THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 438/2024

In the matter between:

KINGDOM OF LESOTHO	**APPELLANT**
and	
FRAZER SOLAR GMBH	**FIRST RESPONDENT**
TRANS-CALEDON TUNNEL AUTHORITY	**SECOND RESPONDENT**
LESOTHO HIGHLANDS DEVELOMENT AUTHORITY	**THIRD RESPONDENT**
STANDARD BANK OF SOUTH AFRICA LTD	**FOURTH RESPONDENT**
SHERIFF, JOHANNESBURG CENTRAL	**FIFTH RESPONDENT**
SHERIFF, CENTURION EAST	**SIXTH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**SEVENTH RESPONDENT**
ARBITRATION FOUNDATION OF SOUTH AFRICA	**AMICUS CURIAE**

Neutral citation: *Kingdom of Lesotho v Frazer Solar GmbH and Others* (438/2024) [2026] ZASCA 75 (22 May 2026)

Coram: MOLEMELA P and MAKGOKA, MOKGOHLOA, SMITH and KOEN JJA and STEYN and MODIBA AJJA

Judgments: Mokgohloa and Smith JJA (first judgment): [1] to [144]
Modiba AJA (second judgment): [145] to [245]
Molemela P (third judgment): [246] to [295]

Heard: 20 May 2025
Delivered: 22 May 2026

Summary: Rescission of judgments and orders in terms of Uniform Rule 42(1)*(a)* or common law – grounds for rescission – explanation for default and *bona fide* defence – article 34(3) of the UNCITRAL Model Law on International Commercial Arbitration – whether the three-month period in article 34(3) for bringing an application to set aside arbitration award can be extended – whether condonation competent – constitutional validity of the three-month time limit.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Strijdom AJ sitting as court of first instance):

1 The first respondent's application for leave to adduce further evidence is dismissed with costs, including the costs of two counsel.

2 The appeal against the order of the high court (per Strijdom AJ) dismissing the rescission application is upheld with costs, including the costs of two counsel.

3 The order of the high court (per Strijdom AJ) dismissing the rescission application is set aside and replaced with the following order:

'(i) The enforcement order granted by Lamont J on 29 April 2021, is hereby rescinded.

(ii) Each party is directed to pay its own costs.'

4 The appeal against the order of the high court (per Strijdom AJ) dismissing the application to set aside the arbitral award, is dismissed with costs including the costs of two counsel.

JUDGMENT

Mokgohloa and Smith JJA (Koen JA and Steyn AJA concurring):

Introduction

[1] The appellant, the Kingdom of Lesotho (the KOL), appeals an order of the Gauteng Division of the High Court, Johannesburg (the high court), which dismissed its application to: (a) set aside an arbitration award against the KOL (the setting aside order); and (b) rescind a judgment making the arbitration award an order of court (the enforcement order). The appeal is with the leave of the high court. Only the first respondent, Frazer Solar GmbH (FSG), and the seventh respondent, the Minister of Justice and Constitutional Development South Africa, opposed this appeal, but on different grounds.

[2] The appeal raises several pertinent and interrelated questions, which are informed by their historical context. Notwithstanding this interrelation, this judgment identifies and addresses two discrete issues, both of which are rooted in the framework of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), as adapted by the International Arbitration Act 15 of 2017 (the IA Act) Those issues are, first, whether an order which made an arbitral award an order of court, can be rescinded. This question is considered against the background of article 36 of the Model Law.[1] Second, considered against the background of article 34 of the Model Law,[2] is the setting aside of an arbitral award.

The parties

[3] The KOL is a sovereign country, represented in these proceedings by the Attorney-General of the Government of Lesotho in terms of the Government Proceedings and Contract Act 4 of 1965 (the Lesotho GPC Act).

[4] The first respondent is FSG, a company incorporated under the laws of the Federal Republic of Germany. In South Africa, FSG trades under the name Frazer Solar (Pty) Ltd. The seventh respondent is the Minister of Justice and Constitutional Development South Africa.

The facts

[5] On 24 September 2018, the KOL entered into an agreement with FSG to roll out renewable energy products across Lesotho (the supply agreement). The events leading up to and following this agreement are accordingly set out below.

[6] During 2015 the KOL published its renewable energy policy. The policy provided that the Department of Energy is mandated to coordinate, monitor and evaluate the programmes and activities within the energy sector. It also envisaged a consolidation of all existing energy funds and accounts to create a single energy fund and accounts that would finance energy programmes and other programmes that would be administered by the Ministry responsible for energy issues.

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[1] Article 36 of the Model Law governs grounds for refusing recognition or enforcement of arbitral awards.
[2] Article 34 of the Model Law covers applications for setting aside as exclusive recourse against arbitral awards.

[7] On 10 July 2017, responding to the KOL's energy needs, FSG, through its sole director, Mr Robert John Frazer, contacted Mr Seqhebolla Letsie (described as one of the KOL's officials) to propose a €50 – €100 million solar energy project. Mr Frazer requested a meeting with the then Prime Minister, Mr Thomas Thabane to discuss FSG's proposals for the project. On 3 August 2017, Mr Frazer met with the then Minister in the Office of the Prime Minister, Minister Temeki Tšolo, who assured Mr Frazer that the project was supported by the Prime Minister.

[8] A German bank, KfW-IPEX Bank GmbH (KfW-IPEX Bank), was identified as the financial institution which would lend the money to the KOL to finance the energy project with FSG. On 5 October 2017, Minister Tšolo wrote a letter to KfW-IPEX Bank indicating that the KOL was interested in FSG's proposal, and requested an indicative term sheet for the loan to cover the project. The letter recorded: 'Please be advised that the Government of Lesotho through the Department of Treasury of the Ministry of Finance will administer the loan'.

[9] In response, on 17 October 2017, Mr Frazer wrote to Minister Tšolo and requested formal advice on the suggested steps, including: (a) a briefing session for the Minister of Finance and his team; (b) a meeting with the Ministries of Public Works and Energy; and (c) the establishment of a project team that would include representatives of the Ministries of Finance, Energy, and Public Works, and any other necessary ministries or departments. Mr Frazer stated that the support of the Ministry of Finance would be important for the project to proceed.

[10] On 12 November 2017, Mr Frazer sent a draft memorandum of understanding (MOU) to the then Minister of Finance, Mr Moeketsi Majoro for his signature. Minister Majoro's response was:

'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 to sign any agreements, whether binding or not.'

Notwithstanding this, Minister Tšolo signed the MOU on 20 November 2017. The MOU recorded that it is the responsibility of the Steering Committee to deliver the 'final Proposal for Government approval'. Furthermore, the MOU recorded that it was the Government of Lesotho that was required to 'grant approval for the Project by 28

February 2018'; and that the 'Project proposal also needs to be finalised and submitted to the Government for approval'.

[11] On 1 December 2017, Minister Tšolo invited Minister Majoro to a cross-ministry workshop to take place on 6 December 2017. The purpose of the workshop was among other things, to 'obtain buy-in and support of each Ministry' and to 'discuss and agree on different implementation options for further analysis and costing'. The kick-off meeting was held at the Durham Lesotho Link Conference Centre between FSG and the KOL. It was attended by 27 officials from different ministries in the KOL government including several cabinet ministers, the principal secretary in Minister Majoro's office and other officials from the Ministry of Finance.

[12] On 13 December 2017, KfW-IPEX Bank sent a letter to Minister Majoro expressing its 'in-principle' interest in funding the project. The letter referred to the MOU as constituting an agreement of intention to proceed with the project. Thereafter, several emails were exchanged between Mr Frazer and Minister Majoro.

[13] On 22 March 2018, KfW-IPEX Bank sent another letter to Minister Majoro expressing its general interest to fund the project. KfW-IPEX Bank confirmed that it would, in principle, be prepared to finance up to €100 million of the eligible contract value. On 7 April 2018, Mr Frazer sent an email to Minister Majoro requesting him to acknowledge receipt of the letter of intent from KfW-IPEX Bank and asking the bank to prepare a formal finance offer. Minister Majoro's response was that he would communicate with the bank when he was in Washington DC. To this, Mr Frazer's response was that Minister Tšolo had sent a letter to 'tide things over' and that the 'Germans are working on the details of finance offer'.

[14] Mr Frazer prepared a document titled: 'Information for KfW-IPEX FSG Lesotho project'. This document recorded that the Ministry of Finance needed to know 'two more key pieces of information before they can give their formal response and approval'. It recorded further that once the Ministry of Finance 'has the full picture they will make their formal recommendation to the Lesotho government who will give their final approval'. The document also recorded that the project was perfectly aligned with the Energy Policy.

[15] On 11 May 2018, Minister Tšolo sent a letter to Minister Majoro and the Cabinet, recommending that Cabinet approve the project. The letter stated:

'Most of you have already been exposed to the German Government's nominated supplier, Frazer Solar GmbH and its Directors, Mr Robert Frazer. The German Government has extended deadline of this offer to June 2018 in order for us to make a decision whether to take up this opportunity or decline.

Please find the attached business proposal from Frazer Solar GmbH, for your Ministry to review and advise on your comments and opinion whether to proceed or not by Thursday 2 May 2018. Please focus your deliberations on how this project would impact your own Ministry. Pending majority feedback in the affirmative, the Office of the Prime Minister and Ministry of Finance will then finalise the project parameters with the German Government and present the final proposal to Cabinet in early June'.

[16] During early June 2018, Minister Tšolo or his secretary prepared a memorandum to be submitted to Cabinet. The memorandum recommended that Cabinet approve the €100 million low-interest loan project funded by the German Government. On 12 June 2018, Cabinet met but the memorandum was withdrawn. No decision was taken on the project. On the same day, Mr Frazer reported the outcome of the Cabinet meeting to the German ambassadors. He expressed hope that the project would be submitted to a vote the following day and noted that they 'only need[ed] a simple majority to pass, a unanimous vote [wasn't] required'.

[17] On 1 August 2018, Minister Tšolo wrote to Mr Frazer informing him that the KOL agreed and committed itself to proceed with the project. He further stated that the primary points of contact would be the Office of the Prime Minister and FSG to ensure effective communication between the parties. Thereafter Mr Frazer wrote to KfW-IPEX Bank advising it that the project had been confirmed by the KOL. He later wrote to the Development Bank of South Africa (DBSA) and informed them that all interaction including the finance offer from the DBSA must go through his office.

[18] On 4 September 2018, Mr Frazer sent an email to Minister Majoro referencing a meeting they had the previous day. Mr Frazer advised Minister Majoro that he would work with the Prime Minister on securing clearance for Minister Majoro to negotiate

the financial arrangements. Further, that the Minister of Energy would be back by then so Minister Majoro could ascertain his support for the project.

[19] On 24 September 2018, the supply agreement was signed by Minister Tšolo on behalf of the KOL and Mr Frazer on behalf of FSG. This was done in the office of the Prime Minister and witnessed by Minister Tšolo's secretary, Ms Ntobaki, and his personal assistant, Mr Matla. Three days later Mr Frazer sent a signed copy of the supply agreement to the Minister of Energy, Minister Hloaele. According to the KOL, the Minister of Energy considered this as a 'joke' because there was no compliance with the approval process necessary for the valid execution of the project.

[20] On 16 October 2018, Mr Frazer sent a letter to Minister Majoro commenting that Minister Majoro had refused to initiate discussions with the DBSA on the finance offer and had insisted that he would only do so on instruction of the Prime Minister. Mr Frazer informed Minister Majoro that he considered it 'ridiculous' that Minister Majoro would need permission to initiate the process and that his actions were not perceived as rational or logical. In response, Minister Majoro reiterated that the energy saving project should have leadership in the energy ministry, and that it must first pass the technical scrutiny by the relevant technical ministry. Mr Frazer informed Minister Majoro that in fact the Ministry of Energy was involved.

[21] On 2 November 2018, Mr Fintelmann, Mr Frazer's partner at FSG, sent an email to Minister Majoro stating that:

'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 systems 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…'

[22] In the meantime, Mr Frazer prepared a status report on the project which acknowledged that the Cabinet paper submitted in June 2018 had been withdrawn. Under the heading 'Required Action', Mr Frazer identified steps that Minister Majoro had to take in order to finalise the finance agreement.

[23] Minister Majoro responded to Mr Fintelmann's email stating:

'The project as presently proposed is to be financed by the resources of the Kingdom of Lesotho even if these are to be borrowed from the Government of Germany. This makes it subject to the ordinary rules of government investment including being the project of the appropriate Ministry of Lesotho namely the Ministry of Energy. This is a prerequisite before the Ministry of Finance can assess the project for economic and financial soundness. I have explained this to your colleague Robert'.

[24] In response, Mr Fintelmann stated that he assumed that the prescribed procedure had been followed before the supply agreement was signed. He stated that: 'now I do not understand at all how the contract is to be understood'. He requested Minister Majoro to help him assess the situation correctly.

[25] On 10 December 2018, Minister Tšolo wrote to Mr Frazer reassuring him of the KOL's commitment to the project. He asked for more time for the other stakeholders to have a clear understanding of the project in order to engage in consultation with the German government regarding the finance offer.

[26] With nothing coming up, on 11 March 2019, FSG, through its legal representatives, sent a letter of demand to Minister Tšolo and his secretary. The letter referred to the supply agreement, the appointment of FSG as a supplier, the acceptance by the KOL of FSG's proposal, the arbitration clause contained in clause 24 of the supply agreement and demanded the KOL to comply therewith. Two other letters were sent to the Prime Minister's office without response. On 29 July 2019, FSG terminated the supply agreement.

[27] On 30 July 2019, FSG commenced arbitration proceedings in Johannesburg. Notice to that effect was sent to the Office of the Prime Minister. The arbitration hearing took place on 2 December 2019, and an award was issued in favour of FSG on

28 January 2020. On 20 May 2020, Minister Majoro became the Prime Minister of Lesotho.

[28] FSG commenced with the application in the high court to make the arbitration award an order of court (the enforcement application). The court issued an edictal citation order granting FSG leave to serve the enforcement application on the KOL. The application was served on the KOL Ministry of Foreign Affairs through diplomatic channels via the Department of International Relations and Cooperation (DIRCO) and the Lesotho High Commission.

[29] On 20 March 2021, a CaseLines[3] invitation in respect of the enforcement application was sent from the South African Judiciary to Prime Minister Majoro. The following day, Prime Minister Majoro forwarded the invitation to the General Secretary who in turn, informed the Chief Legal Officer in the Cabinet Office of the matter. Prime Minister Majoro's covering email forwarding the CaseLines Invitation to the Government Secretary reads:

'The email below suggests this case is proceeding. Are we ready? How are we ready? No one has spoken to me even though now it is suggested that I am a respondent'.

[30] The notice of set down in the enforcement application was emailed to Prime Minister Majoro on 19 April 2021. The hearing was set down for 29 April 2021, to be heard virtually. A link to that effect was provided to Prime Minister Majoro via his official email address. The KOL never responded to any of the notifications and failed to attend the hearing. The high court subsequently granted the order making the arbitration award an order of court. Writs of execution and attachment were issued in South Africa and other jurisdictions to attach €50 million worth of the KOL's assets.

[31] In the meantime, the KOL's Directorate on Corruption and Economic Offences (the DCEO) commenced with investigations into alleged corruption and fraud into the supply agreement and concealment of the arbitration information. On 9 June 2021 the DCEO wrote a letter to the KOL's Attorney-General recording that the latter had reported allegations of corruption and fraud in May 2021. He also stated that the

[3] CaseLines is an online evidence management system that digitises court documents and allows participating parties to share and present evidence electronically.

DCEO's investigations revealed fraud in the process of signing the contract as it was allegedly signed by people who had no authority to sign and witness the contract. The letter furthermore recorded the following:

'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 all these were done deliberately, further investigations are ongoing.

-Our preliminary information has led 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 financially, with individuals standing to benefit from these corrupt activities.

-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'.

In his founding affidavit Prime Minister Majoro adds the following regarding the content of the letter:

'[A]fter 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 Notices of Arbitration processes, the Court Order and the Set Down received on the 20th April 2021, were intercepted and concealed'.

[32] Following the above report, the KOL established a commission of enquiry into the signing of the supply agreement. Minister Tšolo was then charged with inter alia, fraud and corruption.

[33] The KOL launched an application in the Gauteng Division of the High Court, Johannesburg (the Johannesburg High Court) to stop the execution of the writs. This application was adjourned to a date to be arranged by the Deputy Judge President. The KOL and FSG agreed to the application being adjourned sine die. FSG undertook not to execute the writ pending finalisation of the stay application.

[34] While that application was pending, the KOL launched an application in the Lesotho High Court, seeking to review and set aside the supply agreement. On

9 November 2022, the Lesotho High Court found that Minister Tšolo had no authority or power to sign the Supply Agreement and that the regulations were not followed when the Supply Agreement was signed. Thus, it concluded, the supply agreement was invalid, unconstitutional and void *ab initio*.[4] The Lesotho High Court accordingly granted an order setting aside the supply agreement and the arbitration clause.

In the high court

[35] In the Johannesburg High Court, relying on the provisions of rule 42 of the Uniform Rules of Court (rule 42), the KOL contended that the enforcement order was erroneously sought or granted; that the KOL had never agreed to submit to arbitration; that Minister Tšolo was never authorised to enter into the supply agreement; and that because the KOL never consented to the supply agreement, which included the arbitration clause, the Johannesburg High Court lacked jurisdiction over the KOL in terms of the Foreign States Immunities Act 87 of 1981 (FSI Act).

[36] The Johannesburg High Court found that 'Minister Tšolo had actual or at least ostensible authority to conclude the arbitration agreement'; that the KOL was in wilful default for not opposing the enforcement application; and that the limitation of the fundamental rights of access to courts imposed by article 34(3) of the Model Law, which requires that an application for setting aside an arbitration award must be brought within three months, constituted a reasonable and justifiable limitation.

In this Court

Issues

[37] The two main issues, structuring the two main parts of this judgment, and their respective ancillary issues for determination are:

Part 1: Whether the KOL has made out a case for the rescission of the enforcement order. This issue is subdivided as follows:

(a) whether the question that the order can be rescinded should be based on rule 42, the common law or on the absence of jurisdiction;

(b) whether the KOL has a reasonable explanation for their default; and

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[4] *Attorney General v Frazer Solar GMBH & 2 Others* [2022] LSHC 141 (*Attorney General v Frazer Solar GmbH* LSHC).

(c) whether the KOL has a bona fide defence and prima facie prospects of success in defending the application to enforce the arbitral award.

Part 2: Whether the arbitration award can be set aside. This issue is subdivided as follows:

(a) whether the KOL is time-barred from bringing an application to set aside the arbitration award in terms of article 34(3) of the Model Law, and if so, whether the court can grant condonation;
(b) if article 34(3) is not capable of being interpreted to allow condonation, whether it should be declared constitutionally invalid;
(c) whether the KOL has waived their foreign state immunity; and
(d) the weight to be accorded to the judgment of the Lesotho High Court.

However, prior to addressing these matters, it is necessary to consider the preliminary issue of FSG's belated application for leave to submit additional evidence.

FSG's application for admission of further evidence

[38] On 1 December 2025, following the argument of the appeal and the reservation of judgment, FSG filed an application for leave to submit further evidence. This evidence consists of a judgment of the Lesotho High Court, delivered on 11 November 2025. The judgment relates to criminal proceedings involving Minister Tšolo. FSG explains that its attorneys were only made aware of this judgment on 19 August 2025, when their Lesotho-based correspondents notified them that the Lesotho High Court had issued a permanent stay of prosecution against Minister Tšolo. At that point, the written reasons for the judgment had not yet been provided, but the Court indicated that they would follow. According to the Lesotho attorneys, it is customary for reasons to be furnished within ninety days of the judgment. The reasons were ultimately received on 21 November 2025.

[39] FSG states that the new evidence it seeks to introduce is a judgment from the Lesotho High Court, which – even though it is still subject to appeal – constitutes conclusive evidence of the current status of the criminal prosecution against Minister Tšolo. The judgment is also material since it had been deemed so by the KOL. The KOL submits that the judgment sought to be introduced as further evidence is not an acquittal on the merits and that the Lesotho High Court did not make any determination

of the lawfulness or validity of the supply agreement or the conduct of the parties in relation to the contract at issue in these proceedings. Furthermore, the judgment does not exonerate Minister Tšolo of wrongdoing in relation to the supply agreement; and that the permanent stay was granted purely due to procedural delays and the unreadiness to proceed with the prosecution. Therefore, FSG argued, the judgment is irrelevant to the determination of the issues before this Court.

[40] Section 19*(b)* of the Superior Courts Act 10 of 2013, empowers this Court to receive further evidence on appeal. The criteria as to whether evidence should be admitted are: the need for finality; the undesirability of permitting a litigant who has been remiss in bringing forth evidence and to produce it late in the day; and the need to avoid prejudice.[5] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[6] the *C*onstitutional Court, referring to s 22 of the repealed Supreme Court Act 59 of 1959 which is similar to s 19*(b)* of the Superior Courts Act, cautioned that the power to receive further evidence on appeal should be exercised 'sparingly' and that such evidence should only be admitted in 'exceptional circumstances'. Furthermore, in *O'Shea NO v Van Zyl NO and Others*,[7] this Court held that one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed.

[41] In our view, the evidence which FSG seeks to introduce does not satisfy the requirements of materiality and conclusiveness. The only direct evidence currently before the Court concerning Minister Tšolo's involvement in the disputed contract is provided in the affidavit of Prime Minister Majoro. In this affidavit, Prime Minister Majoro sets out various allegations regarding Minister Tšolo's authority to act on behalf of the KOL and his bona fides in entering into the contract in question. The criminal proceedings against Minister Tšolo originate from these allegations. Minister Tšolo has not submitted an affidavit to dispute or respond to these assertions.

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[5] *Colman v Dunbar* 1933 AD 141 (A) at 161-162.
[6] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) paras 41-43.
[7] *O'Shea NO v Van Zyl NO and Others* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 9.

[42] The allegations contained in Minister Majoro's affidavit are pertinent to both the application for rescission and the application seeking to set aside the arbitral award. While the judgment of the Lesotho High Court – which permanently stays the prosecution against Minister Tšolo – possesses some degree of relevance, it does not make any findings as to Minister Tšolo's guilt or innocence. Furthermore, as the judgment is currently under appeal, it cannot be regarded as final or conclusive evidence of the status of the criminal proceedings against him. In light of these findings, FSG has not established adequate grounds for the admission of the further evidence it seeks to introduce.

The parties' submissions regarding the main issues

The KOL's submissions

[43] The KOL asserted that the signing of the supply agreement by Minister Tšolo purportedly on its behalf, involving, as it does, the exercise of public power, was subject to the principle of legality, both under the Constitutions of the KOL and of South Africa.

[44] The supply agreement, including the arbitration clause, was invalid because it was concluded in breach of the KOL's Constitution, and the country's procurement and financial regulation laws. Minister Tšolo was acting ultra vires and on a frolic of his own when he signed the supply agreement as he was not authorised to do so by Cabinet, or by the Minister of Finance or the Minister of Energy. Therefore, the arbitration clause could not survive the invalidity and unlawfulness of the supply agreement.

[45] The KOL submitted further that the arbitration clause is invalid because Minister Tšolo had no authority to waive the KOL's sovereign immunity and submit disputes to the jurisdiction of the arbitrator in a foreign State, ie South Africa. He did not have ostensible authority either as a matter of law or of fact. FSG knew from the onset that the approval of Cabinet, the Minister of Finance and the participation of the Minister of Energy were required for a valid agreement to be concluded. They sought to obtain this approval but failed to do so.

[46] As regards the provisions of article 34(3) of the Model Law, the KOL submitted that its application to review and set aside the arbitration award is not time-barred by the article. This, according to the KOL, is because article 34(3) is capable of being interpreted to afford the courts the power to condone non-compliance on good cause shown, if not, then it is constitutionally invalid and should consequently be struck down to the extent that it fails to afford the court the power to condone non-compliance on good cause shown.

FSG's submissions

[47] FSG contended that Minister Tšolo had statutory authority provided for in terms of s 10 of the Lesotho GPC Act.[8] FSG contended that s 10 makes agreements binding on the KOL if they are signed by a Minister purporting to act on behalf of the KOL. It contended further that Minister Tšolo was 'the Minister in the Office of the Prime Minister'. His portfolio served to coordinate projects straddling different cabinet portfolios and to ensure that they communicate effectively and efficiently.

[48] Furthermore, Minister Tšolo was specifically assigned to represent the KOL in relation to this project. His authority was recorded in a letter dated 1 August 2018, written by him to FSG confirming that 'the Government of Lesotho agrees and commits itself to proceed with the [FSG] Energy Efficiency and Employment Creation project…'. This letter, so the contention went, further confirmed that 'the primary points of contact will be the Office of the Prime Minister and [FSG]'.

[49] As regards the application of article 34(3) of the Model Law, FSG submitted that this article imposes an absolute three-month bar. There is no scope to read into it a power to condone a party's failure to comply with it. FSG submitted further that the reading-in discretion overrides the time bar and would mean that a South African court would be creating an additional barrier for approaching the court, in conflict with article 5 and article 34 of the Model Law.

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[8] Section 10 of the Lesotho GPC Act reads:
'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 Her Majesty in Her Government of Basutoland or the Basutoland Government shall be held to be a contract or agreement made by and on behalf of Her Majesty in Her Government of Basutoland if signed by a Minister of Motlotlehi's Government or by an officer authorised by such Minister and unless so signed shall be of no effect.'

Part I: Rescission of the enforcement order

Rescission based on rule 42, common law or the absence of jurisdiction

[50] Generally, a court has no power to set aside its own final order. This is because the court is *functus officio* and, in the public interest, there must be finality to litigation.[9] Under certain circumstances, judgments can however be rescinded in terms of the Uniform Rules of Court or in terms of the common law.

[51] The common law requires that 'sufficient' or 'good cause' must be shown to warrant the rescission of a default judgment. In order to establish good cause, an applicant must set forth (i) a reasonable explanation for the default; (ii) bona fides in bringing the application and (iii) a bona fide defence/s.[10] These requirements were restated in *Government of the Republic of Zimbabwe v Fick* (*Fick*)[11] as follows:

'First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as to show that there is sufficient cause for an order to be rescinded. A failure to meet all of them will result in refusal'.[12]

[52] The power of a court to rescind its orders or judgment under rule 42(1)*(a)*[13] requires the applicant to show: (a) that the order was granted in its absence; and (b) that the order was erroneously sought or granted. In *Zuma v Judicial Commission of Inquiry*[14] (*Zuma*), the Constitutional Court held that even when both these requirements are met, the court merely has a discretion to rescind its order, which discretion must be exercised judicially.[15]

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[9] *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA), para 16.
[10] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 761E-G.
[11] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).
[12] Ibid para 85.
[13] Rule 42(1)*(a)* reads as follows:
Variation and rescission of orders
(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
[14] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 2011 (11) BCLR 1263 CC.
[15] Ibid para 53.

[53] In this Court the KOL asserted that a court order granted in the absence of jurisdiction is a nullity. Related to this argument, it contended that the arbitration award is susceptible to being set aside; that it had never in fact waived its sovereign immunity; and that the award had been set aside by the Lesotho High Court. During the proceedings before this Court, counsel for the KOL clarified that they had not abandoned the rule 42 and common law grounds, which they argued in the Johannesburg High Court, but argued that the absence of jurisdiction as such provided a basis for setting aside the enforcement order. We deal with the arguments related to the waiver of sovereign immunity and the reliance on the judgment of the Lesotho High Court in part 2 below, even though, as we intimate in the introduction, these issues are interrelated. Below, we find that the KOL, having agreed in writing to submit the dispute for arbitration, was not immune from the jurisdiction of the courts of the Republic in any proceedings which related to the arbitration. Accordingly, in this part, we consider the case for rescission on common law grounds.

Reasonable explanation for default

[54] FSG submitted that the KOL was procedurally absent during the enforcement proceedings, despite having been served with the notice of set down of the enforcement proceedings, as mentioned earlier. Therefore, the KOL's highest officials knew of the enforcement proceedings and the date of the set down.

[55] The KOL conceded that notices informing it of the enforcement were sent and received by the KOL. Prime Minister Majoro who deposed to the founding affidavit stated that he was aware that documents relating to the enforcement proceedings were served on the South African High Commission in Lesotho via edictal citation. He proceeded to outline the process that would normally be followed when such documents are received through diplomatic channels. Of importance, is that when such documents are received, they are delivered to the Office of the Principal Secretary. The Executive Secretary to the Principal Secretary will receive the documents, affix the date stamp and place them in the Principal Secretary's office.

[56] The Principal Secretary would peruse the documents so delivered and allocate particular documents to a specific directorate. The documents that relate to legal processes would be marked and sent to the Directorate of Legal Affairs for advice.

Thereafter, such documents would be hand-delivered to the Office of the Attorney-General, which would take appropriate steps to defend the proceedings.

[57] Prime Minister Majoro further stated that the documents and notices relating to the enforcement proceedings in this matter did not reach their destination. He stated that the Ministry of Foreign Affairs and International Relations did receive the notice of motion and the founding affidavit in the enforcement application. These documents were marked accordingly and forwarded to the Directorate of Legal Affairs, where they were supposed to be forwarded to the Office of the Attorney-General. However, for unknown reasons, these documents never reached the Office of the Attorney-General.

[58] The notice of set down was served physically on the Office of the Government Secretary. This notice was supposed to be forwarded to the Office of the Attorney-General. But since this office was vacant, it was forwarded to the Office of the Chief Legal Officer, who advised that she did not receive such notice of set-down. The same notice of set-down was emailed to Prime Minister Majoro. He forwarded the notice to the Government Secretary. The notice was also sent to the Office of the Chief Legal Officer. However, the Chief Legal Officer never received it. The Prime Minister received a CaseLines invitation. According to him, he did not open the link but forwarded the email to the Government Secretary, who, in turn, notified the Chief Legal Officer, who, it later transpired, never received the notification. The KOL conducted an extensive investigation to determine the reason for this.

[59] The investigation revealed that the notices and processes were intercepted and concealed. This was reported to the DCEO, which started with its criminal investigations. In its preliminary report, the DCEO confirmed 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’.

[60] The KOL submitted that even if notices were served on the office of the Prime Minister, this was not proper service in terms of Lesotho law. He stated that in terms of s 3 of the Office of the Attorney-General Act 6 of 1994, the Attorney-General shall represent the Government of the KOL in all legal proceedings in which the Government is a party. Furthermore, s 3 of the Lesotho GPC Act, in actions against

the government, the Principal Legal Advisor, ie the Attorney-General, is to be the nominal defendant or respondent. In terms of rule 4(1)*(f)* of the Rules of the Lesotho High Court, any process that has to be affected on the Government of Lesotho or any Minister of the Government, such processes have to be served or delivered to the Office of the Attorney-General.

[61] FSG argued that the KOL's submission that notices were intercepted and concealed is a suspicion that is unsubstantiated by any facts and should be rejected. We do not agree. On the contrary, we find that the suspicion is confirmed by the DCEO's preliminary report alluded to in paragraph 31 above. Furthermore, the KOL established a commission of enquiry into the signing of the supply agreement and Minister Tšolo was charged with fraud and corruption. We accept the KOL's explanation for its default. Whether there was indeed interception, we do not know, and that the issue is not before us.

Bona fide defence and prima facie prospects of success

[62] The KOL submitted that the supply agreement is unlawful and invalid because: (a) it was concluded without an open tender in breach of the Public Procurement Regulations 2007, as amended by the 2018 Regulations[16]; and (b) it was concluded in contravention of s 28 of the Public Financial Management and Accountability Act of 2011 (the PFMAA)[17].

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[16] '32A (1) The Chief Accounting Officer for Ministry of Finance shall do the following:
(a) enter into framework contract or agreement if the required quantity of goods, work, consultancy services or non-consultancy services cannot be accurately determined at the time of entering into the contract or agreement but with a determined rate or price and in which goods, work or non-consultancy services needed in certain quantities at different times over a defined contract period;
(b) use open tender method of procurement for a framework contract or agreement in accordance with the provisions of these regulations and shall use the standard tender as appropriate; and
(c) not to make a commitment to purchase the full quantity on a framework contract or agreement but shall indicate the volume for the estimated quantity.'

[17] The purpose of the PFMAA is recorded in its preamble as follows:
To establish and sustain transparency, accountability and sound management of the receipts, payments assets and liabilities of the Government of Lesotho.
Section 28 of the PFMAA provides as follows:
'Borrowing and guarantees
(1) The Minister, with 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.
All funds borrowed in accordance with subsection (2) shall be paid into and form part of the Consolidated Fund'.

[63] It is common cause that the supply agreement was concluded without an open tendering process and the involvement of the entities stipulated in the Regulations. Compliance with the procurement processes is paramount for efficiency, transparency and overall value for money and competition among prospective bidders. As stated by the Lesotho High Court, the procurement process is 'based on ensuring competitiveness of the tendering process, fostering accountability, transparency and are meant to ensure that legality is not sacrificed at the altar of patronage and nepotistic behaviour on the part of those entrusted with exercising this important public power'.[18]

[64] Furthermore, clause 9 of the supply agreement states:

'9.1 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 Product 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 approval 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…. 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 of 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'.

[65] It is clear from clause 9 that the price of the products to be supplied, far from being negotiated and considered before the signing 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 FSG would act reasonably. Consequently, the quality, quantity and price of the goods to be supplied would be entirely in FSG's control with the KOL having no entitlement to insist on any input on these issues, either before or during the performance of the contract. This, in our view, is a breach of the fundamental requirements of procurement laws and processes.

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[18] *Attorney General v Frazer Solar GMBH* LSHC para 18.

[66] In our view, efficiency, transparency, and competition are the foundational principles upon which every procurement process is based. They are designed to eliminate patronage in the awarding of contracts, to provide members of the public with the opportunity to tender, and to ensure a fair, impartial and independent exercise of the power to award contracts. Absent these foundational principles, the supply agreement is invalid, unconstitutional and cannot be enforced.

[67] Section 28 of the PFMAA provides that only the Minister of Finance, with the Cabinet's consent, can approve borrowings of funds for public purposes. It provides that loan agreements on behalf of the government must be signed by the Minister of Finance after consultation with Cabinet. Minister Tšolo was not the Minister of Finance but a Minister in the Office of the Prime Minister. Therefore, he could not sign a loan agreement on behalf of the KOL. Prime Minister Majoro was the Minister of Finance when the supply agreement was signed. He did not approve the borrowing of funds from KfW-IPEX Bank as contemplated in the supply agreement. He did not sign the supply agreement. On FSG's own version, the steps required from the KOL to conclude a valid the supply agreement as alluded to in paragraph 10 above, they were not followed at all.

[68] Faced with these difficulties, and having conceded that the supply agreement does not comply with the Procurement Regulations, FSG sought reliance on s 10 of the Lesotho GPC Act. It called in aid an expert opinion by a senior advocate practising in Lesotho for 31 years, whose view was that this provision makes agreements binding on the KOL if they are signed by a Minister purporting to act on behalf of the Government.

[69] The opinion expressed by the advocate was authoritatively rejected by a full bench of the Lesotho High Court led by the Chief Justice when it found that such interpretation would lead to 'astonishing results'.[19] The Lesotho High Court held that s 10 merely serves as a presumptive validity to a contract signed by the Minister or his authorised person. It does not 'serve as a shield to a review of the decision to sign the

[19] *Attorney General v Frazer Solar GMBH* [2022] LSHC 141 para 23.

contract by the stated public functionaries'.[20] The Lesotho High Court referred to its earlier decision in *Swissborough Diamond Mines (Pty) Ltd & Another v The Commissioner of Mines and Geology N.O. & Others*[21] where it was held:

'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 a contract or an agreement made by or 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 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"'.

[70] We are satisfied that the KOL succeeded to establish that it was not in wilful default to appear in the enforcement application.

[71] Regarding the requirement of a bona fide defence, article 36(1)(*a*)(i) of the Model Law provides that recognition or enforcement of an arbitral award may be refused at the request of the party against whom it is invoked. It may further be refused if that party furnishes proof that a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it. We are satisfied that the KOL has put up a compelling case that Minister Tšolo lacked the requisite capacity to bind the KOL and that the arbitration and supply agreements are invalid. It has thus established that it has a bona fide defence to the enforcement application and prima facie prospects to succeed in the defence. Consequently, the Johannesburg High Court erred in not granting the rescission of the enforcement order.

Part 2: The application to review and set aside the arbitral award

The KOL's challenge in the Johannesburg High Court

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[20] Ibid.

[21] Ibid referring to *Swissborough Diamond Mines (Pty) Ltd & Another v The Commissioner of Mines and Geology N.O & Others* (1990-2001) LLR 559 at 574 B-D.

[72] The KOL sought to review and set aside the arbitral award on the following grounds:

(a) The award is liable to be set aside under article 34(2)(*a*)(i) of the Model Law because both the supply agreement and the arbitration clause were not validly concluded. In terms of that article an arbitral award may only be set aside by the court specified in article 6,[22] in this case the Gauteng Division of the High Court, Johannesburg – if a party to the arbitration agreement referred to in article 7[23] was under some incapacity. The KOL argued that the necessary statutory prerequisites to the conclusion of the aforesaid agreements were not met, and Minister Tšolo therefore lacked authority to conclude the agreements on its behalf.

(b) The award conflicts with public policy and is therefore liable to be set aside under article 34(2)(*b*)(ii) of the Model Law. That article provides that the court mentioned in article 6 may set aside an arbitral award if it conflicts with the public policy of the Republic of South Africa.

(c) Because the arbitration agreement, in clause 24 of the supply agreement, was concluded in breach of the KOL's' constitution, its procurement laws and financial regulation laws, it was void and invalid *ab initio*. The KOL consequently did not waive its foreign state immunity in terms of the provisions of the Foreign States Immunities Act (the FSI Act) and was therefore not subject to the jurisdiction of the South African courts.

(d) Regarding the three-month limit for the bringing of an application to set aside an arbitral award, the KOL argued that article 34(3) should be interpreted as preserving the court's inherent jurisdiction to control its own processes by condoning the late filing of proceedings.

(e) The KOL contended further that if the court concluded that article 34(3) is not capable of an interpretation which affords courts the power to condone

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[22] Article 6 reads as follows: 'Subject to paragraph (2), the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by—

(a) the High Court within the area of jurisdiction of which the arbitration is being, or is to be, or was held;

(b) the division with jurisdiction over a South African party, or if there is no South African party, the Gauteng Division of the High Court seated in Johannesburg, if the place within the Republic where the arbitration is to take place has not yet been determined, until such place is determined.'

[23] Article 7(1) provides that: 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'

non-compliance, the article amounts to an unconstitutional limitation of the right to access to courts guaranteed in terms of s 34 of the Constitution.

(f) The KOL further relied on the judgment of the Lesotho High Court, which reviewed and set aside the arbitral award on the grounds that both the arbitration and supply agreements were void *ab initio* and invalid. The KOL contended that the effect of that order is that it did not waive its foreign state immunity. This, according to the KOL, was an absolute bar to the enforcement of the award in terms of article 36 of the Model Law.

Is the KOL's challenge of the arbitral award time-barred and if so, can condonation be granted?

[73] The Johannesburg High Court held that article 34(3) of the Model Law operates as an absolute bar to a legal challenge of an international arbitral award outside the period of three months. Any legal challenge brought outside the prescribed time limit must therefore fail, irrespective of the circumstances or its merits.

[74] The Model Law, in its original form, as adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 with amendments as adopted in 2006, reads as follows:

'Article 34(3)

An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33 from the date on which that request had been disposed of by the arbitral tribunal'.

[75] This Court in *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Others*,[24] (*Tee Que Trading*) held that the International Arbitration Act 15 of 2017 (IA Act) 'was enacted in South Africa with the specific objective, amongst others, to domesticate the Model Law as adopted by the UNCITRAL in 1985. The Model Law reflects worldwide consensus on key aspects of international arbitration practice'.

[24] *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Others* [2022] ZASCA 68*;* 2022 JDR 1242 (SCA) para 29.

[76] South Africa did not adopt the Model Law wholesale but adapted it to fit in with the South African context through the IA Act. Article 34(3) of the domestic version of the Model Law reads as follows:

'(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal, unless the party making the application can prove that he or she did not know and could not, within that period, by exercising reasonable care, have acquired knowledge by virtue of which an award is liable to be set aside under paragraph (5)*(b)* of this article [the making of the award was induced or affected by fraud or corruption], in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care'.

[77] The domestic version of article 34(3) was thus adapted to provide that the three-month period should not apply to applications for the setting aside of an arbitral award on the grounds of fraud or corruption because of the risk that the prejudiced party only found out about it after the expiration of the time limit. South Africa thus made a deliberate legislative choice to draw a distinction between the general three-month limit and the special limit for fraud and corruption.

The KOL's submissions

[78] The KOL asserted that it became aware of the arbitral award and the enforcement order on 18 May 2021, when they came to the attention of Prime Minister Majoro. It is common cause that the application to set aside the arbitral award was brought outside the three-month period.

[79] Notably, the KOL did not challenge either the contract or the arbitral award on the ground that they were obtained through corruption or fraud. The three-month time limit therefore applies. The KOL, nevertheless, asserted that, despite the expiration of the three-month period for lodging a challenge, it remained entitled to seek the annulment of the award pursuant to article 34(3) of the Model Law. To substantiate this position, the KOL advanced the following arguments:

(a) On a reasonable and contextual interpretation, article 34(3) of the Model Law endows courts, in the exercise of their inherent jurisdiction to control their own

processes, with the power to condone the late filling of proceedings brought out of time, on good cause shown. Such a construction is necessary to strike an appropriate balance between the need for commercial certainty and finality, on the one hand, and the constitutional right of access to courts, on the other. This balancing act is required by s 34 of the Constitution, and weighty considerations would be necessary to justify its limitation.

(b) The contended interpretation is necessary and constitutionally required in the context of international arbitrations. Courts in other foreign jurisdictions (in particular, Malaysia and Hong Kong) have held that article 34(3) is capable of an interpretation that affords courts discretion to condone non-compliance with its strictures.

(c) The only method by which an international arbitral award may be impeached is through an application to have it set aside in terms of article 34(2) of the Model Law. Interpreting article 34(3) as an absolute 'guillotine' provision regardless of the reasons for being out of time, would impermissibly limit the constitutional right of access to justice.

(d) International arbitrations frequently occur between large and slow-moving entities composed of many parts. The issues are invariably complex and intertwined with difficult public policy considerations and there are usually huge amounts of money involved. As a result, it may be impossible to bring a review of an arbitral award within the short period of three months.

FSG and the Minister's submissions

[80] FSG and the Minister, supported by the amicus, argued that the domestic version of article 34(3) – by legislative design – imposes a strict three-month time limit for the challenge of an arbitration award. This is subject only to an exception in respect of challenges based on allegations of fraud and corruption. Importing a general power of condonation would be contradicting a deliberate legislative choice and would amount to judicial legislation.

[81] They further contended that the reading in of a discretion to condone non-compliance with article 34(3) would effectively create an additional basis for challenging international arbitration awards in South African courts, in conflict with article 5 of the Model Law, which provides that 'in matters governed by this law, no court shall intervene except where so provided in terms of this law'.

Discussion and analysis

[82] In interpreting article 34(3), it is necessary to adopt a reasonable, contextual, and purposive approach. This requires careful consideration of the language employed, applying the ordinary rules of grammar and syntax to ensure clarity and precision. Additionally, the context within which the provision appears must be taken into account, as this provides insight into its intended function and relevance within the broader legislative framework.[25] The apparent purpose of article 34(3) must also guide its interpretation. This involves examining the objectives sought by those who drafted the provision and understanding the material available to them at the time. In instances where the language admits of more than one possible meaning, each interpretation should be weighed carefully against all relevant factors, including linguistic, contextual, and purposive considerations. This method ensures that the construction of article 34(3) aligns with both its wording and its intended purpose within the Model Law.

[83] There are, in addition, various other constitutional and statutory provisions which regulate the interpretation of the Model Law. In terms of s 39(1)*(b)* and *(c)* of the Constitution, courts must, when interpreting the Bill of Rights, consider international law and may consider foreign law. And in terms of s 233 of the Constitution, when interpreting legislative provisions, courts must prefer an interpretation which is consistent with international law over an alternative interpretation which is inconsistent with it.

[84] Article 2A of the Model Law reads as follows:

'(1) In the interpretation of this law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this law which are not expressly settled in it are to be settled in conformity with the general principles on which this law is based.'

[85] In terms of s 8 of the IA Act, '[t]he material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes relevant reports of UNCITRAL and its secretariat'.

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[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

[86] In terms of s 3 of the IA Act, its objects are to:

'(a) facilitate the use of arbitration as a method of resolving international commercial disputes;
(b) adopt the Model Law for use in international commercial disputes;
(c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards; and
(d) give effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 3 to this Act, subject to the provisions of the Constitution'.

[87] According to the South African Law Reform Commission's (the SALC) *Project 94 Report on Arbitration: An International Arbitration Act for South Africa*, the Model Law was adopted to achieve:

'[F]irst the liberalisation of international arbitration by limiting the role of national courts and emphasising party autonomy by allowing the parties the freedom to choose how their disputes should be determined; secondly the establishment of a define core of mandatory provisions to ensure fairness and due process; thirdly to provide a framework for conducting an international commercial arbitration so that in the event of the parties being unable to agree on the procedure, the arbitration could still be completed; and finally the incorporation of provisions to aid in the enforcement of awards and to clarify certain controversial practical issues'.[26]

[88] It is also significant that the SALC considered the option of adapting the original version of the Model Law to endow courts with the power to extend the three-month period. It, however, rejected that option for the following reasons: (a) it would be contrary to the object of the Model Law to limit the powers of the courts; (b) such a power would create difficulties for foreign users who assume that the standard provisions apply; and (c) it would undermine the goal of the Model Law to promote uniformity.[27]

[89] The SALC, recognising that article 34(3) in its original form may well be unduly harsh, decided to adopt the more lenient approach taken in Scotland. The Dervaird Committee in Scotland recommended that the three-month period should not apply where the application to set aside an arbitral award is brought on the grounds of fraud

[26] South African Law Commission *Project 94 Report on Arbitration: An International Arbitration Act for South Africa* (1998) at 37, available at https://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf.
[27] Ibid at 124 – 125.

or corruption because of the risk that a party who had been affected by such behaviour only found out about it after the time limit had expired.[28]

[90] This addition to the original clause – in the case of a legal challenge based on corruption or fraud – extends the three-month period from when a party receives the award to when a party has knowledge of the award. This is a significant change from the original Model Law. This departure from the original Model Law in essence provides for an indefinite period where there was corruption or fraud, provided that a party can prove that it took reasonable care to have knowledge of the award.

[91] However, challenges based on other grounds mentioned in article 34, including lack of capacity on the part of a person who concluded the arbitration agreement and the award being contrary to the Republic's public policy, are subject to the three-month time-limit. The phrase 'may not' expresses a total and peremptory prohibition against the bringing of an application to set aside an award in terms of article 34(3) outside of the three-month period on grounds other than fraud or corruption. The use of the negative adverb 'not' qualifies the modal verb 'may' and the effect is to express a strong prohibition.

[92] The fact that South Africa chose to legislate for a circumstance when the three-month period would not be applicable, namely in cases of fraud or corruption, compels the inference that the intention is to allow for an extension of the three-month period only in those limited circumstances and no other.

[93] The context of article 34(3) also allows no scope for a judicial reading in of a power of condonation. Reading in of such a discretion would mean that a South African court would have an additional basis for approaching the court in conflict with article 5, which expressly limits the powers of courts to interfere in international arbitration proceedings.

[94] Moreover, in the context of international commercial arbitration, the right of access to courts is better served by interpreting article 34(3) as having a strict time

[28] Ibid at 118.

bar, creating certainty and predictable rights and obligation for parties. This approach is consonant with the Constitutional Court judgment in *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews* (*Lufuno*).[29] In that matter, the Constitutional Court warned that our Constitution is not better served by enhancing the power of the courts in the arbitration context.

[95] A survey of the legal positions in comparable foreign jurisdictions shows that authoritative pronouncements by courts in Singapore, New Zealand, Canada, Australia, India, Zimbabwe and Kenya have held that the time limit in article 34(3) is peremptory and does not permit a power of condonation. The only legal authorities the KOL proffered in support of its contentions are the decisions of *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd*[30] in Hong Kong and *Government of the Lao People's Democratic Republic v Thai-Lao Lignite*[31] in Malaysia. Those cases are, however, distinguishable because they both concerned the power of condonation in domestic legislation. They are therefore irrelevant to the construction of the Model Law.

[96] In the Singaporean case of *ABC Co v XYZ Co Ltd*,[32] wherein the appellants applied for the setting aside of an arbitration award, within the prescribed time, and later applied to amend the notice of motion after a three-month period that expired, the court found as follows:

'It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as Article 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and as the court derives its jurisdiction to hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time'.

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[29] *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) para 235.
[30] *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKEC 2128.
[31] *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd Civil* Appeal No W-02 (NCC)-1287-2011.
[32] *ABC Company Limited v XYZ Company Limited* Singapore High Court [2003] SGHC 107 para 9.

[97] Furthermore, all the *travaux préparatoires* (preparatory documents and records) of the Model Law, the UNCITRAL report,[33] the SALC report[34] that preceded the adoption of the IA Act for South Africa, are against a general power of condonation. They all promote the position that the powers of courts to interfere with an arbitration award should be strictly limited to those provided for by the Model Law.

[98] The interpretation of article 34(3) as creating a rigid time bar is also consistent with and supported by the purpose of the article and the Model Law. The article serves several purposes including, finality; expedition; observance of the *pacta sunt servanda* principle; party autonomy; and uniformity.

The constitutional challenge

[99] The KOL contended that without a provision for a general power for courts to condone non-compliance with the provisions of article 34(3), the article constitutes an impermissible limitation of the right of access to courts provided for in s 34 of the Constitution. That section provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair, public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[100] The Johannesburg High Court conducted an enquiry in terms of s 36 of the Constitution[35] and concluded that to the extent that article 34 limits the right of access to courts, it constitutes a reasonable and justifiable limitation. The Johannesburg High Court was also mindful of the ratio set out in *Lufuno*[36] namely, that article 34 is not applicable to private arbitration proceedings. The Minister submits that this dictum

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[33] United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, U.N. Doc. A/40/17, 15 (1985) paras 63 and 278.

[34] SALC *Project 94 Report on Arbitration: and International Arbitration Act for South Africa* at 24 para 1.8; at 36 para 2.4; at 38 para 2.9 and at 73 para 2.

[35] Section 36 of the Constitution provides as follows:

(1) The rights in the Bill of Rights of Rights may be limited only in terms of law of general application to the extent that it the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including:-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

[36] *Lufuno* fn 23.

must, by parity of reason, be extended to international arbitrations as well. The reason being that international arbitrations, in essence, afford a party the same election to have its disputes adjudicated by an arbitral tribunal as it would in domestic arbitrations.

International jurisprudence

[101] Only two states departed from the Model Law's article 34(3). In the German Arbitration Law of 1998, which also applies to domestic arbitration, the phrase 'unless the parties have agreed otherwise' was added. This approach was not incorporated into the Model Law. The other addition was that no application for setting aside an award may be made after the award has been declared enforceable by a German court. These provisions have the same effect as a time bar, which operates until a court has granted an enforcement order.

[102] The Indian Arbitration and Reconciliation Act of 1996, which, unlike its German counterpart, only applies the Model Law to International Commercial Arbitration, added a proviso to s 34(3). It reads as follows:

'An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33 from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter'.

The Indian Act therefore permits condonation, but only for a period of approximately one month. At most the losing party is allowed four months to bring its application for the setting aside of the award.

[103] In the Indian case of *State of Maharashtra v Hindustan Construction Co Ltd*[37] the Court found that the courts had the power to condone non-compliance only up to 30 days. The courts have no further discretion even if sufficient cause is made out. Thus, although the Indian Constitution affords the same rights as the South African Constitution, albeit worded differently, India adopted the Model Law in a far more

[37] *State of Maharashtra v Hindustan Construction Co Ltd* (2010) 2 ArbiLR 1 (SC); 2010 (4) SCC 518; AIR 2010 SC 1299; 2010 (3) CTC 452.

restrictive manner than South Africa. This adaptation, according to Indian Legislatures, met constitutional muster.

[104] Some states have deviated from article 34(3) and inserted shorter time limits, namely Guatemala which has reduced the time period to one month and Hungary and Sri Lanka which reduced the time period to sixty days.[38] The Constitution of Hungary[39] and that of Sri Lanka also enshrine an access to courts clause. Both these jurisdictions, despite being under a constitutional obligation to provide access to courts, have found it appropriate to limit the right under the Model Law. These jurisdictions have gone a step further by introducing a more stringent element to the Model Law by decreasing the time period.

[105] The United Kingdom has not adopted the Model Law and arbitrations are regulated by its domestic Arbitration Act.[40] That Act also includes a time bar, which provides that 'any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review of the date when the applicant or appellant was notified of that process'.[41]

[106] The United Kingdom has therefore limited the period within which a party can approach a court to set aside an arbitration award to 28 days compared to the three-month period set out in article 34(3). This is even though article 6 of the United

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[38] P Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 4th ed (2019) at 452.
[39] Hungarian Constitution 2011 (rev 2016) Article XXVIII(7).
[40] United Kingdom Arbitration Act 1996.
[41] United Kingdom Arbitration Act s 70(3) before its amendment by Arbitration Act 2025 (c. 4), ss. 12(2), 17(2); S.I. 2025/905, reg. 2. The current wording reads:
'70(3) Any application or appeal must be brought within 28 days of the applicable date.'
'70(3A) In subsection (3), "the applicable date" means—
(a) in a case where there has been any arbitral process of appeal or review, the date when the applicant or appellant was notified of the result of that process;
(b) in a case where the tribunal has, under section 57, made a material correction to an award or has made a material additional award, the date of the correction or additional award;
(c) in a case where a material application for a correction to an award or for an additional award has been made to the tribunal under section 57 and the tribunal has decided not to grant the application, the date when the applicant or appellant was notified of that decision;
(d) in any other case, the date of the award.'

Kingdom's Human Rights Act 1998,[42] which regulates the right to fair trials, is substantially similar to our right of access the courts.

Discussion and analysis

[107] Having found that the rigid time bar in article 34(3) does not vest in courts the power to condone non-compliance with it, and that it therefore limits the s 34 constitutional right of access to courts, we proceed to consider whether the limitation can be justified, by addressing the factors listed in s 36 of the Constitution, namely the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

[108] Insofar as the nature of the right is concerned, the Johannesburg High Court correctly found that s 34 of the Constitution does not envisage that only courts can administer justice but that the adjudication of a dispute may – by choice – take place before another independent tribunal. The IA Act and the Model Law do not compel parties to submit a dispute for arbitration but merely recognize their right to elect to do so. Once they have chosen arbitration, the parties willingly accept all the strictures of the IA Act and the Model Law in exchange for the advantages of an expedited and cost-effective resolution of their dispute.

[109] The KOL challenged the Johannesburg High Court findings essentially on the ground that there are less restrictive means to achieve the purpose of article 34(3). The alleged restrictive means being to provide for a power of condonation. According to the KOL the only version of article 34(3) of the Model Law that would be compatible with s 34 of the Constitution, would be one providing for an open-ended power of condonation. This submission reaches the issue of proportionality.

[110] We disagree with the submission. The impact of the time-bar provided for by article 34(3) only arises – and the clock only starts to run – after the arbitrator's decision had been delivered. As mentioned, the grounds on which the losing party can

[42] The relevant portion of that Article provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

impeach the award are limited. By that time the evidence would have been ventilated, and the parties would have access to all the information they may need to formulate a legal challenge to the award. In the domain of arbitrations, a period of three months is a generous period.

[111] The reading in of an open-ended discretion for courts to extend the time limit will defeat the main purpose and objects of international arbitration namely expedition, predictability and finality. If such an uncertain and cumbersome international arbitration dispensation is introduced, it would be difficult to conceive of any reason why parties would choose to submit their disputes for arbitration in South Africa.

[112] Insofar as the purpose and importance of the provision is concerned, the three-month time limit promotes the efficacy of international arbitration by protecting its integrity as an expedient and cost-effective mechanism for the resolution of international commercial disputes. The provision, which mirrors the legal position in almost all the foreign jurisdictions that have adopted the Model Law, ensures uniformity and predictability, which makes the Republic an attractive destination for international arbitrations. The potential harm of allowing courts to condone and have a discretion is far greater than the limitation.

[113] The provision also ensures certainty and finality. As mentioned, the three-month period is sufficient to allow the losing party to challenge the arbitral award in the courts, while limiting the ability of parties to employ delaying tactics. This is an important consideration when parties, which are usually large commercial enterprises or governments, agree to submit their disputes for international arbitration. It is manifest that an open-ended power of courts to extend the period will defeat those objectives.

[114] Parties who choose private arbitration elect not to exercise their right to have their dispute heard in a court. As mentioned, s 34 of the Constitution recognises and protects the choice of parties who agree to have their disputes resolved by an arbitral tribunal. By choosing international arbitration, parties also submit to the provisions of the Model Law, which strictly circumscribe the bases for judicial involvement and

intervention.[43] These arbitrations usually involve well-resourced litigants on both sides, seeking speedy resolution of commercial disputes.

[115] Significantly, the failure to apply in time under article 34(3) to have an award set aside does not deprive the losing party of the right to resist the recognition and enforcement of the award. As we have stated earlier, the KOL may do so in South Africa Law in terms of article 36 of the Model Law or in any other jurisdiction which is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Article 36 of the Model Law provides for various grounds on which an application for the enforcement of an arbitral award may be refused at the request of the party against whom it is invoked. These include the grounds on which the KOL assails the arbitral award namely, that a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it.

[116] The Johannesburg High Court therefore correctly found that, insofar as article 34(3) of the Model Law limits the right of access to the courts guaranteed in terms of s 34 of the Constitution, the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The time bar provided for in article 34(3) of the Model Law therefore passes constitutional muster.

Foreign state immunity

[117] To understand properly the KOL's submissions regarding its entitlement to rely on foreign state immunity, it is necessary to provide a brief overview of the relevant provisions of the FSI Act. Section 2 of that Act provides that a foreign state shall be immune from the jurisdiction of the Republic of South Africa – except as provided for in the FSI Act. In terms of s 2(2) of the FSI Act, a court is enjoined to give effect to the immunity even if the foreign state does not appear in the proceedings in question.

[118] A foreign state may also expressly waive immunity in terms of s 3 of the FSI Act and shall, in terms of s 3(3), be deemed to have waived immunity if it has instituted

[43] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (*Telcordia Technologies*) paras 48 to 51; *Lufuno* fn 29 para 216.

the proceedings or intervened or taken any steps in the proceedings. That section, however, does not apply to any intervention or steps taken to claim immunity or assert an interest in property in circumstances where the foreign state would have been entitled to claim immunity.

[119] Other relevant instances in which a foreign state would not be entitled to claim immunity are: (a) in terms of s 4 of the FSI Act, in relation to a commercial transaction entered into by the foreign state or in respect of an agreement which by virtue of the agreement is to be wholly or partly performed in the Republic of South Africa; and (b) in terms of s 10(1) of the FSI Act, '[a] foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic [of South Africa] in any proceedings which relate to the arbitration'.

The KOL's submissions

[120] The KOL submitted that even if the Johannesburg High Court's conception of the separability principle were correct, the arbitration agreement is nevertheless invalid. That is so because Minister Tšolo did not have the authority to waive the KOL's sovereign immunity and to agree to submit the disputes to the jurisdiction of the arbitrator acting in terms of International Arbitration Law. This is so for two reasons: (a) it is the state's right to waive immunity; an unauthorised Minister cannot do so acting alone; (b) in terms of s 3(6) of the FSI Act a person concluding a contract on behalf of a foreign state can only waive its immunity – and will only be recognised as having done so – if that person had actual authority to do so from the foreign state.

[121] The KOL submitted further that in this matter, there was no lawful decision to enter into any agreement with FSG. As a result, there was no waiver of immunity for the purposes of s 3; no entry into a commercial transaction for the purposes of s 4; and no agreement to submit a dispute for the purposes of s 10 of the FSI Act. The KOL argues that it therefore never waived its foreign state immunity.

[122] Moreover, the KOL asserted that it did not enact legislation that recognises and gives domestic effect to the International Arbitration Regime and the Model Law. Its Arbitration Act affords its domestic courts supervisory jurisdiction over all arbitrations,

and they consequently have residual power to set aside any arbitration agreement on good cause shown.

[123] Finally, the KOL submitted that the evidence shows that its cabinet was circumvented in the conclusion of the supply agreement (and its arbitration clause) and that Minister Tšolo signed, acting alone. In those circumstances, the arbitration agreement was *ultra vires* and invalid. FSG's reliance on s 10 of the Lesotho GPC Act, which authorises any minister in the Cabinet of the Government of Lesotho to sign any agreement on behalf of the KOL, is misplaced. The Lesotho High Court has unequivocally held that s 10 does not have the consequence contended for by FSG and found that it does no more than to create a rebuttable presumption that a contract signed by a minister is a contract by the KOL. It does not preclude a challenge to that contract, including on the ground that the minister lacked authority.

FSG's submissions

[124] FSG argued that the KOL has taken steps in the proceedings in respect of which it claims sovereign immunity and under s 3(3) of the FSI Act it is deemed to have waived its immunity. It has brought the present application and an urgent application to stay the writ of execution pending challenges to the legality of the supply agreement in the Lesotho High Court. Neither of those applications confine themselves to asserting the immunity of the KOL. In the circumstances the KOL has waived any immunity it may have had.

[125] It argued furthermore that the Johannesburg High Court could only make a finding based on the evidence before it. When it determined that the KOL was a party to an arbitration agreement on a facial reading of the agreement, it was sufficient to satisfy the requirements of s 10(1) of the FSI Act. The Johannesburg High Court therefore correctly found that the KOL was subject to its jurisdiction.

Discussion and analysis

[126] As we explained above, the Model Law clearly defines the powers of international commercial tribunals and the boundaries for the grounds on which courts may intervene in those proceedings. If an arbitrator is satisfied that a written arbitration agreement with a foreign state exists, disputes over the validity of that agreement are

governed by article 34 of the Model Law. It is therefore incumbent on a foreign state that wants to assert immunity by disputing the validity of the arbitration agreement, to provide the High Court, before which the enforcement or the setting aside of the agreement is sought, with proof that the arbitration agreement is invalid. In the context of an application for the setting aside of the arbitral award, this must be done within the three-month period provided for in article 34(3).

[127] This approach to the interrelationship between the FSI Act and the Model Law is consistent with the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004. Its article 17[44] confirms that the purpose of denying state immunity in relation to arbitration agreements to which it is a party is so that domestic courts can still perform their supervisory roles over arbitrations, including determining the validity of arbitration agreements.

[128] A foreign state is entitled to appear before an arbitral tribunal or domestic court to challenge the validity of the arbitration agreement and to request a ruling in respect of jurisdiction. However, that can only happen within the confines of the legal dispensation provided for in terms of s 34(3) of the Model Law. If the state, having been duly informed of the proceedings, does not appear in the arbitration or court proceedings, or does not challenge the arbitral award within three months, it must live with the legal consequences. It cannot later, on some other basis, challenge the arbitration award or the court's findings regarding jurisdiction by relying on an alleged invalid arbitration agreement, the validity of which was not challenged in the proceedings.

[129] Section 1(2) of the United Kingdom's State Immunity Act 1978, also provides that '[a] court shall give effect to the immunity conferred by this section even though

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[44] That article provides as follows:
'Effect of an arbitration agreement
If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
(a) the validity, interpretation or application of the arbitration agreement;
(b) the arbitration procedure; or
(c) the confirmation or setting aside of the award,'
unless the arbitration agreement otherwise provides.

the State does not appear in the proceedings in question.' In *Zhongshan Fucheng v Nigeria*,[45] the Federal Republic of Nigeria (Nigeria) contended, based on that provision, that it was entitled to raise state immunity even though it did not comply with a timetable determined by the court. Nigeria had been granted 74 days within which to bring an application for the setting aside of the award on the ground of immunity. The English Court of Appeal (Civil Division)[46] addressed the argument that Nigeria was nonetheless entitled to raise the issue of state immunity without complying with procedural requirements.[47] In its judgment, the Court unequivocally rejected this submission, stating that 'the suggestion that it was somehow open to Nigeria to fail to comply with or disregard that timetable, but that the Court would still make a determination as to state immunity, is as startling as it is misconceived.' This stance illustrates the importance that the Court placed on adherence to procedural rules, even in the context of state immunity claims.

[130] In this case the KOL asserted immunity based on its contention that the arbitration agreement was void *ab initio* and invalid, for the reasons explained above. Therefore, the procedural context in which the KOL was required to raise the issue of immunity was that provided for in terms of article 34(3) of the Model Law. And as we have stated earlier, courts do not have any power to extend the time limit prescribed in terms of that article.

[131] In our view, however, FSG's submission that the KOL is deemed to have waived its immunity in terms of s 3(3) of the FSI Act because it has brought an application for the setting aside of a writ of execution, is untenable. That application was brought on an urgent basis and pending the outcome of proceedings in which the KOL had asserted its foreign state immunity.

[132] Nevertheless, the arbitrator had before him an arbitration agreement, which on the face of it, was valid and binding. Not only was it signed by Minister Tšolo, who had

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[45] *Zhongshan Fucheng Industrial Investment CO. Ltd v Nigeria* [2023] EWCA 867 (*Zhongshan Fucheng*).
[46] The United Kingdom equivalent of this Court.
[47] It should be noted, however, that the United Kingdom did not adopt the Model Law, and as such, the time-bar established by article 34(3) does not apply in that jurisdiction.

warranted that he was duly authorised to sign on behalf of the KOL, but he was also the duly authorised functionary in terms of s 10 of the Lesotho GPC Act. The KOL also warranted that the agreement complied with all the relevant laws. Having telephonically informed Minister Tšolo of the pending arbitration hearing, there was consequently nothing before either the arbitrator or the enforcement court to alert either to the alleged invalidity of the agreement. Consequently, the KOL, having ostensibly agreed in writing to submit the dispute for arbitration, was not immune from the jurisdiction of the courts of the Republic in any proceedings which related to the arbitration.

The reliance on the judgment of the Lesotho High Court

[133] In our view, the judgment of the Lesotho High Court is inconsequential in the context of the challenge to the arbitral award in terms of article 34(3) of the Model Law. This is so because our courts are precluded by the laws governing international commercial arbitration from taking it into account.

[134] International commercial arbitration rests on the pillars of party autonomy and deference for the arbitral tribunal chosen by the parties. This Court in *Telcordia Technologies*[48] said that our courts have, since the 19th century, consistently recognised the principle of party autonomy in arbitration proceedings and the obligation to give due deference to an arbitral award. Factors such as international comity, acknowledgment of the capabilities of foreign and transnational tribunals, and awareness of the need for predictability in resolving international commercial disputes have led other jurisdictions to adopt standards that uphold the autonomy of the parties chosen forum and limit judicial intervention when reviewing international arbitral tribunals. This is reflected in the principle of non-interference by courts, codified by article 5 of the Model Law. Courts thus have no power to intervene in matters governed by the Model Law, other than to the extent provided for by the Model Law itself.

[135] The Model Law allows the South African courts the power to pronounce on the existence or validity of an arbitration agreement only in two circumstances. First, under article 16(3), when a party has taken jurisdiction as a preliminary plea and the arbitral

[48] *Telcordia Technologies* fn 43 para 4.

tribunal has issued a ruling on jurisdiction. In that case, a party may request the courts specified in article 6 to decide the matter. That decision is not subject to appeal. Second, under article 34(2)*(a)*, upon a timeous application to set aside an award upon proof that a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the governing law of South Africa.

[136] Under articles 16(3) and 34(2), only the courts specified in article 6 may exercise these powers. The Model Law does not recognize the power of any other court to pronounce on the validity of an international arbitral agreement, whether that court is a domestic court or a foreign court. Article 6(1), read with articles 16(3) and 34(2), is a codification of settled practice in international commercial arbitration, which is to regard the function of pronouncing on the existence of validity of an arbitration agreement as adjunct to the supervisory function of the courts of the seat of the arbitration.

[137] The fact that the Model Law limits supervisory jurisdiction to only certain courts, serves to promote the core objects of international arbitration, namely party autonomy, neutrality and certainty. Party autonomy, because when parties identify a supervisory jurisdiction, courts should respect that decision. Neutrality, because parties to an international arbitration agreement appoint neutral supervisory courts so that they do not end up litigating on the home ground of (especially) a state counter party and on the application of the laws of that state counter party when it is not the chosen law. It is manifest that by fixing the supervisory court, there is a reduced risk of parallel and conflicting decisions over the validity of an arbitration award.

[138] Similarly, article 11(1) of the New York Convention excludes regard to the courts of other jurisdictions.[49] Under it, South Africa is bound to recognize written arbitration agreements between parties and should, upon request, refer parties to arbitration unless a court of South Africa finds that the said agreement is null and void inoperative or incapable of being performed. Thus, South African courts must enforce

[49] See also A Tweedale and K Tweedale *Arbitration of Commercial Disputes: International and English Law and Practise* 2007 chapter 4 para 4.28.

arbitration awards unless they can find that the arbitration agreement is invalid. They cannot abdicate that responsibility to a foreign court.

[139] This Court in *Trustees for the time being of the Burmilla Trust and Another v The President of the RSA and Another*,[50] held that 'an international tribunal is not bound to follow the result of a national court'.[51] This is so because one of the reasons for parties agreeing to submit their dispute for international arbitration is 'that they feel often more confident with a legal institution which is not entirely related to one of the parties.'[52] The decisions of a state party to an international arbitration therefore have no *res judicata* effect on issues between the parties.

[140] The arbitration agreement, in clause 24 of the supply agreement, required the arbitration to be held in Johannesburg. Accordingly, under article 6, only the Johannesburg High Court had the competence to pronounce on the existence and validity of the arbitration agreement between the KOL and FSG. Since the Lesotho High Court had no authority under the South African Law to make any pronouncement regarding the validity of the award, its decision on the existence and validity of the arbitration agreement was correctly ignored by the Johannesburg High Court. It must similarly be discarded by this Court.

[141] The KOL relied on the Lesotho High Court judgment in support of its contention that both the supply and arbitration agreements were void *ab initio*. This was also one of the grounds on which the KOL claimed foreign state immunity. Based on the reasons detailed above, and regarding the challenge to the validity of the arbitral award, it is evident that this matter has already been resolved. In view of the conclusions reached regarding the rescission application, the KOL retains the opportunity to contest the enforcement application. The KOL may do so by relying on any of the grounds stipulated in Article 36 of the Model Law. Among these grounds is the issue of Minister Tšolo's alleged lack of capacity, which may be invoked should the KOL choose to oppose enforcement. Given this finding, this Court refrains from

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[50] *Burmilla Trust and Another v President of the RSA and Another* [2022] ZASCA 22; 2022 (5) SA 78 (SCA); [2022] 2 All SA 412 (SCA) para 30.
[51] Quoting from *Amco Asia Corporation and Others v Republic of Indonesia* (ICSID Case No. ARB/81/1) (award) para 177.
[52] Ibid.

making any determination concerning the significance or effect of the findings and order issued by the Lesotho High Court. It remains for the court tasked with hearing the enforcement application to decide what, if any, weight should be attributed to those findings and orders.

Findings and conclusion

[142] In summary, regarding the first issue of the rescission of the enforcement order, we find that:

(a) rescission in this case can be considered on common law grounds;

(b) the KOL provided a reasonable explanation for its default to appear in the enforcement application;

(c) the KOL established a bona fide defence to the enforcement application and prima facie prospects of success in the defence.

The KOL has therefore shown 'sufficient' or 'good cause' to warrant the rescission of the default judgment and the appeal regarding that issue must succeed. Consequently, the KOL has achieved substantial success in its appeal against the enforcement order and is entitled to recover its costs associated with this appeal. Furthermore, we consider that the engagement of two counsel was warranted.

[143] Regarding the second issue of the dismissal of the application to set aside the arbitral award, we find that:

(a) Reasonably interpreted, article 34(3) of the Model Law does not bestow on courts a discretion to extend the three-month time limit for applications to set aside an arbitral award.

(b) Article 34(3) of the Model Law constitutes a justifiable limitation of the constitutional right of access to justice provided for in terms of s 34 of the Constitution and thus passes constitutional muster.

(c) The Johannesburg High Court correctly found that the KOL was deemed to have waived its foreign state immunity in terms of the provisions of the FSI Act.

(d) The judgment of the Lesotho High Court had no binding effect on the arbitration proceedings.

The appeal on the second issue must therefore fail.

Order

[144] In the result we make the following order:

1 The first respondent's application for leave to adduce further evidence is dismissed with costs, including the costs of two counsel.

2 The appeal against the order of the high court (per Strijdom AJ) dismissing the rescission application is upheld with costs, including the costs of two counsel.

3 The order of the high court (per Strijdom AJ) dismissing the rescission application is set aside and replaced with the following order:

'(i) The enforcement order granted by Lamont J on 29 April 2021, is hereby rescinded.

(ii) Each party is directed to pay its own costs.'

4 The appeal against the order of the high court (per Strijdom AJ) dismissing the application to set aside the arbitral award, is dismissed with costs including the costs of two counsel.

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F E MOKGOHLOA

JUDGE OF APPEAL

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J E SMITH

JUDGE OF APPEAL

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Introduction

[145] The KOL seeks to extricate itself from an arbitral award in which it was ordered to pay contractual damages to FSG in the amount of €50 million, interest and costs

pursuant to an international arbitration held in South Africa in terms of the Model Law. At FSG's instance, Lamont J, sitting in the Gauteng Division of the High Court, Johannesburg, has since made the arbitral award an order of court (the enforcement order). The KOL unsuccessfully applied for an order in the same court before Strijdom AJ to rescind the enforcement order (the rescission application). In the same proceedings, it also unsuccessfully sought an order reviewing and setting aside the arbitral award (the review application). It appeals against these orders by Strijdom AJ with his leave.

[146] The KOL faces two substantial hurdles in its endeavour to extricate itself from the arbitral award. First, unless it successfully appeals against Strijdom AJ's dismissal of its rescission application, the door for reviewing the arbitral award remains closed to it because the enforcement order will remain binding and enforceable against it. Second, if the enforcement order is rescinded, the KOL faces a statutory time bar imposed by article 34 of the Model Law to review the arbitral award as it brought the review application out of time. To overcome the time bar, the KOL sought to persuade Strijdom AJ to interpret article 34 to permit a court-sanctioned condonation for its delay in bringing the review application. It also challenged the constitutionality of article 34 to the extent that it does not permit the court to condone such delay. It failed in both quests. If this Court does not accept the KOL's submissions on these issues, the door to reviewing the arbitral award will remain closed to it.

[147] I have read the first judgment jointly penned by Mokgohloa and Smith JJA. It finds that the KOL made out a case for the rescission of the enforcement order and upholds its appeal against the dismissal of its rescission application by Strijdom AJ, thus opening the door for the KOL to oppose FSG's enforcement application. However, it finds that article 34 does not provide for a court-sanctioned condonation for reviewing an arbitral award out of time and is not unconstitutional, thus keeping the door to reviewing the arbitral award closed to the KOL. Therefore, the first judgment's orders will leave the parties in an untenable situation because if the KOL succeeds in resisting the enforcement of the arbitral award, it will remain extant as it cannot have it reviewed and set aside. However, FSG will not be able to enforce it in South Africa. This will not only render that order of no practical effect, but will also imperil the objectives of the International Arbitration Act 15 of 2017 (the IA Act), which are directed

at ensuring the finality and enforceability of international arbitral awards. The erosion of those objectives undermines the legal certainty and commercial confidence the Act is designed to promote. South Africa's position as a reputable seat of international arbitration would accordingly be placed in jeopardy.

[148] The objectives of the IA Act include facilitating the recognition and enforcement of certain arbitration agreements and arbitral awards;[53] and giving effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 3 to the IA Act, subject to the provisions of the Constitution.[54] The positive consequences that flow from recognizing and enforcing arbitration agreements and arbitral awards include increased investor confidence that international awards are enforceable in South Africa in accordance with generally accepted international practice, continued acceptance of South Africa as a seat for international arbitration by foreign firms that invest in South Africa and in other countries and increased foreign investments prospects for South Africa.

[149] Alluding to the duty of South African courts to promote South Africa as a venue for international arbitrations, this Court in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co (Zhongji)*[55] stated as follows:

'South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country.'[56]

[150] As submitted on behalf of the *amicus*, South Africa is party to the Model Law, having domesticated it through Schedule 1 to the IA Act. In *Tee Que Trading*,[57] this Court held that the Model Law reflects worldwide consensus on key aspects of international arbitration practice. Courts in forum countries conventionally draw

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[53] Section 3*(c)* of the IA Act.
[54] Section 3*(d)* of the IA Act.
[55] *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Company Sarl* [2014] ZASCA 160; 2015 (1) SA 345 (SCA); [2014] 4 All SA 617 (SCA).
[56] Ibid para 30.
[57] *Tee Que Trading* fn 24.

guidance from how courts in different jurisdictions have interpreted the Model Law when adjudicating international arbitration disputes. This is important to maintain global consensus on key aspects of international arbitration practice.

[151] I concur in the first judgment's dismissal of the application to lead further evidence and the appeal in respect of the review application. I do not concur in its order in respect of the KOL's appeal against the rescission application.

[152] For reasons I will shortly explain, I determine the issues that arise in the appeal against Strijdom AJ's order in the rescission application on FSG's version with reference to the globally accepted international arbitration principles. And I conclude that the appeal must fail.

The facts

[153] Several key factual issues are in dispute between the KOL and FSG. Given that the KOL brought the rescission and review proceedings on application, the *Plascon Evans* rule[58] dictates that common cause facts and FSG's version of the disputed facts prevails. The KOL did not show that FSG's version of the disputed facts is so untenable that this Court cannot reasonably rely on it. I therefore determine the disputed facts on FSG's version. I set out the common cause facts and FSG's version of the disputed facts below.

[154] FSG was established to provide renewable energy schemes to government clients. It enjoys the exclusive right to supply solar energy products manufactured by KBB Kollektorbrau GmbH, a German entity. The projects are supported by the European Union and German policy. These government entities also provide financial support for the projects. FSG sought to supply the Lesotho government with renewable energy products in response to their energy needs as set out in the Lesotho Energy Policy 2015 to 2025 (the energy policy). The KfW IPEX Bank in partnership with the Development Bank of South Africa (DBSA) were targeted to provide funding for the project.

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[58] *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 D-G.

[155] FSG's Robert John Frazer (Mr Frazer) contacted Mr Letsie, an official of the government of Lesotho in July 2017 to propose the €50-100 million Frazer Solar GmbH Energy Efficiency and Employment Creation Project (the project) which is central to this appeal. Shortly afterwards, Dr Tom Thabane was elected as the Prime Minister of the KOL (Prime Minister Thabane). Minister Majoro became its Minister of Finance. Minister Tšolo was a senior minister in Prime Minister Thabane's office. Mr Letsie introduced Mr Frazer to Minister Tšolo in August 2017. The latter played a key role in coordinating the project within the KOL.

[156] Minister Tšolo represented to Mr Frazer that Prime Minister Thabane supported the project, he was carrying out Prime Minister Thabane's instructions on behalf of the KOL, and the latter's office would coordinate other Ministries that needed to participate in the project. To commence the project, the government of Lesotho represented by Minister Tšolo, and FSG represented by Mr Frazer, signed a non-binding MOU, on 20 November 2017.

[157] The MOU provided for the installation of various renewable energy products in all government buildings and homes of public servants over a period of four years. KfW IPEX Bank would provide €100 million for the project in partnership with the DBSA, repayable by the KOL over a period of 10 years. The MOU contemplated that Minister Tšolo and Minister Majoro would form part of the project steering committee.

[158] A project kick-off meeting was held on 6 December 2017, attended by 27 representatives including officials of all relevant ministries and the Principal Secretary in Minister Majoro's finance ministry. This meeting led Mr Frazer to believe that the project enjoyed the support of all the relevant stakeholders including Minister Majoro. The MOU recorded 1 March 2018 as the original commencement date.

[159] In January 2018, Mr Frazer and his partner in FSG, Mr Fintelmann met with KfW IPEX Bank in Berlin, expressed support for the project and required that the offer of financial assistance be approved on behalf of the KOL by Minister Majoro as the Minister of Finance. Between February and April 2018 Mr Frazer tried to arrange meetings with Minister Majoro to appraise him of the project.

[160] On 8 March 2018, Minister Tšolo requested Mr Frazer to prepare a one-page summary for Prime Minister Thabane, explaining the benefits of the project. He did and was informed that Prime Minister Thabane wished to proceed. Mr Frazer's proposed meeting with Minister Majoro took place on 4 April 2018. During the meeting, Minister Majoro verbally confirmed that he supported the project and wanted to proceed. He agreed to send a letter to KfW IPEX Bank acknowledging receipt of its letter of intent and asking it to prepare a formal finance offer. On 14 April 2018, Minister Majoro emailed Mr Frazer to apologise for not contacting KfW IPEX Bank yet and undertook to do so by the following Wednesday.

[161] On 18 April 2018, Mr Frazer prepared a document for KfW IPEX Bank updating it on the project and informing it of Minister Majoro's general agreement to their funding structure. On 11 May 2018, Minister Tšolo sent a letter to Minister Majoro, attaching the FSG business proposal and requesting feedback. He also stated that the offices of Prime Minister Thabane and Minister Majoro will finalise the project parameters with the German government and present the final proposal to Cabinet in early June. On 8 June 2018, Minister Tšolo submitted the Cabinet paper. It records the concurrence of the Ministers of Finance, Public Service, Local Government and Chieftainship, Energy, Public Works and Transport, and Development Planning, all of whom had been consulted. Minister Tšolo informed Mr Frazer that Cabinet vote would be deferred to a later date to address Minister Majoro's concerns and that in the interim Prime Minister Thabane would liaise with him.

[162] On 1 August 2018, FSG received a letter signed by Minister Tšolo and copied to Prime Minister Thabane and the Government Secretary Mr Moahloli Mphaka (the Government Secretary), the Ambassador of the Federal Republic of Germany, Dr Martin Schäfer and the Vice President of KfW IPEX Bank, Mr Kai Hartmanshenn. It provided official confirmation that 'the Government of Lesotho agrees and commits itself to proceed with the project for a total value of €100 million before financing costs' and that the project should be commenced 'as soon as possible, beginning September 2018'. It also stated that 'the Office of the Prime Minister will in turn co-ordinate and involve relevant ministries as deemed necessary. This includes the export contract being signed by the office of Prime Minister Thabane and the Ministry of Finance signing the loan documentation on behalf of the government'.

[163] On 2 August 2018, Mr Frazer addressed correspondence to KfW IPEX Bank, updating it of this development and undertaking to work with the DBSA to prepare the financial offer for the KOL to get the project started as soon as possible. He attached the confirmation letter from the office of Prime Minister Thabane. On 8 August 2018, Mr Frazer met with Prime Minister Thabane and presented the project to him. Prime Minister Thabane undertook to ensure Minister Majoro's co-operation, assured him that all was in order and requested him to prepare the contract.

[164] Subsequently, Mr Frazer contacted the DBSA to request that the finance offer be sent to the office of Prime Minister Thabane. On 17 August 2018, he followed up with DBSA and KfW IPEX Bank and asked them to expedite the finance offer. Prime Minister Thabane had called for it as he wanted to publicly announce the project to quell unrests due to rising electricity prices and low wages in the KOL.

[165] The supply agreement was executed in September 2018. Minister Tšolo represented the KOL and signed the supply agreement on its behalf. Mr Frazer represented FSG and signed on its behalf. He also relied on warranties that the KOL gave in the supply agreement, including that the project complied with all the laws of Lesotho. Mr Frazer met with Minister Majoro again on 3 September 2018 and informed him that Prime Minister Thabane had approved the project and that he was accordingly required to complete the finance agreement. Minister Majoro expressed no reservation. He required 'policy clearance' from Prime Minister Thabane which entailed 'the green light'. He confirmed these discussions in an email to Minister Majoro on 4 September 2018 to which he attached the project overview presentation. He also undertook to obtain policy clearance from Prime Minister Thabane the following week to enable Minister Majoro to negotiate financial arrangements with KfW IPEX Bank and the DBSA. At that point, Minister Majoro raised no issues about the Procurement Regulations, Loans and Guarantees Act or otherwise. Under the circumstances described above, Mr Frazer believed that Minister Tšolo was duly authorised to sign the supply agreement on behalf of the KOL.

[166] On 27 September 2018, FSG emailed the signed supply agreement to the Minister of Energy, Minister Hloaele. On 2 November 2018, Mr Fintelmann addressed an email to Minister Majoro to express his frustration at the lack of progress with the

financial arrangements for the project. In his email of 20 October 2018, Minister Majoro said the most important message was that the energy project should have leadership in the energy ministry. At no point, at that stage, did he take issue with the validity of the supply agreement.

[167] On 30 November 2018, a Lesotho Radio station devoted a morning broadcast to the project and its lack of implementation. There was no immediate rebuttal from the KOL. Instead, Mr Frazer was advised by government officials that it was not safe for him to remain in Lesotho. Subsequently, Mr Frazer endured death threats and on 5 December 2018 was forced to leave Lesotho on one hour's notice. FSG resorted to resolve its claims against the KOL arising from the supply agreement through arbitration proceedings.

[168] In July 2019, FSG caused a notice to be delivered to the KOL on Prime Minister Thabane, being its chosen *domicilium* address, declaring an arbitration dispute against it. The notice also commenced arbitration proceedings against the KOL in South Africa in terms of clause 24 of the supply agreement. In the arbitration notice, FSG contended that the KOL failed to fulfil its contractual obligations in breach of the supply agreement. As a result, it suffered financial loss. The KOL did not respond to the arbitration notice. It also did not respond to the procedural calls and orders issued by the arbitrator after having acknowledged receipt thereof. The arbitration proceeded in its absence on 2 December 2019. The arbitrator made the arbitral award on 28 January 2020, upholding FSG's claim. He also found that Minister Majoro did not make financial arrangements for the project because he supported a competing project sponsored by the Chinese Government and funded by the China EXIM Bank.

[169] In October 2020, Lamont J issued an edictal citation at FSG's instance, authorising service of an application by FSG to have the arbitral award made an order of court. FSG caused South Africa's High Commission in Lesotho to serve it on the KOL's Ministry of Foreign Affairs in terms of s 13(1) of the Foreign States Immunities

Act 87 of 1981 (FSI Act) in December 2020.[59] Meanwhile, Prime Minister Thabane was removed from office in November 2020. He was replaced by Minister Majoro. To place his role in the events that followed in a proper context, hence forth, where I deal with Minister Majoro's role after this date, I refer to him as Prime Minister Majoro.

[170] The KOL did not oppose the enforcement application. As a result, on 29 April 2021, Lamont J granted the enforcement order against the KOL on an unopposed basis. The notice of set down had been served on 20 April 2021 on the Office of the Government Secretary of Lesotho. Attempted service on the Office of Prime Minister Majoro was unsuccessful. His office refused to accept service of the notice of set down as it did not consider service necessary because the Office of the Government Secretary of Lesotho had already accepted it.

[171] In May 2021, FSG caused a writ to be issued against the KOL, attaching its assets in South Africa to satisfy the enforcement order. In July 2021, the KOL instituted an application in South Africa for the stay of FSG's writ of execution, pending an application in the Lesotho High Court to review and set aside the supply agreement and an application in the High Court of South Africa for orders rescinding the enforcement order and reviewing and setting aside the arbitral award.

[172] The KOL instituted the rescission and review applications in October 2021. FSG opposed these applications, culminating in the order by Strijdom AJ which is subject to this appeal. The KOL also instituted the application in the Lesotho High Court to review and set aside the supply agreement. The Lesotho High Court delivered its judgment on 9 November 2022, reviewing and setting aside Minister Tšolo's decisions to enter into the supply agreement with FSG. It declared the supply agreement to be unconstitutional, unlawful and invalid and reviewed and set it aside. It also declared clause 24 of the supply agreement which constitutes the arbitration agreement *void ab initio*.

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[59] Section 13(1) of the FSI Act provides as follows:
Service of process and default judgments
(1) Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry.

[173] The issues that arise in the present appeal are interwoven between procedural issues and the merits and overlap between the two applications that are subject to this appeal. Where I agree with the findings made in the first judgment and the reasons therefore, I simply refer thereto, as I do not consider it necessary to deal with the issues in respect of which those findings were made.

Rescission Application

[174] The KOL's case in the rescission application as set out in its founding affidavit differs from the basis on which it made submissions in its heads of argument. In its founding affidavit, it invoked the Court's rescission powers in terms of rule 42(1)*(b)*, alternatively, in terms of the common law. In its heads of argument, in addition, it relied on the lack of jurisdiction as a self-standing basis for rescission. In the present appeal, the KOL persists on all these bases.

Requirements for rescission

[175] To succeed under rule 42(1)*(a)*, the KOL must show that the enforcement order was granted in its absence, and that it was erroneously sought and granted.[60] Only when both requirements are met will the court employ its discretionary power to grant rescission, which must be exercised judicially.[61]

[176] To succeed at common law, the KOL must establish good cause for its default. There are two elements to the good cause requirement. First, the KOL must furnish a reasonable and satisfactory explanation for its failure to oppose the enforcement application. Second, it must establish a *bona fide* defence.

[177] In *Zuma*, the Constitutional Court put to rest any suggestion that South African law recognizes self-standing grounds of review beyond common law requirements for rescission and those set out in rule 42(1)*(a)*.[62] Therefore, this Court is bound by it. This means that its case for rescission on lack of jurisdiction does not leave the starting blocks. I therefore do not deal with it further in this judgment. In any event, as I find in this judgment, the KOL fails to establish lack of jurisdiction in other aspects of the

[60] *Zuma* fn 14 para 54.
[61] Ibid para 53.
[62] Ibid para 79.

appeal where it sought to rely on this issue. Therefore, even if jurisdiction was recognised as a self-standing ground for rescission, the KOL did not make out a case for rescission based on lack of jurisdiction. Therefore, its appeal on this ground would accordingly not succeed.

In the High Court

[178] In its founding affidavit, the KOL contended that Lamont J's order was erroneously sought and granted because it was legally incompetent for the court to make it as there existed at the time the order was made, facts of which the court was unaware and which, if known, would have precluded the granting of the order. These facts are that the notice of the application had not come to the attention of the KOL and the supply agreement is unlawful because the KOL cabinet never approved it, and Minister Tšolo was not authorised to conclude it on behalf of the KOL.

[179] Therefore, further contended the KOL, the supply agreement and concomitantly the arbitration agreement contained in it fell to be declared unlawful and invalid *ab initio.* Since the arbitration agreement was unlawful and void, it did not waive its sovereign immunity and did not subject itself to the jurisdiction of the arbitrator under the supervision of South African courts. Therefore, surmised the KOL, the arbitrator could not derive his jurisdiction from an unlawful and invalid arbitration agreement.

[180] The KOL also contended that it was not in default of appearance at the arbitration and enforcement proceedings; it could not oppose the proceedings because the relevant notices were withheld from it. It alleged that the notice of the enforcement application was not served on the Office of the Attorney General, being the person with the authority to decide whether to oppose the application or not. It also contended that the edictal citation was also not served on the Office of the Attorney General. The KOL further contended, that even if the explanation for its default is lacking in some respects, its defence on the merits is so strong that it weighs in favour of granting rescission.

[181] FSG contended that Minister Tšolo had actual authority to conclude the arbitration agreement on the KOL's behalf. He derived it from s 10 of the Lesotho GPC Act. Alternatively, FSG contended that, if Minister Tšolo lacked actual authority, on the

authority of *The Law Debenture Trust v Ukraine*,[63] a Foreign Cabinet Minister can bind the state with either actual or ostensible authority and the requirements of the latter authority are satisfied on the facts of this matter.

[182] FSG also contended that the KOL was in wilful default. Both the arbitration notices and the process in respect of the enforcement application were duly served on it. The former was served on Prime Minister Thabane at the *domicilium* address chosen in the supply agreement. The latter was served through diplomatic channels on the KOL's foreign ministry in terms of s 3(1) of the FSI Act. The Caselines invitation was directly emailed to the office of Prime Minister Majoro and the Government Secretary. Prime Minister Majoro acknowledged receipt. The notice of set down was served on the Office of the Government Secretary with an unsuccessful attempted service on the Office of Prime Minister Majoro, which refused service as already stated.

[183] FSG further argued that, in line with the separability principle articulated in the House of Lords judgment in *Fiona Trust & Holding Corp v Privalov*,[64] the arbitration clause was an independent and enforceable agreement, unaffected by any challenge to the validity of the supply agreement. On jurisdiction, FSG relied on the *Oudekraal* principle,[65] asserting that the decisions taken by Minister Tšolo remained valid until set aside and that both the arbitrator and the High Court properly exercised jurisdiction at the time the enforcement order was granted. It further argued that sovereign immunity could not retrospectively invalidate those proceedings, drawing on *Tasima*[66] and *Zhongshan Fucheng*[67] in its contention that finality in judgments must be preserved. FSG also contended that South African courts were obliged under article 11 of the New York Convention to disregard the Lesotho High Court's decision declaring the supply agreement void, as recognising it would breach international arbitration principles. It cited comparative jurisprudence showing that courts refuse to enforce foreign judgments obtained in breach of arbitration agreements.

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[63] *Law Debenture Trust PLC v Ukraine* [2023] UKSC 11.
[64] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.
[65] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).
[66] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC).
[67] *Zhongshan Fucheng* fn 45.

[184] Strijdom AJ found that on FSG's version, as set out in paragraphs 11 to 21 of this judgment, Minister Tšolo had actual or at least ostensible authority to enter into the supply agreement on behalf of the KOL. When Mr Frazer updated him about the developments with the project and that Prime Minister Thabane had approved it, he expressed no reservations. On 27 September 2018, Mr Frazer sent the signed supply agreement to the Minister for Energy. The signatures of Minister Majoro and the Minister for Energy may have been relevant for the approval of the finance agreement but not relevant for the signing of the supply agreement.

[185] Strijdom AJ also found that when the enforcement order was made, a valid supply agreement was extant, containing an arbitration clause. On the authority of *Tasima*[68] and *Oudekraal*[69], a decision exists *de facto* until it is set aside. Therefore, the enforcement order was correctly made as Lamont J enjoyed the jurisdiction to make it.

[186] Strijdom AJ rejected the notion that procedural rules do not apply to any state which wishes to rely on the principle of state immunity. He found support for this finding in *Zhongshan Fucheng*[70], where the court emphasised the importance of speed and finality in international arbitrations and refused to grant an extension to allow the Nigerian state to raise the defence of immunity as a jurisdictional bar to an arbitral award.

[187] On the authority of *Lodhi 2*,[71] Strijdom AJ also found that a judgment to which a party is procedurally entitled is not considered to be erroneously granted by reason of the fact that the Judge who granted it was unaware and did not consider a subsequently disclosed defence. There was proper service of the enforcement application on the KOL in terms of s 13 of the FSI Act. The Caselines invitation was served on Prime Minister Majoro and the Government Secretary by email. The notice of set down was also served on the Government Secretary. Therefore, the KOL's

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[68] *Tasima* fn 14.
[69] *Oudekraal* fn 13.
[70] *Zhongshan Fucheng* fn 15.
[71] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) 87 SA (SCA).

absence from the hearing before Lamont J was not caused by any procedural irregularity for which the court or FSG could be held responsible.

[188] He found that the KOL was in wilful default for the following reasons: (a) it failed to explain why Prime Minister Majoro and the Government Secretary failed to take the necessary action to ensure that the enforcement application was opposed and to follow up with the persons to whom these officials sent the Caselines invitation after they received it; (b) subsequently these officials also did not follow up on the outcome of the enforcement application, until FSG commenced execution proceedings against the KOL; (c) the KOL's delay in filing its application for a stay is also unexplained; (d) as is its delay in instituting the rescission and review applications; (e) in terms of article 11(1) of the New York Convention, the High Court is obliged to recognise the arbitration agreement submitting the KOL to arbitration proceedings in South Africa and; (f) it is a settled practice in comparable jurisdictions for courts to ignore foreign judgments obtained in breach of an arbitration agreement.[72]

In this Court

[189] The parties largely repeated the same contentions they made before Strijdom AJ. In addition, the KOL took issue with what it contends is a narrow application of the separability principle by Strijdom AJ and made elaborate submissions in support of the conclusion that only the Lesotho High Court has jurisdiction over the supply agreement, which it found it to be unlawful, and invalid *ab initio.* It contended that, equally, the arbitration agreement contained in it is also unlawful, and invalid *ab initio*. Therefore, further submitted the KOL, the arbitrator could not found jurisdiction on the arbitration agreement and in turn Lamont J could not derive his jurisdiction from the arbitral award. Therefore, the enforcement order should have been rescinded and the arbitral award reviewed by Strijdom AJ.

[190] The KOL further contended that:

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[72] He relied on the authority in the following cases: *Tracomin SA v Sudan Oil Seeds* [1983] 1 WLR 1026: *Lloyd's Rep 384 (BS Corporation v WAK Orient Power & Ltd* 68 F Supp 2d 403 (ED.Pa.2001); *American Construction Machinery and Equipment Corporation Ltd v Mechanised Construction of Pakistan Ltd* 659 F Supp 426 (S.D.N.Y. 1987); *WSG Nimbus Pte Ltd v. Board of Control for Cricket in Sri Lanka* [2002] SGHC 104; [2002] 3 Sing L.R 603 (Sing. H.C.).

(a) although the separability principle as contained in article 16(1) of the Model Law allows courts to consider the validity of an arbitration agreement separately from the other terms of the agreement in which it is contained, a ground that renders the main agreement invalid may also invalidate the arbitration agreement. Lack of authority on the part of the official who signs the agreement is one such ground. A successful challenge to the conclusion of the main agreement on such a ground will invalidate the arbitration agreement in which it is contained.[73] Among several authorities, it relied on *Canton Trading*[74] where this Court found that it may determine a dispute over the validity of an arbitration agreement even though according to the competence-competence principle, the arbitrator must be allowed to first determine his jurisdiction;

(b) since the Lesotho High Court found that the supply agreement is invalid due to Minister Tšolo's lack of authority, its findings are cognisable under South African law and binding on the parties by virtue of the principle of estoppel;

(c) even if the judgment of the Lesotho High Court was not binding on South African courts, the conclusion of the supply agreement was unlawful under South African law. Only a court may review such an agreement in terms of s 172(1) of the Constitution. The supply agreement required cabinet approval which was not obtained. Therefore, no lawful and binding agreement came into effect. To find otherwise would mean that article 16 insulates the decision to enter into an arbitration agreement from constitutional review in breach of the principle of constitutional supremacy;

(d) section 10 of the Lesotho GPC Act did not bestow Minister Tšolo with the authority to conclude the supply agreement on behalf of the KOL. It only created a rebuttable presumption that a contract signed by a Minister is a contract with the KOL;

(e) as a matter of law or fact, Minister Tšolo could not derive ostensible authority under these circumstances, as his conduct was *ultra vires*. For the same reason, he could not derive authority from s 3(6) of the FSI Act. The deeming provision in s 3(2) is therefore not triggered;

(f) since Minister Tšolo lacked the actual authority to conclude the arbitration agreement, s 10 of the FSI Act does not apply. It provides that where a foreign state

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[73] It relied on *Fiona Trust* op cit fn 12 as confirmed in *DHL Project Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA Civ 1555; [2023] Bus. L.R. 584.

[74] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* [2021] ZASCA 163; 2022 (4) SA 420 (SCA). It also relied on this Court's judgment in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) which made a similar ruling on the authority in *Fiona Trust*.

has agreed in writing to submit a dispute to arbitration, it shall not be immune from the jurisdiction of the courts in the Republic in any proceedings which relate to the arbitration;

(g) FSG's reliance on s 4 of the FSI Act is misplaced as it applies only if the KOL validly concluded the supply agreement.[75] Therefore, there was no waiver of immunity under s 3, a commercial transaction was not concluded for the purpose of s 4, and there was no agreement to submit to a dispute to arbitration for the purpose of s 10.

(h) although the Model Law subjects public bodies to its provisions, Lesotho's public bodies are not subject to it as it does not recognise the international arbitration regime and has not domesticated the Model Law. As a result, arbitrations to which it is party are subject to supervision by its courts. In terms of its Arbitration Act, its courts enjoy the residual power to set aside any arbitration agreement on good cause shown. Therefore, there is no statutory provision that empowers it to waive its immunity and to subject the supply agreement to the jurisdiction of the arbitrator in South Africa under the supervision of South African courts. On a proper approach to the principle of separability, the KOL deduced, the arbitration agreement is invalid and the arbitration award falls to be set aside in terms of article 34(2)*(a)*(i).

[191] FSG rejected the KOL's argument that the alleged invalidity of the supply agreement rendered the arbitration agreement, the arbitral award, and subsequent court orders invalid. It maintained that the supply agreement had been validly concluded and that Minister Tšolo possessed the necessary authority to conclude it on behalf of the KOL. Accordingly, any claim that the invalidity of the supply agreement

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[75] This section provides that:
'(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to-
(a) a commercial transaction entered into by the foreign state; or
(b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.
(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.
(3) In subsection (1) 'commercial transaction' means-
(a) any contract for the supply of services or goods;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and
(c) any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.'

had a cascading effect on the arbitration proceedings and Lamont J's enforcement order was, in FSG's view, without merit.

[192] FSG also contended that the KOL was improperly using the alleged invalidity of the supply agreement as a jurisdictional challenge to support its rescission application. This, according to FSG, could not be entertained because it was not raised in the founding affidavit and would require the Court to consider new evidence outside the record that was before Lamont J and this was impermissible under rule 42. FSG further argued that even if the arbitration agreement and award were assumed to be invalid, this would not deprive the High Court of jurisdiction to grant the enforcement order, as the court's jurisdiction does not depend on the validity of the underlying arbitral award.

Issues in this appeal

[193] Below I set out issues that arise in the appeal against the dismissal of the rescission application:

(a) Whether the KOL has furnished a reasonable and satisfactory explanation for its absence from the arbitration and the enforcement proceedings. This issue arises in the rescission application under both rule 42(1)*(a)* and the common law. Since lack of proper notice of the arbitration proceedings and inability to present a case are grounds for resisting the enforcement of an arbitral award in terms of article 36(1)*(a)*(ii), the KOL's explanation for its absence from the arbitration proceedings is also relevant when determining its *bona fide* defence as a requirement for rescission under the common law.

(b) The purported error by Lamont J. This issue arises in the rescission application under rule 42(1)*(a).*

(c) The jurisdiction of the arbitrator and in turn of Lamont J. This issue arises in various parts of the present appeal. In addition to relying on it as a self-standing ground for rescission as already mentioned, the KOL contends that it is one of the errors Lamont J made during the enforcement proceedings which entitles it to rescission application under rule 42(1)*(a)*. This issue is also interwoven with the other issues the KOL raises in contending that the arbitral award should not be enforced on public policy grounds. The following other issues raised by the KOL and FSG's response thereto are relevant when determining the jurisdiction question:

i. the alleged invalidity of the supply agreement and the applicability of the judgment of the Lesotho High Court in which it set it aside;
ii. the validity of the arbitration agreement with reference to the competence-competence and separability principles and Minister Tšolo's alleged lack of authority to conclude the supply agreement and waive State immunity on behalf of the KOL.

[194] I disagree with the first judgment that the arbitration agreement is invalid. To substantiate this, it is necessary that I deal with the effect of the separability and the competence-competence principles to bolster reasons in support of the conclusion that the arbitration agreement is valid. I also disagree with the first judgment's findings and reasons regarding Minister Tšolo's alleged lack of authority.

[195] The first judgment accepts the KOL's explanation for its absence from the enforcement proceedings. For reasons set out below, I find that the KOL has failed to provide a reasonable explanation for its absence from the enforcement proceedings. The findings I make on this issue results in marked differences in how the two judgments determine whether the KOL meets the *bona fide defence* requirement for rescission under the common law. While the first judgment entertains the basis on which the KOL seeks to resists the enforcement of the arbitral award in the event its appeal against the dismissal of its rescission application succeeds, the second judgment does not. The latter judgment moves from the premise that the KOL is not entitled to relitigate the issues it failed to raise before Lamont J and only considers the appeal on the evidence and the issues that were raised before Lamont J.

[196] Since the KOL could only resist the enforcement order on limited grounds set out in article 36, its *bona fide* defence is limited to those grounds. They include grounds I have alluded to above, namely, lack of notice and inability to present its case at the arbitration, the invalidity of the arbitration agreement and what the KOL refers to as the public policy grounds. I consider these grounds below.

The KOL's absence from the enforcement proceedings

[197] In respect of the KOL's absence from the enforcement proceedings, the present matter is on all fours with *Zuma*,[76] where the Constitutional Court interpreted the words 'granted in the absence of any party affected thereby' in rule 42 (1)*(a)* as follows:

'…the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.'[77]

[198] It is common cause that: (a) the KOL was served with the notice of the enforcement application on its Ministry of Foreign Affairs through South Africa's DIRCO. Such service is deemed to be proper service in terms of s 13(1) of FSI Act; (b) notice of the arbitration proceedings was duly served on the KOL's chosen *domicilium* as set out in the supply agreement; and (c) its senior officials were aware of both the arbitration and enforcement proceedings. Prime Minister Majoro who deposed to affidavits in the review and rescission applications was particularly aware of the enforcement proceedings as he was served with the Caselines invitation and acknowledged receipt.

[199] The version by the KOL that it did not have notice of the arbitration and enforcement proceedings because there was a conspiracy by certain of its senior officials to conceal them from it is not only contrived, but it is also inconsistent with these common cause facts. FSG had discharged its duty in having the notice of the enforcement proceedings served in terms of s 13(1) of the FSI Act, which provides that notice of proceedings is deemed to be served when it is delivered at Lesotho's Ministry of Foreign Affairs. Further, as Strijdom AJ found, the KOL offered no explanation as to why the notices were not sent to the office(s) mandated to take the appropriate action after they were duly served.

[200] In addition, the KOL's version that notices were not served on its Attorney General in terms of rule 4(1)*(f)* of the rules of the Lesotho High Court lacks merit. The rules only apply to proceedings brought before the Lesotho High Court. They do not apply to arbitration proceedings. They also do not apply to proceedings brought in the

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[76] *Zuma* fn 14.
[77] Ibid para 56.

High Court of South Africa. Its contention that s 3 of the GPC Act requires service on the KOL Attorney General is also without merit. This section provides:

'(1) In any action or other proceedings which are instituted by virtue of the provisions of section two of this Act, the plaintiff, the applicant or petitioner (as the case may be) may make the Principal Legal Advisor the nominal defendant or respondent.

(2) Save as may otherwise expressly be provided by law, actions or other proceedings by Her Majesty in Her Government of Basutoland shall be instituted by and in the name of the Principal Legal Advisor'.

[201] Section 3 of the Lesotho GPC Act only designates the KOL Attorney General as the official to be cited in proceedings against the KOL. He is also the official authorised to defend proceedings on behalf of the KOL. The section does not designate him as the official on whom notice of proceedings against the KOL ought to be served.

[202] An inescapable inference to be drawn from these common cause facts is that so intent was the KOL on disregarding judicial process that it made no effort to follow up on the outcome of the enforcement proceedings. It took the eminent and coerced loss of its assets through execution proceedings to prompt it into action. Prime Minister Majoro, in his then capacity of the KOL Minister of Finance was a constant figure throughout FSG's interactions with the KOL. Subsequently, he received notice of both the arbitration and enforcement proceedings and deposed to the KOL's affidavits in the proceedings before Strijdom AJ, yet he failed to provide a satisfactory explain why the KOL waited until FSG commenced execution proceedings to apply for the rescission of the enforcement order and review the arbitral award. He was aware that the supply agreement had been concluded as far back as September 2018 when Mr Frazer appraised him of this development. Yet, he did not explain why he failed to take steps then to have the supply agreement reviewed and set aside.

[203] The investigations by the DCEO and the Commission of Enquiry the KOL established to investigate the circumstances under which the supply agreement was signed did not yield any new evidence that the KOL did not have. These enquiries have not unearthed evidence of the alleged fraudulent conduct on the part of Minister Tšolo or any other the KOL official that the KOL relied on in the rescission and review

application. More importantly, the outcome of these enquiries does not support Prime Minister Majoro's contradictory version that the enforcement proceedings documents were concealed from the KOL. If they were concealed, they would not have been served on him. They would also not have been served on the KOL Foreign Affairs Ministry. And, the fact that Minister Tšolo was charged with fraud does not substantiate the conspiracy and fraud theory the KOL sought to rely on in the rescission and review proceedings.

[204] For these reasons, I do not agree with the finding in the first judgment that the arbitration and enforcement proceedings notices were intercepted and concealed as a result of which the KOL was absent from the proceedings. And I must find that the KOL failed to provide an explanation for its default in opposing the enforcement proceedings.

The purported error by Lamont J

[205] Concerning the relationship between the absence of a party and the error committed by the court, the Constitutional Court in *Zuma* sounded a warning that these two requirements should not be conflated. It said:

'At the outset, when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstance.'[78]

[206] Therefore, although an error by the court may result from the absence of a party because information that had a bearing on its decision was not placed before it, when an order is erroneously made, the absence of a party *per se*, does not entitle it to rescission. To make out a case for rescission, a party must establish that it was not wilfully absent from the proceedings and that the other party was not entitled to an

[78] Ibid para 57.

order in its absence due to a procedural error by such a party or the court, failing which it is not entitled to re-litigate the issues determined by the court in its absence. This is so even if the defence the party seeking rescission intends disclosing to the court will result in the error being corrected.

[207] This principle serves two purposes. It denies a party who displays contempt for judicial proceedings the court's audience. It also promotes the principle of finality in judicial proceedings. Where rescission is sought in respect of an order that relates to arbitration proceedings, it serves the third purpose of ensuring that such proceedings are disposed of expeditiously.

[208] On the authority in *Zuma*, whatever error the KOL contended that Lamont J committed during the enforcement proceedings was not caused by any procedural defect by Lamont J or FSG. Rather, it is as a result of its absence from the arbitration and from the enforcement proceedings after the relevant notices were duly served on it. Under these circumstances, the KOL is not entitled to re-litigate the issues it failed to raise during the arbitration and enforcement proceedings. This marks the end of its case on rescission in terms of rule 42(1)*(b)* and the common law. And the door to review the arbitral award remains closed to it.

The alleged invalidity of the supply agreement and the effect of the judgment of the Lesotho High Court.

[209] The first judgment correctly finds that the judgment of the Lesotho High Court – which declared the supply agreement invalid due to Minister Tšolo's lack of authority to conclude it on behalf of the government of Lesotho (the lack of authority defence) and non-compliance with the provisions of the Public Procurement Regulations 2007 as amended (the legality defence) – bears no relevance to the appeal against the dismissal of the KOL's review application.

[210] In my view, these factors also bear no relevance to the appeal against the dismissal of the rescission application and therefore do not strengthen the KOL's *bona fide* defence. The KOL failed to raise these defences during the arbitration and enforcement proceedings, and the horse has bolted. This defence is no longer available to it. As already stated, the KOL could have resisted the enforcement of the

arbitral award on the concomitant grounds set out in articles 34 and 36 of the Model Law but opted not to participate in those proceedings.

The validity of the arbitration agreement with reference to the competence-competence and the separability principles, Minister Tšolo's alleged lack of authority to conclude the supply agreement and waiver of immunity.

[211] If the supply agreement is invalid as the KOL contends, it does not necessarily mean that the arbitration agreement is also invalid.[79] Article 16(1) of the Model Law entrenches the separability and the competence-competence principles. It provides as follows:

'Article 16. Competence of arbitral tribunal to rule on its jurisdiction

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

[212] It expressly gives the arbitrator the competency to determine its jurisdiction. This is referred to as the competence-competence principle. The principle has been recognised and applied by this Court in *Canton Trading*[80] where, while it recognised the supervisory role of courts over arbitration proceedings, this Court expressed a preference for the arbitrator to determine his jurisdiction first.[81] It stated that:

'The other approach is based on the principle of competence-competence also known as 'Kompetenz-Kompetenz' (referring to its German origins), or the principle of 'compétence de la compétence'.

[213] This Court observed that the principle has a positive and a negative aspect. The positive aspect is largely uncontroversial. Arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance. The negative aspect of the principle may be formulated as follows. Where the dispute has already been referred to an arbitrator, the court will not rule upon the validity, existence or scope of the arbitration agreement, but will leave these questions

[79] See *Fiona Trust* fn 12 paras 17-19.
[80] *Canton Trading* fn 74.
[81] *Canton Trading* fn 74 para 35. Also see *Fiona Trust*.

of jurisdiction for the arbitrator to decide, at least initially. But, even if the dispute has not yet been referred to arbitration, the court may be disinclined to decide the question of jurisdiction, unless the arbitration agreement is manifestly void. The jurisdiction that has most plainly adopted negative competence-competence is the French Code of Civil Procedure.

[214] Once the arbitrator has ruled and rendered an award, the courts may finally decide any issue of jurisdiction if the award is brought on review or its enforcement is sought. On this approach, the competence-competence principle gives effect to the principle of judicial restraint.

[215] This Court observed that the principle of competence-competence is formulated in different ways in different jurisdictions, the principle recognises that courts will be inclined to allow the arbitrator to decide questions of jurisdiction, unless the challenge before the court shows that there is a manifest basis to resist the submission to arbitration. Ultimately, the application of the principle is a matter of timing. It does not vacate the court's ultimate power to determine the question of an arbitrator's jurisdiction, but defers its exercise in favour of allowing the arbitrator to render an award, including an award on the issue of jurisdiction. The principle thus favours the facilitation of arbitration and restricts pre-emptive court challenges to the jurisdiction of an arbitrator, save in the clearest of cases. In any event, there was not pre-emptive challenge to the arbitrator's jurisdiction here.

[216] Contrary to what the KOL contends, *Canton Trading* does not support KOL's proposition that the conclusion of the main agreement by a person who lacks authority also invalidates the arbitration agreement in which it is contained. Since the KOL did not mount a frontal challenge to jurisdiction of the arbitrator and did not raise the issue before Lamont J, the negative effect of the competence-competence alluded to in *Canton Trading* does not arise in this case.

[217] Preference for the arbitrator to determine his jurisdiction first, which is promoted in *Canton Trading* is consistent with article 16(2) of the Model Law. It provides as follows:

'(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.'

[218] Therefore, the arbitrator in the present matter was competent to determine his jurisdiction over the dispute between FSG and the KOL in respect of the supply agreement. It was open to the KOL to object to the arbitrator's jurisdiction during the arbitration proceedings. It failed to do so. The arbitrator found that the KOL had been duly served with notices in respect of those proceedings and was wilfully absent. He determined that he enjoyed jurisdiction over the matter. The supply agreement was signed by Minister Tšolo. According to the *Swissborough Diamond Mines* interpretation of s 10, he is deemed to have signed it on behalf of the KOL. The KOL could rebut this presumption but failed to participate in the arbitration proceedings after having been duly served with arbitration notices on its chosen *domicilium* address.

[219] The separability principle postulates that an arbitration agreement contained in another agreement as in the present matter must be regarded as separable and severable from the main agreement.[82] This implies that the two agreements may not necessarily be subject to the same legal requirements and as a result, the validity of the arbitration agreement is not determined by that of the main agreement.

[220] It is for that reason that I find that alleged status of the supply agreement has no effect on the validity of the arbitration agreement. While the supply agreement may be subject to Lesotho's procurement regulations, the arbitration agreement is not. In terms of s 10, Minister Tšolo, whose signature appears on the supply agreement in which the arbitration agreement is contained is deemed to have signed it on behalf of the KOL. The KOL could have rebutted that presumption during the enforcement proceedings but was wilfully absent. It is not entitled to re-litigate Minister Tšolo's alleged lack of authority by having the enforcement award rescinded.

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[82] Ibid paras 37 and 38, applying *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) and *Zhongji* fn 3.

[221] Therefore, the KOL's contention that FSG's reliance on s 4 of the FSI Act is misplaced lacks merit. The KOL is not immune from South Africa's jurisdiction by virtue of s 4 (1)*(a)* of the FSI Act. It provides that '[a] foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a commercial transaction entered into by the foreign state'. The supply agreement is a commercial agreement as defined in s 4(3)*(a)* of the FSI Act as it is a contract for the supply of goods or services. It is also particularly hit by s 4(3)*(c)* which defines a commercial agreement as:

'. . .any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority'.

[222] The supply agreement was not concluded in the exercise of its sovereign authority as envisaged in s 4(3)*(c)*. The arbitration agreement which, in terms of s 10 of the Lesotho GPC Act, Minister Tšolo is deemed to have signed on behalf of the KOL, constitutes an agreement to submit the dispute arising from the supply agreement to arbitration as envisaged in s 10(1) of the FSI Act, which provides as follows:

'A foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic in any proceedings which relate to the arbitration.'

[223] For the same reasons set out above, there is no merit in the assertion by the KOL that it did not give domestic effect to the Model Law and the International arbitration regime and that only its courts have jurisdiction over the arbitration agreement. As reasoned in *Zhongshan Fucheng*,[83] this is another defence belatedly disclosed. The KOL has no right to have the enforcement award rescinded to resist the enforcement of the arbitral award on this ground. It has failed to establish that on the papers before the arbitrator, he wrongly founded his jurisdiction on the arbitration agreement and that as a result, the arbitral award was defective, and Lamont J could not found his jurisdiction on it.

[83] *Zhongshan Fucheng* fn 15.

Public policy

[224] What remains of the KOL's *bona fide* defence is whether the arbitral award should not be enforced for public policy reasons. Due to their international nature, and the fact that domestic courts play a supervisory role over international arbitrations, such proceedings are prone to tension between international and domestic policy. The approach of forum state courts to public policy defences in enforcement proceedings is that they are narrowly construed and rarely lead to the refusal of enforcement.[84]

[225] Case law shows that courts tend to diffuse the tension between international and domestic policy by refusing to enforce an arbitral award on public policy grounds under very limited circumstances. Courts have refused to enforce awards where there is a defect in the procedure of the arbitration or the resulting award such as where an arbitrator failed to determine his jurisdictional competency;[85] on the basis that the arbitral award violate the forum state's most basic notion of morality and justice[86] and where an arbitral award conflict with domestic policy of the forum state but the contract was not performed in that state.[87]

[226] The English Commercial Court in *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd*[88] stated that a contract that was valid under commercial principles and the law of arbitration but unlawful in the enforcing state could still be enforced because the public policy of sustaining international arbitration awards outweighed the public policy of discouraging international commercial corruption. It further stated that it is inappropriate in the context of the New York Convention for the enforcement court to retry that very issue in the context of public policy submission.

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[84] See *Parsons & Whittemore Overseas Co., Inc. v Société Générale de L'Industrie Du Papier (RAKTA)*. 508 F.2d 969.

[85] *German Seller v German Buyer* (1980) V YBK Comm Arb 260.

[86] *Slaney v International Amateur Athletic Federation* 244F 3d 580, 593 (7th Cir 2001); *Sarhank Group v Oracle Corp* 2002 US Dist LEXIS 19229; 2002 WL 31268635 (SDNY); *Waterside Ocean Navigation Co v International Navigation Ltd* 737 F 2d 150 (1984); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2002) XXVII Ybk Comm Arbn 814; and *Shreter v Gasmac Inc* (1992) 7 OR (3d) 608, 89 DLR (4th) 365 (Gen Div).

[87] *Lemenda Trading Co Ltd v Africa Middle East Petroleum Co Ltd* [1988] 1 QB 448.

[88] *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1999] Q.B. 740 [1998] 2 Lloyds Rep 111 at 131.

[227] The public policy issues the KOL invokes in this appeal are far outweighed by the consequences of the KOL's absence from both the arbitration and enforcement proceedings and the principle of finality in proceedings. As already indicated, they are: (a) that the award relates to decisions which under South African law are only reviewable by courts exercising their constitutional power in terms of s 172(1) of the Constitution (the decision to conclude a public procurement contract and to waive sovereign immunity) (b) that the arbitrator lacks such powers; and (c) that the cost of enforcing the award is astronomical for the people of Lesotho.

[228] Further, none of the public policy issues the KOL raised relate to the arbitration procedure and the resultant award. But for its wilful absence, the KOL could and should have raised these substantive issues during the arbitration and enforcement proceedings. As already found, it is not entitled to relitigate these issues through a belated rescission application. Arbitration proceedings ought to be finalised expeditiously and there must be finality in such legal proceedings in the interests of commercial imperatives inherent in the supply agreement.

[229] In any event, as already determined, the KOL's legality defence lacks merit. Its argument that the supply agreement failed to comply with Lesotho's procurement laws and cabinet had not approved it does not constitute a *bona fide* defence. In terms of article 36, the enforcement of the arbitral award may not be resisted on this ground. And as already found, that agreement is separable from the arbitration agreement and procurement laws do not apply to the latter agreement. The arbitration agreement was deemed to be duly signed by Minister Tšolo on behalf of the KOL, waiving its immunity and subjecting itself to arbitration proceedings in South Africa under the supervision of South African courts.

[230] The KOL's contention that the decision to conclude the supply agreement constituted a borrowing also lacks merit. A separate finance agreement ought to have been concluded between the KOL, KfW IPEX Bank and the DBSA. The fact that the two agreements ought to have been concluded concomitantly does not mean that the conclusion of the finance agreement was a condition precedent to the supply agreement. The KOL has not pointed to a clause in the supply agreement that supports such a finding. It is common cause that Minister Majoro as the Finance Minister did

not facilitate the conclusion of the finance agreement. Hence, that agreement was never concluded and the supply agreement was never financed.

[231] Further, as contended on behalf of FSG, if the KOL is allowed to raise the defences it failed to raise before the arbitrator and before Lamont J to demonstrate that it has a *bona fide* defence, that would be an invitation to parties to ignore arbitrations and litigate in High Courts of their choosing, thus disregarding the Model Law and the New York Convention. Furthermore, The FSG has correctly pointed out that the KOL's attempt to resist the arbitral award on economic grounds is unsubstantiated as it provided no authority for such a finding.

[232] Given that the arbitrator found that the supply agreement is valid based on the principles of contract and there is a legal basis for the arbitral award, refusing to enforce it would undermine the rule of law and would be contrary to the objectives of the IA Act referred to above. These imperatives far outweigh the KOL's public policy concerns.

On the first and third judgments

[233] I have had the benefit of considering the third judgment. I set out my views on that judgment below. Although I have dealt with aspects on which I do not find common ground with the first judgment at pertinent points of the second judgment, I consider it necessary to surmise my views on it, which I also set out below.

[234] The first judgment, while comprehensive and carefully reasoned, proceeds from premises that, with respect, conflate issues that ought to have remained doctrinally distinct. In particular, its approach to rescission impermissibly extends the scope of the court's discretion by allowing substantive merits, especially the alleged invalidity of the underlying supply agreement, to predominate over the anterior procedural enquiry required under rule 42 or the common law. Once it is accepted, as it must be, that service of the enforcement application was affected in a manner sanctioned by the FSI Act, the enquiry into "absence" and "error" should have been confined to whether any procedural defect attributable to the court or the applicant vitiated the enforcement order. The first judgment, however, traverses issues that were neither

before Lamont J nor capable of rendering his order erroneous at the time it was granted.

[235] Closely related to this is the first judgment's treatment of the KOL's explanation for default. The reliance on allegations of interception and concealment of process gives determinative weight to speculative inferences drawn from subsequent investigative initiatives, none of which establish that the default was involuntary in the sense contemplated by rule 42(1)(a) or the common law. This departs from the principle that rescission is not available to litigants who, having been afforded procedurally regular notice, elect – whether by inaction or internal dysfunction – not to participate in proceedings.

[236] The third judgment, for its part, advances an interpretation of article 34 of the Model Law that, in substance, reintroduces a broad discretionary power which the legislature declined to confer. While its concern to prevent fraud or corruption from being insulated by procedural time bars is understandable, its interpretive approach insufficiently accounts for the deliberate and limited nature of the statutory exception expressly enacted for that purpose. By treating article 34 as generally amenable to condonation, the third judgment risks undermining the core objectives of the international arbitration regime: finality, certainty, and uniformity; and places South Africa at odds with the prevailing international consensus reflected in comparable jurisdictions. Lastly on this issue, the third judgment does not meaningfully engage with the structural consequences of ignoring the exclusivity of article 34.

[237] The third judgment further proceeds on an attenuated application of the separability and competence-competence principles. In doing so, it incorrectly displaces jurisdiction that had already vested in the arbitrator and the enforcement court on the basis of an arbitration agreement that was facially valid at the material time.

[238] The criticism advanced in the third judgment concerning the application of the *Plascon-Evans* rule cannot, with respect, be sustained. That rule does not operate mechanistically, nor does it require a court to accept at face value every assertion

made by a respondent merely because it has been denied. It is well established that where denials are bald, implausible, internally contradictory, or inconsistent with contemporaneous documentary evidence, a court is not bound to adopt the respondent's version but may reject it as falling within the recognised exceptions to the rule. In the present matter, the explanation advanced by the KOL for its default was not met by a coherent competing narrative grounded in admissible evidence, but largely by speculative denials and arguments of probability.

[239] In those circumstances, the acceptance of FSG's version did not constitute a misapplication of *Plascon-Evans*, but rather a principled application of it, informed by its qualification that courts are not required to credit versions that are untenable on the papers as a whole.

[240] The KOL's reliance on an alleged fraud, concealment and conspiracy, together with its denial that it was properly served, is untenable when assessed against Mr Frazer's version and the objective facts. Mr Frazer's account establishes a continuous, transparent course of dealings with multiple senior officials of the KOL over an extended period, supported by extensive contemporaneous correspondence and formal service effected in a manner expressly authorised by the FSI Act. Against this evidentiary backdrop, the allegations of a coordinated scheme to conceal the arbitration and enforcement proceedings rest largely on inference and speculation, not on primary facts demonstrating deliberate suppression by identifiable actors. Importantly, the KOL does not seriously dispute that notices were received at its Ministry of Foreign Affairs, that senior office-bearers became aware of the proceedings, or that no timely steps were taken to investigate, respond, or oppose them. Nor does it provide a coherent explanation, consistent with Mr Frazer's version, as to why multiple independent communications and formal processes served on different KOL's offices and officials at different times would all have been intercepted without trace.

[241] When regard is had to these factors, the KOL's version amounts to a belated reconstruction aimed at explaining institutional inaction rather than a genuine factual dispute. Properly applied, the *Plascon-Evans* principle does not oblige a court to prefer such a version where it is contradicted by contemporaneous documentation, objective

probabilities, and a plausible opposing account; rather, it permits its rejection as unsustainable on the papers.

[242] The third judgment incorrectly critiques the second judgment as treating procedure and legality as opposites. The second judgment does not with respect do so. It treats procedure as the institutional mechanism through which legality is adjudicated. Fraud must be raised in the proper procedural window, before the arbitrator or in a timeous article 34 challenge, and cannot be introduced for the first time through rescission when default was elected. Worse so for the third judgment, fraud is not established on the papers. Therefore, the factual basis for the application of the 'fraud unravels all' principle is not extant.

[243] Further, the third judgment does not fully grapple with the *Zuma* principle that rescission is not a forum for revivifying substantive challenges not pursued by election. Legality must be asserted in the fora and within the time frames prescribed by the Model Law, which Parliament chose to domesticate; article 34 is the *exclusive* recourse for setting aside an award at the seat and rescission under rule 42 cannot be used to resurrect legality challenges that were procedurally bypassed. This is not formalism; it is legislative fidelity.

[244] For these reasons, the approaches adopted in the first and third judgments do not, with respect, sufficiently safeguard the principles of procedural finality and judicial restraint that underpin both rescission jurisprudence and the international arbitration framework.

[245] For all the above reasons, I find that the KOL failed to provide a reasonable explanation for its default from the arbitration and enforcement proceedings and lacks a *bona fide* defence. Therefore, its rescission application on all the bases it raises in this appeal must fail. Had I carried the support of the majority, I would dismiss the appeal with costs including those of two counsel.

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LT MODIBA

ACTING JUDGE OF APPEAL

Molemela P (Makgoka JA concurring):

[246] I have read the judgment of my colleagues, Mokgohloa and Smith JJA (the first judgment). The salient factual background has been correctly set out in the first judgment. There is therefore no need to repeat the facts in this judgment, except insofar as it may be necessary for purposes of articulating my reasoning. I agree with the first judgment's conclusion that the supply agreement is invalid, and the reasons proffered as the basis for its conclusion. I also agree with the first judgment's reasoning and conclusion in respect of the dismissal of the application to lead further evidence, the upholding of the appeal, and the setting aside of the enforcement order. However, I respectfully disagree with its reasoning and conclusion regarding the refusal to set aside the arbitration award. I have also read my colleague, Modiba AJA's, judgment (the second judgment). I respectfully disagree with that judgment's reasoning and conclusion on all aspects.

[247] In my view, the gravamen of this case is the validity of the arbitration agreement embodied in the underlying supply agreement, which is impugned on the basis that Minister Tšolo knew, as a matter of fact, from the outset that there was no Cabinet approval for the project; that he had no actual or ostensible authority to enter into the supply agreement; that he therefore acted on a frolic of his own when he concluded a patently unlawful agreement (the supply agreement) which obliged the KOL to obtain a loan from external sources for the procurement of goods and services amount to the sum of €100 million (R1.7 billion) without any Cabinet approval or tender processes preceding it and purported to waive the KOL's sovereign immunity; and that once FSG initiated legal steps for alleged breaches of the agreement, several officials colluded to conceal the unfolding legal processes.

[248] The relevant evidence can be gleaned from the parties' affidavits and annexures.[89] It is common cause that FSG never provided any products or services to the KOL under the impugned supply agreement. A significant aspect of this case is that Minister Tšolo served as a Minister in the Prime Minister's Office. The then Prime Minister Thabane signed a confirmatory affidavit on behalf of the KOL. This must mean that he agrees with the version that holds that Minister Tšolo had no authority, actual or ostensible, to sign the underlying agreement and was therefore on a frolic of his own when he did so, and also with the assertions regarding the concealment of the legal documents. The key question is whether the arbitration clause can survive the invalidity and unlawfulness of the supply agreement. This requires a proper interpretation of the supply agreement as a whole, which embodies the arbitration clause.

[249] In *Namasthethu Electrical (Pty) Ltd and Another v City of Cape Town* (*Namasthethu*),[90] this Court had to determine whether, in light of the appellant's fraudulent and corrupt conduct, the City of Cape Town, after validly cancelling the contract, could be compelled to submit to arbitration under the contract's dispute-resolution clause. The court held that this aspect had to be determined in line with the generally accepted approach to the interpretation of contracts, which included having regard to the context in which the agreement was concluded.[91] It further stated that the contract had to be interpreted so as to give it a commercially sensible meaning. This is the interpretive exercise that will be followed in this case.

[250] Before I delve deeper into the facts for context, it is necessary to set out the legal principles enunciated in several judgments of this Court when determining similar issues. The golden thread that runs through those judgments is the paramount principle that 'fraud unravels everything'. In *North West Provincial Government and Another v Tswaing Consulting CC and Others (Tswaing)*, Cameron JA stated as follows:

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[89] Since these are motion proceedings, the affidavits and the annexures referred to therein constitute evidence. See *Transnet Ltd v Rubenstein* [2005] ZASCA 60; [2005] All SA 425 (SCA); 2006 (1) SA 591 (SCA) para 28.
[90] *Namasthethu Electrical (Pty) Ltd and Another v City of Cape Town* [2020] ZASCA 74.
[91] Ibid para 33.

'This conclusion entails that the arbitration agreement also cannot stand. This is for two reasons. First, the arbitration clause was embedded in a fraud-tainted agreement that the province elected to rescind. The clause cannot survive the rescission, and the agreement purporting to give effect to it is stillborn. The Judge overlooked that to allow Tswaing to enforce the arbitration agreement, the tainted product of Tswaing's fraud would be offensive to justice.[92]

[251] In *North East Finance v Standard Bank* (*North East Finance*),[93] the respondent bank identified instances of fraud that led to the formation of a contract. The bank chose not to refer the question of whether the contract was induced by fraud to arbitration, arguing that the arbitration clause was part of the contract.[94] The key question was whether, in circumstances where there are substantial grounds to suspect that a contract was induced by fraud, an arbitration clause in that contract, which requires the parties to submit any dispute to arbitration, still binds the aggrieved party.[95] This Court made it plain that a dispute is arbitrable only if the parties intended that it should be arbitrated.[96] As to whether the parties intended the issue of the validity of the agreement to be arbitrable, is an issue that can only be determined by having regard to the context in which the agreement was concluded.[97]

[252] Crucially, in *North East Finance*, this Court reaffirmed the *Tswaing* principle, which states that fraud vitiates the arbitration clause. Having considered all issues raised in that matter, including the separability of arbitration agreements principle as discussed in the *Fiona Trust* judgment of the House of Lords,[98] this Court did not

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[92] *North West Provincial Government and Another v Tswaing Consulting CC and Others* [2006] ZASCA 108; 2007 (4) SA 452 (SCA); [2007] 2 All SA 365 (SCA) (*Tswaing*) para 13.
[93] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA).
[94] Ibid para 7.
[95] Ibid para 1.
[96] Ibid para 20.
[97] Ibid para 23.
[98] In *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 paras 17 to 18, the House of Lords held that if a party alleges that someone who purported to sign as agent on his behalf had no authority whatsoever 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 the allegation is that the agent exceeded his or her authority by entering into a main agreement with terms that were not authorised or for improper reasons, this does not automatically attack the validity of the arbitration agreement. It would have to be shown that, regardless of the terms of the main agreement or the reasons behind the agent concluding it, he or she would have had no authority to enter into an arbitration agreement at all.

consider the ratio of those judgments to detract from the *Tswaing* principle that accepted that fraud vitiates the arbitration clause.

[253] *North East Finance* did not consider the principle of separability to be insulating an arbitration agreement from all challenges to the validity of the underlying agreement in which it is embodied. Lewis JA unequivocally stated that 'if a contract is void from the outset, then all of its clauses, including exemption and reference to arbitration clauses, fall with it'.[99] This Court also endorsed the following dictum in *Heyman v Darwins Ltd*, where the following was stated:

'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 is made. If the dispute is 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 has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged 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.' [100]

[254] This Court in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* (*Esorfranki*) [101] referred with approval to Lord Denning's dicta in *Lazarus Estates Ltd v Beasley* [1956] 1 QB (CA) at 712, where he said:

'No court in this land will allow a person to keep an advantage, which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever'.[102]

A unanimous judgment of this Court in *Namasthethu* applied the dictum in *Esorfranki*.[103]

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[99] *North East Finance* fn 93 para 12.
[100] This dictum is as quoted in *North East Finance* para 12.
[101] *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA).
[102] Ibid para 25.
[103] *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* [2020] ZASCA 74.

[255] It is clear that the principle that fraud vitiates the arbitration clause has not been overruled in any judgment of this Court; it remains good law and is therefore binding on this Court under the doctrine of precedent.[104] What is also plain from these judgments is that a challenge to the conclusion of an agreement, or its legality, will also entail a challenge to the validity of the arbitration clause, and the courts may determine such a challenge.

[256] I do not understand the competenz-competenz principle as imposing an absolute bar on courts from determining the validity of a contract that embodies an arbitration clause in circumstances where there is a challenge to the arbitration agreement. This Court's judgment in *Canton Trading* did not negate courts' competence to adjudicate upon such matters; on the contrary, it expressly acknowledged that courts may, in fact, decide such a challenge.

[257] To the extent that reliance was placed on *Lufuno* as authority for the proposition that only an arbitrator had jurisdiction to hear the arbitration, notwithstanding the invalidity of the underlying contract, that reliance is misplaced. That case is, in any event, distinguishable because the issues that arose for determination were different from the present. It follows that *Lufuno* cannot be used to support the conclusions reached in either the first or the second judgment. It suffices to observe that, in that judgment, the Constitutional Court underscored the importance of party autonomy in arbitration agreements, stating that they are consensual and private mechanisms for dispute resolution, while still acknowledging the supervisory role of the courts to ensure that the process does not violate the Constitution.

[258] It is worth noting that in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd*,[105] the England and Wales Court of Appeal, after reviewing *Fiona Trust* and the cases that followed, clarified the limits of the separability principle. It distinguished between disputes over contract formation (where the dispute is whether a party ever assented to a contract containing an arbitration clause) and challenges to the validity

[104] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* [2024] ZASCA 65; [2024] 3 All SA 1 (SCA); 2024 (9) BCLR 1189 (SCA); 2024 (5) SA 463 (SCA) paras 36-37.
[105] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA Civ 1555; [2023] Bus.L.R 584; [2013] 1 Lloyd's Rep 245.

of the contract (where parties did assent to the terms of the agreement embodying the arbitration clause, but their agreement is invalidated on some legal ground which renders the contract void or voidable.[106] The court reasoned that while an arbitration agreement is a separate contract, it still requires the usual rules of contract formation to be satisfied. The court found that a successful challenge to the formation of a contract generally invalidates the arbitration agreement embodied in it.[107]

[259] Based on the discussion above, it is clear that the high court erroneously interpreted the principle of separability to mean that the KOL had to impugn the arbitration agreement on grounds distinct from its challenge to the supply agreement. Based on that erroneous interpretation, the high court found that Minister Tšolo's lack of authority was not relevant to the arbitration agreement.

[260] With the afore-mentioned principles in mind, I now turn to consider the context in which the supply agreement was concluded, with a view to determining whether the parties envisaged that their dispute would remain arbitrable despite the invalidity of the underlying agreement. As the Constitutional Court held in *University of Johannesburg v Auckland Park Theological Seminary*,[108] when interpreting a contract, a court has to consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge, at the time, of those who negotiated and drafted the contract.[109] The Court went on to explain:

'This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded.'[110]

[261] The common cause facts gleaned from the affidavits and annexures provide a background to Minister Tšolo's signature of the supply agreement and leave no doubt that FSG was well aware that the KOL was a sovereign state – Minister Majoro stated

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[106] Ibid para 46.
[107] Ibid para 58.
[108] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).
[109] Ibid para 66.
[110] Ibid para 67.

this in so many words in one of the emails exchanged between him and Mr Frazer. As already mentioned in the first judgment, a report dated 18 April 2018, sent by Mr Frazer to the KFW-IPEX Bank, further stated that once the Ministry of Finance 'has the full picture they will make their formal recommendation to the Lesotho government who will give their final approval'. That was before the supply agreement was signed. Clearly, Mr Frazer knew that several procedures needed to be taken before a valid conclusion of the supply agreement.

[262] A crucial aspect in this case is that Mr Frazer knew the internal procedures that had to be followed as prerequisites for the project's approval. He dedicated nearly a year to negotiating FSG's energy provision proposal with the government of Lesotho in an attempt to secure its acceptance. He clearly kept abreast of all developments and knew that Cabinet approval was necessary. Mr Frazer knew that one Minister's signature alone would not suffice. In a letter addressed to Minister Majoro dated 16 March 2018, Mr Frazer said: 'The current step is the Cabinet paper. The Minister of Energy has said he is only waiting for the green light from yourself so he can prepare the Cabinet paper'.

[263] A letter from Mr Frazer to Mr Fintelmann reveals that Mr Frazer was aware that a memorandum presented by Minister Tšolo, in terms of which he recommended that Cabinet approve a 100 Euros 'loan project funded 'by the German Government' was presented to Parliament but not voted on because it was withdrawn; he described that situation to Mr Fintelman as strange. He also knew that thereafter the matter was never discussed in Cabinet and that no Cabinet decision approving the deal was taken either before the signature of the supply agreement or after the purported conclusion of that agreement as some attempt at ratification.

[264] Thus, FSG knew that Cabinet approval was never obtained. This is an incontrovertible fact. Significantly, in November 2018, a few months after the supply agreement was signed, Minister Majoro informed Mr Fintelmann that the project still needed to be assessed by the Ministry of Finance 'for economic and financial soundness'.

[265] Much was made of the fact that Minister Majoro expressed no reservations when Mr Frazer updated him on the project's developments and that Prime Minister Thabane had approved it. The fact that Minister Tšolo was in favour of the project was nothing new. After all, in the memorandum presented to the Cabinet in June 2018 regarding FSG's proposal, prepared by Minister Tšolo, he expressly recommended approval of the 100 euros loan for the project's funding. Of significance is that he knew that the memorandum did not carry the day; it was withdrawn, and the matter was not raised in Cabinet again. That attests to Minister Majoro's understanding that the project had not yet received approval.

[266] Moreover, in an email dated 20 October 2018 Minister Majoro pertinently told Mr Frazer that he (Mr Frazer) knew that the project had to 'first pass scrutiny by being owned by the relevant technical ministry' and that 'such a huge and expensive project must have the support of cabinet having passed all the prior steps'. I therefore consider it opportunistic for FSG to seek to rely on Minister Tšolo's ostensible authority. The averments in the founding affidavit reveal that Mr Frazer knew that Cabinet approval was necessary, but it was never obtained. This has not been denied and is therefore common ground. A denial that Mr Frazer was on a frolic of his own when he signed the supply agreement is unsustainable and does not raise a genuine factual dispute. The KOL's assertions that the conclusion of the supply agreement embodying the arbitration clause was tainted by fraud are not far-fetched and must be accepted as uncontroverted.

[267] Against the backdrop of all the correspondence exchanged, and in the absence of countervailing evidence, the respondent's bald denials about Minister Tšolo's lack of authority are clearly untenable and fall to be rejected.[111] This point, when taken to its logical conclusion, suggests that FSG's simple denial of the KOL's claims about the concealment of documents pertaining to the arbitration and the subsequent enforcement proceedings does not raise a real, genuine, or bona fide factual dispute. In fact, it is clearly untenable and falls under the *Plascon-Evans* exception.[112] I

[111] *Plascon -Evans Paints Ltd* note 55 at 635C.
[112] Ibid.

therefore disagree that this aspect must be decided on the basis of the KOL's version, which, in my view, is essentially a bald denial.

[268] For the reasons already advanced in the first judgment, I agree that FSG's reliance on s 10 of the Lesotho GPC Act[113] is misplaced. To my mind, there can be no better exposition of a legal position than in a court judgment. The Lesotho High Court has unequivocally held that s 10 does not have the consequences advanced by FSG; it gives presumptive validity, ie there is a rebuttable presumption that a contract signed by a Minister is a valid contract with the KOL. This does not preclude a challenge to the contract. When there is evidence to the contrary, the provisions of s 10 cannot be used to establish Minister Tšolo's authority to conclude the supply agreement.

[269] A judgment that is of persuasive authority in this regard is the UK Court of Appeal judgment of the *Republic of Yemen v Aziz*,[114] where that court held that solicitors acting for a foreign state lack authority to waive state immunity unless explicitly authorised by the head of mission or a senior diplomat, overriding implied or ostensible authority. The court insisted on strict proof of authority to ensure that sovereign protections are not inadvertently lost, thereby preventing agents' acts from bypassing the requirement for direct authorisation from the foreign state. The court stated as follows:

'In other cases, the authority of the State's representative must be established by evidence, if challenged. In such cases, there can be no question of ostensible authority, this being the species of estoppel and incapable therefore of extending the court's jurisdiction.'[115]

[270] In my view, the evidence in this matter is overwhelmingly against FSG. As correctly pointed out in the first judgment, one of the reasons the KOL asserted that the supply agreement was tainted by fraud was that Minister Tšolo was not authorised to conclude it. Both Mr Frazer and Mr Fintelmann were aware that: (i) Minister Majoro, as the Minister of Finance, was required to approve the project;(ii) he had not done so, and (iii) Cabinet had not approved the project. None of the letters and emails relied upon by FSG suggested otherwise. Minister Majoro's reaction must therefore be seen

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[113] See note 5 above.
[114] *Republic of Yemen v Aziz* [2005] EWCA Civ 745; [2005] ICR 1391.
[115] Ibid.

in the light of this uncontroverted evidence. More importantly, these three aspects show that Minister Tšolo did not have the authority to conclude the supply agreement, nor the mandate to represent the KOL in entering into it on its behalf. I therefore agree that the evidence shows that when signing the supply agreement, Minister Tšolo was on a frolic of his own.

[271] Mr Frazer's knowledge that Minister Tšolo was not authorised to conclude the supply agreement without prior Cabinet approval is an important feature regarding the context in which the supply agreement was signed. This aspect brings the doctrine of foreign state immunity into sharp focus. As I refer to the various provisions of the FSI Act, it bears emphasis that when a statute refers to a decision to enter into an agreement or transaction, that statute is satisfied only if the decision was made lawfully and validly.[116] Section 2 of the FSI Act unambiguously provides that a foreign state shall be immune from the jurisdiction of the Republic of South Africa except as provided for in the FSI Act. The principle of foreign State immunity is considered to be so vital that a court is enjoined to give effect to the immunity even if the foreign state does not appear in the proceedings in question.[117]

[272] Section 10 of the FSI Act makes it plain that a foreign State is considered to have waived its immunity to the jurisdiction of the South African courts in relation to arbitration proceedings only if *the foreign state* has agreed in writing to submit a dispute to arbitration. In the present case, Minister Tšolo has been shown to have lacked the authority to agree on behalf of the KOL, as evidenced by the three factors mentioned in the preceding paragraph. It ineluctably follows that FSG's contention that Minister Tšolo had ostensible authority does not even get off the starting blocks.

[273] Another reason why FSG cannot get to the finishing line as a victor is the provisions of s 3(6) of the FSI Act, which make it plain that a person concluding a contract on behalf of a foreign State can only waive the foreign State's immunity and will only be recognised as having validly done so if that person had actual authority to

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[116] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd* [2018] ZASCA 21; [2018] 3 All SA 605 (SCA) para 21.
[117] See s 2(2) of the FSI Act.

do so from that foreign State.[118] Put differently, a foreign State is considered to have waived immunity only if the person who entered into the impugned contract did so 'on behalf of and with the authority of' the foreign State in question. It follows that the KOL cannot be considered to have waived its foreign state immunity by dint of Minister Tšolo's unauthorised actions.

[274] FSG also relied on s 4 of the FSI Act, which provides that a foreign State is not immune from the jurisdiction of the South African courts in proceedings relating to 'a commercial transaction entered into by the foreign State'. Based on the same reasoning expressed in the preceding paragraphs, s 4 applies to the KOL only if it validly agreed to the supply agreement.

[275] FSG has not denied that before the Lesotho High Court, it conceded that the supply agreement breached the KOL's Constitution, its financial management legislation, and its procurement laws. To deprive the KOL of foreign State immunity would have grave consequences. It would uphold a manifestly unlawful and invalid underlying agreement, concluded as it was, without the lawful exercise of the requisite public powers. This, in circumstances where, to FSG's knowledge, cabinet approval for the transaction was never obtained; no tender process preceded the conclusion of the agreement, borrowing of a substantial amount (in excess of R1.5 billion) was concluded without adherence to the prescripts of the KOL that regulate borrowings.

[276] It must be borne in mind that an arbitrator has no power in law to declare the conduct of executive action unconstitutional and invalid. As this Court explained in Compare *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another*, issues concerning constitutional invalidity, compliance and procurement validity are reserved for courts. [119] If the remedial powers of courts to intervene on the basis of the principle of legality in relation to the unlawful exercise of public power were precluded, this would jettison the checks and balances embodied in the FSI Act and

[118] Section 3(6) of the FSI Act provides that:
'any person who has entered into a contract on behalf of and with the authority of a foreign state shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of proceedings arising out of the contract'.
[119] *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another* [2025] ZASCA 184; 2026(2) SA 426 (SCA) paras 14-17

grant jurisdiction to an arbitrator in a matter where a foreign State was impermissibly denied foreign State immunity. It would also undermine the applicable checks and balances in matters of constitutional compliance, which, under South African law, must be resolved by the courts.

Interpretation to be attached to article 34 of the IA Act

[277] I am of the view that article 34(3) of the original Model Law is capable of being interpreted to afford courts the power to condone non-compliance where good cause is shown. It is trite that where a legislative provision is reasonably capable of two interpretations, with one interpretation rendering the provision unconstitutional and the other not, a court must adopt the interpretation most compatible with the legislation.[120]

[278] Article 34(2)*(a)*(i) of the Model Law lists the limited grounds for setting aside an award, and these grounds include an arbitration agreement that is not valid under the law to which the parties have subjected it,[121] and inconsistency with public policy.[122] Based on the *Tswaing*, *North East Finance* and *Fiona Trust* judgments, I conclude that the arbitration agreement is invalid under South African law, and that the arbitration award is therefore liable to be set aside on grounds of invalidity of the arbitration award under article 34(2)*(a)*(i) of the Model Law. It is also liable to be set aside because of its inconsistency with public policy under article 34(2*)(b)*(ii).

[279] Article 34(3) sets a three-month time limit for setting aside the arbitration, which runs from the date the award is received. Because the Model Law is intended to provide finality and certainty in international commerce, courts often hold that they have no inherent power to extend the three-month time limit. It is noteworthy that article 34(2)*(b)*(ii) of the original Model Law allows a court to set aside an award if it conflicts with the public policy of South Africa.[123] Bearing in mind the 'fraud unravels all' principle alluded to in the foregoing paragraphs, I am inclined to agree with the KOL's

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[120] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (1) BCLR 1079 (CC); 2001(1) SA 545 (CC); 2000 (2) SACR (CC) paras 22 -23.

[121] In terms of clauses 24 and 26 of the Supply Agreement, the parties to the agreement agreed that it would be governed and construed under and in accordance with the laws of South Africa. The Arbitrator acknowledged South African law as the applicable choice of law in paragraph 25 of the Arbitration Award.

[122] See article 34(2)*(b)*(ii).

[123] Ibid.

assertions that the fraud-tainted award is so contrary to public policy that it should not be shielded by a strict procedural time limit (the three-month time limit). Therefore, article 34(3) of the original Model Law, properly interpreted, is not intended to be an absolute time bar.

[280] Further, and in any event, as correctly pointed out in the first judgment, South Africa did not adopt the Model Law wholesale but adapted it to the South African context through the IA Act. It is quite significant that article 34(5) of the IA Act commences with the phrase ‘for the purposes of avoiding any doubt’. That provision then goes on to stipulate that an award is considered to be *in conflict with the public policy* of the Republic if: (a) there was a breach of the arbitral tribunal's duty to act fairly during the process of making the award, which resulted in, or will result in, significant injustice to the applicant; or (b) the award was influenced or affected by fraud or corruption. In the circumstances of this case, (b) is applicable because of the concealment of unfolding legal processes by government officials with the aim of preventing Minister Tšolo’s lack of authority from coming to light. Plainly, the effect of the adaptation of the original Model Law to the South African context, which is discernible if article 34(2)(b)(ii) is read with article 34(5) of the IA Act, is that the three-month limit does not apply if the applicant can show they did not know, and could not by the exercise of reasonable care, have known the facts constituting fraud or corruption within the prescribed three-month period. It is for the afore-mentioned reasons that I hold the view that article 34(5) of the IA Act serves as a self-contained, comprehensive mechanism for extending the three-month limit in cases where fraud or corruption is demonstrated.

[281] Put differently, the term ‘fraud or corruption’ set out in this provision is broader than merely the arbitration award itself, separately, being tainted by fraud or corruption. Rather, what is foreshadowed is that, as happened in this case, if the underlying agreement that embodies the arbitration clause is tainted by illegality, and the arbitration hearing proceeds because the service of arbitration documents was tainted by fraud or corruption (concealment of documents by various officials), the resultant arbitration award may be considered to have been induced by fraud or corruption, and may, accordingly, be liable to be set aside under article 34(2)*(b)*(ii) read with article 34(5)*(b)* of the IA Act once the fraud or corruption is revealed.

[282] Thus, the three-month period begins on the date when knowledge about the fraud or corruption could have been acquired through the exercise of reasonable care. Clearly, this provision treats fraud and corruption as exceptions to the ordinary three-month period within which an arbitration award may be set aside. Interpreting the IA Act in a manner that ignores the clear provisions of article 34(5) would be inconsistent with South African principles of interpretation, specifically the unitary approach that mandates that a provision be read in light of its text, context, and purpose.

[283] Considering the authorities canvassed earlier, I am persuaded that South Africa adapted the text of article 34(3) to, inter alia, prevent fraud from being shielded by an inflexible procedural three-month deadline. This is the interpretation that must be followed in this matter because the parties to the purported contract in which the arbitration clause is embodied chose South African law as the governing law.[124] This interpretation accords with the authorities canvassed earlier in this judgment. I am fortified in this view by the Malaysian and Hong Kong court decisions that consider Art 34(3) to be capable of an interpretation that gives the courts a discretion to condone non-compliance in appropriate circumstances

[284] In my view, the first judgment's interpretation of s 34(5) of the IA Act is too restrictive. There can be no question that the purpose of article 34(5) is to balance finality with the integrity of the arbitration process. From my point of view, a purposive interpretation of that provision recognises that in circumstances where there are substantiated allegations of fraud or corruption in relation to the processes leading to the arbitration hearing, the fraud and corruption in question taint the arbitration award. Under such circumstances, that arbitration award may be set aside more than three months after its issuance, provided that good cause is shown that the party seeking the setting aside of the award could not have reasonably discovered the facts related to the fraud or corruption within three months from the date the award was issued.

[285] Given that both Mr Frazer and Mr Fintelmann were aware that a *sine qua non* of Cabinet approval had not yet occurred, FSG's denial of Minister Tšolo's lack of

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[124] In this regard, clause 26.1 of the agreement stated that '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 [the] laws of South Africa.'

authority sounds hollow. In a similar vein, his reliance on ostensible authority is misconceived. Mr Fazer's knowledge about the requirement of Cabinet prior approval of its proposed project, which was never obtained, is therefore of crucial importance. In light of the clear provisions and relevant case law alluded to in the foregoing paragraphs, which firmly indicate that an arbitration clause contained within an invalid agreement is not enforceable, along with the stipulations outlined in article 34(5) of the IA Act, I am of the view that prioritising speedy resolution in international arbitrations over this long-held principle would amount to expedience.

[286] The fact that Mr Frazer knew that KOL was a sovereign State and that a series of processes had to be concluded before FSG's proposed project could be approved is a compelling factor in KOL's contention that it did not waive its sovereign immunity. In my view, it is unquestionable that the arbitration clause in the tainted supply agreement cannot survive the agreement's invalidity.

[287] FSG contended that this matter falls within the ambit of the exception set out in s 10(1) of the FSI Act. This, it argued, is because the KOL, as a foreign state, has agreed in writing to submit disputes arising from the supply agreement to arbitration; thus, the KOL shall not be immune from the jurisdiction of the courts of the Republic of South Africa in proceedings relating to the arbitration. This is a circular argument that fails to take into account the principles laid down in several unanimous judgments of this court.

[288] The rationale for international arbitration, which is to resolve disputes efficiently and achieve finality, should not compromise long-standing legal principles intended to maintain the integrity of arbitration clauses by shielding fraud. In any event, the rationale for domestic arbitrations is no different, and in appropriate circumstances, the courts have set aside arbitration awards predicated on tainted underlying agreements. In my view, it is simply irrational to seek to elevate the rationale of speedy resolution of international arbitrations above the recognition of long-standing legal principles.

[289] The Singapore case of *ABC Co v XYZ Co Ltd*[125] is inapposite for two reasons: first, in this matter, the governing law applicable to the parties' dispute under the impugned agreement is South African law, which triggers the application of article 34(5) due to substantiated assertions of fraud. Second, that case is distinguishable on the facts, as there were no allegations of fraud attributed to any party to the arbitration agreement. This means that the passage quoted from that judgment was made under an entirely different context. For the same reasons, *Zongshan Futcheng*[126] is also self-evidently distinguishable on the facts. In a similar vein, in *Burmilla Trust* [127] the issue to be decided was not about whether a party was too late to challenge a private arbitrator's decision.

[290] Plainly, the principles laid down in *Tswaing*, *North-East Finance*, *Esorfranki*, and *Namasthethu* ought to apply in this matter too, notwithstanding that the dispute-resolution mechanism identified in the impugned agreement is categorised as international arbitration under UNCITRAL. These principles support the setting aside of the arbitration award and the enforcement order. It follows that the Johannesburg High Court, therefore, erred when it applied a strict interpretation of the original model law as its basis for concluding that article 34(3) of the Model Law operates as an absolute bar to a legal challenge of an international arbitral award outside the period of three months.

[291] Strijdom AJ correctly held that the grounds embodied in article 36(1) for refusal to recognize or enforce an award are identical to those constituting the grounds upon which an arbitral award may be set aside in terms of article 34. Based on the reasoning adopted in the paragraphs 32-38 above, it follows that the enforcement of the award ought to be rescinded on the grounds that the arbitration agreement was invalid under the law of South Africa; furthermore, the recognition of the impugned arbitration award would be contrary to the public policy of South Africa. It follows that denying a party who has demonstrated fraud or corruption the right to challenge an arbitration award predicated on an arbitration agreement that is embodied in a fraudulent underlying

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[125] *ABC Co v XYZ Co Ltd* is referred to in para 96 of this judgment (see fn 29 above).
[126] *Zongshan Futcheng Industrial Investments COV Nigeria* is referred to in para 129 of this judgment (see fn 42 above).
[127] *Burmilla Trust* is referred to in para 139 of this judgment, see fn 47 above.

agreement would, in my view, constitute an unjustifiable limitation on the constitutional right to access to the courts and a fair hearing that is enshrined in s 34 of the Constitution.

[292] The approach followed in this judgment, confirming the principle that fraud vitiates the consent underlying arbitration agreements, is dispositive of the appeal. However, on the authority of *Spilhaus Property Holdings v MTN,*[128] this Court must address all issues raised in this appeal.

Was there proper service of processes?

[293] In my view, the same reasons the first judgment accepted as showing good cause for the rescission of the award form a solid basis for setting aside Strijdom AJ's enforcement award on the basis that the KOL would not have reasonably known the facts constituting the fraud or corruption within the prescribed three-month period. I would add to those reasons a finding that the form of service on a sovereign state is circumscribed under the FSIA. The minutes of the preliminary arbitration meeting reveal that the arbitrator mentioned that he had contacted Minister Tšolo to enquire whether the KOL would be appearing at the hearing, and that Minister Tšolo indicated that the KOL would not be participating in the preliminary hearing. Moreover, it can be gleaned from the arbitration award that at the arbitration hearing, FSG relied on breaches of the supply agreement but failed to inform the Arbitrator about Minister Tšolo's lack of actual or ostensible authority to sign the far-reaching supply agreement on behalf of the KOL. Given Minister Majoro's explanation of how the arbitration documents were concealed by various officials to conceal the discovery of Minister Tšolo's unauthorised actions, it is clear that the purported service of the documents before proper service of the writ on the KOL did not satisfy the FSIA requirements.

[294] Section s 13(2) provides that 'any time prescribed by rules of court or otherwise for notice of intention to defend or oppose or entering an appearance shall begin to run two months after the date on which the process or document is received as

[128] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) paras 44–48. See further *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC), paras 36–37; *King and Others NNO v De Jager and Others* [2021] ZACC 4; 2021 (5) BCLR 449 (CC); 2021 (4) SA 1 (CC) paras 13, 105–107.

aforesaid. The notice of set down was served on 20 April 2021 at the Office of the Government Secretary of Lesotho. It is common cause that the enforcement proceedings were heard on 29 April 2021, ie 9 days later. The email service via case lines clearly did not constitute proper service on the KOL as envisaged in the FSIA. The only document that was properly served was the writ of execution. Under s 13(3) of FSIA, a state may waive its right to this formal service by written agreement. There is no indication that the KOL waived this immunity as contemplated in s 13(3) of the FSIA. It follows that the KOL's absence from the hearing before Lamont J was indeed caused by a procedural irregularity and falls to be set aside.

[295] For all the reasons mentioned in the foregoing paragraphs, I agree with the first judgment's order dismissing the first respondent's application for leave to adduce further evidence with costs, including the costs of two counsel; upholding the appeal against the order of the high court dismissing the rescission application and replacing it with one rescinding the enforcement order granted by Lamont J on 29 April 2021. I disagree with the order proposed by the second judgment in respect of the appeal directed at Strijdom AJ's order dismissing the application to set aside the arbitral award. I would uphold the entire appeal and rescind the enforcement order of Lamont J and replace the order of Strijdom AJ with one setting aside the arbitral award with costs, including costs of two counsel.

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M B MOLEMELA

PRESIDENT

Appearances:

For appellant:	T Ngcukaitobi SC (with I Goodman SC, N Ferreira and P Maharaj-Pillay)
Instructed by:	Edward Nathan Sonnenbergs Inc., Johannesburg Webbers Attorneys, Bloemfontein
For first respondent:	M Chaskalson SC (with D Watson and N Qwabe)
Instructed by:	Petersen Hertog Attorneys, Johannesburg Honey Attorneys, Bloemfontein
For seventh respondent:	G Georgiades SC (with N Deeplal)
Instructed by:	State Attorney, Johannesburg State Attorney, Bloemfontein.