



LESOTHO

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/332/2021

In the matter between:

ATTORNEY GENERAL

APPLICANT

AND

FRAZER SOLAR GMBH

1ST RESPONDENT

FRAZER SOLAR (PTY) LTD

2ND RESPONDENT

MINISTER IN THE OFFICE OF THE PRIME

MINISTER OF THE KINGDOM OF LESOTHO

3RD RESPONDENT

**Neutral Citation: Attorney General v Frazer Solar GMBH & 2 others [2022] LSHC
284 Comm. (09 NOVEMBER 2022)**

CORAM: S.P SAKOANE CJ, M.A MOKHESI J AND A.R MATHABA J

HEARD: 26TH AND 27TH OCTOBER 2022

DELIVERED: 09TH NOVEMBER 2022

SUMMARY

CONTRACT- *The application by the Government of Lesotho to review a contract entered into by the minister without the authority of Cabinet and the Minister of Finance and for breaching the Constitution of Lesotho 1993, Public Financial Management and Accountability Act and Procurement Regulations- Arbitration clause in a contract does not survive the nullification of a contract concluded in breach of the Constitution and other applicable laws.*

ANNOTATIONS:

Legislation:

Arbitration Act no.12 of 1980

Public Financial Management and Accountability Act 2011

Public Procurement Regulations 2007 as amended by Regulations 2018

Constitution of Lesotho 1993

International Treaties:

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

Cases

Lesotho:

Drytex (Pty) Ltd Lesotho v Pyramid Laundry Services (Pty) Ltd and Others LAC (2015-2016) 387

Former Employees of the Lesotho Agricultural Development Bank vs The Government of Kingdom of Lesotho & 2 Others C of A (CIV) NO.35 of 2020

Lesotho National Development Corporation v Maseru Business Machines (Pty) Ltd and Others (C of A (CIV) 38/2015) [2015] LSCA 48 (06 November 2015)

Letsela v Director of Public Prosecutions and Others LAC (2013 – 2014) 115

Minet Lesotho (Pty) Ltd v Ministry of Defence and 15/20) LSCA 27 (30 October 2020)

Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd (C of A (CIV) No.9/14 [2014] LSCA 11 (17 April 2014)

Swissborough Diamond Mines (Pty) Ltd & Another v The Commissioner of Mines and Geology N.O & Others (1990 – 2001) LLR 559

Tšalong v Principal Secretary Ministry of Public Works and Transport (C of A (CIV) 64/2018) [2019] LSCA 17 (31) March 2019)

South Africa:

AB and Another v Pradwin Preparatory School and Others 2019 (1) SA 327 (SCA)

Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd [2001] ZASCA 59; 2001 (4) SA 501 (SCA)

Barkhuizen v Napier 2007 (5) 323 (CC)

Beadica 231 CC vs Trustees for the time being of the Oregon Trust 2020 (9) BCLR 1098 (CC)

Canton Trading 17(Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O 2022 (4) SA 420 (SCA)

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] ZASCA 99 (09 July 2021)

Essau and Others v Minister of Co-operative Government and Traditional Affairs and Others 2021 (3) SA 593 (SCA))

Fedsure Life Assurance v Greater Johannesburg Transitional Council & others 1999 (1) SA 374 (CC)

Independent Electoral Commission Langeberg Municipality 2001 (3) SA 925 (CC)

MEC, Dept of Co- Operative Governance v Nkandla Local Local Municipality 2022 (8) BCLR 959 (CC)

Merifon (Pty) Limited v Greater Letaba Municipality and Another [2022] ZACC 25

Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA)

North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA)

Setsokotsane Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoerkommisie 'en Ander 1986 (2) SA 57 (AD)

United Kingdom:

Fiona Trust & Holding Corp. v Privalov [2007] UKHL 40

Heyman v Darwins Ltd [1942] 1 LL ER 337 (HL)

Royal British Bank v Turquand (1856) 6 E & B 327

Articles

P.J Sutherland "Ensuring Contractual Fairness in Consumer Contracts After Burkhuzen v Napier 2007 (5) SA 323 (CC) – Part 1 *Stell LR* 2008 (3) 390

JUDGMENT

MOKHESI J:

[1] Introduction

This application is a self-review by the Government of Lesotho (“GoL”) of the decision by the then Minister in the Prime Minister’s office, Mr Temeki Tšolo, to conclude the Supply Agreement (to be used interchangeably with ‘the Agreement’) with the 1st respondent (“FSG”), a company incorporated in terms of the laws of the Federal Republic of Germany (FRG), purportedly on its behalf, on 24 September 2018. The aim of the project, the subject matter of the Agreement was to install within the country solar heaters, solar photovoltaic systems and Light Emitting Diode (LED) lights on GoL buildings and infrastructure, civil servant and private sector housing. In terms of the Agreement, The GoL is obliged to borrow money in the amount of €100M (Hundred Million Euros) from German financial institutions, which money was to be expended on buying the said LED lights, solar geysers and to cover other costs. The Agreement, which contains an arbitration clause, is being attacked from three fronts, namely; (i) for breaching Public Procurement Regulations 2007 (“Procurement Regulations”), as amended in 2018, (ii) for breaching Public Financial Management and Accountability Act 2011 (“PFMAA”), (iii) for breaching the Constitution of Lesotho 1993.

[2] Factual setting of the case

In 2017, one of the FSG’s directors, Mr Frazer made an unsolicited proposal for a €50 to €100 million solar project. This proposal was made to one GoL

official, by the name of Mr Letsie, through an email. This proposal was made by him having been acquainted with the GoL's Energy Policy through his previous employment by a company which installed solar systems onto GoL health facilities around 2014 and 2015. Having left the employ of this company, he floated the 1st respondent. In the said email he insisted that the proposal be sent to the then Prime Minister of the Kingdom. Fully aware of the pivotal role the Ministry of Finance was to play in the success of the project, Mr Frazer wrote a letter on 17 October 2017 to Minister Tšolo requesting his advice on how to bring the Ministries of Finance and Energy on board. In relevant parts the said letter said:

"Dear Honourable Minister

Further to our previous preliminary discussions regarding the proposed Energy efficiency and Employment Creation Project for the Government of Lesotho, I would like to formally request your advice on the suggested next steps to follow:

- 1. Briefing session for the Honourable Minister of Finance and his team (PS Finance, Accountant General, etc)*

It is important to engage with Ministry of Finance in general, particularly the Department of Treasury as this project is financed via loan from German Government institutions to the Department of Treasury. The Ministry of Finance's input, interest and agreement is of vital importance for this project to proceed, hence briefing of the Honourable Minister of Finance, PS Finance and Accountant General to start the engagement process is pivotal.

2. *Meeting with Ministries of Public Works and Energy.*

There is need for a follow-up meeting with the Ministries of Public Works and Energy to discuss in more detail how the project could be implemented in order to prepare a detailed project proposal. This could take the form of a workshop/brainstorming session."

[3] On 12 November 2017, Mr Frazer urged Minister of Finance (then) Dr Majoro to sign the Memorandum of Understanding (MoU) with FSG. Dr Majoro disagreed with this proposed signature of MoU as it was impermissible to sign it before the relevant Ministries' officials had considered it in view of its financial scale and its economic impact on the country. However, despite Dr Majoro's stated objection to the signing of the MoU, Mr Frazer and Minister Tšolo, on the 21 November 2017, the latter purportedly acting for the GoL signed the MoU. It should be stated that the MoU was signed barely four days after the Minister of Finance had objected to its signature for the reasons cited above. So, clearly, the officials had not considered and studied the project as Dr Majoro had intimated. In terms of this MoU, the parties agreed that the project would proceed subject to it being approved by the GoL. It recorded that the "desired" commencement date was 1 March 2018 and that its value was €100 million excluding finance costs, and that it was to be financed through German financial providers.

[4] As Mr Frazer and Minister Tšolo were acutely aware that for the project to kick-start successfully, it needed Cabinet approval, Minister Tšolo, for these purposes, prepared a Memorandum for its consideration on 06 June 2018. In it, Mr Tšolo recommends that the project be approved. He further states, untruthfully, that Ministers of Finance, Public Service, Local Government, Energy and Development Planning had been consulted. At least the Minister

of Finance had on record objected to the project which was being pushed without necessary processes being followed. Dr Majoro confirms this fact, which is not issuably dealt with by the respondents in their answering affidavit. On 12 June 2018 the Memorandum was withdrawn although no reasons were stated in the Savingram dated 14 June 2018. In short, the Memorandum was not voted on or adopted. Cabinet never approved any signature of any agreement by any Minister in relation to the proposed project.

- [5] Notwithstanding the fact that Cabinet had not approved the project, Minister Tšolo quite bizarrely, though not surprising in the context of this case, wrote a letter to Mr Frazer on 01 August 2018, informing him that the GoL “agrees and commits itself to proceed with the Frazer Solar GmbH Energy Efficiency and Employment project for a total value of €100 million before financing costs.” In the same letter Minister Tšolo states that “[t]o ensure effective and efficient communication between the parties, the primary points of contact will be the office of the Prime Minister and Frazer Solar GmbH.” And further; in the same letter he records his impatience that the project had not commenced:

“This offer has been on the table for far too long and our desire is that the project commence as soon as possible, beginning of September 2018 to be precise. Your urgent attention to providing detailed documentation required would be highly appreciated.

We look forward to the commencement of a successful and transformational project which will greatly benefit all Basotho and create closer bonds between Germany and Lesotho.”

What is clear is that Minister Tšolo's mind was dead set on concluding the agreement regardless of every conceivable legal impediment which stood in its way. Despite there not being Cabinet approval, Minister Tšolo and Mr Frazer, on 24 September 2018, signed the Supply Agreement.

[6] **Critical components of the Supply Agreement**

The agreement obliges the GoL to borrow funds to fund the project as in terms of clause 1.1.20, the "*project*" is defined as "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." Clause 1.1.9 defines "*the Finance Agreement(s)*" as "loan agreement(s) concluded between MFL [Ministry of Finance Lesotho] on behalf of the GoL and the Finance providers, and annexed hereto as annexure A." Despite knowing that there was no such Finance Agreement, it is stated that it is annexed to the Agreement. This was clearly a deliberate misrepresentation. In terms of clause 17.1.3, the GoL warrants that "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." As already said, the Agreement was signed with full knowledge that the GoL had not signed any Finance Agreement, but quite dishonestly, it is stated that it is annexed to the Supply Agreement. So, plainly, when the Supply Agreement was signed, the GoL was in breach from that moment because the Finance Agreement was non-existent.

[7] Despite there being no Finance Agreement in existence, in terms of clause II, the Supply Agreement obliges the GoL that:

- (i) It will be responsible for loan repayments;
- (ii) it will on-lend the Project funds that it receives from Finance Providers to the various non-governmental entities, civil servants, private sector organizations and individuals to whom the products will be delivered and services rendered by FSG, and that irrespective to who the GoL on-lends the funds, it shall nevertheless be solely responsible for repaying the loans to the financiers;
- (iii) Shall be responsible for ensuring that sufficient funds are set aside and are at all times available for purposes of the loan repayments and should ensure that the project is included by the Ministry of Finance in Lesotho's annual budgets estimates.
- (iv) 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 national budget estimates.

[8] In terms of clause 17.1.1, GoL warrants that the Supply Agreement complies with all the procurement laws:

"17.1.1 the 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);"

When Minister Tšolo warranted, on behalf of GoL, that all procurement laws had been complied with, he knew that he was being mendacious, because as a fact, procurement laws had not been complied with, as will soon become clear. This should also be read with what is titled “Warranty on Authority” under clause 26.9, in terms of he warrants that he had “the power, authority and legal right to sign this Agreement and this Agreement has been duly authorized by all necessary actions of its trustees and constitutes valid and binding obligation on it.” Minister Tšolo had no authority at all to conclude the Agreement on behalf of the GoL as will soon emerge in the subsequent paragraphs of the judgement.

- [9] The Agreement, further, importantly for purposes of this case has an arbitration clause in terms of which disputes between the parties were to be referred to arbitration. Clause 24 provides that:

“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 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.

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."

[10] And further under clause 26, the Agreement provides:

26.1 Applicable Law

Regardless of the place of execution, performance or domicile of the Parties, this Agreement and all modification and amendments thereof shall be governed by the 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 the disputes in connection with or in relation to this Agreement."

[11] It is common cause that FSG never provided any products or services in terms of the Supply Agreement. On 11 March 2019, in view of what it considered

the breaches of the Agreement, FSG issued a letter of demand through its attorneys addressed to the office of Prime Minister, the Government Secretary one Moahloli Mphaka. Minister Tšolo and Ms Ntobaki (Minister Tšolo's Secretary). The basis of the breach as contained this letter is variously tabulated in paragraph 14 as follows:

"14 We are instructed that the Government of Lesotho is in material breach of the terms of the Agreement; inter alia, in that: -

14.1 it has breached all of its obligations committed to in clause 5.1 and 5.2 of the Agreement, respectively;

14.2 it has laid itself open to claims relevant to the indemnities referred to in clause 16.2, 16.3 and 16.4 of the Agreement, respectively;

14.3 it has breached its warranty in clause 17.1.2 of the Agreement to commence with the roll out of the products without any delays;

14.4 it has breached its warranty in clause 17.1.3 of the Agreement by refusing to sign and bind itself to the terms of the Finance Agreement (as defined) prior to or contemporaneously with the execution of the Agreement;

14.5 it has breached its warranty in clause 17.1.6 of the Agreement to desist from any acts or omissions which result in or are likely to result in any delays to the project timelines;

14.6 it has breached its warranty in clause 17.1.7 of the Agreement to provide full, complete and timely access to all its key personnel,

including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities;

14.7 it has breached its warranty in clause 17.2 of the Agreement that as time is of the essence for the project, it would do all things necessary to ensure that the project ran smoothly, without interruption or undue delay, including responding to our client's queries and requirements in a timely and prompt manner ... ”

[12] On 30 July 2019, FSG instituted arbitration proceedings, which culminated, on the 28 January 2020, in the arbitrator making an award against the GoL by default and directed payment in favour of FSG, liquidated damages plus interest in the amount of €50 million. Again, in the absence of GoL, the High Court of South Africa made the arbitration award an order of court. Suffice for present purposes to state that on 18 June 2021, GoL launched an application for the stay of execution or enforcement of the writs of execution and notices of attachment in South Africa, pending the determination of the present matter and application for the rescission of the arbitral award.

[13] **Issues for determination**

Whether the Supply Agreement breached:

1.

- (i) The Public Procurement Regulations 2007 as amended by Regulations 2018;
- (ii) Section 28(1) and (2) of the Public Financial Management and Accountability Act 2011 (“PFMAA”);
- (iii) The Constitution of Lesotho 1993 and
- (iv) Section 28 (3) of the PFMAA

2. Whether the arbitration clause is unlawful and void *ab initio*.
3. Remedy
4. Delay and condonation

I turn to deal with these issues.

[14] **Breaches of Public Procurement Regulations.**

The exercise of power in terms of which the Public Procurement Regulations are engaged, being public in nature, is harnessed by the Constitution and the doctrine of legality as stated in **Fedsure Life Assurance v Greater Johannesburg Transitional Council & others 1999 (1) SA 374 (CC)** at 400 para. [58], where the Court stated that:

"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then the principle of legality is implied within the terms of the interim Constitution."

- [15] Allied to the doctrine of legality is the principle of accountability which is one of the anchors upon which procurement regime in this country safely rests. Other equally important bases are efficiency, transparency and overall value for money and stimulation of competition among prospective bidders (**Minet Lesotho (Pty) Ltd v Ministry of Defence and 15/20) LSCA 27 (30 October 2020)** at paras. [1] and [2]). These are the foundational principles upon which procurement processes in the Kingdom are based.

[16] Even though, under clause 17.1 of the Supply Agreement the parties warrant that all the laws of the Kingdom, including Procurement Regulations were complied with and that the Chief Accounting Officer, as defined in those regulations, approved the Agreement all this is untrue, as counsel for the Respondent Adv. Rood S.C, conceded during argument that the Agreement did not comply with the Procurement Regulations 2007 as amended by 2018 Regulations (hereinafter 'Procurement Regulations'). The concession was correctly made in the light of the incontrovertible evidence of non-compliance. In fact, all along the respondents were mistakenly relying on the repealed regulation 8 which used to provide for exceptional procedure. Regulation 8 has been repealed and substituted with single sourcing which provides that:

"8 (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 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 reason 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 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 particular supplier as a condition of a performance guarantee or warranty;*
- (e) *in exceptional cases of extreme urgency due to 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;*
- (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, wildfire or such other reason of similar nature; or*
 - (ii) *Where without the urgent procurement, the continued functioning of the government unit would suffer irreparable loss, the preservation or protection of irreplaceable public property, health or safety will be threatened.”*

[17] The Supply Agreement did not comply with the above prescripts. It was concluded in the absence of an open tendering process and without the involvement of the entities stipulated in the Regulations. The Agreement

concerned an amount which in terms of Schedule 1 to the Regulations, should have been subjected to open tender method of procurement. None of these requirements together with a whole host of others which are unnecessary to traverse in view of the respondents' concession, were not complied with. In the light of these procurement breaches, the only inescapable result is that the Supply Agreement is invalid and should be reviewed and set aside and declared *void ab initio*.

[18] Procurement regulations, as already stated, are based on ensuring competitiveness of the tendering process, fostering accountability, transparency and are meant to ensure that legality is not sacrificed at the alter of patronage and nepotistic behaviour on the part of those entrusted with exercising this important public power. I endorse the remarks by the Supreme Court of South Africa in **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA)** at paras. [15] to [16], as being applicable in the instant matter, where the SCA stated that:

“Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. In Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) this court set aside a contract concluded in secret in breach of provincial procurement procedures, holding such a contract was ‘entirely subversive of a credible tender procedure’ and that it would ‘deprive the public of the benefit of an open competitive process’ – Similarly in Eastern Cape Provincial Government v Contract props 25 (Pty) Ltd 2001 (4) SA 142 (SCA), which concerned the validity of two leases of immovable property concluded between the respondent and a provincial department without

the provincial tender board having arranged the hiring of the premises as was required by statute, this court concluded that the leases were invalid. In giving the unanimous judgment of this court, Marais JA, after outlining the applicable statutory tender requirements, said the following: -

'As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure fair, impartial and independent exercise of power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any sanction of invalidity, the mischief which the Act seeks to combat could be perpetuated.

As to the consequences of visiting such transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'

I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with

above which are designed to ensure a transparent, cost effective and competitive tendering process in the public interest, is invalid and will not be enforced.”

[19] Although FSG conceded that the Supply Agreement is non-compliant with the Procurement Regulations, they put up a defence that they should not be expected to know that the Agreement did not comply with these Regulations. The respondents are here invoking the company law doctrine that people transacting with companies are entitled to assume that internal processes have been complied with, even in situations where they have not. This rule is known as the “Turquand Rule” or “Indoor Management Rule.” It was derived from the English case of **Royal British Bank v Turquand** (1856) 6 E & B 327. The question is whether, in the public law sphere, this principle is applicable. In the public sphere the exercise of public power is conditioned by the principle that all exercise of public power must comply with the Constitution and the doctrine of legality. It follows that if the exercise of public power does not comply with the Constitution and the doctrine of legality, its fate is sealed, it cannot stand. It cannot be corseted into legitimacy through the invocation of estoppel or indoor management rule. The answer to the question posed in the preceding lines is answered authoritatively in the case of **Merifon (Pty) Limited v Greater Letaba Municipality and Another** [2022] ZACC 25 at para. 42, as follows:

“This brings me to another submission advanced by Merifon, namely, its reliance on the doctrine of estoppel and Turquand rule. Does Turquand rule apply in respect of municipalities and where innocent parties are involved? It is trite that void acts cannot be resuscitated through Turquand rule is a species of estoppel and therefore cannot be raised to

cure an action that is ultra vires, as opposed to one that is intra vires (within one's legal powers), but suffers some defect. The doctrine of legality is applicable and decisively trumps Merifon's argument. Furthermore, Fedsure, as referred to by the Supreme Court of Appeal, remains decisive authority especially in relation to acts in the local government sphere."

[20] When Minister Tšolo purported to act for the GoL he did so knowingly that his acts are contrary to the procurement laws of the Kingdom. Although FSG wants to now play victim, upon the conspectus of the facts of this case, I am convinced beyond doubt that it knew that the Supply Agreement did not comply with the Procurement Regulations. Its proposal to the GoL was unsolicited, and even if it was, for it to ultimately be preferred as the rightful entity to provide the services it had to go through a competitive tendering process, after all the preliminary steps which are mandated by the Regulations are complied with. Even if this court were to assume in its favour that it was an innocent party, which is a hard thing to do in view of the facts of this case, the doctrine of legality would still loom large and require that for the fact that the Supply Agreement does not comply with procurement laws, it should be nullified.

[21] The other defence which the FSG, rather feebly put up, was that the Supply Agreement complied with the Procurement policy, especially clause 17 of the GoL Procurement Policy which seem to authorise unsolicited proposals from private sector entities. Although in the light of the concession that the Agreement falls foul of the Procurement Regulations, it would have been unnecessary to consider this point, this court is of the view that it raises an important issue whether policy can be relied upon in the face of legislation

which was promulgated on its strength. I think the answer lies in logic more than anything. Logic dictates that policy is prototypical in nature and by design and is generated by the Executive arm of government. It merely sets the scene for promulgation of laws based on its spirit. Once the laws are promulgated, they are the only source of authority. This point was succinctly made in **Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd** [2001] ZASCA 59; 2001 (4) SA 501 (SCA) para. [7]:

*“The word “policy” is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school can fairly be called a “policy” and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word “young” has a measure of elasticity in it. Any course of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislations). Otherwise the separation between Legislature and Executive will disappear.” (See also: **Essau and Others v Minister of Co-operative Government and Traditional Affairs and Others** 2021 (3) SA 593 (SCA))*

[22] Section 10 of the Government Proceedings and Contracts Act no.4 of 1965.

It is the respondents' argument that despite the conceded breaches of the Kingdom's procurement laws, the Supply Agreement is valid and binding on the basis of Section 10 of the Government Proceedings and Contracts Act (the "Act"). The applicants countered this argument by contending that to take the line of the respondents' argument would lead to 'astonishing' results as by mere appendage of the Minister's signature to a contract or document, review is foreclosed. The provisions of section 10 of the said Act provides that:

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

[23] I agree with Mr Budlender SC for the applicant, that the construction being contended for by the respondents will lead to "astonishing" results. In fact, it would lead to a situation where a mere presence of the Minister's signature on a contract, such a contract will be enforceable even in the face of violations of the doctrine of legality. This section merely gives a presumptive validity to a contract signed by the Minister or his authorised person. What, however, it does not do is to serve as a shield to a review of the decision to sign the contract by the stated public functionaries. This issue was put to bed by this

Court in *Swissborough Diamond Mines (Pty) Ltd & Another v The Commissioner of Mines and Geology N.O & Others* (1990 – 2001) LLR 559, where Kheola C.J, said, at p. 574 B – D:

“In my view there is nothing, in section 10 to support the submission that the contract shall be enforceable if properly signed regardless of whether the prior procedures were complied with. What is said is that once the contract is signed by the Minister or a person authorized by him, it shall be held to be contract or agreement made by on behalf of His Majesty’s Government. The signature of the Minister or a person authorized by him proves that it is a contract made on behalf of His Majesty’s Government. That does not mean that such a contract cannot be challenged in a court of law to show that it is invalid for any reason. Section 10 of the Act can be a defence only in a case where there is a dispute as to whether that is a contract on behalf of His Majesty. The applicant has to show that it is signed that is signed by the Minister or a person authorized by him. It will be held that it is contract made on behalf of His Majesty’s Government. That section has nothing to do with “procedural irrelevance.”

[24] Sections 28(1) and (2) of the PFMAA

In its preamble the PFMAA states that its purpose is:

“[T]o establish and sustain transparency, accountability and sound management of the receipts, payments, assets and liabilities of the Government of Lesotho.”

[25] In *Tšalong v Principal Secretary Ministry of Public Works and Transport (C of A (CIV) 64/2018) [2019] LSCA 17 (31) March 2019)* at para. [10] the Court of Appeal described the PFMAA as:

“[T]he predominant legislative tool that introduces processes and standards to guide the use, management and control of public funds. The Act provides for financial management.”

[26] Sections 28(1), (2) and (3) of the PFMAA provides as follows:

“Borrowings and guarantees

28(1) The Minister, with the prior consent of Cabinet, shall approve any borrowing of funds or other assets for the public purposes of Government or local authorities.

(2) Loan agreement on behalf of 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.”

[27] It is common cause that the “Minister” as appears in the section, refers to the Minister of Finance per the definition of the word in the Act. The purpose of this section is to provide for gatekeeping in the expenditure of public funds. The Minister of Finance plays a pivotal role in that regard. As stated in the preamble to the Act, in order to have transparency, accountability and sound management of public financial resources, the Minister of Finance is made a

central figure together with Cabinet towards that end. Because government by its nature is made of multifarious ministries, with differing needs, any liability each ministry would be desirous of incurring towards fulfilling its needs, should be green-lighted by the Minister of Finance. Even if he considers the borrowing to be above board, he is not the final arbiter as the Cabinet is the ultimate authority to decide whether to consent to or reject the intended borrowing.

- [28] It is trite that in order to decipher the meaning of the words used in s. 28 an interpretative exercise has to be undertaken. It needs no repeating that interpretation of statutes/documents is a unitary exercise which takes into account the language use, and the context in which it is used, having regard to the purpose of the provision, as *Unterhalter AJA., expressed in Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] ZASCA 99 (09 July 2021)* at para. [25]:

“...It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself.’”

- [29] This interpretive exercise is particularly important in the context of this case because there is disagreement between the parties as to the meaning of the words “borrowings of funds” as appear in s. 28(1), but before I get there it is important to highlight that before the GoL can be bound by a transaction which is characterized as a “borrowing”, two requirements must be found to

exist, namely, (i) prior to making a borrowing, the Minister of Finance must approve it, and (ii) such approval must be preceded by Cabinet's consent that such a borrowing be made.

[30] As to whether the Supply Agreement constitutes a "borrowing" within the meaning of the word in s. 28(1), the parties offer divergent interpretations. The applicant contends that the Supply Agreement amounts to the borrowing of funds for public purpose, of the GoL. It relies on the fact that the Agreement imposes a contractual obligation on it to borrow funds from external financiers through FSG. On the one hand, FSG contends that the Agreement does not constitute a borrowing of funds because it is not a loan agreement. It says the borrowing of funds is a loan, that this interpretation is confirmed by the provisions of section 28(2) which says loan agreements on behalf of GoL shall only be signed by the Minister after consultation with Cabinet. And this is further confirmed by Section 28(3) which refers to "funds borrowed in accordance with subsection (2)." The respondents argued that the Agreement was not itself a loan agreement as it anticipates that a loan agreement will be concluded by the GoL and the third-party financier.

[31] I turn to consider the provisions of s.28 (1). It is critical to recall the context in which s.28 is set. This section pertains to borrowings and guarantees by the GoL. Equally important not to lose sight of is the fact that government raises funds to finance its various programmes. Whether the GoL engages in a borrowing or guarantees payment of a particular sum of money, both these constitutes liability on the fiscus, and it therefore follows that they should be tightly controlled by the Minister of Finance and Cabinet. This is the context in which this section is set.

[32] The raising of funds through borrowings is done through various means and channels which are not restricted to securing of loans. Borrowing can either be through the selling of Treasury Bills and Bonds, and of course, other securities. It is common cause that treasury Bills and bond sales are done under the auspices of the Central Bank of Lesotho on behalf of GoL. If borrowing is understood in this light, the construction which is contended for by FSG is quite unduly restrictive and does not accord with the purpose of section 28(1). My understanding of the interplay between section 28(1), (2) and (3) of the PFMAA is this: the word 'borrowing' is wide enough to include any form of fundraising through which GoL may raise funds for public purposes. Loans are just but one of those forms of borrowings. Once a borrowing takes the form of loan, such an agreement cannot be signed by the Minister of Finance without consulting Cabinet. And in a case where Cabinet had been consulted and a loan is advanced, it must be paid into the Consolidated Fund, and be disbursed therefrom to fund the intended public purposes.

[33] I accept Mr. Budlender's submission that the Supply Agreement amounts to a borrowing within the meaning of the word in s. 28(1) due to the following striking features: In terms of clause 1.1.20, "the Project" which is the target of the Agreement is described as "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". The same idea of provision of finance is echoed in clause 3.2 which provides that "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).” Further in clause 3.3 it is stated that “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 institutions.” GoL binds itself in terms of clause 11 to borrow money and be solely responsible for repaying it regardless to whom it on-lends the fund it will have secured through FSG from the external funders.

[34] In substance, in my respectful view that, this Agreement is a borrowing in terms of which the GoL is obliged to borrow money from external funders through FSG. These loans would have been sourced by FSG, and what would be left of the GoL to do would be to sign loan agreement with the funders (Finance Agreement). It is exactly the GoL’s lack of movement on this front which led FSG, among others, to issue letters of demand for breach of contract and ultimately the arbitral award. For these reasons, the Supply Agreement amounts to a borrowing. Once this conclusion is reached, it is inescapable to find that Minister Tšolo did not have the authority of Cabinet to borrow the funds on behalf of the GoL. As can be seen he was not even empowered to do so as he was not the Minister of Finance, as only the latter has the power to approve the borrowing of fund after obtaining Cabinet’s consent. Minister Tšolo, at best was on a frolic of his own when he concluded the Supply Agreement. The respondents rather feebly contend that the funds secured from external funders would not be for the public purposes is unsustainable as the facts are clear that they were meant for the public purpose of implementing GoL energy policy.

[35] **The Constitution and Section 28(3) of the PFMAA**

Like the breach of Procurement Regulations, breach of the Constitution and s.28(3) of the PFMAA was conceded by Counsel for the respondents. Despite these concessions, this court will nonetheless give a brief overview of the extent of these breaches. We have already seen that section 28(3) of the PFMAA provides that:

“All funds borrowed in accordance with subsection (2) shall be paid into and form part of the Consolidated Fund.”

[36] Section 28(3) gives a direct effect to s.110 of the Constitution which 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 or Parliament, into some other fund established for any specific purpose or that may, by or other 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 form a Consolidated Fund.”

[37] Section 111 of the Constitution regulates the withdrawals from the Consolidated Fund, and it provides (for purposes of the present case) that:

“(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 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 authorized 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.”

[38] Section 116 of the Constitution provides that:

“(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 debt created thereby.”

[39] The Supply Agreement provides on the one hand in clause 12.1 that:

“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....”

[40] Plainly, in the light of section 28(3) of the PFMAA and the sections of the Constitution, the Supply Agreement breaches all of them. In terms of these sections, funds raised through borrowings have to form part of the Consolidated Fund as repayment obligations which may arise from such borrowings must be satisfied from it. When therefore, the Supply Agreement provides that funds raised through external funding should be paid directly to FSG, that is a flagrant breach of the provisions of the Constitution and the PFMAA, outlined above. The Supply Agreement is for these reasons, unconstitutional. These provisions are aimed at controlling expenditure of public funds and to ensure transparency in dealing with them. These financial controls are important and cannot be circumvented through any contractual stratagems.

[41] **Supply Agreement and Arbitration Clause contrary to Public Policy.**

The case of **AB and Another v Pradwin Preparatory School and Others 2019 (1) SA 327 (SCA)** at para. 27 restated the principles upon which courts control private contracts through the instrumentality of the doctrine of public policy:

- (i) Public policy demands that contracts freely and consciously entered into must be honoured, however, where it is offensive public policy it will be declared invalid.
- (ii) Where a contract on the face of it does not offend public policy, but its enforcement in a particular situation is, the court will not enforce it.
- (iii) The court should use the power to invalidate the contract or not to enforce it sparingly, and “only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds.” This is an expression of the principle of ‘perceptive restraint’ on the part of the courts when dealing with the invalidation or refusal to enforce contractual provisions. However, the Constitutional Court issued a stark warning against the courts unduly shackling themselves with this principle even where a case cries out for infusion of public policy with constitutional values. These views were expressed in the case of **Beadica 231 CC vs Trustees for the time being of the Oregon Trust 2020 (9) BCLR 1098 (CC)** at para. [90] as follows:

“[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional value. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy consideration that they fail to give proper weight to the overarching mandate of the Constitution.”

The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the “perceptive restraint” principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable “harm to the public” before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.”

[42] **Treatment of public policy in this jurisdiction**

Public Policy as the basis on which the courts can control private contracts was recognised in this jurisdiction in **Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd (C of A (CIV) No.9/14 [2014] LSCA 11 (17 April 2014)** by relying on **Barkhuizen v Napier 2007 (5) 323 (CC)**. In *Barkhuizen*, the South African Constitutional Court had formulated the criterion for determining public by holding it is determined by reference to the Constitution and its values as are expressed in the Bill of Rights. Scott AP, writing for the Court, while embracing it, showed that he was alive to the criticism from some quarters about the breadth of the formulation of the criterion for determining public policy, when he said, (at para.[10]):

“The criterion so formulated has been criticised for being too radical a departure from that formulated in the case previously cited, but it is unnecessary to consider that criticism.”

[43] Briefly, one of the criticisms is that the Constitutional Court concluded that the Constitution should be the only source of public policy when that should not be the case. P.J Sutherland “**Ensuring Contractual Fairness in Consumer Contracts After *Burkhuzen v Napier* 2007 (5) SA 323 (CC) – Part 1 *Stell LR* 2008 (3) 390** at 407 (under para. 2.4) expressed this point thus:

“...The clear text of the Constitution will assist courts in determining public policy. But public policy also embraces more than the Constitution and constitutional values. It will remain very difficult to determine what public policy is in a specific case, partly because it embraces more than just the Constitution and partly because constitutional values are often vague and conflicting,”

[44] At p.408, the learned author says:

“If public policy is more than an expression of constitutional rights and values, it may be contended that it is inappropriate to mediate the Constitution’s application to contracts through public policy. It may water down constitutional rights and bring them down to the level of ordinary rights and values.... Public policy is not, or at least is not necessarily, a factual issue. It is a collection general principles and more specific rules of contract law that are aimed at protecting the public and broader interest and values of society that is at most sensitive to public opinion.”

[45] Whatever the criticism of *Barkhuizen* formulation, this case can easily be determined on the principles stated in **AB and Another v Pradwin and Beadica 231 CC** cases. The respondents have already conceded that the

Supply Agreement breaches the Kingdom's procurement laws and the Constitution. By extension, the conclusion by Minister Tšolo of the arbitration agreement should fall together with the main agreement given its harm to the public: In his founding affidavit Prime Minister Majoro (then Minister of Finance) avers that for the Kingdom to part with €50m approximately (M855 510 900) in favour of FSG would be detrimental to the country in view of the dire economic situation the country is currently languishing. Supporting Prime Minister Majoro's averments, Dr Emmanuel Letete who was an Economic Advisor to the Prime Minister (and currently Governor of the Central Bank of Lesotho) basing himself on the assessment by the International Monetary Fund on debt sustainability of the Kingdom and data he collected from the 2020/2021 fiscal year mid-term budget review, made the following findings:

- (i) The Country's economy is already in a poor state, and when Covid-19 pandemic struck, this had knock-on effect, compounding an already dire economic situation, resulting in the decline in revenue during the fiscal year 2020/2021 while expenditure remained constant. This resulted in a budget deficit of €60.3m, representing 3% of the country's Gross Domestic Product (GDP)
- (ii) €50m indebtedness to FSG resulting from an unlawful Supply Agreement constitutes an amount almost equal to the Country's current budget deficit and that if the country pays this amount, it would push the country's current budget deficit of 3% to 6% of its GDP. The size of the Supply Agreement and its indebtedness to FSG is enormous in the context of the country's small economy.

- (iii) During the fiscal year 2020/2021 IMF and European Union advanced emergency loans to the Kingdom which fades in size compared to the €50m indebtedness.
- (iv) The result of this would render the deficit unsustainable and negatively impact the country's ability to address its citizens' most basic needs, such as food security and health.
- (v) The impact of this indebtedness to the economy would be to inhibit the country from borrowing money by raising its debt ratios to unsustainable levels.

[46] In its opposing affidavit FSG makes a feeble and fantastic attempt at explaining away the impact of enforcing the Supply Agreement:

- (i) It states that, by reference to Minister Tšolo's unlawful letter addressed to it that the GoL had already committed €100m required for the Project in the year 2018/19. There is a fallacy here. Minister Tšolo's letter does not by any stretch of imagination constitutes budget allocation and as already seen there was no such a commitment from Cabinet to proceed with this project. Cabinet did not any at any given time deliberate upon it. Only Parliament has authority to allocate funds for public expenditure. It is apposite to bear the following remarks by the Court of Appeal in **Former Employees of the Lesotho Agricultural Development Bank vs The Government of Kingdom of Lesotho & 2 Others C of A (CIV) NO.35 of 2020:**

“[57] However one might try to dress it up to commit the Fiscus to pay the benefits of the former employees such as they claim is the exercise of a power. Under Lesotho’s democratic system of government the Executive can only assume financial liability for obligations which arise under law and which unless they are contingent liabilities have been authorised by Parliament through appropriation.”

- (ii) It concedes that the judgment debt amounts to 4.9% of the total budget revenue of the country. But despite this concession, it argues that it is not staggering. It is my respectful view that the respondents are downplaying the obvious, the amount is staggering within the context of the Kingdom’s economy.
- (iii) FSG contends that the averments that the judgment debt will not have a detrimental impact on the country’s food security, health and education, and dismisses the averment as “emotive allegations” as “[n]o factual basis is established for any suggestion that the people of Lesotho will materially suffer in this or any other respect if the application is unsuccessful.” The respondents seem to be downplaying the glaring economic picture which is painted by facts averred by the Prime Minister’s economic adviser, and to make matters worse, it does not counter these facts with their own expert evidence. I consider that the applicant’s averments stand unchallenged in substance.
- (iv) When FSG reacts to the overwhelming evidence of economic impact of the Supply Agreement, it states that there are alternative sources of funding the Kingdom can always make use of such as Chinese food aid,

loans and donor grants. In the same vain as the above point, this does not amount to denial of the fact of the potential devastation the Supply Agreement will visit upon the country's vulnerable citizens.

[47] In the light of the fact that Minister Tšolo and FSG concluded an unconstitutional and invalid agreement, an Agreement in terms of which the former was unauthorised, it would be contrary to public policy that the Agreement should stand. Equally, the arbitration Agreement cannot survive as it was concluded without authority of the GoL. Its enforcement will bring considerate economic harm to the country for a long time, in circumstances where the agreement was concluded by an unauthorised errant Minister who flaunted every possible provision in the rulebook.

[48] **Separability of Arbitration clause**

The applicant argued that the arbitration clause was not lawfully concluded for the reasons that the Supply Agreement of which it is part, was concluded consequent to flouting of public procurement laws and the Constitution and further that Minister Tšolo lacked authority to conclude the Supply Agreement. Consequently, if the GoL did not consent to conclusion of the Supply Agreement it also did not consent to arbitration agreement.

[49] It is the respondents' argument that the legal impediments to the Supply Agreement do not apply to the arbitration clause. Even if the former agreement can be declared invalid, unless the arbitration clause is attacked on the basis of fraud, impersonation or non-compliance with the **Arbitration Act no.12 of 1980**, it will remain standing because it is separate from the

Supply Agreement. FSG argued that separability principle has acquired the status of a transnational rule of international arbitration regime which is binding on the courts of this country.

[50] **The law**

What the principle of separability entails is that the arbitration clause survives the invalidity of the main contract. For the conclusion that I am going to reach in this regard, it is unnecessary to engage in an interpretative exercise of whether the parties intended that the dispute regarding the validity of the arbitration agreement should be determined by the arbitrator. The principle of separability was stated in the leading English case of **Fiona Trust & Holding Corp. v Privalov** [2007] UKHL 40 at paras. [17] to [18]:

“The principle of separability enacted in Section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a “distinct agreement,” was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his

behalf, that is an attack on both the main agreement and the arbitration agreement.

On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms of which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement... ”(Underlining added)

[51] In **Heyman v Darwins Ltd [1942] 1 LL ER 337 (HL)** at 343F, the House of Lords said:

“An arbitration clause is a written submission, agreed to by the parties to the contract, and like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it was made. If the dispute as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the contract is contending that it is void ab initio (because, for example the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.”

[52] This latter case was followed closer to home in **North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA)** at para. [12], where the court stated “...[i]f a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall

with it...” The same court in **Canton Trading 17(Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O 2022 (4) SA 420 (SCA)** at para. [34] said:

“...If the challenge is that the contract is invalid, unenforceable, or as here, the contract never came into existence, then, it may appear logical that arbitration clause must fail, if the contract falls to be impugned.”

[53] All these judgments provide in uncertain terms that the courts will as a matter of public policy lean towards upholding the parties’ agreement to arbitrate their disputes, despite the main agreement being invalid. This is in recognition of the trite principle that the arbitration clause constitutes a separate agreement which should be impugned for reasons which pertain to it rather than the main agreement. However, different considerations apply where the simultaneous attack on the main and arbitration contracts is that the main contract in which the arbitration clause is housed is *void ab initio*, or that the person who purported to act for the protesting party did not have authority to conclude the arbitration contract on its behalf, or that the main agreement and the arbitration clause are contrary to public policy as discussed earlier. In fact, the latter ground is one of the grounds recognised for refusing the enforcement of the arbitration award under Article V (2)(b) of the **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)**.

[54] In the present matter, it is common cause that the Supply Agreement which contains an arbitration clause was concluded by Minister Tšolo who did not have the authority to do so, as only the Minister of Finance does. Only the Minister of Finance has the authority to authorise borrowings of funds for

utilization for public purposes: It was further conceded by the FSG that procurement laws were not followed in many of their different facets. Minister Tšolo did not have the power to sign the Supply Agreement as supply agreements properly so-called can only be signed by the Chief Accounting officers of the relevant procuring ministry in terms of Regulation 39(1) of the Procurement Regulations and not the minister: The Supply Agreement and the arbitration agreement are contrary to public policy for reasons already articulated above. For these reasons the main agreement is *void ab initio*, for further contravening the Kingdom's Constitution, and for these reasons, the arbitration agreement falls with it. The arbitration agreement cannot survive constitutional invalidity (which is conceded by FSG) as that would allow circumvention of the constitutional provisions which are aimed at curbing the behaviour which was exhibited by Minister Tšolo in this case. The constitutional and legislative controls were put in place for a legitimate public purpose, which cannot be defeated by hiding behind the arbitration clause. I, therefore, find the FSG's contention that the arbitration clause survives the fall of the Supply Agreement to be insupportable in law and is rejected.

[55] **Remedy**

What remains, therefore, is to determine the appropriate remedy. The applicant argues that consequent upon the Supply Agreement being declared *null and void ab initio*, the court should not exercise its discretion to save it given the flagrant violations of the procurement laws and the Constitution.

[56] FSG on the one hand argues, firstly, that as regards the reliefs sought by the applicant, the court has a remedial discretion especially where there has been

a delay to seek the court's intervention to halt the contract running its course, and secondly, that it would not be just and equitable to visit the consequences of the Minister Tšolo's misdeeds upon it. In short FSG contends that it was an innocent party which finds itself at the receiving end of the actions of an errant minister. I deal with the issue of delay in due course.

[57] **Judicial discretion**

Before I determine whether this court can exercise discretion whether to allow the Supply Agreement to stand despite breaches of the various laws which were articulated earlier in the judgment, the point of departure should be the relevant statutes concerned. Regulation 39(1) of the Public Procurement Regulations 2007 (as Amended) provides that:

“(1) The procurement process shall be regarded invalid and 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 the Regulations.”

[58] The default position when procurement laws are breached is that the decisions fall to be reviewed and set aside. The court may exercise its judicial discretion to depart from this default position only when a clear case has been made out. This has been the attitude of the apex court in this country as evidenced by

Minet Lesotho (Pty) Ltd v Ministry of Defence and National Security (C of A (CIV) 15/20 [2020] LSCA 27 (30 October 2020) and Drytex (Pty) Ltd Lesotho v Pyramid Laundry Services (Pty) Ltd and Others LAC (2015-2016) 387. In the former case, *Minet* had objected to the award of the tender and the Ministry of Defence's Procurement and Policy Advise Department had, consequent to the appeal being lodged, suspended the award of the tender. Notwithstanding the publicized suspension of the award pending appeal, the Ministry of Defence signed the contract with the preferred bidder. When reversing the decision of the High Court to allow the contract to stand despite the irregularities, the Court of Appeal said (at para. [31]):

"...The revered principle of the rule of law, at the heart of a democracy, dictates that illegality should not be condoned and allowed to prosper, especially by a court of law, unless very compelling circumstances are present."

[59] In the present matter, FSG has conceded that the Supply Agreement breached the Procurement Regulations, the PFMAA and the Constitution of Lesotho. The breaches are flagrant and multifarious. The contract has not been carried out. In the context of this case it would be hard to regard FSG as an innocent party, as it was fully aware that all these laws were not followed. In order to give their arrangement a semblance of legitimacy, Minister Tsolo and FSG included a clause in the Supply Agreement in terms of which GoL warrants that all the procurement laws were followed and all necessary parties who in terms of those procurement laws should have green-lighted the contract did so. This was all a sham because Minister Tšolo and FSG knew that these laws were not followed, as it correctly conceded before this court. In the result, the

principle of legality and the need to maintain the rule of law demands that the Supply Agreement be declared *void ab initio* and set aside together with the arbitration Agreement.

[60] **Delay in lodging self-review**

FSG argues that in view of the delay of the GoL to launch this self-review application, this court should exercise its discretion not to condone it and bar the applicant from reviewing the decision of former Minister Tšolo. On the other hand, the applicant argues that even if the delay could be considered inordinate, that does not bar it from launching the present application given extent of the illegalities involved.

[61] In **Letsela v Director of Public Prosecutions and Others LAC (2013 – 2014) 115**, adopted the following dictum from **Setsokotsane Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoerkommisie ‘en Ander 1986 (2) SA 57 (AD)** where (Quoting from the English version of the headnote) the court said:

“The test which a Court has to apply to ascertain whether a common law application for review in the absence of a specific time limit, was brought within a reasonable time, is of a dual nature. The Court namely has to ascertain (a) whether the proceedings were instituted after expiration of a reasonable time and (b) if so, whether the unreasonable delay should be condoned. As regards (b), the Court exercises a discretion but the enquiry as far as (a) is concerned does not involve the exercise of the Court’s discretion; it involves a mere examination of the facts in order to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable or unreasonable.”

[62] Even where the court comes to the conclusion that there has been an unreasonable delay, it is entitled, in the exercise of its discretion to condone it in the light of the explanation proffered for the lateness, its degree, the prospects of success and the importance of the case (**Letsela** case *ibid* at para. [11]). I will assume in favour of FSG that the GoL should have launched the present application in 2018 when FSG brought to the attention of the then Minister Majoro that it had concluded an agreement with the GoL. This is a very serious case in which the doctrine of legality and the rule of law are implicated. Should the GoL be barred from challenging the conceded illegality, the doctrine of legality and the rule of law would be undermined, in fact, it would send a wrong message that on the basis of a mere technicality of delay, the court is willing to look the other way instead of nipping the illegality in the bud. The prospects of success are overwhelming in view of the conceded breaches of the procurement laws, PFMAA and the Constitution of Lesotho. An unlawful exercise of public power cannot be allowed to stand. It has to fall together with its consequences. The views expressed in **Merifon (Pty) Limited v Greater Letaba Municipality and Another [2022] ZACC 25** at para. [45] are equally applicable in the present matter:

“...Whilst I agree with the criticism levelled against the municipality for its inordinate delay in taking steps to deal with its conduct in concluding an invalid agreement, this has no bearing on the eventual outcome of the matter. The unexplained long delay in reviewing its unlawful conduct does not cure the invalidity and unenforceability of the agreement.”

I would therefore condone the delay for these reasons.

[63] **Mootness**

It is FSG's contention that this application is moot because the Supply Agreement has led to it invoking its arbitration clause and consequently obtaining an arbitration award in South Africa. The applicant denies that the application is moot as the declaration by this court that the Supply Agreement is void *ab initio* will play a pivotal role in its review proceedings it has instituted in South Africa. The Court of Appeal in this jurisdiction has set out a test for determining mootness, thus:

"A case is moot and therefore not justifiable [justiciable] if it no longer presents an existing or live controversy which should if the court is to avoid giving advisory opinions on abstract propositions of law" **Lesotho National Development Corporation v Maseru Business Machines (Pty) Ltd and Others (C of A (CIV) 38/2015) [2015] LSCA 48 (06 November 2015)** citing with approval **Independent Electoral Commission Langeberg Municipality 2001 (3) SA 925 (CC) at 931 para. [9]**.

[64] The Constitutional Court of South Africa in the case of **MEC, Dept of Co-Operative Governance v Nkandla Local Local Municipality 2022 (8) BCLR 959 (CC)** aptly articulated the approach thus:

"[16] The principles applicable to mootness are trite. Courts should not decide matters that are abstract or academic and which do not have any practical effect, either on the parties before the court or the public at large. The question is a positive one, namely whether a judgment or order of the court will have a practical effect and not whether it will be

of importance for a hypothetical case. A matter is also moot and not justiciable if it no longer presents an existing or live controversy.

However, where the interest of justice so require, a court still has discretion to determine a matter despite its mootness. Several factors are considered in order to determine whether the interests of justice require that the matter should be determined nonetheless. Where there are two conflicting judgments of different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of granting leave to appeal and thereby entertaining moot matter. Another factor is the nature and extent of the practical effect that any possible order might have."

[65] I accept the submission of the GoL that there is a live controversy between the parties. As already stated, consequent to FSG obtaining an arbitration award against by default and having applied successfully to the High Court of South Africa to have that award made an order of court, the GoL lodged review proceedings. The decision of this court will play a crucial role in the arguments to be advanced before that court when the matter is finally heard. The GoL is, vociferously, as I understand, pursuing the review proceedings in South Africa in view of the enormity of the award in the context of Kingdom's economy. I therefore find that this application is not moot at all.

[66] It is unnecessary to deal with the choice of law and forum arguments in the light of this court's conclusion that the arbitration clause collapses together with the Supply Agreement in the wake of the latter agreement being found to be void *ab initio*.

[67] **Costs**

There is no reason why a trite principle that costs should follow the event should not be followed in the present matter. Given the complexity and the nature of the issues raised herein, the parties were entitled to be represented by at least two counsel of a Senior and a Junior.

[68] In the result the following orders are made:

1. The third respondent's decisions:
 - 1.1 to appoint 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 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 *void ab initio*;
5. The Applicant's delay in instituting this application is condoned.

6. The Applicant is awarded the costs of suit, which costs shall include the costs of employing three counsel.




M. A MOKHESI
JUDGE

I AGREE



S. P SAKOANE
CHIEF JUSTICE

I AGREE



A. R MATHABA
JUDGE

For the Applicant: Adv. Motiea Teele KC, Adv. Steven Budlender SC and Adv. Nick Ferreira instructed by ENSafrica Incorporated C/O Mei & Mei Attorneys Incorporated

For the Respondents: Adv. Pearce Rood SC and Adv. Frank Pelsler instructed by Petersen, Hertog & Associates C/O Harley & Morris Attorneys, Notaries Public & Conveyancers