess electricity.[607]

295. Thus the entire "windfall" argument falls apart already at the first level of fact. Lightbulbs is not even remotely the sole remit of the Supply Agreement. FSG had, as mentioned, already for sixteen months preceding the Supply Agreement's signing performed full-time, unpaid preparatory work on the project.[608]

296. It is, moreover, an unfortunate misstatement of fact that FSG merely contracted to change the lightbulbs. It is particularly inappropriate for failing to disclose that FSG in fact contractually undertook – in addition to all its other extensive and onerous obligations (including the establishment of an energy management company to manage the products installed and electricity generated on all the sites for a period of five years)[609] – to provide 75 000 solar lights free of charge to poor households currently without any electricity.[610]

297. In any event, the "windfall" argument is unsound in law too. If it were true that the liquidated damages clause constituted an unenforceable penalty which

[607] See e.g. Record p 108 clause 1.1.19 (describing the products to be installed as including but not limited to solar water heating systems, solar photovoltaic systems, LED lighting products, electricity storage batteries and accoutrements); Record p 111 clause 3.4 (recording that the project concerns a large scale installation of a large volume of solar water heaters, solar photovoltaic systems and LED lights amongst other things across a range of sectors, buildings, facilities and infrastructure, including non-electrified households reliant on paraffin and candles); Record p 115 clause 5.1.10 (recording the need for FSG to attend to roof strengthening , ground levelling and laying concrete slabs for batteries prior to installation).
[608] Record p 611 para 43, not denied at Record p 2313 para 106.
[609] Record p 152 para 11.1.
[610] Record p 160 para 12.

overcompensated FSG unduly (contrary to the evidence before the arbitrator, which he accepted and upheld),[611] then this is a contractual defence to be pursued before the arbitrator. It could even notionally be raised as a defence against enforcement. This was indeed attempted in the pending South African proceedings. But quite rightly the applicant does not mount any such complaint before this Court: it has no factual basis.

298. The windfall fallacy is, therefore, on clear Court of Appeal authority, misconceived.[612]

299. Furthermore, the correct position is that not only FSG itself, but also the public interest is prejudiced by the overall outcome for which the applicant contends. As the answering affidavit establishes (again, without refutation), foreign investment, FSG itself, the regional public interest, and particularly a project in Eswatini will suffer if FSG's vested interest in the enforcement of the Award is further delayed by undue, dilatory and misdirected litigation.[613]

300. Both the public interest and FSG is prejudiced by deferring finality in the enforcement of the international arbitration award. This *per se* suffices for purposes

[611] Record pp 772-773 paras 110-112.
[612] *M & C Construction International v Lesotho Housing and Land Corporation supra* at para 35, holding that "the respondent's case was that if it had received what was due to it on the due date it would have invested it in building developments which would have produced a return of 35 per cent per annum. It led evidence to that effect and though this evidence was not supported by its financial statements showing its profits in the past and what the trend was (as the respondent's expert witness suggested) the arbitrator was satisfied it had proved its case in that regard." The Court of Appeal held that even had the arbitrator been "wrong" in holding the evidence satisfactory, then this still "would not justify the setting aside of his award" (*ibid*).
[613] Record pp 698-699 paras 296-299, not effectively denied at Record p 2341 paras 183-184.

of establishing prejudice, even had any onus somehow been cast on FSG (which is not the case).

301. In law the position is simple, but fundamental. Both under the Constitution of Lesotho and under international law FSG's vested interests in the enforcement of the Award and execution of the judgment debt are protected. The relief for which the applicant contends asks this Court to exercise its discretion in a manner inconsistent with international law.[614] Such relief amounts to a judicial expropriation under international law.[615] National courts in other jurisdictions do not give effect to such orders. Therefore any suggestion that this Court should exercise its remedial discretion for the "assistance" of the South African forum-*cum*-enforcement court is contrary to international law. It is also inconsistent with South African national law in the form of a Constitutional Court judgment and Supreme Court of Appeal judgment to which the South African High Court is bound.[616]

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[614] *Burmilla Trust supra* at paras 27-28. As the Supreme Court of Appeal explained:

> "In the present context the principle of estoppel is applicable where a state by official act granted a right and thereby represented or created a legitimate expectation that the right had been validly granted under its municipal law or would be honoured. If the grantee in good faith acted upon the representation the state may in appropriate circumstances be estopped from contesting the validity of the right on the basis of non-compliance with some internal requirement of municipal law."

[615] *Id* at paras 40-41.

[616] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews supra* at paras 225-227; *Burmilla Trust supra* at paras 27-28. The High Court of South Africa is, of course, not bound by the ruling in the interlocutory postponement application delivered by the single acting judge in *Kingdom of Lesotho v Frazer Solar GmbH* Case no. 2020/33700. Nor, of course, is this Court bound by (or, with respect, assisted by) the reasons provided or the order. The reasons are, significantly, marked by the acting judge himself as *not* of interest to other judges. The acting judge delivered his order immediately after the conclusion of oral argument. This after informing the parties that he had only read and considered the applicant's heads of argument, not also FSG's. There can therefore be no contention that the postponement ruling somehow persuasively suggests that this Court should determine the merits in this application for the assistance of the South African temporary acting judge, who is not seized with the South African litigation. With the utmost respect, we strongly disagree with Mr Acting Justice JJ Strydom's reasoning and interlocutory ruling in the postponement application. However, neither his reasons nor his interlocutory ruling is appealable. Demonstrably it failed to apply Constitutional Court caselaw cited in the heads of FSG (which, as mentioned, the acting judge did not read before rendering his ruling), and gave no effect to the separability principle or the New York Convention. Applying the correct precedents and principles, including the Court of Appeal's caselaw, it would facilitate the expeditious progress of the South African litigation (if the applicant is indeed mindful to

302. It follows that the windfall argument is factually flawed and legally misconceived. As we shall show, some of the same considerations dispose also of the three residual issues on which the applicant advances extensive submissions. We address them separately for purposes of completeness.

G. Residual issues

303. Finally it remains to address the three residual issues relegated to the last thirty pages of the applicants' heads of argument. The applicant's stance on none of these issues is sustainable or of assistance to this Court.

(1) Choice of forum

304. The applicant's heads of argument advance an extensive excursus on what constitutes submissions on the topic of *forum non conveniens* under the subheading "the arbitration clause".[617] It fails entirely to address the true issue.

305. The true issue is this: having elected to prioritise its litigation in South Africa (in an attempt to attack before the forum-*cum*-enforcement court the Award, and the court order enforcing it), the applicant should be held to that litigation strategy,

proceed with it) for this Court to dismisses this application and allow the forum-*cum*-enforcement court to exercise its jurisdiction as contemplated by the New York Convention. It is for the forum-*cum*-enforcement court to apply the law which the applicant invokes before this Court: South African law, which the applicant says makes no difference but nonetheless appears to prefer for purposes of citations.

[617] Paras 268-294, following an introduction explaining to the Court the difference between a choice of law and choice of forum clause (para 265).

particularly in circumstances where the relief sought from this Court cannot have the effect for which the applicant contends, and especially since the international law regime for proper recourse against arbitral awards contemplates recourse before the forum and/or enforcement court (*not* the domestic courts of the country contracting with a foreigner investor).

306. As international commentators confirm, precisely for the reasons addressed above in dealing with mootness, a different court in a different country cannot be asked to interfere with an extant arbitration award – unless that court is or was or becomes the forum or enforcement court before which recourse against an arbitration award properly lies.[618] Proceedings in other courts are vexatious and oppressive;[619] and should on this basis not be permitted to proceed pending proceedings before the forum and/or enforcement court.[620]

307. Before the South African court the Kingdom already formally adopted the position that the proceedings pending there *must* be determined "come what may".[621] This confirms the mootness of this application: relief based on precisely the same situation and against exactly the same judgment creditor must "come what may" be

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[618] Joseph *Jurisdiction and Arbitration Agreements and their Enforcement* 3rd ed (Sweet & Maxwell, London 2015) at para 16.62:

> "… If relied upon, the party opposing recognition must raise and prove any such ground advanced. The party opposing recognition must not only assert but prove any ground relied upon on a balance of probabilities. … The grounds of refusal are exhaustive. Thus in principle an unsuccessful party to an arbitration ought not to be allowed to bring an independent action by way of collateral attack to the award either in England or abroad. In England the enforcement or recognition of a New York Convention award ought to be assessed and decided by reference to grounds of challenge recognised under the New York Convention and not otherwise. If an award was obtained in England and an unsuccessful party brought proceedings overseas by way of collateral challenge to the award then the English courts may restrain those proceedings on the grounds of vexation and oppression. …".

[619] Record p 605 para 25.

[620] Joseph *op cit* at para 16.62.

[621] These were the words used in paragraphs 10 and 51 of the Kingdom of Lesotho's heads of argument in the postponement application, seeking to back rank its preceding South African litigation.

sought before the South African court in the prior proceedings already pending in South Africa. Therefore, whether on the basis of mootness or *forum non conveniens*, the current application is inappropriate.

308. In an attempt to circumvent established law on international commercial arbitration, the applicant contends that it is only this Court that can review and set aside administrative action in the form of a public decision to enter into an agreement like the Supply Agreement.[622] The flaw in this argument is twofold.

309. First, it is simply incorrect in law. The enforcement and forum courts are required to exercise their own jurisdiction based on Article V of the New York Convention.[623] For this purpose no judicial review jurisdiction is exercised or even relevant.[624] The question to be determined *de novo* (without deference to the decision-maker or its domestic court) by the forum or enforcement court concerns the legality, validity

[622] See e.g. para 267 of the applicant's heads of argument.

[623] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews supra* at paras 225-227 and 235. See also the South African Supreme Court of Appeal's judgment in *Trustees for the time being of the Burmilla Trust v President of the RSA supra*. In *Burmilla* the SCA referred with approval to and applied *Amco v Indonesia Amco Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/1) (award). As the SCA's quotation correctly reflects (*Burmilla Trust supra* at para 30), *Amco* held that an international tribunal is not bound to follow the result of a national court (*Amco supra* at para 177). It recognised that one of the typical reasons for instituting an international arbitration procedure is parties' preference for a legal institution which is not entirely related to one of the parties (*ibid*). If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless (*ibid*). Therefore, irrespective of the description of the legal position of a party in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court (*ibid*). Similarly, the SCA referred to *Vigotop v Hungary* (ICSID Case no. ARB/11/22 (award) paras 583-584, showing that international tribunals may of course differ from the conclusion of a national court, even on issues of validity under municipal law (*Burmilla Trust supra* at para 31). The same quite clearly applies in this context: the enforcement court seized with an application for recourse against an international arbitral award, too, cannot take its cue from the domestic court of one of the parties.

[624] *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at para 29, holding that the issue whether an arbitration agreement actually existed and whether the government concerned had agreed to arbitrate in France, and whether the French arbitral award would actually prove binding in France, could only be determined in the French court proceedings which were already pending at the time.

and compliance with international public policy of the arbitration agreement and the enforcement of the Award under the arbitration agreement.[625]

310. Second, the applicant's argument is in its own terms self-destructive. If it is indeed required that this Court must exercise its judicial review jurisdiction to review and set aside the *decision* to enter into the relevant agreement, then the applicant has failed to do so. The decision to enter into the arbitration agreement, which the applicant accepts constitutes a separate agreement, is not part of the review relief sought in this application. It is only the decision to *appoint* FSG and to *enter into the Supply Agreement* which the notice of motion identifies as the impugned "decision(s)".[626]

311. Thirdly, not even the specifically-cited choice of law or choice of forum clauses are attacked.[627] The chosen forum is the High Court of South Africa, which is already seized with the pending South African litigation – which precedes the institution of this application by months. The founding affidavits serving before the High Court of South Africa are virtually identical to the one filed in this affidavit. The same issues are invoked, and even the same law applies – because the applicant's fallback argument is that the choice of South African law (to be applied by the South African court in the preceding South African proceedings instituted by the applicant itself) is no different.[628] The applicant's argument indeed heavily relies on South African

[625] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at para 61.
[626] Record p 1 prayer 1.
[627] Paras 263-264 of the applicant's heads of argument.
[628] Para 307 of the applicant's heads of argument.

caselaw.[629] But in doing so the applicant overlooks Lesotho law.[630] This renders this application defective, as the Court of Appeal held in *Kompi*.[631]

312. Fourthly, the Arbitration Act is not attacked. It renders all disputes other than those excluded in section 2 arbitrable.[632] Accordingly the applicant's reliance on a South African judgment by a single judge in the High Court is untenable for being contrary to the governing Lesotho legislation. It is also cynical. Arbitrating international commercial disputes with foreigners in ICC arbitration proceedings is clearly not outlawed whenever the government-defendant unilaterally and conveniently resorts to self-review.[633]

313. As a matter of important public policy, if no due recourse is taken under the Arbitration Act, then effect must be given to the arbitration award, the preceding arbitration agreement, and the subsequent enforcement by a foreign court. All of this is required under international law, and under the Court of Appeal's caselaw confirming the *pacta sunt servanda* principle.[634]

314. This applies particularly in circumstances where the arbitration agreement and award do not on any approach purport to provide for or exercise judicial review

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[629] The applicant cites 76 judgments, of which 43 are South African. Only 19 are from Lesotho. The remaining 13 are from the United Kingdom and the United Stated.
[630] This despite the applicant being the Attorney-General of Lesotho (his specific role as law advisor to the Government is specifically invoked in Minister Majoro's various affidavits filed in South Africa), and despite the Lesotho Courts' specific confirmation of institutional and state litigants' higher duty to the Courts in conducting their litigation, and despite the Court of Appeal decrying litigants overlooking legislation (specifically the Arbitration Act) in their pleadings and argument.
[631] *Kompi supra* at para 44.
[632] Section 3 of the Arbitration Act.
[633] Para 270 of the applicant's heads of argument.
[634] *Ministry of Public Works v Lesotho Consolidated Civil Contractors (Pty) Ltd* C of A (CIV) Case no. 9/14 [2014] LSCA 11 at paras 9-11.

jurisdiction over the exercise of "public powers".[635] The applicant's argument is simply misplaced. The proposition for which it contends is an abstract hypothesis far removed from the facts of this case or the practice of international commercial arbitration. Arbitrators arbitrate under extant arbitration law. The judiciary exercises judicial review powers, provided the right relief is sought in the right circumstances by the right party in the right proceedings.[636]

315. Fifthly, the reliance on "South Africa's constitutional architecture" is not only misplaced but also self-defeating.[637] If that "architecture" so warrants, then South Africa's courts (before which recourse against the Award and the order enforcing it is currently pending) will exercise their power to refuse and countermand enforcement of the Award.[638] The applicant cannot have it both ways, and it must demonstrate confidence in its contention by pursuing its prior South African litigation.

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[635] Para 270.1 of the applicant's heads of argument.

[636] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 28, citing Wade *Administrative Law* 7th ed at 342:

> "… the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason."

[637] Para 270.1 of the applicant's heads of argument.

[638] As the South African Constitutional Court's caselaw confirms, this is the appropriate approach if a legal and factual basis for non-enforcement is established (*Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)). In this well-known South African judgment – which the applicant does not address (despite relying predominantly on South African law before this Court) – the Constitutional Court confirmed that a distinction must be drawn between the arbitration agreement and the underlying contract, and that the invalidity of the one does not affect the other (*id* at paras 45-51). The Constitutional Court further held that an arbitral award which sanctioned illegalities or subverted the purpose of statutes are unenforceable, but that this does not mean that courts would never enforce awards inconsistent with statutory prohibitions – public policy is the applicable criterion, and only if it is violated will the award be unenforceable (*id* at paras 53-62).

316. It is self-destructive to argue now before this Court that "[o]nly courts can declare law or conduct invalid."[639] This is precisely the defect in the applicant's case.[640] Minister Majoro did not seek an order to declare Minister Tšōlo's decision and conclusion of the contract invalid. Minister Majoro's inertia and usurpation of the powers of the court did not, however, also affect the arbitration. Demonstrably the arbitrator himself did not purport to pass judgment on the validity of administrative action. He could and should, contrary to Minister Majoro, have approached the unimpugned conduct by applying the presumption of validity. FSG's case did not require the contrary, and the arbitrator was not asked to pass judgment on issues for judicial review. Arbitrator Maleka SC determined a contractual cause of action. Not even the applicant's contractual defences require – on the version the applicant now advances – such declaration.[641]

317. Since Minister Majoro unconstitutionally usurped the power of the court and violated the separation of powers (by purporting to determine for himself the validity and legality of the contract and exercise of public power brought to his attention by FSG, repeatedly and persistently),[642] the applicant's attempt to incant the rule of law and separation of powers is self-destructive.[643]

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[639] Para 272 of the applicant's heads of argument.
[640] Record p 714 para 355; Record p 722 para 381.
[641] *Lesotho Hotels International (Pty) Ltd v Minister of Tourism* LAC (1995-1999) 578 at 584A-F.
[642] It follows that the applicant's resort to the rule of law and separation of powers (paras 274-279) is not merely transparently self-serving, it is self-defeating.
[643] As was pointed out by Lord Bingham writing extra-curially on the rule of law, the "utterance of those magic words [rule of law] meant little more than 'Hooray for our side'" to political adversaries (Bingham *The Rule of Law* (Allen Lane, 2010), citing Professor Jeremy Waldron, commenting on the decision of the US Supreme Court in *Bush v Gore*).

318. Sixthly, for similar reasons, rerunning the same argument for purposes of contending that "the South African arbitrator does not have jurisdiction to hear this review application" is particularly misconceived.[644] The nationality of the arbitrator is irrelevant; the arbitrator did not purport to conduct any judicial review; and it is in any event not the arbitrator who is contended to be the appropriate forum, but the forum-*cum*-enforcement court. Transposing the same argument to apply to the High Court of South Africa does not assist the applicant either. This is because it contends for the "flagrant" and "patent" invalidity of the contract under South African law, which it (so the applicant argues) "no differen[t]" to Lesotho's law.[645] The circularity in the applicant's repetitive proposition is clear. Since South African courts refuse to enforce arbitral awards in violation of law, and since the selfsame factual and legal questions are already pending before the South African courts (pursuant to the Kingdom's preceding applications long since lodged"), the applicant's case can be and is being pursued before the forum court. The forum court is therefore "*available* to Lesotho".[646] Demonstrably, then, FSG has clearly acquitted itself of the "low threshold"[647] for establishing *forum non conveniens*.

319. Contrariwise, the onus resting on the applicant to establish the two issues identified in the applicant's own heads of argument (acting reasonably in its litigation; and the absence of procedural advantages sought to be obtained over an opponent)[648] is not even averred by it. The applicant's heads of argument correctly cite no part of the papers in any attempt to address these issues. The papers reflect an unreasonable

[644] Para 289 of the applicant's heads of argument.
[645] Para 307 of the applicant's heads of argument.
[646] Para 290 of the applicant's heads of argument, emphasis in the original.
[647] Para 285 of the applicant's heads of argument.
[648] Para 287.1-2 of the applicant's heads of argument.

delay in instituting this litigation; an unreasonable and untenable attempt by the applicant's deponent to determine for himself issues of legality; an unreasonable non-disclosure by the applicant's deponent of the competing Chinese contract, and other non-disclosures to this Court; an unreasonable attempt to litigate in multiple jurisdictions simultaneously, raising the selfsame issues in mirror-image affidavits; and a clear attempt to advance before this Court local legal procurement peculiarities and arguments *ad misericordiam*.[649]

320. Demonstrably the applicant attempts in this application to achieve a tactical advantage to which it is not entitled, and this at FSG's prejudice. It follows that the

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[649] South African courts have consistently rejected such arguments. See e.g. *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE) at 365C-E:

> "Notwithstanding this plea *ad misericordiam*, the fact that the Department of Welfare has not budgeted for the payment of interest on social grants cannot excuse it from its obligation to pay if such interest is legally due. Thus, for example, in *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) (2001 (2) BCLR 118) at para 23 O'Regan J stated:
>
> > 'If a court concludes that the government owes money to a litigant, the fact that the government has not budgeted for such payment cannot deprive the court of the power to make an appropriate order. Nor will it excuse the government from an obligation to pay.'"

SA Express Ltd v Bagport (Pty) Ltd 2020 (5) SA 404 (SCA) at para 16:

> "In *Saloojee v Minister of Community Development* [1965 (2) SA 135 (A) at 140H, 141B-E], the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory' Steyn CJ proceeded to hold:
>
> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'"

Bitou Local Municipality v Timber Two Processors CC 2009 (5) SA 618 (C) at paras 35-36, rejecting a plea *ad misericordiam* and holding that any existing discretion to interfere with the operation of a final court order should be exercised by refusing the relief sought.

applicant's arguments on the "choice of forum" issue (i.e. *forum non conveniens*) fall to be rejected.

(2) Choice of law

321. The applicant's arguments concerning choice of law is internally inconsistent, contradicted by the papers, and contrary to law.

322. The applicant's argument approaches choice of law, on the one hand, as a matter which parties to a contract are "free to choose".[650] This is correct. Incorrect and inconsistent with this correct concession is a proposition – necessary for the applicant's argument – for which *no* authority is cited. It is the suggestion that parties can "never" adopt a choice of law clause in a procurement context, unless it is the law of the contracting government.[651]

323. The correct position is that in international investment contracts such clauses are standard.[652] Investment contracts like the Supply Agreement are typically governed *not* by the host state's law, but by the proper law of the contract as chosen in a choice of law clause.[653]

[650] Paras 297 and 300 of the applicant's heads of argument.
[651] Para 305 of the applicant's heads of argument.
[652] See e.g. Article 42(1) of the International Convention on the Settlement of Investment Disputes (ICSID) Convention, which provides that an arbitral tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties." See, too, Focarelli *International Law* (Edward Elgar Publishing, Cheltenham 2019) at para 163.5, referring to investor-state contracts which "generally" provide for the law applicable to the contract to internationalise it or stabilise it from the host state's domestic law "or in any event to unbind it from the local law" of the host state.
[653] Joubert *et al* (eds) *The Law of South Africa* (LexisNexis, Durban 2019) vol 7(1) at paras 353, 361 and 362.

324. Courts throughout the world recognise and give effect to a choice of law clause, also against governments. For instance, in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* the UK Supreme Court did so.[654]

325. In *Dallah v Government of Pakistan* the Supreme Court specifically referred to the two choice of law rules codified in Article V(1)(a) of the New York Convention.[655] The first concerns the primary rule of party autonomy, permitting parties to choose the law which governed the validity of the arbitration agreement.[656] The second is the default rule: absent an agreement on the law governing the validity of the arbitral agreement, the law of the country in which the Award is sought to be enforced governs the validity of the arbitration agreement.[657] These rules are "uniform" conflict of laws rules.[658] Therefore the reference to "the law of the country where the award was made" in Article V(1)(a) of the New York Convention connotes that country's *substantive* law rules; not its conflicts of law rules.[659]

326. Thus international law itself recognises a choice of law clause. Governments cannot under international law invoke their own internal law to avoid the consequences of agreements to which they are party.[660] Lesotho acceded to both the New York Convention and the Vienna Convention on the Law of Treaties. Therefore there is no merit in the applicant's choice of law contentions. It infringes international law.

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[654] [2010] UKSC 46.
[655] *Id* at para 104.
[656] *Ibid*.
[657] *Ibid*.
[658] *Ibid*.
[659] *Ibid*.
[660] Article 27 of the Vienna Convention on the Law of Treaties.

327. Instead of referring to the New York Convention (or, for that matter, the Vienna Convention), which applies specifically in the current context, the applicant's argument attempts to rely on a Transvaal Provincial Division judgment.[661] In "[a]lmost 100 years" no better precedent than *De Wet v Browning* could be found by the applicant.[662] Even then, the centenarian TPD judgment is itself of no assistance to the applicant. The quoted *ratio* explicitly excludes issues concerning "authority". In this case it is Minister Tšōlo's alleged *ultra vires* conduct which the applicant invokes. The applicant argues on the basis of the surviving three review grounds that Minister Tšōlo had acted beyond the scope of his power. This is, the applicant alleges, because Minister Tšōlo did not comply with jurisdictional facts, or was not authorised to conclude the contract. Thus the exception to which *De Wet* explicitly refers applies.

328. Therefore the argument that "*De Wet* applies forcefully to the facts of this case" is self-defeating. This case does not concern fraud. The applicant attempted variously to allege fraud. But fraud is not one of the three review grounds, it has never been invoked for purposes of arguing the merits of the validity of the impugned conduct or contract, and it is simply not established.[663]

[661] Para 300 of the applicant's heads of argument.
[662] 1930 TPD 409.
[663] Even in the paragraph of the applicant's heads of argument contending for the "forceful" application of *De Wet* to the "facts of this case" the applicant argues for "flagrant violations of Lesotho law" – not fraud (para 301). The attempt to introduce the specter of a "possibly corrupt, and fraudulent" contract (para 304) has no tenable factual traction.

329. Unsurprisingly an "alternative" third argument is advanced by the applicant.[664] It is, in turn, internally inconsistent with the "fourth and "final". The "fourth and final" argument is that the choice of law "makes no difference".[665] This is because, so the applicant contends, South African law and Lesotho law are "unfortunately for FSG" insufficiently dissimilar.[666] We have shown significant legal features of both South African, Lesotho and international law to which the applicant gives no consideration. The proposition therefore cannot be accepted at face value.

330. More importantly, however, it is not open to the applicant to advance this significant fallback argument.[667] Foreign law is a matter of fact, which must be proved through evidence.[668] There is no evidence on South African law establishing that it is no different from Lesotho law on the surviving three review grounds or any other relevant issue.[669] As regards remedy, the Court of Appeal explicitly questioned, for instance, whether the South African Constitutional Court's approach to public policy in a contractual context is consistent with the law of Lesotho, and whether the same

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[664] Para 302 of the applicant's heads of argument.
[665] Para 307 of the applicant's heads of argument.
[666] Para 306 of the applicant's heads of argument. This begs the question why such importance is attached to the applicant's attempt to apply Lesotho law.
[667] *Moosa v Lesotho Revenue Authority* C of A (CIV) Case no. 2/2014) [2015] LSCA 36 (06 November 2015) at para 31:

> "It is patently clear that whether foreign law is treated as a fact, as it is, under English law or law as it is under German Procedural Law, there is a procedure laid down for its admissibility. Critical to that procedure is testimony of an expert. This procedure was not complied with in the court *a quo.* The Learned Judge therefore rightly rejected its admissibility. We therefore cannot interrogate inadmissible evidence, as such evidence was not before the Court *a quo* and is not before this court."

[668] *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G, recently reiterated in *The Asphalt Venture Windrush Intercontinental SA v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA) at para 31 by Maya DP (as she then was) for a unanimous SCA .
[669] The applicant's attempt to introduce expert evidence (by an attorney, on issues of investment financing) contracts is significant in this regard. The "expert evidence" tendered is not on South African law.

approach (which received academic criticism) is to be applied by the Courts of Lesotho.[670]

331. The only clear aspect of this case on which there is indeed "no difference" between the law of Lesotho and South Africa is the anterior issues of undue delay, inertia and usurpation (i.e. self-deciding issues of legality).

332. For reasons of public policy shared between the legal systems of South Africa and Lesotho, undue delay, inertia and self-help (whether in the form of deciding for oneself issues of legality and their consequences; or resorting to funds under juridical attachment), this application is doomed to fail. Therefore the third argument, invoking public policy, is itself untenable.

333. Furthermore and in any event, it is *not* the internal (i.e. national) public policy of the host state which is relevant for purposes of applying or disregarding choice of law clauses. It is international public policy which is relevant.[671] Therefore, "[n]ot every provision of a foreign law which runs counter to a mandatory provision (*ius cogens*) of the *lex fori* or some tenet of internal public policy is excluded. … There must be something fundamentally offensive about the application of the foreign law before public policy will exclude it."[672]

[670] *Ministry of Public Works v Lesotho Consolidated Civil Contractors (Pty) Ltd* C of A (CIV) Case no. 9/14 [2014] LSCA 11 at paras 9-11.
[671] Forsyth *Private International Law* 5th ed (Juta & Co Ltd, Cape Town 2012) at 121.
[672] *Id* at 121-122.

334. Far from identifying any such offensive feature of South African law, the applicant extensively invokes South African law, and is driven to contend for "no difference" between South African law and the law of Lesotho. It follows that the applicant failed to establish a basis for *not* having regard to the choice of law clause in determining the *forum non conveniens* argument. On this issue FSG has acquitted itself of the "low threshold".

(3) <u>Novation</u>

335. Finally, the applicant advances an extensive excursion on novation.[673] It, again, resorts to South African caselaw.[674] This in an attempt to establish that a judgment and arbitration award do "not necessarily" result in a novation or "mean the novation of the debt".

336. *Not necessarily* is the significant refrain running throughout this section of the applicant's heads of argument.[675] What it implies is a primary position (novation) to which exceptions may exist in certain circumstances.

337. Not only the legal starting point for the applicant's argument is problematic. More immediately, the applicant's approach to the pleadings is untenable. The applicant advances the contingency on which it depends (i.e. novation does "not necessarily" apply on the facts of this case) for purposes of arguing that FSG is "wrong". FSG is contended to have submitted "that *this Court cannot hear this application* because

[673] Paras 239-261.3 of the applicant's heads of argument.
[674] The applicant's heads of argument cite not a single Lesotho authority on novation.
[675] See e.g. paras 253, 254.4 and 255 of the applicant's heads of argument.

the contract has been 'novated'".[676] But the correct position is simple: FSG's argument is that the relief for which the applicant contends is "in any event academic"[677] since the undue delay resulted in the impugned contract being superseded by not only the Award, but also a court order enforcing the Award.[678]

338. Under Lesotho law governing novation FSG's position is well-supported.[679] An Award made an order of court is indeed executable "as such", i.e. as a court order (not as a contractual claim).[680]

339. Furthermore, even the South African caselaw cited by the applicant itself confirms the in-principle position: *novatio necessaria* (as opposed to *novatio voluntaria*, which applies when a contract is novated by another contract) applies by "operation of law" from "judicial proceedings".[681] A judgment is indeed "regarded as a form of novation under Roman-Dutch law".[682] It operates to render contractual debt enforceable as a judgment debt.[683] Since the judgment debt is not attacked before this Court, the contractual cause of action is academic.

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[676] Para 239 of the applicant's heads of argument, emphasis added.
[677] Record p 599 para 6.
[678] Record p 609 para 29.
[679] As the Court of Appeal's approach clarifies, the correct question is whether the enforcement order preserved or strengthened the arbitration award or extinguished and replaced it. If the former, then novation operates. See *Construction and Allied Workers Union v Mohale Dam Contractors* (CIV/APN/39/02) [2002] LSCA 102 (23 August 2002) at 4.
[680] *Thabiso Leballo v Cana High School* Lesotho Law Reports (1991-1996) vol 1 at 298, citing *Amlers* at 30.
[681] *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 940F/G-H.
[682] *Id* at 940*fin*.
[683] The applicant appears to have misunderstood the Roman Dutch writers quoted in Swadif supra at 941*sup-fin*. They debate the linguistic use of the term novation, stating that compulsory novation is *stricto sensu* "not a novation '*quoniam prius debitum non exstinguitur sed salvum manet*'." In other words, it is not the type of novation that extinguishes a debt, but the type of novation that executes a debt in a different form: judicially, not contractually.

340. As the Appellate Division held in *Swadif*, even in a "case … where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution" and even if it "seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it", then the position remains that the contractual "right of action, as Fannin J puts it, is replaced by the right to execute".[684]

341. Therefore, on the best possible scenario for the applicant, the right to execute (which exists under the order by the South African High Court) has replaced the right to enforce the contract (i.e. the "right of action" under the contract, being the contractual cause of action).

342. There is no merit in the applicant's argument that *res judicata* did not result, *ergo* no novation intervened.[685] The Award and its enforcement exhaust any contractual cause of action by FSG. It cannot claim on the contract. Therefore there is *res judicata* effect.[686]

343. The applicant apparently confuses the relevant *res judicata* effect for purposes of the actual inquiry.[687] The inquiry is not whether this Court's judgment will have *res judicata* effect in the pending and preceding South African proceedings, nor whether

[684] *Swadif supra* at 944F-G.
[685] Para 260.5 of the applicant's heads of argument.
[686] Demonstrably there is no merit in the applicant's attempt to argue that the same orders or relief are not sought before the respective courts, or before the arbitrator. The question for purposes of *res judicata* is whether "the same issue of fact or law was finally decided in previous litigation between the same parties" (*Burmilla Trust supra* at para 43). *Swadif* itself states what is required for purposes of *res judicata*: "the same question … must arise" between "the same parties" (*id* at 945A).
[687] Para 249.4 of the applicant's heads of argument.

the Award has such effect before the forum, enforcement or any other court.[688] The question is whether FSG can claim again on the contract.[689]

344. It follows that also the applicant's novation argument is flawed in multiple respects.

H. Strike-out

345. FSG's answering affidavit invited the applicant to withdraw its extensive but unfounded allegations of fraud, conspiracy, corruption, subterfuge, criminality and related accusations. It pointed out that the applicant did not invoke any of these accusations as review ground, and correctly accepted in the pending South African proceedings that the accusations are not established even at a level sufficing for establishing a *prima facie* case for interim relief. FSG's answering affidavit added that in the event that FSG's invitation to withdraw those allegations were rejected by the applicant, then FSG pleaded that they be struck out with a punitive costs order.[690]

346. The applicant's replying affidavit did not respond to the invitation, and did not traverse the relevant paragraph of FSG's answering affidavit.[691] Accordingly the strike-out in respect of the founding affidavit is not opposed. It accordingly falls to be granted on an unopposed basis, with costs as requested (also uncontested).

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[688] As the applicant argues (para 260.5 of the applicant's heads of argument).
[689] *Swadif supra* at 944H-*fin*.
[690] Record p 710 para 354.
[691] Record p 2344 paras 192-193 traverses only up to paragraph 346 and then again from paragraph 361 of FSG's answering affidavit.

347. It is only FSG's strike-out directed at the applicant's *replying* affidavit which generated opposition. The strike-out targeting the applicant's replying affidavit concerns the attempt to introduce new material – including "expert evidence" – in reply in a purported attempt to interpret the Supply Agreement. This is *per se* impermissible.[692]

348. The applicant only attempts to advance two propositions in opposition to the strike out application targeting its replying papers.

349. On the one hand, the basis of opposition is that the impugned material is intended to substantiate allegations contained in the applicant's founding affidavit. This of course is a clear concession of the irregularity of attempting to buttress an application in a replying (instead of a founding) affidavit. Thus the applicant scores a considerable own goal.[693]

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[692] *Union Government v Vianini Ferror-Concrete Pipes (Pty) Ltd* 1941 (AD) 43 at 47:

> "(T)his Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save for the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

The Constitutional Court of South Africa recently confirmed the application of the parol evidence rule in *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at para 88, citing the above dictum from *Union Government v Vianini Ferror-Concrete Pipes* as the most apt articulation of the essence of the rule. The Supreme Court of Appeal, for its part, in applying and clarifying the Constitutional Court's judgment in *University of Johannesburg v Auckland Park Theological Seminary* cautioned in *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty)* Ltd 2022 (1) SA 100 (SCA) at para 48 against "the laxity with which some courts have permitted evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court." In this case the expert evidence purports to do precisely that: expressing a personal "view" on the meaning of the Supply Agreement (see e.g. Record p 2420 para 5; Record p 2422 para 12; Record p 2426 para 21).

[693] *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) at paras 26-28:

> "…The new material introduced by the applicant in the replying affidavit relates to the evidence that seeks to support the applicant's cause of action. This is evidence which the applicant ought to have known about even before she received the respondent's answering affidavit.
>
> I do not agree with the suggestion which was made on behalf of the applicant that the objection to raising new material in a replying affidavit can only be dealt with by way of an application to strike out. The issue of introducing new material in a replying affidavit is a point of law which in my view can be raised even at the hearing of the matter.

350. On the other hand, the applicant argues that some of the new material was rendered "necessary", and that the necessity arose from issues raised in FSG's answering affidavit. This is factually false: the same issues were raised by FSG already in its June 2021 affidavit filed in the preceding and still pending South African litigation. They concern jurisdictional issues of delay and the knowledge of the deponent to the applicant's founding affidavit. The same deponent was also the deponent in the South African litigation. He read FSG's answering affidavit and deposed to the replying affidavit well before deposing to his founding affidavit filed in this Court. Therefore his non-disclosure of facts pertinent to delay and condonation constitutes a fatal defect in the founding affidavit. This did not arise for the first time from FSG's November 2021 answering affidavit filed in this Court. It therefore cannot be justified for inclusion in the applicant's April 2022 replying affidavit.[694]

351. The latter impermissibly took four months to attempt to improve a case not established as required in the applicant's founding papers. Particularly in the light

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> In the circumstances, I find that the applicant has failed to persuade this Court to indulge and permit the use of the new evidence raised for the first time in the replying affidavit. The new evidence so introduced forms the essential aspect of the case of the applicant and is evidence based on the facts which, if they indeed existed, ought to have been known to the applicant and should, therefore, have been raised in the founding affidavit. The new evidence introduced in the replying affidavit will accordingly be ignored."

[694] *Id* at at para 24, confirming that courts "will not permit or will strike out new issues raised in a replying affidavit if the applicant know or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit." This is an application of the well-established principle articulated in cases like *Bayat v Hansa* 1955 (3) SA 547 (N), cited specifically in the quoted paragraph of the judgment in *Faber v Nazerian. Bayat v Hansa* is itself routinely applied by this Court. See e.g. *Masakale v Masakale* (CIV/APN/389/99) (CIV/APN/389/99) [1999] LSCA 120 (22 November 1999):

> "The attempt to supplement founding affidavits in replying affidavits on a crucial fact is not permissible and applicant and the chief never asked for leave of court to supplement their founding affidavit. … as Caney J [held in] *Bayat v Hansa* 1955 (3) SA 547 (N), [an] 'applicant for relief must (save in exceptional circumstances) make his case and produce all evidence to use in support of it, in his affidavits filed with the notice of motion ... and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by respondent in his answering affidavits), still less make a new case in his replying affidavits."

of his false accusations that FSG and the third respondent did not disclose relevant facts to Government, the applicant's deponent's non-disclosures to Court in his founding affidavit cannot be permitted a second attempt in reply.

352. The Court of Appeal's caselaw is clear: it is impermissible to introduce new issues or "evidence" in reply. As was held in *Mota v Motokoa*:

> "It requires to be stressed that in motion proceedings the court is confined to resolving the dispute on the issues raised in the founding affidavit. As a general rule, an applicant must make out his case in the founding affidavit and the court will not allow him to make out a different case and seek to rely on a new cause of action in reply as has happened here. See *AG v Michael Tekateka & Others* C of A (CIV) No.7 of 2001 (unreported), *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635F-636A."[695]

353. As *Director of Hospital Services v Mistry* demonstrates, and this Court's and the Court of Appeal's caselaw confirms, an applicant in motion proceedings stands or falls by his founding papers "and the facts therein alleged".[696] Accordingly the applicant is not at large to advance further facts in its replying affidavit.

354. Therefore the new material introduced in the replying affidavit and the scandalous and vexatious averments in the applicant's founding affidavit fall to be struck out with an appropriate punitive costs order on the basis of irrelevance.

[695] (23/2001) [2002] LSCA 4 (11 April 2002).
[696] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635*fin*-636B.

I. Conclusion

355. In multiple fatal respects, the applicant's case contradicts this Court's and the Court of Appeal's caselaw, and the law of Lesotho as adopted by Parliament.

356. Factually, the applicant's deponent impermissibly ignored conduct by a Cabinet colleague of which he was informed by FSG already in 2018. In doing so he usurped the competence of the Court to decide for himself issues of law and legality. He inexcusably remained inert, delayed unduly for multiple years, and did not resort to Court (whether in Lesotho or South Africa) even when he received a personal invitation to participate in pending South African proceedings. The only excuse provided is a convoluted and simply false accusation of criminality. It is correctly not invoked as review ground.

357. Legally, at its core the application is misconceived. It purports to advance, as in *Kompi*, a cause of action in the Court of Lesotho which is not based on the Lesotho legislation governing arbitration awards and agreements: the Arbitration Act. There is therefore demonstrably no prospect of success, and accordingly the applicant cannot qualify for condonation – least of all for relief which is in any event ineffectual and therefore academic.

358. Jurisprudentially, the "precedent" which the applicant implies should be set by this Court (in a significant implicit concession that this is not the law, hence the need to create a precedent) will leave Lesotho law isolated. The applicant requires the creation of an interpretation of Lesotho law which eviscerates the separability

principle. Creating such precedent would violate international law, contradict comparative foreign law, and negate national law on arbitration. This, in turn, would violate the Constitution for failing to respect the doctrine of separation of powers.

359. Constitutionally, the applicant's case is in multiple fundamental respects incompatible with the rule of law too. The rule of law requires, as the Court of Appeal confirmed, that –

- "all law be certain in its meaning";
- no government, however powerful and resourceful and awesome its police power and however popular at any point in time may take the law in its own hands;
- the law binds equally the powerful and impotent;
- courts are the arbiters of legality, and they fiercely protect individuals against invasions of vested rights;
- no person or official is allowed to resort to self-help;
- disputes be resolved by courts properly approached; and
- political rulers observe the fundamental values and vigorously observe them, by following the required procedures established by law.[697]

360. Remedially, the relief sought is academic insofar as the (in any event unfounded) harm invoked by the applicant is concerned. However, granting such relief will reward a violation of the doctrine of separation of powers and the rule of law, prejudice FSG's constitutional rights; and simultaneously also prejudice the public

[697] *Attorney-General v Swissborough Diamond Mines No. 2* LAC (1995-1999) 214 at 224B-I and 230A-C.

interest – *inter alia* by adversely impacting on the potential of attracting foreign investment.

361. On any or all of the above bases the application falls to be dismissed with costs, on the attorney-and-client scale.[698] No basis for a different costs order in favour of FSG has been suggested by the applicant.

362. As regards FSG's strike out, we ask that it be granted in the terms set out in FSG's accompanying notice of motion, coupled with a recordal that the founding affidavit's allegations imputing criminality to FSG are struck out on the basis of being irrelevant. In respect of the latter a punitive costs order should be made *de bonis propriis*, particularly in the light of the heightened standard of conduct required from government litigants.[699]

MF Webber
HARLEY & MORRIS
Attorneys for the first
and second respondents

2 September 2022

[698] Record p 725 para 388.

[699] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paras 152-153:

> "the source of a court's power to impose personal costs orders against public officials is the Constitution itself. The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.
>
> The purpose of a personal costs order against a public official is to vindicate the Constitution. These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer. This court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances."