170.4 Platt's Quotation for Dated Brent for applicable month of January 2016 was annexed as annexure "B" (clause 1.5.2).

Guarantee / Letter of Credit

171 On or about 10 February 2016, Natixis (which holds 100% shareholding in Contango as per annexure "**FA48**" attached hereto and dated 11 February 2016) issued a letter of credit/guarantee in favour of SFF in the total amount of 112,000,000 US$ valid until 28 February 2016. A copy of the letter of credit/guarantee is annexed marked "**FA49**".

Novation Agreement

172 On or about 24 June 2016, Mr Gamede and Taleveras, duly represented by its authorised representative, concluded a novation agreement (the **Novation Agreement**). A copy of the Novation Agreement is annexed marked "**FA50**".

173 The express material terms of the novation agreement, *inter alia*, were as follows:

173.1 The purchase and sale agreement dated 28 December 2015 and the addendum thereto dated 28 January 2016 for the supply of 4,000,000 barrels of crude oil by Taleveras to SFF would be rescinded (item 1 to the Preamble).

173.2 The purchase and sale agreement, as amended, would be replaced by the Novation Agreement, which Novation Agreement was valid until 23 July 2021 (item 2 to the Preamble).

173.3 The seller is Taleveras and the purchaser is SFF (clause 1).

173.4 The delivery quantity would be in lots of 15,000 to 30,000 metric tons +/- 10 at SFF's option (clause 3).

173.5 Taleveras may elect to deliver in bigger lots of 60,000 metric tons +/- 10% subject to SFF's acceptance that would not be unreasonably withheld (clause 3).

173.6 The price would be in US$ per metric ton and guiding pricing formula would as follows:

173.6.1 JET A1: average mean quotations under PLATTS CIF NEW for JET A1, as published in Platt's for three consecutive publishing days around vessel bill of lading date on a 1-1-1 basis with vessel bill of lading date as day 2 plus an agreed premium (clause 5).

173.6.2 PMS (Gasoline): average mean quotations under Platt's EUROPEAN FOB BARGES 10 PPM gasoline as published in Platt's for three consecutive publishing days around vessel bill of lading date on a 1-1-1 basis with vessel bill of lading date as day 2 plus an agreed premium (clause 5).

173.6.3 Automotive Gasoil: average mean quotations under ICE GASOIL FUTURES as published in ICE GASOIL FUTURES for three consecutive publishing days around vessel bill of lading date on a 1-1-1 basis with vessel bill of landing date as day 2 plus an agreed premium (clause 5).

173.7 The price would be rounded off to three decimal places with the third decimal to be increased to the upper digit whenever the fourth decimal place is five or greater than five and all pricing premium would always be consistent with the market as at the time of supply (clause 5).

173.8 Title and risk of loss or damage to the product shall pass to Taleveras on delivery date, as evidenced by SFF's execution and issuance of all endorsable tank warrants and endorsable tank holding release certificates free from any lien or encumbrances

to the order of buyer or buyers specified bank for ITT transfer. SFF hereby expressly warrants that, upon execution of tank warrants, it will no longer have marketable title to the goods, and all goods are free and clear of any liens or encumbrances and will have on delivery, full right and authority to transfer such title and effect delivery of such product to the buyer. (clause 8).

Storage Agreements

174 On or about 15 December 2015, and in Cape Town, Mr Gamede and Taleveras, duly represented by its authorised representative, concluded a storage agreement for the crude oil in tank 2. A copy of the storage agreement is annexed marked "**FA51**".

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

175.1 SFF undertook to:

175.1.1 store the crude oil received via ocean-going vessels from Taleveras or its duly authorised representatives in tank 2 of the Saldanha terminal (clauses 1.1.1 and 7.2.1);

175.1.2 provide Taleveras 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

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

175.2 To secure the performance of its obligations, Taleveras 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 of 1,000,000 US$ in favour of SFF, which performance bond would be valid for the duration of the storage agreement (clause 3.1).

175.3 Taleveras would be liable to pay SFF the following fees and charges:

175.3.1 A fixed monthly fee of US$0.13 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).

175.3.2 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).

175.3.3 Clearing and forwarding fees (clause 4.1.5).

175.3.4 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).

175.3.5 All cargo dues as denoted in annexure "A" of the agreement (clause 4.1.7).

176 On or about 15 December 2015, and in Cape Town, Mr Gamede and Taleveras, duly represented by its authorised representative, concluded a storage agreement for the crude oil in tank 6. A copy of the storage agreement is annexed marked "**FA52**".

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

177.1 SFF undertook to:

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

177.1.2 provide Taleveras 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

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

177.2 To secure the performance of its obligations until the commencement date, i.e. 1 January 2016, Taleveras would within 10 (ten) days after the date of the storage agreement 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 of 1,000,000 US$ in favour of SFF, which performance bond would be valid for the duration of the storage agreement (clause 3.1).

177.3 Taleveras would be liable to pay SFF the following fees and charges:

177.3.1 A fixed monthly fee of US$0.13 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).

177.3.2 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).

177.3.3 Clearing and forwarding fees (clause 4.1.5).

177.3.4 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).

177.3.5 All cargo dues as denoted in annexure "A" of the agreement (clause 4.1.7).

178 On or about 4 February 2016, Mr Gamede, Taleveras, duly represented by its authorised representative, and Natixis, duly represented by its authorised representative, concluded a side letter to the storage agreements. A copy of the side letter is annexed marked "**FA53**".

179 The express material terms of the side letter were *inter alia* as follows:

179.1 Taleveras and Contango had or were to conclude a master sale and purchase agreement under which Contango would:

179.1.1 purchase the crude oil stored in accordance with the storage agreements in tank 2 and tank 6 at Saldanha terminal (clause 1.3(a)); and

179.1.2 acquire and accept cession of all of Taleveras' rights, entitlements and benefit of any nature whatsoever in and interests and claims of any nature whatsoever in the crude oil (clause 1.3(b)).

179.2 SFF approved the transfer of title of the crude oil from Taleveras to Contango (clause 2.2).

179.3 Contango appointed Taleveras to act as its agent (clause 3.1(c)).

179.4 Contango was not a party to or bound by the terms of the storage agreements and would at no time be liable to SFF for any obligations or duties of Taleveras (clause 3.1(d)).

The Agreements with Vesquin

Purchase and Sale Agreement

180 On 20 January 2016, and in Geneva, Mr Gamede and Vesquin, duly represented by an authorised representative, concluded a purchase and sale agreement for 3,000,000 barrels in tank 2. A copy of the purchase and sale agreement is annexed marked "**FA54**".

181 I emphasise that, quite apart from the various other grounds of review discussed elsewhere in this affidavit, which also apply to the decision to conclude an agreement with Vesquin (and the resulting agreements), the Second Approval Notice made no mention of Vesquin. Even assuming that the Minister's approval was without fault (which is denied for the reasons discussed elsewhere in this affidavit), the approval did not permit SFF to enter into any agreement with Vesquin. This is an additional reason that the decision to enter into the agreement with Vesquin and the resultant contract with Vesquin are unlawful and fall to be set aside.

182 The express material terms of the agreement were *inter alia* as follows:

182.1 SFF must rotate Oil Reserves held in Saldanha Bay in line with the ministerial directive received and to ensure that the quality of the Oil Reserve is consistent and relevant to the needs of the South African refinery system (paragraph (a) of the preamble).

182.2 SFF holds certain Oil Reserves in tank 2, which was originally Basrah light crude quality and, over time, this crude oil has been blended and/or mixed with other grades of non-Basrah light quality or origin (paragraph (b) of the preamble).

182.3 It is imperative for the strategic requirements of South Africa not to be prejudiced adversely, therefore measures are to be put in place to guarantee a clear plan of security of supply in the event of a declaration of emergency by the Minister (paragraph (d) of the preamble).

182.4 SFF would sell to Vesquin and Vesquin would purchase from SFF 3,000,000 barrels +/-10% in Vesquin's option of blend sour crude oil in tank 2 (clauses 1, 2, 3 and 4).

182.5 SFF would conclude a storage agreement with Vesquin and Vitol for the space in tank 2 (clause 5.1).

182.6 For any unsold barrels that are stored by Vesquin in tank 2 pursuant to the storage agreement, Vesquin would grant SFF the first right of refusal to borrow, with the replacement to be arranged, through Vesquin for the account of SFF within a 30 day period. This option would only be exercised in the event of a declared event of supply emergency by the Minister and after depletion of the other quantity of Oil Reserves held by SFF (clause 5.2).

182.7 In the event that Vesquin is not holding a sufficient quantity of unsold barrels at the time of a declared supply emergency by the Minister, Vesquin undertook to deliver to Saldanha Bay within 30 to 40 days of declaration for sale to SFF, at mutually agreed market terms prevailing at time of delivery (clause 5.2).

182.8 The price would be in US$ per net US barrel based on a mutually agreed method of measurement of the crude oil in tank 2 using the average of the mean quotations as published by the Platt's Crude Oil Marketwire under the heading DATED BRENT CARGOES less a quality adjustment of 8 US$ per net US barrel (clause 6).

182.9 The final price would be calculated to three decimal places and the following arithmetic rules would be applied if the fourth decimal place is:

182.9.1 five or greater than five, then the third decimal place would be rounded up to the next digit; and

182.9.2 less than five then the third decimal place would be unchanged (clause 6).

182.10 Vesquin and Vitol would at a future date sell back to SFF the same or substantially the same quantity of 3,000,000 barrels of crude oil that had been sold to the Vesquin (clause 9).

182.11 The time of resale shall be either on or around termination or expiry of the storage agreement or 30 days after Vitol and Vesquin give SFF notice before expiry of the storage agreement or on a mutually agreed future date (subclauses 9(1), (2) and (3)).

182.12 The price for this sale would be in US$ per net US barrel using the average of the mean quotations as published by the Platt's Crude Oil Marketwire under the heading DATED BRENT CARGOES less a quality adjustment of 8.25 US$ per net US barrel (paragraph 6 of clause (9))

Amendment to the Purchase and Sale Agreement

183 On or about 22 January 2016 and in Geneva, Mr Gamede and Vesquin, duly represented by an authorised representative, concluded an amendment to the purchase and sale agreement. A copy of the amendment is annexed marked "**FA55**".

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

184.1 Reference to "*quantity*" in clause 4 was deleted and replaced with "*3.0 million barrels*" (clause (a)).

184.2 Any other reference to quantity that stated "*3 000 000 bbls +/- 10% in SFF's option*" were also amended to read "*3.0 million barrels*" (clause (b)).

184.3 The delivery date in clause 5 was amended from 31 January 2016 to 22 January 2016 (clause (c)).

184.4 Clause 6 was amended to the effect that the price would be calculated less six point fifty/five point fifty (6.50/5.50) US$ per net US barrel (as opposed to 8) and the quotations to be used were from 25 to 29 January 2016, both days inclusive (clause (d)).

184.5 Clause 9 was amended to the effect that the price for the resale would calculated less a quality adjustment of five point seventy five/six point seventy five (5.75/6.75) US$ per net US barrel (clause (e)).

Storage Agreements

185 On or about 20 January 2016 and in Geneva, Mr Gamede, Vesquin and Vitol SA, both duly represented by an authorised representative, concluded a storage agreement for the

storage of the crude oil in tank 2. A copy of the storage agreement is annexed marked "**FA56**".

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

186.1 The agreement commenced on date of the purchase and sale agreement until 31 January 2019 (clause 2.1).

186.2 SFF undertook to:

186.2.1 receive via ocean-going vessels oy by cross pump from another storage in tank 2 (clause 3.1.1);

186.2.2 provide Vesquin and Vitol 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 (clause 3.1.2); and

186.2.3 execute the loading and discharging of the crude oil into a vessel or other storage tank as nominated and in accordance with Vesquin and Vitol's instructions (clause 3.1.3).

186.3 SFF agreed to grant to Vesquin and Vitol the right to use storage tank 2 and to receive and store, up to a maximum volume of 3,000,000 bbls, in Vesquin and Vitol's option (clause 4.1).

186.4 Vesquin and Vitol agreed to pay SFF the following fees and charges:

186.4.1 A storage fee of USD 0.11 per barrel of crude oil stored in the tank 2 from time to time per calendar month pro-rata and any other duties of levies by the Republic, exclusive of Value Added Tax (clauses 7.1 and 7.2).

186.4.2 Oil pollution control fees in the amount of USD 0.039 barrels in respect of pollution control services (clause 7.3).

186.4.3 All cargo dues as denoted in annexure "A" of the storage agreement (clauses 7.4 and 7.6).

186.4.4 The cost of nitrogen blanketing to be charged at USD 0.02 per barrel and applicable to increase as and when applied by the supplier (clause 7.7).

186.5 As security for the payments of any amounts due by Vesquin or Vitol to SFF in terms of the purchase and sale agreement, Vesquin and Vitol would amend the parent company guarantee in favour of SFF, which guarantee would remain valid and enforceable until 31 January 2019 or Vesquin and Vitol's obligations in respect of payment of any amount have been fulfilled (clauses 8.5 and 8.6).

186.6 SFF would offer to Vesquin and Vitol on a first refusal basis any additional space that becomes available and/or for which storage agreements applicable at the time of this storage agreement has expired subject to the South African government's strategic stock provisions and requirements (clause 28).

Amendment to the Storage Agreement

187 On or about 17 May 2016, Mr Gamede, Vesquin and Vitol SA, both duly represented by an authorised representative, concluded an addendum to the storage agreement relating to tank 2. A copy of the addendum is annexed marked "**FA57**".

188 The express material term of the addendum was that clause 28 of the storage agreement referred to above be deleted (clause 1.3).

OTHER EVENTS FOLLOWING THE DECISION TO CONCLUDE THE IMPUGNED AGREEMENTS

189 On 13 January 2016, Mr Mayaphi questioned whether the Impugned Transactions complied with s54 of the PFMA and prepared a memorandum setting out his concerns, which he sent to Mr Gamede. A copy of the memorandum is annexed marked "**FA58**". Mr Mayaphi did not receive a response to his memorandum.

190 On 19 January 2016, the SFF Exco held its first meeting for the year. A copy of an extract of the unsigned minute is annexed marked "**FA59**".

191 At the meeting, Mr Gamede submitted a memorandum regarding transferring Mr Mayaphi from his position as General Manager: SHEQ and Risk to the position of General Manager of the still-to-be-established Trading Division. A copy of the memorandum is annexed marked "**FA60**". The memorandum is clearly premised on the idea that the Second Directive and the First Approval Notice would be given effect to by the Trading Division once it was up and running. I quote the relevant excerpts:

> "*SFF received a Ministerial Directive on the 8th October 2015 and subsequently another one on the 12 November 2015, authorizing the rotation of strategic stock through selling and repurchasing the entire 10.3 million barrels currently stored in Saldanha Tank Farm. The respective Directives necessitated the establishment of the Trading division to ensure that the implementation is carried out seamless. Following on the various Exco*

discussions, resolutions were taken that facilitated the moving of GM SHEQ & Risk to occupy the GM position in the Trading Division...

In order to facilitate the rapid setting up of the Trading division, it is necessary and prudent that the division be populated with immediate effect. The proposed structure is as follows...

It is recommended that the members of EXCO NOTE and recommend to SFF BOARD the SFF Trading division establishment" (sic).

192 This memorandum was therefore wholly inconsistent with the fact that Mr Gamede had already executed the Impugned Transactions in issuing offer letters to four traders, concluding disposal agreements with two traders and negotiating another agreement with a third trader. Despite the contents of the memorandum, it is clear that there would be no aspect of the Second Directive and the First Approval Notice left for the Trading Division (once established) to implement other than to manage the agreements that he had already concluded.

193 At the meeting of 19 January 2016, Mr Gamede informed the other members of the Exco that he had in fact sold the entire Oil Reserves. The other members of the Exco were shocked: they were not aware of, and had not been involved in, any of the processes described above, barring Mr Mayaphi's witnessing of the Taleveras contracts on 28 December 2015.

194 Mr Ngqongwa immediately asked for the commercial terms of the sale, but received no response from Mr Gamede.

195 At the same Exco meeting Mr Gamede also explained that there would be a restructuring of SFF's executive management and that Ms de Wet would move from General Manager: Commercial to General Manager: Corporate Services (item 5 of annexure FA59). It

seems that Mr Mayaphi took over responsibility for the Commercial portfolio. At this point Ms de Wet's participation in establishing the trading division ceased.

196 On 25 January 2016, Mr Ngqongwa discovered a fax that referred to the cancellation of the tripartite agreement between SFF, Glencore and Venus. Following on from his earlier enquiry on 19 January 2016, and as he had still not been provided with the copies of the relevant contracts, Mr Ngqongwa enquired whether the tripartite agreement could contain the relevant commercial terms in relation to the disposal to Venus. Mr Ngqongwa received no response to his enquiries.

197 Standard Bank sent correspondence to SFF regarding a payment from Vitol under one of the Impugned Agreements. Mr Ngqongwa enquired from Mr Gamede about banking correspondence and the contracts of sale. In Mr Ngqongwa's presence Mr Gamede called through to Vitol's offices in Geneva in an attempt to procure copies of addenda to the sale contract. He spoke to an employee of Vitol and obtained an undertaking to receive the further documentation. On 27 January 2016, the SFF Board convened. A copy of an extract from the unsigned minute of that meeting is annexed marked "**FA61**".

198 The SFF Board approved the preliminary steps for the establishment of the new Trading Division, to be headed up by Mr Mayaphi. It noted that "*a more detailed report on the planned new Trading division would be incorporated into the corporate plan and be presented at the next meeting*".

199 In relation to the Second Directive, the SFF Board noted as stated in item 4.2 of annexure FA61 that "*the actual strategy [for implementation] and the corporate plan would be reviewed more specifically with regards to the budget.*" It also noted as stated in item 3.3.4 that the submission regarding the "*Rotation and Trading Policy Procedure*" would be "*presented at the next meeting*". In addition, the SFF Board noted that the letter

regarding the clarification of the Minister's intentions regarding the funding of the strategic stock rotation had been sent and that "*the meeting would be arranged with the Minister in this regard.*" In short, the SFF Board thought that the Second Directive and the First Approval Notice would be implemented in the future, once the necessary approvals had been issued and processes complied with.

200 Even though Mr Gamede and other members of the SFF Exco were present, the SFF Board was not made aware of the Second Approval Notice or the extent to which Mr Gamede had implemented the Impugned Transactions. By the time the SFF Board sat, Mr Gamede had not only issued the request-for-proposal letters, accepted bids, evaluated and adjudicated those bids, issued offer letters and commenced negotiations with the traders, he had concluded the Impugned Agreements that disposed of the entirety of the Oil Reserves.

201 On 4 February 2016, Mr Gamede instructed the finance department to issue an invoice in respect of the Taleveras sale contract. Mr Ngqongwa instructed his staff not to proceed with the issuing of the invoice as, at that stage, he had not yet been furnished with a copy of the impugned agreement relating to Taleveras. This led to a disagreement between Mr Gamede and Mr Ngqongwa, which resulted in Mr Gamede proceeding to authorise the invoice himself.

202 On 5 February 2016, the SFF Board convened again. A copy of the extract of the minute of this meeting is annexed marked "**FA62**".

203 The members of the SFF Board agreed as recorded in item 4.1 that the "*comprehensive trading business plan should be prepared and be presented at the next [Budget and Audit Review Committee] meeting.*"

204 They were also presented with a "*Trading Report*". In this regard, after being informed of the Second Approval Notice and the Disposal Process implemented by Mr Gamede for the first time, the SFF Board noted the following as item 5.1:

> "- *It was reported that SFF received the Ministerial directive authorizing the rotation of strategic stock through selling and repurchasing of the 10.3 million barrels stored in Saldanha tankfarm.*
>
> - *The projected revenues would be based on the various discounts offered as per the quality of the material.*
>
> - *It was stated that Vitol, Venus and Televeras were three companies considered for the stock rotation purposes. It was noted that all the three companies were expected to present the financial guarantee to SFF to secure the given quantities by 31 January 2016.*
>
> - *It was agreed that Vitol and Televeras transactions be approved*" (sic).

205 Regarding SFF's interactions with Venus, noted in item 5 under the heading "*Venus*", the SFF Board recorded the following:

> "- *It was noted and agreed that Venus would be given 30 days to perform in terms of the contract with SFF and failure to that the contract would be terminated. Furthermore the Board would appoint two people to engage directly with the SFF political principal in this regard. The appointed people would have to meet with the Minister urgently. It was noted that the Minister had the report and should be notified by the appointed people that Venus was not performing in terms of the agreement.*
>
> - *It was reported that SFF signed the sale and purchase as well as the storage contract for 3 years with Venus and SFF was charging Venus for storage.*
>
> - *It was AGREED that the SFF Management would draft the letter to Venus indicating their non-performance and request to review the terms of the contract taking into account the pricing.*"

206 The SFF Board purported to grant its *ex post facto* approval to the Impugned Agreements concluded with Taleveras and Vitol on 5 February 2016. No such approval was granted in respect of Venus.

207 I note that the members of the SFF Board made no enquiry into the process in terms of which the traders had been selected, the content of the bids, the evaluation and adjudication criteria adopted in relation to the bids, the extent to which Mr Gamede had complied with the applicable regulatory and policy framework in concluding the agreements or the extent to which the necessary approvals had been obtained. Moreover, the SFF Board did not have copies of any of the sale contracts before it when it deliberated on the Impugned Agreements concluded at that stage. The *ex post facto* approval by the SFF Board therefore served no purpose because the disposal of the Oil Reserve still did not comply with the applicable procurement processes discussed below. The members of the board were simply not in a position to grant any approvals as they were not in possession of the relevant information and documentation.

208 Mr Mayaphi submitted the Trading Policy at this meeting. At this meeting the SFF Board also *prima facie* approved the sale contracts in relation to Vitol and Taleveras. Mr Mayaphi had proposed that 30% of the Oil Reserves be rotated (but by then the Impugned Agreements had already been concluded). For the first time the members of the SFF Board, as well as Mr Ngqongwa and Mr Nkutha, were provided with copies of the Impugned Agreements (although Mr Ngqongwa had received a copy of the Taleveras agreement on the previous afternoon).

209 On or about 4 February 2016, SFF issued Contango with Tank Warrants relating to a portion of the Oil Reserves held in tanks 2 and 6, Saldanha, respectively, which reserves had been the subject of the Impugned Agreement concluded with Taleveras.

210 On 7 February 2016, Mr Ngqongwa, Mr Nkutha and Mr Mayaphi discussed the sale contract entered into with Vitol. They decided to engage Vitol informally about allowing SFF to hedge its position and not insisting on its tank rental claims in the contract. In addition, they decided that Mr Nkutha would convey their concerns regarding the sale contract to the Chairperson of the Bid and Audit Review Committee (**BARC**). Mr Nkutha travelled to Johannesburg on 9 February 2016 to meet with the BARC Chairperson to discuss their concerns.

211 On 8 February 2016, Mr Nkutha submitted a memorandum to Mr Gamede, setting out his opposition to the disposal of the Bonny Light crude oil reserves and his reasons therefore as discussed with Mr Mayaphi. A copy of this memorandum is annexed marked "**FA63**".

212 In essence, Mr Nkutha strongly objected to, what he considered to be, risky and unfavourable commercial terms of the sale transactions of the entire 5 million barrels of Bonny Light, 3 million of which was sold to Venus and the remaining 2 million was sold to Taleveras.

213 On his view, the "*deal economics for these transactions [were] sub-optimal as the discount given undervalued the crude oil by at least US$5.5/barrel*" resulting in a "*discount to market price*" of ZAR456 million (paragraph (i) "Deal Profitability"). As I have explained above, Bonny Light crude oil is a low sulphur grade of oil which trades at a premium in the international markets given that it has a low corrosive effect on refinery infrastructure and it is less harmful to the environment.

214 In addition to the aforementioned concerns, Mr Nkutha identified further commercial risks in the structure of the transactions. First, he pointed out that the sale and purchase agreements failed to consider freight costs (i.e. the transportation of the oil to Saldanha

Bay). It would have been necessary to include freight costs as the value of the oil included the shipping costs associated with transporting the oil from point of origin (Nigeria) to point of sale (Saldanha Bay).

215 Secondly, Mr Nkutha highlighted that the "*buy back*" option failed to take into account fluctuations to the price of crude oil, thereby exposing SFF to material price risks. Simply put, SFF failed to agree to a favourable, objectively determinable and secure rate at which it would buy back the crude oil sold, meaning that the freight costs and purchase price would have to be determined at the prevailing market rates, further exposing SFF to material commercial risk.

216 Cumulatively, the commercial risks placed both CEF and SFF in a precarious position, in which SFF could in the case of an emergency, be compelled to "*buy significantly less volume*" of the same crude oil it sold.

217 Mr Nkutha submitted his memorandum detailing his concerns regarding the commercial risks to Mr Gamede. The memorandum was marked "*PRIVILEGED INFORMATION STRICTLY CONFIDENTIAL & NOT FOR DISTRIBUTION*". Therein Mr Nkutha recommends that:

> "*the commercial terms for both transactions be negotiated again and that proper risk management strategies [be] implemented to mitigate flat price risk and the currency risk*".

218 In the alternative, Mr Nkutha recommended "*that SFF be discharged from its contractual obligations*".

219 Notwithstanding the fact that the document was not intended for third party use and before the SFF's Exco had an opportunity to consider Mr Nkutha's submissions, Mr Gamede, acting on his own, sent the memorandum to Taleveras, Venus and Minister

Joemat-Pettersson on 10 February 2016. The cover letters attaching Mr Nkutha's memorandum are dated 10 February 2016 and are annexed marked "**FA64**" to "**FA66**". In the third paragraphs of FA64 and FA65 Mr Gamede indicated that he took:

> "*a decision to review and investigate these issues and to refer the matter to the Board for its consideration. As a consequence [he] decided to put this transaction in abeyance until all the issues raised in the memo [were] fully reviewed and addressed by the Trading and Risk Committees (Executive Management), Internal Audit and the Board.*"

220 Annexure FA66 – the letter to Minister Joemat-Pettersson contained a statement of similar import.

221 Evidently, Mr Gamede accepted that Mr Nkutha's memorandum raised concerns of a "*serious nature*" that required "*careful consideration*". Indeed, he was alive to "*perceptions that this transaction was reckless and irregular and to the insinuations of breaches of duties and obligations and inappropriate conduct.*"

222 I am not aware of any correspondence from Taleveras, Venus or Minister Joemat-Pettersson, in which the respective parties respond to, or acknowledge receipt of, Mr Gamede's letter of 10 February 2016. Nor am I aware of any further enquiries that may have been made by Minister Joemat-Pettersson into the veracity of the concerns raised by Mr Nkutha, in light of the "*perceptions*" of irregularity and the risk that the transactions did not achieve a stock rotation and security of crude oil supply.

223 Mr Gamede subsequently set up a deal evaluation committee. It is not clear whether this committee was ever convened or what its function was.

224 On or about 9 February 2016, SFF issued tank warrants to Glencore.

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225 On 11 February 2016, Mr Gamede instructed all executives to return all correspondence/contracts/signed/unsigned.

GROUNDS OF REVIEW

THE DECISIONS AND THE SUBSEQUENT TRANSACTIONS ARE INVALID

226 On the basis of the facts set out above, and in view of the relevant legal framework set out elsewhere in this affidavit, the applicants submit that the decisions to award contracts to the relevant respondents and to conclude the subsequent Impugned Agreements and Impugned Transactions should be reviewed and set aside for, at least, the following reasons:

226.1 Non-compliance with the constitutional principles regarding disposal of assets by an organ of state.

226.2 Non-compliance with the Preferential Procurement Policy Framework Act, No 5 of 2000 (the **PPPFA**). and the Regulations thereto.

226.3 Non-compliance with the binding policy system governing disposals.

226.4 Non-compliance with the PFMA (commencement of a significant business activity and disposal of a significant asset).

226.5 Non-compliance with the PFMA (non-compliance with the materiality and significance framework).

226.6 Non-compliance with the Companies Act.

226.7 The disposals are in contravention of the National Energy Act and the directive issued thereunder.

227 I deal below with some of the grounds of review in more detail. At the outset, I underscore that the impugned decisions, broadly, consisted of three significant and interrelated components:

227.1 The flawed process intially followed by Mr Gamede (his election not to follow any proper procurement process; the unfair and unprincipled provision of "RFPs" to particular entities in the market to the exclusion of others);

227.2 The Minister's decision (as reflected in the Second Approval Notice) to approve SFF entering into the transactions, subject to certain conditions (which was premised on a number of material errors of law and fact); and

227.3 Mr Gamede's failure to adhere to the stipulated conditions in the Minister's Second Approval Notice.

228 I am advised and aver that all three components are unlawful and fall to be set aside either when viewed in isolation or, alternatively, if viewed cumulatively as a multi-layered decision.

229 The decisions to enter into the Impugned Agreements and the Impugned Transactions (as well as the resultant agreements) were unlawful in at least five fundamental respects.

229.1 First, as set out above, the underlying rationale for entering into the transactions was simply incorrect. On this score, it is unclear why the desirability of rotating a portion of the Oil Reserves (the high sulphur Basrah Light barrels) necessitated disposal of the entirety of the Oil Reserves, when a great percentage of that stock was Bonny Light, rather than Basrah Light, oil. The decision to enter into the Impugned Agreements and Impugned Transactions was accordingly unreasonable (s6(2)(h) of PAJA) as well as irrational as the action was not rationally connected

to the purpose for which the action was taken (s6(2)(f) of PAJA and/or the principle of legality)

229.2 Second, notwithstanding the strategic importance of the product being disposed of, and the large sums of money involved (well over the amount R1 000 000,00 contemplated by the statutory framework, discussed in more detail below), no competitive public procurement process was followed. Instead, as set out below, Mr Gamede simply selected companies and offered them the opportunity (to the exclusion of any other potential participants) to conclude the deal with SFF. The award of the contracts to the relevant respondents was based on a procedurally flawed procurement process because it, *inter alia*, did not comply with the requirements of the PFMA, the PPPFA, the Companies Act, the CEF Group Procurement Policy and the Energy Act (s6(2)(b) of PAJA and/or the principle of legality).

229.3 Third, even if the deviation from the competitive bidding process had been lawful (which is denied) the "*RFPs*" that Mr Gamede distributed in his initial correspondence contained no bid specifications whatsoever. There were thus no objective criteria according to which each bid could be evaluated (s6(2)(e)(i), (ii) and (vi) of PAJA and/or the principle of legality). Some of the bidders received more detailed proposals than others. Thus, even assuming that the primary decision to seek only 9 entities was competent (which is again denied), the bidders who were invited to participate were not treated fairly. I am advised and aver that our courts have made plain that where bidders are not supplied with the same bid conditions and the same amount of time to prepare their proposals this renders the procurement process unlawful (section 6(2)(c) of PAJA and/or the principle of legality).

229.4 Fourth, the Minister's decision, as reflected in the Second Approval Notice dated 7 December 2015, was also unlawful and falls to be set aside for a number of reasons:

229.4.1 It was procedurally unfair as well as procedurally irrational. The decision was premised on Mr Gamede's flawed process without any open and competitive bidding process. I am advised and aver that the Constitutional Court has held that where a failure had an impact on the rationality of the entire process, then a subsequent decision (or part of the final decision) may be rendered irrational and invalid by the irrationality of the process as a whole. I submit that this is plainly so in relation to the decision of the Minister which was premised on Mr Gamede's decision. Indeed, even if it were to be claimed that the Minister was not required to follow any procurement processes before directing that the Oil Reserves should be disposed of (which is denied), I am advised and aver that, in any event, the Minister would still need to have followed a fair process that treated bidders equally. As set out above, some bidders were provided with detailed information in their invitation to submit a proposal, while other bidders were provided with virtually no information at all.

229.4.2 The Minister's decision was unreasonable (s6(2)(h) of PAJA) as well as irrational (s6(2)(f)(ii) of PAJA and/or the principle of legality). That is so since, as set out in more detail above, the Minister made the decision without being informed about 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 whether approvals from the SFF's sole member (CEF) or the National Treasury were required and had been obtained. The Minister made no effort to apply her mind to any of the bids or other relevant information – the

Minister simply accepted Mr Gamede's evaluation. There is no indication whatsoever that the Minister was even in possession of the bids.

229.4.3 The Minister's approval was premised on material errors of fact: Mr Gumede erroneously claimed that SFF had received a number of proposals from different local BEE companies; and that "*SFF*" had vetted the bids (I am advised that our courts have held that a material mistake of fact is valid ground upon which a decision can be reviewed under s6 of PAJA and/or the principle of legality).

229.4.4 The Minister's approval was based on material errors of law: Mr Gumede failed to mention to the Minister that approvals needed to be obtained from CEF (as the sole member of SFF) as well as National Treasurey, and the Minister did not obtain any of the required approvals (s 6(2)(b) of PAJA and/or the principle of legality).

229.5 Fifth, even assuming that the process and rationale that Mr Gamede stipulated in his various letters to the former Minister seeking approval were correct and competent (which is again denied), Mr Gamede thereafter simply failed to follow the very process he set out for SFF. Mr Gamede sought, and the Minister granted, the Second Approval Notice subject to three conditions, including obtaining the SFF board's approval for entering into the transactions. Board approval was never obtained. Thus even if this court were not persuaded that the failure to follow a proper procurement process, or that the Minister's approval, were unlawful – the decisions to enter into the Impugned Agreements and Impugned Transactions would still be unlawful as Mr Gamede failed to obtain the requisite SFF Board approval.

230 As set out below, the decisions of SFF and/or the Minister plainly amount to administrative action in terms of PAJA. I am advised that the Constitutional Court has

held that SFF may not review its own decision under PAJA and must rely on the principle of legality. I emphasise that in the present case, this precedent is of no application in relation to the review brought by CEF. In any event, I stress two points:

230.1 Even assuming that the Constitutional Court's precedent is correct, SFF also brings this application in the public interest (in addition to its own interest) and thus it may in the public interest raise the grounds of review under PAJA.

230.2 The grounds of review raised below all, principally, obtain under the principle of legality. It accordingly makes little practical difference whether this court determines the matter under PAJA or legality.

PAJA AND THE PRINCIPLE OF LEGALITY

231 I am advised that the decisions to conclude the Impugned Agreements constitute administrative action within the meaning of s33 of the Constitution and PAJA.

232 I am advised that section 1 of PAJA defines "*administrative action*". The impugned conduct or action of the organ of state must qualify as a "*decision*", involving the exercise of a public power or the performance of a public function in terms of legislation, that "*adversely affects the rights*" of any person; which has "*a direct, external legal effect*".

233 I submit that the decisions by Mr Gamede, purportedly on behalf of SFF, and the Minister amount to administrative action in that the decisions to award contracts, and to conclude the contracts, constitute decisions taken by organs of state exercising a public power or performing a public function in terms of any legislation.

234 Those decisions, as I have explained above, materially and adversely affect people's rights and, in my submission, they clearly have a direct, legal and external effect. I accordingly submit that they are reviewable under PAJA.

235 However, I am also advised that an organ of state may not utilise PAJA and s33 of the Constitution for the review of its own decision.

236 I am further advised that the decisions, irrespective of the provisions of s33 of the Constitution or PAJA, constitute the exercise of public power by an organ of state which, in terms of s1(*c*) of the Constitution, is subject to the principle of legality.

237 Section 1(*c*) of the Constitution underscores the supremacy of the constitution and the rule of law. Section 2 of the Constitution provides that law or conduct that is inconsistent with it is invalid and the obligations imposed by it, must be fulfilled.

238 For the above reasons, this review is instituted in terms of PAJA and the principle of legality. SFF is seeking to review its own decision and therefore institutes these proceedings only under the principle of legality.

239 CEF is seeking to review SFF's decision(s) and institutes these proceedings under PAJA and under the principle of legality.

240 It is trite that a public power may not be exercised nor a public function performed beyond that which is conferred to the authority exercising such power or performing such function, by law. Accordingly, the exercise of a public power or performance of a public function is only legitimate where lawful.

241 As depicted above, the decisions to enter into the Impugned Agreements and Impugned Transactions were contrary to the Constitution, the PPPFA and its Regulations, the

PFMA and the Practice Note, the CEF Act, the Energy Act, the Companies Act, the CEF Procurement Policy and Treasury Regulations. I am advised that the deviation from applicable legislation rendered the decision to conclude the disposal agreements at variance with the principle of legality. For this reason, the decisions are invalid.

242 For the reasons set out above and below, it is clear that the decisions to conclude the Impugned Agreements were blatantly unlawful and are reviewable in terms of ss6(2)(a)(i); 6(2)(b); 6(2)(c), 6(2)(d); 6(2)(e)(i); 6(2)(f)(i); 6(2)(f)(ii); 6(2)(h); 6(2)(i) of PAJA as well as under the principle of legality.

243 It is therefore my submission that, under both the principle of legality and PAJA, the decisions to conclude the Agreements, and therefore the Agreements themselves, fall to be declared invalid. Further legal argument in this regard will be addressed at the hearing of this matter.

244 I now turn to set out some of the grounds of review in further detail.

Non-compliance with constitutional principles regarding the disposal of assets

245 SFF is an organ of state in the national sphere of government and is therefore bound by s217(1) of the Constitution, which reads as follows:

> *"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*

246 I am advised that s217 of the Constitution applies to both the acquisition and the disposal of assets. SFF therefore had to comply with s217 of the Constitution in disposing of the

Oil Reserves. Further legal submissions will be made at the hearing of this matter on this score.

247 SFF is a major public entity and is therefore subject to the provisions of the PFMA and, in particular, to Chapter 6 thereof. In terms of s51(1)(a)(iii) of the PFMA, a public entity's accounting authority must ensure that the public entity "*has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective*".

248 The decision to conclude the Impugned Agreements, and therefore the agreements themselves, was unlawful for want of compliance with the constitutional framework governing procurement and due to non-compliance with the applicable supply chain management system.

249 In addition, I stress that the process implemented (even after an unlawful process had been stipulated by Mr Gamede) was manifestly unfair for a variety of reasons:

249.1 Different bidders were issued with the request-for-proposal letter at different times. On this score I emphasise that the request for proposal letters to Total, SkyDeck, GNI, Mercuria and Vitol are dated 13 October 2015. See annexures "FA9" to "FA13". The request for proposal letter to Enviroshore is dated 19 October 2015 (annexure "FA16"), Zittatu is dated 23 October 2015 (annexure "FA17"), Taleveras Oil SA (Pty) Limited is dated 30 October 2015 (annexure "FA18") and Taleveras Petroleum Trading DMCC is dated 2 November 2015 (annexure "FA20"). The request for proposal letters to Venus and Mbongeni Investments are dated 24 November 2015 (annexures "FA27" and "FA28" respectively). The bid process was not fair, as the bidders did not receive the same amount of time to prepare and submit their bids.

249.2 The bidders were issued with materially different request-for-proposal letters. All of the letters that were issued prior to 24 November 2015 merely invited the recipient to "*submit a proposal to participate in the Rotation of Strategic Stock.*" However, the request-for-proposal letters issued on 24 November 2015 were far more detailed, setting out the relevant statutory framework, the applicable history, SFF's rationale for the contemplated transaction and the documentation required to be submitted. The bidders were therefore presented with materially different bid requirements. This evinces the lack of fairness in the bid process.

249.3 Some bidders were only allowed to bid for a limited portion of the Oil Reserves, while other bidders were allowed to bid more expansively. Our courts have in various instances found this kind of skewed bidding process to amount to unlawful administrative action. Venus and Mbongeni Investments were only allowed to bid in relation to the Bonny Light crude oil, whereas no such limitation was expressed in the request for proposal letters to the other bidders and therefore it can be concluded that these bidders were allowed to bid for the Basrah Light and the Blended Sour oil too. This differentiation between bidders was not preceded by any pre-qualification process that SFF conducted to determine who should be allowed to submit bids for which types of oil. Bidders were therefore not allowed to bid for the same thing, and the differentiation between them was entirely unfair and arbitrary.

249.4 At least one bidder – GNI – was given prior notice of the proposed disposal process as it submitted its bid before the request-for-proposal letter was even issued. GNI submitted its bid on 8 October 2015 whilst its request for proposal letter is dated

13 October 2015. GNI was clearly given an unfair advantage in the bidding process.

249.5 Mr Gamede did not publish any bid specifications, any evaluation criteria or any adjudication criteria. The bidders therefore received no reliable or objective indication of what their bids should address, or the criteria according to which they would be evaluated. The majority of the request-for-proposal letters did not even tell the bidders what information to submit. There was therefore no way in which an adjudicatory authority could receive comparable bids that could be evaluated in one rational and objective process.

249.6 I am advised that this cuts against the very purpose of the procurement legislation. Thus, even if it could be argued that it was not unlawful to follow a different process (which is denied) it is trite that any different process that, in any event, would only ever be permissible in extraordinary circumstances must still maintain the qualities of a fair process. I underscore that, notwithstanding some of Mr Gamede's remarks and communications (set out above) there was no urgency, or indeed any factual basis whatsoever, for the need to "rotate" the stock. Thus, the basis for any supposed deviation from an ordinary competitive procurement process is wholly without merit.

249.7 Some bidders were allowed to revise their bids after the passing of the closing date. For example, Venus was required to submit its bid by 27 November 2015 but the offer letter issued by Mr Gamede refers to proposal submitted on 30 November 2015.

249.8 Some bidders were allowed to revise their bids after those bids had already been evaluated and recommended to Minister Joemat-Pettersson, and that the offer

letters issued by Mr Gamede were based on the revised bids. For example, Mr Gamede made his submission to Minister Joemat-Pettersson in respect of Taleveras on 30 November 2015. However, the offer letter he issued was based on the proposal submitted on 2 December 2015.

249.9 Some bidders were excluded from the adjudication process for completely arbitrary reasons. For example, Zittatu and Skydeck were not excluded for any reason related to a published bid specification, evaluation criterion or adjudication criterion, or for any other objective reason. Their exclusion was therefore unfair.

The process implemented by Mr Gamede is a quintessential example of an absence of transparency:

249.10 The Impugned Transaction occurred by way of a closed tender process, when the ordinary, stipulated mechanism for such disposals among the CEF and its subsidiaries is an open and competitive tender process.

249.11 Mr Gamede's intention to dispose of the Oil Reserves was not advertised.

249.12 The terms on which Mr Gamede intended to effect the disposal were never made available for public inspection. I am advised and aver that one of the primary purposes of the public advertisement of the RFP is so that the public and public interest organisations have the ability and opportunity to hold organs of state accountable where they, for example, seek to procure or dispose of goods or services in manifestly unlawful circumstances. The present factual matrix is precisely of the kind that would have benefited from public advertisement since – as set out above – there is no factual basis for Mr Gamede's claims that the crude oil stock needed to be "rotated".

249.13 The majority of the recipients of the request-for-proposal letter were not informed of the material terms of the proposed transaction or SFF's requirements in respect thereof.

249.14 There are no objective or ascertainable reasons for why Mr Gamede selected the traders he did as the recipients of the request-for-proposal letters, just as there are no objective or ascertainable reasons for why Mr Gamede selected the ultimately successful bidders or why he offered them the terms he did. I emphasise that the Constitutional Court has pointed out that radical departures from procedurally fair processes might point towards corruption and dishonesty.

249.15 The applicants do not have any information or evidence that any corruption took place in this instance. However, the manner in which the deals took place is suspicious. It is for that reason that CEF intends to commission (with the approval of the Minister) a further forensic process into the manner in which these transactions occurred. However, as pointed out above, there was a need to launch this application without further delay. To the extent that any relevant information emerges from further forensic investigations, this can be tendered and made available to this court in Part B.

249.16 Mr Gamede excluded every other SFF official who ought to have participated in the Impugned Transactions, just as he excluded the CEF and The National Treasury. At no stage was SFF's Procurement Division involved in the issuing of the request-for-proposal letters and the evaluation of bids, let alone the determination of evaluation and adjudication criteria.

249.17 Under the CEF Act, I am the accounting officer in respect of SFF, and is responsible for all money received by SFF. At no stage prior to the conclusion of

the Impugned agreements was I notified of or requested to approve: Mr Gamede's proposal to dispose of the Oil Reserves, the request-for-proposal letters, the bids of the successful bidders, Mr Gamede's evaluation of the bids, the offer letters issued by Mr Gamede or the terms of the Impugned Agreements.

249.18 Under the PFMA, the SFF Board is the SFF's accounting authority and is charged with responsibility for the entity's asset management. At no stage prior to the conclusion of the Impugned Agreements was the SFF Board notified of, or requested to approve: the request-for-proposal letters, the bids of the successful bidders, Mr Gamede's evaluation of the bids, the offer letters issued by Mr Gamede or the terms of the Impugned Agreements. Even after the SFF Board was belatedly informed of the Second Directive and the First Approval Notice, it was at all times of the understanding that SFF was in the process of developing policies and procedures, and establishing a trading division, and that the Disposal Process would only be implemented once those policies, procedures and structures were in place.

249.19 As discussed in greater detail below, under the PFMA, the SFF Board was obliged to notify National Treasury of the proposed transactions to dispose of the Oil Reserves prior to the implementation of the Impugned Transactions. There was, however, no such notification and National Treasury was therefore unable to discharge its oversight and prudential functions.

249.20 Mr Gamede disclosed none of the material terms of the bidders' proposals to Minister Joemat-Pettersson, who issued her various approvals in a vacuum of information.

249.21 Since at least October 2015, Mr Gamede misled Minister Joemat-Pettersson, the SFF Board and the SFF Exco into believing that the Impugned Transaction would be implemented by the SFF's Trading Division in accordance with policies and procedures duly formulated and approved by the Minister, the SFF Board and the SFF Exco. However, Mr Gamede never implemented the Impugned Transactions in this manner and never intended to do so. He therefore misled persons and structures that had a critical role to play throughout the entirety of the Impugned Transactions, and eventually presented the SFF Board and the SFF Exco with a *fait accompli* at the beginning of 2016.

249.22 There is no documentary record of the process pursuant to which Mr Gamede evaluated and adjudicated the various bids received. The truth of what went on between Mr Gamede, Minister Joemat-Pettersson and the various bidders and traders remains shrouded in mystery.

250 For all of these reasons the decisions to conclude the Impugned Agreements, and the Agreements themselves, and the Impugned Transactions infringed s217(1) of the Constitution and s51(1)(a)(iii) of the PFMA. I am advised that they are therefore unlawful and invalid.

Non-compliance with the Preferential Procurement Policy Framework Act

251 In terms of s217(2) of the Constitution an organ of state may implement a procurement policy that allows for categories of preference in the allocation of contracts. Section 217(3) of the Constitution requires national legislation to prescribe a framework within which the procurement policy is implemented. I am advised that the national legislation is the PPPFA.

252 The PPPFA and the regulations promulgated thereunder[1] require that bids must be evaluated in accordance with a preference-point system (s2(1)(a)). In the case of contracts with a Rand value in excess of R1,000,000,00 bids have to be evaluated in accordance with a system that allocates a maximum of 100 preference points, with 90 points allocated on the basis of price and 10 points allocated based on the bidder's broad-based black economic empowerment (**BEE**) profile (ss2(1)(b) and (d) read with regulation 6).

253 The Preferential Procurement Regulations, 2011 also allow bids to be evaluated on the basis of functionality (essentially a bidder's technical competence in relation to the goods or services in question). Regulation 4 requires:

253.1 functionality evaluation criteria to be objective and clearly specified in the invitation issued by the organ of state;

253.2 the values and minimum scores for each functionality criterion to be clearly specified in the invitation issued by the organ of state; and

253.3 a bid to be dismissed from further consideration if it fails to achieve the minimum functionality score.

254 In terms of s2(1)(f) of the PPPFA, a contract must be awarded to the bidder who scores the highest number of preference points in accordance with the published bid-evaluation criteria, unless additional objective criteria justify the award of the contract to another bidder.

[1] At the time of the Disposal Process and the conclusion of the Agreements the Preferential Procurement Regulations, 2011 were in force. They have since been replaced by the Preferential Procurement Regulations, 2017. Unless otherwise stated, all references herein are to the Preferential Procurement Regulations, 2011.

255 The Impugned Transactions and the conclusion of the Impugned Agreements materially contravened the PPPFA and the Preferential Procurement Regulations, 2011:

255.1 The request-for-proposal letters did not stipulate any evaluation or functionality criteria, and certainly did not set out the criteria that Mr Gamede intended to utilise in adjudicating the bids. For example, Mr Gamede's offer letters stipulated various conditions to bidders, including the provision of a letter of credit from a reputable institution, the conclusion of a storage agreement and a six-month rotation cycle. However, none of these issues were mentioned or stipulated in the request-for-proposal letters, especially those issued prior to 24 November 2015.

255.2 The bids were not evaluated in accordance with a 90-10 preference-point system. No analysis in terms of the PPPFA was undertaken in relation to any of the bids.

255.3 Bidders were not selected for reasons relating to their price submissions or their BEE profiles. Neither were they selected on the basis of any other published or objective criteria.

255.4 Mr Gamede excluded one of the bidders, GNI, because it wished to uplift its crude oil allocation immediately. However, a delay in upliftment of the crude oil allocation was never stipulated by Mr Gamede in the request-for-proposal letter, or by Minister Joemat-Pettersson in the Second Directive, as a functionality or evaluation criterion.

255.5 Section 3 of the PPPFA empowers the Minister to grant an exemption from any or all of the provisions of this Act if it is in the interest of national security, the likely tenderers are international suppliers or it is in the public interest. There is no

evidence whatsoever that Mr Gamede sought or was provided with an exemption, in accordance with s3 of the PPPFA, from complying with the PPPFA.

256 For these reasons the Disposal Process, the decisions to conclude the Agreements and the Agreements themselves infringed ss217(2) and (3) of the Constitution, the PPPFA and the applicable Preferential Procurement Regulations. I am advised that they are therefore unlawful and invalid.

Non-compliance with the binding policy system governing disposals

257 The CEF has adopted a Group Procurement Policy (the **CEF Procurement Policy**) that is applicable to the CEF Group, including SFF. A copy of the CEF Procurement Policy is annexed hereto, marked "**FA66.1**".

258 The CEF Procurement Policy was adopted pursuant to the CEF's principal mandate, which is the security of energy in South Africa. The policy expressly applies to both the acquisition and the disposal of assets, requiring compliance with the constitutional principles referred to above for both categories of commercial activity. Clause 1 of the CEF Procurement Policy states the intention of the CEF Group to be guided by "*the Constitution of South Africa, Chapter 13, Section 217, the PFMA, the PPPFA, B-BBBEE and other Treasury Regulations including Practice Notes issued from time to time.*"

259 This is the basis on which the decision to conclude Impugned Agreements should have been premised.

260 Clause 6 of the Procurement Policy deals with delegation and provides that the Chief Financial Officer is responsible for the implementation of the group procurement policy and processes in terms of the relevant applicable legislation. The procurement committee

is responsible for the procurement of goods and services for CEF and to arrange the hiring or letting of anything, or the acquisition or granting of any right for or on behalf CEF. The Procurement Manager would be responsible for, *inter alia*, the administration of quotations and tenders, drafting of tenders and procurement tenders, pre-qualification of suppliers and service providers, evaluation of quotations and tenders, negotiation of contracts with suppliers and service providers, conducting of due diligence audits on high risk suppliers and service providers, drafting and approval of procurement documents (templates), letters of invitation and engagement, issuing letters of awards, purchase orders and reporting on all procurement activities.

261 In terms of clause 6.3.2 of the CEF Procurement Policy, the SFF Board is responsible for reviewing and approving "*the preferred quotations and tender recommendations*" as well as for the "*final review and approval of contracts awarded*". Furthermore, any transaction with a value in excess of R10,000,000,00 must be approved by the SFF Board.

262 In terms of clause 7.1 of the CEF Procurement Policy, a SFF "sourcing team should develop a procurement and contracting strategy", which must be "presented to the procurement committee for approval before the market can be approached". Clause 8 provides that procurement must be conducted in accordance with SFF's "comprehensive procurement procedure".

263 In terms of clause 13.3 of the CEF Procurement Policy, for disposals with a transaction value in excess of R500,000,00 the "*main preferred procurement method*" is "*open competitive tendering*" (including a 21-day advertisement period) and the "*second preferred procurement method*" is "*close competitive tendering*".

264 Clauses 13.3.1 and 13.3.2 provide for the ratification of procurement and the condonation of procurement respectively. Ratification of procurement is only permitted where there

was an emergency procurement which complies with the emergency criteria. Condonation is granted where there if no procurement process followed in conducting a transaction.

265 Clause 20 sets out the "key roles and responsibilities in relation to the procurement function". In this regard, the SFF Board is the "overseer and approver of long-term contracts and awards" that bind the entity for more than one year, "irrespective of value". The CEO, on the other hand, is to "provide sponsorship and ensure appropriate governance and organizational arrangements are in place". The Procurement Department, furthermore, is the "custodian of the procurement process" and is responsible for legislative and policy compliance. In this regard the Procurement Department is responsible for "managing the whole tendering process from invitation to awarding the tenders", "corresponding with suppliers and service providers" and the "initiation and management of tender and procurement committee(s) and evaluation teams". The Disposal Process, the conclusion of the Agreements and the Agreements themselves materially contravened the CEF Procurement Policy in the following respects:

265.1 The Disposal Process did not entail an "*open competitive tendering*" process, which is the main procurement method used by the CEF and its subsidiaries for this sort of transaction. An open competitive tendering process ought to have been followed given the scale of the contemplated transaction, *viz* the disposal of the entirety of the Oil Reserves. This contravened clause 13 of the CEF Procurement Policy.

265.2 SFF's sourcing team was not involved in developing a "*procurement and contracting strategy*" for the Impugned Transactions and SFF's procurement committee did not approve any "*procurement and contracting strategy*" in relation

to the Disposal Process. SFF's Procurement Department did not develop the applicable specifications or evaluation criteria, formulate or issue the request-for-proposal letters, communicate with the bidders, establish an evaluation committee, manage the bids or evaluate or adjudicate the bids. SFF's procurement officials were completely excluded from playing any role in relation to the disposal of the Oil Reserves. This contravened clause 6 of the CEF Procurement Policy. The SFF Board did not review or approve any of the bids that Mr Gamede selected as successful or any of the recommendations that Mr Gamede made in relation to the adjudication of the bids.

265.3 Each of the transactions reflected in the Impugned Agreements had a value in excess of R10,000,000,00. However, the SFF Board did not grant prior approval for any of the Impugned Agreements or the Impugned Transactions they embodied. This was a contravention of clause 6.3.2 of the CEF Procurement Policy.

265.4 The SFF Board did not grant any approval at all in relation to the Vesquin Agreement. In terms of clause 13.3.1 read with clause 13.3.2, the SFF Board's approval of the Taleveras and Vitol agreements amounted to a condonation as the procurement was not as a result of a state of emergency and no procurement process had been followed by Mr Gamede. In the result, the purported condonation could not and did not cure the defects which are a result of Mr Gamede's failure to comply with relevant legislation, policies, guidelines and practice notes. The jurisdictional prerequisites for the lawful exercise of the power to condone the Impugned Transactions, were simply not present.

265.5 Mr Gamede failed to ensure that SFF observed the applicable governance constraints in implementing the Impugned Transactions. This was in contravention of clause 20.2 of the CEF Procurement Policy.

266 I am advised and aver that while an organ of state is not in all instances bound to consider a policy, which generally has the status of a guideline, the organ of state must at least consider the Policy that is in place. Mr Gamede's disposal of the Oil Reserves and conclusion of the Impugned Agreements was therefore in complete contravention of the CEF Procurement Policy, on the basis that there is simply no evidence whatsoever that:

266.1 The CEF Procurement Policy was even considered; and/or

266.2 That there Policy was considered and there were sound and demonstrable reasons for departing from that Policy.

267 I have been advised that this rendered the decisions to conclude the Impugned Agreements and the Impugned Transactions (and the process followed) as unlawful and invalid.

Non-compliance with the PFMA (commencement of a significant business activity and disposal of a significant asset)

268 SFF is a Schedule 2 major public entity within the meaning of the PFMA and is therefore bound to comply with *inter alia* chapter 6 of that statute. Section 54(2) of the PFMA reads as follows:

> "*Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:*

(a) *establishment or participation in the establishment of a company;*

(b) *participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;*

(c) *acquisition or disposal of a significant shareholding in a company;*

(d) *acquisition or disposal of a significant asset;*

(e) *commencement or cessation of a significant business activity; and*

(f) *a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement*" (emphasis added).

269 When Mr Gamede proposed that SFF should engage in trading the Oil Reserves, he proposed the commencement of a "*significant business activity*" by SFF. When Mr Gamede proposed disposing of the entirety of the Oil Reserves, he proposed the "*disposal of a significant asset*" by SFF. Both courses of action triggered obligations under s54 of the PFMA.

270 However, the decision to conclude the Impugned Agreements, the Impugned Agreements themselves, the Impugned Transactions materially contravened s54 of the PFMA in a variety of ways.

271 First, s54 obliges a public entity's accounting authority to seek prior approval from the relevant Executive Authority (i.e. the Minister of Energy) and to issue a prior notification to the National Treasury. For purposes of the PFMA, SFF's accounting authority is the SFF Board. However:

271.1 The SFF Board did not issue or approve "FA6", which was the request to allow the SFF "*to venture into other economic activities within the Energy sector*", including "*trading in commercial stock*" and rotating the Oil Reserves. "FA7" was

formulated and dispatched by Mr Gamede on his own initiative and without input from the SFF Board.

271.2 The SFF Board did not issue or approve "FA14", which was the request to commence negotiations to dispose of a portion of the Oil Reserves to GNI. "FA14" was formulated and dispatched by Mr Gamede on his own initiative and without input from the SFF Board. Indeed, at this stage the SFF Board did not know that Mr Gamede had issued request-for-proposal letters, let alone that he had already purported to evaluate and recommend a bid.

271.3 The SFF Board did not issue or approve "FA25", which was the request to sell the entirety of the Oil Reserves with a view to purchasing replacement oil at an undetermined future date. "FA25" was formulated and dispatched by Mr Gamede on his own initiative and without input from the SFF Board. Once again, at the time that "FA25" was dispatched the SFF Board did not know that the request-for-proposal letters had been issued or that bids had been received. Indeed, at the meeting of 23 November 2015, the SFF Board recorded its displeasure at the focus on outright disposal of the Oil Reserves without the inclusion of a proper rotation mechanism.

271.4 Finally, the SFF Board did not issue or approve "FA29" – "FA32", being the requests for Ministerial approval to dispose of the Oil Reserves to Vitol, Venus, Taleveras and GNI. These letters were formulated and dispatched by Mr Gamede on his own initiative and without input from the SFF Board. Once again, at the time that "FA29 – "FA32" were dispatched the SFF Board did not know that bids had been received, evaluated and recommended.

272 The SFF's accounting authority therefore did not play the role it was required by s54 of the PFMA to play in relation to the conclusion of the Impugned Agreements. Rather, that role was usurped by Mr Gamede without warrant or authority to do so.

273 Section 54(4) empowers the accounting authority to exempt a public entity from the requirements of s54(2). No such approvals were sought or received by Mr Gamede in respect of the disposal process. The second contravention lies in the fact that the National Treasury did not receive prompt and prior written notification of Mr Gamede's intention to commence commercial trading activities or of Mr Gamede's intention dispose of the entirety of the Republic's strategic reserves of crude oil. National Treasury was therefore prevented from ensuring that the Impugned Agreements were concluded (to the extent that they could be concluded at all) in accordance with the PFMA.

274 The third contravention was in relation to the necessary prior Ministerial approvals stipulated in clause 4 of the Practice Note. In order to conclude the Agreements, SFF had to submit applications and obtain approvals from Minister Joemat-Pettersson's and the Finance Minister for the transactions they embodied after her consideration of the "*relevant particulars*". However, no such particulars were ever submitted to the Ministers.

275 As is evident from "FA29" – "FA32", Mr Gamede only informed Minister Joemat-Pettersson of his own determination that the bids were "*sound and acceptable*"; the necessity of obtaining the SFF Board's prior approval of the Agreements; the necessity of concluding sale-and-purchase agreements with the successful bidders; and the requirement that each trader would have to produce a reliable letter of credit.

276 Mr Gamede did not inform Minister Joemat-Pettersson of the number of barrels of oil that will be sold to each trader, the terms on which those barrels will be sold, the price at

which they will be sold or the mechanisms put in place to ensure a secure crude-oil supply after the sales. Neither did he inform the Minister of his complete failure to comply with the public-procurement prescripts as set out above. Minister Joemat-Pettersson was at no stage provided with copies of the bids received or summaries or evaluations thereof.

277 Mr Gamede did not inform the Minister of the extent to which he had failed to meet the requirements that she had imposed on the contemplated transactions, *viz* the failure to undertake a "*detailed due diligence*" in relation to any of the traders or their proposals, the failure to establish a Trading Division to implement and manage the transactions and the failure to ensure the "*integrity of our Strategic Stock levels*" by securing appropriate replacements for the crude oil being disposed of (see "FA7" and "FA24"). Mr Gamede also omitted to mention his failure to notify and obtain approvals from the CEF (as the sole member) and National Treasury.

278 National Treasury has published a Practice Note on s54 applications (the **Practice Note**). A copy of the Practice Note is annexed marked "**FA67**". In terms clause 7, read with Annexure "A", thereof, a s54(2)(d) application must include: the public entity's objectives for the transaction; the relationship between the transaction and the public entity's core business; the transaction's socio-economic objectives (including B-BBEE, poverty alleviation and skills development); the transaction's likely impact on the Government and the public entity; the transaction's financial viability, including a cash-flow analysis, estimates of future revenue and funding details; risk identification and risk-mitigation strategies; alternatives to the transaction; the transaction's success measures; the transaction's impact on human capital; and the necessary board and third-party approvals. Mr Gamede did not submit any of the necessary information to Minister Joemat-Pettersson, including any financial analysis of the bids and the Agreements.

279 Because Mr Gamede never submitted the relevant particulars of the Impugned Agreements or the Impugned Transactions, Minister Joemat-Pettersson never issued the approvals she was required to in terms of s54(2)(d). For this reason, I am advised that the Impugned Transactions, the decisions to conclude the Impugned Agreements and the Impugned Agreements themselves are unlawful and invalid.

Non-compliance with the PFMA: (non-compliance with the materiality and significance framework)

280 As a major public entity, SFF is bound by Regulation 28 of the Treasury Regulations promulgated under the PFMA. Sub-regulation 3.1 reads:

> "*For purposes of material [section 55(2) of the Act] and significant [section 54(2) of the Act], the accounting authority must develop and agree a framework of acceptable levels of materiality and significance with the relevant executive authority.*"

281 The disposal agreements were concluded by Mr Gamede prior to the finalisation of the engagements between the SFF Board and the Minister regarding the Strategic Stock Policy. The decision(s) to conclude the Impugned Agreements were not taken after Mr Gamede had given due regard to a significant framework agreed with Minister Joemat-Petterson. For this reason, I am advised that the decision(s) to conclude the Impugned Agreements (and the Impugned Agreements) and the Impugned Transactions are unlawful and invalid.

Non-Compliance with the Companies Act

282 In terms of SFF's Memorandum of Incorporation (**MOI**) (a copy of which is attached marked "**FA68**"), SFF's main business is:

"to carry on the business of promoting, conducting, establishing, facilitating, guiding and assisting, by the establishment of a fund or funds and/or in any other manner whatsoever, the location, procurement, storage, production and/or exploitation of fuels, materials, materials, products and commodities which are or may become of strategic importance to the Republic of South Africa, not for gain but solely in the communal interests of the general public, and to perform any other acts towards this end." (emphasis added)

283 Further, in carrying on with the business of managing South Africa's strategic stock reserve, SFF operates solely in the interests of the general public. The SFF's MOI provides the main objects of SFF, which I quote herein:

"The main object of the [SFF] is to carry on the business of promoting, conducting, establishing, facilitating, guiding and assisting, by the establishment of a fund or funds and/or in any other manner whatsoever, the location, procurement, storage, production and/or exploitation of fuels, materials, materials, products and commodities which are or may become of strategic importance to the Republic of South Africa, not for gain but solely in the communal interests of the general public, and to perform any other acts towards this end... The pursuance of all or any of the above objects shall be in accordance with the provisions of the Statutes. (emphasis added)

284 SFF is a company incorporated in terms of the Companies Act, No 61 of 1973, which has since been amended to the Companies Act, No 71 of 2008 (**Companies Act**), accordingly as a non-profit company with members, it is subject to the Companies Act. In addition, Article 1.1(3) of the MOI expressly provides that SFF shall operate, be controlled and conduct its business subject to the provisions of the PFMA, the Companies Act, the MOI, the Parent Shareholders Compact, the Members Compact and any other agreement that may regulate SFF and its members.

285 The Oil Reserves constituted all or the greater part of SFF's assets. I am advised that as such, the Impugned Transaction of these assets were subject to Schedule 2(2) and Schedule (3) of the Companies Act that provides that a non-profit company disposing of

all or the greater part of its assets should do so in accordance with ss112 and 115 of the Companies Act. It is helpful to quote in relevant parts these sections of the Companies Act.

286 Section 112 of the Companies Act, provides as follows:

> *"(2) A company may not dispose of all or the greater part of its assets or undertaking unless –*
>
> *(a) the disposal has been approved by a special resolution of the shareholders, in accordance with s115; and*
>
> *(b) the company has satisfied all other requirements set out in s115, to the extent those requirements are applicable to such a disposal by that company... (own emphasis)*
>
> *(3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2) (a) must-*
>
> *(a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 62 read with any changes required by the context;*
>
> *(b) include or be accompanied by a written summary of-*
>
> *(i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and*
>
> *(ii) the provisions of sections 115 and 164, in a manner that satisfies the prescribed standards.*
>
> *(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.*
>
> *(5) A resolution contemplated in subsection (2) (a) is effective only to the extent that it authorises a specific transaction."* (emphasis added)

287 Section 115 of the Companies Act provides the following:

"(1) Despite section 65, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless-

(a) the disposal, amalgamation or merger, or scheme of arrangement-

(i) has been approved in terms of this section...;

(b) to the extent that Parts B and C of this Chapter, and the Takeover Regulations, apply to a company that proposes to -

(i) dispose of all or the greater part of its assets or undertaking...

the Panel has issued a compliance certificate in respect of the transaction...

(2) A proposed transaction contemplated in subsection (1) must be approved –

(a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise... and

(b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company's holding company if any, if-

(i) the holding company is a company or an external company;
(ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
(iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company..." (emphasis added)

288 As is clear from the above, in order for the Impugned Transactions (a sale of of all or the greater part of the assets of SFF) to be lawful, there must have been (i) a special resolution passed by that company's board of directors, (ii) a special resolution passed by the company's holding company and (iii) a compliance certificate issued by the Take-Over Regulation Panel.

289 The Impugned Agreements and Impugned Transactions materially contravened ss115 and 112 of the Companies Act, in that:

(i) No meeting of the SFF Board was called but more importantly, the CEF Board did not issue a special resolution as required by s112(2) of the Companies Act, read together with s115(2)(a) and (b) of the same. Nor did the CEF Board issue such a resolution to ratify Mr Gamede's Disposals.

(ii) Mr Gamede did not obtain a compliance certificate from the Take-Over Regulation Panel, as he was required to do in terms of s115(1)(b) (of the Companies Act, read together with s119 of the same).

290 Mr Gamede's disposal of the Oil Reserves and conclusion of the Impugned Agreements was therefore in complete contravention of the Companies Act. I have been advised that this rendered the decisions to conclude the Impugned Agreements, and thus the Agreements themselves, and the Impugned Transactions unlawful and invalid.

The disposals are in contravention of the National Energy Act and the directive issued thereunder

291 I am advised that the Minister of Energy's power to issue directives regarding the acquisition and maintenance of national strategic energy feedstocks and carriers is sourced from the Energy Act, in particular s17(1) thereof. Section 17(1) reads:

> *"[T]he 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."*

292 When former Minister Joemat-Pettersson issued the various directives referred to hereinabove, she could have only done so pursuant to s17(1) of the Energy Act.

293 As explained above, when Mr Gamede resolved to conclude the Impugned Agreements and give effect to the Impugned Transactions, he purported to have been acting in terms of the directive issued by Minister Joemat-Pettersson on 8 October 2015. However, this directive imposed a number of conditions, which are detailed hereinabove.

294 The conditions imposed by Minister Joemat-Pettersson's directive were not met, in that:

(i) The disposals were not preceded by a detailed due diligence undertaken by SFF. To the contrary, Mr Gamede seems to have done everything himself without reference to and regard to the SFF Board.

(ii) No comprehensive motivation was provided to Minister Joemat-Pettersson before the disposal of the Oil Reserves.

(iii) If regard is had to the terms of the Impugned Agreements (and their various amendments), the Impugned Transactions compromised the integrity of the country's Oil Reserves.

295 On this premise, the failure to adhere to the conditions prescribed by Minister Joemat-Pettersson amounts to a material non-compliance with s17(1) of the Energy Act. I am advised that decision(s) to conclude of the Impugned Agreements, and the Agreements themselves, and the Impugned Transactions are therefore unlawful and invalid.

THE CONSEQUENTIAL AGREEMENTS ARE ALSO INVALID

296 I am advised and aver that the storage contracts and other contracts that include third parties (such as the agreement with Glencore) are patently affected by the illegality of the decisions to enter into the Impugned Agreements and Impugned Transactions as well as the resulting contracts.

297 I submit that one of the striking features of the transactions in the present case is the apparent absence of a commercial rationale for SFF entering into the contracts for the disposal of 10 million barrels of the Oil Reserves. The oil was sold well below the prevailing market price. One of the purported commercial bases for the transactions was that the state could make rental income from the storage of the oil. Thus, so the argument went, in the absence of any oil emergency, the State was generating income from storing the crude oil with the additional benefit that, if there happened to be an emergency relating to the supply of crude oil, the oil was still notionally available for SFF to buy-back the stock.

298 I am advised and submit that the consequential contracts that are thus inextricably linked to the invalid Impugned Agreements and Impugned Transactions also fall to be set aside (for instance, the storage contracts). Indeed, the storage contracts provided the only apparent commercial rationale for SFF entering into the purchase agreements in the first place.

299 Moreover, if the purchase agreements are found to be *void ab initio*, it follows that the ownership of the oil remains with SFF and a logical consequence of this is that there would have been no lawful justification for the buyers to pay SFF for it to store SFF's own oil. The storage contracts should accordingly be treated on equal footing to the purchase contracts and should also be challenged as being *void ab initio*.

300 I am advised and aver that the same should be so in relation to other consequential agreements such as the tank warrants (referred to above) and the Tripartite Agreement with Glencore. As set out above, the applicants do not necessarily have possession of all of the relevant agreements that have been entered into pursuant to the Impugned Agreements and Impugned Transactions. Accordingly, the applicants reserve their rights

to amend their notice of motion to target expressly any additional agreements that are put up by the respondents.

301 I am advised and aver that whether any of the third parties (for instance, Glencore) were innocent and unaware of the illegality is irrelevant for the purposes of Part A of this application. These considerations do not salvage the lawfulness of those contracts but – rather – might be considerations when this court is determining what amounts to a just and equitable remedy.

302 In any event, as regards the third parties who concluded contracts directly with SFF (such as Glencore), they did so when SFF had no authority to conclude the contract, and that the Minister's approvals in this matter (as flawed as they were) did not even purport to cover these additional consequential contracts. For this reason, too, these contracts also fall to be set aside either under PAJA or under the principle of legality.

SUBSEQUENT EVENTS AND CEF'S KNOWLEDGE OF THE IMPUGNED AGREEMENTS AND TRANSACTIONS

303 The CEF Treasury first became aware of the sale of the Oil Reserves on 25 February 2016, upon receiving notification from ABSA Bank that 112 000 000 USD had been deposited into the CEF's bank account.

304 On 26 February 2016, Mr Gamede provided Minister Joemat-Pettersson with documents relating to the Impugned Transactions, in particular the documentation relating to the sale of the Oil Reserves to Taleveras and Venus. A copy of the correspondence without attachments is annexed marked "**FA69**".

305 On 29 February 2016, SFF issued an invoice to Vesquin for 3 million barrels of Blended Sour Crude quality. Upon notification that this invoice had been issued, the CEF requested a copy and an explanation from the SFF Finance department, namely Ms Susanna Pistorius.

306 On 29 February 2016, 78 606 000 USD was received from Vesquin. The funds from Vesquin were only applied to it on 5 April 2016 as no beneficiary was specified on the payment instruction. However, when the CEF received the Vesquin invoice, it contacted the bank to make inquiries as to whether the funds were received. When the bank confirmed that it had received that amount, the funds were applied to Vesquin.

307 On 3 March 2016, Mr Gamede issued an invoice to Venus for 3 million barrels of Bonny Light, which it paid on the same day. Shortly after this, the CEF Treasury received a notification that 90 225 000 USD was received from Venus.On each notification from ABSA Bank, the CEF Treasury notified the then acting CEO, Mr Siphamandla Mthethwa.

308 In March 2016, Mr Ngqongwa prepared a draft request for condonation from the National Treasury for non-compliance with s54 in respect of the disposal of the Oil Reserves, and for non-compliance with the delegations and the CEF Act.

309 In or about April 2016, Mr Gamede entered into an agreement with Skydeck Trading S.A, a company which I am advised specialises in sourcing commodities such as crude oil. According to an email from one of the Skydeck's directors, Mr Menzi Sikhakhane to Mr Gamede, Skydeck's "*mandate cover[ed] the sourcing and procuring of crude oil on behalf of SFF.*" *Skydeck was hoping to formalise its arrangement with Mr Gamede in accordance with a "mandate letter" stating that it was to "[a]ssist SFF in funding and securing crude oil for the purpose of trading and security of supply.*"

310 For the first time in May 2016, National Treasury became aware of the disposal of the Oil Reserves "*as a result of media coverage after the transaction had already been concluded*". National Treasury was not at any stage informed or consulted. At around the same time that National Treasury began to enquire into the sale of the Oil Reserves, Minister Joemat-Pettersson also sought feedback from SFF, specifically from the (then) Chairperson of the Board, Mr Riaz Jawoodeen, regarding compliance with her Second Directive. As far as I am aware this was the first and only time that the erstwhile Minister sought a report on the implementation of the Second Directive, notwithstanding her condition that SFF was required to provide monthly reports "*to the Minister and Department on all activities in relation to the Directive.*"

311 On 23 June 2016, Mr Jawoodeen submitted a "*report on the rotation of strategic stock and storage contract*", attached hereto and marked "**FA70**". Mr Jawoodeen's submissions consisted of a summary report entitled "*REPORT ON THE ROTATION OF STRATEGIC STOCK AND STORAGE CONTRACTS*", as well as two further reports, both of which had been prepared by Mr Gamede to explain SFF's "*compliance with the Ministerial Directive of 12 November 2015*".

311.1 The First Report, titled "*SFF STRATEGIC SHIFT*" was in the form of an explanation:

> *"to the South African people as to why it was necessary to rotate the strategic crude oil reserves, explain the process that was followed in the rotation, the price and how it was determined, the long term strategy of to ensure security of supply, and the legal regime under which the rotation was authorised and executed."*

311.2 In addition to setting out the purported rationale for the "rotation", Mr Gamede recorded that the "*process that was used was negotiation without prior tendering*",

a contracting strategy "*provided for in the Central Energy Fund Procurement Policy*". Without much more detail, Mr Gamede purported to give an assurance that the disposal complied with the "*2000 Policy in Respect of Strategic Crude Oil and Petroleum Stocks to trade in Strategic Crude Oil Stocks*", the Agency Agreement and relevant legislation such as the National Energy Act, the CEF Act and the PFMA.

311.3 In this regard, the First Report highlighted the applicable legal and policy provisions in terms of which SFF was "*authorised*" to trade and/or rotate the Oil Reserves, despite its failure to address the requisites of the Companies Act. In Mr Gamede's view, all that was required for the Impugned Transactions were the ministerial directives contemplated in s17 of the National Energy Act and, because the Oil Reserves were "*operational asset[s], it [was] in the companies considered view that [it] did not require section 54"* approval from the National Treasury.

311.4 The Second Report, headed "*REPORT ON THE ROTATION OF STRATEGIC STOCK*" dated 7 June 2016, was a high level technical account of the "*rotation*". The report addressed the background to the "*rotation*", the operational and risk assessments that were purportedly undertaken by SFF, the process implemented by "*SFF Management*" to give effect to the "*rotation*", SFF's approach to proposals from recipients, the *ex post facto* SFF Board approvals and the price per barrel for each of the two grades of oil.

311.5 However, as Mr Nkutha's memorandum and the Board minutes demonstrate, the update given by Mr Jawoodeen on 23 June 2016 was woefully thin on the detail. Most obviously, was the failure to provide any particulars relating to how the purchasers were initially selected, when the proposals were adjudicated, the

methodology used for the adjudication, the persons involved in the adjudication and the extent to which Mr Nkutha's concerns raised in his memorandum, referred to above, were considered. Furthermore, the members of SFF's Exco team other than Mr Gamede had not been involved in the disposal process and Messrs Nkutha and Ngqongwa had indicated to Mr Gamede that his account was not correct.

311.6 Mr Gamede's reports, unquestionably submitted to Minister Joemat-Pettersson by Mr Jawoodeen, were at best a selection of half-stories. For instance, the Second Report only referred to Mr Nkutha's concern in relation to the price at which the Bonny Light crude oil was sold to Taleveras and Venus, and implied that the SFF Board approved all three sales at its February 2016 meeting, when this was clearly not the case.

311.7 As the SFF Board minutes indicate, the SFF Board unequivocally approved the Taleveras and Vitol contracts, but concluded that:

> *"Venus would be given 30 days to perform in terms of the contract with SFF and failure to that the contract would be terminated. Furthermore the Board would appoint two people to engage directly with the SFF political principal in this regard. The appointed people would have to meet with the Minister urgently. It was noted that the Minister had the report and should be notified by the appointed people that Venus was not performing in terms of the agreement."*

312 I do not know whether the concerns raised by Mr Nkutha were examined by the Minister or the SFF Board. Notably and in addition to the porous nature of the report, the reports painted a picture that Mr Gamede acted with the concurrence of the SFF Exco, when it appears that, save for the GM SHEQ and Risk, Mr Mayaphi, the SFF Exco only became aware of the disposals after the Impugned Agreements were concluded.

313 On 1 June 2016, officials from the National Treasury, the DoE, SFF and the CEF met to discuss the disposal of the 10 000 000 barrels of Oil Reserves. SFF undertook to provide National Treasury with supporting information relating to the transaction.

314 On 26 August 2016, the National Treasury reviewed the "supporting information" so that it could "*determine whether there had been compliance with the Public Finance Management Act of 1999 (PFMA) and the Central Energy Fund Act of 1977 (CEF Act).*" Following its review, the National Treasury determined that the disposal of the 10 000 000 barrels of crude oil was inconsistent with the PFMA and the CEF Act.

315 Minister Gordhan conveyed the "findings" of the National Treasury's review in a letter to Minister Joemat-Pettersson on 26 August 2016, marked "**FA71**" in which he specified that:

315.1 In the light of the financial and operational value of the disposal, the CEF Group's Significance and Materiality Framework, applicable to SFF as a subsidiary of CEF, required SFF to report "*any transaction in excess of 2% of its total assets (i.e. R135 million)*" to the CEF Board. In turn, the CEF Board would "*have had to obtain approval from the Minister of Energy (MoE) and notify the National Treasury for all transactions in excess of 5% of profit after tax or R713 million.*" As the product of the proceeds of the three transactions was 280 831 000 USD and as such, constituted the disposal of a significant asset.

315.2 By virtue of s54(2)(d) of the PFMA and the Significance and Materiality Framework, the CEF Board and the National Treasury ought to have been notified before Mr Gamede concluded the Impugned Agreements and Impugned Transactions. In addition to Mr Gamede's failure to inform the National Treasury of the Disposals, I note that it appears as though neither the SFF Board or the CEF

Board were involved in the transaction, which given the triage established under the Shareholder Compact, the Significance and Materiality Framework and the s54(2)(*d*) notification required by the PFMA, they ought to have been.

315.3 The proceeds obtained by SFF from the sale of the Oil Reserves were meant to be paid into the "*Equalization Fund*" with the concurrence of the Minister of Finance. The Equalization Fund is established under the CEF Act and must be used for, amongst other transactions, the proceeds of the sale and storage of crude oil as determined by the Minister of Energy in consultation with the Minister of Finance, and in accordance with any relevant directives. However, instead of paying the money into the Equalization Fund, the proceeds from the sale of the Oil Reserves were paid into the SFF's Customer Foreign Currency investment account held by ABSA Bank without the contemporaneous concurrence of the Minister of Finance as required by the CEF Act.

315.4 Finally, then Finance Minister Gordhan pointed out what, in the National Treasury's view, appeared to be "*a number of procedural discrepancies in how the transaction was undertaken*":

315.4.1 The conditions set by the Minister of Energy and the SFF Board were not met.

315.4.2 Mr Gamede's authority to execute the transactions although retrospectively approved by the SFF Board was questionable.

315.5 In the light of these concerns, former Minister Gordhan suggested that Minister Joemat-Pettersson should "*instruct*" SFF to submit a written notification of the transaction, with reasons for its failure to notify the National Treasury before the

transactions were concluded. Furthermore, Minister Joemat-Pettersson was advised that the proceeds of the disposals were required to paid over into the Equalization Fund, by 30 September 2016, as required under s4(*a*)(ii) of the CEF Act.

316 The SFF BARC met on 2 September 2016. I annex hereto the unsigned draft minute marked "**FA72**". At that stage, it appeared that the SFF Board was still largely unclear on the implications of the disposal. For instance, it noted as recorded in item 6.1 of the minute that:

> *"AGSA had also consulted the technical team to investigate whether SFF had deviated from s54 of the PFMA and if it could sell the significant assets. The non-compliance in this regard was already included in the financials however could be changed depending on the outcome of the technical team recommendations."*

317 In addition, there also appeared to be a lack of clarity on the objectives of SFF's corporate plan. It is helpful to quote the relevant extract of the draft minute (item 4.3):

> *"at the beginning of the financial year there was no strategic stock therefore the objectives relating to the strategic stock could no longer be achievable due to circumstances outside the control of the organisation."*

318 In this regard it was noted in the final paragraph of Item 5.3 of the minute,

> *"it was indicated that the Management would present the submission to BARC for the recommendation of the Board to approve the condonation of Taleveras and Venus contracts signed outside the limitation of the authority of SFF CEO".*

Enquires into the reviewability of the sale of the Oil Reserves

319 Following the engagement between the Minister of Finance and the Minister of Energy in June 2016, Minister Joemat-Pettersson directed the CEF to conduct a legal review of all the contracts entered into by SFF, dating back to 2014, which specifically related to any sale of the Oil Reserves or storage agreements.

320 Initially, the CEF's efforts to implement the Minister's instruction relating to the legal review of SFF's contracts were met with resistance and an unfortunate lack of organisation on the part of its subsidiary.

287.1 First, SFF had no proper contract management system in place, thereby making the process to source contracts challenging.

287.2 Second, SFF failed to respond to the CEF's requests timeously, and required repeated requests for documentation before the SFF staff obliged. In fact, contracts were only obtained once the then acting CEO of SFF, Mr Godfrey Moagi, intervened and instructed the staff to comply with the CEF's requests.

321 The legal review directed by the CEF was completed on 20 December 2016 when the Minister, the CEF Board and the SFF Board were provided with feedback. In essence, the outcome of that process revealed that:

321.1 The sale of the Oil Reserves did not comply with the conditions that Minister Joemat-Pettersson set out in the Second Directive as no "*detailed due diligence*" had been undertaken, the "*integrity of our Strategic Stock levels*" were not sufficiently secured given that SFF would have to purchase oil at prevailing market rates in the event of an emergency or catastrophe and because the sales took place before a trading division was formally established.

321.2 There were indications that the sale of the Oil Reserves did not comply with provisions of the Companies Act and the PFMA, and, on this basis, the disposals were liable to be set aside in judicial review proceedings.

322 Given these concerns relating to the legality of the sale of the Oil Reserves, the CEF considered it prudent to engage senior advocates to consider the outcomes of the legal review and, in the event of their agreement, provide legal advice on the way forward. The first senior counsel provided his opinion on 10 February 2017 and the second senior counsel provided his opinion on 27 July 2017.

323 The reason for seeking a second opinion from senior counsel concerned the financial analysis the CEF received from KPMG. This financial analysis was sought for purposes of gaining a comprehensive understanding of the financial consequences for the CEF, SFF, and by implication, the fiscus, given the unlawful nature of the sale of the Oil Reserves.

324 KPMG issued its report on 25 July 2017 and the CEF accordingly instructed new senior counsel to consider the outcome of the legal review directed by the CEF in the light of the financial analysis it received from KPMG.

325 Although the advice received from senior counsel is legally privileged and is not, I submit, capable of discovery, given where we are now, suffice it to say that the senior advocates agreed with the outcomes of the CEF legal review.

326 However, matters were further delayed following a series of compromising reports that related to allegations published on various media platforms, that one of KPMG's employees had engaged in unethical conduct relating to services the auditing firm provided to a public entity. Subsequently, the CEF considered it prudent to seek a second

financial analysis from PriceWaterhouse Coopers (**PwC**). PWC's report was provided on 7 November 2017.

327 Along the trail of these enquires into the reviewability of the sale of the Oil Reserves, four respective Ministers of Energy presided over the energy sector in the government. This change in guard added a further dimension to the delay in instituting this application as all new Ministers had to be fully apprised of the context and circumstances surrounding the sale of the Oil Reserves, amongst other current programmes underway in the energy sector.

Engagements with Traders: Taleveras, Venus and Vesquin/Vitol

328 Between 6 and 9 June 2017, Mr Thabane Zulu, SFF's then acting chief executive officer, directed letters to Taleveras, Vesquin/Vitol and Venus, copies of which are annexed marked "**FA73**" to "**FA75**", respectively, in which he informed each of the traders that Minister Joemat-Pettersson had commissioned "a legal review", to be undertaken by the CEF, of all contracts related to the sale of the Oil Reserves. As the legal review was, at that stage, still ongoing, the Minister had issued an instruction prohibiting the removal of Oil Reserves stock from the Saldanha Terminal.

329 On 26 September 2017, following the outcome of the legal review directed by the CEF, SFF sent identical letters to each of the three purchasers of the Oil Reserves, attached hereto and marked "**FA76**" to "**FA78**". In essence, the letters sought to give the purchasers notice that the sale of the Oil Reserves was invalid and that the contracts relating to the Oil Reserves were unenforceable for want of compliance with relevant legal requirements. In the light thereof, SFF indicated its intention to seek judicial recourse in accordance with its duty as an organ of state. Accordingly, SFF requested a

meeting with each of the traders that purchased the Oil Reserves which was subsequently held on 7 and 9 November 2017 on a without prejudice basis.

330 Vesquin was the first to respond to SFF's letter on 29 September 2017, by way of an email from one of its directors, Mr Harvey Foster, annexed marked "**FA79**". Therein, Vesquin rejected the outcome of the legal review and requested a meeting. However, before SFF could respond to this letter, Vesquin wrote a second letter on 6 October 2017, annexed marked "**FA80**" demanding performance in terms of the respective contracts (i.e. delivery of 3 000 000 barrels of Basrah Light crude oil).

331 In SFF's view, it could not perpetuate any illegality by allowing Vesquin to uplift the Oil Reserves, particularly in the light of the advice it received pursuant to the CEF's review of the contracts that related to the sale of the Oil Reserves between December 2015 and January 2016. In response to Vesquin, SFF reiterated its position and invited Vesquin to a meeting, in a letter dated 20 October 2017, annexed marked "**FA81.**"

332 Venus and Taleveras took a slightly difference stance. It is important to canvass their circumstances relative to Vesquin, in that both Venus and Taleveras had purported to sell the Oil Reserves to third parties. Venus, ostensibly on-sold to Glencore UK, Taleveras, on-sold to Contango, a company registered in France. SFF was not a party to these further purchase and sale agreements. I am unaware of the details of the negotiations that culminated in the conclusion of these further purchase and sale agreements, nor have I ever had sight of these agreements.

333 Notwithstanding that SFF was not a party to Venus' purchase and sale agreement with Glencore or Taleveras' purchase and sale agreement with Contango, SFF engaged with both third parties because of their purported interest in the legality of the disposal of the Oil Reserves in the first instance.

334 In this regard, Contango's response to SFF's letter of 26 September 2017, annexed marked "**FA82**", was delivered on 12 October 2017. Although Contango took no objection to SFF's view that it was obliged to institute judicial review proceedings, it foreshadowed its resistance to SFF's approach to the courts on the basis that "*Contango Trading was not a party to the Agreements and that it purchased from Taleveras the Product (as defined in the Tank Warrants) in good faith and at arm's length*". Therefore, "*there can be no question that SFF is obliged to comply with its obligations to Contango Trading under the Tank Warrants.*" Nevertheless, SFF responded on 20 October 2017 in a letter identical in content to that which was sent to Vesquin. The letter is attached marked "**FA83**".

335 Glencore (and not Venus), responded to SFF on 13 October 2017 through its attorneys. Glencore' letter to SFF marked "**FA84**" "*demanded*" that SFF comply with its ostensible obligations under the Venus Sale and Purchase Agreement and the subsequent Tripartite Agreement between Venus, Glencore and SFF on the basis that Glencore concluded these agreements:

> *"pursuant to representations . . . made by SFF's then acting CEO, Mr Sibusiso Gamede . . . as well as Ms Tina Joemat-Pettersson (the Minister of Energy), on 30 November 2015 and 2 December 2015 respectively in written correspondence to the effect that the transactions contemplated in the Venus Rays SPA and Storage Agreement had the necessary approvals and were in compliance with requisite procedures applicable to transactions of the nature regulated therein."*

336 SFF responded to Glencore on or about 18 October 2017 affirming its position communicated in its letter to purchasers and inviting the latter to a meeting.

337 Like Vesquin, Glencore rejected SFF's approach and requested an undertaking that SFF would adhere to the obligations provided for in the agreements. Consistent with its

approach to Taleveras and Vesquin, SFF responded by reiterating its position and requesting a meeting.

338 The meeting referred to by SFF in its letters to the traders, took place on a without prejudice basis on 7 November 2017 and 9 November 2017 respectively. Representatives of SFF and CEF met with each of the purchasers individually over the course of the two days. Meetings were also held with Contango and Glencore, third party purchasers of the Oil Reserves who were engaged to the extent that they had an interest in SFF's decision to judicially review the disposals in the light of the outcome of the legal review process.

339 A second round of meetings between SFF, CEF and purchasers took place on 12 December 2017 and 13 December 2017. Glencore UK was approached on the same basis as Taleveras and Vesquin/Vitol but was not available on the proposed dates.

340 The purpose of the second round of engagements with the traders, was to solicit views, once again on a without prejudice basis, relating to a just and equitable remedy. Since none of the traders disputed that CEF and SFF were obliged, as organs of state, to seek a declaratory order which I submit, as reasonable prospects of success in the grant thereof, the CEF and SFF considered it prudent to obtain as much information of the relevant circumstances as possible before approaching the court.

341 In the light of the significant costs to the fiscus as well as the business relationships with the traders, that process is ongoing and will be canvassed fully before this court in Part B of the application relating to just and equitable remedy.

342 Suffice it to say, that in January 2018, some of the traders set out their approach to remedy, on a without prejudice basis. At every stage of the engagements, CEF and SFF

have made it clear that an approach to the court for a declaratory order and a court sanctioned approach to dealing with the consequences of invalidity is paramount.

343 In this regard, the traders have been well aware that CEF and SFF consider the contracts void and of no force or effect.

THE LATENESS OF THIS APPLICATION SHOULD BE CONDONED

344 As set out above, this application is brought by CEF under PAJA and the principle of legality; and by, SFF under the principle of legality (and under PAJA, to the extent that it is acting in the public's interest).

345 On either basis, I am advised and aver that it is in the interests of justice for this court to (a) extend the time period for bringing the review (in terms of s9 of PAJA) and/or to (b) condone the unreasonable delay in the institution of these proceedings under the principle of legality.

346 The institution of judicial review proceedings in terms of PAJA is governed by s7 read with s9 thereof. These provisions state:

> *"7 Procedure for judicial review*
>
> *(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-*
>
> ....
>
> *(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."*
>
> *"9 Variation of time*
>
> *(1) The period of-*
>
> *(a) ...*

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

347 In relation to review proceedings based on the principle of legality, I am advised that the requirement is that the review must be brought within a reasonable time, and that what is reasonable depends on the circumstances. I submit that the explanation of the circumstances which resulted in the delay in launching the application demonstrates that the applicants have acted reasonably in bringing the application. Alternatively, I submit that it is in the interests of justice for this Court to condone the unreasonable delay.

348 This application was filed in March 2018, about two years since Mr Gamede purported to dispose of the Oil Reserves.

349 As set out above, SFF holds South Africa's Oil Reserves for safekeeping, to be accessed only in circumstances of emergency or catastrophes. As a net importer of crude oil, physical access to crude oil, on demand and without further risk, it is necessary for the government to ensure national and public security in circumstances of dire need. It is akin to a burn-shield in a first aid kit that lies dormant in the home for years, but is indispensable in the time of need.

350 Mr Gamede unlawfully and irregularly disposed of a fundamental national public insurance. He lay claim to this power by purporting to act under the National Energy Act, the CEF Act and, more particularly the ministerial directives issued by Minister Joemat-Pettersson. I am advised that in so doing he exercised a public power sourced in legislation and took decisions that have caused serious and grave prejudice to the State,

the fiscus and the public. He concluded *inter alia* sale and purchase agreements pursuant to [his] decision/s to sell the Oil Reserves to Taleveras, Venus and Vesquin, global commodity trading firms based in Paris, London and Dubai. In so doing, Mr Gamede sought to bind the State to contracts for the disposal of its Oil Reserves to the detriment of the public and in flagrant disregard of the law. I submit this cannot be countenanced. The only recourse for the State and the public, in whose interest I approach this court, is to seek a juridical review of the offending decisions and a setting aside of the sale and purchase agreements concluded pursuant thereto.

351 This application concerns, *inter alia*, the protection of a national asset, the governance and administration of public entities and the rule of law. More particularly, this application concerns the constitutionally invalid and unlawful sale of the Oil Reserves and arises in circumstances where CEF and SFF have approached this court, candidly with a comprehensive explanation of the circumstances that have led to these proceedings.

352 This application had to be considered by various officers, structures and entities of the DoE and the Executive, including the SFF Board, the CEF Board, legal advisors, audit and risk committees as well as high level officials and employees within those respective public entities and within the DoE. In addition, it had to be considered by the political leadership of the relevant departments. In the light of the subject matter of this application, the nefarious conduct I have set out above and the extent of engagements with officials, the preparation of this application took time to prepare and had to be carefully managed.

353 I do not intend to burden the papers in this application by repeating the chronology of events leading to the necessity for these proceedings.

354 The impugned decisions were taken between December 2015 and January 2016. The SFF Board found out about the disposals in February 2016. In the six months that followed, enquires were undertaken by various structures and entities to determine the circumstances surrounding the disposal, including Mr Gamede (who initially provided insufficient facts), Mr Nkutha, the SFF Exco, the CEF Board Risk and Audit Committee, the National Treasury, the Auditor General of the South Africa and the former Ministers of Energy.

355 By September 2016, it became clear that a thorough review of the contracts relating to the disposals was required. As I have demonstrated, the purchase and sale agreements are complex, voluminous, opaque and haphazardly composed of several amendments, novations and rescissions. These complexities, coupled with the importance of gaining a comprehensive understanding of what happened and how, took time to consider and deliberate upon.

356 Further difficulties arose because of the number of officials implicated in this matter who had to be consulted, interviewed and tested. In addition, the CEF also sought to engage the former Ministers of Energy and the erstwhile SFF Chairperson and CEO. Given the importance of this matter, it would not have been prudent to rush to court hurriedly.

357 Further delays in the legal review process were compounded by the initial recalcitrance of SFF employees and DoE officials.

358 When the CEF's legal review process was concluded in December 2016, it sought legal advice from senior counsel. That advice was provided in February 2017. Given the financial implications of the legal conclusions, the CEF prudently engaged the services of an auditing firm that provided its report in July 2017.

359 In the interim, I hasten to add that the appointment of a new Minister of Energy as recently 26 February 2018 has meant that a new political head had to be brought up to speed with the matter.

360 In the light of the unfortunate cloud of controversy over KPMG, the CEF took the view that a second opinion on the financial implications of the legal review was required, so too was the second senior counsel's opinion sought.

361 The second financial analysis was provided to the CEF in November 2017.

362 A new Minister of Energy was appointed a mere two weeks prior to that report. To fully understand the background and context to the Impugned Agreement and the subsequent enquires, as well as the legal issues presented by CEF and two senior counsel.

363 Indeed, since the Impugned Agreements and Impugned Transactions the Ministry, DoE and public entities have experienced significant shifts in leadership and management. Minister Joemat-Pettersson served as Minister of Energy from 25 May 2014 to 31 March 2017, thereafter, she was replaced by Minister Mmamoloko Tryphosa Kubayi, who served as Minister for seven months, until 17 October 2017 whereafter Minister Mahlobo took office and, since then, sought to carry on the trail of enquiries into the circumstances surrounding the sale of the Oil Reserves. As indicated, Minister Mahlobo was recently replaced by Minister Jeff Radebe.

364 This difficulty has been compounded by the changes in the leadership at the CEF and SFF, respectively.

365 At the time that the Minister of Energy was appointed and the second financial analysis was presented, SFF and CEF began to engage Taleveras, Vesquin/Vitol and Venus in good faith in an attempt reach agreement on a just and equitable remedy. I note that none

of the traders launched review proceedings or a mandamus, which has always been a remedy available to them if the prejudice was so grave.

366 During November 2017, the applicants were advised that its then attorneys of record Allen & Overy could no longer act as it had a conflict of interest.

367 The applicants had to appoint its current attorneys of record who had to first familiarise themselves with the matter, consider voluminous documentation and consult with applicants before being able to advise and draft the necessary court application. This has inevitably led to a delay in the finalisation of this application.

368 In addition, since 7 November 2017, the applicants have, mindful of the buyer's position, attempted to engage with the buyers in order to determine whether it might be possible to reach some form of agreement regarding the just and equitable remedy that should be ordered by this court. Initially it was envisaged to seek to ascertain some form of agreement and then to approach this court for both the declaration of unlawfulness as well as the just and equitable remedy. However, I am advised that the applicants have been unable to agree with the buyers regarding the just and equitable remedy that should follow the declarations of unlawfulness in these proceedings. This engagement process added to the delay and I am advised and submit that it was in the interests of justice for the applicants to seek to procure some form of agreement regarding the just and equitable remedy. If that had been possible it might well have saved further public funds from the need for lengthy litigation.

369 Moreover, the separation of these proceedings in Part A and Part B have been done in order to continue the negotiations with the respondents in respect of what they consider to be the just and equitable remedy and the bases for their claims on that score.

370 I am advised and aver that when determining whether to grant an extension and/or condone the lateness in bringing the review, the prospects of success of the review are a material consideration that should be considered by this court. As set out above, I am advised and aver that the prospects of the decisions taken by Mr Gamede (purportedly with the authority of the SFF Board as well as the raft of other approvals that were not sought or procured) demonstrates that the prospects of the decisions being declared unlawful are extremely strong. I am advised and aver that even where there has been a lengthy delay our courts have condoned it, particularly where the prospects of success are as strong as this case, where an organs of state seek to review their own decision (or the decisions of a subordinate in the accountability chain), and where (as in the present case) the factual matrix regarding precisely what occurred and the unlawfulness have only been uncovered pursuant to further investigations and reviews.

371 In the light of the delay, unless this court allows an extension in the interests of justice, the applicants will be barred from bringing this application on a purely technical ground.

372 As the factual background demonstrates, the former (and present) Ministers of Energy as well as the leadership of the CEF and SFF, have taken all reasonable steps available to investigate the reviewability of the contracts after becoming aware of the sales. Extensive and detailed enquiries were made in order to determine how the contracts were concluded and whether the process complied with the strictures of the PFMA, the Companies Act and the CEF Act. This trail of enquiry lead to the facts that form the basis of this review application in fact investigations and endevoures to obtain documentation are continuing.

373 I respectfully submit that the applicants have provided a satisfactory explanation for their delay. It is evident that the delay was not due to any intention to cause prejudice to the

PROVISION FOR FILING A SUPPLEMENTARY FOUNDING AFFIDAVIT

377 The applicants reserve their right to file a supplementary founding affidavit after the record of the impugned decisions have been provided.

378 I am advised that generally where an organ of state is reviewing its own decision it may not be necessary for the applicant to supplement its founding papers after it files the record of its own decision. In this instance, however, because of the difficulties in tracing all of the relevant documents (which may be in the possession of some of the respondents) as well as because decisions by the Minister have also been challenged, and the Minister has also been called upon to file any record of the impugned Ministerial decision, the applicants submit that it is in the interests of justice that they be permitted to supplement their founding affidavit (as new information may well come to light).

COSTS

379 The applicants only seek costs against the respondents in the event of opposition. It is respectfully submitted that opposition to the application, in light of the flagrant disregard of the Constitution and the overwhelming public interest, would simply be unreasonable. Given the myriad of complex factual and legal issues in this application, we submit that the costs of three counsel would be warranted.

CONCLUSION

380 In these circumstances, I submit that applicants are entitled to the relief sought in the notice of motion, including the costs of three counsel and that the determination of the just and equitable remedy be determined in Part B - with any of the applicants and any of the respondents who wish to oppose Part B filing supplemented papers after the

determination of Part A and in accordance with the timetable set out in the notice of motion.

LUVO LINCOLN MAKASI

I certify that the Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on this the 12 day of MARCH 2018, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

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