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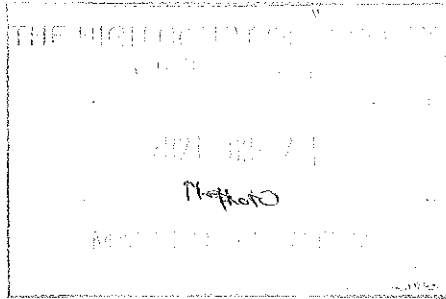
IN THE HIGH COURT OF LESOTHO
(HELD IN MASERU)

CIV/APN/332/2021

In the matter between:

ATTORNEY-GENERAL

AND



APPLICANT

FRAZER SOLAR GMBH

1ST RESPONDENT

FRAZER SOLAR (PTY) LIMITED

2ND RESPONDENT

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

3RD RESPONDENT

NOTICE OF MOTION

KINDLY TAKE NOTICE that an application will be made to the above honourable Court on behalf of the abovenamed Applicant on the 11th day of October 2021 at 9:30 am or soon thereafter as the matter may be heard for an Order in the following terms:

- 1 The third respondent's decision(s):
 - 1.1 to appoint the first respondent as a sole supplier of goods and services; and
 - 1.2 to enter into a supply agreement dated 27 September 2018 ("**Supply Agreement**"),

are declared unconstitutional, unlawful and invalid and are reviewed and set aside.

- 2 The Supply Agreement is declared unconstitutional, unlawful and invalid and is reviewed and set aside.
- 3 The arbitration agreement contained in clause 24 of the Supply Agreement is declared unconstitutional, unlawful and invalid, and is reviewed and set aside.
- 4 The Supply Agreement and the arbitration agreement contained in clause 24 are declared to be void ab initio.
- 5 To the extent necessary, the applicant's delay in instituting this application is condoned.
- 6 The applicant is granted such appropriate further and alternative relief as this Honourable Court considers necessary.
- 7 If the application is opposed, the respondents so opposing are ordered to pay the applicant's costs jointly and severally.

FURTHER TAKE NOTICE that the applicant appoints the office of his attorneys of record, Mei & Mei Attorneys Inc., Patsa Building, Top Floor, Suite No 4, Captain Dorego's (Cathedral Area), Maseru 100 at which he will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT the affidavit of **MOEKETSI MAJORO** herein together with supporting affidavits, documents and annexures will be used in support of the application.

TAKE NOTICE FURTHER THAT if you wish to oppose this application, you must:

- a. Deliver a notice to the applicant's attorneys that such respondents intend to oppose the application, within 14 days of receipt of this notice of motion or any amendment thereto, as contemplated in Rule 50(5)(a);
- b. Appoint an address in terms of Rule 8(10)(a) at which such respondent will accept notice and service of all process in these proceedings; and
- c. Deliver any affidavits in answer to the allegations of the applicant, within 21 days of the time period referred to in Rule 50(5)(b).

AND TAKE NOTICE FURTHER THAT in terms of Rule 50(6), the applicant reserves the right to deliver any replying affidavit in terms of Rule 8(11) in answer to the allegations made by any respondent; and shall deliver such affidavit within seven days after the expiry of the period referred to above.

DATED AT MASERU ON THIS 20TH DAY OF SEPTEMBER 2021.



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TO: THE REGISTRAR
HIGH COURT
MASERU 100

AND TO: FRAZER SOLAR GMBH
2ND FLOOR, FOUR ON ANSLOW
ANSLOW CRESCENT
BRYANSTON
SOUTH AFRICA

AND TO: FRAZER SOLAR (PTY) LIMITED
QHAOLI STREET, THETSANE WEST
MASERU 100

AND TO: MINISTER IN THE OFFICE OF THE PRIME MINISTER
GOVERNMENT OFFICE COMPLEX
PHASE 1, QHOBOSHEANENG
MASERU 100

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OF THE KINGDOM OF LESOTHO

3RD RESPONDENT

FOUNDING AFFIDAVIT: MOEKETSI MAJORO

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I, the undersigned,

MOEKETSI MAJORO,

state under oath that:

- 8 I am the Prime Minister of the Kingdom of Lesotho. My offices are at Government Office Complex, Phase 1, Qhobosheaneng, Maseru, Lesotho. I was sworn in as the Prime Minister on 20 May 2020. Before that, I was the Minister of Finance from 23 June 2017 to 19 May 2020. As the Head of the Government of the Kingdom of Lesotho, I have the responsibility to depose to this affidavit on behalf of the applicant. I am therefore duly authorised to do so. A copy of the Power of Attorney from the Cabinet of the Lesotho Government providing such authorisation is attached as "FA1.1".
- 9 The Cabinet of the Government of Lesotho has resolved to institute this application.
- 10 The facts in this affidavit are within my knowledge unless indicated otherwise. To the best of my knowledge and belief, the facts in this affidavit are true and correct.
- 11 The submissions of law I make in this affidavit are made on the advice of the applicant's lawyers.

THE PARTIES

- 12 The applicant is the Attorney-General, acting on behalf of the government of the Kingdom of Lesotho. The Office of the Attorney-General was established in terms of sections 98 and 140 of the Constitution of Lesotho, 1993. The Office of the Attorney-General is at the Government Office Complex, Phase 1 Qhobosheaneng, Maseru, Lesotho.
- 13 The first respondent is **FRAZER SOLAR GMBH ("FSG")**. FSG is a company incorporated in terms of the laws of the Federal Republic of Germany. FSG's principal place of business is at Bruno-Burgel Weg, 142-144, 0-12439 Berlin in Germany.
- 14 The second respondent is **FRAZER SOLAR (PTY) LIMITED**, with registration number 63554. Frazer Solar (Pty) Limited is a company incorporated in terms of the laws of the Kingdom of Lesotho. Frazer Solar (Pty) Limited's registered address is Qhaoli Street, Thetsane West, P.O Box 8908, Maseru, Lesotho. Frazer Solar (Pty) Limited is referred to in the Supply Agreement (defined below) as the entity through which FSG will manage all aspects of the project in Lesotho.
- 15 In the legal proceedings conducted in the High Court of South Africa, FSG is represented by South African attorneys, Petersen Hertog & Associate. The attorneys' offices are on the Second Floor, 4 On Anslow, Anslow Crescent, Bryanston, Gauteng. These attorneys were also FSG's attorneys of record in the dispute with the Kingdom in the arbitration proceedings. Accordingly, the

applicant will also serve this application and any subsequent pleadings that have to be delivered in these proceedings to FSG and its attorneys through email.

- 16 The third respondent is the **MINISTER IN THE OFFICE OF THE PRIME MINISTER OF THE KINGDOM OF LESOTHO**. The Ministry in the Office of the Prime Minister is at the Government Office Complex Phase 1 Qhobosheaneng, Maseru, Lesotho. At the relevant and material time, between June 2017 and September 2020, Minister Temeki Phoenix Ts'olo was the Minister in the Office of the Prime Minister of the Government of Lesotho. The erstwhile Minister signed the Supply Agreement at the relevant time, purporting to act for and on behalf of the Government of Lesotho. Minister Ts'olo is no longer a member of the cabinet of the Lesotho Government.

JURISDICTION

- 17 In terms of section 12 of the High Court Act 5 of 1978, read with section 119 of the Constitution of Lesotho, 1993, this Honourable Court has the jurisdiction to hear and determine this application. The cause of action arose within the jurisdiction of this Honourable Court because the purported Supply Agreement seems to have been signed in Maseru on 24 September 2018. The Supply Agreement was purportedly entered into on behalf of the Government of Lesotho by the then Minister in the office of Prime Minister.
- 18 This Honourable Court has jurisdiction to review decisions or acts of all public administrative powers, including powers or purported powers exercised or

purported to have been exercised by a Minister of the Government of Lesotho, as is the case in this application.

OVERVIEW

- 19 The Kingdom seeks to review and set aside the third respondent's decisions to appoint the first respondent as a sole supplier of goods and services and enter into an agreement styled as a "*supply agreement*" dated 24 September 2018 ("**Supply Agreement**"). A copy of the Supply Agreement is attached as "**FA1.2**".
- 20 The Supply Agreement purported to impose a financial commitment of €100 million (M1.7 billion) on the Kingdom's fiscus. This constitutes 4.4% of the Kingdom's Gross Domestic Product ("**GDP**"). Astoundingly, the Kingdom was purportedly bound to this financial commitment without even a veneer of compliance with the Constitution of Lesotho or the applicable procurement or public finance law by a signatory who was unauthorised to bind the Kingdom.
- 21 The signatories to the Supply Agreement appear to be FSG's Mr Frazer and Minister Ts'olo (who was, at that time, the Minister in the Office of the Prime Minister). Minister Ts'olo appears to have represented himself as acting on behalf of the Kingdom when he signed the Supply Agreement. I note that Minister Ts'olo now denies that he signed the Supply Agreement.
- 22 Both the Supply Agreement and Minister Ts'olo's decision to sign it are manifestly unlawful for the following reasons:

- 22.1 The Supply Agreement provides for payment of funds raised as part of the Kingdom's public debt directly to FSG, instead of into the Kingdom's Consolidated Fund. This is unconstitutional.
- 22.2 Minister Ts'olo had no authority to enter into the Supply Agreement on behalf of the Kingdom. He failed to comply with the most basic legal requirement of obtaining Cabinet approval. Any decision he took to enter into the Supply Agreement is accordingly *ultra vires*.
- 22.3 The Supply Agreement breaches section 28 of the Public Financial Management and Accountability Act ("PFMAA").
- 22.3.1 The Supply Agreement requires the Kingdom to procure loan funding, through FSG, from German financiers to be used to procure energy-efficient products from FSG.
- 22.3.2 It, therefore, constitutes a loan agreement within the contemplation of section 28(2) of the PFMAA. Only the Minister of Finance can validly sign such an agreement – not a Minister in the office of the Prime Minister, such as Minister Ts'olo was at the time of signing the Supply Agreement.
- 22.3.3 Section 28(1) of the PFMAA provides that the approval of the Minister of Finance with the prior consent of the Cabinet is required for the approval of any borrowings of funds for public purposes. Neither the approval of the Minister of Finance nor Cabinet's consent was obtained.

22.4 The purported procurement of a contract of this kind, with a value of €100 million (M1.7 billion), had to be conducted in accordance with the Kingdom's Public Procurement Regulations. No attempt was made to do so. The purported appointment of FSG was not subjected to public tender nor approved by the Central Tender Board or the Procurement Unit as was required by the Kingdom's Public Procurement Regulations.

23 Therefore, Minister Ts'olo's decision to appoint FSG was unlawful; and the Supply Agreement is invalid and unenforceable.

24 It is necessary for the Kingdom to approach this Court to have the Supply Agreement, and Minister Ts'olo's decision to enter into it, reviewed and set aside:

24.1 Though FSG has since terminated the Supply Agreement, it has sought to enforce its breach provisions through arbitration proceedings in South Africa. On 28 January 2020, FSG obtained an arbitration award (in the absence of the Kingdom) in the sum of **€50 million (M880 million)**, together with interest and costs, for alleged breach of the Supply Agreement ("**arbitration award**"). On 29 April 2021, the South African Commercial Court made the arbitration award an order of court.

24.2 This means that, relying on the Supply Agreement, FSG has successfully claimed a windfall of €50 million (with interest and costs) as liquidated damages against the Kingdom. As things stand, the

Kingdom is indebted to FSG in the amount of €50 million (approximately M880 million) as a result of Minister Ts'olo's unlawful actions and the unlawful agreement he purportedly concluded.

24.3 FSG has started executing on the Kingdom's assets to meet this judgment debt and to realise its windfall of €50 million. Paying this amount of money to FSG would have untold consequences for the Kingdom's economy. It would severely strain the Kingdom's fiscal survival.

24.4 The Kingdom's interests are affected by the agreement, in terms of which the financial commitment was undertaken until the agreement is reviewed and set aside by a court.

25 Accordingly, the applicant brings this application to review and set aside Minister Ts'olo's decision to appoint FSG as the sole supplier of goods and services, as well as the Supply Agreement itself.

THE FACTS

- 26 Before I set out the salient facts in chronological order, it is important to highlight two points.
- 27 First, the facts upon which this application is based have only recently come to light in ongoing investigations into the conclusion of the agreements about the project.
- 27.1 There is an ongoing criminal investigation into the circumstances of the signature on the Supply Agreement, which is being conducted by the Kingdom's Directorate on Corruption and Economic Offences ("DCEO"). The DCEO has confirmed that its preliminary view, following its investigations thus far, is that this is a clear case of corruption and fraud perpetrated against the Kingdom by some officials working in collaboration with individuals from abroad.
- 27.2 I have also established a Commission of Inquiry to investigate allegations of corruption and fraud in the conclusion of the Supply Agreement and concealment of the arbitration proceedings about the Supply Agreement. A copy of the *Government Gazette* notice in terms of which the Commission was established is attached as "FA2". I shall expand on the significance of the applicant's investigations and the Commission of Inquiry below when I explain why the application has only been brought at this stage.

28 Second, the individuals who are implicated or thought to have been involved in the processes leading up to the conclusion of the Supply Agreement were interviewed by the applicant to ascertain their version of what occurred in relation to the conclusion of the Supply Agreement and the litigation that resulted from the agreement. As I explain below, in several respects, the versions of those individuals are contradictory, and some appear improbable. However, it is perfectly clear, as I explain below, that the purported conclusion of the Supply Agreement was unlawful and invalid.

FSG'S proposal to the Lesotho Government

29 In late 2017, FSG approached the Lesotho Government with a proposal for a €100 million (M1.7 billion) renewable energy project to improve energy efficiency and create employment utilising products and loan finance from Germany. It appears that, from that point on, the then-Minister in the Office of the Prime Minister, Minister Ts'olo, was the primary contact point between the Lesotho Government and Mr Robert Frazer, who was the managing director of FSG. He also appeared to be the primary individual coordinating the process.

30 This is clear from the correspondence, which the Kingdom has recently discovered during its investigations. It is not necessary to attach all of the correspondence for the purposes of this application. However, I attach the following letters to demonstrate that Minister Ts'olo's was central to the unlawful process from the beginning:

- 30.1 A letter, dated 5 October 2017, from Minister Ts'olo to Kfw-Ipex Bank Gmbh regarding the financing of the project is attached as "FA3"; and
- 30.2 A letter dated 17 October 2017, from Mr Frazer to Minister Ts'olo requesting formal advice on the suggested next steps is attached as "FA4".
- 31 The extent of Minister Ts'olo's involvement, even at this early stage, is irregular. It could never have been appropriate for the Minister in the Office of the Prime Minister to attempt to coordinate a renewable energy project of this nature on behalf of the government of the Kingdom of Lesotho.
- 31.1 The Supply Agreement is in substance a loan agreement on behalf of the Lesotho Government, which would ultimately require payment from the Consolidated Fund. In terms of section 28(2) of the PFMAA, only the Minister of Finance can sign such an agreement, and the Ministry of Finance should have been central to its negotiation and conclusion.
- 31.2 The Minister of Energy and Meteorology is the appropriate contact point for energy proposals.
- 31.3 There was no lawful basis for Minister Ts'olo's involvement as the lead negotiator for the project.

32 I, as the Minister of Finance, also engaged with Mr Frazer on a number of occasions regarding the financing of the project over the period between October 2017 and November 2018.

33 In my early engagements with Mr Frazer, I was particularly concerned with the pressure that Mr Frazer was putting on the Lesotho Government to sign a memorandum of understanding with FSG. Even though a memorandum of understanding would not be a binding agreement, I made it clear that before the Lesotho Government signs the memorandum of understanding, the relevant officials need to give the project full consideration.

34 More specifically, in Mr Frazer's email, dated 12 November 2017, Mr Frazer once again pushed me to sign the memorandum of understanding. On 16 November 2017, I responded as follows:

"Dear Robert,

I advise differently. Before we move to MOUs, our officials need to make sense out of this. There are technical aspects of this that we do not have the time or the sense of detail needed."

35 Mr Frazer's email, dated 12 November 2017, and my response, dated 16 November 2017, are attached as "FA5" and "FA5.1", respectively.

36 My major concern was always that the proposed solar project, estimated at €100 million (M1.7 billion), was not something that could be entered into without the relevant government departments and Ministers being properly informed and without the requisite approvals. It would also require full consideration of the Prime Minister and the Attorney-General (the applicant).

For a project of this scale, the Lesotho Government would need to have the relevant documentation reviewed by a team of legal representatives and relevant experts. I considered that the Supply Agreement was clearly the type of agreement that would bind the Kingdom for many years to come and would have a substantial impact on the country's economy.

The purported conclusion of the memorandum of understanding

37 On 20 November 2017, Minister Ts'olo appears to have signed a memorandum of understanding with FSG and Minister Ts'olo incorrectly represented himself as acting on behalf of the Kingdom ("MOU"). Although the MOU is a non-binding agreement, Minister Ts'olo had no authority to sign it. Further, my email to Mr Frazer dated 16 November 2017 was clear – the Lesotho Government should not sign the MOU without further information. For this reason, I did not sign the MOU. It is inconceivable that Mr Frazer and Minister Ts'olo would sign an MOU within four days of my email, clearly stating that this should not be done.

38 In terms of the MOU, FSG and the Kingdom purportedly agreed that:

38.1 FSG would be appointed to install 36 000 to 40 000 Solar Water Heating Systems and up to 1 million LED lights in all Government buildings and homes of public servants over a period of four years.

38.2 The project would be funded by a loan from KfW in the amount of €100 million (M1.7 billion) repayable over a period of ten years.

38.3 They would obtain the Lesotho Government's approval for the project by 1 March 2018.

39 A copy of the MOU is attached as "FA6".

40 As I explain below, before the Kingdom could enter into any such agreement, it was a legal requirement for there to be an open and competitive tender process and an evaluation of competing bids. No such process was ever conducted in respect of either the MOU or the Supply Agreement.

41 Minister Ts'olo should not have signed the MOU. Important information was still required, and lawful procedures needed to be followed before the proposal could be accepted and approved by the Lesotho Government.

42 Any MOU of this kind would have had to go through the following processes before it could be entered into on behalf of the Kingdom:

42.1 An open and competitive tender process would have to be conducted in terms of the country's procurement laws.

42.2 The Ministry of Energy would have had to submit a proposal to the Ministry of Planning.

42.3 The Ministry of Development Planning would have had to then convene the Public Sector Investment Committee ("PSIC") to evaluate the project proposal.

- 42.4 Thereafter, the Ministry of Development Planning through PSIC would have had to consider and approve the proposal. This would include a viability and bankability assessment.
- 42.5 Then the proposal would have to be submitted to Cabinet for endorsement.
- 42.6 The Ministry of Finance would then have to negotiate and sign the agreement.
- 42.7 Finally, the Ministry of Energy and Meteorology would have to implement the project.
- 43 In the light of the above, it is clear that the Minister of Finance, the Minister of Energy and the Minister of Development Planning play important roles in projects of this nature because they have immense financial implications for the Kingdom. For this reason, Cabinet would need to approve that the MOU should be negotiated and signed. As already indicated, I (as the then-Minister of Finance) did not sign or approve the MOU. Minister Ts'olo could never enter into it because obviously, in terms of the above-stated procedure, he did not have the necessary capacity to sign it.

The period between 20 November 2017 to 6 June 2018

- 44 After the MOU was signed, it appears that there was little movement in relation to the proposal for the project. This is clear from the letter from Mr Frazer to Minister Ts'olo, dated 8 May 2018, attached as "FA7". The letter records that

FSG had been discussing the project with representatives in the Kingdom since August 2017 and goes on to address the fact that the project had not progressed. It states as follows:

"Progress on the Project has slowed in recent months. The German government which has already pre-approved the funding has indicated concern at this and has requested I meet with the Right honourable Prime Minister to discuss this matter prior to attending a meeting called by the German Ambassador in Pretoria next week.

I hereby formally request your assistance to help me arrange a meeting with the Right Honourable Prime Minister for a time convenient to him this week. I realise this is short notice but meeting this timing is a critical step for this very important project."

45 I do not know whether this meeting took place. Nor do I know what transpired in communications between Minister Ts'olo and Mr Frazer at that time. However, I engaged with Mr Frazer via email in the early months of 2018, in my capacity as then-Minister of Finance. The nature and extent of the email exchange can be summarised as follows:

45.1 On 28 February 2018, Mr Frazer addressed an email to me and requested a meeting. This email is attached as "FA8".

45.2 On 6 March 2018, Mr Frazer addressed a further email to me again requesting a meeting to discuss the project proposal. He stated that we should convene in anticipation of an internal meeting with the Lesotho Government, which he anticipated would take place soon. He further wished to advise me on discussions with the German officials regarding the proposed project. This email is attached as "FA9".

45.3 On 10 March 2018, Mr Frazer addressed an email to Minister Ts'olo and me. He provided us with an updated business proposal dated

10 March 2018. This email, dated 10 March 2018, is attached as "FA10".

- 45.4 On 16 March 2018, Mr Frazer addressed another email to me. This was the fourth email Mr Frazer sent me. This time Mr Frazer noted that he had been waiting seven weeks to meet with me. He requested that I give the Minister of Energy and Meteorology the "*green light*" to prepare a Cabinet paper in respect of the project proposal. The email is attached as "FA11".
- 45.5 On 21 March 2018, Mr Frazer addressed another email informing me that he would extend his stay so that we could meet. This email is attached as "FA12".
- 45.6 On 23 March 2018, Mr Frazer addressed an email to me, Minister Ts'olo and the Minister of Energy and Meteorology, informing us that '*the pre-approved German government finance offer*' was due to expire by the end of March 2018. However, the German government had "*remarkably*" extended it. He urged me to "*bring this matter to a conclusion.*" I did not take any additional step to "*bring the matter to a conclusion*" or to have the project proposal approved. This email is attached as "FA13".
- 45.7 On 3 April 2018, Mr Frazer addressed a further email urging me to meet with him. On the same day, Mr Frazer and I agreed to meet on 4 April 2018. Mr Frazer then sent me two letters of intent from Kfw-Ipex Bank. The emails are attached as "FA14" and "FA15".

- 45.8 On 7 April 2018, Mr Frazer emailed me asking me to acknowledge the German Kfw-Ipex Bank's letter of intent and requesting a formal finance offer. The email is attached as "FA16".
- 45.9 On 14 April 2018, I replied by stating that I would communicate with the bank when I was in Washington. However, on the same day, Mr Frazer sent an email to me stating that Minister Ts'olo had already written to the bank. At the time, I thought this was strange since Minister Ts'olo should not be engaging with foreign parties on financing issues which is the Minister of Finance's field of authority and expertise. These emails are attached as "FA17" and "FA18".
- 46 On 26 April 2018, after my return from Washington, Mr Frazer again requested a meeting with me. The email is attached as "FA19". I did not meet with Mr Frazer on that day.
- 47 As is evident from the above, since I was the Minister of Finance at the time, the emails to me were chiefly concerned with the financing aspect of the proposed Project. It is clear from these emails that the project proposal was far from being approved. This is especially so when considering the fact that I, along with Minister Ts'olo and the Minister of Energy and Meteorology, received a new business plan dated 10 March 2018 via email, and I had not engaged with the German financiers.
- 48 Notwithstanding that the Project had not been concurred to by me (as the Minister of Finance), Minister of Planning and Minister of Energy,

Minister Ts'olo went ahead with preparing a memorandum dated 6 June 2018, requesting Cabinet to approve the project. He did this even though I had not even been authorised by Cabinet to negotiate funding with the German financiers or any other financiers.

Minister Ts'olo attempted to get approval for the project through a memorandum dated 6 June 2018

- 49 Minister Ts'olo or his secretary prepared a memorandum dated 6 June 2018 to be submitted to Cabinet. The memorandum is attached as "FA20". In terms of this memorandum, Minister Ts'olo provided his recommendation that the Cabinet approves the proposal. The relevant excerpt from the memorandum reads as follows:

"I recommend that Cabinet approve:

The € 100 million (M1.5 billion) low interest loan project funded by the German Government for Energy Efficiency and Employment Creation in Lesotho.

...

The Honourable Ministers of Finance; of public service; of local government and chieftainship Affairs; of Energy; of Public Works and Transport; and of Development Planning have been consulted and they concur.

Cabinet is invited to advise in accordance with paragraph 1 above."

- 50 Though the memorandum reflects six Ministers as having been consulted and concurring, this is not accurate. Concurrence by Cabinet Ministers is typically provided in writing. In this case, there were no written concurrences in respect of this memorandum and the relevant concurrences were not sought and obtained. The Ministers had not concurred to the memorandum as alleged. I, in my capacity as Minister of Finance, certainly never concurred.

- 51 At the Cabinet meeting on 12 June 2018, the memorandum proposed by Minister Ts'olo dated 6 June was withdrawn. It was withdrawn because it was presented by Minister Ts'olo and not the Minister of Energy and Meteorology; the relevant ministers did not concur with it and had not gone through the necessary procedures. The document verifying this is attached as "FA21".
- 52 In the light of the above, as of 12 June 2018, it is clear that Cabinet had not approved the proposal for this project. After that, no other formal recommendation was put to Cabinet regarding the approval of this project.
- 53 On 28 June 2018, Kfw-Ipex Bank issued another written intent to finance the project. The validity period of that letter would expire on 30 September 2018. A copy of the letter from Kfw-Ipex Bank is attached as "FA22".
- 54 On 1 August 2018, Minister Ts'olo wrote to Mr Frazer informing him that the Lesotho Government agreed and committed itself to proceed with the project. A copy of the letter from Minister Ts'olo is attached as "FA23".

The unlawful "Supply Agreement" concluded on 24 September 2018

- 55 Notwithstanding the fact that there was no Cabinet approval for the project, Minister Ts'olo, of his own accord and without any authority, signed the Supply Agreement on 24 September 2018.
- 56 Ms Ntobaki, Minister Ts'olo's secretary, appears to have witnessed Minister Ts'olo's signature after it was signed and Mr Matla, the personal aid to the

then-Prime Minister, also witnessed Minister Ts'olo's signature after it was signed.

57 The Supply Agreement is not a typical "*supply agreement*". It does not involve the mere provision of products and services in exchange for a fee. It purports to bind the Kingdom to far greater obligations, which would clearly require the extensive involvement of the Minister of Finance and Cabinet's consent or approval. I explain the nature of the Supply Agreement in more detail later in this affidavit.

58 Minister Ts'olo was not authorised to sign the Supply Agreement on behalf of the Kingdom. His decision to do so and the Supply Agreement are unlawful and invalid and stand to be set aside for the reasons I set out later in this affidavit.

59 As far as the investigations have been able to determine, at the time the Supply Agreement was signed, no official in the Lesotho Government except for Minister Ts'olo and possibly his secretary had any knowledge of the supply agreement or that it had been signed. Though Mr Matla also witnessed the signature of the document, he has informed the DCEO that he did not know what it was he was signing. He was simply called into the office to witness Minister Ts'olo's signature.

60 It is also not clear to me how Mr Frazer could believe that signing this agreement on 24 September 2018 would be lawful. His interactions with me, as Minister of Finance, up until April 2018, had not led to anything final on the

financing side of the deal. The email correspondence confirming that Mr Frazer was alive to the fact that Cabinet had withdrawn the Cabinet memorandum is attached as "FA24" and "FA25".

- 61 Moreover, on 10 December 2018, nearly three months after the date of the signing of the Supply Agreement, Minister Ts'olo addressed a letter to Mr Frazer. This letter requested further time so that other government stakeholders could be engaged. The letter does not refer to the Supply Agreement. It states as follows:

"On behalf of the Government of the Kingdom of Lesotho, I would like to reassure you that we are still committed to pursuing the Energy Efficiency Project as per our previous correspondence. Please note that due to lack of time concerning other stakeholders, I wish to request your indulgence that the Government of Lesotho requires additional time for other stakeholders to have a clear understanding of the project in order to engage in consultation with the Government of the Federal Republic of Germany regarding the finance offer.

I wish to apologise for the extended period of time in which it has taken so far and assure you it will not be much longer for a final decision to be made. This is a project of national importance that will benefit hundreds of thousands of Basotho for decades to come and would wish to commence as soon as a possible, once a consensus has been reached." (My emphasis)

- 62 A copy of the letter is attached as "FA26".
- 63 When investigators interviewed him, Minister Ts'olo said that he informed FSG (Mr Frazer) that he did not have the authority to give final approval for the project. Minister Ts'olo says he informed FSG that FSG's proposal had to go through a process: the proposal had to be submitted to the Ministry of Energy and Meteorology, which would submit the proposal to the Ministry of Planning. The Ministry of Planning would have to convene a Public Sector Investment

Committee to appraise the project proposal. After that, the proposal would have to be considered by the Minister of Finance for viability assessment and bankability. Finally, the proposal would be submitted to Cabinet for approval and then sent back to the Ministry of Energy and Meteorology for implementation.

64 If this is true, then it means that Minister Ts'olo and FSG were aware of the process that had to be undertaken before any agreement could be concluded to bind the Kingdom. However, as I explain below, it appears that Minister Ts'olo and FSG nonetheless purported to conclude the MOU and the Supply Agreement without the necessary processes being followed while knowing this to be the case.

65 It is clear from the above that the relevant government approvals had not been obtained. In these circumstances, it is inconceivable that Minister Ts'olo and Mr Frazer could have signed the Supply Agreement in the genuine belief that it would result in a lawful agreement in pursuit of a project proposal that Cabinet had not approved. This is especially so considering that, as far back as November 2017, I, acting as the Minister of Finance, indicated to Mr Frazer that a project proposal of this magnitude required careful consideration of the Lesotho Government and that due process was imperative.

The interactions with FSG after the unlawful Supply Agreement was purportedly concluded

- 66 I had further interactions with FSG after the Supply Agreement was purportedly concluded (though I was not aware that it had purportedly been concluded).
- 67 On 4 September 2018, Mr Frazer had emailed me expressing his desire to work with the Prime Minister to influence Cabinet to issue a policy clearance. The email is attached as annexure "FA27".
- 68 On 20 October 2018, I replied to Mr Frazer's email, reiterating that the project ought to be initiated and owned by the Ministry of Energy and Meteorology and that it ought to have Cabinet clearance. The email is attached as annexure "FA28".
- 69 On 2 November 2018, Mr Frazer's partner at FSG, Mr Fintelmann, emailed me informing me that a "supply contract" had been concluded. The email is attached as annexure "FA29". His email reads, in relevant part, as follows:

"Frazer Solar has been working with the government of Lesotho on an Energy Efficiency Project for about a year. In the process, intensive discussions were held with all ministries and stakeholders concerned. The cooperation has been fruitful so far and led to an agreement on what will be implemented. This agreement was concluded in the form of a supply contract between the Government of Lesotho and FSG. It is fully in line with the goal of renewing the energy system of Lesotho already adopted by the government in 2015.

For the implementation of the project, there is currently a lack of funding, which Germany has offered, but now has to be

implemented. Unfortunately it does not seem to me that there is any progress at this time, so I am writing to you today.” (My emphasis)

70 Though Mr Fintelmann’s email said that a “*supply contract*” had been “*concluded*” between FSG and the Government of Lesotho, I did not believe that this could be so or that any contract to which Mr Fintelmann referred could be lawful, valid and binding on the Kingdom. The legal requirements for the Kingdom to enter into the Supply Agreement were simply not met. For that reason, I did not consider it possible that a binding agreement had been concluded on behalf of the Kingdom with FSG.

71 I emphasise that no official in the Kingdom’s Government (including, most notably, Minister Ts’olo) ever informed me of the existence of the Supply Agreement.

72 On 28 November 2018, Mr Fintelmann emailed a follow up to his 2 November 2018 email. The email is attached as “**FA30**”.

73 On the same day, I replied that such a project would have to be financed by the resources of the Kingdom, even if these are to be borrowed. This means that the project is subject to ordinary rules of government investment, including that the project would have to be initiated by the relevant Minister – in this case, the Minister of Energy and Meteorology. The email is attached as “**FA31**”. Mr Fintelmann replied on the same date. I attach a copy as **FA31.1**.

74 Until the proper processes had been followed, I understood that the proposed project remained just that – a “*proposed project*” – and could not lawfully be

implemented. That was the tenor of my communication to Mr Fintelmann on 28 November 2018.

The alleged breach and termination of the Supply Agreement

- 75 FSG did not provide any products or services to the Kingdom in terms of the Supply Agreement.
- 76 However, on 11 March 2019, FSG's legal representative, Peterson Hertog, addressed a letter of demand to the Office of the Prime Minister, which was at the time occupied by the former Prime Minister, Motsoahae Thomas Thabane. The letter of demand alleged that the Lesotho Government had breached various terms of the Supply Agreement and demanded that it remedy the breach within 30 days of receipt of such notice. The letter further advised that if this 30-day notice period was unreasonable, the Lesotho Government would have 60 days to remedy the breach failing which FSG would refer the dispute to arbitration. This letter is attached as "**FA32**".
- 77 On 11 July 2019, FSG's legal representatives, Peterson Hertog, sent a further letter to the Office of the Prime Minister. This letter recorded that no response had been received in relation to the earlier demands. It raised further issues relating to information in the public domain regarding a potential solar project by Chinese investors in Lesotho. This letter is attached as "**FA33**".

- 78 On 29 July 2019, FSG terminated the Supply Agreement and indicated that it intended to exercise its right to resolve the dispute by way of arbitration. This letter is attached as annexure "FA34".
- 79 All three of these letters were addressed to the office of the Prime Minister, and the following individuals were copied: Government Secretary (Moahloli Mphaka), Minister Ts'olo (the Minister in the Office of the former Prime Minister) and his secretary, Ms Ntobaki.
- 80 None of the documents referred to above was sent to or received by the Office of the Attorney-General. The Kingdom only discovered them in a preliminary investigation conducted by the Office of the Attorney-General.
- 81 The law requires that any litigation process against the Kingdom be served on the Office of the Attorney-General, which FSG never did.
- 82 The former Acting Attorney-General's recent preliminary investigation reveals that it appears none of these individuals took any action in relation to the letters of demand and termination. In fact, the Supply Agreement and relevant letters were not brought to the attention of the most critical officials in the Lesotho Government – most crucially, the Attorney-General, the official who is statutorily responsible for dealing with litigation against the Kingdom.
- 83 Despite the purported termination of the Supply Agreement and having not delivered under the purported Supply Agreement, FSG claimed damages from the Kingdom under the Supply Agreement. Therefore, the Kingdom must

review and set aside the decision to appoint FSG as a supplier on the terms set out in the Supply Agreement and the Supply Agreement. If the decision and the Supply Agreement are not reviewed and set aside, the Kingdom may be said to have obligations that purportedly accrued and which FSG claims the Kingdom breached.

The arbitration proceedings between the Kingdom and FSG in South Africa

84 On 30 July 2019, FSG instituted arbitration proceedings by way of a notice of arbitration. The notice of arbitration has the following unusual features:

84.1 It describes the respondent as follows:

6 The Respondent is

The Kingdom of Lesotho, whose contact details are:

The Office of the Prime Minister
Government Office Complex
Phase 1 Qhobosheaneng
Maseru 100
Kingdom of Lesotho

Postal address:
PO Box 527
Maseru 100
Lesotho

84.2 This description of the Kingdom of Lesotho as the respondent corresponds with the definition of the Kingdom of Lesotho contained in clause 1.1.13 of the unlawful Supply Agreement.

84.3 It appears that FSG may have purported to effect service on the Office of the Prime Minister at the address set out above.

84.4 It appears from the arbitrator's award that a series of notices and letters were served on the office of the Prime Minister and that confirmations of receipt by that office were provided (arbitrator's award paragraphs 15 to 21). I have not been able to confirm the correctness of these findings.

84.5 But even if the notices were served on the office of the Prime Minister, it is a requirement of law in the Kingdom that such proceedings should have been served on the Office of the Attorney-General, not the Prime Minister.

84.5.1 In terms of section 3 of the Office of the Attorney-General Act 6 of 1994 (as amended), "*the Attorney-General shall represent the Government of Lesotho in all legal proceedings in which the Government is a party.*"

84.5.2 In terms of section 3 of the Government Proceedings and Contracts Act, 1965, in actions against the government, the Principal Legal Adviser (the Attorney-General) is the nominal defendant or respondent.

84.5.3 In terms of Rule 4(1)(h) of the Rules of the Lesotho High Court, service of process is effected "*Where the Government of Lesotho or any Minister of the Government is to be served, by delivering a copy of the process to the*

Solicitor General". The reference to the "*Solicitor General*" now means the Attorney-General.

84.6 The purpose of the requirement that legal process be served on and conducted through the Office of the Attorney-General is to ensure that litigation is responded to by the government department responsible for doing so.

85 As a result of the failure to cite or serve on the office of the Attorney-General as required by statute, the only individuals who received the notice are the same ones who failed to inform any other government official of the signature of the Supply Agreement, the letters of demand and termination letter. These individuals are Mr Mphaka (the Government Secretary then), Ms Lebusa (Mr Mphaka's secretary), Minister Ts'olo (the Minister in the Office of the Prime Minister) and Ms Masentle Ntobaki (Minister Ts'olo's secretary). It appears that these individuals did not inform anyone else in the Lesotho Government of the arbitration notice. To the best of my knowledge and from the investigations conducted, they specifically did not inform the Attorney-General's office.

86 It also appears from the correspondence and the arbitration award that the Lesotho Government has recently discovered that Minister Ts'olo was directly engaged in relation to the arbitration proceedings. He appears to have informed all participants in the arbitration that the Lesotho Government would not be attending the pre-arbitration meeting that took place in early September 2019. This was despite the fact that he had not brought the

arbitration notice to the attention of any member of the Lesotho Government and had no authority to conduct the litigation on behalf of the Kingdom.

- 87 The pre-arbitration minutes record the following in relation to the “*participation of the respondent*” (the Lesotho Government):

“3. Participation of the Respondent

The arbitrator noted that, with the consent of the claimant, he made contact with a serving member of the executive (cabinet) of the respondent, Minister Ts’olo, to enquire whether the respondent would be appearing at the preliminary meeting. The arbitrator explained that he spoke with Minister Ts’olo who said that the respondent would not be participating in the preliminary meeting. The arbitrator recorded that he indicated to Minister Ts’olo that the preliminary meeting would be proceeding at the schedule time and invited the respondent to participate.”

- 88 The pre-arbitration minutes and the covering email dated 17 September 2019 is attached as “**FA35**”.

- 89 It appears that Ms Ntobaki and Minister Ts'olo were the only ones who were copied in all of the pre-arbitration correspondence. It is simply inconceivable that FSG and its legal representatives could have believed that it was permissible to bypass the Office of the Attorney-General to conduct the arbitration in this way.

- 90 When the statement of claim was filed, and the Kingdom was required to put up a defence in the arbitration, no statement of defence was filed. A letter from FSG's legal representative to the arbitrator, Mr Vincent Maleka SC, records the following:

“We note that the Respondent in the above-referenced matter has not filed its statement of defence in accordance with Annex A of

Procedural Order No. 1 dated 16 September 2019. Accordingly, pursuant to items 3 and 4 of Annex A of the Procedural Order No. 1, a preliminary procedural call is to be held on 25 November 2019 and the hearing to be held on 2 December 2019 (and if necessary, 3 December 2019)

As anticipated in Procedural Order No. 1, we are writing to confirm the Preliminary Procedural Call scheduled to take place on Monday 25, November.”

91 This letter, dated 22 November 2019, is attached as “FA36”.

92 After that, on 25 November 2019, a procedural call was held. The arbitrator requested FSG to provide documents evidencing that the Lesotho Government was served correctly. FSG, through its legal representatives, responded to the arbitrator on the same day. The letter confirms that service was effected correctly and attaches the following documents for the arbitrator’s records:

“Emails dated 7 October 2019 filing the statement of claim, with representatives of the respondent;

- *Letter dated 9 October 2019 serving the statement of claim on the respondent with acknowledgement of receipt dated 14 October 2019;*
- *Email dated 22 November 2019 regarding the procedural call with representatives of the respondent in copy;*
- *Letter dated 22 November 2019 regarding the procedural call and confirmation of hard copy service of the same on the respondent dated 25 November 2019.”*

93 This letter of 25 November 2019, as well as the email dated 7 October 2019 and the emails dated 22 November 2019, referred to in this letter, are attached as “FA37.1”, “FA37.2” and “FA37.3”. I have not been able to locate the letter dated 9 October 2019.

94 Again, none of these documents was copied to or served on the Office of the Attorney-General, the only office with the legal power to represent the Kingdom in legal proceedings.

95 It appears from the email dated 7 October 2019 and one of the emails dated 22 November 2019 that Ms Ntobaki and Minister Ts'olo were the relevant persons from the Kingdom who received the correspondence.

96 In relation to the second email of 22 November 2019, the Office of the Prime Minister was copied.

96.1 I reiterate that the Office of the Prime Minister is the office where Minister Ts'olo and Ms Ntobaki were employed. These are also the same two individuals who were continually copied in the pre-arbitration correspondence and the same two individuals who did not communicate the fact of the agreement, the breach, the termination letter and the arbitration proceedings to any other individuals within the Kingdom.

96.2 The Office of the Prime Minister consists of five office units, namely:

96.2.1 the office of the Prime Minister himself;

96.2.2 the office of the Government Secretary;

96.2.3 the office of the Minister to the Prime Minister;

96.2.4 the office of the Principal Secretary of Administration; and

96.2.5 the office of the Principal Secretary for Economic Affairs.

- 96.3 Therefore, not every document received in the general office of the Prime Minister goes directly to his office unit or comes to the Prime Minister's personal attention. A document might be processed by the other office units or incorrectly delivered to a different office unit.
- 97 Since the arbitrator was satisfied that the Kingdom was properly served, the arbitration hearing took place on 2 December 2019 in the absence of the Kingdom. Had the Kingdom been made aware of arbitration proceedings through service on the Office of the Attorney-General, it would certainly have defended the claim, including by challenging the validity of the Supply Agreement purporting to confer jurisdiction on the arbitrator.
- 98 The arbitrator and FSG did not seek to establish the cause for the Kingdom's failure to participate in the arbitration proceedings. Instead, the arbitrator only considered that it was sufficient that there was purported service of the notice of arbitration seemingly in accordance with a purported written Supply Agreement which was not unlawfully concluded. The arbitrator and FSG did not consider that it was necessary for any further action to be taken, despite the claim against the Kingdom being for €100 million (M1.7 billion).
- 99 On 28 January 2020, the arbitrator made the following award:
- 99.1 The respondent is directed to pay the claimant liquidated damages in the sum of €50 million (M880 million);
- 99.2 The respondent is ordered to pay pre-award interest on the above sum of €50 million (M880 million) in the amount of €754 273;

99.3 The respondent is ordered to pay the post-interest award in the sum of €50 million (M880 million) calculated at 1.7% per annum from the date of the award to date of payment, and payable in the Euro currency;

99.4 The respondent is ordered to pay the costs of the arbitration; and

99.5 The respondent shall pay the arbitrator's fees in accordance with the final invoice submitted by the arbitrator to the claimant's legal representatives.

100 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 the 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.

101 The arbitration proceedings were accordingly conducted in the absence of the Kingdom. If the relevant letters of demand and notices of arbitration had not been concealed, and the arbitration proceedings had come to the attention of the relevant officials, and in particular the Attorney-General, this would never have been allowed to happen. The Kingdom would most certainly have opposed the arbitration. It would have sought to persuade the arbitrator that there was no submission to arbitration and accordingly that the arbitrator lacked jurisdiction. It would immediately have sought to review and set aside the purported Supply Agreement in the Lesotho High Court.

102 However, because the letters of demand and notice of arbitration were not served on the Attorney-General as required by law and also concealed from the Kingdom, the arbitration occurred in the Kingdom's absence, and an order was granted effectively by default.

103 In the answering affidavit in the Rule 45A application in the High Court of South Africa, FSG annexes a document purporting to demonstrate that the arbitration award was hand-delivered to the former Prime Minister on 31 January 2020. I attach a copy of the first page of such document as "FA38". As I have explained above, from the Kingdom's investigations, it appears that the document did not reach the former Prime Minister. For some reason, it appears to have been delivered to Ms Ntobaki, who was at that time working as the secretary to the Ministry of Mining (and who signed for it); and Ms Mapetla, who was the secretary to the Government Secretary. They both informed investigators that they filed the document away and did not provide it to the Attorney-General's office.

104 Due to the concealment of the award, neither the former Prime Minister nor the former Attorney-General knew about the award. I first became aware of its existence on 18 May 2021, and the then previously Acting Attorney-General ("Advocate Morojele") first became aware of it on the same day.

Application to have the arbitration award made an order of court

105 On 14 October 2020, the High Court of South Africa granted FSG leave to institute motion proceedings against the Kingdom and to do so by way of

edictal citation. The motion proceedings related to FSG's application to have the arbitration award declared an order of court.

106 FSG was successful, and the edictal citation order was granted. FSG then complied with the requirements of edictal citation. A copy of the order for edictal citation is attached as "FA39".

107 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.

108 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.

109 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.

110 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.

111 As a result, and again in the absence of the Kingdom, the High Court of South Africa made the arbitration award an order of court on 29 April 2021. I attach a copy of the order as "**FA40**".

112 Advocate Morojele, the acting Attorney-General at the time, as the person 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.

113 Writs of execution and notices of attachment were issued pursuant to the order of the High Court of South Africa against the Kingdom's assets in various jurisdictions, including South Africa, the United Kingdom, the United States of America and Mauritius.

113.1 A writ of execution in respect of monies due to the Kingdom by the Trans-Caledon Tunnel Authority SOC Limited, dated 11 May 2021 and attached as "**FA41**";

113.2 A notice of attachment served on the Trans-Caledon Tunnel Authority SOC Limited dated 17 May 2021 and attached as "**FA42**";

113.3 A writ of execution dated 17 May 2021 in respect of monies due to the Kingdom by Eskom Holdings SOC and attached as "**FA43**";

113.4 A notice of attachment served on Eskom Holdings SOC Limited dated 21 May 2021 and attached as "FA44"; and

113.5 A notice of attachment served on the Attorney-General of Lesotho on 8 June 2021 and attached as "FA45".

The former acting Attorney-General's investigation

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

115 On 18 May 2021, I instructed Advocate Morojele to investigate the matter.

116 On 19 May 2021, Advocate Morojele, the former acting Attorney-General, 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.

117 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 were the edictal citation with its attachments comprising the arbitration proceedings, the arbitration award. The bundle of documents that the Ministry of Foreign Affairs later gave to the investigating team comprised copies of the documents that had previously been forwarded (and, it appears, concealed). The Ministry of Foreign Affairs keeps copies of documents for its own records as a matter of good practice.

118 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:

118.1 Mr Moahloli Mphaka 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.

118.2 Ms Phuthi Lebusa, who was employed as secretary to the Government Secretary (Mr Mphaka) from 30 April 2012 to 27 July 2020. She is currently employed as the secretary in the National Assembly.

118.3 The third respondent, the Minister in the Office of the Prime Minister, was Minister Ts'olo from June 2017 to September 2020. Minister Ts'olo was then moved to the position of Minister of Mining from October 2019 to June 2020. Minister Ts'olo is no longer a member of the Cabinet. He ceased to be a Minister on 20 June 2020.

118.4 Ms Ntobaki was Minister Ts'olo's secretary in the Office of the Prime Minister from April 2012 to July 2020. She now holds the position of secretary to the Economic Advisor to the Prime Minister.

119 Following the investigation and interviews with each of these individuals, Advocate Morojele, the Acting Attorney-General, and a 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 me and the applicant. 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 applicant.

120 Their explanations were as follows:

120.1 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 the legal process must be served on the applicant's office and assumed that the applicant was already dealing with the matter. He applied this same thinking in relation to each of the documents and court notices that he received.

120.2 MSA Lebusa said that she received the notice of arbitration and subsequent documentation. However, her understanding was that the documents were being sent to me because she noted the date stamp of the Office of the Prime Minister and Ms Ntobaki's signature. When she brought the notice of arbitration to Mr Mphaka's attention, he instructed her to file the document away because it was seemingly already received by the Office of the Prime Minister. She received further documents but followed the same course and filed them away.

120.3 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. Minister

Ts'olo stated that none of the arbitration or court documents was brought to his attention. His emails were managed by his secretary, who would print emails and bring them to him.

120.4 Ms Ntobaki said that Minister Ts'olo called her into his office to witness an agreement that was already signed. 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 the 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 facilitate the implementation of the project/agreement. She says that she relayed this information to Minister Ts'olo showed it to him, and he then told her to file the notice away. Minister Ts'olo reacted the same way when further documents were served, so she also filed them away.

120.5 Both Ms Ntobaki's and Minister Ts'olo's versions appear improbable and require further investigation.

121 The former acting Attorney-General's confirmatory affidavit (Advocate Morojele) will be filed together with this affidavit.

The criminal investigation by the DCEO

122 During her investigations, Advocate Morojele reported the matter to the DCEO.

The DCEO is a statutory authority to prevent and investigate acts of corruption and economic offences; it is established by the Prevention of Corruption and Economic Offences Act 5 of 1999.

123 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 Advocate Morojele regarding this investigation. The letter, which is attached as "FA46", states the following:

"INVESTIGATION INTO ALLEGED CORRUPTION AND FRAUD INTO THE AWARD OF CONTRACT AND CONCEALMENT OF ARBITRATION INFORMATION: DCEO R.C.U.1140/05/21

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."*

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

124.1 All the arbitration documents were concealed from the Office of the Attorney-General and the Prime Minister.

124.2 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. According to the DCEO's letter quoted above, it appears that in the process of it reaching the Attorney-General, it was intercepted and concealed.

124.3 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. The Caselines invitation that I received on 21 March 2021 was forwarded to the Government Secretary, who printed and caused it to be sent to the Chief Legal Officer of the Cabinet Office because the Attorney-General's office was vacant at the time. The Chief Legal Officer says that he did not receive it.

125 The facts set out above give rise to a reasonable belief that the signature of the Supply Agreement and the concealment of the legal process that led to the arbitration award and judgment against the Kingdom were part of a corrupt scheme.

Attachment of Lesotho's Government's assets

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

127 The Kingdom has taken steps to suspend the execution of the relevant writs of execution in the High Court of South Africa and in the other jurisdictions. Full details can be provided if necessary, but I am advised that they are not relevant to this application.

The ongoing litigation between the Kingdom and FSG in South Africa

128 On 18 June 2021, the Kingdom launched an application to stay the execution or enforcement of the writs of execution and notices of attachment in South Africa, pending, amongst other things, the determination of this judicial review application and an application for the rescission of the arbitration award. A copy of the notice of motion is attached as "FA47".

129 FSG has opposed the application. The application will be heard between 10 and 12 November 2021.

130 The Kingdom is in the process of preparing an application to rescind the arbitration award.

THE IMPACT OF ENFORCING THE SUPPLY AGREEMENT

131 The obligations the Kingdom purportedly incurred as a result of the unlawful Supply Agreement have resulted in the arbitration award granted on 28 January 2020, without the Kingdom defending the claim. The execution of the arbitration award of €50 million (M855 510 900) would have catastrophic consequences for the Kingdom.

132 To demonstrate the extent of the crippling consequences, I asked Dr Emmanuel Maluke Letete ("**Dr Letete**"), who is my Economic Advisor, to conduct an analysis of the economic impact of payment of the judgment debt

upon the Kingdom. Dr Letete's confirmatory affidavit in which he confirms the analysis below is attached.

133 In doing so, Dr Letete drew data from—

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

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

134 As is confirmed by this analysis:

134.1 The Covid-19 pandemic has exacerbated the poor condition of the Kingdom's economy. During the 2020/21 fiscal year, government revenues declined while expenditures remained constant. This has resulted in a budget deficit of approximately €60.3 million, representing 3% of the Kingdom's GDP.

134.2 From this, it is clear that the Kingdom's indebtedness of €50 million to FSG as a result of the unlawful Supply Agreement constitutes an amount that is almost as much of the amount of the entire country's current budget deficit.

134.3 As a result, if the Kingdom is compelled to pay the indebtedness of €50 million awarded to FSG as a result of the unlawful supply agreement, the immediate and instant consequence will be to almost

double the Kingdom's current budget deficit, pushing it to close to 6% of its GDP.

135 The size of the indebtedness of €50 million arbitration award founding upon an unlawful Supply Agreement is staggering in the context of the Kingdom's economy.

135.1 For example, the Kingdom received a loan from the IMF in the USD equivalent of €40.3 million as an emergency support loan to reduce the fiscal effects of the pandemic. Allowing the Kingdom to comply with the obligations that arose from the unlawful Supply Agreement by paying the damages awarded to FSG would more than wipe out the benefits of this emergency support loan.

135.2 The €50 million arbitration award exceeds the combined amount of the IMF and European Union loans used to finance the Kingdom's 2020/21 budget deficit.

136 The obvious consequence is that the government cannot cover its budgetary deficit if the Kingdom is obliged to pay damages directly from the conclusion of the unlawful Supply Agreement.

137 In addition, a failure to set aside the unlawful Supply Agreement and permitting the Kingdom to pay damages that are a direct result of the conclusion of the unlawful Supply Agreement 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 can only cover a small fraction of its required capital expenses for food security, health and education. For example:

137.1 The Kingdom budgeted about €24 million for food security capital expenses and can only cover €1.7 million (7%) of this amount.

137.2 For capital expenses related to health infrastructure in 2021, the Kingdom budgeted €33.1 million, of which only €5.6 million can be covered directly.

137.3 The Kingdom's budget for education-related capital expenses amounts to €13.2 million, of which the Kingdom will only cover about €2.9 million (22%).

137.4 The Kingdom is heavily dependent on donor grants and loans to cover the balance of respective capital budgets for food security, health and education.

137.5 In a further example illustrating the scale of the impact of the judgment debt on the Kingdom'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 €50 million, equivalent to the judgment debt to be covered by a grant from the government of the People's Republic of China.

138 In total, the Kingdom can only afford to cover €10.2 million (14%) of its total capital budget for food security, health infrastructure and school facilities. The

€50 million arbitration award directly founded in the unlawful Supply Agreement is five times this amount and represents 71% of the total capital budget for food, health and education in 2021.

139 As a result, execution on the €50 million arbitration award (which is essentially an enforcement of the unlawful supply agreement) 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 €50 million arbitration award is likely to result in food scarcity, starvation and ultimately deaths of Basotho citizens.

140 The Kingdom has significant challenges addressing food insecurity within its available resources. The estimated number of persons suffering from food insecurity in the Kingdom was 679,430 in 2016/17; 306 660 in 2017/18; 308,980 in 2018/19; 508 110 in 2019/2020; 766,000 in 2020/21 and 470,00 in 2021/22. In confirmation of this, I attach, as "FA48", a slide from the Lesotho Vulnerability Assessment Committee presentation dated July 2021.

141 In addition, execution of the Kingdom's indebtedness to FSG due to the unlawful Supply Agreement will have an enormous impact on the Kingdom's ability to borrow money.

141.1 To finance its critical transport, health and education infrastructure needs, the Kingdom typically needs to borrow funds from domestic or international sources. Its debt sustainability analysis and credit risk

assessment determine its ability to raise debt for such infrastructure projects.

- 141.2 The indebtedness will be reported as the Kingdom's public debt according to international public accounting standards, which will affect the Kingdom's ability to borrow.
- 141.3 The indebtedness to FSG will increase the country's debt ratios above approved thresholds of sustainability.
- 141.4 A standard 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 €1.2 billion, representing 58.1 % of its GDP.
- 141.5 The €50 million judgment represents 2.2% of the Kingdom's GDP. Hence, the enforcement of the Kingdom's indebtedness to FSG will push the country's debt-to-GDP ratio over the 60% recommended threshold, and the government may be deemed a high credit risk. This will significantly reduce the country's ability to borrow funds for or guarantee needed infrastructure projects. The judgment debt will therefore undermine any efforts to address the developmental needs of Lesotho.

142 Permitting the enforcement of the indebtedness would bring governance in the short-term in the Kingdom to an immediate and grinding halt:

142.1 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.

142.2 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. Enforcement of the debt raises the genuine prospect that it will cause increased starvation, insecurity and death because of a lack of available services that would have been covered if the agreement is not declared unlawful and void *ab initio*, and therefore unenforceable.

142.3 The Kingdom also needs about €54 million to provide public assistance during the pandemic to vulnerable groups such as children, the 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.

143 The basic reality is this: if the Kingdom is required to pay €50 million to FSG, it will have to find that €50 million somewhere – in an economy where €50 million is not easily found, and in exchange for zero value from FSG. If the Kingdom must find €50 million to pay FSG, that is €50 million that cannot be spent on salaries, schools and hospitals. Extracting €50 million from the Kingdom will severely affect its ability to meet its other pressing financial needs.

144 The government's total revenues are already deficient to cover its expenses. Therefore, the government resorts to dependence on donor grants and loans. Since the government cannot cover a significant portion of the main expenses from its total revenues, diverting any source of these insufficient revenues to pay the judgment sum will ultimately result in widespread poverty, disease, and hunger.

145 For example:

145.1 The 2021 annual budgetary expense for wages and salaries amounts to M6.412 billion, the most significant expense in the government's annual budget. On average, this represents the sum of M533.3 million per month. If the government reallocates these funds to cover the judgment debt, all salaries of government employees will not be paid for one month and approximately 60% of all salaries for the next month will be unpaid.

145.2 The 2021 total annual budgetary expense for subsidies to cover feeds and fertilisers amount to M850,4 million. On average, this represents

the sum of M70,9 million per month. If the government reallocates the funds for this expense to cover the judgment debt, no subsidies will be paid to cover the purchase of feeds and fertilisers.

146 The Kingdom has never budgeted or allocated any funds for the project contemplated in the Supply Agreement. In terms of the Kingdom's procedures and policies for capital projects, funds are only committed for projects that have been appraised and recommended by the Public Sector Investment Committee, approved by Cabinet, and tabled in the National Assembly for the appropriation of funds. I do not attach a copy of the Public Sector Investment Manual to avoid burdening these papers, but one can be provided if necessary.

147 None of this ever occurred in relation to the project contemplated in the Supply Agreement, and as a result, no funds were committed in the 2018/2019 budget or in any subsequent budget. The 2018/19 budget speech confirms this. I do not attach a copy in order to avoid burdening the papers unduly, but it is publicly available, and a copy can be provided if required.

148 FSG contends that implementing the project would have saved the Kingdom significantly more than it would have cost. These projected savings are extremely unlikely to have been realised.

149 In light of the above far-reaching consequences, it would not be in the interests of the Kingdom and the Basotho people to allow FSG to claim in terms of a judgment that directly results from an unlawful Supply Agreement.

150 FSG has done nothing to implement the Supply Agreement. As a result, the effect of upholding the judgment debt would be to confer on FSG a considerable windfall, at the expense of the citizens of Lesotho, in exchange for no value. The Kingdom will accordingly suffer enormous irreparable harm if this application is not upheld.

THE NATURE OF THE SUPPLY AGREEMENT

151 As I have said elsewhere in this affidavit, the Supply Agreement was not only for the procurement of the products from FSG. The agreement also purports to create a financial commitment by the Kingdom to a funder, KfW. The total amount of the funds that would be borrowed and the terms for the repayment of the loan are set out in the purported Supply Agreement.

152 The Supply Agreement is not typical. It does not involve the mere provision of products and services in exchange for a fee. It purports to bind the Kingdom to far greater obligations, which would clearly require the Minister of Finance's extensive involvement and Cabinet's consent or approval. In this regard, the following clauses of the Supply Agreement are relevant:

152.1 Clause 1.1.9 defines "*the Finance Agreement(s)*" as "*the loan agreement(s) concluded between the [Ministry of Finance of Lesotho] on behalf of GoL and the Finance Providers, and annexed hereto as annexure A*".

152.2 In clause 5.1.4, FSG is given sole discretion to decide on product mixes and scheduled input costs for each site. The Government of Lesotho

undertakes not to interfere with or delay the project's rollout by imposing an approvals regime.

152.3 The quality of the products to be supplied under the agreement was to be entirely within FSG's discretion as the Supply Agreement provides that no single uniform standard could be applied to the products (clause 6.1).

152.4 The Supply Agreement is extraordinary in its approach to the price that the Kingdom of Lesotho would pay to FSG. It states that:

"GOL acknowledges that FSG is unable to provide a pricelist for the Products and/or Services as such Product price list is but a component of the total installed cost of the Products and the characteristics of each Site will vary greatly from one another. Provided that the Evaluation Criteria, where required, are met, GOL irrevocably authorises FSG to determine the cost of installation, Product mix, and the Services required per Site and to proceed with the requisite production installation without being subject to a GOL approvals process. FSG undertakes to act reasonably in this regard."

152.5 The consequence is that in terms of the Supply Agreement, the price of the products to be supplied, far from being negotiated and considered in advance of the conclusion of the agreement, was to be a matter entirely within FSG's discretion and to be determined by FSG subject only to an undertaking that it act "reasonably".

152.6 Clause 9.2 also gives FSG the unlimited power to adjust input costs in respect of the project based on changes in all material prices, exchange rates, inflation rates, etc.

152.7 As a result, the quality, quantity and price of the goods to be supplied would be entirely in FSG's control, with the Kingdom having no

entitlement to insist on any input on these three issues, either in advance or during the performance of the contract.

152.8 In terms of clause 10, the entire project was to be zero-rated for VAT purposes.

152.9 Clause 11 of the Supply Agreement binds the Kingdom to the following obligations in relation to the Finance Agreement / Finance Partners:

152.9.1 The Lesotho Government shall be fully responsible for all repayments of the loan funding provided by the Finance Providers.

152.9.2 The Lesotho Government will on-lend the Project funds that it receives from the Finance Providers to the various non-governmental entities, civil servants, private sector organisations, and individuals to whom the products will be delivered, and services rendered by FSG in accordance with the requirements of the Project. Irrespective of who the Lesotho Government on-lends these funds to, the Lesotho Government shall nevertheless be solely responsible for repaying the loan finance to the aforementioned Finance Providers.

152.9.3 The Lesotho Government shall be responsible for ensuring that sufficient funds are set aside and at times available for purposes of the loan repayments, and will ensure that the project is included in the Ministry of Finance's official

budget on government income and expenditure, this notwithstanding the electricity savings that will accrue to the Lesotho Government over time. The supply agreement accordingly purports to fetter the power of the Ministry of Finance to determine the national budget.

152.9.4 The Lesotho Government undertakes that it will comply with all the Finance Agreements covenants, including but not limited to peremptory terms stipulating that the loan must be a separate line item in the budget.

152.10 Clause 12 provides for the consideration payable for the products and services in respect of the project as follows:

152.10.1 FSG will be compensated during the Term and Extended Period, as the case may be, of the Project by way of direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every six months on the basis provided for in the Draw-down schedule, as follows:

- (a) On the commencement date – 30% of the Project Value, being €30 million;
- (b) On the first day of the 6th month after the commencement date – 20% of the Project value, being €20 million;
- (c) On the first day of the 12th month after the commencement date – 20% of the Project value, being €20 million;

- (d) On the first day of the 18th month after the commencement date – 20% of the Project value, being €20 million;
- (e) On the first day of the 24th month after the commencement date - 10% of the project value, being €10 million.

152.11 Clause 12.1 says that the loan funds procured from finance providers would be paid directly, not to the Kingdom of Lesotho, but directly to FSG on a six-monthly basis.

152.12 Clause 17.1.3 provides that the Lesotho Government warrants that “it will have signed and bound itself to the terms of the Finance Agreement before or contemporaneously with the execution by the Lesotho Government of this Agreement”.

152.13 In terms of clause 18 of the Supply Agreement, FSG is afforded the first opportunity to provide any renewable energy, energy efficiency or electricity generation opportunities with the Government of Lesotho for five years from the commencement date. It is extraordinary that any such right could be granted without an open and competitive procurement process.

152.14 Clause 22 of the contract provides for extraordinarily punitive liquidated damages in the event of termination. Clause 22.2.2 provides for a payment of 50% of the remaining unpaid drawdown amount in respect of the project as compensation to FSG in the event of termination.

153 This is no ordinary Supply Agreement for at least two reasons:

153.1 In addition to its supply obligations, it functions as a loan agreement, which imposes full responsibility on the Kingdom to repay the loan funding provided by the Finance Providers. The consideration for the Supply Agreement is linked directly to the loan arrangement.

153.2 It includes a purported consent to arbitration that is fundamentally at odds with the Kingdom's sovereignty and independence.

154 The Kingdom never did conclude a finance agreement separately from the Supply Agreement. This was known to Mr Frazer and Minister Ts'olo when the Supply Agreement was purportedly signed.

155 During the applicant's ongoing investigation, the applicant has confirmed with KfW-Ipex Bank that the finance agreement contemplated in the Supply Agreement was not concluded. A copy of the confirmation that the finance agreement was not concluded dated 27 July 2021 is attached as "FA49". Nobody in the Lesotho Government confirmed receipt of a draft finance agreement for consideration.

156 Despite knowing that the finance agreement had not been concluded, FSG and Minister Ts'olo seemingly signed the Supply Agreement, which contained significant financial commitments regarding the funding of the procurement of the goods and services were created for the Kingdom.

157 It is extraordinary that a contract of this scale and value could purport to have been signed absent any procurement process and without the concurrence of

Cabinet, or Parliament, in particular since FSG does not appear to be a company of substance.

158 The contract would further strain the Lesotho Government's total revenues, which are already deficient to cover the Kingdom's expenses. The Kingdom resorts to heavy dependence on donor grants and loans. Since the Lesotho Government cannot cover a significant portion of its main expenses from its total revenues, diverting any source of these insufficient revenues to pay the judgment sum will ultimately result in widespread poverty, disease, and hunger.

159 For example:

159.1 The 2021 annual budgetary expense for wages and salaries amounts to M6.412 billion, the most significant expense in the government's annual budget. On average, this represents the sum of M533.3 million per month. If the Lesotho Government reallocates these funds to cover the judgment debt, all salaries of government employees will not be paid for one month, and approximately 60% of all salaries for the next month will be unpaid.

159.2 The 2021 total annual budgetary expense for subsidies to cover feeds and fertilisers amount to M850,4 million. On average, this represents the sum of M70,9 million per month. If the government reallocates the funds for this expense to cover the judgment debt, no subsidies will be paid to cover the purchase of feeds and fertilisers.

160 FSG has done nothing of substance to implement the Supply Agreement. As a result, the effect of execution of the judgment debt would confer on FSG a massive windfall, at the expense of the citizens of Lesotho, in exchange for no value.

GROUNDS OF REVIEW

First ground: contravention of the Constitution

161 Chapter X of the Constitution deals with Finance.

162 Section 110 of the Constitution provides that:

“All revenues or other money raised or received for the purposes of the government of Lesotho (not being revenues or other moneys that are payable, by or under an Act of Parliament, into some other fund established for any specific purpose or that may, by or under such an Act, be retained by the authority that received them for the purpose of defraying the expenses of that authority) shall be paid into and from a Consolidated Fund.” (My emphasis)

163 Section 111 of the Constitution deals with withdrawals from the Consolidated Fund and provides, in relevant part:

- “1. No moneys shall be withdrawn from the Consolidated Fund except—
 - a. to meet expenditure that is charged upon the Fund by this Constitution or by any Act of Parliament; or
 - b. where the issue of those moneys has been authorised by an Appropriation Act or by an Act made in pursuance of section 113 of this Constitution.
2. Where any moneys are charged by this Constitution or any Act of Parliament upon the Consolidated Fund or any other public fund, they shall be paid out of that fund by the Government of Lesotho to the person or authority to whom payment is due.

3. *No moneys shall be withdrawn from any public fund other than the Consolidated Fund unless the issue of those moneys has been authorised by or under any law.*
4. *Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Fund or any other public fund."*

164 Section 112 of the Constitution deals with the authorisation of expenditure from the Consolidated Fund by appropriation. It provides, in relevant part:

- "1. The Minister for the time being responsible for finance shall cause to be prepared and laid before both Houses of Parliament in each financial year estimates of the revenues and expenditure of Lesotho for the next following financial year.*
- 2. When the estimates of expenditure (other than expenditure charged upon the Consolidated Fund by this Constitution or by any Act of Parliament) have been approved by the National Assembly, a bill, to be known as an Appropriation bill, shall be introduced in the Assembly, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums, under separate votes for the several heads of expenditure approved, to the purposes specified therein."*

165 Section 116 of the Constitution provides:

- "1. All debt charges for which Lesotho is liable shall be a charge on the Consolidated Fund.*
- 2. For the purposes of this section debt charges include interest, sinking fund charges, the repayment or amortisation of debt and all expenditure in connection with the raising of loans on the security of the Consolidated Fund and the service and redemption of debt created thereby."*

166 The effect of these provisions is that:

166.1 Any revenue or money raised for the purposes of the Government of Lesotho must be paid into the Consolidated Fund.

166.2 Money may not be withdrawn from the Consolidated Fund except to meet expenditure charged upon the Fund by the Constitution or

authorised by an Act of Parliament. No money may be withdrawn from any public fund other than the Consolidated Fund unless authorised by law.

166.3 Money may only be withdrawn from the Consolidated Fund after a budget has been prepared by the Minister of Finance and placed before Parliament, whereafter Parliament must approve the budget and pass an appropriate Bill to give effect to it.

166.4 Any debt for which the Kingdom is liable is required to be a charge upon the Consolidated Fund.

167 The Supply Agreement breaches all of these constitutional requirements.

168 First, it purports to fetter the power of the Minister of Finance to prepare a budget and the power of Parliament to enact that budget by imposing a contractual obligation on the Kingdom to provide for the payment of the debts arising out of the Supply Agreement in the budget.

168.1 Clause 11.1 states that the Kingdom "*shall be fully responsible for all repayments of the loan funding provided by the Finance Providers*".

168.2 Clause 11.3 states that the Kingdom shall ensure "*that sufficient funds are set aside and at all times available for purposes of all the loan repayments*".

168.3 In terms of clause 11.4, the Kingdom "*undertakes that it will comply with all the Finance Agreements covenants, including but not limited to*

the peremptory terms stipulating that the loan must be a separate line item in the budget”.

168.4 The power to determine the Kingdom’s budget is conferred exclusively on the Minister of Finance in terms of section 112 of the Constitution.

168.4.1 The Minister of Finance is required to exercise that power by preparing and laying before both Houses of Parliament estimates of the Kingdom’s revenues and expenditures for the next financial year (section 112(1) of the Constitution).

168.4.2 Once the National Assembly has approved these estimates, an Appropriation Bill must be introduced in the assembly, providing for the issue from the Consolidated Fund of the sums necessary to meet the expenditure and the appropriation of those sums, under separate votes for the several heads of expenditure approved (section 112(2) of the Constitution).

168.4.3 Even Parliament would have needed the consent of the Cabinet to discharge any such obligation. Section 79 of the Constitution prohibits either House of Parliament from proceeding upon any Bill for the imposition of any charge on the Consolidated Fund or any public fund of Lesotho otherwise than by reduction, except with the consent of Cabinet.

168.5 The obligations purportedly created in the Supply Agreement cut across all of these constitutional powers and obligations. They purport to oblige the Kingdom to make provision in its budget to spend enormous sums of money without any approval of that expenditure by the Prime Minister, Minister of Finance, or Parliament. The Supply Agreement purports to fetter the constitutional power and duty of the Minister of Finance to determine the national budget and the constitutional authority and duty of Parliament to approve that budget and legislate for appropriations from the Consolidated Fund.

168.6 Any contract which purports to fetter the constitutional powers of the Minister of Finance and Parliament in this way is unconstitutional and unlawful. FSG must have known that an agreement of this kind would never survive constitutional scrutiny.

169 Second, it purports to impose obligations to incur debt on the Kingdom but provides that the revenue raised as a result of the Kingdom incurring that debt would not be paid into the Consolidated Fund but would be paid directly to FSG.

169.1 The Supply Agreement provides that the funds would be paid directly to FSG from the lenders.

169.2 In terms of clause 12, FSG is compensated "*by way of a direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every 6 months*" in accordance with the timeline set out in clauses 12.1.1 to 12.1.5.

169.3 This is a breach of section 110 of the Constitution.

170 Third, it provides that FSG would be remunerated directly by the contemplated credit providers and not through authorised and lawful payment from the Kingdom's Consolidated Fund.

170.1 In this way, the payments from the Kingdom to FSG via the finance providers are removed from the scrutiny and oversight provided in the budgeting process in which the Minister of Finance and Parliament are constitutionally obliged to participate and conduct in terms of the Constitution.

170.2 This breaches the requirement that "*all debt charges for which Lesotho is liable shall be a charge on the Consolidated Fund*" in terms of section 116 of the Constitution.

170.3 The financial commitments in terms of the Supply Agreement gave rise to debt charges in respect of which the Kingdom was liable. The undertaking that these debt charges would be discharged in a manner other than prescribed in section 116(1) of the Constitution of Lesotho was a violation of the Constitution.

171 Fourth, the Supply Agreement purports to have all of these extraordinary and unconstitutional consequences based on the purported signature of a single Minister, absent any knowledge or approval from Cabinet or Parliament.

171.1 While I am advised and submit that these extraordinary and unconstitutional contractual arrangements could never be enforceable

on their own terms, they could most certainly never be enforceable based on a single signature by a single Member of Cabinet without having obtained any approval either from his colleagues in Cabinet, the Prime Minister or the Houses of Parliament.

171.2 The Constitution requires involvement by and approval from the Minister of Finance, Cabinet and Parliament whenever financial obligations of this kind, giving rise to debt incurred by the Kingdom and which must be paid from the Consolidated Fund, are incurred.

172 The Supply Agreement and the decision to enter into it are patently unconstitutional, unlawful, and invalid.

Second ground: contravention of the Public Procurement Regulations

173 The Supply Agreement was negotiated and signed without any open and competitive tender process, without any lawfully authorised entities' involvement to procure goods and services. This is a contravention of the Public Procurement Regulations, 2007, as amended.

No open tender

174 Schedule 1 of the Public Procurement Regulations provides:

"1. The following threshold shall apply:

- (a) for goods and services procured between the value of M0.00 to M50,000.00 direct contracting shall be applied;*
- (b) for goods and services procured between the value of M50,000 to M100,000 three quotations shall be obtained from three different service providers;*

(c) for goods and services above M100,000.00 the open tender method of procurement shall be applied.

2. *The Unit is required to secure from tenderers for goods, works or services to be procured at the cost above M100,000.00 to submit a tender security.*
3. *The registration fee for participation for procurement above the value of M100,000.00 shall be between M2,000.00 and M5,000.00 at the discretion of the Unit depending on the complexity of the tender documentation and the cost of producing them.” (My emphasis)*

175 The value of the procurement exceeded the thresholds set out in Schedule 1 clause (1)(c). The value of the Supply Agreement was approximately M1.7 billion. An open tender method of procurement was therefore required.

176 Part VI of the Public Procurement Regulations deal with open procurement procedures. Regulations 19 to 32B provide for a range of obligations that must be complied with in the conduct of an open procurement procedure. In this matter, no open tender nor any pretence of an open tender was conducted, and as a result, not one of the requirements of those regulations was satisfied.

177 The most egregious failures to comply with the duty to conduct an open tender are the following:

177.1 Regulation 19(1) requires that an invitation for an open tender must be announced and that all interested tenderers should be given an equal opportunity to participate. This was not done in the present matter. On FSG's version and in accordance with our investigations, FSG was awarded the contract following an unsolicited proposal to Minister Ts'olo and in the absence of any open publication or opportunity for any other tender to submit a bid.

177.2 Where a two-stage open tender process is conducted, the Unit (which is the Procurement Unit authorised under the regulations to carry out public procurement) is required to prepare tender documents to include relevant information required for tenderers to submit a satisfactory tender (regulation 20(4) and (5)). In this matter, no tender documents were prepared or published.

177.3 Tenderers participating in tenders for goods more than the threshold value specified in schedule 1 are required to submit tender security, which was required to be specified in the tender documents. Tenderers are required to submit a guarantee of between 1% to 2% of their tender price, and tenderers will not be considered if the required guarantees were not submitted (regulation 21(1) to (5)). No tender security was requested or provided from FSG in this matter.

177.4 The Procurement Unit must make invitations to tender available publicly through the mass media and on its web page. It is necessary to announce detailed information openly and transparently and provide it to any interested body without delay. Invitations to tender are required to include mandatory information such as a summary of the works, goods or services to be procured, special requirements of the tender, deadline for submission, the required validity period of tenders and a range of other information necessary to allow interested bidders to submit compliant bids (regulation 22). None of these requirements was complied with in the present matter, as there was no tender nor publication of any documents.

- 177.5 The Procurement Unit must make copies of the tender available to the public and tenderers in hard copy and in a form that can be downloaded from the internet (regulation 23). This was not done here.
- 177.6 Tender documents and invitations to tender were required to be prepared in either of the official languages and tenderers were invited to complete tenders in either of the official languages (regulation 24). In this matter, there was no invitation to tender and no tender documents.
- 177.7 The Procurement Unit is obliged to provide all tenderers with sufficient and equal time to prepare and submit tenders and to provide for enough time to make site visits and was required to make public the timeframe for the evaluation of tenders (regulation 25). None of this was done in this matter.
- 177.8 The tender panel is required publicly to open all tenders received and permit tenderers their representatives or other interested bodies to attend a tender opening. At the opening of tenders, the tender panel is obliged to announce and make a record of the tenderers' names, their tendered prices, alternative tender prices, overall price and price discounts and whether mandatory documents had been received. The Unit is required to make and keep a written record of explanatory notes provided from tenderers on request (regulation 27). None of these requirements was complied with in this matter.
- 177.9 The Procurement Unit is obliged to review tenders received to ensure that they satisfy the capacity qualifications set by the Procurement

Unit, technical specifications of the tender, and other terms, conditions, and requirements set out in the tender documents. Tenders that fail to meet the requirements set out in the invitation to tender are required to be rejected by the Procurement Unit (regulation 28). In this matter, there was no assessment of capacity qualifications, technical specifications or any terms, conditions or requirements, as there were no tender documents and no tender process conducted. FSG was never assessed for its capacity to provide the goods and services that were the subject of the Supply Agreement. The technical specifications of its proposal were never considered by anyone. There was simply no review of any tender and no bid was submitted. Instead, FSG obtained the signature of the purported Supply Agreement by Minister Ts'olo in the absence of any procurement process whatsoever.

177.10 The Procurement Unit is obliged to evaluate tenders. The primary criterion in assessing compliant tenders is tendered price. The Procurement Unit is required to evaluate the whole life cost of the overall tender instead of the initial cost of purchase. It is necessary to consider various factors affecting the overall economy, efficiency and effectiveness of the goods, works or services being procured. The price tendered is required to include taxes, insurance, transportation and all other expenses associated with the execution of the contract unless the tender documents provide otherwise. The Procurement Unit is required to evaluate compliant tenders, ranking them from lowest to highest, taking into account whole life costs and best long-term value for money. The Procurement Unit is required to consider the impacts

of the use of foreign currency where this was quoted by the tenderer (regulation 29).

177.11 In terms of regulation 10(2) of the Public Procurement Regulations, 2007, "*[t]he selection of the procurement procedure shall be based on the total cost estimate of the goods, works or services involved in a contract.*"

177.12 In this matter, there was no assessment or evaluation of tender prices or any cost estimate whatsoever. On the contrary, clause 9.1 of the contract expressly states that FSG cannot provide any price.

177.13 As a result, FSG was given free rein to determine pricing at its discretion as it implemented the contract. There was no comparison of competing bidders' prices because there were no competing bidders and no invitation for anyone to tender.

177.14 The Unit was obliged to invite the tenderer that had satisfied the requirements specified to enter into a contract. It was also required to advise the remaining tenderers that the tenderer who submitted the most favourable tender had been invited to enter into a contract (regulation 30). None of this was done in this matter. The Supply Agreement was signed absent any procurement process.

177.15 The Unit is obliged to reject all tenders where no compliant tender was submitted, and tendered prices exceeded the Unit's cost estimate by more than 50%, or the procurement process failed. There was no

tender submitted, no tendered price, and no attempt to comply with a mandatory procurement process.

177.16 Since the Supply Agreement was for commitment for a term of **two years**, and a possible 18-month extension (clause 1.1.7), Minister Ts'olo had to comply with regulation 32B, which states:

- “(1) A procurement that results in binding contractual and financial commitments that fall into future financial years shall be notified to the Chief Accounting Officer of the Ministry of Finance.*
- (2) A contract in terms of sub-regulation (1) shall not exceed five years and its continuation shall be subject to annual budget approved by Parliament.*
- (3) A contract in terms of sub-regulation (1) which extends in duration beyond a single financial year shall encapsulate within the contract documentation, a price control clause or a price variation clause in line with regulation 6.” (My emphasis)*

177.17 Minister Ts'olo did not notify the Chief Accounting Officer, nor did he inform the Ministry of Finance of the Supply Agreement before the agreement was signed. Minister Ts'olo acted alone. In addition to all the violations I have already listed above, Minister Ts'olo also breached regulation 32B when he decided to act alone to commit the Kingdom to a €100 million (M1.7 billion) financial commitment over two years.

178 There can be no doubt that the purported conclusion of the Supply Agreement was unlawful and invalid for failure to comply with Public Procurement Regulations.

Exceptional procurement procedures not permitted

179 Nor can it be suggested that the procurement fell within the exceptional provision for non-competitive procurement. 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.

180 Regulation 33 provides for exceptional procurement procedures:

"(1) Exceptional procurement procedures shall be carried out in the following ways:

- (a) limited tendering;*
- (b) comparison; or*
- (c) non-competitive procurement.*

(2) Matters pertaining to the exceptional procurement procedure but not regulated under this part shall be governed by the appropriate articles and provisions set out in Part III of these Regulations." (My emphasis)

181 Regulation 8 (as amended) provides:

"(1) The procurement unit shall seek approval from the tender panel to employ direct or sole-source contracting procedure under the following circumstances:

- (a) where the procurement is for the extension of an existing contract of similar nature for goods, works or services awarded in accordance with procedures set forth in these regulations;*
- (b) where additional purchases from the original supplier may be justified for reasons of standardization of equipment or spare parts so as to be compatible with existing equipment and the tender panel shall be satisfied in such cases that no advantage could be obtained by further competition and that the prices on the contract are reasonable;*
- (c) where the required goods, works and services are proprietary and obtainable from only one source;*

- (d) where the contractor responsible for a process design requires the purchase of critical items from a particular supplier as a condition of a performance guarantee or warranty;
 - (e) in exceptional cases of extreme urgency due to an emergency, provided the circumstances which gave rise to the urgency were neither foreseeable by the procurement unit nor the result of dilatory conduct on its part;
 - (f) in case of a contract that is a subject of a security caveat; and
 - (g) where the Minister determines that it is in the public interest that goods, works or services be procured as a matter of urgency and such emergency procurement shall meet one of the following criteria—
 - (i) compelling urgency that creates threat to life, health, welfare or safety of the public by reason of major natural disaster, epidemic, riot, war, abnormal snow, heavy floods, hurricane, extreme draught, wild fire or such other reasons of similar nature; or
 - (ii) where without the urgent procurement, the continued functioning of the government or procurement unit would suffer irreparable loss, the preservation or protection or unreplaceable public property, health or safety or public will be threatened.
- (2) For a single sourcing engaged in terms of sub-regulation (1), the procurement unit shall prepare a written description of the needs and any special requirements relating to quality, quantity, terms and time of delivery.
- (3) The procurement unit shall request a submission of a quotation and may negotiate with the sole tenderer.
- (4) Where the estimated value of the contract exceeds the threshold set out in schedule 1, the notice of the single source proceedings shall be published in the procurement bulletin or website.
- (5) The recommended contract award shall be submitted for approval to the tender panel.
- (6) Where a single sourcing method has been used, a copy of the contract and a copy of the tender panel's authority to use single sourcing method shall be submitted by the procurement unit to the PPAD immediately after signing the contract."

182 None of the jurisdictional facts necessary for direct or sole contracting contained in regulation 8 was satisfied in this matter.

- 182.1 The Procurement Unit never sought or obtained approval from the tender panel to employ direct or sole-source contracting.
- 182.2 The Supply Agreement was not for the extension of an existing contract of similar nature for goods, works or services already awarded in accordance with the procurement regulations.
- 182.3 The goods and services are not proprietary and obtainable only from FSG.
- 182.4 No emergency warranted the procurement of the products from a sole supplier. The Kingdom's energy policy provided for a timeframe of ten years over which the objectives of the policy would be realised. There was sufficient time within which the Kingdom could have conducted an open, transparent and competitive procurement process – if the products procured from FSG were considered part of the objectives of the energy policy.
- 182.5 FSG 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 FSG as the sole supplier without undertaking a public procurement process. I am advised that any number of renewable energy providers could quite easily provide finance and supply of renewable energy products of the kind that is the subject of the Supply Agreement. An expert affidavit confirming this will be filed together with or as soon as possible after this affidavit has been filed.

182.6 FSG is not an original equipment manufacturer, nor does it hold exclusive licences for the products or the services that FSG was to provide to the Kingdom in terms of the Supply Agreement.

182.7 The Supply Agreement is not a new contract linked to or directly relevant to a completed contract.

182.8 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 costs that may be derived through a competitive tender.

182.9 The products could not only be procured from FSG. There are other suppliers. This is also supported by the fact that FSG sought to gain an advantage over any other potential supplier in the Supply Agreement by including a right of first opportunity (clause 18 of the Supply Agreement).

182.10 None of the requirements contained in regulations 8(2) to 8(6) was complied with.

No authority to procure the Supply Agreement

183 The Procurement Unit is the only authority that is authorised to carry out a public procurement of goods and services on behalf of the Kingdom.

184 Regulation 3 provides for the authority of the Procurement Unit in the following terms:

- "(1) There is established a Procurement Unit to be known as the Unit which shall be an individual or a group of individuals authorized to carry out public procurement.*
- (2) The following bodies shall constitute the Unit when carrying out public procurement:*
- (a) ministries;*
 - (b) districts councils;*
 - (c) state owned legal entities;*
 - (d) any other bodies covered by public Law; or*
 - (e) any project implementing authority authorized to carry out public procurement and funded by foreign loans, grants and assistance."*

185 Regulation 4 provides for the functions of the Procurement Unit:

- "(1) The Unit shall apply Government Standard Conditions of Contract appropriate to the nature of the purchase.*
- (2) The Unit shall maintain, update and disseminate Government Standard Conditions of Contract.*
- (3) The Unit shall place advertisements for procurements and awards of contracts in the Contracts Bulletin of the Government."*

186 Minister Ts'olo did not have the authority to procure the products from FSG.

Had the Government decided to procure the goods and services from FSG, the Ministry of Energy would have commissioned its Procurement Unit to procure goods and services. Minister Ts'olo acted *ultra vires*.

187 In addition, the custodian of the energy policy framework is the Minister of Energy and Meteorology: "*Governance and coordination of the energy sector will be vested in the Government Department responsible for Energy.*" (page 8, paragraph (a) of the energy policy).

188 Yet, Minister Ts'olo concluded both the MOU and the Supply Agreement without getting approval to do so from the Minister of Energy and Meteorology. In terms of the policy, "[t]he private sector and cooperative associations will be eligible to participate in large power generation projects through a tendering process led by the public sector in relation with the resource plan."

189 I submit that Minister Ts'olo acted *ultra vires* by procuring products ostensibly in line with the objectives of the energy policy encroaching in the terrain of the Minister of Energy and Meteorology.

Conclusion on Procurement Regulations

190 The consequences for a contract that was concluded following a non-compliant procurement process conducted in contravention of the Public Procurement Regulations, 2007 are set out in regulation 39:

- "(1) The procurement process shall be regarded invalid and the subsequent contract void or voidable in the following cases:*
- (a) the contract shall have been entered into breaching the elements of the law of contracts;*
 - (b) The Unit entered into the contract without the approval of the chief accounting officer; or*
 - (c) The Unit entered into the contract breaching the procedures set out under these Regulations."*

191 The Supply Agreement must be declared void and set aside.

192 I emphasise that no reasonable tenderer in the position of FSG could have been unaware of the legal requirements applicable to the procurement of goods and services of this value. The Public Procurement Regulations have been promulgated and must be deemed to be known to any business wishing

to procure contracts from the Government of Lesotho. They constitute the necessary legal framework within which any lawful public procurement must take place.

193 FSG must accordingly have known that its procurement of Minister Ts'olo's signature on the Supply Agreement would not give rise to a lawful contract and could not possibly pass legal muster.

194 Accordingly, I submit that in line with regulation 39 of the Public Procurement Regulations, 2007, Minister Ts'olo's actions in appointing FSG as the sole and exclusive supplier of the goods should be regarded as invalid, and the Supply Agreement that resulted from the appointment should be declared void *ab initio*.

Third ground: contravention of the PFMAA

195 In terms of section 20 of the PFMAA, the Minister of Finance "*has responsibility for the management, supervision, control and direction of all matters relating to the financial affairs of Government which are not by law assigned to any other minister or authority*".

196 Section 28 of the PFMAA states:

"(1) The Minister, with the prior consent of Cabinet, shall approve any borrowings of funds or other assets for the public purposes of Government or of local authorities.

(2) Loan agreements on behalf of the Government shall be signed by the Minister only, after consultation with Cabinet.

- (3) *All funds borrowed in accordance with subsection (2) shall be paid into and form part of the Consolidated Fund.*
- (4) *The Minister may guarantee the repayment of loans on-behalf of Government.*
- (5) *Before approving any borrowing or guarantee, the Minister shall be satisfied that the beneficiary of the borrowing or guarantee has the capacity to repay the amount involved, together with any interest, within the term proposed."*

197 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.

198 The Supply Agreement required the Kingdom to borrow funds. It obliged the Kingdom to obtain funds on credit through FSG.

198.1 "*The Minister*" referred to in section 28 is the Minister of Finance. The definition of "*Minister*" in section 2 of the PFMAA is "*the minister responsible for finance.*"

198.2 In terms of section 28(1), before a lawful and valid decision could be taken to enter into the Supply Agreement, two things had to happen: (i) the Minister had to obtain Cabinet's consent; and (ii) the Minister had to approve the borrowing of funds. Neither of these requirements was met.

198.3 The Supply Agreement is in substance and effect a loan agreement. It purported to impose obligations on the Kingdom to obtain finance in terms of a loan agreement.

198.4 However, in terms of section 28(2), a loan agreement on behalf of the Government of Lesotho can only be signed by the Minister of Finance.

Because the supply agreement creates the obligation to enter into a loan agreement within the contemplation of section 28(2), in order to be valid and lawful, it had to be signed by the Minister of Finance. This requirement was not met.

198.5 In terms of section 28(3), *all funds borrowed in accordance with [section 28(2)] shall be paid into and form part of the Consolidation Fund*". This section gives statutory effect to the constitutional requirement set out in section 110 of the Constitution of Lesotho that any debt or financial commitments of the Kingdom must be paid into the Consolidated Fund. The Supply Agreement provides that the money that will be borrowed in terms of the finance agreement will be paid directly to the on-lenders or FSG. This is a contravention of section 28(3).

199 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 PFMAA.

Fourth ground: infringement of the Loans and Guarantees Act 15 of 1967

200 In terms of section 3 of the Loans and Guarantees Act, the Minister of Finance—

"may, in a financial year, raise outside Lesotho, upon such terms and conditions as to interest, repayment or otherwise as may be negotiated by the Minister, a loan or loans of such sum or sums as may be required to defray the expenditure which may lawfully be defrayed:

Provided that the total sum outstanding at any time in a financial year in respect of a loan or loans raised under this section in that year shall not exceed fifteen million rands, (or such greater sum as Parliament may, in relation to a financial

year, by resolution appoint), or the equivalent of thereof in the currency which the loan or loans is raised calculated at the rate of exchange in force at the time of the raising thereof, and such further sum or sums as may be necessary to defray expenses in connection with the raising thereof."

201 Section 4 adds that "*money borrowed under the provisions of section 3 shall be paid into and shall form part of the Consolidated Fund and shall be available in any manner in which that fund is available*".

202 This section gives further statutory effect to the constitutional requirement set out in section 110 of the Constitution of Lesotho that any debt or financial commitments of the Kingdom must be paid into the Consolidated Fund. Since the Supply Agreement stipulated that the funds would be paid directly to FSG, and FSG would be compensated directly by the borrower from whom the Kingdom allegedly undertook to borrow the funds, the Supply Agreement was concluded in contravention of section 4 of the Loans and Guarantees Act 15 of 1967.

203 Section 4 also clarifies that the Minister of Finance is the only member of Cabinet that may conclude an agreement that creates financial obligations for the Kingdom. Minister Ts'olo did not have any authority to sign the Supply Agreement in terms of which the Kingdom was purportedly required to borrow €100 million (M1.7 billion) from a foreign lender.

204 Moreover, in terms of the Supply Agreement, the Kingdom purportedly became obliged to incur an obligation to take out a loan of approximately €100 million (M1.7 billion). This exceeds the limit provided for in section 3.

Minister Ts'olo undertook to commit the Kingdom to the financing arrangement without Parliament's approval. Accordingly, the Supply Agreement was *ultra vires* and inconsistent with section 3 of the Loans and Guarantees Act.

Fifth ground: decision unreasonable and *ultra vires*

205 In the light of the provisions of the Constitution of Lesotho and the statutory framework that I have discussed above, 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 Ts'olo. Minister Ts'olo 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.

206 In view of the extraordinarily punitive consequences of concluding the agreement and the absence of any material benefit to the Kingdom, the decision was substantively unreasonable and irrational. A reasonable member of the Cabinet who is not a Minister of Finance would never commit the Kingdom to a loan of €100 million (M1.7 billion).

207 Minister Ts'olo acted in bad faith to the detriment of the Kingdom and 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 Ts'olo was not advancing the public interest of the Kingdom. Minister Ts'olo's actions in appointing FSG and concluding the Supply Agreement were unreasonable and fall to be reviewed and set aside.

Sixth ground: contravention of public policy

208 Given that the Supply Agreement breached the Constitution and the legislation set out above, its conclusion was also contrary to public policy. Moreover, the clauses in the Supply Agreement included the following warranties:

208.1 The Government of Lesotho warranted that the project complies with all the laws and met the requisite approvals of the Government;

208.2 The Government of Lesotho warranted that FSG was authorized to commence with the implementation of the project without delay, and

208.3 The Government of Lesotho warranted that it had signed the finance agreement and bound itself to the terms of the agreement before the Supply Agreement was concluded.

209 These warranties could only have been recorded for an ulterior purpose because it was known to both the signatories that the Kingdom had not concluded a finance agreement (signed by the Minister of Finance) at the date of the signing of the supply agreement.

210 It was, therefore, clearly the intention of the parties that the Kingdom would have breached the agreement before it was even concluded and thus entitle FSG to launch legal proceedings as it did claim damages whilst FSG had not provided any products or services.

211 The Kingdom cannot be bound to an agreement that includes undertakings and clauses that are clearly false and known to the parties that purported to

sign the agreement. It would 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 ultimately what FSG relied upon in its claim against the Kingdom in the arbitration.

Seventh ground: loans to private parties

212 In terms of chapter C, "*Private Sector Organisations*" of Annexure C of the Supply Agreement,

212.1 the Kingdom undertook to advance loans to private sector organisations (clause 7.1.4);

212.2 the term of the loans would be six or eight years (clause 7.1.9);

212.3 the private sector organisations would repay the loans to the Kingdom using a bank account that would have to be opened or set up presumably after the conclusion of the agreement (clauses 7.1.6 and 7.1.7); and

212.4 the private sector obligation may make deposits towards this loan, but is not obliged to do so (clause 7.1.8).

213 In terms of chapter A, "*Civil Servants*" of Annexure D of the Supply Agreement, the Kingdom undertook to advance loans to civil servants to enable them to purchase the products FSG would supply (clause 3). In terms of chapter B,

"*Private Sector Homes*" of Annexure D of the supply agreement, the Kingdom also undertook to provide loans to private sector homes to finance the installation of the products.

214 The Kingdom may only advance loans as contemplated in section 110 of the Constitution and the Loans and Guarantees Act. Minister Ts'olo contravened section 110 of the Constitution and section 4 of the Loans and Guarantees Act. This is because the monies that would be advanced to the third parties would not be paid into and out of the Consolidation Fund as required in terms of section 110 and section 4.

215 The Supply Agreement is unlawful and void *ab initio* because of this contravention of a provision of the Constitution of Lesotho.

Eighth ground: delegation of authority to appoint energy management entity

216 In terms of chapter C, "*Private Sector Organisations*" of Annexure C "*Buildings, Facilities and Infrastructure*" of the Supply Agreement, the Kingdom purportedly authorised FSG to appoint a third party entity that would provide energy management services for a fee. (clause 11 – including the subparagraphs)

217 The third-party energy management entity would be appointed for an indefinite term that would not exceed five years. (clause 11.5)

218 Minister Ts'olo was not authorised to delegate the procurement process for the appointment of the third-party energy management entity. This is impermissible in terms of the applicable legal framework.

219 The supply agreement is therefore unlawful because it authorised FSG to appoint the third-party energy management entity in breach of the Public Procurement Regulations.

ARBITRATION CLAUSE UNAUTHORISED AND INVALID

220 Since the Supply Agreement is void from inception and unenforceable, the agreement did not create any obligations in respect of which the Kingdom could have to submit itself to arbitration; the Supply Agreement did not produce a legal relationship between FSG and the Kingdom.

221 Since the Supply Agreement is void from the instance, nothing can be born from it as it is a non-existent agreement. It can be regarded as *pro non-scripto*; the Supply Agreement never came into force. Minister Ts'olo was never authorised to enter any agreement on behalf of the Kingdom. In particular, he was never authorised to waive the Kingdom's sovereign immunity by subjecting itself to the jurisdiction of a South African arbitrator.

222 The Kingdom disputes the existence of the Supply Agreement. It denies that there was ever any consent by the Kingdom of Lesotho to any part of the Supply Agreement and denies in particular that there was ever any consent to

arbitrate. Without consent to arbitrate by the Kingdom, the arbitrator never had jurisdiction over the Kingdom, and his award has no validity.

223 Because Minister Ts'olo lacked authority to bind the kingdom to the arbitration clause, it follows that the arbitrator could not have had jurisdiction because it is only in terms of a valid agreement to submit a dispute to arbitration that the Kingdom could be contended to have waived its sovereign immunity to adjudication and enforcement.

224 As I have explained above, Mr Ts'olo lacked the authority to enter into any agreement on behalf of the Kingdom, including an arbitration agreement. He did not obtain the approval of the Cabinet, Parliament, or any other arm of government before signing the agreement. Even if the signature on the agreement is his (which he denies), the signature of a lone Minister, acting on a frolic of his own, could never bind the Kingdom to the arbitration clause or subject it to the jurisdiction of the arbitrator.

225 I submit that any other finding is inconsistent with the Kingdom's sovereign immunity. The doctrine of foreign sovereign immunity provides that a foreign state is immune from the jurisdiction of the courts of another sovereign state. Because the Kingdom did not enter into any agreement with FSG, it did not waive its sovereign immunity and could not validly have been subjected to the arbitrator's jurisdiction.

226 As a result, no agreement came into existence by virtue of Minister Ts'olo's purported signature of the supply agreement. This applies equally to the arbitration agreement contained in clause 24.

227 The arbitration clause was a nullity. The arbitrator lacked jurisdiction to determine any dispute in terms of the supply agreement.

DELAY AND CONDONATION

228 As I have demonstrated above, the Kingdom has provided a full account of the delay in bringing this application.

229 Given the nature and circumstances of this case and the contents of this affidavit, I submit that the delay was not unreasonable. However, if this Court finds that the delay was unreasonable, it should be condoned having regard to all of the facts contained in this affidavit, including those that follow.

230 The Kingdom would be severely prejudiced if it were denied access to court on the basis of the conduct of rogue former government officials and employees, who appear to have deliberately attempted to delay or prevent the Kingdom from challenging or opposing the enforcement of or claims relating to the supply agreement by FSG. Refusing condonation in these circumstances would only reward their unlawful efforts.

231 The matters raised in this application are of profound significance to the Kingdom. They address important issues concerning fiscal affordability and

sustainability and the conduct of private parties who do business with the Kingdom.

232 While there has been a delay in instituting these proceedings, I submit that none of the respondents have been prejudiced by the delay.

233 FSG ought to have expected that the legality of the Supply Agreement would come under scrutiny because an essential and primary condition for enforcing the Supply Agreement, the conclusion of the finance agreement, did not occur. The Supply Agreement was always dependent on the conclusion of the finance agreement. Therefore, it was unreasonable for FSG to seek to enforce the Supply Agreement when the finance agreement had not been concluded.

234 The applicant only became aware of the nature of the Supply Agreement when I found out about the court order through media reports on 18 May 2021, and I instructed the applicant to investigate the matter.

235 The Public Accounts Committee of the National Assembly also initiated an investigation into the events leading up to the signing and non-response to arbitration and court processes in this case. The Public Accounts Committee has ceased its investigation due to pending judicial processes in different jurisdictions.

236 Me and the applicant had the difficult task of attempting to understand the circumstances which gave rise to the decision to appoint a supplier and agreeing to a financing arrangement for €100 million (M1.7 billion) without a

competitive process and without the concurrence of the Ministers of Finance, Energy and Development and Cabinet approval. The decisions and events surrounding the appointment and the conclusion of the supply agreement and the arbitration proceedings are inexplicable.

237 It also appears that deliberate attempts were made by Minister Ts'olo and FSG to disguise the true nature of these decisions and to hide relevant information from the only government officials that had the authority to make such an appointment and conclude such a supply agreement. The efforts to understand these decisions and events have been further complicated because many of the critical role players claim ignorance and are not openly and frankly cooperating with the investigators.

238 Given the nature of the allegations and the potential consequences for the Kingdom, the then-Acting Attorney-General had to assemble a team in various Ministries to conduct the investigation. The Acting Attorney-General assembled the team on 19 May 2021.

239 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 were the edictal citation with annexures comprising the arbitration proceedings, and the arbitration award. The Commission of Inquiry was also initiated around this time.

240 These investigations may produce new evidence that was not available to the applicant and me at the time of preparing this affidavit. As a result, the

applicant reserves its right to address any new evidence that may come to light in its replying affidavit or by means of appropriate supplementary affidavits. The applicant also reserves its right to seek additional relief, either in these proceedings or in future proceedings, in light of the new evidence that may emerge.

241 The information about the nature of the Supply Agreement and the events around how it was concluded was only discovered during the investigations conducted by the applicant's office. Since discovering the unlawful nature of the supply agreement and the circumstances surrounding the conclusion of the agreement, the Kingdom acted expeditiously and with the necessary haste to launch this review application.

242 In the intervening period, the Kingdom had to prepare and launch the litigation that was launched in the High Court of South Africa to stay the implementation of the court order obtained as a result of the arbitration proceedings. The preparation and launching of the application took place over the entire month of June 2021. The application in South Africa was launched on 18 June 2021. After that application was launched, the applicant instructed its legal representatives to launch this review application.

243 I, therefore, submit that the applicant has not unreasonably delayed bringing this application when considering the time that had lapsed since 18 May 2021, when I first discovered the nature of the Supply Agreement and the suspected illegality surrounding the conclusion of the agreement.

244 However, if there was any unreasonable delay, it should be condoned. I have had to ensure that I obtained all the necessary information to support the basis of this review application before launching the application. The applicant could not have approached the Court earlier.

245 It would be in the interests of justice and just and equitable for this Court to overlook or excuse the applicant's delay in launching this review application. The factors set out above in relation to the harm that will be suffered by the Kingdom if this application is not upheld weigh in favour of condonation.

246 Moreover, there also appears to have been a deliberate and concerted effort to conceal the nature of the Supply Agreement and to ensure that FSG benefits to the detriment of the Kingdom. This observation is supported by the fact that even once a dispute arose about the enforcement of the unlawful agreement, Minister Ts'olo, despite knowing that the Office of the Attorney-General represents the Kingdom in civil disputes launched against the Kingdom did not inform the office of the Attorney General of the dispute. Instead, all the documents relating to the dispute were stored away in his office.

247 This Court's intervention is required to avoid the perpetuation of unlawful activities and to deter such activities. This matter raises issues of fundamental importance related to unlawful activities and irregularities in procurement, with enormous financial implications for the Kingdom. The applicant is thus required, in the interest of the Kingdom, justice and the national interest, to take decisive steps in correcting the wrongs of rogue government employees

and officials. It is clear that the decisions under review in this application are unlawful in a number of respects and require immediate action by the Kingdom. As I have demonstrated, the Kingdom has strong prospects of success in this application. As a result, legality and the rule of law also weigh in favour of condonation.

248 So, to the extent that the applicant is found to have delayed and that the delay is unreasonable, the applicant prays that this Court should condone the delay.

THE APPROPRIATE REMEDY

249 As a result of the grounds of review set out above, the impugned decision, as well as the Supply Agreement and the arbitration agreement it contains, must be declared unlawful and invalid and set aside.

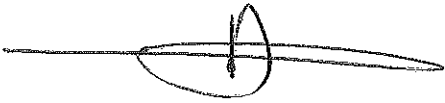
250 In the circumstances of this case, as set out in detail throughout this affidavit, the appropriate remedy is a declaration that Minister Ts'olo's decision to appoint FSG was unlawful and should be set aside, and the Supply Agreement is invalid and void *ab initio*.

251 This order is appropriate because the Kingdom cannot be compelled to comply with any of the terms or conditions, or obligations stipulated in the supply agreement. Nor can FSG be permitted to profit or benefit in any way from a purported agreement that is so patently and obviously unlawful.

CONCLUSION


245 For the reasons set out above, I submit that the Kingdom has made out a case for the relief sought in the notice of motion.

WHEREFORE, the applicant prays for the relief in the notice of motion.



DEPONENT

THUS, SWORN AND SIGNED TO BEFORE ME IN MASERU BY THE DEPONENT ON THE 20th OF SEPTEMBER 2021 HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS HEREOF


COMMISSIONER OF OATHS

ATTORNEY
CAPACITY

LESOTHO
AREA

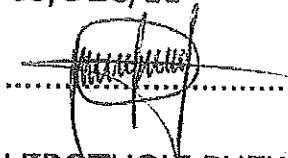
"FA1.1"

SAVINGRAM

FROM : GOVERNMENT SECRETARY

TO : PS JUSTICE AND LAW

REF NO : GS/DEC/11

SIGNED : 
(Full Signature)

NAME : LEROTHOLI PHEKO
(Typed)

DATE : 08 SEPTEMBER, 2021

RECEIVED DATE STAMP

MINISTRY OF JUSTICE
AND LAW

08 SEP 2021

PRINCIPAL SECRETARY
P.O. BOX 33, MASERU 100, LESOTHO

FILE NO:.....
Receiving Min./Dept)

2021-09-08

P.O. BOX 33
MASERU - LESOTHO

GRANTING OF POWER OF ATTORNEY

Memorandum **C3(2021/10/2)128** by the Honourable Minister of Justice and Law

At its Cabinet Meeting on Tuesday 07th September, 2021 under "**Memoranda**"

Cabinet Approved:

The granting of Power of Attorney to the Right Honourable the Prime Minister of the Kingdom of Lesotho, Dr. Moeketsi Majoro, to initiate before the courts of Lesotho, all proceedings, applications, suits and court actions of whatsoever kind and nature against any defendant and/or respondent, including against Frazer Solar GmbH, to defend any suit or suits or other proceedings brought against the Kingdom of Lesotho and to perform any other actions incidental thereto.

"FA1.2"

FS2

SUPPLY AGREEMENT

entered into between

FRAZER SOLAR GmbH
("FSG")

and

Office of the Prime Minister for and on behalf of the **GOVERNMENT OF LESOTHO**
("GOL")

MA/MS

1. DEFINITIONS

1.1. In the Agreement, including clause this 1, unless the context indicated a contrary intention or unless inconsistent with the context, the following expressions shall have the respective meanings set out below and cognate expressions bear corresponding meanings -

1.1.1. "this Agreement" means this supply agreement together with all annexures.

1.1.2. "Applicable Laws" means the applicable anti-corruption laws, including but not limited to, the Prevention of Corruption and Economic Offences Act 5 01 1999 (applicable law in Lesotho), the UK Bribery Act, the Prevention and Combating of Corrupt Activities Act ("POCCA", applicable in South Africa) and the US Foreign Corrupt Practices Act;

1.1.3. "Commencement Date" means 1 October 2018;

1.1.4. "DBSA" means the Development Bank of Southern Africa;

1.1.5. "the Draw-down Schedule" means the schedule of cash draw-downs referred to in the Finance Agreement(s), and referred to in clause 12 hereof, in order for the Project to remain cashflow positive throughout the Term and/or Extended Period, as the case may be;

1.1.6. "Evaluation Criteria" means the criteria in terms of which the financial feasibility of each installation per Site, to the extent required, will be assessed up front, determined and measured, as follows:-

1.1.6.1. payback period in years, to one decimal place of accuracy;

1.1.6.2. taking account of the total installed costs of the Product:-

- 1.1.6.2.1. including VAT if the product owner is not registered for VAT and VAT is applicable; or
- 1.1.6.2.2. excluding VAT if the product owner is registered for VAT and VAT is applicable;
- 1.1.6.3. Including interest charges and other fees payable that are reasonably known at the time;
- 1.1.6.4. at the current electricity price paid, and increased at the ten year average annual price increase rate of 10.1%;
- 1.1.6.5. at the five year average EUR/ZAR exchange rate of 15.0;
- such that for the avoidance of doubt, the Project is premised on a payback of less than 10 years, which entitles and authorises FSG to proceed with the installation of Products without delay;
- 1.1.7. "Extended Period" means the additional time of 18 months, or such longer period as the parties may agree to in writing, afforded by GOL in order for FSG to complete installations if for any reason the installation schedule in respect of the Project is incomplete at the end of the Term;
- 1.1.8. "the Finance Providers" means the organisations involved in providing the loan finance for the Project, which includes, but is not limited to, KfW-Ipex Bank, Euler-Hermes and the on-lending institution;
- 1.1.9. "the Finance Agreement(s)" means the loan agreement(s) concluded between the MFL on behalf of GOL and the Finance Providers, and annexed hereto as annexure A;
- 1.1.10. "FSG" means Frazer Solar GmbH, a company duly registered and

- incorporated in terms of the company laws of Germany, with registered address at Bruno-Bürger Weg, 142-144, Berlin, Germany;
- 1.1.11. "the FS Group" means all the companies within the FS Group, including, Frazer Solar International, Frazer Solar Australia, Frazer Solar South Africa, Frazer Solar Lesotho, FSG, its holding company or companies, subsidiaries and affiliates;
- 1.1.12. "FSL" or "Frazer Solar Lesotho" means Frazer Solar (Pty) Ltd, a company registered in Lesotho, which entity will manage all aspects of the Project in Lesotho;
- 1.1.13. "GOL" means the Kingdom of Lesotho, c/o the Office of the Prime Minister, with physical address at Government Office Complex Phase 1 Qhobosheaneng, Maseru 100, Lesotho and postal address PO Box 527, Maseru, 100, Lesotho;
- 1.1.14. "GOL Energy Policy" means the energy policy titled "Lesotho Energy Policy 2015-2025" formulated and published by the Ministry of Energy on behalf of the GOL;
- 1.1.15. "LEC" means the Lesotho Electricity Corporation;
- 1.1.16. "the LNDC" means the Lesotho National Development Corporation, a government entity who owns and rents out buildings to industrial and commercial customers;
- 1.1.17. "the MFL" means the Ministry of Finance of Lesotho;
- 1.1.18. "on-lending institution" means a South African domiciled bank selected by KfW-Ipex Bank to on-lend the KfW-Ipex funds to GOL, such on-lending mechanism chosen as if reduces the financing costs for GOL as compared to a direct loan to GOL from KfW-Ipex;
- 1.1.19. "Products" means energy efficient products supplied to GOL by

- the FSG Group, including but not limited to, solar water heating systems, solar photovoltaic systems, LED lighting products, electricity storage batteries, and other energy efficient products, items and equipment, together with any ancillary items and equipment deemed necessary by FSG in their sole discretion, for the Products to operate;
- 1.1.20. "the Project" means the provision of financing and Products required to realise the goals and/or key requirements of the energy policy of GOL all of which flow from the acceptance by GOL of the Project Proposal;
- 1.1.21. "the Project Committee" means the committee appointed by GOL to liaise with FSG in the management of the Project;
- 1.1.22. "the Project Proposal" means the FSG Energy Efficiency and Employment Creation Project dated 1 August 2018, which is annexed hereto marked B;
- 1.1.23. "PSO" means private sector organisations;
- 1.1.24. "PV" means photovoltaic;
- 1.1.25. "Quality Standards" means the quality standards and applicable to any of the Products and/or Spare Parts and/or Services;
- 1.1.26. "Regulations" means the Public Procurement (Amendment) Regulations 2018, and all updates and amendments in regard thereto, published from time to time by the Minister of Finance in terms of s61 of the Public Financial Management and Accountability Act, 2011, and on the authority of His Majesty the King of Lesotho;
- 1.1.27. "Services" means the services associated with any of the Products, Spare Parts, and equipment, including but not limited to installation, repair, technical assistance or energy management services in



regard thereto;

1.1.28. "Site" means the site selected for the installation of any of the Products and/or the rendering of any Services;

1.1.29. "Spare Parts" means spare parts to replace used or defective parts of the Products;

1.1.30. "Target Homes" means homes in Lesotho that use paraffin and candles as the primary source of lighting and who will be provided with a solar light with in-built phone charger;

1.1.31. "Technical Specifications" means the technical specifications and applicable to any of the Products and/or Spare Parts and/or Services;

1.1.32. "Term" means the two year period calculated from the Commencement Date within which it is anticipated by the Parties that the Project will be implemented and the Services will be rendered.

1.1.33. "VAT Act" means the Value Added Tax Act no. 9 of 2001 of Lesotho;

1.2. Unless the context indicates a contrary intention, a word to which a meaning is ascribed in the text of this Agreement shall bear that meaning whenever such word appears thereafter.

2. INTERPRETATION

2.1. The headnotes to the clauses in this Agreement are for reference purposes only and shall not be used in the interpretation thereof.

2.2. In this Agreement, including clause 1, unless inconsistent with or otherwise indicated by the context.

2.2.1. words which signify or denote-

2.2.1.1. any gender shall import and include the other genders;

2.2.1.2. a natural person shall import and include an artificial person and vice versa;

2.2.1.3. the singular shall import and include the plural and vice versa;

2.2.2. A day shall exclude Saturdays, Sundays and gazetted public holidays in the Republic of South Africa.

3. INTRODUCTION

3.1. In terms of its energy policy, the GOL intends to reduce its current imported electricity requirements by way of, amongst other things, replacing water heaters with solar water heaters and implementing other demand-side management tools such as energy efficient lighting.

3.2. FSG wishes to provide and/or facilitate the financing and provide the Products to GOL in order for GOL to substantially implement its energy policy (the Project).

3.3. In order to implement the Project, FSG is able to source loan funding to the value of €100 000 000 (one hundred million Euros) from the German Government channelled through the on-lending institution.

3.4. The Project is large scale and is likely to result in the installation within Lesotho of large volumes of solar water heaters, solar photovoltaic systems and LED lights, amongst other things, across the following range of sectors:

3.4.1. Buildings, facilities and infrastructure;

3.4.1.1. GOL buildings, facilities and infrastructure;

3.4.1.2. LNDC properties;

- 3.4.1.3. Industrial and commercial customers;
- 3.4.2. Residential housing;
 - 3.4.2.1. civil servant housing;
 - 3.4.2.2. private sector housing;
- 3.4.3. Non-electrified households;
 - 3.4.3.1. households that use paraffin and candles as the primary lighting source;
- 3.5. The Project will result in very significant costs savings and generate considerable net cash flow to the GOL. Other benefits to GOL include employment creation, a reduction in paraffin and candle lighting, reduced reliance on imported electricity, and lower electricity costs to commercial, industrial and residential users.
- 3.6. It is estimated that the Project will be implemented over a period of two years from the Commencement Date, but the Parties have provided for an extended period should it be required.
- 3.7. The Parties hereto wish to record the terms and conditions by which the supply of Products and Services by FSG to GOL will be governed.

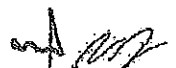
4. APPOINTMENT

- 4.1. In consideration of the capability, skill and experience of FSG, GOL hereby with effect from the Commencement Date appoints FSG as its sole and exclusive supplier to supply the Products and to render the Services in respect of the Project. FSG accepts such appointment and commits itself to achieving the performance and goals in respect of the Project.
- 4.2. GOL authorises FSG to manage the Project in such manner as FSG reasonably deems fit, including utilising the products, skills and expertise of the FS Group, provided that each Installation, to the extent expressly required by GOL, achieves a payback to break even within a period of 10 years in

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- 3.4.2. Residential housing;
 - 3.4.2.1. civil servant housing;
 - 3.4.2.2. private sector housing;
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accordance with the Evaluation Criteria.

- 4.3. This Agreement shall not be construed as forming an association or partnership of any kind between the parties hereto. The Products to be supplied and the Services to be rendered in respect of the Project are provided and rendered on an arm-length's basis by FSG and neither Party appoints the other as its agent, or binds the other to any liability whatsoever, save for the reciprocal obligations stipulated herein.

5. PRODUCT SUPPLY TERMS

5.1. General

- 5.1.1. FSG shall with effect from the Commencement Date supply the Products (and value added products) and render the required Services to GOL, subject to the terms and conditions of this Agreement.
- 5.1.2. Throughout the Term (and/or Extended Period, as the case may be) of the Project, FSG shall keep GOL informed and shall provide GOL with the necessary technical and technological information and innovations developed by FSG in relation to the Products and/or the Services, of which FSG reasonably becomes aware (from its supplier and manufacturing base) with a view to using it's best endeavours to ensure that the Products, Services, equipment, parts and spare parts remain of sound quality and purpose.
- 5.1.3. GOL acknowledges that FSG is an expert in its field and as such will entrust the decision-making in respect of the optimal Product-mix and Product solutions applicable to each Site solely to FSG. FSG in turn undertakes to exercise its discretion reasonably.
- 5.1.4. GOL and FSG acknowledge that time is of the essence with the Project, and that FSG is accordingly authorised by GOL to proceed without delay in the implementation thereof. In this regard GOL undertakes not to interfere with or delay the roll-out of the Project

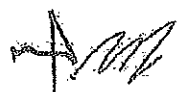
with an approvals regime. FSG will have a full and unfettered discretion to decide on the Product mixes and scheduled input costs for each Site. FSG will in order to give GOL a measure of protection, be guided per Installation where required by the Evaluation Criteria to ensure that each Installation is financially viable.

- 5.1.5. GOL acknowledges that key personnel, Products, equipment, components and parts thereof may be sourced from and supplied by various FS Group companies. Accordingly, GOL accepts and authorises FSG to engage with FS Group companies if so required.
- 5.1.6. Risk in and to the Products supplied in terms of this Agreement shall pass to GOL on delivery thereof.
- 5.1.7. Unless otherwise agreed to in writing, delivery of Products will take place at GOL premises and/or the respective Sites.
- 5.1.8. Notwithstanding that the risk in and to the Products shall pass to GOL on delivery thereof, ownership in and to the Products shall remain vested in FSG until such time as the full draw-down consideration in respect of the Products or batch thereof has been fully discharged.
- 5.1.9. GOL authorises FSG to proceed with any installation or in the making of any decisions pertinent to the project in the event that a meeting as per 5.2.9 is not timeously convened by GOL and/or where as a result of any delays by GOL the timeframe required to maintain the Project within the schedule provided is jeopardised. GOL agrees that to the extent that FSG suffers a loss as a result of the tardiness of GOL, then, notwithstanding the other rights of FSG in terms of this Agreement or in law, FSG will be entitled to invoice GOL on a monthly basis for any such losses.
- 5.1.10. For so long as the Evaluation Criteria are required and met at time of Installation, FSG shall be entitled to undertake all and any

necessary capital and ancillary work projects in order to facilitate the installation and operation of the Products and Services. Examples of the type of projects envisaged include, but are not limited to, roof strengthening prior to the installation of panels, ground levelling and/or the laying of concrete slabs on which storage batteries will be placed. GOL acknowledge that for so long as the Evaluation Criteria are required and met, FSG will not need any specific consents or approvals process to be in place in this regard.

5.2. GOL' Obligations

- 5.2.1. GOL will assist with the provision of a factory shell, office space, warehousing and storage throughout the country which FSG may avail itself of if it so desires.
- 5.2.2. GOL will assist, where necessary in respect of VAT registration, business permits and licences, and other administrative areas to ensure the smooth and efficient running of this Agreement and the Project.
- 5.2.3. GOL will ensure that FSG will at all reasonable times have full and unfettered access to all Sites. This will assist FSG in its endeavours to timeously perform its obligations in terms of this Agreement.
- 5.2.4. GOL undertakes to expedite work permits and/or VISA approvals for all of FSG's and FSG Group's personnel (who shall include but not be limited to specialists and technicians) and furthermore that GOL will not impose any restrictions on the number of international consultants and/or employees that FSG, in its discretion, acting reasonably, may elect to retain for purposes of the Project.
- 5.2.5. GOL acknowledges that the free flow of goods across the Lesotho border is critical to the achievement of the timelines and to the success of the Project. As such, GOL will ensure that the clearance of goods at the Lesotho/South African border in relation to this



Project is at all times expedited such that the goods are cleared within 24 hours.

5.2.6. GOL agrees that all orders from, deliveries of, and supply of Products will take place strictly by and/or via FSG and the FS Group exclusively. GOL undertakes not to circumvent, bypass or otherwise solicit alternative sources for the Products or the Services in respect of the Project, unless FSG and GOL agree thereto in writing by way of an Addendum.

5.2.7. Records of Products installed will be kept and stored by FSG for a period of twelve years from the date of delivery of the Products and shall be made available to GOL with one month's written notice.

5.2.8. GOL acknowledges that FSG in its sole discretion manages the appointment of suppliers, contractors, employment of staff and so on. GOL warrants and represents to FSG that it will not put influence on FSG to use any particular supplier, contractor or person.

5.2.9. GOL represents to FSG that it will provide full, complete and timely access to all of its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities including LEC and LNDC, in order for FSG to meet its obligations in terms of this Agreement in a timely manner. All such meeting requests from FSG shall be arranged by GOL within 24 hours or such reasonable short period thereafter.

5.3. Project Committee

5.3.1. GOL undertakes to establish a Project Committee manned with sufficient staff to liaise with FSG in the management and facilitation of the Project.

5.3.2. The Project Committee shall be chaired jointly by the Minister in the Prime Minister's Office or other Minister nominated by the Prime

Minister ("Responsible Minister") to lead the project on behalf of GOL and the FSG local representative ("the joint chairpersons").

5.3.3. In addition, certain pre-selected senior civil servants shall be co-opted onto the committee in order to facilitate the rapid roll-out of the Project.

5.3.4. The Project Committee members will be engaged in the Project on a full time basis and its primary function will be to ensure smooth communication and elimination of any interruptions in relation to the necessary activities pertaining to the Project.

5.3.5. The Project Committee will include members with knowledge of public service, energy, local government, finance and the like.

5.3.6. A finance officer will be appointed by GOL to sign the on-lending loan contracts on behalf of the GOL and such finance officer will be accommodated at FSG's Administration Centre in Lesotho.

5.3.7. GOL undertakes to obtain FSG's approval of the committee members so that FSG knows exactly who it needs to deal with in relation to which matters in order to roll-out the Project in a timely fashion.

5.3.8. The parties record that the committee members will provide the information, access and approval to FSG to the various government departments.

5.3.9. The Project Committee will meet regularly as determined by the joint chairpersons.

5.4. FSG's Obligations

5.4.1. FSG acknowledges that time is of the essence and that subject to full co-operation being given by GOL and the recipients thereof, that it will ensure that it will perform in accordance with the time



schedule at hand.

- 5.4.2. To the extent that FSG is unable, for any reason whatsoever, to supply any Product required by GOL, FSG will procure an alternative Product from suppliers. FSG reserves the right to not supply (or to limit the supply of) particular Products to GOL in certain instances, such instances include but are not limited to factors such as product quality, availability, supply times, cumbersome logistics, and the like.
- 5.4.3. In addition, FSG shall provide advice and information during the execution of the Project to GOL and to the recipients of the Products and Services at each Site.
- 5.4.4. In order to facilitate the receipt by GOL of timely and adequate supplies of Products from FSG, FSG will endeavour to maintain a centrally stored inventory of Products, from which FSG will strive to continually supply GOL. FSG will also endeavour to provide an efficient procurement service for GOL of all Products.
- 5.4.5. FSG will use Technical Standards in force globally in respect of the Products and determined relevant by FSG.
- 5.4.6. FSG will keep records of Product and/or Service rendered at each Site for purposes of audit, stock management and cost management in respect of the Project.
- 5.4.7. GOL and FSG will from time to time hold progress meetings at a location mutually agreed upon with a view to monitoring the progress/rollout of the Project.
- 5.4.8. FSG will ensure that it will have at its disposal all equipment and tools necessary for the performance of the Project and shall assign qualified personnel in sufficient numbers to perform the obligation within the required timeline and in accordance with the terms of this Agreement.

5.4.9. FSG shall maintain a complete, up to date and orderly documentary record of all installations completed by FSG as part of the Project. Information, records and documents of installations shall be available during reasonable business hours on 30 day's prior written notice for inspection by the neutral third party auditor at the sole cost of GOL for quality assurance purposes only.

5.5. Modifications

5.5.1. FSG shall within their discretion be entitled to make modifications to improve or to modify the Products, equipment or parts where such a need is identified.

5.5.2. In such event, and notwithstanding, the broad and unfettered discretion enjoyed by FSG in this regard, FSG will nevertheless act reasonably, and keep GOL informed of any such modifications.

5.6. Free issue materials by FSG

5.6.1. Materials such as components, equipment, tooling, patents, moulds, jigs, fixtures, accessories and the like shall be provided as part of the overall Project by FSG in its sole discretion for the performance of their obligations under this Agreement and as required to implement the Project.

5.6.2. These will remain under the care, control and custody of FSG and will be identified as FSG's property unless otherwise agreed in writing.

5.7. Dangerous Products

5.7.1. In the event that any of the Products, parts, equipment or spare parts supplied in terms of this Agreement contain dangerous substances or require particular safety precautions in their handling, transport, storage, or use, as the case may, then FSG shall before delivering or installing them supply in writing to GOL.

and the recipients of such products necessary information regarding the nature of such substances and the precautions to be taken.

5.7.2. FSG shall make sure before shipment that the appropriate instructions and warnings are clearly marked on such equipment, parts, spare parts and/or Products and are securely fastened to them as well as to the packages inside which they have been placed.

5.7.3. Furthermore, FSG shall provide in writing to the recipients thereof and/or GOL in particular with necessary indications, instructions and warnings enabling compliance with the applicable legal provisions or regulations in connection with safety and health.

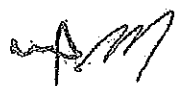
5.8. Maintenance

5.8.1. FSG shall ensure that it makes available as part of the Project all the necessary parts, both for preventative and corrective installation related maintenance of the Products delivered and/or the Services rendered in regard thereto as per standard practice as determined by FSG during the Project Term and Extended term.

5.8.2. FSG can provide ongoing service and maintenance of the Products to GOL for an additional cost to GOL if GOL so requires. Should GOL wish to avail itself of this it is to advise FSG in writing and a separate agreement will be entered into and added to this Agreement as an Addendum.

5.8.3. FSG will provide GOL with its recycling and jettisoning processes and recommendations in respect of the Products, equipment, parts, spare parts and components, and end-of-life cycle assemblies, as the case may be.

5.8.4. FSG shall provide the recipient of the Products and Services in respect of the Project with the necessary training on or before



commissioning of each solution at the relevant Site as required as determined by FSG.

5.8.5. This will include whatever documentation is required and whatever tools are required for such purpose.

5.9. Skills Transfer and Training

5.9.1. FSG undertakes to solicit, employ, and at its own cost to train Basotho individuals and companies to the maximum extent that it is able to within the timelines, budgets and quality standards which are required to complete the Project. In addition, FSG shall award Basotho individuals and companies as much of the installation work at the various Sites as is possible.

5.9.2. The parties record that approximately 1 000 (one thousand) jobs are likely to be created by the Project.

6. QUALITY STANDARDS, TESTS

6.1. GOL acknowledges and accepts that the Products will be compliant with various global standards and does not require any specific approval regime in relation to the Products. These standards include, but are not limited to, any one or more of the European Standards, American/Australian/South African (SABS) Standards and the International Safety and Quality Standards;

FSG, however, do not warrant that any particular, or all of these standards to be applicable to the Products. In this regard, GOL acknowledges that the Products will be sourced from various jurisdictions and various manufacturing facilities and as such one uniform standard will be impossible to apply.

6.2. FSG shall implement the necessary Product and Service checks through skip inspections and batch releases at its Lesotho facility in order to ensure that the equipment, Products, parts and spare parts are of sufficient quality and that they comply the requisite quality control criteria defined on its own quality control check lists. To the extent that any such Products, equipment, parts or

- spare parts fall short of the standard required, FSG will implement the necessary action plan to substitute such Products and the like as speedily as possible.
- 6.3. FSG shall carry out the necessary static and dynamic tests of the equipment, Products, parts and spare parts together with the necessary installation and integration tests in order to ensure that the Products comply with the necessary standards and specifications. FSG, furthermore, will at all times search for the best applicable energy saving solutions in respect of the Products and Services and they will utilise the expertise of external Product support specialists for the design, validation and assessment of the Products and Services in respect of the Project.
- 6.4. FSG will provide an appropriate project management service at each Site and ensure that its main facilities in Lesotho will provide the necessary phone assistance in relation to the commissioning and installation of Products and equipment. In this regard, technical assistance in respect of Products installed at each Site will be available upon request by GOL.
- 6.5. FSG undertakes to perform the Services and to supply Products in respect of the Project which accord with international quality standards. In this regard, equipment, parts, spare parts and/or Services will conform to the Technical Specifications in accordance with sound engineering practice and the applicable standards as determined by FSG. Instructions, warning and other data necessary for the safe and proper operation of the Products shall be supplied by FSG. Any non-conforming equipment, parts, spare parts, Products and/or Services shall be replaced at the cost of FSG as soon as reasonably possible after being notified of such defect.
- 6.6. If GOL ascertains that FSG fails to perform the Services in accordance with terms of this Agreement, it may require FSG to communicate in writing the corrective steps that FSG intends to make in order to remedy any such failure or defects.
- 6.7. FSG undertakes to use its best endeavours to provide Products which are fit for purpose, new, functional, novel, and are not obsolete or nearing

obsolescence.

- 6.8. FSO agrees that it will consistently remain vigilant of and carry out reviews of all failures of any Products, equipment, parts or spare parts in order to analyse the effects of any such failures for purposes of minimising or eliminating the impact of such failures on the recipients and/or the GOL during the warranty period applicable thereto.

7. PROJECT IMPLEMENTED ACROSS BROAD RANGE OF SECTORS

- 7.1. The Project is large scale and will result in Products being installed and Services being rendered across, amongst others, the following specific sectors:
- 7.1.1. Buildings, facilities and infrastructure;
 - 7.1.1.1. GOL buildings, facilities and infrastructure;
 - 7.1.1.2. LNDC properties;
 - 7.1.1.3. Industrial and commercial customers;
 - 7.1.2. Residential housing;
 - 7.1.2.1. civil servant housing;
 - 7.1.2.2. private sector housing;
 - 7.1.3. Non-electrified households;
 - 7.1.3.1. households that use paraffin and candles as the primary lighting source.
- 7.2. The roll-out and implementation of the Project in the aforesaid sectors will be similar but not identical in nature. Though many of the Products and Services deployed in each sector will be the same, the implementation of the Project in some of these sectors will require specific terms and conditions. For this reason, the specific terms and conditions per sector are recorded in separate annexures, being C to E hereto.

8. PRODUCT WARRANTY

Warranty of Products, equipment, parts and/or spare parts

- 8.1. FSG warrants that all Products, equipment, parts and spare parts delivered to GOL shall be free from any material defect;
- 8.2. the general warranty period applicable to such Products, equipment, parts and/or spare parts varies from 12 months to ten years with performance guarantees of up to 25 years but shall be a minimum of 12 months calculated to commence from the date of commissioning of the said Products, parts, equipment or spare parts. Unless otherwise stated by FSG the warranty does not cover labour costs;
- 8.3. FSG shall at its own cost and expense remedy all defects timeously notified to it by the respective recipients thereof or GOL, as the case may be, within a reasonable period but with due regard to the location of the Site. With this in mind, FSG shall determine the most appropriate solution (whether repair or replacement of the defective component or part or Product), after consulting with GOL and/or the recipient thereof and notifying it/them of its findings;
- 8.4. in the event of repair or replacement of any Product, equipment, part or spare part due to a defect, the general warranty period referred to above shall be extended for a minimum period of 12 months starting from the date of repair or replacement, but will not exceed 12 months after expiration of the initial general warranty period.

9. PRICE

- 9.1. GOL acknowledges that FSG is unable to provide a price list for the Products and/or Services as such Product price list is but a component of the total installed cost of the Products and the characteristics of each Site will vary greatly from one another. Provided that the Evaluation Criteria, where required, are met, GOL irrevocably authorises FSG to determine the cost of installation, Product mix, and the Services required per Site and to proceed with the requisite Product installation without being subject to a GOL approvals process.

FSG undertakes to act reasonably in this regard.

9.2. The consideration payable to FSG in respect of the Project includes all spare parts, full installation and commissioning of each and every Site, and these costs shall at all times remain variable provided that they comply with the Evaluation Criteria. For the avoidance of doubt, the parties record and acknowledge that FSG will be entitled to adjust the input costs in respect of this Project based on changes in raw material prices, exchange rates, inflation rates, fuel and labour costs, and the like, and will be entitled to do so for so long as the total costs incurred remain within the ambit of the Evaluation Criteria where required.

10. VAT

- 10.1. The Parties record that as FSG is based in Germany, Value Added Tax shall not be applicable to the Products or Services, the entire Project being either zero rated or exempt from VAT, as the case may be. GOL will instruct, authorise and otherwise enable this with the Lesotho Revenue Authority ("the LRA") and provide written confirmation thereof to FSG by the Commencement Date.
- 10.2. All payments made by FSL to suppliers and contractors in respect of their approved fees and expenses/disbursements and the like within Lesotho will be subject to VAT as is normal.
- 10.3. All payments and transfers of funds between FSG or FS Group to FSL in respect of the sale of Products and/or the rendering of Services for which invoices are issued, shall constitute inter-company loans and shall not be subject to VAT. This relates to payments and transfers from FSG or FS Group outside of Lesotho to FSL in Lesotho. GOL will instruct, authorise and otherwise enable this with the LRA and provide written confirmation to FSG.
- 10.4. FSG reserves the right to include VAT refunds, duty refunds or other tax credits on its monthly invoice to GOL in the case of slow or late payment of such refunds or credits to FSL.

11. **THE FINANCE AGREEMENT / FINANCE PROVIDERS**

11.1. GOL shall be fully responsible for all repayments of the loan funding provided by the Finance Providers.

11.2. GOL will on-lend the Project funds that it receives from the Finance Providers to the various non-government entities, civil servants, private sector organisations, and individuals to whom the Products will be delivered and Services rendered by FSG in accordance with the requirements of the Project. Irrespective of who GOL on-lends these funds to, GOL shall nevertheless be solely responsible for repaying the loan finance to the aforementioned Finance Providers.

11.3. GOL shall be responsible for ensuring that sufficient funds are set aside and at all times available for purposes of the loan repayments, and furthermore, will ensure that the Project is included in the MFL's official budget on government income and expenditure, this notwithstanding the electricity savings that will accrue to GOL over time.

11.4. GOL undertakes that it will comply with all the Finance Agreements covenants, including but not limited to the peremptory terms stipulating that the loan must be a separate line item in the budget.

12. **CONSIDERATION PAYABLE FOR THE PRODUCTS AND SERVICES IN RESPECT OF THE PROJECT**

12.1. FSG will be remunerated during the Term and/or Extended Period, as the case may be, of the Project by way of direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every 6 months on the basis provided for in the Draw-down Schedule, as follows:-


12.1.1. on the Commencement Date - 30% of the Project value, being €30 000 000 (thirty million Euros);

12.1.2. on the first day of the 6th month after the Commencement Date - 20% of the Project value, being €20 000 000 (twenty million Euros);

- 12.1.3. on the first day of the 12th month after the Commencement Date -- 20% of the Project value, being €20 000 000 (twenty million Euros);
- 12.1.4. on the first day of the 18th month after the Commencement Date -- 20% of the Project value, being €20 000 000 (twenty million Euros);
- 12.1.5. on the first day of the 24th month after the Commencement Date -- 10% of the Project value, being €10 000 000 (ten million Euros).
- 12.2. FSG will invoice GOL monthly for the work completed during each month and shall deduct the amount due, owing and payable per the invoice from the amount of the prepayment received from the Finance Providers via the on-lending institution. The Products and Services will be charged for in Euros.
- 12.3. FSG will provide GOL with a monthly statement setting out a summary of the funds received and the amounts invoiced and deducted in respect of each component of work done for each month.
- 12.4. FSG will issue each invoice to GOL by the 15th day of each month for the services rendered during the previous month.

13. INTELLECTUAL PROPERTY

- 13.1. All Intellectual Property, save for intellectual property which belongs to FSG, as relates to the Products and/or Services shall vest in GOL upon payment being made to FSG in full.
- 13.2. For the duration of this Agreement, the Parties are entering into an arms-length relationship, with the transfer of such Intellectual Property in respect of the Products and Services as envisaged in terms of the Deed of Cession and Assignment attached to this Agreement as Annexure F.
- 13.3. It is expressly recorded that any Intellectual Property in or relating, directly or indirectly to FSG's Product development efforts, including any derivative works or documentation, reports, manuals or other output pertaining thereto, shall vest in and remain the sole property of FSG.



13.4. It is expressly recorded that all Intellectual Property owned or vesting in FSG prior to the Commencement Date of this Agreement, shall vest in and remain the sole property of FSG. It is also recorded that FSG shall utilize pre-existing proprietary methodologies, tools and software developed by, owned or licensed by FSG ("FSG Materials"). During the course of the Agreement, FSG may modify or improve the FSG Materials, all of which modifications or improvements will be owned by FSG or its licensors. If any FSG Materials are incorporated into the deliverables set out in Annexure G and required for the operation, maintenance or modification of such deliverables, FSG shall notify GOL and hereby grants to GOL a perpetual, worldwide, royalty-free, and non-exclusive license to, for its internal business purposes only and subject to maintaining its confidentiality obligations towards FSG (i) use, execute, reproduce, display, perform, distribute, adapt, maintain, support and prepare derivative works of the FSG Materials used in conjunction with the deliverables set out in Annexure G or required for the operation, maintenance or modification of such afore-mentioned deliverables and (ii) authorize or sub-license third parties to do any of the above, subject to such third party having concluded a confidentiality agreement with GOL in terms whereof the third party is bound to the confidentiality obligations of GOL in terms of this Agreement

14. **AUTONOMY**

Due to the logistical challenges of rolling out the installation of Products in the territory of GOL, GOL undertakes to allow FSG to render the services without hinderance or interference of any kind and expressly authorises FSG to do all things necessary to render the services.

15. **LIMITATION OF LIABILITY**

In no event shall FSG be liable for any special, exemplary consequential, incidental or indirect damages of any nature whatsoever, including but not limited to loss of profits or economic loss, even if the GOL has been advised of the possibility of such loss or damage.

16. **INDEMNITIES**

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GOL indemnifies and holds FSG, its employees and agents harmless against:

- 16.1. any and all claims of any nature whatsoever, including any claims from any third parties arising from or in connection with or as a result of the use of purchase or delivery of Products by FSG to GOL;
- 16.2. all and any claims, losses, liabilities, or damages arising from or attributable to decisions or actions taken by FSG as a consequence of any delays by GOL in providing key inputs, information or other responses to FSG;
- 16.3. any loss that may arise or be caused to FSG as a result of GOL not providing timely access to FSG, or its key personnel, to any facility together with all costs occasioned thereby. Such costs shall be invoiced to GOL by way of the monthly invoice provided for in clause 9;
- 16.4. any losses or damages incurred to any delayed clearance of goods at the Lesotho/South African border;
- 16.5. to the extent that FSG does not comply with a specific law, GOL hereby indemnifies FSG and holds it harmless against any non-compliance.

17. WARRANTIES AND REPRESENTATIONS BY GOL

- 17.1. GOL warrants that:-
 - 17.1.1. this Agreement and the Project complies with all the laws of the Government of Lesotho in respect of procurement, including but not limited to the Regulations and this contract has been approved by the Chief Accounting Officer (as referred to in the Regulations);
 - 17.1.2. FSG are expressly authorised to commence with the roll-out of the Products without any delay and to act autonomously where necessary to achieve that outcome;
 - 17.1.3. it will have signed and bound itself to the terms of the Finance Agreement prior to or contemporaneously with the execution by



GOL of this Agreement;

- 17.1.4. the Project is financially viable owing to the following factors:-
- 17.1.4.1. the savings brought about by the reduction in electricity use by GOL;
 - 17.1.4.2. the savings brought about by the substitution of imported electricity or diesel generator produced electricity with electricity generated within Lesotho from solar PV Products provided by FSG;
 - 17.1.4.3. the savings brought about by the use of storage batteries provided by FSG that save surplus electricity from solar generation for later use or for arbitrage opportunities where electricity is stored from the grid when the price is lower to be used when the price is higher;
 - 17.1.4.4. reduced running, maintenance and/or replacement costs including for diesel generators, electric geysers and non-LED lighting;
 - 17.1.4.5. the receipt of interest rate margin on funds on-lent to residential home owners and private sector organisations;
 - 17.1.4.6. the on-lent Project funds to residential home owners and private sector organisations are set to a shorter term than the GOL loan with the Finance Providers, e.g. civil servants will repay GOL over a maximum term of 8 years whereas the GOL term with the Finance Providers is 12 years; and
 - 17.1.4.7. VAT on the above where applicable;
- 17.1.5. the Project accords and is consistent with the GOL Energy Policy;

- 17.1.6. to desist from any acts or omissions which result in, or are likely to result in any delays to the Project timelines;
- 17.1.7. It will provide full, complete and timely access to all its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities, including LEC and LMDC. GOL further warrants and acknowledges that this is necessary due to the time constraints in respect of the Project and in order for FSG to meet its obligations in terms of this Agreement.
- 17.2. As time is of the essence for this Project, GOL shall do all things necessary to ensure that the Project runs smoothly, without interruption or undue delay. This includes responding to FSG's queries and roll-out requirements in a timely and prompt manner.
- 17.3. GOL warrants that the Project incorporating the necessary sale of the Products and rendering of the Services is exempt from VAT or zero rated.
- 17.4. All Products, components, parts, vehicles, office and other equipment and the like brought into Lesotho by FSG as part of the Project will be exempt from any and all taxes, duties, license fees or other charges. GOL shall provide written confirmation of this to FSL by the Commencement Date and written instruction in this regard to LRA.
18. **GRANT OF FIRST OPPORTUNITY**
- GOL hereby grants FSG the first opportunity for all other renewable energy, energy efficiency or electricity generation opportunities with GOL for a duration of 5 years calculated from the Commencement Date.
19. **INSURANCES**
- 19.1. FSG warrants that as soon as possible after the Commencement Date of this Agreement, it will obtain the necessary insurance policies covering its liability in respect of its performance in terms of this Agreement as deemed appropriate

by FSG. FSG undertakes to maintain the insurance policy by paying the premium in respect thereof such that the terms remain extant throughout the Term (and/or Extended Period, as the case may be) of the Project.

20. ENVIRONMENT, HEALTH AND SAFETY

FSG shall comply with all the laws and regulations in force regarding health and safety within Lesotho. A schedule with the requirements and regulations will be prepared by GOL and attached to this Agreement as annexure H.

21. TERMS AND CONDITIONS OF SALE

FSG's terms and conditions of sale, annexed hereto as I, shall be read together with and deemed to form part of this Agreement, *mutatis mutandis*. Reference to "customer" in the said terms and conditions of sale shall be deemed to include "GOL" as defined in this Agreement. Reference to "goods" in the terms and conditions of sale shall be deemed to mean "Products" as defined in this Agreement. In the event of a conflict between any term referred to in the terms and conditions of sale and the terms contained in this Agreement, then the terms contained in this Agreement shall prevail.

22. TERMINATION

22.1. Neither Party to this Agreement may terminate this Agreement prior to the end of the Term and/or Extended Period, as the case may be, save for an event of material breach as provided for in clause 23 below.

22.2. In the event of the termination of this Agreement by FSG, then GOL shall:-

22.2.1. purchase all Products and stock in and in transit to Lesotho;

22.2.2. pay 50% of the then remaining unpaid draw-down amount in respect of the Project as compensation;

22.2.3. pay all outstanding amounts due under the Finance Agreements, which will become immediately due and payable;

22.2.4. pay all labour, retrenchment and/or termination costs; and

22.2.5. elect whether to purchase FSG's equipment, vehicles and other items surplus to FSG's requirements at a price agreeable to both Parties.

22.2.6. In the event of termination after the Term but before end of the Extended Period, FSG will provide to GOL goods to the net value of the unexpended contract value taking into account 22.2.1-22.2.5 above.

23. BREACH

23.1. If GOL commits any material breach of the terms of this Agreement and fails to remedy such breach within 30 (thirty) days (or such other period as may be reasonable in the circumstances) after receipt of written notice from FSG requiring it to do so, FSG shall be entitled to claim specific performance without prejudice to its right to such damages as may have been occasioned by the breach or, should the damages go to the root of the contract, to cancel this Agreement with or without a claim for damages.

23.2. If FSG commits any material breach of the terms of this Agreement and fails to remedy such breach within 30 (thirty) days (or such other period as may be reasonable in the circumstances) after receipt of written notice from GOL requiring it to do so, GOL shall be entitled to claim specific performance without prejudice to its right to such damages as may have been occasioned by the breach. GOL may not cancel this Agreement.

24. ARBITRATION

24.1. If a dispute arises between the Parties in connection with this Agreement or its subject matter which cannot be resolved amicably by the Parties, then the Parties shall refer the dispute to arbitration. The rules of arbitration will be the rules of the South African Association of Arbitrators in force at the time of referral of the dispute to arbitration and the arbitration will be conducted in accordance with the provisions of the Arbitration Act, No 42 of 1965.

- 24.2. The Parties shall agree on the appointment of an arbitrator within 5 (five) Business Days after the declaration of a dispute by one or both of the Parties and failing such agreement, the arbitrator shall be appointed by the President for the time being of the Johannesburg Bar Council within 2 (two) Business Days after having been requested by 1 (one) or both of the Parties to make such appointment. The decision of the arbitrator shall be final and binding on the Parties and can be made an order of court.
- 24.3. The arbitration shall be held in Johannesburg, South Africa. *at*
- 24.4. Nothing in this clause shall prevent any Party from obtaining urgent, interim interdictory relief in the courts pending the outcome of or pending the consideration of an alternative dispute resolution procedure contemplated in this clause.
- 24.5. The arbitrator's decision shall be final and binding on the Parties and either Party may apply to court to enforce the order in Lesotho and/or South Africa. *at*

25. **RECIPROCAL COMMITMENT TO PREVENT CORRUPT ACTIVITIES**

- 25.1. In the performance of their respective obligations under the Agreement, both FSG and GOL shall comply with all Applicable Laws, rules, regulations and orders of any applicable Jurisdiction on combating bribery and corruption. The said Parties agrees that they will neither receive, nor offer, pay or promise to pay, either directly or indirectly, anything of value to anyone in connection with any commercial or other opportunity other than in accordance with this Agreement. Furthermore, each Party hereto shall notify the other Party immediately in writing with full particulars in the event that such Party receives a request from anyone requesting any illicit payment or any other event which may constitute corruption or bribery.
- 25.2. The Parties respectively commit to keeping themselves abreast and up to date with global best practice in relation to anti-corruption, money laundering and corrupt activities protocols.
- 25.3. It is recorded that the Party hereto shall:

- 25.3.1. not engage in any conduct which would constitute an offence under any Applicable Laws;
- 25.3.2. not do or omit to do anything likely to cause a Party to be in breach of any such Applicable Law;
- 25.3.3. not give, offer, promise, receive, or request any monetary bribes and/or bribes in the form of gifts, including in relation to any public official;
- 25.3.4. provide sufficient reasonable assistance to enable a Party hereto to perform any actions required by any government or agency in any jurisdiction for the purpose of compliance with any Applicable Law or in connection with any investigation relating to the Applicable Law;
- 25.4. Notwithstanding anything to the contrary in this Agreement, if there has been a breach of this clause 25, such a breach shall be deemed a material breach of the Agreement, and such Party shall have the right to terminate the Agreement without prejudice to its other rights in law.

26. GENERAL

26.1. Applicable Law

Regardless of the place of execution, performance or *domicile* of the Parties, this Agreement and all modifications and amendments thereof shall be governed by and construed under and in accordance with laws of South Africa.

26.2. Jurisdiction

The Parties consent to the jurisdiction of the High Court of South African, Gauteng Local Division, Johannesburg, in respect of all matters arising out of and disputes in connection with or in relation to this Agreement.

26.3. Domicilium and Notices

26.3.1. The Parties choose as its *domicilium citandi et executandi* (in this clause *domicilium*) for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purpose arising from this Agreement as stated in clause 1 hereof.

26.3.2. Either Party shall be entitled, from time to time by written notice to the other, to vary its *domicilium* (comprising physical address and, if possible, an electronic mail address and/or facsimile number) to any other address within the Republic which is not a post office box or *poste restante*. Such notice shall become effective as regards a party on date of receipt by that party.

26.3.3. Any notice given and any payment made by one party to the other (the addressee) which

26.3.3.1. is delivered by hand during the normal business hours of the addressee at the addressee(s) *domicilium* for the time being shall be presumed, until the contrary is proved, to have been received by the addressee at the time of delivery;

26.3.3.2. is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee(s) *domicilium* for the time being shall be presumed, until the contrary is proved, to have been received by the addressee on the tenth day after the date of posting;

26.3.3.3. is given by electronic mail or facsimile shall be presumed, until the contrary is proved, to have been received within one hour of transmission where it is transmitted during normal business hours.

26.4. Invalid Provisions

26.4.1. Each clause herein shall be deemed to be separate and severable

from any other clauses which may be deemed to be invalid or unenforceable.

26.4.2. If any provision of this Agreement contravenes any provision of any law, regulation, ordinance or the like, that provision shall be deemed to be null and void or the scope of the provision shall be deemed to have been limited to exclude such contravention, provided that if any Party can establish in a court of law that it is adversely affected or prejudiced thereby or if any Party unsuccessfully relies on that provision in any legal proceedings, arbitration or the like, that Party shall be entitled to cancel this Agreement.

26.5. Force Majeure

26.5.1. No failure by either Party to perform in accordance with any provision of this Agreement shall constitute a breach of this Agreement if the failure arose from force majeure, including acts of God, war, strike, sanctions, or changes in laws, regulations, ordinance or the like made by any competent authority, or other circumstances wholly outside the control of the Parties.

26.5.2. A party shall not be liable for any loss suffered by the other party arising out of delay in or prevention of performance of the party(s) obligations due to any cause including labour unrest, the adverse effects of which the relevant party could not and cannot reasonably and practically avoid in the ordinary conduct of that party(s) business.

26.5.3. The party whose performance is delayed or prevented shall immediately give notice in writing of such delay or prevention to the other party.

26.5.4. If a party(s) performance is delayed by such a cause, the party shall be entitled to a reasonable extension, not exceeding 30 (THIRTY) days, for performance. If the performance is and will be delayed for

longer than this period, the performance shall be regarded as having been prevented.

26.5.5. If a party(s) performance is prevented by such a cause, the parties shall -

26.5.5.1. If the obligation of which performance is prevented is not material, make such financial adjustment between them as may be equitable;

26.5.5.2. If the obligation of which performance is prevented is material, endeavour in good faith on an alternative basis to achieve the purpose of this Agreement in order to sustain an ongoing relationship between the parties.

26.5.6. If a party(s) performance of a specific material obligation has been prevented by a cause referred to in this clause and such cause will prevent the performance of further obligations in terms of this Agreement in the future, with the effect that there is no reasonable prospect of one or other party being able to perform its obligations in terms of this Agreement and if no alternative basis for achieving the purpose of this Agreement has been agreed between the parties in terms of 26.5.5.2, then either party shall be entitled, by written notice to the other, to terminate this Agreement.

26.6. Confidentiality and Non-Disclosure

26.6.1. Both Parties hereto undertake, during and after termination of this Agreement, to treat as confidential all information given by the one to the other and shall not without the prior written consent of the other disclose to any third party any documents, information, technical data, manufacturing techniques and records furnished or made available by the one to the other except for such information which is already in the public domain.

26.6.2. Neither Party shall be required to supply or distribute any material

or information in violation of any law, regulation, ordinance or other official decree or, if such supply or distribution can only be made with the approval of a governmental authority, without approval of that authority.

26.7. Taxation

The Parties will use their best endeavours to comply with the tax laws applicable within the jurisdictions within which they will operate.

26.8. Confirmation of Compliance with Local Laws

Each party confirms that it has obtained legal advice confirming that the provisions of this Agreement comply with all applicable laws within the countries in which it will operate.

26.9. Warranty of Authority

Each party warrants to the other party that it has the power, authority and legal right to sign this Agreement and that this Agreement has been duly authorised by all necessary actions of its trustees and constitutes valid and binding obligations on it.

26.10. This document constitutes the entire agreement between the parties and no addition to, variation or amendment of this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

26.11. No party shall have any claim or right of action arising from any undertaking, representation or warranty not included in which document.

26.12. No indulgence which a party (the grantor) may grant to another (the grantee) shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from enforcing any rights against the grantee which may have arisen in the past or which may arise in the future.

26.13. No party may cede any of its rights or delegate any of its obligations under this

Agreement without the prior written consent of the other party.

26.14. Each party acts herein as principal and not as agent.

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