

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

Case Number: 4305/18

In the application of:

ORGANISATION UNDOING TAX ABUSE

Applicant for leave to
intervene as *amicus curiae*

In the matter between:

CENTRAL ENERGY FUND SOC LIMITED

First Applicant

STRATEGIC FUEL FUND ASSOCIATION NPC

Second Applicant

and

VENUS RAYS TRADE (PTY) LIMITED

First Respondent

GLENCORE ENERGY UK LIMITED

Second Respondent

TALEVERAS PETROLEUM TRADING DMCC

Third Respondent

CONTANGO TRADING SA

Fourth Respondent

NATIXIS SA

Fifth Respondent

VESQUIN TRADING (PTY) LIMITED

Sixth Respondent

VITOL ENERGY (SA) (PTY) LIMITED

Seventh Respondent

VITOL SA

Eighth Respondent

MINISTER OF ENERGY

Ninth Respondent

MINISTER OF FINANCE

Tenth Respondent

FOUNDING AFFIDAVIT



I, the undersigned,

STEFANIE FICK

do hereby make oath and say that:

- 1 I am the Executive Director of the Accountability Division of the Organisation Undoing Tax Abuse ("**OUTA**"), a non-profit company with registration number 2012/064213/08. OUTA is situated at 314 Oak Avenue, Ferndale, Randburg, Johannesburg.

- 2 I am authorised to bring this application on behalf of OUTA. A resolution of the OUTA Executive Committee confirming my authority is attached, and marked "**OUTA1**".

- 3 Unless the context indicates otherwise, the facts contained in this affidavit are within my personal knowledge, and are true to the best of my belief. To the extent that I rely on hearsay evidence, I request the court to admit the evidence in terms of section 3(1) of the Law of Evidence Amendment Act, 1988.

- 4 Any legal submission that I make is based on the advice of OUTA's legal representatives.



5 OUTA wishes to intervene in this matter as an *amicus curiae* with the view to make written and oral submissions to this Court. OUTA also seeks to adduce evidence by placing a report and government statements before the court. These documents are uncontroversial. The affidavit is filed in support of OUTA's application for admission and its application to adduce evidence.

OUTA'S BACKGROUND AND INTEREST IN THIS MATTER

6 OUTA is a Non-Profit Company ("**NPC**") incorporated in terms of the Companies Act, 2008, and has been approved as a public benefit organisation in terms of the Income Tax Act, 1972 ("**PBO**"). OUTA's NPC and PBO certificates are attached, and marked respectively "**OUTA2**" and "**OUTA3**".

7 OUTA is funded by ordinary South Africans, as well as small and medium-sized local businesses who believe in and support its civil activism. The funders support OUTA's vision of an engaged and empowered civil society that ensures the responsible use of tax revenues throughout all levels of government.

8 OUTA was established on 12 March 2012 under the name "The Opposition to Urban Tolling Alliance".

9 In 2016, OUTA changed its name to the "Organisation Undoing Tax Abuse", and expanded its objectives. Its core aim is to ensure that tax revenue is expended in a frugal and lawful manner, unimpeded by the rising tide of the



inappropriate use of state authority and power. OUTA's central aim is to promote public accountability and transparency. The mandate requires OUTA to investigate and challenge alleged corruption and other acts of poor governance. OUTA's Memorandum of Incorporation is attached, and marked "OUTA4".

10 Since 2017, OUTA has engaged in a range of activities and interventions to promote public accountability. These include:

10.1 raising public awareness of the alleged rotation of South Africa's Strategic Oil Reserves;

10.2 monitoring deliberations in Parliament, and its portfolio and select committees, and engaging with its members, to ensure that issues or accountability and oversight are considered and acted upon;

10.3 keeping abreast of new legislation and providing comments on draft legislation that is relevant to OUTA's mandate of creating accountability, transparency, rational policy and good governance in the areas of transport, energy, water and sanitation, and environmental issues;

10.4 making submissions to a Commission of Inquiry, Ministries, regulators and the South African Human Rights Commission on issues relating to accountability, transparency and good governance in the areas of transport, energy, water and sanitation, environmental issues;

10.5 investigating allegations of corruption within the public sector and collecting evidence and laying criminal charges against state officials who have been involved in corruption, fraud and misappropriation of public funds;

10.6 gathering evidence and laying complaints against private professionals who have been involved with corruption with various oversight bodies including the Companies and Intellectual Property Commission, the South African Institute of Chartered Accountants, the Independent Regulatory Board for Auditors, Parliament's Ethics Committee and the Council for Debt collectors;

10.7 advocating for public participation in government processes and engaging with local communities to encourage active citizenry, which includes making representations in respect of the right of individual candidates to stand for elections;

10.8 seeking a declaration of delinquency for life against a former board member of a state entity; and

10.9 calling upon whistle-blowers to report Covid-19 related corruption:

10.9.1 Over the past few months, the media has widely reported on the extensive plundering of state resources in respect of the procurement of Personal Protective Equipment and other resources needed to fight Covid-19 and its effects. An

overwhelming amount of misused funds is due to companies submitting inflated prices for non-transparent tenders, whose bids were subsequently approved by accounting officials acting without any procedural or oversight safeguards. The inflation of prices was aided by the decision of National Treasury to suspend competitive and transparent bid processes. In other words, accounting officials and authorities in government departments were permitted to choose suppliers without any oversight. There were no invitations to bid, no submissions of competitive bids, and no transparency over the process. National Treasury Instructions No. 5 of 2020/21, dated 28 April 2020, is attached and marked "OUTA5".

10.9.2 OUTA received numerous requests from the public to request transparency and effective accountability against those responsible for corruption and maladministration of Covid-19 related expenditure. OUTA subsequently invited the public to provide any information on OUTA's whistleblowing portal.

10.9.3 The information will be passed on to the Special Investigating Unit ("SIU") and the Auditor-General. In particular, on 23 July 2020, given the widespread nature of the looting, the President of the Republic of South Africa signed a proclamation authorising the SIU to investigate any



unlawful or improper conduct in the procurement of any goods works and services during or related to the national state of disaster in any institution. The proclamation is attached, and marked “**OUTA6**”.

10.9.4 In addition, on 5 August 2020, the President of the Republic directed that all ministerial departments to urgently provide “all information related to the names of companies and amounts of tenders and contracts that have been awarded in your respective departments (and entities) during the period of the Covid-19 and National State of Disaster”. The President intends to make the information publicly available. It bears noting that much of this information will have ordinarily been publicly available and subject to public oversight if National Treasury did not empower state departments and entities to choose suppliers without competitive bid processes. The letter to Cabinet Ministers is attached, and marked “**OUTA7**”.

11 OUTA’s interest in this litigation aligns with its strategic objective. Corruption and poor governance bear a large measure of responsibility for poor service delivery and the non-delivery of public goods. OUTA is therefore driven to improve the ways that public procurement systems can be improved in order to reduce their susceptibility to corruption and poor administration. If admitted as an amicus, OUTA’s submissions will focus on principles that seek to tighten public procurement procedures and discourage private companies



from concluding contracts with the state that are tainted with corruption and other forms of maladministration.

- 12 OUTA's focus and experience mean that it is well placed to make submissions in this matter. I respectfully submit that it is in the interests of justice to admit OUTA as an *amicus curiae* in these proceedings.

CONSENT TO INTERVENE

- 13 In terms of Rule 16A(2) of the Uniform Rules of Court, on 4 August 2020, OUTA's attorneys addressed a letter to the applicant's attorneys requesting its written consent to intervene as an *amicus curiae* in the matter. A copy of the letter is attached, and marked "**OUTA8**".
- 14 On 6 August 2020, the applicants' attorney responded that it had forwarded the letter to all the respondents. A copy of the letter is attached, and marked "**OUTA9**".
- 15 OUTA has only received one response to its request. On 11 August 2020, the attorney for the third respondent said that the third respondent would consider its position once the application has been received. The third respondent indicated that it was not minded agreeing to the production of further evidence given the stage at which the amicus application has been filed. It requested that the application be filed before the end of the week ending Friday, 14 August 2020. The letter is attached, and marked "**OUTA 10**".

16 No other responses were received.

17 Leave is therefore sought, in terms of Rule 16A(5), to admit OUTA as an amicus curiae, and to afford it an opportunity to make written and oral argument (the latter being on the days the matter is heard). OUTA also seeks leave to file the evidence for the reasons outlined in this affidavit. I respectfully submit that the evidence is not controversial, does not pertain directly to the facts of the case, and is easily verifiable.

THE ANSWERING AND REPLYING AFFIDAVITS

18 OUTA has only perused the founding affidavit.

19 In the letter seeking consent to intervene, OUTA requested the parties to provide it with copies of the answering affidavits and the replying affidavit. The requests were ignored.

20 On the enquiries made by OUTA's legal representatives, OUTA learned that the affidavits were exchanged on a confidential basis. OUTA is unaware of the basis and scope on which the respondents claim confidentiality, and whether they are indeed entitled to do so. At the very least, the filing of this application entitles OUTA to view copies of the answering affidavits and replying affidavit (and any other affidavits or written submissions that may have been filed).



POSITION ADOPTED BY OUTA

21 If admitted as an *amicus curiae*, OUTA will make submissions on three points.

21.1 **Condonation for the late filing of the review application.** The applicants have requested condonation for the late filing of its application. In support of the applicant's prayer for condonation, OUTA submits that the court must take into account two considerations when exercising its discretion as to whether to grant condonation for the late filing of state-initiated judicial review proceedings pertaining to unlawfully awarded tenders.

21.1.1 First, courts must actively encourage parties to come forward and disclose irregular activity (even if late). This is particularly the case when large and significant public resources — like the country's oil reserves — are at stake. Courts are the final bulwark against unlawful state practices, and should therefore actively encourage the ventilation of disputes alleging the irregular spending of public fund. The courts should not shrink their role. Within its constitutional mandate and limits, the courts must aid in combating corruption and other irregular spending in civil proceedings. It is ultimately in the public interest that the alleged irregularities are ventilated in open judicial proceedings, and, if proved, are set aside.

21.1.2 Second, the courts must acknowledge that the proper and diligent fulfilment of state duties requires times. There can be no dispute that state entities have a constitutional duty to investigate corruption and other irregular acts that harm the public. The South African public rely upon government departments and agencies to investigate and root out corruption at every turn. Government is best placed to do so for a number of reasons – not least because it is able to investigate its own departments. And if sufficient evidence is present, there is a constitutional duty on the state to take legal action in order to undo the unlawful act. However, in order to execute this constitutional duty diligently, the complexity of maladministration and the bureaucratic nature of the state means there will invariably be a delay in the launching of legal proceedings.

21.2 In a nutshell, if the court finds that there are competing considerations that are equally-balanced as to whether or not to grant condonation, the above two public interest considerations require the court to exercise its discretion in favour of granting condonation.

21.3 **The importance of procedure and “red flags” in public procurement.** The applicants allege there were numerous irregularities in the process followed when awarding the tender and concluding the agreements. OUTA will not make submissions on the facts of the case, but submits that the court should always ensure

strict process is followed and draw adverse inferences against red flags that are not (or poorly) explained.

21.3.1 In judicial review proceedings pertaining to public procurement, the courts must recognise the importance of procedure and require the strict compliance with process. This includes transparency and oversight over the process. Process ensures fairness. Moreover, procedural irregularities are often good indicators of corruption and other unlawful activities. Public procurement often requires the involvement of a number of state departments and many people. It also often involves large sums of money. Clear procedural guidelines, and the following of those guidelines, are important for establishing and maintaining checks and balances to minimise and avoid corruption and other illegal behaviour in the procurement processes. Procedures also assist the officials tasked with managing and monitoring the processes. The absence of a comprehensive and reasonable explanation for any deviation from a standard procedure is a strong indication of corruption or the misuse of public funds in the procurement process.

21.3.2 Indeed, in circumstances like the present where it is the state that comes forward with allegations of procedural irregularity after extensive investigations, the court should place greater weight on factual findings of the state. This is



because the relevant department often has the best access to relevant information.

21.3.3 The courts should accordingly view 'red flags' in the procurement procedure as a serious issue particularly when there are multiple red flags that are unexplained (or are poorly explained). The courts should take an uncompromising stance on lax public procurement procedures as these are often a product of corrupt and other unlawful decisions. In matters involving allegations of the misuse of public funds in tender processes, the courts should place more emphasis on "red flag" issues raised by circumstantial evidence.

21.3.4 The recent plundering of Covid-19 related funds demonstrates the importance of 'red flag' issues. As explained, National Treasury suspended competitive and transparent bidding process. The failure to follow regular process meant that no competitive bids were submitted, and there was no oversight over the process. In secrecy, government departments and entities were able choose preferred suppliers (who had submitted unduly inflated prices for PPE and other equipment despite National Treasury indicating a range of acceptable price ranges for these resources).

21.4 Accordingly, the courts should draw an inference when procurement laws that are designed to insulate or limit corruption, unfairness and other unlawful activity, and those laws are contravened or ignored or changed at a late stage without any good explanation. The inference is that it is due to impropriety in the tender process. The courts should only depart from this inference when a compelling and watertight is reason is provided.

21.5 **Remedy.** Although OUTA has not viewed the answering affidavits filed in this matter, it has become common practice in judicial review proceedings for respondents to aver that it is just and equitable that, even if found to be unlawfully concluded, the contract not be set aside. In most cases, private companies allege that they may suffer financial loss. OUTA submits that, in the event that the applicants prove their case and the court declares the sale agreement invalid, the financial loss that the respondents allege they will suffer should not constitute sufficient basis for the court not to reverse the unlawful transactions.

21.5.1 Any financial loss alleged by the respondents is far overshadowed by the overwhelming public interest in ensuring that the state is restored lost tax revenue and its emergency oil supplies. The Covid-19 pandemic demonstrates that the state must have sufficient resources to deal with unexpected and harmful events.

21.5.2 Private companies contracting with the state do so on the clear understanding that the state must always act in the public interest and within the legal framework. In this matter, assuming that the applicants prove their case, the transactions could never serve the public interest. There were considerable 'red flags' in the process followed, and the second applicant agreed to commercial terms that were plainly irrational and detrimental to the state. If a private entity contracting with the state has sufficient reason to believe — or ought reasonably to believe — that a contract with the state is irrational and could be set aside in the future, then that private company assumes the financial risk that a court will someday set aside the contract. In such circumstances, the courts should not protect the private company from financial loss. This principle is designed to discourage private companies from bidding for and accepting red-flag-tainted contracts.

22 OUTA intends not to repeat submissions advanced by other parties. As explained, OUTA has only been able to peruse the founding affidavit. OUTA is unaware of what is contained in the answering affidavits and replying affidavit (and written submissions, if those have been filed). Nevertheless, based on its perusal of the founding affidavit, it appears that OUTA's proposed submissions will cover different topics to those addressed by the parties. To the extent that OUTA's submissions overlap based on the

contents of the answering affidavits and the replying affidavit, OUTA will refrain from repeating those submissions.

- 23 OUTA respectfully submits that its submissions will be different to those addressed by the parties, and that its submissions will also be relevant to the legal issues before this Court and useful in the determination of the matter.

APPLICATION TO ADDUCE EVIDENCE

- 24 In order to supports its submissions, OUTA seeks leave to lodge a Transparency International Report, titled *Curbing Corruption in Public Procurement: A Practical Guide*, 2014. The Report is attached, and marked “**OUTA11**”.

24.1 Transparency International is a reputable international non-profit organisation, which has chapters in more than 100 countries (including South Africa). Transparency International’s mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society.

24.2 The content of the Report is not controversial, and is easily verifiable. It does not pertain to the facts of the dispute at hand.

24.3 The Report contains the following:



24.3.1 All governments spend huge sums of taxpayers' money on public sector procurement. Given the vast amounts of money at stake there are few government activities that create greater temptations or offer more opportunities for corruption than public sector procurement.

24.3.2 Public procurement procedures are often complex, and the process can often be conducted in non-transparent ways which makes detecting manipulation difficult.

24.3.3 Corruption can have a massive impact on society:

24.3.3.1. Taxpayers' money that is meant to pay for services (like hospitals and educations) ends up being held in corrupt hands;

24.3.3.2. The failure to provide for competitive procurement limits access to innovative solutions and products; and

24.3.3.3. Corrupt behaviour by government officials (and the toleration thereof) encourages bad practices by companies and citizens.

24.3.4 The public procurement system must be underlined by core principles and minimum standards, including integrity,



transparency, accountability, professionalism, fairness and efficiency.

24.3.5 The public procurement must be able to monitor risk factors and red flags. These include, among other things:

24.3.5.1. Urgent purchases;

24.3.5.2. Inadequate access to information;

24.3.5.3. The use of non-standardised bidding documents that are narrow or appear tailored, and the use of technical specifications that are created solely for a particular procurement transaction;

24.3.5.4. Sector vulnerability (of which oil is among the most vulnerable);

24.3.5.5. Lack of transparency in the assessment of needs and development of a procurement plan, including the failure to publish bidding opportunities;

24.3.5.6. Failure to keep accurate minutes of pre-bid meetings, including questions and answers;

- 24.3.5.7. Clarifications sought by bidders are not answered;
- 24.3.5.8. Bids are not opened publicly in the presence of the bidders and/or key elements of all bids are not made public;
- 24.3.5.9. There are political figures on the evaluation committee;
- 24.3.5.10. Evaluation criteria are amended after receipt of bids;
- 24.3.5.11. Contracts are not in conformity with bid documents, including allowances for variations which are not part of the bidding documents;
- 24.3.5.12. Staff involved in the contract award decision is involved in contract supervision;
- 24.3.5.13. Contract specifications or the scope of work is altered after the contract is awarded;
- 24.3.5.14. Failure to publish financial and performance audit reports.



- 25 In a general sense, the Report is relevant to the matter at hand. It is in the interests of justice that the Report be placed in evidence before the Court.
- 26 The third respondent indicated that it was not minded consenting to the filing of further evidence because of the timing of the application. I respectfully submit that the complaint is without merit. OUTA acted expediently when it learnt that the replying affidavit had been filed and that the hearing was set down for mid-September 2020. In these circumstances, OUTA should not be refused an opportunity to furnish a 40-page report that is both inconvertible and easily verifiable. In addition, the application will be filed a month before the application is heard. The parties will have a sufficient opportunity to respond to the report, if they so choose.
- 27 To demonstrate the importance of following transparent and compliant procedure in tender processes, OUTA also requests that annexures “**OUTA5**” to “**OUTA7**” pertaining to the COVID-19 Relief is admitted as evidence. The contents of the annexures are not directly relevant to the facts of the case, are inconvertible and easily verifiable. The letter requesting consent to intervene did not request the consent of the parties to adduce this specific evidence. The evidence is relatively new, and was not available when OUTA’s attorney consulted with its counsels. OUTA submits that it is in the interests of justice to admit the evidence.

DISPENSING THE TIME REQUIREMENTS / CONDONATION

28 In terms of Rule16A(9) of the Uniform Rules of Court, OUTA requests the court to dispense with the time requirements for filing the amicus application (alternatively condone the late filing of the application).

29 Despite not requesting intervention within 20 days of the Applicant filing the Rule16A Notice, it is in the interests of justice to permit OUTA to intervene in these proceedings for three reasons.

29.1 First, there is a justifiable reason for the delay. Although the application was launched in 2018, the matter has progressed at a slow pace. Prior to 2020, the litigation focused on issues in which OUTA has no direct legal interest. First, the respondents sought the discovery of documents, which is a dispute that was only resolved in the Supreme Court of Appeal at the end of 2019. Second, the applicants sought leave to file a supplementary affidavit. The affidavit was later abandoned. As a result, the respondents only filed their answering affidavit to the main application this year. On Monday, 27 July 2020, OUTA's legal representatives were informed that the replying affidavit was filed at the end of the previous week and that the matter had been set down for 14 – 17 September 2020. Once it received notification that the replying affidavit and that the matter was to be heard in September 2020, OUTA's attorney sent the request to intervene. Given the nature of the case, OUTA submits that it was prudent for it to wait for the issues to crystallise between the parties



before it decided whether it was necessary to apply to join as an amicus (even though that strategy did not ultimately work because of the confidentiality arrangement between the parties).

29.2 Second, no party will suffer prejudice should OUTA be admitted as an amicus. OUTA's submissions are of a legal nature, and the evidence sought to be admitted by OUTA does not pertain to the particular dispute and is easily verifiable and incontrovertible.

29.3 Third, OUTA's submissions are made in the public interest. This is beneficial to a matter (i) where it alleged that public resources have been squandered and plundered (ii) that has attracted considerable public attention. It bears noting that in 2019, OUTA called upon the Minister of Mineral Resources to intervene in the matter. The Minister has regrettably elected not to do so. There is an overwhelming public interest in this matter, and a compelling need to ensure that emergency oil reserves are not sold in secret and on terms that defy commercial sense. The outcome of the litigation may have severe ramifications for public resources. This includes the wasteful depletion of the public purse in times when the state is requesting international assistance, and the loss of the country's emergency oil reserves in the time of a pandemic.

29.4 Fourth, OUTA is of the view that the submissions will be of assistance to the court in the determination of this matter.



CONCLUSION

30 For the reasons set out above, OUTA seeks leave to be admitted as an *amicus curiae* and to make both written and oral representations.



STEFANIE FICK

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Rooi poort on this the 14th day of AUGUST 2020, and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



Commissioner of Oaths

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