



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No: 2020/33700**

**Heard on: 7 June 2023**

**Judgment: 31 August 2023**

- (1) Reportable: No  
(2) Of interest to other judges: No  
(3) Revised.

**31 August 2023**  
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**J.J. STRIJDOM**

**THE KINGDOM OF LESOTHO**

Applicant

and

**FRAZER SOLAR GMBH**

First Respondent

**TRANS-CALEDON TUNNEL AUTHORITY**

Second Respondent

**LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY**

Third Respondent

**STANDARD BANK OF SOUTH AFRICA**

Fourth Respondent

**THE SHERIFF OF THE COURT: JOHANNESBURG**

Fifth Respondent

**THE SHERIFF OF THE COURT: CENTURION EAST**

Sixth Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

Seventh Respondent

**NATIONAL GOVERNMENT OF THE REPUBLIC OF**

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## JUDGMENT

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**STRIJDOM, AJ**

### **Introduction**

1. This matter arises from a contract purportedly, concluded between the Kingdom of Lesotho “KOL” and a Germany company Frazer Solar GMBH (“FSG”). I refer to the contract as the “supply agreement”.

2. The supply agreement purported to oblige KOL to borrow money from German financial institutions and use that money to buy energy-efficient light bulbs and solar geysers from FSG.

3. The supply agreement ultimately led to an arbitration award and an order of this court in favour of FSG. I refer to this order as the “enforcement order”.

4. The minister who purportedly signed the supply agreement on behalf of the KOL was Minister Tsolo.

5. Having considered submissions from only FSG, the arbitrator held that:

- a. He had jurisdiction over KOL<sup>1</sup>; and
- b. he awarded a sum of liquidated damages against KOL.

6. FSG then sought an order making the arbitration award an order of this court. This order was granted on an unopposed basis.

7. Kol brought an application in the Lesotho High Court to review and set aside the

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<sup>1</sup> Caselines pp 020 – 167 and 168 para 22 (Arbitration Award).

decision to enter into the supply agreement and the arbitration agreement it contained.

The Lesotho High Court declared the decision to enter into the supply agreement, the supply agreement and the arbitration agreement void and invalid *ab initio*.

8. In the current application KOL seeks two primary forms of relief:

8.1 Firstly, it seeks to set aside the arbitration award in terms of Article 34 of the Model Law under the International Arbitration Act 15 of 2017.

8.2 Secondly, it seeks to rescind the order of this court, making the Arbitration award an order of court.

***Issues requiring determination.***

9. Whether a case for the rescission of the order of Lamont J has been made out on one or more of the following grounds:

9.1 in terms of Uniform Rule 42 on the basis that the order was erroneously sought or granted in the absence of the applicant;

9.2 on the grounds that this court did not have jurisdiction over the Kingdom because it never consented to the jurisdiction of South African courts under the Foreign States Immunities Act, 87 of 1981;

9.3 in terms of the common law on the basis that the Kingdom has shown good cause by furnishing a reasonable explanation for its default of appearance before this court and has a bona fide defence with strong prospects of success.

10. Whether Article 34(3) of the Model Law affords this court a discretion to condone non-compliance with the time periods it stipulates.

11. Whether, if article 34(3) of the Model Law is interpreted to allow for a court to grant

condonation, the Kingdom has made out a satisfactory case for condonation.

12. If Article 34(3) is incapable of an interpretation which affords this court a discretion to condone non-compliance with the time period it stipulates, whether it is constitutionally invalid as it constitutes an unjustifiable limitation of section 34 of the Constitution.

13. Whether the arbitration award should be set aside under Article 34 of the Model Law.

14. Whether, and to what extent, the court should recognise the findings of the Lesotho High Court.

15. It was submitted by KOL that this case turns on the following question: 'Did the Kingdom of Lesotho ever agree that its disputes with FSG in connection with the Supply Agreement would be subject to Arbitration in South Africa, thus waiving its sovereign immunity?' If the answer to this question is 'no', then the following consequences occur:

15.1 The Arbitration clause contained in the supply agreement was then invalid;

15.2 there was no consent to arbitrate;

15.3 the arbitrator's finding that he had jurisdiction was wrong; and

15.4 this court never had jurisdiction to make the arbitration award an order of court.

16. It was further argued by KOL that the presence of Minister Tsolo's signature on the supply agreement did not constitute agreement by the Kingdom, to subject its disputes with FSG to arbitration in South Africa.

17. FSG's argument on authority is that:

17.1 Minister Tsolo had actual authority to conclude the Arbitration Agreement because of section 10 of the Lesotho Government Proceedings and Contract Act 4 of 1965. Mr Nathane KC, a senior advocate in the Kingdom, confirms that this is

so.<sup>2</sup>

17.2 Even if he lacked actual authority, a foreign Cabinet Minister can bind the state with either actual authority or with ostensible authority (relying on the **Law Debenture Trust v Ukraine** case).

17.3 The requirements for ostensible authority are satisfied on the facts of this matter.

### **The Separability Principle**

18. The separability principle is entrenched by Article 16 (1) of the Model Law.

19. The following was decided in **Fiona Trust**:<sup>3</sup>

19.1 'The arbitration agreement must be treated as a 'distinct agreement'.'

19.2 'The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do.'

19.3 'It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent conclude it, he would have had no authority to enter into an arbitration agreement.'

20. The undisputed facts relevant to the authority of Minister Tsolo to bind KOL to the arbitration agreement can be summarised as follows:

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<sup>2</sup> FSG HOA para 142

<sup>3</sup> Fiona Trust & Holding Corp and Others v Privalov and Others [2007] 4 ALL ER 951 (HL)

20.1 After the Cabinet memorandum was withdrawn at the Cabinet meeting of 8 June 2018, held in the absence of the Prime Minister, Mr. Frazer continued to receive expressions of support for the project from Prime Minister Thabane and King Letsie III.<sup>4</sup>

20.2 On 1 August 2018, Mr. Frazer received the letter 'FS-12' from Minister Tsolo.<sup>5</sup>

20.2.1 The letter recorded the commitment of the government of Lesotho

to the project and stated the following: '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 this office and the Ministry of Finance to sign the loan documentation on behalf of the government.'

20.2.2 The then Prime Minister Thabane has deposed to a confirmatory affidavit on behalf of KOL. He does not dispute that the letter was provided to him.<sup>6</sup>

20.3 On 8 August 2018, Mr. Fraser met Prime Minister Thabane, Minister Tsolo and the Government Secretary. Prime Minister Thabane assured Mr. Frazer that all was in order, undertook to ensure the co-operation of Minister Majoro and asked Mr. Frazer to prepare the contract for the project.<sup>7</sup>

20.4 On 24 September 2018, Mr. Frazer was called by Minister Tsolo to the office of the Prime Minister to sign the supply agreement. The witnesses to the signing of the supply agreement included, Mr. Matla, the personnel aide to Prime Minister.<sup>8</sup>

20.5 On 3 September 2018, Mr. Frazer met Minister Majoro, informed him that the Prime Minister had approved the project and requested him to complete

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<sup>4</sup> Caselines: 020 -511:34

<sup>5</sup> Caselines: 020 - 675 to 676 Annexure FS12

<sup>6</sup> Caselines: 020 - 511 para 35 - not disputed in 020 - 2602 para-26.

<sup>7</sup> Caselines: 020 - 512 para 38 not disputed in 020 - 2602 para-26 to 27.

<sup>8</sup> Caselines: 020 - 28 para 45 and 020 - 516 para 44

the finance agreement. Minister Majoro undertook to do so and expressed no reservations.<sup>9</sup>

20.6 On 27 September 2018, Mr. Frazer sent a copy of the signed supply agreement to the Minister of Energy. KOL admits that the Minister of Energy received the signed supply agreement.

21. KOL dispute the authority of Minister Tsolo on the unsubstantiated allegation of now Prime Minister Majoro that the arbitration agreement is fundamentally at odds with the sovereignty of KOL and could only be concluded with authorisation of the Cabinet and prior consultation with the Attorney-General.

22. The approval of the Minister of Finance and the Minister of Energy may have been relevant to the financing agreements but was not relevant to the arbitration agreement.

23. I concluded that the evidence shows that on a balance of probabilities Minister Tsolo had actual authority or at least ostensible authority to conclude the arbitration agreement.

### **The jurisdiction of the Arbitrator and Lamont J**

24. The Constitutional Court in **Department of Transport and Others v Tasima**<sup>10</sup> decided that the enforceable jurisdiction of a court to make an order is determined at the time that it makes the order.

25. At the time the court made the enforcement order, there was in existence, a supply agreement with an arbitration clause concluded by the Minister in the office of the Lesotho Prime Minister in his capacity as such.

26. The decision to conclude the supply agreement embodying the arbitration agreement was a decision that Minister Tsolo took in his capacity as Minister in the Office of the Prime Minister.

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<sup>9</sup> Caselines: 020 - 511 para 42 and 020 - 544 para 116 - not disputed in 020 - 2603 para 28 or 020 - 2626 para-92 -93

<sup>10</sup> 2017 (2) SA 622 (CC) a5 para 198

27. It is trite law that decisions of this nature and the agreements flowing from them exist de facto unless and until they are reviewed and set aside.<sup>11</sup>

28. When Lamont J issued the enforcement order, the decisions of the Minister in the office of the Prime Minister of the KOL to enter into the supply agreement and the arbitration agreement had not been reviewed and set aside and the resultant agreements had not been declared invalid.

29. In my view, at the time that Lamont J issued the enforcement order, he had jurisdiction to do so based on the arbitration agreement embodied in the supply agreement that remained extant.

30. It was argued by the KOL that because sovereign immunity is a jurisdictional issue, there are no constraints on its right to bring a rescission application based on the alleged lack of authority of Minister Tsolo to bind KOL to an arbitration.

31. In my view the **Tasima** and **Oudekraal** principles applies to jurisdictional challenges based on sovereign immunity because the alternative would be to create a regime where no judgment against a sovereign defendant would ever be final, and a sovereign defendant could always raise a complaint of sovereign immunity as a *sui generis* ground of rescission that would allow them to defy all procedural rules applicable to determining the sovereign immunity issue.

32. That is an untenable regime for any legal system to tolerate as the High Court stated in **Zhongshan Fucheng Industrial Investments Co. Ltd v The Federal Republic of Nigeria**<sup>12</sup> (**Zhongshan**).

33. Zhongshan concerned Articles 1(1) and 2 of the English State Immunity Act 1978, which is framed in terms identical to Sections 2(1) and (2) of our Act. It states:

‘General immunity from jurisdiction -

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<sup>11</sup> Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

<sup>12</sup> 2022 WL 18717271 2 December 2022



1. A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.
2. A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.'

34. In **Zhongshan**, the High Court had granted an *ex parte* order enforcing an arbitration award of over \$65 million, and £2.88 million against Nigeria. As the order was granted in Nigeria's absence, Justice Cockerill afforded Nigeria two months and 14 days to apply to set aside or vary the order. No application was made by Nigeria timeously and instead they brought an application for extension of time as of right to allow it to advance the defence of state immunity as a jurisdictional bar to the award.

35. The high court dealt with this argument summarily:

'I am, as I indicated in the course of argument, unimpressed by this argument which amounts, taken to its logical conclusion, (though that was disavowed by Mr Hussain KC in argument) to an assertion that procedural rules do not apply to any state which may conceivably wish to raise state immunity issues or to any case where there is a state involved which might conceivably raise state immunity issues.'

36. The court emphasized the importance of speed and finality in International arbitrations and refused to grant the extension sought by Nigeria.

### **The rescission of the court order**

37. The Kingdom's case for rescission of the order of this court is based on three separate grounds:

37.1 First, in terms of Uniform Rule 42, the order was erroneously sought or granted. If this court had known that the Kingdom had never agreed to submit to arbitration and that Minister Tsolo was never authorised to enter into the

supply agreement or the arbitration clause it contained, it would never have made it an order of court.

37.2 Second, because the Kingdom never consented to the supply agreement, including the arbitration clause the court did not have jurisdiction over the Kingdom. Indeed, this court lacked jurisdiction over the Kingdom in light of the Foreign States Immunities Act 87 of 1981. Absence of jurisdiction is a self-standing ground for rescinding the order of this court.

37.3 Third, in terms of the common law, the Kingdom has explained the reasons for its default of appearance before this court and seeks rescission of the court order on the basis of a bona fide defence which enjoys extraordinarily strong prospects of success.

38. In this matter, I have already dealt with the second ground for a rescission and concluded that the court did have jurisdiction over the Kingdom.

39. Uniform Rule 42 (1) (a) confers on the court a discretion to rescind 'an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

40. It is common cause that the order of Lamont J was granted in the absence of the Kingdom. The only question is whether the Kingdom has established that it was erroneously granted or sought.

41. It was argued on behalf of the Kingdom that in order to demonstrate that the judgement sought to be rescinded was erroneously granted, an applicant must show that 'there existed at the time of its issue, a fact of which the Judge was unaware of, which would have precluded the granting of the judgement, and which would have induced the Judge, if aware of it, not to grant the judgement'.

42. It was submitted by the Kingdom that the following facts existed at the time of the Lamont J order which he was not aware of:

42.1 The Kingdom had never agreed to submit to arbitration.

42.2 Minister Tsolo was never authorised to enter into the supply agreement, or the arbitration clause contained in it on behalf of the Kingdom.

42.3 As a result, neither the arbitrator nor this court had jurisdiction over the Kingdom and the award was invalid.

42.4 The Kingdom was unable to present its case in the arbitration.

43. It was argued that had Lamont J been aware of these facts, they would have precluded him from granting the enforcement order.

44. Article 35 of the Model Law provides that an arbitral award shall be recognised as binding and upon application in writing to the competent court shall be enforced subject to the provisions of Article 36.

45. The grounds contained in Article 36(1) for refusal of recognition or enforcement of an arbitral award are identical to those constituting the grounds upon which an arbitral award may be set aside in terms of Article 34.

46. It is a ground for refusing recognition or enforcement of an arbitral award if-

46.1 a party to the arbitration agreement was under an incapacity;

46.2 if the arbitration agreement is not valid under the law of South Africa;

46.3 if the party against whom the award invoked is unable to present his or her case; or

46.4 recognition or enforcement of the award would be contrary to the public policy of South Africa

47. A judgement to which a party is procedurally entitled, is not considered to be

erroneously granted by reasons of fact of which the judge who granted the judgement was unaware.<sup>13</sup> Similarly, a judgement to which a plaintiff is procedurally entitled in the absence of the defendant, cannot be said to have been granted erroneously, in light of a subsequent disclosed defence.

48. It is common cause that Lesotho was properly served in the enforcement application.

48.1 There was proper service of the application by edictal citation with strict compliance with the provisions of section 13 of the Foreign States Immunities Act.<sup>14</sup>

48.2 There was also service of the Caselines invitation and the notice of set down on Prime Minister Majoro himself and separately on the Government Secretary.<sup>15</sup>

49. Section 13 of the Foreign States Immunities Act provides that any process or other document requirement to be served for instituting proceedings against a foreign state shall be served by being transmitted through the now Department of International and Co-operation (DIRCO) 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'.

50. On 14 October 2020, this court granted an edictal citation order to serve the enforcement order on KOL.

51. The enforcement application was hand delivered by DIRCO to KOL's Ministry of Foreign Affairs on 8 December 2020.

52. The Kingdom's absence from the hearing was not caused by any procedural irregularity for which the respondent or the court can be held responsible. In my view there can be no rescission under Rule 42.

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<sup>13</sup> Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) 87 SCA

<sup>14</sup> Caselines: 020 - 596 para 288; 020 - 49 to 51. See also the DIRCO return of service of 8 December 2020 at 020-991

<sup>15</sup> Caselines: 020 - 52 to 53 paras 98.2 to 98.5, 020 - 597 para 291 and to 020 - 597 para 294.

53. In order to obtain rescission at common law, an applicant must prove that there is “sufficient” or good cause to warrant rescission. To do so, the applicant must meet two requirements.

53.1 First, the applicant must furnish a reasonable and satisfactory explanation for its failure to oppose the proceedings, and;

53.2 Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some reasonable prospect of success.

54. The Kingdom contends that, the only question under the common law is whether the Kingdom has given an adequate explanation for its default to appear before Lamont J.

55. The primary reason for the Kingdom's default is that the process notifying the Kingdom of the application was not received by the relevant officials of the Kingdom.<sup>16</sup> In the Kingdom of Lesotho, service of process in legal proceedings against the government must be made on the office of the Attorney-General. The Attorney-General is the person with authority to decide whether to oppose such proceedings.<sup>17</sup>

56. The Kingdom further contends that FSG never served notice of the arbitral proceedings on the Attorney-General's office and the notice of motion and founding affidavit to make the arbitration award an order of court, did not reach the office of the Attorney-General.

57. The Kingdom argued that even it can be said that the Kingdom's explanation is lacking in some respect, the Kingdom's defence on the merits is so overwhelmingly that it weighs in favour of granting rescission.

58. In adopting the requirement of reasonable and satisfactory explanation, the

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<sup>16</sup> FA Caselines at p020 - 75 para 148.

<sup>17</sup> FA Caselines at P020 - 76 para 150.1.

courts apply a strict test.<sup>18</sup>

59. It is common cause that:

59.1 There was proper service on KOL to the designated representatives of KOL for service of international process;

59.2 Prime Minister Majoro was aware of the importance of the matter because, when he received the Caselines invitation, he forwarded it to the Government Secretary on 21 March 2021 with an e-mail saying: 'The e-mail 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 I am a respondent'.<sup>19</sup>

59.3 Prime Minister Majoro has not disclosed whether or not he received a reply to his concerned e-mail and he did not see fit to follow up anything with the Government Secretary. He stated as follows:

'I considered that I had done what was necessary to bring the matter to the attention of the relevant people, as at the time'.<sup>20</sup>

59.4. Nobody took any steps to ensure that the Kingdom was represented at the hearing or to even follow up their emails.

60. The evidence shows that the Kingdom was in wilful default for not opposing the enforcement application. The Kingdom provides no factual substantiation for why Lesotho's Prime Minister and Government Secretary failed to act. From when it was in a position to file its stay application to when the rescission application was launched, there is no acceptable explanation for its additional delays.

61. KOL's primary defence is that Minister Tsolo, lacked the authority to conclude the arbitration agreement and supply agreement. KOL alleges that the

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<sup>18</sup> De Wet v Western Bank Ltd 1979 (2) SA 1031 (A).

<sup>19</sup> Caselines: 020-348 RA 36

<sup>20</sup> Caselines: 020-53 para 98.6

arbitration agreement has been declared void *ab initio* by the Lesotho High Court, and this would constitute a good defence. I have concluded that the arbitration agreement was validly entered into by Minister Tsolo. The status of the supply agreement cannot substantiate a *bona fide* defence to the enforcement order.

62. In terms of Article 11(1) of the **New York Convention**, this court is obliged to recognise the written agreement between FSG and Lesotho to submit to a South African arbitration all disputes in connection with the supply agreement, including the validity of the arbitration clause.

63. When they entered into an arbitration agreement, Lesotho and FSG agreed, in the event of any dispute that:

63.1 An arbitration would be brought;

63.2 The seat of the arbitration would be South Africa;

63.3 The South African courts, and not the Lesotho courts, would exercise supervisory jurisdiction over the arbitration; and

63.4 Only South African High courts, applying South African law, could pronounce on the existence and validity of the arbitration agreement.

64. It is settled practice in comparable jurisdictions for courts and tribunals to ignore foreign court judgements, which are obtained in breach of an arbitration agreement.

65. In the United States and in the United Kingdom, courts have refused to recognize foreign court judgements obtained in breach of an arbitration agreement.<sup>21</sup>

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<sup>21</sup> *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)

66. In **American Construction Machinery and Equipment Corporation Ltd v Mechanised Construction of Pakistan Ltd**,<sup>22</sup> the court ignored a Pakistani judgment in circumstances reminiscent of the present case.

67. In Singapore the High Court in **WSG Nimbus Pte Ltd v. Board of Control for Cricket in Sri Lanka**, in rejecting orders obtained in the Sri Lankan courts in breach of an agreement to arbitrate, held as follows:

‘By virtue of the MRA [the parties] had agreed to submit disputes to arbitration in Singapore upon election by any party, and the Plaintiffs have so elected. In the circumstances it would be manifestly against public policy to give recognition to the foreign judgement at the behest of the Defendants who have procured it in breach of an order emanating from this court’.<sup>23</sup>

68. The courts in Switzerland adopt a similar approach, refusing to recognize foreign judgements obtained when an arbitration agreement was in place, and reasoning that this was a breach of Article 11 of the New York Convention.

69. It was submitted by FSG that this court must ignore the decision of the Lesotho High Court in order to avoid breaching its obligations under Article 11 of the New York Convention and that the Kingdom should not be permitted to circumvent the arbitration agreement that it subjected itself to. I agree with this submission.

70. It was submitted by the KOL that the Constitutional Court has held that South African courts should give appropriate recognition and weight to judgments of the courts of foreign states. It has endorsed ‘the principle of reciprocity’:

‘The import of which is that the courts of a particular country should enforce judgments of foreign courts in the expectation that foreign courts would reciprocate’.<sup>24</sup>

71. The Kingdom contends that the Lesotho High Court’s judgement did not resolve the need for this court to grant the relief that the Kingdom seeks, and that

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<sup>22</sup> 659 F Supp 426 (S.D.N.Y. 1987)

<sup>23</sup> [2002] SGHC 104; [2002] 3 Sing L.R 603 (Sing. H.C.) para 63

<sup>24</sup> Government of the Republic of Zimbabwe v Fick 2013 [5] SA 325 (CC)



the judgment does not automatically result in the arbitration award being vacated or reviewed or set aside. The Kingdom argued that as a result of Article 34(1) and (2) read together with Article 6 of the Model Law, it is this court that has jurisdiction to set aside the arbitral award. That is part of the relief sought in the present application.<sup>25</sup>

72. Having regard to all the relevant facts and circumstances, I am of the view that on common law principles, the Kingdom failed to prove that there is 'sufficient' and good cause to warrant a rescission.

### **The Review**

73. The KOL seeks a declaration that Article 34(3) of the UNCITRAL Model Law on international Commercial Arbitration 'the Model Law' contained in schedule 1 of the **International Arbitration Act 15 of 2017** ('the Act') constitutes a procedural time bar which is capable of condonation by the courts in the event of non-compliance.<sup>26</sup>

74. In the alternative the applicant seeks a declaration that Article 34 (3) of the Model Law is unconstitutional and invalid to the extent that it precludes condonation. The Applicant's constitutional challenge is conditional upon the event that the time bar contained in Article 34 (3) is not condoned by this court.

75. The seventh Respondent in these proceedings is the Minister of Justice and Constitutional Development. ("The minister"). The Minister has not been cited to make any substantive submissions on whether the Model Law can be interpreted to allow for condonation. Any submissions on this issue are solely for the purpose of giving context to the Act.

76. The minister contends that the time bar imposed by Article 34 (3) of the Act does not offend the Constitution for the following reasons:

76.1. The time bar does not limit the right to access to courts.

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<sup>25</sup> HOA Caselines: 037-54 para 104.

<sup>26</sup> Applicant's amended notice of motion: Caselines 020-2059, para 5.

76.1.1 The Applicant still has access to courts, albeit in limited circumstances.

76.1.2 In the instance that the access to courts is limited, the limitation is reasonable and justifiable, and is in line with section 36 of the Constitution, and

76.1.3 Article 34(3) is just and equitable.

77. The Kingdom submits that Article 34 does not impose an 'absolute' time bar, terminating a litigant's rights to approach the court under Article 34 after three months, but that the time bar is 'procedural' not 'substantive' and so courts may condone reviews brought outside of the three-month period.

78. FSG contends that on a proper interpretation of Article 34(4) of the Model Law, a court has no power to relax the three-month time limit for the institution of proceedings to set aside an international arbitration award.

79. Article 34 of the Model Law provides:

'Article 34 application for setting aside as exclusive recourse against the

Arbitral award:

- 1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- 2) An arbitral award may be set aside by the court specified in Article 6 only if.....
- 3) An application for setting aside may not be made after three months have lapsed from the date on which the party making the 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, in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care.'

80. It is common cause that the application to set aside the award was launched outside the three-month period laid down by Article 34.

81. The two questions that arise are accordingly?

81.1. Does this court have the power to grant condonation for the failure to launch within the three-month period?

81.2 If so, should the Kingdom be granted condonation.

82. The contention of the Kingdom is that: if Article 34 does not contain a condonation power, it is an unconstitutional breach of the right of access to court in section 34 of the Constitution.

### **The interpretation under Article 34**

83. Interpretation under South - African law is an objective unitary exercise, where the court must consider the text to be interpreted, the context in which it appears and the purpose of that provision.

84. The text to be interpreted should ordinarily be given its grammatical meaning, given the words used and their syntax, unless doing so would result in absurdity.

85. The interpretive context considered includes the setting of the word or provision, with reference to all words, phrases or expressions around it, and the

statute more generally, including other subsections, sections, or the chapter in which the word, provision, or expression to be interpreted appears.<sup>27</sup>

86. Section 8 of the IAA expressly allows courts to consider the travaux préparatoires of UNCITRAL and its secretariat when interpreting chapter 2 of the IAA, and also the Model Law. Article 2A of the Model Law provides that:

‘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 general principles on which this Law is based.’

87. When Interpretating legislation, courts must promote the spirit, purport and objects of the Bill of Rights. This entails that courts should, when reasonably possible on the text of the instrument, adopt an interpretation that avoids the unjustifiable limitation of rights in the Bill of Rights. The application of this interpretive injunction ‘should not unduly strain the reasonable meaning of words.’<sup>28</sup>

88. Courts must, when interpreting legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>29</sup>

89. Courts may have regard to foreign law as an aid when interpreting statutes, provided that this is done with caution given the possible differences between jurisdictions.<sup>30</sup>

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<sup>27</sup> Road Traffic Management Corporation v Waymark (Pty) Ltd 2019 (5) SA 29 (CC) para 38

<sup>28</sup> Road Traffic Management Corporation v Waymark (Pty) Ltd 2019 (5) SA 29 (CC) para 32

<sup>29</sup> Section 233 of the Constitution

<sup>30</sup> H v Fetal Assessment Centre 2015 (2) SA 193 (CC) paras 31-32

### **The text of Article 34(3)**

90. Article 34(3) provides that application 'may not be made after three months.'

91. The Kingdoms submits that the Pickfords judgement,<sup>31</sup> where the Constitutional Court recognized power of condonation in relation to the phrase 'may not' in section 67(1) of the Competition, Act 89 of 1998, illustrates that the same phrase in Article 34(3) must be treated as permissive, not mandatory.

92. There is, under the Model Law, no general power enabling courts to grant condonation with the time periods imposed by it.

93. In Pickfords, there was an express power of condonation for non-compliances with the Competition Act. Section 58(1)(c)(ii) of the Competition Act allowed the Competition tribunal the power to 'condone, on good cause shown, any non-compliance of ... a time limit set out in this Act.'

94. Section 67(1) of the Competition Act makes no express provision for cases when the complaint could not have been aware of his/her right to lodge a claim flowing from a prohibited practice. It provides that:

'a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.'

95. Article 34(4) of the Model Law caters for the innocent litigant who could not reasonably have been aware of his/her right to set aside the Tribunal award.

96. There is now an express exception to the general time in Article 34 (3), the general time bar applies 'unless' there are grounds for the setting aside of the award on the basis of fraud and corruption, and the application is brought within three months of learning of, or reasonably being able to learn of those grounds of annulment.

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<sup>31</sup> Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd 2021 (3) SA 1 CC

97. The SALC explains the purpose of altering Article 34 (3), to include the exception in these terms:

‘Usually, an application for the setting aside of an award has to be brought within three months of receipt of the award. A qualification has been added to exclude the operation of this time limit where the award is attacked on the basis of fraud or corruption.’<sup>32</sup>

98. By providing for an express exemption from the general rule - and stipulating and confining the ambit of that exception - Article 34(3) makes clear that the time bar it imposes is a rigid time bar and not subject to condonation.

99. There is nothing in the Model Law that empower courts to extend the time bar period under Article 34 (3) or to condone non-compliance with that time period.

### **The context of Article 34(3)**

100. Article 34(1) of the Model Law provides that:

‘Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.’

101. Article 5 of the Model Law provides that:

‘In matters governed by this Law, no court shall intervene, except where so provided in this Law.’

102. Articles 34(1) and (5) excludes recognizing a discretionary override of the substantive three-month period.

103. In the travaux préparatoires of UNCITRAL it was reported that:

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<sup>32</sup> SALC Project 94 ‘Arbitration: An International Arbitration Act for South Africa’ at 27.

'The purpose of Article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in International Commercial arbitrations, by compelling the drafters to list in the (Model) Law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the Model Law.'<sup>33</sup>

104. In my view, our courts should not use domestic statutory interpretive injunctions to read into the Model Law provisions that are not expressly apparent, nor should the courts read into the Model Law Judicial powers not granted by the Model Law. This would undermine the purpose of Article 34(1) and (5).

### **The purpose of Article 34(3) and the Model Law**

105. Article 34(3) serves several purposes:

105.1 Finality. Parties submit their disputes to arbitration to resolve those disputes. Annulment proceedings undermine finality.

105.2 Enforcement. Parties select arbitration proceedings because of the relative ease of enforcing arbitral awards. Pending annulment proceedings may prevent the enforcement of arbitration awards.

105.3 Expedition. The longer the period in which annulment may be sought, the greater the delays to the parties.

105.4 *Pacta sunt servanda* and good faith. Parties choosing international arbitration accept the obligations imposed by the international arbitration framework, including the stringent time limits in Article 34(3) and to co-operate with and give effect to arbitration awards once rendered. The longer the period for which a party may seek annulment, the greater their ability to avoid those obligations.

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<sup>33</sup> United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law on the work of its Eighteen Session U.N. Doc. A/40/17,15 (1985) at para 63

105.5 Party autonomy. Parties that have chosen to submit themselves to arbitration have elected to avoid judicial proceedings. The powers of annulment in Article 34 undermines this choice by increasing judicial oversight.

105.6 The right of access to courts. Delay in judicial proceedings is unfair to the other party.

105.7 Harmonization. Article 34(3) brings South Africa in line with other jurisdictions adopting the Model Law.

106. The time bar in Article 34 serves the general purposes of time bars, which act to promote fairer, expeditious and just judicial proceedings.

### **The approach of other courts**

107. In Singapore, the leading decision in **ABC Co. v XYZ Co Ltd**<sup>34</sup> finds that Article 34 of the Model Law provides the exclusive route by which a disgruntle party may challenge an arbitral award. For this purpose, an application under, Article 34(3) may not be brought more than three months after the arbitration award is received, and the time limit cannot be extended by an order of court.

108. The Federal Court of Australia General Division for New South Wales in **Sharma v Military Ceramics Corporation**,<sup>35</sup> after noting earlier Model Law authorities, commented arbiter that ‘the balance of authority heavily favours there being no power to extend the time period’ and agreed with the New Zealand Court of Appeal, that ‘the whole scheme of the [Model Law] is to restrict court review of arbitration awards. Both with respect to grounds and time.’

109. In India, there is no power to extend the time period under Article 34(4) of the Model Law.<sup>36</sup>

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<sup>34</sup> [2003] Sing LR 546 S.G.H.C 107 (Singapore) (ABC Co.)

<sup>35</sup> [2020] FCA 216 (20 February 2020)

<sup>36</sup> P Radha Bai & Others v P Ashok Kumar [2018] INSC 841 Supreme Court of India



110. In Canada not all of the states have adopted the Model Law. Those that have, appear to apply Article 34(3) as imposing a substantive time bar and not permitting condonation.<sup>37</sup>

111. In New Zealand, the courts also treat Article 34(3) as imposing a time-bar that cannot be ignored. In **Todd Petroleum Mining Co. Ltd v Shell Petroleum Mining Co. Ltd**<sup>38</sup> the Court of Appeal held that ‘the applicable time limits in Article 34(3) are firm in the sense that there is no discretion to extend them.’

112. In Zimbabwe the courts have interpreted Article 34(3) as not providing for a power to condone non-compliance with the three-month time bar.<sup>39</sup>

113. The Kingdom submits that there is a ‘reasonable interpretation’ that Article 34(3) empowers courts to condone non-compliance with the time bar, and so this must be selected under section 39(2) of the Constitution.<sup>40</sup>

### **The Constitutional context**

114. In **Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews**<sup>41</sup> the Constitutional Court held:

‘Given the approach not only in the United Kingdom, (an open and democratic society within the contemplation of s39(2) of our Constitution, but also the international law approach as evidenced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the value of our Constitution will not necessarily best be served by interpreting S33(1), in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case.’

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<sup>37</sup> Ontario Inc v Lakeside Produce In 2017 ONSC 4933 (Can L II)

<sup>38</sup> [2014] NZCA 507; [2015] 2 NZLR 180 (17 October 2014)

<sup>39</sup> Courtesy Connection (Pty) Ltd & Another v Muphamhadzi (62/06) (SC 35 of 2007, Civil Appeal 162 of 2006) [2007] ZWSC 35 (07 May 2007)

<sup>40</sup> KOL HOA 97- 191 4

<sup>41</sup> 2009 (4) SA 529 (CC) at para 55

115. There is no basis for the assumption that section 39(2) read with section 34(3) of the Model Law should be capable of relaxation.

116. South Africa has committed itself to promoting certainty in commercial arbitrations, over other interests, and has sought to align itself with the international community in this regard, and to achieve uniformity in interpretation.<sup>42</sup>

117. On a conspectus of all the factors I have taken into consideration and the submissions made by the parties, I concluded that the time bar in Article 34(3) of the Model Law as domesticated and adopted by the IAA, must be interpreted as a rigid time bar, subject only to relaxation in relation to the specific cases of fraud and corruption that are identified in Article 34(5) b. There is no basis upon which a tacit general power to condone non-compliance can be read into the Model Law.

### **The constitutionality of the time-bar imposed by Article 34(3)**

118. Section 34(3) is a law of general application. The question is to whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

119. Section 36 of the Constitution sets out the limitation clause together with the relevant factors, which must be considered:

#### 119.1 The nature of the right:

119.1.1 The right to access court is an important right. The judicial system is one of the most important pillars of the state and access to the system is important.

119.1.2 The nature of section 34 is to have a dispute adjudicated and is not solely premised on that adjudication being before a court.

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<sup>42</sup> Section 8 of the IAA; Article 2A(1) of the Model Law

## 119.2 The importance of the purpose of the limitation:

119.2.1 The legitimate purpose of the limitation is that this Act has international significance.

119.2.2 It posits South Africa as a suitable and attractive arbitration destination where arbitrations can be efficient and effective.

119.2.3 The purpose of the limitation is to allow for South Africa to have a Model Law which resembles the original Model Law text and promotes within international law that govern arbitrations.

119.2.4 The limitation exists to allow for States and large commercial entities to have their disputes adjudicated in South Africa under the Model Law, without the intervention of the South African judicial system.

## 119.3 The nature and the extent of the limitation:

119.3.1 The nature of the limitation is that an applicant is barred from approaching a court after three months or three months after the award has come to the applicant's knowledge.

119.3.2 Article 34(3) is not the only provision in the Model Law to impose time limits on court applications.

119.3.3 A party wishing to pursue a court challenge of an arbitrator under Article 13(3) or to request the court to overrule a decision by the Arbitral Tribunal on its jurisdiction under Article 16(3) prior to the award must bring the application within 30 days of receipt of the decision which it wants to challenge.

## 119.4 The relation between the limitation and its purpose:

119.4.1 The court must balance the limitation of a fundamental right with the potential delaying effects for arbitrating parties which are often States or large commercial entities.

119.4.2 The time limit is imposed to discourage parties from abusing the court process and avoiding the expeditious determination of disputes.

119.5 Less restrictive means to achieve the purpose:

119.5.1 The only less restrictive means is affording the parties more time to bring the application. This would defeat the purpose of the act. In my view, three months is a reasonable and sufficient time period.

119.5.2 The knowledge element provides an indefinite period to a party.

120. When each of the factors in section 36 of the Constitution are weighed together, to the extent that Article 34(3) of the Model Law as adopted and adopted by the IAA limits the fundamental rights of access to court, it constitutes a reasonable and justifiable limitation.

121. In the result, the following order is made:

120.1 The application is dismissed with costs.

120.2 Applicant is to pay the costs of the first respondent, including the cost of three counsel;

120.3 Applicant is to pay the costs of the seventh respondent, including the cost of two counsel.

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**STRIJDOM JJ**  
**ACTING JUDGE OF THE HIGH COURT**  
**OF SOUTH AFRICA GAUTENG DIVISION**  
**JOHANNESBURG**

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