

- 89.5 The respondent shall pay the costs of the fees of the arbitrator in accordance with the final invoice submitted by the arbitrator to the claimant's legal representatives.
- 90 The arbitrator found that the Kingdom was provided with sufficient notice and sufficiently served. He relied on notice to and service on the Office of the Prime Minister. However, service and citation of the Attorney-General were requirements of law; and the individuals who received the notice of arbitration and statement of claim did not bring them to the attention of any other official in the Kingdom.

Application to have the arbitration award made an order of court

- 91 On 14 October 2020, this Court gave FSG leave to institute motion proceedings against the Kingdom and to do so by way of edictal citation, under case number 2020/20891. The motion proceedings related to FSG's application to have the arbitration award declared an order of court.
- 92 I am aware that there are several documents that appear to indicate that the process was served on the South African High Commission in Lesotho in accordance with the order for edictal citation by this Court.
- 93 The Kingdom has conducted extensive investigations to attempt to determine how this process did not come to its attention if it was served in accordance with the court order. The Ministry of Foreign Affairs did receive the notice of motion and founding affidavit in the application to make the arbitration award an order

of court. All court papers received by the Ministry of Foreign Affairs by 8 December 2020 were contained in a dossier. The dossier was forwarded to the Office of the Attorney-General after 8 December 2020 but never reached the Attorney-General.

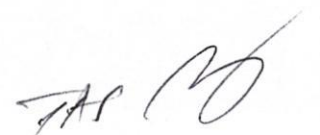
94 In the time available, the best that we can say based on these investigations is that it appears that the process was intercepted and concealed in one way or another. The DCEO is conducting its investigation but has confirmed that the information at their disposal points in the direction of a deliberate concealment of this process.

95 This court heard the application on 29 April 2021 via Microsoft teams in the absence of the Lesotho Government.

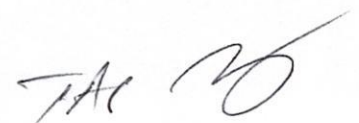
95.1 The Attorney-General, who is the person who is required to represent the Kingdom in such proceedings, was not aware of the application or the hearing. As a result, she did not attend the proceedings or instruct legal representatives to do so on the Kingdom's behalf.

95.2 I did, on 21 March 2021, receive a random CaseLines invitation to have electronic access to the matter. A copy of the email I received is attached as annexure "FA34".

95.3 On receiving that email, I did not open the link but forwarded it to the Government Secretary, who informs me that he notified the Chief Legal Officer in the Cabinet Office of the matter.



- 95.4 I considered that I had done what was necessary to bring the matter to the attention of the relevant people.
- 95.5 However, it appears that the Chief Legal Officer did not receive the notification from the Government Secretary, with the result that, unfortunately, no steps were taken to oppose the matter.
- 96 The High Court made the arbitration award an order of court on 29 April 2021.
- 97 The following writs of execution and notices of attachment have been issued pursuant to this Court's order:
- 97.1 A writ of execution in respect of monies due to the Kingdom by the Trans-Caledon Tunnel Authority SOC Limited, issued by this Court dated 11 May 2021 under case number 2020/33700 and attached as "FA5.1".
- 97.2 A notice of attachment issued out of this Court under case number 33700/20 served on the Trans-Caledon Tunnel Authority SOC Limited on 17 May 2021 and attached as "FA5.2".
- 97.3 A writ of execution in respect of the monies in the bank accounts of the applicant's Lesotho Highlands Development Authority, issued by this Court dated 26 May 2021 under case number 2020/33700 and attached as "FA5.3".



97.4 A notice of attachment issued out of this Court under case number 2020/33700 served on the Attorney-General of Lesotho on 8 June 2021 and attached as "FA5.4".

The Acting Attorney-General's investigation

98 On 18 May 2021, the existence of the court order came to my attention through media reports.

99 On 18 May 2021, I instructed the then-Acting Attorney-General, Ms Morojele, to investigate the matter.

100 On 19 May 2021, Ms Morojele set up a team comprising legal officers from various ministries to assist with the investigation and search for information and documents in their respective offices.

101 The Ministry of Foreign Affairs gave a bundle of documents to the investigating team relating to FSG's proposed project which had been received through diplomatic channels. The legal documents filed in the arbitration proceedings, the arbitration award and the high court application were in that bundle of documents.

102 The team reviewed the documents and used them to identify key individuals that appeared to have knowledge of the matter. The following individuals were identified and interviewed by the investigating team:



- 102.1 Mr Moahloli Mphaka who was the Government Secretary from September 2017 and August 2020. He currently holds the post of Government Advisor to the Ministry of Water in the Lesotho Highlands Developments Authority.
- 102.2 Ms Phuthi Lebusa, who was employed as secretary to the Government Secretary (Mr Mphaka) from 30 April 2012 and 27 July 2020. She is currently employed as the secretary in the National Assembly.
- 102.3 Mr Temeki Phoenix Ts'olo, who was a Minister in the Office of the Prime Minister from June 2017 to September 2020. He was then moved to the position of Minister of Mining from October 2019 to June 2020. Mr Ts'olo is no longer a member of the Lesotho Government. He ceased to be a Minister on 20 June 2020 because of a change of political administration.
- 102.4 Ms Masentle Ntobaki who was the secretary to Minister Ts'olo in the office of the Prime Minister from April 2012 to July 2020. She now holds the position as secretary to the economic advisor to the Prime Minister.
- 103 Following the investigation and interviews with each of these individuals, the Acting Attorney-General and team of advisers concluded that some or all of these individuals from the offices of the Government Secretary and the Offices of the Prime Minister deliberately withheld critical information from the Prime Minister and Attorney-General. These individuals advanced contradictory explanations as to why the arbitration notice, the arbitration award and the court order were

merely filed away and not brought to the attention of the Attorney-General or the Prime Minister.

104 Their explanations were as follows:

104.1 Mr Mphaka said that he did receive the arbitration notice on 30 July 2019 but he asked his secretary to file it away because he did not believe anything further was required from his office. He recognised that the prevailing practice is that legal process must be served on the office of the Attorney-General and assumed that the Attorney-General's office was already dealing with the matter. He applied this same thinking in relation to each of the documents and/or court notices that he received.

104.2 Ms Lebusa said that she received the notice of arbitration and subsequent documentation. However, her understanding was that the documents were being sent to the Office of the Prime Minister. When she brought the notice of arbitration to Mr Mphaka's attention, he instructed her to file the document away. She received further documents but followed the same course and filed them away.

104.3 Former Minister Ts'olo said that he did not sign the Supply Agreement. He conceded that the signature on the Supply Agreement appeared to be his, but he said that it must have been a copy and paste. He said that he suspects fraud perpetrated by his secretary and Mr Frazer.

104.4 Ms Ntobaki said that Minister Ts'olo signed the agreement and she witnessed it. However, Mr Frazer told her that the agreement was not

binding and that it was merely a document aimed at facilitating the extension of the finance offer. In relation to the notice of arbitration and subsequent legal documents, she said that she did receive the notice of arbitration. On instruction of Minister Ts'olo she contacted Mr Frazer who underplayed the document and told her it was nothing more than a document calling on the Lesotho Government to implement the Agreement. She says that she relayed this information to Minister Ts'olo who then told her to file the notice away. When further documents were served, Minister Ts'olo reacted the same way so she continued to file the documents away.

104.5 Both Ms Ntobaki's and Mr Ts'olo's versions appear improbable and require further investigation.

105 The former Acting Attorney-General's confirmatory affidavit verifying the above will be filed together with this affidavit, or as soon as possible thereafter.

The criminal investigation

106 During the course of her investigations, the former Acting Attorney-General reported the matter to the DCEO. The DCEO is a statutory authority with the mandate to prevent and investigate acts of corruption and economic offences; it is established by Prevention of Corruption and Economic Offences Act 5 of 1999.

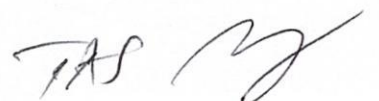
107 The DCEO started criminal investigations in relation to this matter, which thus far have confirmed the suspicions of the former Acting Attorney-General and her investigating team. In this regard, I draw this Court's attention to a letter from the

Director General addressed to the former Acting Attorney-General regarding this investigation. The letter, which is attached and marked annexure "FA6", states the following:

"INVESTIGATION INTO ALLEGED CORRUPTION AND FRAUD INTO THE AWARD OF CONTRACT AND CONCEALMENT OF ARBITRATION INFORMATION : DCEO R.C.U.I 140/05/21

I refer to the above matter and our previous communication regarding the update on the above mentioned investigation. which you and the Right Honourable the Prime Minister reported in May 2021.

1. This matter was reported by yourself alleging that inter alia that the supply agreement was done corruptly and in contravention of the laws of the Kingdom. Further that the arbitration documents issued against the Government of Lesotho were deliberately withheld from the Prime Minister and/or the office of the Attorney General. The whole purpose, allegedly by some public servants acting in concert with Mr Robert Frazer being first to deny the Attorney General and/or the Attorney General information regarding that corrupt agreement, secondly so that default judgement may be entered against Government thereby causing Government financial loss.
2. Our investigations have thus far revealed a series of frauds on the whole process of signing the contract as it is allegedly signed by people with no authority to sign and witness the contract, and investigations are proceeding on this part. On the alleged concealment of the arbitration papers, both the Attorney General and the Right Honourable the Prime Minister claim they were neither served nor informed of the papers despite being the only authorities empowered to deal with such. Our investigations further reveal that following receipt of the dossier by the Lesotho Foreign Affairs on the 8th December 2020, which duly forwarded to other offices, there seems to have been some interception and concealment of the presence of same. From the events and facts gathered thus far, we strongly have reason to believe that the Notice of Arbitration and subsequent Arbitration processes, the Court Order and the Set Down received on the 20th April 2021, were intercepted and



concealed. All these were done deliberately, further investigations are ongoing.

3. Our preliminary information has let us to identifiable individuals whom, I need not disclose to preserve and avoid compromise to our continuing investigations, but what is evident is that the whole enterprise was fraudulent aimed at prejudicing the Government.
4. We have not as yet made any arrests or put anyone before the Magistrate's Court . What I can confirm to you is that there is a clear case of corruption and fraud perpetrated against the Government by some Government officials working in collaboration with other individuals from abroad."

108 The position in relation to the various documents and processes at issue in this matter, therefore, is as follows:

108.1 All the arbitration documents were concealed from the Attorney-General and the Prime Minister.

108.2 The Ministry of Foreign Affairs did receive the notice of motion and founding affidavit in the application to make the arbitration award an order of court. All court papers received by the Ministry of Foreign Affairs by 8 December 2020 were contained in a dossier. The dossier was forwarded to the Attorney-General after 8 December 2020. It appears, according to the DCEO's letter quoted above, that in the process of it reaching the Attorney-General it was intercepted and concealed.

108.3 In respect of the two documents received after that date, being the Notice of Set Down and Court Order, it appears from the investigation that these were also intercepted and concealed.



109 The overwhelmingly probable inference from the facts set out above that the signature of the Supply Agreement as well as the concealment of the legal process which led to the arbitration and judgment award against the Kingdom were part of a corrupt scheme. However, there is no need for this Court to make final or even prima facie finding of corruption. I submit that even without a prima facie finding of corruption, the facts set out above demonstrate that the Kingdom is entitled to the relief that it seeks.

Attachment of Lesotho's Government's assets

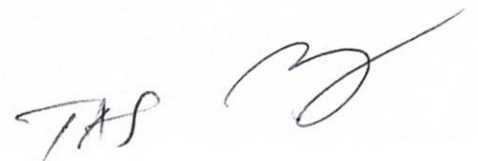
110 FSG has started executing on the Lesotho Government's assets and has applied to further jurisdictions to have the arbitration award made an order of court in those jurisdictions.

111 In South Africa, the following two writs of execution and notices of attachment have been issued:

111.1 The first writ was issued on 11 May 2021 and served on 17 May 2021. It directs the Sheriff or his deputy to attend the offices of the TCTA and attach monies due to the Lesotho Government (through the Government's Lesotho Highlands Development Authority ("LHDA")) in the amount of the judgment debt. The notice of attachment was served on the TCTA on 17 May 2021. It was forwarded to LHDA which forwarded it to the Attorney-General around the 19 May 2021. It was served on the Attorney-General on 26 May 2021.



- 111.2 The second writ was issued on 26 May 2021 and served on the Attorney-General on 8 June 2021. It directs the Sheriff or his deputy to attach and take into execution the monies in the sum of the judgment debt in the bank accounts of the Lesotho Highlands Development Authority held by the Standard Bank of South Africa. The notice of attachment was served on the Attorney-General on 8 June 2021.
- 112 In the United States of America, on 17 May 2021, FSG filed a petition in the United States District Court for the District of Columbia to recognize and enforce the arbitration award. This first page of this petition is attached as annexure "FA35". Notice of this petition was served on the Kingdom of Lesotho on 2 June 2021.
- 113 In Mauritius, a provisional order was granted by the Supreme Court of Mauritius for recognition and enforcement of the arbitration award on 20 May 2021. A copy of this order is attached as annexure "FA36". Thereafter, Lesotho's 5% stake in the West Indian Cable Company was attached.
- 114 In the United Kingdom, on 23 September 2020, FSG was granted an order to have the arbitration award recognised and enforced in the High Court of Justice, Business and Property, Courts of England and Wales, Commercial Court. I attach the order as annexure "FA37".
- 115 The Kingdom has instructed legal representatives to take all necessary steps to set aside these writs of execution in other jurisdictions.

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THE LEGAL BASIS FOR THE STAY OF EXECUTION

116 The Kingdom seeks an interim stay of execution on 3 separate grounds:

116.1 First, in terms of Uniform Rule 45A of this Court.

116.2 Second, in terms of the Foreign States Immunities Act.

116.3 Third, as just and equitable relief in terms of section 172 of the South African Constitution.

Rule 45A

117 I am advised that Rule 45A of the Uniform Rules of Court provides for the suspension of orders by the court.

118 I am further advised that the effect of this rule is that this Court has a discretion to grant a stay of execution where real and substantial justice warrants such a stay.

119 In exercising its discretion, the court will have regard to the facts and circumstances of each case and may borrow from the requirements for the granting of an interim interdict. The most significant of these requirements are: i) that the applicant must establish a well-grounded apprehension of irreparable harm if the interim relief is not granted; ii) that the balance of convenience favours the granting of interim relief; and iii) that the applicant has no other satisfactory remedy. I address these requirements below.

120 I am advised that the requirement of substantial injustice has been held to comprise two sub-components, namely –


120.1 the applicant must have a well-grounded apprehension that the execution is taking place at the instance of the respondents; and

120.2 it must be the case that irreparable harm will result if execution is not stayed, on the assumption that the applicant will establish a clear right.

121 I am advised and submit that it has been held by our courts that irreparable harm will always result where one specific circumstance is present. If there is a ‘possibility’ that the underlying *causa* of the execution sought to be stayed may ultimately be removed – in this case the Order – then the requirement of substantial injustice will, necessarily, be satisfied, and a stay will be granted. That test is plainly satisfied here.

The Foreign States Immunities Act

122 I am advised and submit that, in addition to satisfying the requirements of Rule 45A, the stay of execution sought by the applicant is required by the provisions of the Foreign States Immunities Act 87 of 1981. In terms of section 14(1)(b)(ii) of the Foreign States Immunities Act, the property of a foreign state shall not be subject to any process for the enforcement of a judgment or arbitration award. Section 14(2) contemplates an exception to this immunity, but only “with the written consent of the foreign state concerned”.

TAS 

123 In its founding affidavit in its application to have the arbitration award made an order of court, FSG contended that:

123.1 First, this immunity had been waived by Lesotho by virtue of its agreement to clause 24.5 of the Supply Agreement (at para 37.1 of the founding affidavit).

123.2 Second, in terms of section 4 of the Foreign States Immunities Act a foreign state is not immune to the jurisdiction of the courts in proceedings relating to a commercial transaction as defined. Because Lesotho is party to the Supply Agreement, it contended it is therefore a party to a commercial transaction as defined (para 37.2 of the founding affidavit).

123.3 Finally, in terms of section 10 of the Foreign States Immunities Act a foreign state that has agreed in writing to submit a dispute to arbitration is not immune to the jurisdiction of the courts of the Republic.

124 Each of these three propositions depends upon the Kingdom truly being a party to the Supply Agreement. If the Kingdom is not genuinely a party to the Supply Agreement, then it has never waived its statutory right to immunity from enforcement proceedings; it is not a party to a commercial transaction with Frazer or FSG; and it has not agreed in writing to submit a dispute which has arisen or may arise to arbitration.

125 As a result, given what I have said above about the unauthorised and unlawful signature of the Supply Agreement, the Kingdom has not waived its procedural privilege in terms of section 14(1)(b)(ii) of the Foreign States Immunities Act.

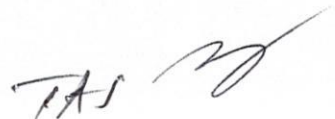
126 The Foreign States Immunities Act confers a statutory privilege upon the Kingdom, which could only validly be waived with the “written consent of the foreign state concerned”. Manifestly, the signature by a single Minister without proper authority could never constitute an effective or lawful consent by the Kingdom of Lesotho for the purposes of section 14(2) of the Foreign States Immunities Act.

The constitutional cause of action

127 In addition to the grounds of relief set out above, the Kingdom seeks the same relief as just and equitable relief in terms of section 172 of the South African Constitution. This matter raises at least the following constitutional issues:

127.1 It implicates the jurisdiction and powers of this Court to have granted an order making the arbitration award an order of court. If, for the reasons I have set out above, the arbitrator lacked jurisdiction over the Kingdom, then this Court too lacked the jurisdiction and power to make the arbitration award an order of court. The Constitutional Court has held questions concerning the powers and jurisdiction of the High Court are constitutional issues.

127.2 Second, it involves the inherent jurisdiction of the courts in terms of section 173 of the Constitution. In particular, because the Kingdom



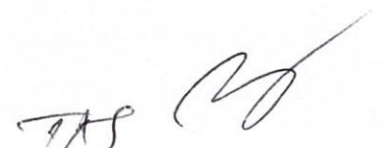
invokes this Court's power to rescind its own judgment under the common law, this constitutes an issue of the jurisdiction of this Court within the meaning of that section.

127.3 Third, because of the profound economic consequences of the judgment debt and the extraordinary circumstances by which a South African arbitrator and judge of the High Court played a part in bringing that judgment debt to the stage of execution, effectively subjecting a foreign sovereign state to the jurisdiction of the South African courts on the authority of an unauthorised and unlawful and probably corruptly procured contract, the matter implicates the Republic of South Africa's international relations and in particular its bilateral relationship with the Kingdom. It therefore raises important issues of the separation of powers which are manifestly constitutional matters.

128 Because the matter raises constitutional issues, the applicant is entitled to 'just and equitable relief', in terms of section 172 of the Constitution.

IRREPARABLE HARM AND SUBSTANTIAL INJUSTICE

129 It is obvious that the execution of a judgment debt of this size would have catastrophic consequences for the Kingdom. I have asked Dr Emmanuel Maluke Letete ("**Dr Letete**"), the economic advisor to the Prime Minister, to conduct an analysis of the economic impact of payment of the judgment debt upon the Kingdom. A confirmatory affidavit by Dr Maluke Letete, confirming the analysis



set out below, will be filed together with this affidavit, or as soon as possible thereafter.

130 In doing so, he / she drew data from –

130.1 the 2020 / 21 fiscal year mid-term budget review presented to the Lesotho Parliament on 17 February 2021; and

130.2 the International Monetary Fund's recent debt sustainability assessment of Lesotho.

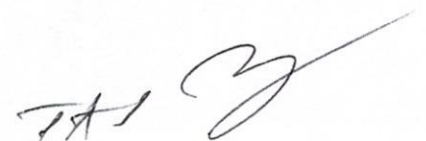
131 As is confirmed by this analysis:

131.1 The Covid-19 pandemic has exacerbated the poor condition of the Lesotho economy. During the 2020/21 fiscal year, government revenues have declined, while expenditures remained constant. This has resulted in a budget deficit of approximately EUR 60.3m representing 3% of Lesotho's gross domestic product ("**GDP**").

131.2 From this it is clear that the EUR 50m judgment debt constitutes an amount that is almost as much of the amount of the entire country's current budget deficit.

131.3 As a result, if the writs of execution are not stayed, the immediate and instant consequence will be to almost double the Kingdom's current budget deficit, pushing it to close to 6% of its gross domestic product.

132 The size of the judgment debt is staggering in the context of Lesotho's economy.



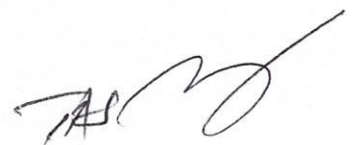
- 132.1 For example, Lesotho received a loan from the IMF in the USD equivalent of EUR 40.3m as an emergency support loan to reduce the fiscal effects of the pandemic. Execution of the writs of execution would more than wipe out the benefits of this emergency support loan.
- 132.2 The judgment debt of EUR 50m exceeds the combined amount of the IMF and European Union loans used to finance Lesotho's 2020 / 21 budget deficit.
- 133 The obvious consequence is that execution on the judgment debt will make it impossible for the government to cover its budgetary deficit.
- 134 In addition, the execution of the writs will have a severe impact on food security, health and education in the Kingdom. In terms of the Kingdom's 2020/21 budget, the Kingdom is only able to cover a small fraction of its required capital expenses for food security, health and education. For example:
- 134.1 The Kingdom budgeted about EUR 24m for food security capital expenses and can only cover EUR 1.7m (7%) of this amount.
- 134.2 For capital expenses related to health infrastructure in 2021, the Kingdom budgeted EUR 33.1m of which only EUR 5.6m can be covered by the Kingdom directly.
- 134.3 The Kingdom's budget for capital expenses related to education amount to EUR 13.2m of which the Kingdom will only cover about EUR 2.9m (22%).

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- 134.4 The Kingdom is heavily dependent on donor grants and loans to cover the balance of a respective capital budgets for food security, health and education.
- 134.5 In a further example illustrating the scale of the impact of the judgment debt on Lesotho's economy, the Kingdom is currently constructing the Maseru District Hospital, a modern hospital facility to provide much needed improved health services. The total cost of this construction, which will be completed in 2023, is the equivalent of EUR 50m, equivalent to the judgment debt to be covered by a grant from the government of the Peoples Republic of China.
- 135 In total, the Kingdom can only afford to cover EUR 10.2m (14%) of its total capital budget for food security, health infrastructure and school facilities. The judgment debt is five times this amount and represents 71% of the total capital budget for food, health and education in 2021.
- 136 As a result, execution on the judgment debt will result in further decline in infrastructure and closure of schools and hospitals, limited funds to purchase grains, vegetable seeds, feeds and fertilizer for farming. The payment of the judgment debt is likely to result in food scarcity, starvation and ultimately deaths of Basotho citizens.
- 137 In addition, execution of the judgment debt will have an enormous impact on the Kingdom's ability to borrow money.

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- 137.1 To finance its critical transport, health and education infrastructure needs, the Kingdom typically needs to borrow funds from domestic or international sources. Its ability to raise a debt for such infrastructure projects is determined by its debt sustainability analysis and credit risk assessment.
- 137.2 Given that the judgment debt will be reported as the government's public debt according to international public accounting standards, it will affect the Kingdom's ability to borrow.
- 137.3 The judgment debt will increase the country's debt ratios above approved thresholds of sustainability.
- 137.4 A common metric used to assess a country's debt sustainability and credit risk is the ratio of its public and publicly guaranteed (PPG) debt to its GDP. The recommended sustainable debt-to-GDP ratio threshold for countries in the Southern Africa Development Community is 60%. At the end of January 2021, the Kingdom's total PPG debt stood at the LSL equivalent of EUR 1.2bn, representing 58.1% of its GDP.
- 137.5 The EUR 50m judgment represents 2.2% of Lesotho's GDP. Hence, the judgment debt will push the country's debt-to-GDP ratio in excess of the 60% recommended threshold and the country may be deemed a high credit risk. This will greatly reduce the country's ability to borrow funds for, or guarantee, needed infrastructure projects. Any efforts to address the developmental needs of Lesotho will therefore be undermined by the judgment debt.

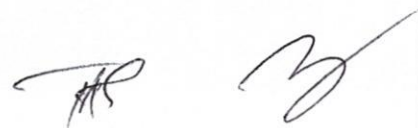


138 Permitting the execution of the orders would bring governance in the short-term in Lesotho to an immediate and grinding halt:

138.1 If the Kingdom were to pay the entire claim, the Kingdom would immediately be unable to pay the salaries of all government employees. These include employees performing services to the public, such as teachers, police and health workers. It would also dilute the Kingdom's capacity to procure needed health facilities to combat the current global pandemic.

138.2 Even as I depose to this affidavit, the Kingdom has inadequate finance to cover its basic needs during the global pandemic. The Kingdom needs an additional sum of about € 240 million to cover its budget deficit, pay salaries, purchase critical goods and services, and provide security to the population. Execution of the order raises the very real prospect that it will cause increased starvation, insecurity and death due to a lack of available services that would have been covered if the execution of the Order is stayed.

138.3 The Kingdom also needs about € 54 million to provide public assistance during the pandemic to vulnerable groups such as children, elderly, disabled, those working in the informal sector and industrial workers furloughed as a result of the global pandemic. The Government substantially relies on financial assistance from external partners to fund this welfare programme. I shall shortly return to the impact of execution on the Kingdom's capacity to borrow in future.

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139 Moreover, the Kingdom is concerned that if the judgment debt is executed upon it is highly likely that the assets will become dissipated and will be incapable of recovery should the judgment debt ultimately be rescinded and set aside. This is for the following reasons:

139.1 FSG does not appear to be a company of substance. On its website it lists only three projects that it has been involved in, namely the disputed Supply Agreement in Lesotho; a project in Eswatini, the status of which is unknown to the Kingdom; and a project in the Limpopo Province.

139.2 A forensic search about the company revealed no further information other than confirmation that it is registered in Germany.

139.3 It is unknown whether the company has sufficient assets to be capable of repaying or satisfying the return of the funds that are the subject of the judgment debt should the judgment ultimately be set aside.

139.4 It is not clear whether FSG has any employees other than its director, Robert Frazer.

140 By contrast, FSG will suffer no harm of any kind if a stay of execution is granted and the applications to review the Supply Agreement, rescind this Court's order and review and set aside the arbitration agreement are ultimately unsuccessful. If those applications do not succeed, FSG will be in possession of a valid and final judgment debt which will have been accruing interest since the date of judgment and will be able to execute on that debt at that time. As a result, the only harm that FSG faces is a delay in being able to execute upon its judgment

debt. But that delay constitutes no harm at all because interest will continue to accrue to FSG's benefit in the interim period.

BALANCE OF CONVENIENCE FAVOURS A STAY

141 For the reasons set out in relation to irreparable harm and substantial injustice, I submit that the balance of convenience favours a stay. The only inconvenience suffered by FSG if the stay is granted and the award in its favour is ultimately found to be valid, will be a delay in payment, for which it will be fully compensated by the running of interest. By contrast, if the judgment debt is executed upon by FSG and the funds are dissipated or ultimately irrecoverable, the loss to the Kingdom of Lesotho and its people will be severe and irreparable.

142 The interest of one company with one director must be balanced against the interest of the over two million citizens of Lesotho.

THERE IS NO ALTERNATIVE REMEDY

143 An interim stay on execution is the only possible remedy available to the Kingdom in these circumstances.

THE JUDGMENT DEBT WILL BE SET ASIDE IN DUE COURSE

144 I am advised that it is not necessary in terms of Uniform Rule 45A for this Court to make a definitive finding that the Kingdom will ultimately succeed in having the judgment debt rescinded and set aside. The test under Rule 45A is that a stay

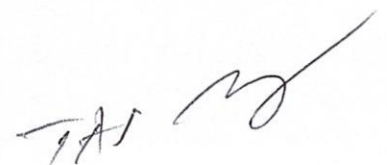
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will be granted where real and substantial justice requires such a stay or that injustice will be done if the stay is not granted. In addition, a stay of execution will be granted where the underlying causa of the judgment debt is being disputed or where an attempt is made to use the machinery relating to levying of execution for an ulterior purpose. For this reason, in this section I will briefly explain the grounds upon which the Kingdom contends that the three proceedings contemplated in paragraph 3 of the notice of motion are likely to succeed.

145 Although it has not been possible in the time available to prepare this application to exhaustively and comprehensively determine the facts upon which Lesotho will rely in seeking to review and set aside the arbitration award, the investigation that has been conducted has revealed a number of significant facts which demonstrate that the arbitrator is highly likely to be found to have lacked jurisdiction and that his award will be reviewed and set aside. If Lesotho never entered into the Supply Agreement, which it did not, then it did not agree to the arbitrator's jurisdiction and there can be no basis on which his award is enforceable against it.

Review and setting aside of the Supply Agreement

146 Like the courts in South Africa, the Lesotho High Court has jurisdiction to review and set aside an unlawful contract. From the facts I have already set out, it is overwhelmingly probably that the Lesotho High Court will set aside the Supply Agreement and declare it to be void *ab initio*.



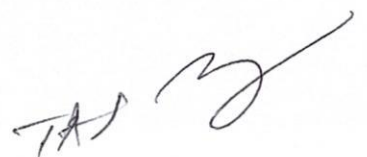
147 The grounds upon which the Kingdom intends to approach the Lesotho High Court include, at this stage, the following:

147.1 The Supply Agreement was signed by an unauthorised member of Cabinet on a frolic of his own, acting without the power to incur legal obligations on behalf of the Kingdom.

147.2 Minister Ts'olo had no authority to enter into the agreement on behalf of the Kingdom and he failed to comply with the most basic requirement of obtaining the approval of Cabinet. The decision is accordingly *ultra vires* and unauthorised and could have no legal effect.

147.3 The agreement constitutes a loan agreement within the contemplation of section 28(2) of the Public Financial Management and Accountability Act, 2011. As such, only the Minister of Finance could have signed it. In terms of section 28(1) of the same Act, the approval of the Minister of Finance with the prior consent of Cabinet was required for the approval of any borrowings of funds or other assets for the public purposes of government or of local authorities. The decision to enter into the contract and the contract itself is therefore unlawful and invalid for breach of section 28 of the Public Financial Management and Accountability Act.

147.4 Moreover, for the reasons I explain below, the purported procurement of a contract of this kind, with a value of €100 million, would have had to be conducted in accordance with the Kingdom's Public Procurement Regulations. No attempt was made to do so. In order to avoid burdening these papers unduly, I do not annex the Public Procurement

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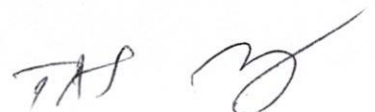
Regulations but refer to them below. A copy can be made available to the respondents and the court if required.

148 The facts set out above demonstrate that the process leading to the signature of the Supply Agreement subverted the letter and spirit of the Public Procurement Regulations. There was no procurement process whatsoever and the Supply Agreement was purportedly entered into as a result of an approach by FSG and Mr Frazer, essentially to a single Minister in the Kingdom's Cabinet. Such a closed process could never constitute lawful procurement under the Public Procurement Regulations.

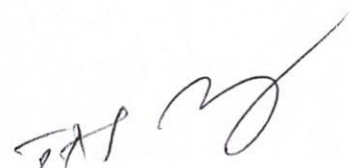
149 The purported conclusion of the Supply Agreement breached all of the following Regulations:

149.1 In terms of regulation 7, contracts must be entered into by a comparison of price quotations from a minimum of three suppliers or contractors and such quotations must be assessed according to the principles of open bidding. Open procedures of procurement must be used where the advantages of securing competition outweigh the need for expediency. Tenders must be advertised in the mass media and methods used in the evaluation of bids and awards of tenders must be objective and made known to all bidders.

149.2 While the Public Procurement Regulations make provision for deviations from this requirement in exceptional circumstances, none of those could seriously be suggested to apply to the conclusion of the Supply Agreement.



- 149.3 In terms of regulation 13, technical specifications for contracts of this kind must be defined and assessed for the purpose of awarding tenders. No attempt to do so was done in the case of the Supply Agreement.
- 149.4 In terms of regulation 14, the unit that procures the services is required to examine and evaluate the financial resources, technical qualifications and expertise of tenderers according to criteria set in the regulations for the purpose of securing equal opportunities and fair competition to tenderers. In this matter, no procurement process was conducted and no assessment of this kind was carried out.
- 149.5 The Regulations require a pre-qualification review process prior to submission of tenders for the purpose of assessing the capacity of businesses used to tender (regulation 15(1)).
- 149.6 The Regulations require an assessment of the general conditions for pre-qualification of tenderers (regulation 16(1)).
- 149.7 The Regulations require an evaluation of technical qualification and expertise to provide the works, goods or services being tendered for (regulation 17(1)).
- 149.8 The Regulations require an evaluation of the financial capability of tenderers to fulfil their contractual obligations (regulation 18).
- 149.9 The Regulations require an invitation for open tendering and equal opportunities to participate (regulation 19).



- 149.10 The Regulations require the provision of security by tenderers in appropriate circumstances (regulation 21).
- 149.11 The Regulations require the public announcement of an invitation to tender through the mass media and on a website (regulation 22).
- 149.12 The Regulations require the making available of hard copies of tender documents available to the public and tenderers (regulation 23).
- 149.13 The Regulations require a review of tenders to determine whether they satisfy various capacity and technical requirements (regulation 28).
- 149.14 The Regulations require an evaluation of tenders to determine the overall economy efficiency and effectiveness of the goods, works or services being procured (regulation 29).
- 149.15 The Regulations require the establishment of an evaluation team, tender panel and other processes for the purpose of procuring goods, works or services (regulation 48).
- 150 In this matter, there was simply no effort to comply with any of these legal requirements for a lawful procurement process. The Supply Agreement was purportedly entered into between Minister Ts'olo and Frazer of FSG, subject to their one-on-one negotiations in the absence of any publication of a tender or invitation to another bidder to make proposals for the provision of similar services. It was manifestly unlawful and will very likely be held to be unlawful by the Lesotho High Court.

151 Once the Supply Agreement has been reviewed and set aside, and declared to be void ab initio, the legal sub-stratum for the arbitration award and the order of this Court making that award an order of court will fall away. Both the arbitration award and this Court's order would then be without any legal basis:

151.1 Absent a valid Supply Agreement, the arbitrator lacked any jurisdiction to make an award against the Kingdom.

151.2 Absent jurisdiction conferred on the arbitrator, there was no legal basis for this Court to make the award an order of court, and its judgment falls to be rescinded.

152 As a result, FSG's judgment debt will cease to be enforceable once the Kingdom has succeeded in setting aside the unlawful and invalid Supply Agreement.

Rescission of this Court's order

153 I am advised that an applicant for rescission of a judgment taken by default must, in terms of the Rules of this Court and the common law, show good cause. This entails a reasonable explanation of the default; showing that the application is made *bona fide*; and showing that the applicant has a *bona fide* defence to the plaintiff's claim which prima facie has some prospects of success.

154 The facts set out above demonstrate that the Kingdom had good cause for its default of appearance, namely that it was the victim of collusion, most likely as a result of corruption, between one of its Cabinet Ministers and other officials and FSG which ensured that the Kingdom did not participate, either in the arbitration



proceedings or in the proceedings to make the arbitration award an order of court.

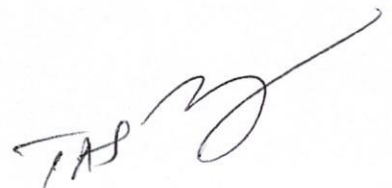
155 In addition, the facts set out above demonstrate that the intended rescission application will be made *bona fide* and as a result of the discovery of facts by the Kingdom pursuant to its investigation once the order of court came to its attention.

156 In addition, the Kingdom has a number of *bona fide* defences to the attempt to make the arbitration award an order of court, including the following:

156.1 The Supply Agreement, which is the contract that purported to confer jurisdiction upon Adv Maleka SC to adjudicate the dispute, was never lawfully entered into by an authorised official on behalf of the Kingdom.

156.2 On the contrary, as I have set out above, Minister Ts'olo lacked authorisation to sign the agreement, the agreement breaches various provisions of legislation in the Kingdom, and the provision is ultimately overwhelmingly certain to be set aside by the Lesotho High Court in review proceedings.

156.3 Once the Supply Agreement is set aside and declared to be void ab initio, which is inevitable, there was never any legal basis for the arbitrator to exercise jurisdiction over the Kingdom and the basis for the arbitration award falls away. So too does the basis for making the arbitral award an order of court.

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Review of the arbitrator's award

157 The primary ground of review of the award of the arbitrator is a lack of jurisdiction.

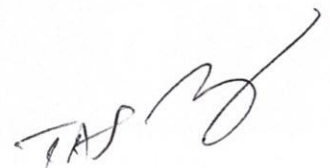
158 The validity of the Supply Agreement goes to the heart of this dispute. If the Supply Agreement is ultimately held to be invalid on the ground that Minister Ts'olo was unauthorised to enter into it on behalf of the Kingdom, the arbitrator could not have had jurisdiction on any basis because it is only in terms of a valid agreement to submit a dispute to arbitration that Lesotho could be construed to have waived its immunity or be brought before a South African arbitrator in Johannesburg.

158.1 In terms of section 7 of the International Arbitration Act 15 of 2017, only commercial disputes which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration.

158.2 Moreover, an arbitration agreement which is contrary to the public policy of South Africa will not be given effect to. I submit that an agreement procured through potentially corrupt means would be one that is contrary to the public policy of the Republic.

159 The arbitrator found that he had jurisdiction to determine the dispute on the following grounds:

- 159.1 Clause 24.1 of the Supply Agreement provides that the rules of the South African Association of Arbitrators will apply to the dispute (arbitration agreement para 23).
- 159.2 Clause 26.1 makes it clear that the terms of the Supply Agreement are governed by and determined in accordance with South African law (arbitration agreement para 23).
- 159.3 Articles 30(1)(b) and 30(2) of the rules of AFSA empower the arbitrator to order that proceedings will continue in the event that the respondent does not communicate a response to the notice of arbitration and fails to file a statement of defence (arbitration award para 27.1).
- 159.4 Although clause 24.1 of the Supply Agreement refers to the 1965 Arbitration Act, the arbitrator found that the dispute fell within the scope and application of article 1 of the model law set out in the International Arbitration Act 15 of 2017. There was no proper basis for the Arbitration Act of 1965 to apply to an extraterritorial dispute of this nature (arbitration award paras 28.1 – 28.2).
- 159.5 Because the parties had specified that the place of arbitration would be Johannesburg, the dispute fell within the meaning and scope of article 1(3) of the model law referred to in schedule 1 of the International Arbitration Act (para 29).
- 160 None of these findings has any legal basis if the Supply Agreement was not validly entered into by the Kingdom of Lesotho but was merely signed by the Minister Ts'olo without authorisation and acting on a frolic of his own.



161 An additional ground on which the Kingdom may seek to set aside the arbitrator's award is that the arbitrator applied the International Arbitration Act, when he ought, in terms of clause 24.1 of the Supply Agreement, to have applied the Arbitration Act.

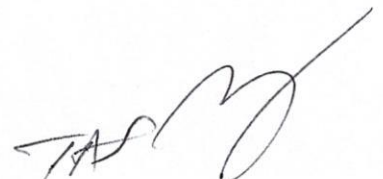
162 Moreover, if the Kingdom had been aware of the arbitration proceedings, it would undoubtedly have participated in those proceedings and opposed the relief that was sought to which it would have had a range of defences including the ability to challenge the jurisdiction of the arbitrator, to challenge the validity of the supply agreement and to oppose the relief sought on any number of grounds.

163 An example of such a defence, which emerges quite clearly from the pleadings and which is not addressed at all in the arbitrator's agreement or the judgment of this Court, is the fact that, even if it is assumed that the Supply Agreement was lawfully concluded, the award of €50 million in liquidated damages is a breach of the Conventional Penalties Act, 15 of 1962.

163.1 In this matter in terms of clause 26.1 of the Supply Agreement, the contract is governed by and construed under and in accordance with the laws of South Africa.

163.2 This entails that any penalty award in terms of the Supply Agreement must comply with the Conventional Penalties Act.

163.3 The award made by Adv Maleka SC for breach of contract in terms of clause 12 read with clause 22 of the Supply Agreement constitutes a

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penalty for breach of contract in terms of section 1 of the Conventional Penalties Act.

163.4 Section 3 of the Conventional Penalties Act provides:

“Reduction of excessive penalty

If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.”

163.5 It appears to be common cause that no part of the contract was performed and FSG incurred no expenses in attempting to perform.

163.6 As a result, the penalty of half of the value of the entire contract in an amount of €50 million, with all of the devastating catastrophic consequences of the size of such a claim for the finances of Lesotho is patently out of proportion to the prejudice suffered by Frazer as a result of the act or omission in respect of the penalty was stipulated.

163.7 I accordingly submit that the award amounts to a penalty intended to operate *in terrorem* alternatively amounts to an agreed liquidation of damages within the contemplation of the Conventional Penalties Act.

164 As a result, had the Kingdom been aware of the arbitration proceedings it would most certainly have raised a defence that the extent of the penalty was markedly out of proportion to the prejudice suffered by Frazer and should have been

reduced by the arbitrator, alternatively the court confirming the award. In fact the sheer quantum of the award relative to the complete absence of prejudice suffered by Frazer demonstrates (which is not required) that the penalty is outrageously excessive in relation to the prejudice.

URGENCY

The Kingdom will not obtain substantial redress in due course

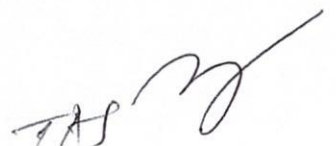
165 FSG has ramped up the attachment and execution proceedings in jurisdictions all across the world. These South African proceedings are at an advanced stage. I respectfully submit that the Kingdom will not obtain substantial relief if this matter is not heard on an urgent basis. The facts set out above at paragraphs 129 to 139 also demonstrate that the matter is urgent.

166 In addition:

166.1 If execution on the Order is allowed to proceed, I am advised that the result will be that the funds of the Kingdom will be transferred to FSG. I am advised that there will then be no legal impediment on FSG to hold the funds, it will be free to dissipate or spend the money as it deems fit.

166.2 From the information available to me about FSG, there is every reason to fear that the funds unlawfully obtained by FSG will indeed be dissipated and will become irrecoverable.

166.3 The forensics department of the Kingdom's attorneys has conducted an investigation into Mr Frazer and FSG, and have concluded that



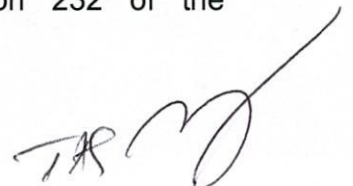
Frazer Solar is a relatively small company, not a substantial or established company.

166.4 There has been a proliferation of execution proceedings across the world that are presently at an advanced stage. The Kingdom has no reason to believe that FSG will continue to prosecute the foreign proceedings in the absence of a grant of the urgent relief sought in the present application. I am advised that the Order making the Award an order of court is the *fons et origo* of all other foreign proceedings. If the matter is not heard as one of urgency, then the foreign execution proceedings will be allowed to proceed to finality, with the same risk of Mr Frazer and FSG dissipating the funds such that they cannot be recovered.

166.5 It may then become impossible to unscramble the egg, and the harm to the Kingdom and its residents will become irreversible.

166.6 I have explained the substantial injustice that would occur if the order sought by the Kingdom is not granted, in my submissions above. Much of that injustice, I submit, may be irremediable if the Kingdom is forced to permit Mr Frazer and FSG to take possession of its assets. In addition:

166.6.1 I am advised that the doctrine of sovereign immunity and the principle of international comity are accepted across the world as bedrock principles of public international law. I am advised that it is well-established that both principles are applicable in our law (pursuant, *inter alia*, to section 232 of the

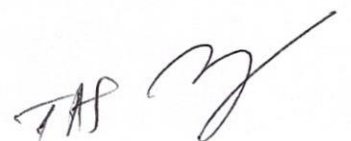


Constitution). The Court would be permitting a waiver of sovereign immunity pursuant to a fraudulent or corrupt act. Whereas the principle of comity states that courts should act with restraint when dealing with allegations of unlawful conduct that is sought to be ascribed to sovereign states.

166.6.2 I am advised that the doctrine of sovereign immunity is given further force by international treaties to which South Africa has bound itself. These include the Southern African Development Treaty, which confirms the importance of the principle of sovereign immunity expressly, in Chapter 11.

166.6.3 There is a real likelihood that if execution is permitted, the Kingdom will be unable to pay the salaries of government employees, including teachers, health workers and others, who will be left to deal with the personal consequences of the absence of an income in the context of a global pandemic. The Kingdom will be unable to combat the pandemic or provide necessary public assistance if redress is not granted now, as opposed to later.

166.6.4 The execution on the alleged debt will also compromise the Kingdom's capacity to obtain emergency interim funding – which would be needed if execution is allowed – from international organisations such as the IMF. These international financial institutions require stringent fiscal



measures from the Kingdom before they can provide any financial assistance.

167 For all of the reasons above, I respectfully submit that the requirement of the absence of substantial redress in due course is clearly met. There is a real prospect that this is the Kingdom's only chance to reverse the consequences of the illegalities in relation to the signature of the Supply Agreement.

The application has been brought with the requisite degree of urgency

168 In all the circumstances of the present application, I submit that the earliest date at which it would be appropriate to 'start the clock' for the purposes of urgency is 18 May 2021 – i.e. less than a month before this urgent application is filed. As I have explained above, that is the day on which I learned of this Court's order, giving rise to the writs of execution against the Kingdom's assets that, in this application, the Kingdom seeks to stay.

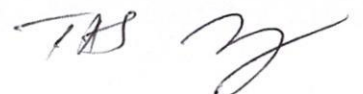
169 In summary:

169.1 Some government officials likely concealed their unlawful and likely fraudulent and/or criminal conduct from the Kingdom. At no stage before 18 May 2021 did they or any one of them inform me or any other official of whom I am aware.

169.2 There was no other outward manifestation, as far as the Kingdom was concerned, that any binding agreement had been signed with FSG. No

equipment was delivered and no work was done. So far as I am aware, nothing was delivered or done by FSG.

- 169.3 When no payment was forthcoming from the Kingdom due to its lack of knowledge, FSG purported to terminate the Supply Agreement precipitously. There is no evidence that FSG ever sought to engage the Kingdom to resolve the dispute amicably, as was required by clause 24.1 of the Supply Agreement.
- 169.4 None of the legal process and relevant letters of demand was served on the Attorney-General, which is the office responsible for dealing with litigation on behalf of the Kingdom.
- 169.5 When the existence of the court order, premised on the unlawful signed Supply Agreement, came to light on 18 May 2021, the Kingdom proceeded with all due urgency after that date.
- 169.6 Investigating what occurred and collating the necessary facts was a difficult task which had to be started from scratch.
- 169.7 This was exacerbated by the advanced stage that FSG had reached in securing its unlawful benefit: the facts and priorities of the Kingdom were in a constant state of flux, due to the swift proliferation of execution and attachment proceedings in various jurisdictions.
- 169.8 Once I instructed the then- Acting Attorney-General, Ms Morojele, to investigate the matter, I am informed by her that she acted swiftly on that instruction and assembled an investigation team comprising legal officers from various ministries. The first matter of priority was



attempting to uncover how it was that the Supply Agreement had come to be signed, and how it was that the process in the arbitration appeared to have been sent to the implicated government officials.

- 169.9 Once it became apparent to Ms Morojele that the facts supported a case of fraud and corruption, she immediately reported the matter to the DCEO. As I explained above, the conclusions reached in the parallel investigation support my submission that the Supply Agreement is the result of unlawful and criminal acts. In the Director-General's words, the "*investigations have thus far revealed a series of frauds on the whole process of signing the contracts*".
- 169.10 Once the writs of execution in South Africa were discovered, the Attorney-General proceeded immediately to appoint South African attorneys and a South African counsel team. In parallel, the Attorney-General instructed that the investigations into the facts should continue as quickly as possible. The Kingdom was advised that this application for an urgent interim stay of execution, and the Kingdom instructed the legal team to proceed on this basis, in parallel with the investigation into the relevant facts.
- 169.11 I subsequently discovered that FSG had instituted attachment and execution proceedings in other jurisdictions, as well. Given the stakes involved for the Kingdom, the Kingdom expanded the legal team, in order to ensure international support.

169.12 The facts that I am advised would be sufficient to launch this application and have reasonable prospects of success were collated by 13 June 2021. This application is brought 5 days later.

170 I therefore respectfully submit that there has been no delay on the part of the Kingdom with respect to urgency. I submit that the Kingdom has launched this application as soon as it was reasonably possible to do so, in all the circumstances.

ALTERNATIVE RELIEF

171 In the alternative to the relief sought in these proceedings, if the respondents require more time to file answering affidavits, such that it is not possible for this matter to be determined on **29 June 2021**, the Kingdom will, on that date, request that the relief sought in the notice of motion be granted on an interim basis pending the determination of this application, which the applicant will conduct on an urgent basis.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This

