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# Sunday Express

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- Says Lesotho cannot be liable for M1, 7 billion based on "falsities".



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Further Together



Mohalenyane Phakela / Pascalinah Kabi

# Majoro intensifies Frazer Solar fight

... petitions High Court to nullify "unconstitutional" power deal, ... says Lesotho cannot be liable for M1,7 billion based on "falsities".

**P**RIME Minister Moeketsi Majoro has approached the High Court in a desperate bid to nullify the M1,7 billion solar energy deal with German company, Frazer Solar.

The application, which is in addition to his pending lawsuit in South Africa's Gauteng High Court, is a clear indication that Dr Majoro is pulling out all the stops in his quest to reverse the controversial deal which could cost the country as much as 2 percent of its gross domestic product.

In his latest application filed on Tuesday, Dr Majoro wants the High Court to nullify a 2019 South African arbitration award of £50 million (M856 million) damages to Frazer Solar. The damages are for the government's alleged breach of a 2018 contract the German company claims to have entered into with the previous Thomas Thabane-led government for the supply of solar water heating systems, solar generated electricity, LED lights and solar lanterns over four years.

Earlier this year, Frazer Solar successfully petitioned the Gauteng High Court to endorse the award to the company. However, Dr Majoro is also challenging the endorsement of the award in the same court.

Dr Majoro was finance minister at the time of the deal. He had refused to sign the financing agreement for the implementation of the project.

However, Frazer Solar insists it had a valid agreement that was signed on behalf of the Lesotho government by then Minister in the Prime Minister's Office, Temeki Tšolo.

In his court papers, Dr Majoro argues that Lesotho cannot be held liable for an agreement that was clearly founded on "falsities".

"The Kingdom cannot be bound to an agreement that includes an undertaking and clauses that are clearly false and known to the parties that purported to sign the agreement," Dr Majoro states.

"It will be against public policy to hold the Kingdom to an agreement that is clearly founded in falsities and was concluded with the ulterior purpose of creating obligations that the Kingdom would have already breached as soon as the agreement was concluded. Significantly, I note that these breaches are what Frazer Solar relied upon in its claim against the Kingdom in the arbitration."

Dr Majoro tears into Mr Tšolo, saying he had no right to negotiate and sign such an agreement.

Mr Tšolo has previously denied signing the deal on behalf of the government.

However, Dr Majoro insists that he signed and, in the process, violated national laws which stipulate how such contracts are agreed and how payments to third parties are made.

He accuses the former minister of acting outside his powers by clandestinely signing the agreement without the knowledge and approval of parliament, cabinet and himself as the finance minister at the time.

"Mr Tšolo did not notify the chief accounting officer nor did he inform the Ministry of Finance of the supply agreement before it was signed. Minister Tšolo acted alone. Minister Tšolo also breached regulation 32(b) (of Public Procurement Regulations) when he decided to act alone to commit the Kingdom to a €100 million (M1,7 billion) financial commitment. There can be no doubt that the purported conclusion of the supply agreement was unlawful and invalid for failure to comply with the Public Procurement Regulations.

"Minister Tšolo undertook to commit the Kingdom to the financing agreement without parliament's approval. In light of the

provisions of the constitution and statutory framework, it could never be permissible for a minister in the Office of the Prime Minister to conclude an agreement of the nature of the supply agreement concluded by Minister Tšolo.

"He acted unlawfully and beyond his powers and abused his discretion when he concluded the agreement without the approval or cooperation of the Minister of Finance, parliament, cabinet or the procurement unit. A reasonable member of cabinet who is not a finance minister would never commit the Kingdom to a loan of €100 million.

"Minister Tšolo acted in bad faith to the detriment of the Kingdom for the exclusive benefit of a foreign entity. He was acting in pursuit of a purpose other than to protect the interests of the Kingdom. Minister Tšolo was not advancing the public interests of the Kingdom. His actions in appointing Frazer Solar and concluding the supply agreement were unreasonable and fall to be reviewed and set aside," Dr Majoro argues.

He further argues that the deal should have been negotiated and signed by the Ministry of Energy and Meteorology, not Mr Tšolo.

"Minister Tšolo did not have the authority to procure the products from Frazer Solar. Had the government decided to procure the goods and services from Frazer Solar, the Ministry of Energy would have commissioned its procurement unit to procure the goods and services.

"Minister Tšolo acted beyond his powers. In line with public procurement regulations of 2007, Minister Tšolo's actions in appointing Frazer Solar as the sole and exclusive supplier of the goods should be regarded as invalid. Frazer Solar must accordingly have known that its procurement of Minister Tšolo's signature on the supply agreement would not give rise to a lawful contract.

"In terms of section 20 of Public Financial Management Act (PMFA), the Minister of Finance has responsibility for the management, supervision, control and direction of all matters relating to the financial affairs of the government which are not only by law assigned to any minister or authority. Section 28 of PMFA states that a Minister of Finance, with the prior consent of cabinet, shall approve any borrowings of funds or other assets for the public purpose of government or of local authorities. Loan agreements on behalf of the government shall be signed by the Minister of Finance only, after consultations with cabinet.

"The reason for the approval of the Minister of Finance is primarily to ensure fiscal affordability and sustainability in respect of any financial commitment to which the Kingdom is

committed or bound. The supply agreement required the Kingdom to borrow funds. The supply agreement is in effect a loan agreement. It purported to impose obligations on the Kingdom to obtain finance in terms of a loan agreement. Therefore, the decision to enter into the contract and the contract itself are unlawful and invalid for breach of sections 28 (1) (2) and (3) of the PMFA," Dr Majoro argues.

The premier also questions why Frazer Solar was not subjected to an open tendering process where it would have competed with other companies for the contract.

He argues that selective tendering is only allowed in emergency situations and there was no such emergency when Frazer Solar was 'contracted' in a 'selective tender'.

Dr Majoro says Lesotho's energy policy can be implemented over a 10-year period, and as such, there was ample time for the government to have conducted an open, transparent and competitive procurement process instead of hurriedly 'handing' Frazer Solar a contract.

In any event, Frazer Solar did not have a proven track record in solar power projects which would have warranted it to be awarded the tender without competing with other solar firms, Dr Majoro argues.

"The Public Procurement Regulations provide for exceptional circumstances in which the Kingdom may deviate from a competitive process to procure goods and services from a single source. Frazer Solar has no established track record or experience that renders its service offering unique and highly specialised so that the Kingdom would be justified to procure the services from Frazer Solar as the sole supplier without undertaking the public procurement process.

"Frazer Solar is not an original equipment manufacturer nor does it hold exclusive licenses for the products or the services that Frazer Solar was to provide to the Kingdom in terms of the supply agreement. The supply agreement was not awarded to a contractor that had already undertaken work for the Kingdom in respect of which a cost saving would be realised and would outweigh any potential reduction in cost that may be de-



MOEKETSI Majoro.

rived through a competitive tender.

"The products could not only be procured from Frazer Solar. There are other suppliers," Dr Majoro says.

Dr Majoro therefore wants the court to "review and set aside the decision, the supply agreement and the arbitration agreement as unlawful and invalid".

He argues that an appropriate remedy is a declaration that Mr Tšolo's decision to contract Frazer Solar was unlawful and should be set aside.

## Mahao murder trial resumes in November

Mohalenyane Phakela

**F**ORMER army commander Tlali Kamoli and eight other soldiers' trial for the June 2015 murder of former army commander, Maaparankoe Mahao, will resume in November this year.

The much-postponed trial will run from 1 to 12 November 2021.

High Court Judge Charles Hungwe on Friday set the new dates after the prosecutor, Naki Nku, said they had agreed with the defence lawyers to resume the trial on those dates. One of the defence lawyers, Attorney Qhalehang Letsika confirmed the agreement.

"By consent of both parties, the

matter is postponed to 1 to 12 November 2021 for the continuation of the trial," Justice Hungwe ordered.

The trial was first halted on 8 July 2021 when the crown's second witness, Retired Colonel Thato Phaila, asked the court to order lead prosecutor, Adv Shaun Abrahams, to not reexamine his evidence.

Rtd Col Phaila accuses Advocates Abrahams and Nku of twisting his evidence to suit their own interests. He accused Advocates Abrahams, Nku and police investigators of fraudulently amending his witness statement and forcing him to lie.

Lt-Gen Kamoli and his co-accused seized on Rtd Col Phaila's claims against the prosecution and applied

for Advocates Abrahams and Nku's recusal.

However, Justice Hungwe dismissed the recusal application on grounds that the accused had failed to make a strong case.

When it was expected that the matter would proceed on 6 September 2021, Adv Abrahams withdrew his representation because he had not been paid by the government.

A fortnight ago, the Director of Public Prosecutions (DPP) Hlalefang Motinyane told Judge Hungwe that Adv Abrahams would be back in court last week when the trial was expected to resume.

He was still not present when the trial was postponed last Monday.

Last week's postponement was due to the fact that two of the suspects had tested positive for Covid-19. Their identities have not been made public. The two are among 74 inmates who are said to have tested positive to Covid 19 at the Maseru Central Correctional Institution.

Two weeks ago, LCS Senior Cadet Officer Ntobane Pheko said the 74 inmates had since been quarantined at the correctional facility to separate them from others.

Lieutenant-General (Lt-Gen) Kamoli is accused alongside Captain Litekanyo Nyakane, Captain Haleo Makara, Sergeant Lekhooa Moepi, Sergeant Motsamai Fako, Corporal Marasi Moleli, Corporal Motsoane

Machai, Corporal Mohlalefi Seithheko, and Corporal Tšitso Ramoholi.

They are all facing five counts which include murder, conspiracy to murder and risk of injury or death. Lt-Gen Kamoli faces additional charges of inciting murder and obstructing the course of justice.

Seventy-two witnesses including former prime ministers, Pakalitha Mosisili and Thomas Thabane, have been lined up to testify in the case.

Lance Corporal Mokete Hlahala and Rtd Col Phaila are the only two witnesses to have testified so far. The latter is expected to be re-examined by Adv Abrahams when the trial resumes.