**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between: CASE NO: 4305/18



| | |
|---|---|
| **CENTRAL ENERGY FUND SOC LIMITED** | First Applicant |
| **STRATEGIC FUEL FUND ASSOCIATION NPC** | Second Applicant |

and

| | |
|---|---|
| **VENUS RAYS TRADE (PTY) LIMITED** | First Respondent |
| **GLENCORE ENERGY UK LIMITED** | Second Respondent |
| **TALEVERAS PETROLEUM TRADING DMCC** | Third Respondent |
| **CONTANGO TRADING SA** | Fourth Respondent |
| **NATIXIS SA** | Fifth Respondent |
| **VESQUIN TRADING (PTY) LIMITED** | Sixth Respondent |
| **VITOL ENERGY (SA) (PTY) LIMITED** | Seventh Respondent |
| **VITOL SA** | Eighth Respondent |
| **MINISTER OF ENERGY** | Ninth Respondent |
| **MINISTER OF FINANCE** | Tenth Respondent |

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## NOTICE OF MOTION

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**TAKE NOTICE THAT** the applicants intend to make an application to this court on a date to be allocated by the Registrar for an order in the following terms:

**PART A**

1 Granting the applicants an extension in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for launching this application outside the 180-day period contemplated in s7(1) of PAJA, and/or to the extent necessary, condoning the applicants' delay in launching this application.

2 Declaring that:

The ninth respondent's (the Minister of Energy) decision in or about December 2015 to approve transactions for the rotational sale and purchase of approximately 10 million barrels of oil of the strategic crude oil reserves held by the second applicant (as recorded in a letter dated 7 December 2015) with the following entities:

2.1 Venus Rays Trade (Pty) Limited;

2.2 Vitol;

2.3 Taleveras; and

2.4 GNI/Enviroshore

is unlawful and/or unconstitutional and falls to be reviewed and set aside in Part B of this application.

3 Declaring that the second applicant's decisions:

3.1 to award a contract to purchase a portion of the strategic crude oil reserves to the first respondent;

3.2 in or about December 2015 to conclude a sale and purchase agreement(s) between the second applicant and the first respondent for the purchase of a portion of the strategic crude oil reserves, as well as any amendments thereto and/or any novation agreements;

3.3 in or about December 2015 to conclude the storage agreement(s) between the second applicant and the first respondent as well as any amendments thereto and/or any novation agreements;

3.4 in or about January 2016 to conclude the Tripartite SFF Terminal Agreement between the second applicant, the first respondent and the second respondent as well as any amendments thereto and/or any novation agreements; and

3.5 any other agreements concluded by the second applicant as a consequence of the decisions set out in paragraphs 3.1 to 3.4 above.

are unlawful and/or unconstitutional and fall to be reviewed and set aside in Part B of this application.

4 Declaring that the second applicant's decision:

4.1 to award a contract to purchase a portion of the strategic crude oil reserves to the third respondent;

4.2 in or about December 2015 to conclude a sale and purchase agreement(s) between the second applicant and the third respondent for the purchase of a portion of the strategic crude oil reserves, as well as any amendments thereto and/or any novation agreements (including the novation agreement dated June 2016 between the second applicant and the third respondent);

4.3 in or about December 2015 to conclude a storage agreement(s) between the second applicant and the third respondent, as well as any amendments thereto and/or any novation agreements; and

4.4 any other agreements concluded by the second applicant as a consequence of the decisions set out in paragraphs 4.1 to 4.3 above

are unlawful and/or unconstitutional and fall to be reviewed and set aside in Part B of this application.

5 Declaring that the second applicant's decision in or about February 2016 to conclude the Side Letter to the storage agreements between the second applicant, the third respondent and the fifth respondent, is unlawful and/or unconstitutional and falls to be reviewed and set aside in Part B of this application.

6 Declaring that the second applicant's decision:

6.1 to award a contract to purchase a portion of the strategic crude oil reserves to the sixth respondent;

6.2 in or about January 2016 to conclude a sale and purchase agreement between the second applicant and the sixth respondent for the purchase of a portion of the strategic crude oil reserves, as well as any amendments thereto and/or any novation agreements;

6.3 in or about December 2015 to conclude a storage agreement(s) between the second applicant and the third respondent, as well as any amendments thereto and/or any novation agreements;

6.4 in or about January 2016 to conclude a storage agreement as well as the amendments thereto, between the second applicant, the sixth respondent and the seventh respondent; and

6.5 any other agreements concluded by the second applicant as a consequence of the decisions set out in paragraphs 6.1 to 6.4 above,

are unlawful and/or unconstitutional and fall to be reviewed and set aside in Part B of this application.

7 Declaring that in terms of s217 of the Constitution, the second applicant's and/or the Minister's decisions to dispose of approximately 10,000,000 barrels of crude oil without following a procurement system that is fair, equitable, transparent, competitive and cost-effective, were unlawful and/or unconstitutional and fall to be reviewed and set aside in Part B of this application.

8 After this Honourable Court handing down its order in Part A, the parties are entitled to file a further affidavit addressing the issue of the just and equitable remedy to be ordered in Part B, according to the following timetable:

8.1 the applicants within 15 days of the order;

8.2 any of the respondents within 20 days of the applicants' affidavit in paragraph 9.1 above; and

8.3 the applicants reply thereto within 10 days of the receipt of the last affidavit from the respondents in paragraph 9.2 above (if any).

9 In the alternative to paragraph 8 above, the decisions set out in paragraphs 2 to 7 above are reviewed and set aside.

10 Pending the determination of Part B, appropriate and effective interim just and equitable relief.

11 Those respondents who oppose the relief sought herein are to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including the costs of three counsel.

12 Further and/or alternative relief.

**TAKE NOTICE FURTHER** that the accompanying affidavit of **LUVO LINCOLN MAKASI** and annexures thereto will be used in support of the application.

7

**TAKE NOTICE FURTHER** that the applicants have appointed **CLIFFE DEKKER HOFMEYR ATTORNEYS** at the address set out below, at which the applicants will accept notice and service of all process in these proceedings.

**TAKE NOTICE FURTHER** that in terms of Rule 53 of the Rules of this court, the applicants:

1 Tender insofar as they are able, within 15 (fifteen) days after service of this notice of motion, to file such record of any and all proceedings relevant to the decisions of the applicants referred to above, with the Registrar of the above Honourable Court, together with the reasons for each decision.

2 Call upon the Minister of Energy within 15 (fifteen) days after service of this notice of motion, to file such record of any and all proceedings relevant to the decisions of the applicants referred to above insofar as they relate to the Minister of Energy, with the Registrar of the above Honourable Court, together with the reasons for each decision.

**TAKE NOTICE FURTHER** that the applicants are permitted, in terms of Rule 53(4), within 10 (ten) days of receipt of the record and the reasons from the Minister of Energy, to amend the relief sought in this application and/or to revise and supplement the grounds on which the relief is sought, including by delivering supplementary founding papers.

**TAKE NOTICE FURTHER** that if you intend opposing Part A of this application, you are required:

(a) to notify the applicants' attorneys in writing within 15 (fifteen) days of the filing of the record and the reasons for the decisions, if any;

(b) within 30 (thirty) days after you have so given notice of your intention to oppose the application, to file your answering affidavit, if any; and further

(c) that you are required to appoint in such notification an address referred to in Rule 6(5)(d)(i) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on the **9 MAY 2018** at 10h00 or so soon thereafter as counsel may be heard.

**PART B**

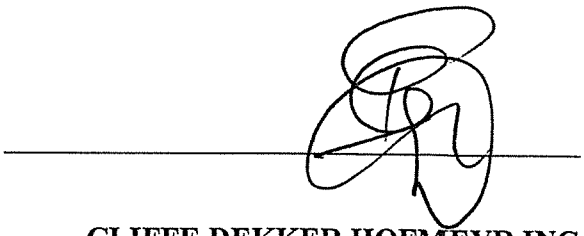
**TAKE NOTICE THAT** the applicants intend to make an application to this court on a date to be allocated by the Registrar for an order in the following terms:

1 Appropriate just and equitable relief, on the basis of the affidavits filed in Part A of this application together with those additional affidavits filed in accordance with paragraph 8 above (if any).

2 Those respondents who oppose the relief sought in Part B are to pay the costs of Part B of this application jointly and severally, the one paying, the other to be absolved.

3 Further and/or alternative relief.

**DATED** at **CAPE TOWN** on this the **12th** day of **MARCH 2018.**



**CLIFFE DEKKER HOFMEYR INC**
PER: Lionel Egypt
Attorneys for the Applicants
11 Buitengracht Street
CAPE TOWN
Tel: (021) 481 6424
Email: lionel.egypt@cdhlegal.com
(Ref: L Egypt/10154327)

TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
CAPE TOWN

AND TO: VENUS RAYS TRADE (PTY) LIMITED
First Respondent
2nd Floor
Mindpearl Building
West Quay Road
V & A Waterfront
CAPE TOWN

AND TO: GLENCORE ENERGY UK LIMITED
Second Respondent
c/o WERKSMANS ATTORNEYS
96 Rivonia Road
Sandton
GAUTENG

AND TO: TALEVERAS PETROLEUM TRADING DMCC
Third Respondent
c/o CLYDE & CO INCORPORATED
13th Floor
South Arican Reserve Bank Building
60 St George's Mall
CAPE TOWN

AND TO: CONTANGO TRADING SA
Fourth Respondent
30 Avenue
Pierre Mendes
France
Paris, 75013
cc: NORTON ROSE FULBRIGHT SOUTH AFRICA INC
15 Alice Lane
Sandton
GAUTENG

AND TO: NATIXIS SA (Natixis)
Fifth Respondent
30 Avenue
Pierre Mendes
France
Paris, 75013
cc: NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Attorneys for Fourth Respondent
15 Alice Lane
Sandton
GAUTENG

AND TO: VESQUIN TRADING (PTY) LIMITED (VESQUIN)
Sixth Respondent
c/o HERBERT SMITH FREEHILLS SOUTH AFRICA LLP
Rosebank Towers
4th Floor
15 Biermann Avenue
Rosebank
JOHANNESBURG

AND TO: VITOL ENERGY (SA) (PTY) LIMITED
Seventh Respondent
c/o HERBERT SMITH FREEHILLS SOUTH AFRICA LLP
Rosebank Towers
4th Floor
15 Biermann Avenue
Rosebank
JOHANNESBURG

AND TO: VITOL SA
Eighth Respondent
c/o HERBERT SMITH FREEHILLS SOUTH AFRICA LLP
Rosebank Towers
4th Floor

11

15 Biermann Avenue
Rosebank
JOHANNESBURG

AND TO: THE MINISTER OF ENERGY
Ninth Respondent
192 Visagie Street
Cnr Paul Kruger and Visagie Streets
PRETORIA

AND TO: THE MINISTER OF FINANCE
Tenth Respondent
40 Church Square
Old Reserve Bank Building
2nd Floor
PRETORIA

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between: **CASE NO:**

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|---|---|
| **CENTRAL ENERGY FUND SOC LIMITED** | First Applicant |
| **STRATEGIC FUEL FUND ASSOCIATION NPC** | Second Applicant |
| and | |
| **VENUS RAYS TRADE (PTY) LIMITED** | First Respondent |
| **GLENCORE ENERGY UK LIMITED** | Second Respondent |
| **TALEVERAS PETROLEUM TRADING DMCC** | Third Respondent |
| **CONTANGO TRADING SA** | Fourth Respondent |
| **NATIXIS SA** | Fifth Respondent |
| **VESQUIN TRADING (PTY) LIMITED** | Sixth Respondent |
| **VITOL ENERGY (SA) (PTY) LIMITED** | Seventh Respondent |
| **VITOL SA** | Eighth Respondent |
| **MINISTER OF ENERGY** | Ninth Respondent |
| **MINISTER OF FINANCE** | Tenth Respondent |

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**FOUNDING AFFIDAVIT: PART A**

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I, the undersigned

**LUVO LINCOLN MAKASI**

do hereby make oath and state that:

1 I am the Chairperson of the Board of Directors of Central Energy Fund SOC Limited (**CEF**).

2 CEF is a major public entity, designated as such, in terms of Schedule 2 of the Public Finance Management Act 1 of 1999 (the **PFMA**). It reports to the National Department of Energy (the **DoE**), which holds all its issued shares, on behalf of the Republic of South Africa (**South Africa**) and her people.

3 CEF is the sole shareholder of the second applicant, the Strategic Fuel Fund Association NPC (**SFF**).

4 I am authorised to depose to this founding affidavit and to bring this application on behalf of CEF and SFF (the **applicants**).

5 This application concerns SFF's unlawful conclusion (purported) of a series of agreements (the **Impugned Agreements**), the net effect of which was the purported unlawful disposal of South Africa's 10 million barrels of Strategic Crude Oil Reserves. In this affidavit I refer to the 10 million barrels as "the **Oil Reserves**" and to the transactions purporting to give effect to this disposal as "the **Impugned Transactions**". The unlawfulness of the Impugned Agreements, and subsequent Impugned Transactions, is set out in detail below.

6 CEF and SFF bring this application pursuant to ss38(*a*), (*c*), (*d*) and (*e*) of the Constitution of the Republic of South Africa (the **Constitution**). The interests sought to be protected are those of the CEF Group, the DoE and, more importantly, the public. I note that CEF and SFF are both State-owned companies, having a legislative mandate to advance the commercial interests of South Africa in the energy sector. Accordingly, there cannot be a great deal of divergence between their respective interests (and need

for sustainability) and those of the general public, whom they are incorporated to ultimately serve.

7 In bringing this application, the applicants are discharging – as it is a positive obligation – an important constitutional mandate by seeking to give meaning and effect to the following constitutional principles and values:

7.1 the supremacy of the Constitution and the rule of law (s1(*c*) read with s2 of the Constitution); and

7.2 accountability, responsiveness and openness (s1(*d*) of the Constitution).

8 The facts contained in this founding affidavit are, unless the context indicates otherwise, within my personal knowledge and are, to the best of my belief, true and correct. Where I rely upon information that does not fall within my personal knowledge, such has been ascertained from documents under the applicants' control or furnished to me by persons in the applicants' employ. I verily believe the information furnished to me to be true and correct and have no reason to doubt the reliability and veracity of the documents. To the extent that reliance is placed on any hearsay evidence, I submit that it is in the interests of justice for it be admitted in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988. Further legal submissions will be made on this score at the hearing of this matter.

9 Any legal submissions contained herein are made on the advice of the applicants' legal representatives, which advice I accept as correct.

10 In compiling this founding affidavit, the respective members of the applicants have gone to great lengths to source and place before this court all obtainable facts, documents and evidence relating to the Impugned Transactions. While the applicants have endeavoured

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to obtain all necessary information and documentation in order to bring this application, some of the relevant individuals are no longer associated with the applicants or in their employ, and have not been available for purposes of obtaining the necessary instructions, despite request. Furthermore, some of the relevant documentation (to the extent that it exists) is simply not in the possession or under the control of, or otherwise accessible by, the applicants. These omissions stem from the irregular manner in which the Impugned Transactions were concluded and purportedly approved, as set out in greater detail below. To the extent that the narrative set out in this affidavit contains such omissions, including unsigned minutes, documents and reports, I ask this Honourable Court's indulgence. I further request leave to supplement these papers, and the relief sought in these proceedings, should further relevant documentation and information come to light, whether from the respondents or from any other process or third party.

**OVERVIEW**

11 The National Government of South Africa (the **government**), through SFF, acquired and holds the Oil Reserves – in the interests of the country. The Oil Reserves are to be deployed in situations of emergency. SFF is mandated to acquire and hold sufficient Oil Reserves to last the country for up to 21 days or equivalent to 10.3 million barrels.

12 As I demonstrate below, there are various legislative enactments and policies that govern how the Oil Reserves should be dealt with, as well as general statutory requirements relating to public procurement and disposals by organs of state. As public entities established under legislation to fulfil a public purpose, both CEF and SFF are organs of state.

13 The former acting Chief Executive Officer of SFF, Mr Sibusiso Gamede (**Mr Gamede**), entered into the Impugned Agreements purporting to act on behalf of SFF and to give effect to the Impugned Transactions.

14 At the outset, I should highlight that the Impugned Transactions were concluded absent proper and competitive public procurement and disposal processes and without any of the necessary approvals. In addition, the Oil Reserves were disposed of at a time when crude oil prices were depressed. Furthermore, the Impugned Agreements did not create a proper (and beneficial) mechanism for the "rotation" of the Oil Reserves, which rotation was the ostensible justification for the Impugned Transactions. Quite the opposite, the Oil Reserves were purportedly sold without any proper mechanism being in place for "rotation" or for SFF to repurchase the Oil Reserves (at favourable prices) if there were a pressing crisis. The buyers of the Oil Reserves could, if they elected to do so, sell the Oil Reserves back to SFF at the prevailing market prices. As the Oil Reserves, in the first instance, were sold at significantly reduced prices, the following would undoubtedly result:

14.1 in the best case, the country would suffer a large financial loss in order to repurchase the Oil Reserves at prevailing market rates; or

14.2 in the worst case, the country not being able to procure the necessary 10 million barrels of oil if there were an energy crisis, either at all or with sufficient haste to deal with the crisis.

15 I note that the flawed procurement and disposal process was conducted by Mr Gamede, to the exclusion of (and without the knowledge of) the SFF Executive Management Team and the SFF Board of Directors (the **SFF Board**). He did so, moreover, in circumstances

in which both he as well as the erstwhile Minister expressly stated that the SFF Board approval would be required to dispose of the Oil Reserves.

16 I am advised and aver that for at least these reasons, the decisions to enter into the Impugned Agreements and Impugned Transactions (as well as the Impugned Agreements and the Impugned Transactions) fall to be set aside.

17 The applicants bring this application seeking relief from the court in two parts:

17.1 in Part A, the applicants seek an order granting an extension for (or condoning their delay in launching) the review application; and if granted, an order to set aside the decisions to conclude the Impugned Agreements and Impugned Transactions (as well as the Impugned Agreements and the Impugned Transactions) in the form of a declaration of unlawfulness; and

17.2 in Part B, the applicants will approach this court, on duly supplemented papers, for an order for a just and equitable remedy, in terms of s8 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) and/or s172(1)(*b*) of the Constitution.

18 As regards the other features of the just and equitable remedy that this court should order, I submit that the precise contours of that remedy should stand over until the determination of Part B. In fashioning a just and equitable remedy, the court may well require detailed evidence from various experts (for example, economists on the pricing of oil). The court will also have to consider the respective positions of those respondents who wish to oppose the applicants' application to have the decision(s) to enter into the Impugned Agreements and Impugned Transactions (and the Impugned Agreements and Impugned Transactions) declared void *ab initio*.

19 I should point out that part of the delay in bringing this application has been occasioned by attempts from representatives of the applicants and some of the respondents to reach agreement, or at least partial consensus, in relation to the question of a just and equitable remedy.

20 However, it has now become clear that such an agreement will not be reached and the applicants were determined not to delay launching this application further by waiting for these additional features of the application to fall into place. I am further advised and aver that our courts have previously taken a similar stance, *mero motu*, in relation to other tender proceedings in which the Constitutional Court decided it would be just and equitable to separate the hearing of the merits with the declaration of unlawfulness from the determination of the remedy. What the applicants pray for in this case is no different. Our courts, I am advised, have appreciated the value and necessity of up to date factual averments (even on appeal) when deciding precisely how a just and equitable order should be constructed.

21 I emphasise, further, that this bifurcation of the application is, in essence, for the benefit of the respondents as well as the public interest (which may well be represented further by any public interest organisations that seek to join these proceedings). The applicants' own stance on remedy is relatively straightforward: the Impugned Agreements and the decisions to enter into the Impugned Transactions are manifestly unlawful. It follows that they are void *ab initio*. In the present matter, the just and equitable remedy is for restitution (in the *status quo* sense) to take place. The applicants are, however, mindful of the respondents' positions.

22 Accordingly, the separation of these proceedings enables the respondents not to oppose Part A of the application (since, the stance of the applicants is that there is no lawful basis

upon which the respondents can defend the lawfulness of the Impugned Transactions) and merely to oppose Part B (if they are so minded). The respondents should not be forced to incur costs in relation to Part A when they merely wish to participate in the remedy that this court should order. In the alternative, and to the extent that this court were to find that the application cannot be split into Part A and B, then the applicants plead that the ordinary consequences of the agreements being declared unlawful should follow – the court should declare the Impugned Agreements and the decisions to enter into the Impugned Transactions *void ab initio*.

23 To address the court on these issues, this founding affidavit is structured as follows:

23.1 First, I set out the details of the parties to this application.

23.2 Second, I canvas the regulatory framework applicable to the Oil Reserves.

23.3 Third, I explain the factual background leading up to the conclusion of the Impugned Agreements and Impugned Transactions.

23.4 Fourth, I indicate why the decision(s) to conclude the Impugned Agreements and to enter into the Impugned Transactions, and therefore the Impugned Agreements and Impugned Transactions themselves, are invalid.

23.5 Fifth, I explain the timing of this application and the reasons why the period for launching the application should be extended or that the applicants' lateness should be condoned.

23.6 In conclusion, I set out the applicants' submissions regarding costs in this matter.

**THE PARTIES**

***The applicants***

24 The first applicant is CEF, a State-owned company, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registration number 1976/001441/30, having its registered address and principal place of business at CEF House, Block C, Upper Grayston Office Park, 152 Ann Crescent, Strathavon, Sandton, Johannesburg, 2031.

25 The second applicant is SFF, a non-profit company, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registration number 1964/010277/08, having its registered address and principal place of business at 151 Frans Conradie Drive, Parow, Cape Town, 7435.

***The respondents***

26 The first respondent is Venus Rays Trade (Pty) Limited (**Venus**), a company duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registration number 2012/041597/07, having its chosen *domicilium citandi et executandi* at the Courtyard, Central Park, Esplanade Lane, Century City, Cape Town, South Africa and its registered address at 2nd Floor, Mindpearl Building, West Quay Road, V & A Waterfront, Western Cape, South Africa.

27 The second respondent is Glencore Energy UK Limited (**Glencore**), a company duly registered and incorporated in terms of the Statutes of England and Wales, having its chosen *domicilium citandi et executandi* and registered office at 50 Berkeley Street, London, England, W1J8HD. Glencore is represented in these proceedings by

Werksmans Attorneys at 96, Rivonia Road, Sandton, South Africa, 2146. As such, full copies of the notice of motion and founding papers (as well as the annexures thereto) will be served on its attorneys of record as they have confirmed that they are authorised to accept such service on behalf of the second respondent.

28 The third respondent is Taleveras Petroleum Trading DMCC (**Taleveras**), a company with registration number registration number DM CC2115, having its chosen *domicilium citandi et executandi* at care of Taleveras Oil SA (Pty) Limited, 1 Thibault Square, Cape Town, South Africa and at Unit 1104, Office No 11-18, Reef Tower, Cluster O, Jumeriah Lake Towers, Dubai, United Arab Emirates. Taleveras is represented in these proceedings by Clyde & Co Incorporated at 13th Floor, South African Reserve Bank Building, 60 St George's Mall, Cape Town, South Africa, 8000. As such, full copies of the notice of motion and founding papers (as well as the annexures thereto) will be served on its attorneys of record as they have confirmed that they are authorised to accept such service on behalf of the third respondent

29 The fourth respondent is Contango Trading SA (**Contango**), a company duly registered and incorporated in terms of the Statutes of France with its chosen *domicilium citandi et executandi* at 30 Avenue Pierre Mendes France, Paris, 75013, France and at care of Natixis, 68/70 quai de la rapee, 75012, Paris, France. Contango is represented in these proceedings by Norton Rose Fulbright South Africa Inc at 15 Alice Lane, Sandton, Gauteng, South Africa, 2196. As such, full copies of the notice of motion and founding papers (as well as the annexures thereto) will also be served on its attorneys of record. The applicants will, to the extent necessary, apply for leave to serve this application on the fourth respondent by way of edictal citation.

30 The fifth respondent is Natixis SA (**Natixis**), a company duly registered and incorporated in terms of the company laws of France, having its registered addressed and principle place of business at 30 Avenue Pierre Mendes France, Paris, 75013, France. Natixis is a major French corporate and investment financial institution and holds all the issued shares in Contango. The applicants will apply for leave to serve this application on the fifth respondent by way of edictal citation.

31 The sixth respondent is Vesquin Trading (Pty) Limited (**Vesquin**), a company duly registered and incorporated in terms of the Statutes of the Republic of South Africa with registration number 2011/011181/07, having its chosen *domicilium citandi et executandi* and registered address at 1st floor, Hudson Building, 28 Hudson Street, Green Point, Cape Town, Western Cape, South Africa, 8001.

32 The seventh respondent is Vitol Energy (SA) (Pty) Limited (**Vitol Energy**), a company duly registered and incorporated in terms of the Statutes of the Republic of South Africa with registration number 2010/020445/07, having its chosen *domicilium citandi et executandi* and its registered address at First Floor, Hudson Building, 28 Hudson Street, Green Point, Cape Town, Western Cape, South Africa.

33 The eighth respondent is Vitol S.A. (**Vitol SA**), a company duly registered and incorporated in terms of the Statutes of Switzerland with registration number CH-107.746.845, having its chosen *domicilium citandi et executandi* as notices@vitol.com and business address at Boulevard du Pont d'Arve 28, Geneva, 1205, Switzerland. Vesquin, Vitol Energy and Vitol SA are represented in these proceedings by Herbert Smith Freehills South Africa LLP at Rosebank Towers – 4th Floor, 15 Biermann Avenue, Rosebank, Johannesburg, South Africa. As such, full copies of the notice of motion and founding papers (as well as the annexures thereto) will also be

served on their attorneys of record. The applicants will, to the extent necessary, apply for leave to serve the application on the eighth respondent by way of edictal citation.

34 The ninth respondent is the Minister of Energy (the **Minister**), a member of Parliament pursuant to s47 of the Constitution. The Minister is a member of the South African Cabinet, pursuant to s91 of the Constitution, and serves as the national executive head of the DoE, exercising overall supervision and control over *inter alia* the entire CEF Group of Companies (the **CEF Group**). He is furthermore the shareholder representative of CEF and SFF. His office is located at 192 Visagie Street, Cnr Paul Kruger and Visagie Street, Pretoria.

35 The tenth respondent is the Minister of Finance, a member of Parliament and a member of the National Assembly, pursuant to s47 of the Constitution. The Minister is a member of the South African Cabinet, pursuant to s91 of the Constitution, and serves as the political head of National Treasury, with its offices at 40 Church Square, Old Reserve Bank Building, 2nd Floor, Pretoria, South Africa, 0002. The National Treasury *inter alia* implements the national government's finance and fiscal policy framework and the co-ordination of macro-economic policy, co-ordinates intergovernmental financial and fiscal relations, promotes and enforces transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.

36 In order to perform its functions, the National Treasury must, *inter alia*:

36.1 prescribe uniform treasury norms and standards, enforce the PFMA and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;

36.2 monitor and assess the implementation of the PFMA, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;

36.3 assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management; and

36.4 investigate any system of financial management and internal control in any department, public entity or constitutional institution.

37 The Minister of Finance is cited in this application in his capacity as the member of the national executive responsible for promoting and enforcing compliance with the PFMA. No relief is sought against the Minister of Finance, save for an order for costs in the event that the Minister opposes this application.

**STANDING**

38 The Central Energy Fund Act 38 of 1977 (the **CEF Act**) provides that the shares in CEF shall be taken up by the State only, and that the shares in SFF shall be taken up by CEF only (s1D(2) of the CEF Act).

39 As stated above, I am the incumbent Chairperson of the CEF Board and act in the interests of the CEF Group, the DoE and the public.

40 A supporting affidavit by the Chairperson of the Board of SFF is filed together with this affidavit.

41 The applicants bring this application to:

41.1 review and set aside the unlawful decision(s) taken by Ms Tina Joemat-Pettersson, in her capacity as the then Minister, to approve the Impugned Agreements and Impugned Transactions;

41.2 review and set aside the unlawful decision(s) taken by Mr Gamede to conclude the Impugned Agreements and Impugned Transactions;

41.3 have declared as constitutionally invalid and unenforceable, the Impugned Agreements and Impugned Transactions;

41.4 have declared as constitutionally invalid, the process that was followed by Mr Gamede in procuring the first to eighth respondents' services for the Impugned Transactions; and

41.5 obtain an order for a just and equitable remedy. As set out above, in relation to the just and equitable remedy that this court should order, I submit that it is just and equitable that the remedy should be determined in Part B of this application.

42 It cannot be gainsaid that the public interest in this matter is demonstrable and significant. I demonstrate below that this significant public interest, as well as the strong prospects of success in this court determining that the decisions to enter into the Impugned Agreements and Impugned Transactions (and the Impugned Agreements and Impugned Transactions) were unlawful, illustrate why this court should, at the very least, make a declaration of unlawfulness.

43 As set out above, both of the applicants each bring this application in their respective own interest as well as in the public interest in terms of s38(c) of the Constitution.

**THE FRAMEWORK REGULATING THE OIL RESERVES**

44 CEF is responsible for contributing to the security of the country's energy supply, investing in and maintaining sustainable commercial operations and projects, and providing resources for developmental projects in the energy sector. It is governed by the CEF Act.

45 In terms of s1(2)(a) of the CEF Act, CEF must utilise, subject to the directions of the Minister, the funds contained in the Central Energy Fund for the acquisition, generation, manufacture, marketing, distribution and research of or into any form of energy, including coal, liquid fuel and oil. This provision states:

> "*(2) (a) Moneys paid under subsection (1) into the said Central Energy Fund shall be utilized in accordance with directions of the Minister of [Energy] for the financing or promotion of –*
>
> *(i) the acquisition of coal, the exploitation of coal deposits, the manufacture of liquid fuel, oil and other products from coal, the marketing of the said products and any matter connected with the said acquisition, exploitation, manufacture and marketing;*
>
> *(iA) the acquisition, generation, manufacture, marketing or distribution of any other form of energy, and research connected therewith...*"

46 Section 1E of the CEF Act states that the chairperson of the CEF Board shall be the accounting officer charged with the responsibility of accounting for all money received by CEF or SFF, and for all payments made by CEF out of the statutory funds provided for in the CEF Act and other payments made by CEF or SFF. The accounting officer must keep full and true records of all transactions entered into by CEF and SFF. The accounting authority shall be accountable to the Minister.

47 SFF is responsible for managing the country's strategic stock of crude oil (including the Oil Reserves) as well as its crude oil storage facilities, in addition to operating a pollution control centre in Saldanha. SFF discharges its objectives solely in the interests of the general public.

48 For purposes of the PFMA (s49(2)(*a*)), the SFF Board functions as the SFF's "*accounting authority*".

49 In November 2000, the Cabinet approved the then Department of Minerals and Energy's Policy Statement entitled "*Crude Oil and Petroleum Strategic Stocks Policy for the Republic of South Africa*" (the **2000 Policy**). A copy of the 2000 Policy is annexed hereto, marked "**FA2**".

50 As a net importer of crude oil, South Africa maintains a strategic stock of crude oil (including the Oil Reserves) to ensure access to energy resources during times of severe fuel disruptions and catastrophes. The maintenance of the strategic stock is important for reasons that include: prevailing supply constraints; the significant role that energy resources play in our economy; the significant expenditure involved in making energy resources available; and the fact that private (i.e. non-State entities) producers and wholesalers are currently not obliged to maintain specfic minimum levels of their own stocks for strategic purposes. Furthermore, the maintenance of strategic stock by the State avoids having to resort to the markets during emergencies, and therefore avoids the premiums that markets are able to extract in such circumstances.

51 The 2000 Policy contemplated in clause 2 thereof that Phase 1 of South Africa's energy security policy would entail holding 14.57 million barrels of crude oil, this amounts to crude oil equal to 35 days of national import requirements, at SFF's Saldanha Bay storage

facility, which reserves were to be acquired and managed by the SFF, in accordance with s1A of the CEF Act.

52 I note that the 2000 Policy did not contemplate the rotation or disposal of any portion of the Oil Reserves. However, it did stipulate that the erstwhile Minister of Minerals and Energy would determine "*when strategic stocks may be released*", until such time as duly approved guidelines were developed.

53 In 2008, Parliament passed the National Energy Act 34 of 2008 (the **Energy Act**) which aims, *inter alia*, to ensure an uninterrupted energy supply and provide for the optimal supply and storage of energy resources, with due regard to, among other things, the security of South Africa's energy supply. Section 17 of the Energy Act states:

> "*(1) The Minister may, in a prescribed manner, for the purposes of ensuring security of supply, direct any state-owned entity to acquire, maintain, monitor and manage national strategic energy feedstocks and carriers.*
>
> *(2) The nominated state-owned entity must perform the functions contemplated in subsection (1) in accordance with the relevant published security of supply strategies or policies....*"

54 In 2012, the DoE (as Principal) and the SFF (as Agent) concluded an agency agreement (the **Agency Agreement**). A copy thereof is attached, marked "**FA3**".

55 The following material terms are set out in the Agency Agreement:

> "*It is recorded that –*
>
> *a) The National Government of South Africa is the owner of Strategic Stocks and Strategic assets which have been managed over the years by the Agent for the Principal for the benefit of the National Government.*

*b) The National Government of South Africa established an Agent before the CEF Act No. 38 of 1977, as amended, came into operation in 1977 in terms of which the whole share capital in the Agent was taken over by CEF (SOC) Ltd, resulting in the Agent being a wholly owned subsidiary of CEF (SOC) Ltd (CEF).*

*c) The mandate given to the Agent was to manage and control its Strategic Stocks and Strategic Assets as well as dealing and storing Crude Oil as Strategic Stocks.*

*d) The control and disposal of the Strategic Stock is and will continue to be regulated in accordance with the provision of the CEF Act unless specifically exempted from it by an Act of Parliament.*

*Clause 2. Appointment of the Agent*

*2.1 The Principal appoints, exclusively, the Agent to be its lawful Agent to take possession of, control of, deal in, manage and replace the Strategic Stocks and manage the Strategic Assets in the name of the Principal and on its behalf to do and execute the following acts:*

*2.1.1 To manage the Strategic Assets;*

*...*

*2.1.4 To manage the Strategic Stocks including trade in, replacing, selling and storing same in accordance with the applicable legislation (including: inter alia but not limited to the CEF Act, the PFMA and the Regulations as amended) as well as policy/ies on Strategic Stock that may be issued or determined by the Minister from time to time.*

*Clause 8. Assets of the Principal*

*The Strategic Stocks and Strategic Assets of the Principal should not under any circumstances or in any manner whatsoever be regarded by any person whomsoever, to be the assets of the Agent.*

*Clause 14. Trading in Crude Oil for the Principal Initially Conducted by the Agent*

*14.1 The Agent will trade in crude oil and carry out the business in the interest of and the benefit of the Principal. The Agent will not trade in Strategic Stocks to the detriment of or in such a manner that will prejudice the financial independence of the Agent."*

30

56 The framework that governs the Oil Reserves makes the following apparent:

56.1 the State must hold the Oil Reserves to be utilised in situations of emergency;

56.2 SFF acquires, controls and manages the Oil Reserves on behalf of the State;

56.3 SFF is obliged to do so in a manner that is not detrimental to the interests of the State (i.e. in the public interest and in a manner which accords with the Constitution, applicable legislation, directives and policies);

56.4 CEF and SFF, as major public entities, and their respective accounting authorities in terms of the CEF Act and the PFMA respectively, are responsible for the financial management of the proceeds generated by SFF. In light of the aforegoing, it stands to reason that transparency between the two entities is paramount;

56.5 ministerial directives may be issued by the Minister directing SFF on how to manage the Oil Reserves; and

56.6 proceeds from the sale of the Oil Reserves are to be paid into the Equalisation Fund or as directed by the Minister, with the consent of the Minister of Finance.

57 In July 2014, former Minister Tina Joemat-Pettersson issued a ministerial directive, directing SFF to maintain strategic stock of 10.3 million barrels. I annex marked "**FA4**" a copy of the ministerial directive (the **First Directive**). The First Directive was ultimately signed by former Minister Joemat-Pettersson on 7 August 2014.

**THE DECISION(S) TO CONCLUDE THE DISPOSAL TRANSACTIONS**

58 As indicated above, South Africa's strategic stock of crude oil comprises 10.3 million barrels. The Oil Reserves that were purportedly disposed of by Mr Gamede pursuant to

the Impugned Agreements and the Impugned Transactions comprise the vast majority of that stock: 10 million barrels. Unless the context indicates the contrary, in this affidavit I address only the 10 million barrels that were the subject of the Impugned Agreements and the Impugned Transactions concluded by Mr Gamede.

59 The Oil Reserves comprise crude oil of different grades: Basrah Light and Bonny Light. Amongst other things, these different grades of oil have different sulphur contents. For example, Basrah Light has a significantly higher sulphur content than Bonny Light. The higher a crude oil's sulphur content, the more expensive it is to refine that oil into a commercially usable product such as petroleum. Crude oil such as Bonny Light is therefore more commercially and environmentally desirable than crude oil such as Basrah Light.

60 Refineries in South Africa have to some extent moved away from utilising high-sulphur crude oil. Accordingly, since 2014, SFF has been considering improving the quality of the strategic stock (including the Oil Reserves) by supplementing that stock with low-sulphur crude oil.

61 As set out above, on 7 July 2014 Minister Joemat-Pettersson issued the First Directive in terms of which she *inter alia*:

61.1 revoked the 2004 directive (and accompanying instructions) regarding the Oil Reserves;

61.2 stipulated that the First Directive shall serve as an interim regime for the management of the Oil Reserves, insofar as the provisions of the National Energy Act may be applicable, until such period that an appropriate Strategic Stocks Policy was in place;

61.3 required SFF to hold sufficient reserves to cover 21 days of national import requirements (Phase 1), or 10.3 million barrels at the Saldanha Bay and Milnerton storage facilities, in accordance with prevailing energy security policy;

61.4 indicated that the "*trading of Strategic Stocks shall be permissible under a regime to be determined by the Department of Energy and approved by the Minister of Energy*", subject to the proviso, *inter alia*, that SFF "*will not expose the strategic reserves or the funds to be utilised for the procurement of strategic stocks to any losses in executing these transactions*"; and

61.5 stipulated that a second phase of additional petroleum stocks to be held would be implemented in due course.

62 On 3 August 2015, as a result of what appeared to her to be the "*very little intention to finalise the Strategic Stocks Policy and the SFF Draft Bill*", Minister Joemat-Petterson withdrew the First Directive, with immediate effect, by means of written correspondence (the **Withdrawal Notice**), which is annexed hereto as "**FA5**". In relation to the trading of Oil Reserves, as contemplated in the First Directive, Minister Joemat-Pettersson noted that trading in the interim regime would had to have been pursuant to the DoE's determination and the approval of the Minister of Energy, but that:

> "*This ha[d] not been fulfilled and accordingly all actions pursued in this respect w[ould] be regarded as irregular.*"

63 Minister Joemat-Pettersson directed SFF to provide her with a detailed report regarding the concerns she had raised, including SFF's trading proposals.

64 Shortly thereafter, on 12 August 2015, Ambassador Bheki Gila resigned as the Chief Executive Officer of SFF.

65 Mr Gamede became the acting Chief Executive Officer of SFF in September 2015. At the beginning of his tenure, he instructed all SFF General Managers to report directly to him, whereas previously they had all (barring the legal team) reported directly to Mr Mfano Nkutha, the Chief Operations Officer.

66 The SFF Board requested Mr Gamede to engage with Minister Joemat-Pettersson regarding the future of SFF in the light of her withdrawal of the First Directive.

67 I note that whilst acting as the Chief Executive Officer of SFF, Mr Gamede maintained his role as Special Advisor to Minister Joemat-Pettersson.

68 A meeting of the SFF Exco was held on 22 September 2015. It did not address the First Directive or the Withdrawal Notice.

69 On 6 October 2015, Mr Gamede wrote to Minister Joemat-Pettersson requesting her to rescind the Withdrawal Notice and to reinstate the First Directive in order for SFF to continue to "*engage in commercial activities that would ensure that SFF is financially independent and sustainable*" and that would allow SFF to fulfill its mandate of energy security. A copy of his correspondence is annexed hereto, marked "**FA6**".

70 Mr Gamede's proposed business model for SFF involved: SFF trading in commercial stock, investing in storage and pipeline infrastructure, oil pollution control services, storage facility management services and the rotation of the Oil Reserves and the rest of the strategic stock. The rotation of crude oil entails the alienation of existing crude oil stocks while simultaneously acquiring replacement crude oil, or at least ensuring the availability of a mechanism to acquire replacement crude oil at the relevant time. A transaction that entails only alienation and provides for no replacement mechanism is not a rotation: it is simply a disposal.

71 In respect of the Oil Reserves (and the rest of the strategic stock), Mr Gamede made the following proposal to Minister Joemat-Pettersson:

> *"SFF proposes to rotate the Strategic Stock under the following conditions with the Ministerial approval,*
>
> *1. When the Crude Oil prices are on the rise,*
>
> *2. There must be a positive margin for SFF, meaning selling price greater than purchase price,*
>
> *3. Risk assessment will be done prior any potential transaction being entered to by SFF*
>
> *Apart from the revenue enhancement benefit on stock rotation, product integrity will be maintained through rotation.*
>
> *When crude market prices are down, SFF will explore the opportunity to procure or replenish additional barrels used to ensure that optimal stock level is maintained at all times.*
>
> *In order for the above to be implemented successfully, SFF will establish a Trading department headed by a General Manager (GM) reporting directly to the CEO of SFF. The key responsibility of the GM, will include but not limited to, providing a monthly report on trading activities to the Honourable Minister*" (sic).

72 From as early as 6 October 2015, therefore, it was envisaged that SFF would establish a dedicated trading division that would conceptualise, plan for and implement the contemplated "*rotation*" of the Oil Reserves and the related commercial transactions.

73 On 8 October 2015, Minister Joemat-Pettersson issued a directive in response to Mr Gamede's correspondence of 6 October 2015 (the **Second Directive**). A copy of the Second Directive is annexed hereto, marked "**FA7**". In terms of the Second Directive, Minister Joemat-Pettersson agreed to "*grant SFF the Ministerial Directive as requested*", which included reinstating the terms of the 7 July 2014 Ministerial Directive as well as

authorisation for "*a business model that would include, SFF Trading in commercial stock, Storage facility management as well as the Rotation of Strategic stock.*"

74 Minister Joemat-Pettersson also imposed the following conditions:

> "*1. Any rotation of strategic stock will be undertaken with a Ministerial Approval, preceded by a detailed due diligence undertaken by the SFF, and supported with a comprehensive motivation to the Minister.*
>
> *2. The integrity of our Strategic Stock levels must be assured in all instances.*
>
> *3. A trading division should be established within the SFF and must be appropriately staffed with skilled personnel and resources to undertake trading activities which must generate revenue for SFF.*
>
> *4. The SFF shall provide a Monthly Report to the Minister and Department on all activities in relation to the Directive herewith granted.*"

75 On 12 October 2015, there was a Strategy Session regarding, *inter alia,* the identified strategic objectives.

76 On 13 October 2015, the SFF Board convened for the first time since Minister Joemat-Pettersson issued the Second Directive. The Board noted (see item 4.2 of the Board Minute) that "*it required a project plan and an action plan with regards to how the [Second] Directive would be implemented setting out the short, medium and long term intentions, the resources that would be required and the decisions needed from the Board to ensure the implementation of the directive.*" The SFF Board also noted that "*SFF did not have the funds to implement some of the activities of the [Second] Directive and that clarification was required from the Minister regarding the funding of the strategic stocks and the infrastructure.*" At this board meeting Mr Gamede was the only representative of SFF's Exco.

77 The SFF Board agreed that Mr Gamede "*would draft a letter to the Minister of Energy on behalf of the [SFF] Board*", addressing *inter alia* "*how the strategic stocks and the infrastructure activities were proposed to be funded*". This draft letter would then "*be circulated to the SFF Board members for review and would be signed by the Interim Chairperson*" before being dispatched to Minister Joemat-Pettersson for her consideration.

78 The SFF Board also noted that "*SFF was required to develop a policy for the rotation of [the Oil Reserves] and that the policy needed to be approved at SFF Board level where after it could be submitted to the Minister.*" Finally, it noted that the SFF Board needed to engage with the Interim Chairperson of CEF regarding the Second Directive.

79 A copy of an extract from the unsigned minute of the SFF Board's meeting is annexed hereto, marked "**FA8**".

80 Notwithstanding that:

80.1 Minister Joemat-Pettersson had, pursuant to the Second Directive, only granted an in-principle and conditional authorisation for an SFF business model that could include a rotation of the Oil Reserves; and

80.2 the SFF Board had determined the preliminary processes that should precede any steps to implement the Second Directive;

by 13 October 2015, however, Mr Gamede had seemingly already decided that the Oil Reserves should be disposed of through a sale-and-subsequent-repurchase process (the **Disposal Process**). He had also manifestly decided the process should be concluded through a closed procurement procedure. Mr Gamede did not consult, or obtain

approvals from, any other SFF employee, the SFF Board, CEF or the National Treasury in making these decisions.

81 On 13 October 2015, Mr Gamede issued request-for-proposal letters to five different companies: Total, SKDeck, GNI, Mercuria and Vitol (referred to in the correspondence as "*Vittol*"). A copy of each letter is annexed hereto, marked "**FA9**" – "**FA13**". I believe that Mr Gamede intended to issue **FA10** to SkyDeck rather than "*SKDeck*". I do not know whether Mr Gamede dispatched **FA13** to "Vittol" which I understand to have been intended to be Vitol SA or Vitol Energy. Each letter had annexed to it a copy of the Second Directive (annexure FA7 to this affidavit). No other documentation accompanied the letters from Mr Gamede.

82 The text of each letter is the same. I quote the substance:

> *"RE: REQUEST FOR PROPOSAL FOR ROTATION OF STRATEGIC STOCK*
>
> *The above matter refers.*
>
> *Following a Ministerial Directive dated 08 October 2015, which authorises SFF to rotate strategic stock, SFF would like to invite your company to submit a proposal to participate in the Rotation of Strategic Stock.*
>
> *The above-mentioned document is attached for your information."*

83 Mr Gamede's correspondence, even assuming he had the authority to send out the letters (which is denied), suffered from several material deficiencies from a procurement perspective. The documents set out no:

83.1 bid specifications;

83.2 minimum requirements and functionality criteria;

83.3 bid evaluation criteria; or

83.4 documentary requirements.

84 Indeed, there was not even any deadline for the submission of bids from the various entities.

85 There was, furthermore, no apparent basis for limiting the process to five entities or for selecting Total, SkyDeck, GNI, Mercuria and Vitol (whether SA or Energy) as the sole entities who should be approached.

86 On 8 October 2015 – the same day as Minister Joemat-Pettersson issued the Second Directive and five days before Mr Gamede issued the request-for-proposal letters, Golden Nest International Group (Pty) Limited (**GNI**) submitted a "*PROPOSAL FOR THE ROTATION OF THE STRATEGIC OIL STOCK IN SOUTH AFRICA*". A copy of the cover letter and the proposal is annexed hereto, marked "**FA14**". In addition, I emphasise that the proposal mysteriously refers to various specifics that were not mentioned in **FA11**.

87 On 14 October 2015 – one day after the request-for-proposal letter had been issued – Mr Gamede wrote to Minister Joemat-Pettersson to request her approval for the SFF to "*explore [the] commercial opportunity with GNI*" in relation to the "*Rotation of Strategic Stock*". A copy of the correspondence is annexed hereto, marked "**FA15**". Mr Gamede made this request on the basis that "*SFF has assessed the proposal and found it to be sound*". I emphasise that SFF did not assess the proposal at all. It would appear that Mr Gamede was referring to the proposal contained in annexure FA14: a bid that had been submitted by GNI prior to the issue of the request-for-proposal letters, as discussed in

detail below. Mr Gamede does not seem to have provided Minister Joemat-Pettersson with any pertinent details or documents regarding GNI's bid.

88 Minister Joemat-Pettersson did not respond to Mr Gamede's correspondence immediately. The Minister responded on 2 November 2015 (this response is discussed in more detail below).

89 On 16 October 2015, the SFF Exco convened. At that meeting, the SFF Exco resolved to incorporate the Second Directive into its operational and strategic plans going forward. I annex hereto, marked "**FA16**", a copy of an extract from the minute of the SFF Exco meeting. Item 2 of that annexure reads:

> *"Operational Plan (Strategic Plan) – it was suggested that the plan needs to be operationalised and the instruction was to;*
>
> *a) Develop an action plan*
>
> *b) Show the cost estimates*
>
> *c) Indicate timelines*
>
> *d) A resource on human capital*
>
> *e) Allocate responsibilities*
>
> *Each leader of the strategic objective needs to give in a more detailed input on the above mentioned points. There's a need to prioritise matters once identified on whether they are of short, medium or long term and these are to be submitted in a weeks' time noting that the ministerial directive needs to be incorporated into the plan being trading and rotation of strategic stock as they are the two main components... The below being some of the focus points;*
>
> *a) The resources required*
>
> *b) Human capital*
>
> *c) Financial obligation*
>
> *d) Key success factors*

*e) Timelines*

*f) And; who will lead*"

90 Mr Gamede proposed that, in order to implement the Second Directive, SFF should engage only with those parties who already had storage agreements with SFF. However, Mr Ngqongwa mentioned that SFF had to comply with company procurement and disposal processes and further that a competitive and open process should be followed, so as to ensure that all interested parties could submit offers.

91 Mr Gamede did not inform the SFF Exco that:

91.1 he had already decided to dispose of the Oil Reserves;

91.2 an open and competitive bidding process would not be followed;

91.3 the closed tender process would be limited to five bidders; and

91.4 he had already, at that stage, issued request-for-proposal letters.

92 During late October and early November 2015, absent approval from or notification to the SFF Board, Mr Gamede issued further letters to four companies: Enviroshore, Zittatu Oil & Gas Investment Holdings (Pty) Limited, Taleveras Oil SA (Pty) Limited and Taleveras. Copies of these letters are annexed marked "**FA17**" – "**FA20**".

93 Following the Second Directive and the resolutions of the SFF Board and the SFF Exco, Mr Lucky Mayaphi, then the SFF's General Manager: Safety, Health, Environment and Quality and Risk, commenced preparation of a Stock Rotation Policy for SFF. He was, at this stage, unaware that Mr Gamede had already commenced implementing the Impugned Transactions. At the same time Ms De Wet, then SFF's General Manager:

Commercial, commenced establishing a Trading Division for SFF. Ms De Wet was similarly unaware of the extent to which Mr Gamede had already progressed in disposing of the Oil Reserves.

94 Mr Gamede claims that he undertook his own due diligence investigation into international best practices regarding the rotation and financing of strategic stock. He also allegedly engaged with the producers of crude oil and refined petroleum products and developed "*Rules and Procedures for trading in strategic stock*". I am not aware of this investigation or these engagements and have not had sight of any report flowing therefrom.

95 A special SFF Board meeting was held on 30 October 2015. Though Mr Gamede was present, he did not provide the SFF Board with any details regarding the Impugned Transactions.

96 On 2 November 2015, Minister Joemat-Pettersson replied to "FA15", being Mr Gamede's earlier correspondence in relation to GNI's bid. A copy of the Minister's correspondence is annexed marked "**FA21**". Minister Joemat-Pettersson granted Mr Gamede "*approval for your engagement with Golden Nest International*", subject to various conditions, including that "*the ownership of the product will remain with SFF*" and that GNI "*will replace the strategic stock with crude of the same quality and quantity every three months*". Minister Joemat-Pettersson issued this preliminary approval without knowledge of any details of GNI's bid (or any competitor's bid).

97 The SFF Exco convened on 2 November 2015, at which meeting a draft "*Action Plan to Address the New Ministerial Directive*" was considered (as reflected in Item 4.1 of the copy of the agenda to this meeting). A copy of the agenda is annexed marked "**FA22**". Mr Mayaphi presented his draft Strategic Stock Rotation Policy to the SFF Exco, a copy

of which is annexed marked "**FA23**". The draft rotation policy, in clauses 4 read with clause 6, proposed to rotate 2 million barrels of the Oil Reserves per rotation cycle, with a return period of between three and six months. The draft, in clause 8, also proposed that potential customers would present rotation proposals to SFF, which proposals would "*initially be evaluated by EXCO members for commercial viability thereafter be recommended directly to the Minister of Energy for consideration and approval.*"

98 Mr Mayaphi's draft Strategic Stock Rotation Policy was not deliberated upon or finalised. Rather, the SFF Exco decided that "*a draft or a finalised document need[ed] to be compiled for Exco members to go through prior to being submitted to [the SFF] Board.*" This decision is recorded in item 7.1 of the unsigned minute of the SFF Exco meeting annexed marked "**FA24**".

99 Notwithstanding this additional opportunity to do so, Mr Gamede, again, did not inform the SFF Exco that:

99.1 he had already decided that the Impugned Transactions would go ahead;

99.2 Minister Joemat-Pettersson had issued a preliminary approval in relation to GNI, whose bid had been received prior to the issuing of the request-for-proposal letters.

100 I note that members of the SFF Exco were aware that Mr Gamede had issued certain request-for-proposal letters to some companies. They were, however, not aware of the detail or import of the letters, or the identity of the recipients, or the manner of their selection. This notwithstanding, no presentation was made to the SFF Exco regarding the extent of Mr Gamede's activities.

101 By mid-November 2015, the members of the SFF Exco – other than Mr Gamede– remained completely unaware of the extent of the engagements with the various oil

trading companies regarding the intended disposal of the Oil Reserves. Confirmatory affidavits from Mr Mfano, Mr Mayaphi and Mr Ngqongwa, being the relevant members of the SFF Exco at the time, are filed together with this application. This was done, moreover, without the knowledge or assistance of any other SFF employee or structure.

102 On 11 November 2015, Mr Gamede wrote to Minister Joemat-Pettersson regarding a "*request for selling of strategic stocks in Saldanha*". A copy of his correspondence is annexed marked "**FA25**". The essence of Mr Gamede's correspondence is reflected in the following excerpt:

> "*Below is the proposal to review the scenario of replacing the current stock holding quantity with a fresh stock to ensure the security of supply is not impacted negatively by feedstock that is in line with future petroleum refining trends.*
>
> *REQUESTING THE MINISTER TO DIRECT THAT WE,*
>
> *1. Sell the entire quantity of 10.3 million Barrels,*
>
> *2. Every barrel will be sold at the prevailing market price,*
>
> *3. The proceeds from the sold stock will be used to purchase the 10.3 million Barrels of Crude Oil from the open market.*"

103 Mr Gamede claimed, in addition, that "*most*" of the Oil Reserves were "*losing [their] relevance with the changing market conditions.* " I am advised and aver that this is not correct. For instance, at the time that the Impugned Transactions were entered into there were approximately 5 million barrels of Bonny Light oil in the Oil Reserves. Thus, even on a generous reading of Mr Gamede's rationale for "rotating" the Oil Reserves, there is no sound basis for why approximately half of the Oil Reserves sold needed to be "rotated".

104 Mr Gamede expressed the benefits of his proposed disposal as follows:

*"SFF will access fresh stock of crude oil in the market that will be in line with the changing crude diet and invariably replacing the old crude stock.*

*The quality integrity will be improved with the new stock thus increasing its refining relevance (fit for purpose).*

*The current stock level of 10.3 million barrels will be sold at prevailing market prices and will be replenished when the market prices are favourable for SFF to acquire such barrels. This will then ensure that SFF creates value that will yield a positive net margin on the selling and buying initiatives of crude oil."*

105 I emphasise three points:

105.1 First, this was wholly inconsistent with the SFF Board's stated position – i.e. that clarity and engagement were required before any aspect of the Second Directive could be implemented, and with the SFF Exco's stated position, i.e. that the Stock Rotation Policy had to be finalised and approved before any commercial activity regarding the Oil Reserves could be contemplated.

105.2 Second, the factual premise is simply incorrect. As noted above, it is unclear why the desirability of rotating a portion of the Oil Reserves (being the high sulphur Basrah Light barrels) necessitated disposing of the entirety of the Oil Reserves, when a great percentage of that stock was, and is, still desirable. Indeed, the desirability of the Bonny Light is the very reason that the buyers have been seeking to take possession of the oil.

105.3 Third, the "*prevailing market prices*" to which Mr Gamede referred as the selling prices for the Oil Reserves were significantly depressed at the time. No cost savings were likely to be achieved from selling in accordance with Mr Gamede's proposal and purchasing at a later point in time.

106 The very next day, 12 November 2015, Minister Joemat-Pettersson issued correspondence to Mr Gamede and approved the latter's request to dispose of the entirety of the Oil Reserves and the balance of the strategic stock (the **First Approval Notice**). A copy of the First Approval Notice is annexed marked "**FA26**".

107 The First Approval Notice commences with a reference to Mr Gamede's letter of 10 October 2015. I do not know whether this was a typographical error, but I know of no letter penned by Mr Gamede on that date. I therefore assume that Minister Joemat-Pettersson intended to refer to annexure "FA25".

108 I quote the substance of the First Approval Notice:

> *"I hereby approve the SFF proposed disposal plan of current Strategic Stock holding as submitted, as part of the security of supply mandate as per the Ministerial directive of 3 August 2015.*
>
> *I need to further emphasise that this plan must be executed in a manner that both addresses the needs of our country to have strategic stocks reserve that can respond adequately to our needs when such a need arise, but also as a catalyst towards ensuring financial self – sustainability of SFF as an organisation. I trust that the SFF will regularly report on the progress thereof on the implementation of the disposal plan."*

109 It should be noted that in the First Approval Notice, Minister Joemat-Pettersson made reference to "*the Ministerial directive of 3 August 2015*" (i.e. the Withdrawal Notice). However, she had replaced the Withdrawal Notice by means of the Second Directive on 8 October 2015. I do not know why Minister Joemat-Pettersson referred to the Withdrawal Notice rather than the Second Directive, which sets out the conditions that she had previously imposed on the rotation of the Oil Reserves.

110 During the course of November 2015, Mr Ngqongwa referred Mr Gamede and Mr Mayaphi to the applicable procurement procedure, being the CEF procurement procedure, as well as the applicable provisions of the Constitution, the PFMA and the Preferential Procurement Policy Framework Act 5 of 2000. A copy of the documentation provided to Mr Gamede and Mr Mayaphi is annexed Marked "**FA27**". He indicated that in respect of the Impugned Transactions approvals would be required from: the SFF's executive authority; Minister Joemat-Pettersson; as well as the National Treasury before the contemplated Impugned Transactions could go ahead. No response to Mr Ngqongwa's concerns was forthcoming from Mr Gamede.

111 The SFF Board convened on 23 November 2015. An extract from the unsigned minute of the meeting is annexed marked "**FA28**".

112 As noted above, at its meeting on 13 October 2015, the SFF Board had discussed the plans that needed to be formulated and thereafter approved by CEF and Minister Joemat-Pettersson, in order to give effect to the Second Directive. On 23 November 2015, it was reported to the SFF Board (recorded in item 3.2.5 of annexure FA28) that the "*strategic plan would be submitted at the January 2016 meeting*", after which it could be revised by the SFF Board and submitted to CEF and Minister Joemat-Pettersson for approval.

113 In item 3.2.6 of annexure FA28, the SFF Board also recorded the following in relation to Mr Gamede's correspondence with Minister Joemat-Pettersson and the First Approval Notice:

> "*...Policy for Stock Rotation*
>
> *It was reported that two letters were included in the pack in relation hereto: (1) a letter from the SFF Acting CEO [i.e. Mr Gamede] to the Minister dated 11 November 2015, requesting a directive to sell the entire stockholding and to repurchase a similar quantity from open market, and (2) a letter from the*

*Minister to the SFF Acting CEO dated 12 November 2015, granting approval for such sale of stock. It was NOTED that the Board had not been made aware of the letters prior to their inclusion in the pack. It was further NOTED that it was unfortunate that the letter from the Minister did not specifically refer to stock rotation, but rather only to the disposal of stock.*

*It was reported that SFF was currently working on the Policy document and that it should be submitted at the January 2016 meeting.*

*In relation to the selling and replacing of strategic stocks the Board RESOLVED as follows:*

- *that every sale should essentially be back-to-back with a purchase in the sense that SFF should first identify the purchase opportunity before it actually makes the sale;*
- *that it should be ensured that the selling price should be such that the margin between the selling price and the purchase price should be sufficient to cover all the incidental costs of the sale and thereafter SFF should still make a margin;*
- *that it should be ensured that all purchases are of the appropriate quality, which can be utilised in South African refineries, and is in line with the clean fuels policy;*
- *that any purchase or sale has to be pre-approved by the SFF Board;*
- *that the SFF Supply Chain Management ('SCM') needs to ensure that any prospective purchaser, seller or agent should be on the supply database;*
- *that all Procurement and SCM Policies need to be strictly adhered to."*

114 The Board also further noted the following:

*"It was reported that SFF would obtain a better price for the sale of the strategic stocks if SFF utilised the negotiated process with players in the market as opposed to following the tender route subject to SFF adhering to procurement processes.*

*For clarity purposes it was NOTED that the directive authorising the selling of strategic stocks by SFF should not be read in isolation but should be read in the context of the previous directive regarding the rotation of stock.*

*The Board further NOTED that in relation to the trading division that SFF needed the specialist skills within SFF to ensure that the right price, quality etc is obtained. It was reported that SFF did have the required trading skills in-house as Mr Mayaphi (GM: SHEQ & Risk) and Mr Nkutha (COO) were traders previously and that SFF would be recommending in its detailed proposal for the establishment of the trading division to be submitted to the BARC and Board meetings in the January 2016 that Mr Mayaphi moves from SHEQ & Risk to head the trading division. It was further reported that there were two current employees of SFF that Vitol and Mecuria have undertaken to train as traders.*

*It was reported that SFF was currently working on the policies and procedures for rotation and trading and that the documents should be finalised by the 15th December 2015."*

115 It should be noted that it was incorrect that Messrs Mayaphi and Nkutha were previously traders, although Mr Nkutha had previously acted in the capacity of a trading manager.

116 The SFF Board attempted to put a brake on the implementation of the Second Directive until such time as the proper procedures had been complied with and the appropriate structures were in place. The SFF Board was not, moreover, aware that Mr Gamede – who sat in on the meetings of the SFF Board – had already issued request-for-proposal letters or that bids in response thereto had been received. Mr Gamede did not inform the SFF Board of the steps that he had taken.

117 On 23 November 2015, the SFF Board also noted that it still had to consider a draft letter to Minister Joemat-Pettersson seeking clarity regarding the terms of, and funding mechanisms for, the Second Directive.

118 On 24 November 2015 Mr Gamede entered into correspondence with two further companies, Venus and Mbongeni Investments South Africa (Pty) Limited (**Mbongeni Investments**). Copies of the correspondence are annexed marked "**FA29**" and "**FA30**", respectively.

119 The correspondence has the following in its subject line: "*RE: INVITATION FOR EXPRESSION OF INTEREST FOR PARTICIPATION IN THE ROTATION, SALES AND PURCHASE OF SOUTH AFRICAN STRATEGIC CRUDE OIL RESERVES*". It is considerably more detailed than the earlier request-for-proposal correspondence issued to other companies. Mr Gamede explains the disposal process to the recipients as follows:

> "*The Strategic Fuel Fund has been giv[en] the authority by the Minister of Energy through a Ministerial Directive to explore the opportunity of diversifying the revenue streams and accessing new crude oil stock by rotating and selling the strategic stocks currently stored in Saldanha and eventually purchasing new crude stocks at the prevailing market prices. The first phase of this process will be the sale of up to 5 million barrels of Bonny Light crude oil in the open market. The current stock level of 10.3 million barrels will be eventually sold at prevailing market prices and will be replenished when the market prices are favourable for SFF to acquire such barrels. This will then ensure that SFF creates value that will yield a positive net margin on the selling and buying initiatives of crude oil*" (sic).

120 Under the heading "*INVITATION OF EXPRESSION OF INTEREST*" Mr Gamede stated the following:

> "*SFF hereby invites your company to submit a firm proposal for the purchase of 5 million barrels of Bonny Light Crude oil as is, and where it is currently stored in Saldanha Bay, South Africa.*"

121 Interested recipients were required to submit a "*firm bid to purchase the 5 million barrels of Bonny Light Crude Oil*". In addition, they were also required to provide a company profile; copies of company registration documents; evidence of "*the ability to establish an irrevocable Letter of Credit (from First Class International Bank) for the payment of any allocated Crude oil*" subject to contract terms; any "*additional information relevant*

50

*to enhance the participation*"; and "*[c]ertainty of business integrity and pre-signed undertaking to strictly compliance with South African Anti-Corruption laws in processing the bid and executing the contract if successful*" (sic). The requested information and the company's firm bid were to be submitted no later than 15h00 South African time on Friday 27 November 2015.

122 The correspondence of 24 November 2015 was the first occasion upon which Mr Gamede stipulated documents required for consideration and a closing date for bids. Quite apart from the other flaws in the process, as explained in more detail below, it follows that the bidders were not treated fairly. The first nine bidders were provided with virtually no details whatsoever while the correspondence to the later bidders unfairly preferred them by furnishing them with more detailed accounts of what was required in their bids.

123 Bids were ultimately submitted by Zittatu, Vitol, Taleveras, GNI, Skydeck and Enviroshore:

123.1 GNI submitted its bid on 8 October 2015, even though Minister Joemat-Pettersson had only issued the Second Directive on that date and even though Mr Gamede only issued the request-for-proposal letter on 13 October 2015. I can only assume that GNI received some sort of fundamentally irregular and unlawful prior notice of Mr Gamede's intention to issue the request-for-proposal letter.

123.2 Taleveras, having been issued with the request-for-proposal letter on 2 November 2015, submitted its bid on 4 November 2015. This was a remarkably quick time within which to put together a bid in response to Mr Gamede's correspondence, particularly given the scant details provided in the latter correspondence.

123.3 Skydeck was issued with the request-for-proposal letter on 13 October 2015 and submitted its bid on 21 October 2015.

123.4 Zittatu was issued with the request-for-proposal letter on 23 October 2015 and submitted its bid on 26 November 2015.

124 It appears that Mr Gamede evaluated the bids sometime between 26 November 2015 and 30 November 2015. I do not know the basis upon which Mr Gamede evaluated the various bids or the specification criteria he utilised. SFF and CEF have no documentary record of Mr Gamede's evaluation and adjudication process and no documentary record of any due diligence conducted in relation to the bidders or their bids. Mr Gamede's evaluation and adjudication process did not involve any other officials, structures or committees of SFF or CEF.

125 Mr Gamede indicated that, on 30 November 2015, he wrote to Minister Joemat-Pettersson and requested her approval for the sale of the Oil Reserves to four bidders: Venus, Vitol, Taleveras and GNI. I am only aware of, and have only had sight of, the correspondence in respect of Venus. A copy is annexed marked "**FA31**". I have not had sight of any correspondence in respect of Vitol, Taleveras, GNI or any of the other bidders and I am not aware of whether Mr Gamede communicated with Vitol Energy or Vitol S.A. I quote in relevant part from the letter regarding Venus:

> "*...In compliance with the Ministerial Directive of the 12 November 2015, authorising SFF to inter alia, Rotate Sale and Purchase of Strategic Stock Crude Oil Reserves, SFF has as part of the first phase, received a number of proposals from <u>different local BEE companies</u>, expressing their interest in participating in the Rotation Sale and Purchase of the Strategic Crude Oil Reserves.*
>
> *SFF has assessed the proposals and found the proposal of Venus Rays Trade (Pty) Ltd proposal as sound and acceptable. Given the size of the transaction, SFF Management is required in terms of the CEF Policy and*

*Limits of Authority to submit the proposal and its recommendations to the SFF Board for consideration and approval.*

*For mitigation of all risks associated with this type of transaction, the transaction will be subject to the following conditions;*

- *The transaction will require[] SFF Board Approval*
- *A Sale and Purchase Agreement with Venus Trade*
- *Venus Trade will provide SFF with a Letter of Credit from a reputable financial institution*
- *SFF will verify the Letter of Credit with the relevant financial institution*

*We request that the Honourable Minister authorizes SFF to pursue this transaction on terms and conditions mentioned above.*" (sic) (emphasis added).

126 There are several aspects of Mr Gamede's correspondence that should be noted:

126.1 First, he does not provide the Minister with any of the pertinent details: there is no information regarding the number of barrels of oil that will be sold, the terms on which they will be sold, the price at which they will be sold or any security (other than a letter of credit) that will be provided.

126.2 Second, Mr Gamede falsely claims that "*SFF has assessed the proposals*" creating the impression that the SFF Board (or its relevant designates) had properly assessed the proposals. In truth, the SFF Board was not even aware of the proposals that Mr Gamede had sent out, nor the responses that had been sent to him. Furthermore, the majority of the SFF Exco and SFF's procurement department were similarly unaware of Mr Gamede's activities. In addition, the letter makes no mention of the evaluation and adjudication criteria employed, or the reasons why Venus was selected as a successful bidder.

126.3 Third, Mr Gamede claims that SFF received "*a number of proposals from different local BEE companies*". There is no mention that some of the proposals were received from foreign entities nor is there anyinformation regarding their supposed black economic empowerment ("***BEE***") credentials.

126.4 Fourth, Mr Gamede expressly acknowledges that the SFF Board must approve the contemplated transaction.

126.5 Fifth, Mr Gamede omits to mention that approvals must also be obtained from CEF (as the sole member) and the National Treasury.

126.6 Sixth, while Mr Gamede refers to a sale-and-purchase agreement, he makes no reference to any rotational aspects of the transaction, *viz* the supplies that SFF has secured to replace what is being sold.

127 The SFF Exco convened on 3 December 2015 to discuss, *inter alia,* the draft Strategic Stock Rotation Policy. A copy of the agenda for the meeting is annexed marked "**FA32**". Mr Mayaphi submitted a revised draft of the policy, a copy of which is annexed marked "**FA33**". The draft policy contained the following:

127.1 A recordal in the third paragraph of clause 1, that the Minister of Energy had issued the Second Directive, "*granting conditional rotation for the stock currently stored at intervals and conditions to be agreed upon.*"

127.2 A stipulation in the final paragraph of clause 1 that the "*stock rotation will be conducted via the upcoming Trading division of SFF*", which trading division was still to be established.

127.3 A further stipulation in clause 2 that the "*stock rotation will be conducted in a manner that will not compromise the security of supply of petroleum products in South Africa as mandated by the government.*"

127.4 A proposal in paragraph 3 of clause 3.1 that as much as "*30% of the strategic crude oil could be loaned out*" per rotation cycle.

127.5 A proposal that the quantity of oil taken up by a particular customer should match the quantity and value of what that particular customer has in storage with SFF at Saldanha (clause 6(a)).

127.6 A proposal that customers would only be identified following a "*rigorous due diligence*" (clause 6(b)).

127.7 A stipulation that any contemplated rotation in response to a particular customer's proposal would "*be taken through the necessary approval channels prior to the product being released to the customer*" (clause 7). The draft also contemplated that customer proposals would "*initially be evaluated by EXCO members for commercial viability thereafter be recommended directly to the Minister of Energy for consideration and approval*" (clause 9).

128 The revised draft Strategic Stock Rotation Policy was accompanied by a Business Case, Business Model and Proposed Structure for the Trading Division that would give effect to the stock rotation authorised by Minister Joemat-Pettersson once it was up and running. As is evident from the covering memorandum to annexure FA33, the drafts were a "*work in progress as more details need to be incorporated, which will include full risk assessment on the activities to be undertaken. Further work on the reports will include the financial and human resources that will drive the initiatives.*"

129 I annex marked "**FA34**" a copy of the extract from the minute of the SFF Exco meeting. As is evident from item 5.1 thereof, the Exco decided:

> "*that a team compromising of the COO, GM's Projects, Corporate Services and Operations along with the Board Chair be established which will review the Strategic Stock Policy. They are also to investigate more extensively the different funding mechanisms available so that we are then able to find one suitable and viable for our organisation (as a Strategic stock holder) bearing in mind the infrastructure impact and finalise the document which is to be presented to Board*" (sic).

130 It is clear that, when the SFF Exco met on 3 December 2015, its members (other than Mr Gamede) were not aware of the extent to which Mr Gamede and Minister Joemat-Pettersson had already given effect to the Impugned Transactions, including the fact that bids had already been submitted by interested parties, evaluated by Mr Gamede and recommended to the Minister for approval. It is also clear that neither Mr Gamede nor Minister Joemat-Pettersson had any intention of disposing of the Oil Reserves through the mechanisms, processes and policies that the SFF Exco was engaged in formulating.

131 Ms De Wet performed a review addressing the impact that reversing the Ministerial Directive would have on SFF's operational activities and plans.

132 On 7 December 2015, Minister Joemat-Pettersson responded to Mr Gamede's earlier correspondence and issued another approval (the **Second Approval Notice**). A copy of the Second Approval Notice is annexed marked "**FA35**". In that notice, Minister Joemat-Pettersson refers to Mr Gamede's correspondence of 6 December 2015. I have not seen a copy of any correspondence sent by Mr Gamede on this date. I have assumed that Minister Joemat-Pettersson intended to refer to the request referred to in annexure FA31 and the similar correspondence ostensibly sent to Vitol, Taleveras and GNI.

133 The Second Approval Notice reads in relevant part as follows:

> *"Pursuant to your request for approval for rotational sale and purchase of strategic oil reserves transaction with the following entities;*
>
> *1. Venus Rays Trade (Pty) Ltd*
>
> *2. Vitol*
>
> *3. Taleveras*
>
> *4. GNI/Enviroshore*
>
> *Given your assurance that you have perused the proposals as submitted by the above mentioned entities, and that you are satisfied with the sound propositions made. I hereby approve in line with the Ministerial Directive of the 12th November 2015, subject to the conditions as stipulated in your letter of request."*

134 It should be noted that Minister Joemat-Pettersson made no reference to or enquiries regarding the procurement process that had been followed by Mr Gamede, the merits of the bids in question, the evaluation and adjudication criteria and process adopted by Mr Gamede or approvals from the SFF's sole member (CEF) or the National Treasury. It is also quite clear that she made no effort to apply her mind to any of the bids or other relevant information – Minister Joemat-Pettersson was content simply to accept Mr Gamede's evaluation. Indeed, there is no indication whatsoever that the Minister was even in possession of the bids. I note that that this is the first time that GNI and Enviroshore are referred to as a single or joint entity. I have no knowledge of how the two entities came to submit a joint bid and note that Mr Gamede has indicated (in a documented explanation) that the two entities submitted separate bids. Similarly, I have no knowledge of whether approval was granted in relation to Vitol SA or Vitol.

135 On the following day, 8 December 2015, Mr Gamede corresponded with Vitol, Taleveras and Venus. Copies of his correspondence are annexed hereto, marked "**FA36**" – "**FA38**".

Although Mr Gamede (in a subsequent report) indicated that similar correspondence was sent to GNI, I am unaware and have not had sight of any such correspondence.

136 In terms of annexure FA36 Mr Gamede indicated that he was providing feedback to Vitol "*on your proposal dated 1 December 2015*". I am not aware of any proposal that was submitted on this date. I note that this supposed submission date occurred after the cut-off date stipulated by Mr Gamede for the submission of bids (27 November 2015). It also occurred after Mr Gamede submitted his motivation to Minister Joemat-Pettersson to allow for the disposal of a portion of the Oil Reserves to Vitol (30 November 2015). Quite how Mr Gamede could have submitted a motivation to the Minister regarding a bid that he had not yet received escapes me.

137 Mr Gamede offered 3 million barrels of the Oil Reserve's Basrah crude oil stored in tank 2 to Vitol for "*rotation, sale and purchase purposes*".

138 In terms of "**FA37**", Mr Gamede indicated that he was providing feedback to Taleveras "*on your proposal dated 2 December 2015*". I am not aware of any proposal that was submitted on this date. The records available to SFF and CEF indicate that Taleveras submitted its bid on 4 November 2015. I note that the supposed submission date of 2 December 2015 occurred after the cut-off date stipulated by Mr Gamede for the submission of bids (27 November 2015). It also occurred after Mr Gamede submitted his motivation to Minister Joemat-Pettersson to allow for the disposal of a portion of the Oil Reserves to Taleveras (30 November 2015). Once again, I simply do not understand how Mr Gamede could have submitted a motivation to the Minister regarding a bid that he had not yet received.

139 Mr Gamede offered 2 million barrels of the Oil Reserve (Basrah Light crude oil stored in tank 2) and 2 million barrels of the Oil Reserve (Bonny Light crude oil stored in tank 6) to Taleveras for "*rotation, sale and purchase purposes*".

140 In terms of "FA38", Mr Gamede indicated that he was providing feedback to Venus "*on your proposal dated 30 November 2015*". I am not aware of any proposal that was submitted on this date. I note that the supposed submission date occurred after the cut-off date stipulated by Mr Gamede for the submission of bids (27 November 2015). It also occurred on the very same day that Mr Gamede submitted his motivation to Minister Joemat-Pettersson to allow for the disposal of a portion of the Oil Reserves to Venus.

141 Mr Gamede offered 3 million barrels of the Oil Reserves (Bonny Light crude oil stored in tank 6) to Venus for "*rotation, sale and purchase purposes*".

142 Each of the letters from Mr Gamede to the traders contains the following:

> "*The above quantity of crude oil is offered for rotation, sale and purchase purposes under the following conditions being met which will be legally binding,*
>
> 1. *A sales and purchase agreement be concluded between SFF and your company*
> 2. *A letter of Credit from First class International Bank be opened in favour of SFF*
> 3. *Storage agreement be concluded for the abovementioned volume at a rate of US$0.13/bbl/month.*
> 4. *Product be rotated every six (6) months from the contract start date.*
> 5. *Granting of an option to SFF to purchase the product in tank as and when is deemed necessary at a price that is discounted by two (2) US Dollars.*
>
> *This offer shall become legally binding upon your acceptance and signature*" (sic).

143 Critically, the letters from Mr Gamede did not say that the offer was contingent on the SFF Board approval – whilst this is precisely what Mr Gamede undertook to get in his letter to the Minister (annexure FA31).

144 CEF and SFF do not have any record of letters of acceptance from the four traders with whom Mr Gamede responded.

145 After 8 December 2015, Mr Gamede commenced negotiations with the four traders. No other officials from SFF were involved in these negotiations. In an explanatory report Mr Gamede indicated that, during the contract negotiation process, "*Enviroshore/GNI*" was disqualified "*as they wanted to lift and sell immediately.*" I am not aware of whether this supposed disqualification was communicated to GNI or to Enviroshore.

**THE AGREEMENTS WITH THE BUYERS**

146 For the purposes of completeness, I set out the material terms of each of the impugned agreements.

**<u>The agreements with Venus</u>**

**Purchase and Sale Agreement**

147 On or about 15 December 2015, and in Cape Town, Mr Gamede and a duly authorised representative of Venus concluded a "*Crude Oil Sale and Purchase Agreement*" in terms of which Venus purchased 3,000,000 barrels of Bonny Light crude oil (the **Venus Sale Agreement**). A copy thereof is annexed marked "**FA39**".

148 The purchase and sale agreement had, *inter alia,* the following express material terms:

148.1 Venus would purchase and take from SFF and SFF would sell and deliver to Venus at Tank 6, SFF storage facility, Saldanha Bay, 3 million barrels of Bonny Light crude oil (clause 2.2.1 read with 1.1.1).

148.2 The purchase price would be in US$ per barrel and would be the arithmetic average of the mean of all published Platt's High and Low quotations for "*dated Brent*" as published in Platts Crude Oil Marketwire under the heading "*Key Benchmarks*" for the five consecutive quotations from 26 December 2015 to 30 December 2015 both dates inclusive, excluding holidays, Saturdays and Sundays, "*minus 4US$ spot 4US$ per barrel*" (clause 3.1).

148.3 The crude oil would be delivered by SFF to Venus at the Saldanha Bay terminal. On the day of delivery "*[t]itle to and risk of the Crude Oil shall pass from SFF to Venus at Saldanha Terminal Tank 6*" (clause 5).

148.4 Venus acknowledged that the crude oil being sold formed part of the "*[Oil Reserves] for the Government of the Republic of South Africa's strategic needs*" and therefore should there be a shortage or emergency situation and the stock be required for strategic reasons, at any time before the lifting of the product from Tank 6, SFF would "*have an option to buy back the crude from Venus at a price to be agreed between the parties*" (clause 10.1).

149 The purchase and sale agreement was subject to the fulfilment of the following conditions precedent, set out in a separate "*Annexure*" to the main sale agreement:

149.1 SFF would concurrently enter into a five-year storage agreement with Venus for the leasing of 3,000,000 barrels of storage in tank 6, to commence no later than the ITT date (clause 2).

149.2 The SFF, Venus and Glencore (being the ultimate buyer of the Bonny Light crude oil) would enter into a tri-partite agreement, on terms acceptable to all parties, recognising:

149.2.1 Glencore's title and ownership of the 3,000,000 barrels of crude oil held in tank 6 at the Saldanha Bay storage terminal;

149.2.2 Glencore's access rights to the crude oil at all times;

149.2.3 Glencore being the sole party responsible for all instructions to SFF in relation to the crude oil; and

149.2.4 the responsibility of Glencore to pay all storage fees in relation to the crude oil (clause 3).

149.3 The conclusion of an oil rotation and buy-back option (to be incorporated in the storage agreement) such that at the end of the storage period, SFF would have the first right to purchase the crude oil in tank 6 from Glencore via Venus at the prevailing market price for the quality and location of the crude oil, failing which Glencore would be duty bound to remove its product from tank 6, alternatively SFF would elect for a new quality of crude oil to be redelivered into that tank after the original product has been exported to Glencore, however this new quality crude oil would be sold to SFF by Glencore via Venus at the prevailing market price for the quality and location of the crude oil sourced for replenishment (clause 4).

**Amendments to the Purchase and Sale Agreement**

150 On or about 29 December 2015, Mr Gamede and Venus concluded an amendment to the Venus Sale Agreement (**Amendment 1**). A copy thereof is annexed marked "**FA40**".

151 The material terms of Amendment 1 were, *inter alia*, as follows:

151.1 Any and all references to Venus Trading in the storage agreement would be amended and replaced by Venus Rays Trade (Pty) Limited (clause 2.1).

151.2 The definition of date of delivery was amended from 1 January 2016 to 00:01 hours local time on 30 December 2015 (clause 2.2).

151.3 The price would be amended to be the arithmetic average of the mean of all published Platt's High and low quotations for "*dated Brent*" as published in Platt's Crude Oil Marketwire under the heading "*Key Benchmarks*" for the five consecutive quotations from 4 January 2016 to 8 January 2016, both dates inclusive, excluding holidays, Saturdays and Sundays, minus 4US$ spot 4US$ per barrel (clause 2.3).

151.4 Clause 5.2 of the Venus Sale Agreement was replaced with a provision that title to and risk in the crude oil would pass from SFF to Venus at Saldanha terminal tank 6 on 00:01 local hours local time on 30 December 2015.

151.5 Clause 10 relating to the security of supply during shortage and emergency situations (buy-back option) and clause 17 setting out the dispute resolution mechanism were deleted (clauses 2.8 and 2.10).

152 It appears that, on or about 8 February 2016, Mr Gamede and Venus concluded a second amendment to the Venus Sale Agreement (**Amendment 2**). Despite diligent search, the

applicants have not been able to trace a copy of Amendment 2. I therefore invite the first respondent to make same available to the applicants and to this Honourable Court.

153 On or about 29 February 2016, Mr Gamede and Venus concluded a third amendment to the Venus Sale Agreement (**Amendment 3**). A copy thereof is annexed marked "**FA41**".

154 The material terms of Amendment 3 were, *inter alia*, as follows:

154.1 Clause 2.1 was inserted to record the market conditions that prevailed at the time the parties concluded the purchase and sale agreement for the Bonny Light and Basrah (clause 2.1).

154.2 The parties agreed that the selling price for the barrels of Bonny Light crude oil would be "*27.075USD bbl plus 3.0 USD bbl*" (clause 2.2). With Venus purchasing 3,000,000 barrels of Bonny Light, the total purchase price of the transaction was therefore US$90,225,000. On 29 February 2016, US$1 would have purchased approximately R15.87, which translated into a total purchase price of R1,431,870,750 for the 3,000,000 barrels of Bonny Light that Mr Gamede sold.

154.3 Nigerian National Petroleum Corporation official selling price for January 2016 was annexed to Amendment 3 as annexure "A" (clause 2.3.1).

154.4 Platt's quotation for Dated Brent for the applicable month of January 2016 was annexed to Amendment 3 as annexure "B" (clause 2.3.2).

**Storage Agreement**

155 On or about 15 December 2015, and in Cape Town, Mr Gamede and Venus duly represented by its authorised representative concluded a storage agreement. A copy thereof is annexed marked "**FA42**".

156 The express material terms of the storage agreement were, *inter alia*, as follows:

156.1 SFF undertook to:

156.1.1 store the crude oil received via ocean-going vessels from Venus or its duly authorised representatives in tank 6 of the Saldanha terminal (clauses 1.1.1 and 7.2.1);

156.1.2 provide Venus with final quantities of the discharged crude oil received, supported by documentation evidencing receipt of the crude oil, its quantity and quality as certified by an independent inspector (clauses 1.1.2 and 7.2.2); and

156.1.3 the storage agreement would be effective from 1 January 2016 until 31 December 2020 (clause 2.1).

156.2 To secure the performance of its obligations, Venus would request a bank surety insurance company or other financial institution acceptable to SFF to issue a performance or surety bond or insurance policy in the amount equal to the annual storage fee in favour of SFF, which performance bond would be valid for the duration of the storage agreement (clause 3.1).

156.3 Venus would be liable to pay SFF the following fees and charges:

156.3.1 a fixed monthly fee of US$0.11 bbls exclusive of value added tax, which fee would escalate at the rate of 6% to be compounded annually (clauses 4.1.1 to 4.1.3);

156.3.2 fees for nitrogen blanketing when cargoes are loaded at US$ 0.028 per bbl and applicable increases as and when applied by the supplier (clause 4.1.4);

156.3.3 clearing and forwarding fees (clause 4.1.5);

156.3.4 oil pollution fees in respect of pollution control services as specified in the amount of US$ 0.039 per barrel of crude oil discharged from the vessel (clause 4.1.6);

156.3.5 all cargo dues as denoted in annexure "A" of the agreement (clause 4.1.7);

156.3.6 in the event that there is a shortage of energy in the Republic of South Africa, SFF reserves the right to attach the crude oil stored by Venus at its own cost. No less than 24 hours notification of distribution of crude oil for strategic purposes must be given to Venus (clause 6.5); and

156.3.7 The crude oil may be sold by Venus to a third party subject to the approval of SFF (clause 16.3).

157 Clause 2.4 of Amendment 1 ("FA42") amended clause 4.2 of the Storage Agreement to state that payment shall be made to the bank account designated by SFF within (7) seven days from the completion of the ITT date against (i) SFF's commercial invoice (telex or fax acceptable), (ii) inspector certificate of quality and quantity, (iii) Holding Certificate (Tank Warrant) issued by SFF to Glencore Energy UK Limited (**Glencore**) in a form acceptable to Glencore and (iv) SFF's warranty of title in the below format:

"*1. We hereby warrant to you that:*

*(A) At the time of such transfer we hold full legal and beneficial title in and lawful right to sell, transfer and effect delivery of the Crude to you; and*

*(B) Full legal and beneficial title in the Crude Oil has been transferred to you in accordance with the Sale Contract free from any and all liens, charges and encumbrances of any nature whatsoever.*

*2. We hereby irrevocably and unconditionally undertake to indemnify you and hold you harmless against any and all (i) claims made against you*

*by any third party and/or (ii) losses, costs (including but not limited to reasonable legal fees), damages and expenses which you may suffer, incur or be put to, as a result of a breach of any of the above listed warranties...*"

**Tripartite SFF Terminal Agreement**

158 On or about 12 January 2016, Mr Gamede, Venus and Glencore concluded a tripartite SFF terminal agreement (**Tripartite Agreement**). A copy thereof is annexed marked "**FA43**". I emphasise that I can find no approvals or requests from Mr Gamede to either the SFF Board or the Minister, nor any resolution from the SFF board, which would have given Mr Gamede the authority to enter into these agreements. The Tripartite Agreement is, accordingly, unlawful and falls to be set aside.

159 The express material terms of the Tripartite Agreement included that:

159.1 Venus has agreed to sell the 3,000,000 barrels of Bonny Light Crude Oil (**Stored Crude Oil**) stored in tank 6 to Glencore (Recital clause);

159.2 the Tripartite Agreement is effective from 30 December 2015 until the earlier of (i) notification by Glencore to SFF that it has removed, discharged or otherwise disposed of the Stored Crude Oil form the Tank or transferred title in the Stored Crude Oil to SFF, Venus or a third party as the case may be or (ii) the date of expiry of the Storage Agreement (which, for the avoidance of doubt, shall also mean the date of early termination in the event that Venus and Glencore give SFF a joint instruction in accordance with clause 3.3(c) (clause 2.1); and

159.3 SFF would have the first right to purchase the 3,000,000 bbls of Bonny light crude oil which is stored in tank 6, following expiry of the storage agreement at the

prevailing market price for the grade and location of the crude oil on terms to be agreed between SFF and Glencore before transfer to title and risk.

160 On a proper interpretation of all the above agreements, it is abundantly clear that they are all interrelated one way or another. They all arise from the purchase and sale agreement dated 15 December 2015. There is also a huge measure of cross-referencing between the agreements.

161 I am advised that if the purchase and sale agreement is successfully set aside, it follows that the other agreements must as a consequence follow suit.

**The Agreements with Taleveras**

**Purchase and Sale Agreement**

162 On 28 December 2015, and in Cape Town, Mr Gamede and Taleveras duly represented by its authorised representative concluded a "*Crude Oil Sale and Purchase Agreement*" for the Basrah equivalent that was currently stored in tank 2 at Saldanha Bay. A copy thereof is annexed marked "**FA44**".

163 On 28 December 2015, Mr Mayaphi witnessed the Taleveras contract concluded by Mr Gamede. Mr Mayaphi assumed that everything was in order with the contract because he was asked to witness it by the acting CEO Mr Gamede, who is fully aware of the SFF Board processes and approvals, and because there had been an "*instruction*" from the Minister.

164 The express material terms of the purchase and sale to agreement were, *inter alia*, as follows:

164.1 Taleveras would purchase and take from SFF and SFF would sell and deliver to Taleveras 2,000,000 bbls of crude oil at tank 2 (clause 2.2.1).

164.2 The final price would be agreed after a mutually appointed independent inspector's certificate of quality and quantity was issued and would include the discount as agreed between the parties (clause 3.2).

164.3 The price would be calculated as the average of the dated Brent mean quotations as published in Platt's daily Oil Marketwire effective for three deemed consecutive publishing days after certificate of quality and quantity date (clause 3.3).

164.4 Payment would be made within 30 days from the date of delivery against SFF's commercial invoice, the inspector's certificate of quality or quantity and the SFF warranty of title issued or endorsed to the order of Taleveras or its bank (clause 4.1).

164.5 The crude oil would be delivered at the SFF storage facility in Saldahna and the title and risk would pass from SFF to Taleveras free from all encumbrances in January 2016 (clause 5.1).

164.6 If, at any time in SFF's opinion, there is a shortage of supply of crude oil in South Africa, SFF would have the first right of refusal to the crude oil if it is still stored in tank 2 (clause 10.1).

165 On 28 December 2015, and in Cape Town, Mr Gamede and Taleveras duly represented by its authorised representative concluded a "*Crude Oil Sale and Purchase Agreement*" for the Bonny light crude oil that was currently stored in tank 6 at Saldahna Bay. A copy thereof is annexed marked "**FA45**".

166 The express material terms of the purchase and sale agreement were, *inter alia*, as follows:

166.1 Taleveras would purchase and take from SFF and SFF would sell and deliver to Taleveras 2,000,000 barrels of crude oil at tank 6 (clause 2.2.1).

166.2 The final price would be agreed after a mutually appointed independent inspector's certificate of quality and quantity was issued and would include the discount as agreed between the parties (clause 3.2).

166.3 The price would be calculated as the average of the dated Brent mean quotations as published in Platt's daily Oil Marketwire effective for three deemed consecutive publishing days after certificate of quality and quantity date (clause 3.3).

166.4 Payment would be made within 30 days from the date of delivery against SFF's commercial invoice, the inspector's certificate of quality and quantity and the SFF warranty of title issued or endorsed to the order of Taleveras or its bank (clause 4.1).

166.5 The crude oil would be delivered at the SFF storage facility in Saldahna and the title and risk would pass from SFF to Taleveras free from all encumbrances in January 2016 (clause 5.1).

166.6 If, at any time in SFF's opinion, there is a shortage of supply of crude oil in South Africa, SFF would have the first right of refusal to the crude oil if it is still stored in tank 6 (clause 10.1).

**Amendments to the Purchase and Sale Agreements**

167 On or about 29 January 2016, and in Johannesburg, Mr Gamede and Taleveras duly represented by its authorised representative concluded an amendment to the purchase and sale agreements. A copy of the amendment is annexed marked "**FA46**".

168 The express material terms of the amendment were that clauses 3.2 and 3.3 were deleted and substituted to the effect that the price of Bonny Light crude oil would be 30.000 US$ per barrel and Basra Light crude oil would be 26 US$ per barrel (clause 1.3).

169 On or about 22 February 2016, and in Cape Town, Mr Gamede and Taleveras duly represented by its authorised representative concluded a further amendment to the purchase and sale agreements. A copy of the amendment is annexed marked "**FA47**".

170 The express material terms of the amendment were, *inter alia*, as follows:

170.1 Clause 1.3.2 was inserted to record the market conditions that prevailed at the time the parties concluded the purchase and sale agreements for the Bonny Light and Basrah.

170.2 Clause 3.1 of the purchase and sale agreement and clause 1.3 subclause 3.2.1 of the addendum signed on 29 January 2016 were deleted and substituted with the following:

170.2.1 Bonny Light would be sold in accordance with the price formula established in clause 1.3 of the addendum (clause 1.4.1.1); and

170.2.2 the Bonny Light price would therefore be 27.075 plus 3.00 US$ per barrel (clause 1.4.1.2).

170.3 Nigerian National Petroleum Corporation official selling price for January 2016 was annexed as annexure "A" (clause 1.5.1).