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

CASE NO: 4305/18

In the matter between:

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

and

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

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INTRODUCTION

1 This review application concerns the disposal of the South African government's strategic oil reserves ("**strategic stock**") in patent disregard of the rule of law and statutory prescripts.

2 The Strategic Fuel Fund Association NPC ("**SFF**") is a public entity that is registered as a non-profit company.[1] It is mandated to hold sufficient strategic crude oil stock to last the country for up to 21 days in the event of a shortage – or equivalent to 10.3 million barrels.[2]

2.1 The decision to hold strategic stock serves a variety of legitimate and sensible purposes: to ensure access to energy resources during times of severe fuel disruptions; the significant role that energy resources play in our economy; and the fact that private entities are not obliged to maintain crude oil stocks.[3]

2.2 Storing crude oil (referred to as Strategic Petroleum Reserves or "**SPRs**") is common amongst countries throughout the world.[4] Crude oil is used to manufacture various refined oil products like petrol. There are, however, sound reasons for storing crude oil rather than petrol since crude oil – if stored correctly – can be stored almost indefinitely.[5]

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1 Founding Affidavit, p 20, para 25

2 Founding Affidavit, p 15, para 11

3 Founding Affidavit, p 27, para 50

4 Replying Affidavit, p 5178, para 698

5 Replying Affidavit, p 5020, para 42.1

3 On 4 September 2015, a new acting chief executive officer, Mr Sibusiso Mr Gamede ("**Mr Gamede**"), was appointed at the SFF. Within three months of his appointment – Mr Gamede orchestrated the sale of 10 million barrels of the strategic stock. The Central Energy Fund SOC Limited ("**CEF**") and SFF (the "**applicants**") seek to review and set aside these transactions.

4 Mr Gamede disposed of the strategic stock in three main transactions:

4.1 Transaction 1: Mr Gamede purported to sell 2 million barrels of Basrah Light crude oil and 2 million barrels of Bonny Light crude oil to Taleveras ("**the Taleveras transaction**"). Taleveras subsequently on-sold the oil to Contango as part of a financial arrangement.[6] Taleveras does not oppose the merits of the review application – nor does Taleveras oppose condonation for the delay launching the review being granted.[7]

4.2 Transaction 2: Mr Gamede purported to sell 3 million barrels of Basrah Light crude oil to Vesquin (a South-African related company of Vitol). The bid was, however, submitted by Vitol and the Minister approved the award of the transaction to Vitol ("**the Vitol transaction**").[8]

4.3 Transaction 3: Mr Gamede purported to sell 3 million barrels of Bonny Light to Venus ("**the Venus transaction**"). Venus on-sold the oil to Glencore.[9] Neither Venus nor Glencore oppose the merits of the review application. Venus elected not to oppose any of the relief sought in these proceedings and

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6 Replying Affidavit, p 5009, para 11.1

7 Replying Affidavit, p 5010, para 15.2

8 Replying Affidavit, p 5009, para 11.2

9 Replying Affidavit, p 5010, para 11.3

does not dispute any of the allegations made against the Venus transaction. Those allegations stand unchallenged on the papers.[10]

5 Mr Gamede thereafter concluded storage agreements with – Taleveras, Vitol and Venus as well as a Tripartite Agreement with Glencore and Venus, and a Side Letter with Contango.

6 There are three broad issues for this Court to consider:

6.1 First, should this Court condone the delay in the review application being launched?

6.2 Second, the merits (i.e. were the impugned decisions unlawful)?

6.3 Third, if the appointment was unlawful, what should this Court do about it? Put differently: what is the just and equitable remedy on the facts of this case?

7 The merits are straightforward. The Ministerial Directives and SFF's Board set out a variety of preconditions that needed to be complied with before any rotations of the strategic stock would be considered or occurred. These included a detailed due diligence process, which should have included in-depth testing and analysis of the quality of the oil in the various tanks before a decision was taken regarding when, what and how much to sell. Further, as this was the first time that SFF would undertake any trading itself (previously this had been done on its behalf by PetroSA)[11] the Minister directed that SFF would first establish a Trading Division. Even Vitol, who continues to defend the merits of the transactions, accepts that the

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10 Replying Affidavit, p 5011, para 15.3

11 Vitol's Answering Affidavit, p 3195, para 22

structure of the Trading Division was only established after Mr Gamede had conducted his selection process.[12] The Trading Division was an essential precondition for any stock rotations to take place: it was the division that would conduct the rotation process to ensure that SFF sold *inter alia* (a) at the right time and (b) for the right price. Independent expert evidence (discussed in detail below) demonstrates that Mr Gamede's process failed on all of these metrics.

8 No fair procurement process was conducted. That is so even if one starts from the premise that (a) SFF was not required to follow a full, open tender process (without accepting that proposition); and (b) even accepting that SFF would have been entitled to select particular traders to offer the oil to. It is well established that even where a deviation is permissible "*such a departure must be justified and only to the extent necessary in relation to the urgency that may prevail at the time of the deviation*".[13] Put differently, a decision to proceed by way of RFPs to particular bidders rather than a full, open tender process does not entitle a public entity to completely abandon the principles in section 217 of the Constitution.

8.1 Mr Gamede personally selected particular entities to take part in the process. The RFQs were sent out on widely different dates, the latter RFQs contained detailed information, while the initial RFQs contained no specificity whatsoever. There were no objective criteria for evaluating the proposals that were received, Mr Gamede simply selected three entities of his choice. The selections made – contrary to the principles of the Preferential

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12 Replying Affidavit, p 5084, para 252 to p 5088, para 265

13 United Democratic Movement and Others v Tlakula and Another [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct) at para 93. We note that Ms Tlakula applied to the Constitutional Court to appeal the recommendation of the Electoral Court that MS Tlakula "*has committed misconduct warranting her removal from office*" as the chairperson of the Independent Electoral Commission. The Constitutional Court dismissed the application, without a hearing, on the basis that it lacked prospects of success.

Procurement Policy Framework Act[14] ("**PPPFA**") – were made without any reference to the mechanism for the price that the different bidders would offer. In other words, Mr Gamede selected entities and thereafter, at the tail-end of the process, Mr Gamede negotiated prices with the entity which already had the comfort of knowing it had been awarded a contract.

9 Independent expert evidence before this court demonstrates that the transactions, viewed objectively, made no sense. There was no evidence to support the rationale for the urgent need to conclude the transactions or rotate the strategic stock. There is even less support for the need to conclude the sales when the oil market was clearly suppressed – it followed that even if the prices concluded by the traders were market related at the time of the sale – it was still not a reasonable or rational time for SFF to sell the strategic stock.

9.1 Quite the opposite, the expert evidence supplied by CEF and the respondents is in agreement that the oil market at the time of the sales was depressed. In crude oil parlance – the market was in a steep Contango period. The rational trader would purchase crude oil when the market was in Contango, store the oil and then sell the oil months or years later when the price of crude oil market was far higher.[15]

9.2 Buy low, sell high. The strategy is so common in oil parlance that it is referred to by name: the 'contango-carry' strategy.[16] Mr Gamede did the opposite. He sought to sell SFF's crude oil when the price was at rock-

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14 5 of 2000

15 See "TM11" to the Replying Affidavit, p 5265 – 5317 where Mr Driscoll's expert report demonstrates how Mr Gamede's approach was completely at odds with what one would have expected a rational functionary in Mr Gamede's position to do, given the market conditions.

16 Replying Affidavit, p 5080 para 239.2

bottom. In doing so, he did not secure any replacement for the crude oil and even assuming that SFF had sought to later, SFF would have almost certainly needed to pay a higher price – even Vitol is constrained to accept this is a "potential disadvantage" of the Vitol transaction.[17]

9.3 To make matters worse, when Mr Gamede sought permission from the Minister, he did so on the basis of various dishonest claims.[18] Further, Mr Gamede requested the permission subject to a set of preconditions for the sales. These included, amongst other things, that the oil would be sold when the oil price was on the rise and in a manner that would ensure that SFF made a positive margin from the sales. The expert reports filed by CEF demonstrate that Mr Gamede would have battled to choose a worse time in the last decade to sell the strategic stock.

9.4 Indeed, in December 2015 and January 2016, the price of Dated Brent (the crude oil benchmark used to price the transactions) was at the lowest point that it had been since 2011. If one plots the price of crude oil on a graph, then the time period that Mr Gamede unilaterally elected to sell the oil was the lowest point in the crude oil market from 2011 until the recent price crash at the beginning of 2020 (due to the COVID-19 virus amongst other factors).

10 The deviations from a fair process do not make sense from SFF's perspective. There was no urgent need to sell – certainly not in the worst oil market of the decade.

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17 Vitol's Answering Affidavit, p 3267, para 213

18 Replying Affidavit, see p 5019, para 39 to p 5022, para 47

11 Mr Ara Barsamian continues to state:[19]

> *"SFF had a poor crude oil quality monitoring and stock management for its inventory, and did not make any reasonable effort to scientifically determine the status of its crude oil stocks quality. SFF DUE DILLIGENCE effort undertaken before the sale transaction was a sham designed to support the crude oil stock sale.*
>
> - *The Bonny Light sale was not justified on a scientific basis.*
> - *The Basrah Light Mix sale was not justified because it could have been "saved" by blending with another crude oil."*

12 Mr Barsamian further emphasises:[20]

> *"Crude oils was formed millions of years ago in the Mesozoic and Paleozoic ages from the remains of animals and plant life and remained in its natural reservoirs for additional millions of years until extracted. The notion that crude oil could become unusable if a transaction was not concluded in matter of months has no scientific foundation and it appears to be suspicious."*

13 Indeed, it is common cause that the first time that Glencore attempted to sell the Bonny Light it acquired – that had never moved from Tank 6 at SFF's storage facility in Saldanha Bay – was in September 2017: nearly two years after Mr Gamede had disposed of it. Glencore was not at all concerned about selling the oil quickly because of any deterioration of the oil.

14 Ms Bossley – Contango's expert refers to a number of stricter sulphur requirements that *could* have encouraged SFF to rotate its Basrah light oil. Importantly, many of these restrictions relate to crude oil that is going to be *exported* – it is common cause that SFF is holding the strategic stock (not for export, not to turn a quick profit) but

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19 Replying Affidavit annexure, "TM9", p 5248

20 Replying Affidavit annexure, "TM9", p 5248, para 13.1

in order to have crude stocks that could be utilised in South Africa if there were an oil emergency.[21]

14.1 Similarly, the hard deadlines Ms Bossley refers to were in 2020 not in 2016.[22] None of that information guided Mr Gamede (it is a hypothetical basis that *might* or *could* persuade a *notional* decision-maker to look into rotating its high-sulphur oil grades). Ms Bossley categorically states that this rationale could not have applied in relation to the Bonny Light oil – 50% of the strategic stock that was sold. In any event, the 2020 deadlines Ms Bossley refers to would have given SFF four years to determine the quality of its oil with proper testing, set up a Trading Division and to conduct an open tender process.

14.2 Mr Driscoll's expert evidence is that an open tender would have been the clear best option for securing the best price for SFF.[23] Ms Bossley admits that open tenders are usually (but not always) the method that SPRs would rotate their strategic stock.[24]

15 Once all of that is so, what was Mr Gamede's rush? The claim that Mr Gamede subsequently relied on after the fact to justify the transactions was that he – Mr Gamede – with no expert knowledge predicted a long-term low price environment and Mr Gamede anticipated that the December / January prices could crash imminently. Importantly, that was not the basis on which Mr Gamede sought the Ministerial Directives (it was a post hoc reason that should be disregarded). In any event:

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21 Ms Bossley's report, p 3148, para 48

22 Ms Bossley's report, p 3149, para 49

23 Mr Driscoll's report, p 5294 – 5297, paras 88 - 94

24 Ms Bossley's report, p 3151, para 53

15.1 Mr Driscoll's expert report assumes that Mr Gamede acted honestly, even on that assumption Mr Gamede's claim about the market was flawed.

15.2 Mr Bossley exclaims that there was "good reason to think that the market was heading towards backwardation" at the time that the impugned transactions were concluded.[25] We emphasise that this is the expert report delivered with Contango's answering affidavit – it shows that Mr Gamede's decisions were premised on material mistakes of fact.

16 We submit that the real motivating factor lay elsewhere. Mr Ducrest of Vitol urged Mr Gamede on 17 November 2015 that: "*I feel that we need to move as soon as possible to close our proposal as some vultures are turning around*".[26] Mr Foster of Vitol similarly emphasised on 18 December 2015 that: "*We are here to sign today if possible as we are conscious of the time issues of concluding the signed agreement asap / this year still with transfer of oil and payment due also triggered this calendar year*".[27]

17 The Constitutional Court has cautioned that: [28]

> *"As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."*

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25 Ms Bossley's report, p 3146, para 39

26 Third supplementary founding affidavit p 863 para 131. The email is attached as MGM46 at p 1066

27 Third supplementary founding affidavit p 870 para 148. The email is attached as MGM 53 at p 1146

28 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) ("Allpay") at para 27

18 Mr Gamede, however, personally profited significantly during the period of the transactions.

18.1 Mr Gamede concluded a very lucrative 'consultancy agreement' with Mr Mulaudzi, a director of Taleveras Oil (SA). The largest portion of the oil contracts was awarded to Taleveras DMCC. Importantly, Mr Mulaudzi is a director of Taleveras Oil (SA) with Mr Sanomi – and Mr Sanomi is also a director of Taleveras DMCC. Various payments at key points in the timeline were made by Mr Mulaudzi to Mr Gamede 'for unrelated legal research'. The version put up by Taleveras is so far-fetched that it can be rejected on the papers.[29] We emphasise that Mr Mulaudzi was plainly a key participant in Taleveras DMCC negotiating and securing the crude oil deal. This is illustrated by Mr Sanomi including him on all of the most important emails regarding the transaction.[30]

18.1.1 Taleveras, in any event, asks the wrong question: the question is not whether Mr Mulaudzi was a director of Taleveras Oil or Taleveras DMCC – rather the question is whether Mr Mulaudzi was acting as a representative for Taleveras with Mr Gamede and during the discussions about the deal to be concluded between Taleveras DMCC and Mr Gamede.[31] At the very least this kind of personal relationship with Mr Mulaudzi would – in any ordinary procurement process – have

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29 Replying Affidavit, p 5118, para 388 to p 5119 para 390

30 Replying Affidavit, p 5

31 Replying Affidavit, p 5117 para 382 – 384; p 5118 paras 389 – 390

needed to have been disclosed, and failure to do so would render the appointment of Taleveras DMCC improper. Indeed, a very similar incident occurred when the former chairperson of the Independent Electoral Commission was deemed to have committed misconduct.[32]

18.2 Mr Gamede during this period received payments into his law firm's trust account, and his personal bank account that amounted to approximately R20 million. The bulk of this money was received in cash instalments of R20 000 that were physically loaded into Automatic Teller Machines ("**ATM**") around the country. No discernible references for the payments were used. The Hawks have opened a criminal investigation into the matter and will be seeking to conduct, *inter alia*, an analysis of the flow of these funds.[33]

19 After evaluating the evidence and taking legal advice the stance of the respondents is as follows:

19.1 The Minister of Energy does not oppose the relief sought and is abiding the decision of this Court. That is hardly surprising given that the former-Minister has admitted that when she approved the transactions, she: "did not scrutinise any contracts"; and "did not have legal advise on [the] contracts".[34] On the prices – she "did not have any". The Minister's method

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32 *United Democratic Movement and Others v Tlakula and Another* (EC 05/14) [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct) in particular at paras 49, 50, 51, 76, 77 and 137

33 Third Supplementary Founding Affidavit annexure "MGM 8", p 954

34 Replying Affidavit, p 5089, para 266

of oversight was blind faith: "To me it is just this is what the board comes [with], this is what they briefed me on, and I do not doubt the board."[35]

19.2 Venus and Taleveras do not oppose any part of the review application.

20 Glencore,[36] Contango and Natixis[37] ("**Contango**") have asserted that they have no knowledge of whether the statutory prescripts and the SFF internal processes were complied with – their opposition is limited to the issues of delay and the just and equitable remedy.

21 Only Vitol squarely disputes the merits of CEF's review application.[38] With respect, Vitol has to attempt to defend the transactions, because the transactions were Vitol's idea. It tells this Court as much. Vitol encouraged Mr Gamede to sell 5 million barrels of Bonny Light oil – a premium, quality product, and to sell the oil when the market was favourable to Vitol and unfavourable to SFF.

22 Vitol contends that the transactions are lawful[39] and that the transactions were commercially sound.[40]

22.1 Vitol concedes that it has no insight into what occurred within SFF, or between SFF and the Minister besides what can be gleaned from the record.[41]

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35 Replying Affidavit, p 5089, para 266

36 Glencore's Answering Affidavit, p 4000, para 24

37 Contango's Answering Affidavit, p 2805, para 238.2

38 Vitol's Answering Affidavit, p 3261 – 3264, paras 196 - 205; RA p 5010 para 15

39 Vitol's Answering Affidavit, p 3261 – 3264, paras 196 - 205

40 Vitol's Answering Affidavit, p 3264 – 3267, paras 206 - 213

41 Vitol's Answering Affidavit, p 3260, para 191

22.2 Vitol claims that the internal processes followed in this transaction had followed the exact process that the SFF had followed in prior engagements with Vitol and, accordingly, it reasonably assumed that the SFF had complied with its internal processes and conducted itself lawfully.[42] That evidence is at odds with the evidence of SFF's COO that Mr Foster told the COO in February 2016 that Mr Gamede's non-compliance with the required processes and conditions was 'not his problem' because the acting-CEO had signed.[43]

23 In relation to the delay – we submit that this court should condone the delay and/or grant an extension under Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

23.1 The impugned transactions were first concluded in December 2015 and January 2016. CEF has provided a full and reasonable explanation for the delay between the transactions being concluded and this review.

23.2 But, in any event, once it is so that the merits of the review are not seriously disputed then, the Constitutional Court's precedent in *Gijima* and *Buffalo City* obliges this court to consider the merits of the review and bypass the delay requirement altogether (even if it were deemed unreasonable and inexcusable).[44] That is the case here in relation to the Venus transaction, the Taleveras transaction and all of the Ministerial approvals that are challenged. There is also no dispute that Mr Gamede secured the Ministerial approvals

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42 Vitol's Answering Affidavit, p 3263, para 203

43 Replying Affidavit, p 5103, para 320; and p 5200, para 822

44 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 66

through dishonest misrepresentations. Once that is so, then this court should hear the merits of reviewing these transactions as well as the Vitol transaction. That is all the more so since Vitol admits that it was the catalyst for the impugned transactions.

24 That leaves the question of the just and equitable remedy. The Constitutional Court has made it clear that the default remedy is that the contract should be reviewed and set aside.[45] Equally, our apex court, has held that no person is entitled to benefit from an unlawful contract.[46]

25 The Hawks are currently investigating the impugned transactions as well as the flow of funds into Mr Gamede's bank accounts.[47] It is difficult to think of stronger *prima facie* evidence of corruption. CEF submits that this is all the more reason for this Court to set aside the impugned transactions and simply order the return of the purchase price to those respondents who paid it.[48] Any additional losses that traders wish to claim can be handled in trial proceedings if the traders launch the necessary claims – where evidence can be subjected to cross-examination.[49]

THE TRANSACTIONS ARE CLEARLY UNLAWFUL

There is clear dishonesty in the conclusion of the transactions

26 Mr Gamede was dishonest in a number of respects.[50] In *Myeni*,[51] the Gauteng

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45 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at paras 30 and 32

46 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2015 (6) BCLR 653 (CC) at para 15

47 Replying affidavit, p 5019, para 35

48 Replying affidavit, p 5019, para 35

49 Replying affidavit, p 5019, para 35

50 Replying affidavit, p 5019, para 39 and p 5022, para 47

Division, Pretoria made clear that:[52]

> *"To serve on a Board of an SOE should not be a privilege of the politically connected. Government has, as custodian of the common good, an obligation to ensure that suitably qualified people, with integrity are appointed in these positions. Whoever serves on the Board of an SOE should ultimately be a servant of the people and whoever is appointed as such, has a sacred duty to society and should ensure that state resources are not squandered, or the economy placed at risk. In my view the plaintiffs were correct when they submitted that a higher duty rests on non-executive directors of SOE's, who are appointed by the government of the day as the shareholder."* (Emphasis added)

27 Mr Gamede knew that he did not have board approval when he requested that the Minister approve the impugned transactions or when he concluded the transactions. In the *Myeni* case the court held:[53]

> *"... As chairperson of the Board, Ms Myeni would also have known full well that there was no Board resolution to authorise her actions. Therefore, this Court can only conclude that there was deliberate dishonesty and a gross abuse of power by her."*

28 Much like Ms Myeni's dishonesty, Mr Gamede's dishonesty "*robbed the public at large of effective oversight*" over the impugned transactions.[54]

29 Mr Gamede acted in the name of the company, and signed on behalf of the company despite knowing that he lacked the authority to do so.[55] He failed to disclose various material facts to the Minister.[56] The Minister was not advised that conditions precedent stipulated in the Directives were not met.

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51 *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another* (15996/2017) (*"**Myeni***")

52 *Myeni* at para 276

53 *Myeni* at para 246

54 *Myeni* at para 269

55 *Myeni* at para 247

56 Founding Affidavit, p 106, para 249.21

30 Mr Gamede's dishonesty, further, had an impact over the oversight by the Minister. The court in *Myeni* held:[57]

> *"Honesty and full disclosure have particular significance under section 54(2) of the PFMA. A Minister can only exercise effective oversight over major transactions that require his or her approval, if information is presented honestly, fully and accurately."*

31 In relation to the Taleveras transaction and the Venus transaction, there is clear dishonesty on the facts that are not disputed on the papers.

31.1 Even on the facts set out in Taleveras' own version – the Taleveras transaction was concluded for an improper and unlawful purpose. In 2015, Taleveras had entered into another agreement with SFF – the Commodity Swap agreement. Mr Gamede wrote a letter to the former-Minister of Energy, Ms Joematt-Petterson, on 14 September 2015, just a few months before the impugned transactions were entered into, exclaiming that the Commodity Swap agreement had failed due to dishonesty by Taleveras.[58] Taleveras explains that there was a *quid pro quo* – Taleveras would not sue SFF if a commercial arrangement could be reached enabling Taleveras to "recover some of its losses" under the Commodity Swap agreement:[59]

> *"In short, Taleveras chose to hold off on legal proceedings against SFF, pending negotiations for the conclusion of an agreement with SFF for the storage and rotation of oil."*

31.2 Taleveras' conduct amounts to unlawful extortion.[60]

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57 *Myeni* at para 254

58 Replying Affidavit, p5014–5015, paras 22.4 – 22.5

59 Taleveras' Affidavit, p 4646 – 4647, paras 42 – 44

60 It is generally not unlawful to institute legal proceedings in order to assert one's rights. As Burchell makes clear, the threat of litigation, however, becomes unlawful "*if it is intended to obtain an advantage which is not due to the extortioner*" – J Burchell Principles of Criminal Law 5ed (Juta

32 Vitol alleges that private negotiation with selected entities made good sense because SFF was able to select tried and tested entities to contract with. The scenario with Taleveras demonstrates that the opposite is true – Mr Gamede's letter to the Minister demonstrates that Taleveras should not have been considered for another contract.[61]

32.1 On that score alone, Mr Gamede's decision to award the contract to Taleveras was irrational, unreasonable and made for an improper purpose (of seeking to settle a dispute so that Taleveras could recover some losses, rather than what was in the best interests of SFF or the public interest).

32.2 For the same reasons, Mr Gamede took irrelevant considerations into account, failed to consider relevant considerations and acted with bias towards Taleveras in the procurement process (defective as it already was from inception). Importantly, Mr Gamede's communications to the Minister seeking permission to enter into the transactions with the list of three traders do not detail that Taleveras is being given an additional contract to compensate Taleveras for the Commodity Swap Agreement.

33 Tellingly, the first time that this version has been put forward was by Taleveras in its explanatory affidavit. On that basis alone, this court should condone the delay in reviewing the Taleveras transaction – since the real reason that the contract was awarded to Taleveras only came to light on 26 June 2020.

34 Similarly, there can be little doubt that Venus and Mr Gamede engaged in collusion and dishonest price manipulation in order to avoid further scrutiny. Those

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2016) at p 739. On its own version Taleveras would not launch its alleged claim under the Commodity Swap Agreement if Mr Gamede concluded a contract for the strategic stock.

61 Replying Affidavit, p5015, para 22.5

allegations squarely made in the supplementary founding affidavit are not denied by Glencore or Venus. Plainly, the Venus contract should be set aside. The position of Taleveras was equally improper. Vesquin was not even the legal entity to which the contract was awarded.

35 In any event, once it is so that the Venus agreement falls to be declared unlawful then the delay should be condoned and – there is no reason why this court should consider the merits of that transaction but not consider the merits of the other transactions (which also suffer from fatal flaws).

36 Glencore, Contango and Vitol contend that they relied on the assurances given by Mr Gamede. But it has been trite for over 10 years that estoppel is not competent in the context of an organ of state acting outside its constitutional and statutory powers.[62] The Supreme Court of Appeal ("**SCA**") has recently applied this principle.[63]

The entire rationale underpinning the transactions was completely baseless

37 The prospects of success are a significant factor in considering whether to condone the delay in the application being launched. Three established principles of judicial review are fatal to the impugned decisions.

38 First, the question in this case is not whether there might be hypothetical reasons that could justify the decisions taken by Mr Gamede or the Minister. The expert evidence

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62 *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) at paras 13-16

63 *Khutala Property Consortium (Pty) Ltd v Mtubatuba Municipality and Others* (1299/2018) [2020] ZASCA 35 (6 April 2020) ("***Khutala***") at para 28; See also Replying affidavit, p 5022, para 48 and p 5026, para 6

proffered by Ms Bossley and Ms Jago is thus, with respect, largely unhelpful. This Court should look at the actual reasons proffered by Mr Gamede and the Minister for the decisions.

39 Second, this Court is not required to sift through the bad reasons given for a decision in order to see if some semblance of reasonableness or rationality can be salvaged. Cameron JA put it as follows in *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration*:[64]

> *"Given that the commissioner took four bad reasons into account in reinstating the employee, but that other legitimate reasons existed that were capable of sustaining the outcome, can it be said that the employee's reinstatement was 'rationally connected' to the information before the commissioner, or the reasons given for it, as PAJA requires? In my view, it cannot. It can certainly not be said that the outcome was 'rationally connected' to the commissioner's reasons as a whole, for those reasons were preponderantly bad, and bad reasons cannot provide a rational connection to a sustainable outcome. Nor does PAJA oblige us to pick and choose between the commissioner's reasons to try to find sustenance for the decision despite the bad reasons. Once the bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it. This dimension of rationality in decision-making predates its constitutional formulation. In Patel v Witbank Town Council,21 Tindall J set aside a decision which had been 'substantially influenced' by a bad reason. He asked:*
>
> > *'[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision. ...*
> >
> > *This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it.'*

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64 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* 2007 (1) SA 576 (SCA)

> *The same applies where it is impossible to distinguish between the reasons that substantially influenced the decision, and those that did not."*

40 Third, and similarly, decisions should be made on the material facts which should have been available for the decision properly to be made.[65] And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary then the decision should be reviewable.[66] That is so even where the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision.[67] The principle of legality requires public functionaries to make decisions (a) in the public interest, (b) on the basis of the true facts.[68]

41 In Digital Voice,[69] the Supreme Court of Appeal summarised what is required: in order to be rational, the decisions must be based on accurate findings of fact and a correct application of the law.[70] If the decision taken is not rationally connected to the information before the functionary then the decision is irrational.[71] Importantly, Plasket AJA made clear that a functionary cannot merely avoid asking the relevant questions to establish the objective facts:

> *"[36] The STB erred factually when it concluded that the second to sixth respondents had been appointed on 11 February 2000, after the tender had been submitted. If the STB had taken its decision based on the proper facts it could not have concluded that the respondents had made fraudulent*

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65 *Pepcor Retirement Fund & another v Financial Services Board & another* 2003 (6) SA 38 (SCA) para 47. See also *Government Employees Pension Fund & another v Buitendag & others* 2007 (4) SA 2 (SCA)

66 *Pepcor* at para 47

67 *Pepcor* at para 47

68 *Pepcor* at para 47

69 *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA)

70 *Digital Voice* at para 40

71 Ibid

> *misrepresentations to it. Its factual error was material as it was the direct cause of the decision to blacklist the respondents.*
>
> *[37] The decision was also irrational. The STB chose to ignore the true position in relation to when the second to sixth respondents were appointed as directors, and it did so without reverting to their attorney who had offered proof in the form of an auditor's certificate. A reasonable administrator, faced with these circumstances would not have taken the decision without first obtaining the certificate. Instead, the STB closed its mind to facts that disproved its suspicion that the respondents were guilty of fraudulently misrepresenting that the second to sixth respondents were directors at a time when they were not."*

Mr Gamede's stated rationale for stock rotation is contradicted by Vitol's <u>and</u> independent expert evidence

42 Vitol's claim that SFF needed to procure stock that was '*fit for purpose*' in relation to all 10 million barrels of the stock is contradicted by its own evidence as well as expert evidence. We emphasise that Mr Foster – while he might have expertise in trading oil – is not an engineer. Moreover, he cannot give expert evidence in this case since he is a representative of one of the parties.

43 Similarly, Vitol's claims that the proposal was strategically sound because, *inter alia*, it would assist SFF in securing oil that was fit for purpose echoes in material respects the constant refrain by Mr Gamede in his communications to the Minister, and in his post hoc explanations for the need for stock rotation, that the (a) strategic stock was obsolete and (b) had been sitting in tanks for 15 years since the last stock rotation in 2001. For instance, in the letter to the Minister dated 14 September 2015 regarding the Taleveras Commodity Swap agreement, Mr Gamede states:[72]

> *"The current Strategic Stock that is held by SFF on behalf of the South African Government is obsolete as it cannot be utilized by any of the refineries in South*

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72 Replying affidavit, p 5014, para 22.4

Africa. Our refineries require light crude oil and <u>some</u> of the strategic stock is heavy crude oil."

44 Mr Gamede's logic in this communication is difficult to follow. He contends that the current stock is obsolete (implying all of it) because <u>some</u> of it is heavy crude oil (i.e. Basrah). That rationale is false in relation to the 5 million barrels of Bonny Light crude oil.

45 In his report on the rotation of strategic stock Mr Gamede states:[73]

"8(vi) *The crude oil in our tanks had been there for a long time, had degraded over time and we experience a loss of 10% per annum through loss of BTX gases and your high octane is lost which results to loss of volumes and degrades in quality.*

15.2.2 *Long-term storage of strategic crude oil stock will ensure that stock will loose both volume (1% per annum) and its quality and therefore financial value. It should be borne in mind that before any sale or purchase, the stock is surveyed for quality and volume".*

15.6.2 *SFF will access new stock of crude oil in line with changing crude oil diet of the domestic refineries and invariably replacing the old crude oil supply which means lighter and lower sulphur grades of crude oil.*

15.6.3 *The quantity and integrity will be improved with the new stock thus increasing its refining relevance and be fit for purpose.*

17.4 *Furthermore it became important to use a procedure [negotiation rather than an open tender] that will assist in expediting the process as the market was collapsing through the decline in prices."*

46 The message, in summary, from Mr Gamede was that SFF needed to replace the stock urgently because the stock it had was "obsolete" this was compounded by the 10% loss per annum (later 1% per annum) and the market was collapsing. Mr Foster

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73 Founding Affidavit, annexure "FA 70", p 690 – 698

from Vitol accepts that any loss is far lower – approximately 0.35%.[74] Already that demonstrates that a material factor in necessitating the transaction occurring when it did was false.

47 We highlight the following points made by Mr Barsamian:[75]

> *"The sale of Bonny Light crude oil on the basis that it needed to be sold in a hurry because it deteriorated and was not suitable for use in oil refineries is FALSE. It is a top tier crude oil much sought by refiners world-wide.*
>
> *The sale of Basrah Light Mix crude oil on the basis that it needed to be sold in a hurry because it was mixed with unknown crude oils and its quality was not suitable for use in oil refineries is FALSE. A crude assay analysis would have permitted SFF to "blend" the mixed oil with a crude oil with appropriate properties that would allow SFF to obtain a blended oil suitable for running in any oil refinery, e.g. by blending down the Sulfur level to match South African refinery crude diet.*
>
> *Overall, one gets the impression that the transaction was done in a hurry without using generally accepted best practices for determining the crude oil properties by using crude assay analysis."*

48 Mr Gamede claimed that the market was about to collapse and therefore SFF needed to move on the transaction. But that is precisely the reason that all of the traders, including Vitol, were licking their lips. As explained by Mr Driscoll and the experts for the respondents – the traders wished to execute the contango-carry-play by buying the stock at a very low price (when the market was at one of its lowest points in a decade), they would then store the oil and sell the oil again at a higher price. Mr Driscoll explains that SFF should have stored the oil (given that SFF was instructed by the Minister to ensure that it received a positive margin between selling the current stock and repurchasing replacement stock).[76]

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74 Vitol's Answering Affidavit, p 3200, para 35.1

75 Replying affidavit annexure, "TM9", p 5247

76 Replying affidavit annexure, "TM11", p 5312, para 136

49 Importantly, this is not a case where Vitol was a stranger to the transaction and simply submitted a bid in response to an RFP put out to tender by a public entity. Quite the opposite, Vitol admits that it was a catalyst for the stock rotation of the entire 10 million barrels (including 5 million barrels of Bonny Light). But Mr Barsamian emphasises that "*[t]here is no technical crude quality reason to sell the Nigerian Bonny Light crude oil, which could have almost infinite life in underground storage*".[77]

50 The reason that Mr Barsamian refers to the due diligence that SFF purportedly conducted before deciding that the stock needed to be sold is that there is no evidence that SFF conducted an assay test on the quality of the crude oil before taking the decision that the stock needed to be sold on the basis of its quality.

51 The only reference to assays or quality tests in the contracts occurred after a decision had been taken to sell the oil, and after the three buyers had been selected. Again, it is completely unclear how Mr Gamede selected buyers without knowing the quality of what SFF had in its tanks, and thus the quantity (if any) of what should be sold (given the dire oil market at the time).

52 But as Mr Barsamian makes clear in Appendix two (when evaluating Mr Gamede's claims):[78]

> *"Mr Gamede's statement (p 460 paragraph 14.1.4.2): "…SFF undertook an investigation (due diligence) into International Best Practices on Rotation of Strategic Stocks…Consultation with oil majors to establish their crude appetite and assay.*
>
> *Comment [by Mr Barsamian]:*

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77 Replying affidavit annexure, "TM9", Appendix 2 Evaluation 5, p 5256

78 Replying affidavit annexure, "TM9", Appendix 2 Evaluation 3, p 5256

> *'Mr. Mr Gamede mentions "…oil majors to establish their crude appetite (meaning diet, crude blends the majors use to feed their refineries), and ASSAY", so he is aware of the importance of crude oil assays, but ASSAYS WERE LEFT OUT OF THE USD300 + million TRANSACTION*
> *All the major oil companies use as part of recognized best practices CRUDE ASSAYS that they routinely use to determine the quality of the crude and their value as both crude oil producers and user. For example, BP, ExxonMobil, and Total provide publicly and freely available crude assays on their web sites for crudes oils that they produce and sell, e.g. Bonny Light and Basrah Light."*

53 Importantly, for the purpose of his analysis, Mr Barsamian accepts that the Basrah Oil was apparently "mishandled by adding unknown crude oils on top of it without precautions, such as considerations of compatibility between different oils, and ensuring availability of assays of tank content before and after adding oils. Thus, sludging of Basrah-Mix is possible".[79]

54 Vitol stated explicitly that it was "*currently testing the actual quality of the crude oil that is stored, as we understand there have been various crude grade movements since May 2015. This is important to determine a baseline for any changes in the crude (quality) held there*." SFF provided Mr Barsamian with the oil quality reports that it has in its possession from the time of the sale.[80] Mr Barsamian states that "*None of these crude oil quality reports are detailed crude oil assay analysis*" and that "*SFF has instructed us that it does not have any evidence of an assay test being conducted or have a record of the results*".[81]

55 Mr Barsamian described the quality reports conducted by Saybolt as "*superficial tests that do not provide enough information about the crude oil to determine its suitability for refining it to obtain certain product yields. Density, Sulfur content,*

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79 Replying affidavit annexure, "TM9", Appendix 2 Evaluation 10, p 5256

80 Replying affidavit annexure, "TM9", Appendix 3, p 5260 para 13.6.4

81 Ibid

and entrained Water content are not enough to characterize the refining yield potential, and therefore its price."[82]

56 Mr Barsamian examined the Saybolt profile conducted on Tank 2 (where the Basrah mix was kept at the time of the transaction) on behalf of "SFF Association" on 9 December 2015. He emphasises that:[83]

> *"The level of sludge deposits in Tank No.2 is 4 meters. There is no indication of the nature and composition of the sludge.*
>
> - *Density profile indicates an almost constant density with no stratification of crude oil in layers with different properties.*
> - *A profile composite sample Lab analysis indicating that the liquid in the tank has*
> - *Sulfur content of 2.26 mass % Sulfur*
> - *Density of 877.6 kg.m3*
> - *API Gravity at 60F of 29.66 degrees API*
> - *Water content of 0.250 volume %*
>
> *The Saybolt Tank No.2 profile analysis has no information whatsoever that indicates:*
>
> - *Deterioration of crude oil quality*
> - *Deterioration of crude oil yields of refining products (gasoline, diesel, heating and fuel oil)*
> - *Propensity to sludge."*

57 By contrast, an assay analysis indicates "the properties of the whole crude" – importantly including the fractional yields of products (light hydrocarbons, gasoline, diesel, asphalt) when processed in an oil refinery. Mr Barsamian explains that the "*fractional yield of products of the crude oil when refined; this determined $-value of crude oil*".[84]

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82 Ibid

83 Replying affidavit annexure "TM9", Appendix 3, p 5261 para 13.6.4.1

84 Ibid

58 Mr Gamede claimed for instance[85] in relation to the price of the Basrah Mix: "*We have our own CRUDE OIL ASSAY for this grade due to co-storing with other grades…*". Mr Barsamian stated that, if Mr Gamede is correct in stating that SFF has its "*own CRUDE OIL ASSAY for this grade*", then he would like the opportunity to examine this Basrah Mix crude oil assay to determine degradation and changes affecting the yields of valuable products such as gasoline and Sulfur levels.

59 Mr Barsamian extracted pages of documents that indicated that the buyers were aware of the need for crude oil assay analysis. There is no evidence of SFF conducting an assay analysis *before* taking the critical decision that the oil needed to be rotated.

60 There is no evidence that Mr Gamede appointed any qualified person (with qualifications similar to those of Mr Barsamian) to conduct an independent analysis of the results of the assay test, before the price for the Basrah mix was set.[86] The assay test would provide the composition of the unique molecular and chemical characteristics of the Oil Reserves.

61 The absence of any proper analysis of an assay test by Mr Gamede has allowed Vitol to claim that the oil was (in their opening gambit of negotiations) only worth Dated Brent with a discount of USD 10 per barrel. Ultimately, Vitol shrunk its discount from USD 10 to USD 8, then finally to USD 5.5. Vitol claims that the price paid was a market related price – but without the assay being placed before this court, the applicants submit that there is no way to verify that. Mr Gamede's report states that SFF has 'its own assay' for the oil in Tank 2.

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85 Founding Affidavit, annexure "FA70", p 703, para 25

86 Replying Affidavit, p 5021 – 5022, para 47

62 CEF invited Vitol or Taleveras to provide this court with a copy of any assay test that was procured. That is a key factor in determining whether the price of Dated Brent minus a discount of USD 5,5 is a fair market price from the perspective of SFF. Mr Barsamian tell us why that is so:[87]

> *"Mixing two crudes with differing fuel fraction yields may lower the refiner yield of the most profitable products and thus lower the crude blend value to the refiner. This is determined by examining the resulting blend 'assay' of the two or more different crudes.*
>
> *Mixing with an 'incompatible' crude or hydrocarbon such as highly paraffinic crude; this may precipitate asphaltenes, which will form a sludge, which coats the tank walls and internals of pipes and pumps. This does not render the crude unusable; it is a headache, and it just increases the cost of pumping and sludge removal, and maintenance costs."*

63 Mr Barsamian makes it clear that, due to blending techniques, there is no such thing as "bad" crude oil that cannot be fixed and then can be used during the refining process.[88]

64 In summary, the rationale for selling the Bonny Light at a low time in the market was non-existent – that amounted to 5 million barrels of the stock. Similarly, Mr Gamede could not have taken a reasonable or rational decision in relation to deciding that the Basrah stock was "obsolete" or "not fit for purpose" without conducting a detailed assay of the Basrah oil and getting a qualified engineer (such as Mr Barsamian) to examine the oil, calculate the cost of any sludge removal or blending techniques that would need to be used to reduce any sulphur levels – on the one hand – against the loss that would be suffered by selling in the December 2015 – February 2016 period.

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87 Replying Affidavit, annexure "TM9", p 5250, para 13.3.1

88 Replying Affidavit, annexure "TM9", p 5251, para 13.4

65 Even assuming that Vitol's price benchmark of a discount of USD 5,5 less than Dated Brent was used – there was no rational or reasonable justification regarding why the sale could not have taken place at a later point when the oil market was still in backwardation. If Vitol or Taleveras (or any of the other traders) secured a detailed assay test on Tank 2, then we invite them to place it before this court. The applicants consent to the respondent filing further affidavits that they deem appropriate.

66 That was the kind of due diligence that the Minister called for. There is no evidence whatsoever that Mr Gamede conducted any due diligence of that kind.

67 In addition to all of the above, on Vitol's own version, on the evidence placed before this court by Mr Foster, it demonstrates that Mr Gamede's claims about the oil sitting in tank for 15 years cannot be true. Mr Foster claims:[89]

> *"Between 2003 and 2008, I, acting on behalf of Masefield, concluded five strategic stock rotations with PetroSA on behalf of SFF. … Under Part B, SFF, through PetroSA, would buy back the same quantity and grade of crude oil from the traders, at a later period."* (Emphasis added)

68 Mr Foster accepts that there were likely other traders involved in similar transactions (at para 22.2.3).[90] Alternatively, Mr Foster states that PetroSA would loan crude stock where Masefield could remove it from the storage tanks at Saldanha Bay.[91] He states:[92]

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89 Vitol's Answering Affidavit, p 3196, paras 22.2 and 22.2.2

90 Vitol's Answering Affidavit, p 3196, para 22.2.3

91 Vitol's Answering Affidavit, p 3197, para 22.2.4

92 Vitol's Answering Affidavit, p 3197, paras 22.3

"transactions of the kind given effect to in the Vitol Contracts have a long pedigree within SFF and are by no means exceptional."

FACTUAL BACKGROUND TO THE CONCLUSION OF THE IMPUGNED TRANSACTIONS

69 CEF and SFF are major public entities in terms of Schedule 2 of the Public Finance Management Act 1 of 1999 ("**PFMA**"). CEF is the sole shareholder of SFF.

70 SFF is the custodian of national strategic energy feedstocks and carriers on behalf of the South African Government and her people.[93] In fulfilling its obligation, SFF conducts its business not for gain but solely in the communal interests of the general South African public.[94]

71 For this reason, the applicants instituted this application in the applicants' respective interest and in the interests of the public in terms of section 38 of the Constitution of the Republic of South Africa (the "**Constitution**").

72 On 7 July 2014, the erstwhile Minister of Energy, Minister Joemat-Pettersson (the "**Minister**") issued the First Directive which directed the SFF to hold 10.3 million barrels of strategic reserves.[95] The purpose of holding the strategic reserves was to ensure security of supply i.e. in the event that agreed commercial stocks cannot meet demand because of recognised disruptions.[96]

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93 Founding Affidavit, p 28, para 53

94 Rule 53 Record, Vol 1, Memorandum of Incorporation, p 70 at clause 4

95 Founding Affidavit, p 30, para 57

96 Founding Affidavit, annexure "FA4", part 1, p 167

73 On 3 August 2015, the Minister withdrew the First Directive due to what seemed to be "very little intention to finalise the Strategic Stocks Policy and the SFF Draft Bill".[97]

74 In September 2015, Mr Gamede was appointed acting chief executive officer following the resignation of Ambassador Gila as chief executive officer of the SFF on 12 August 2015.[98]

75 On 6 October 2015, Mr Gamede made a written request to the Minister for the rescission of the Withdrawal Notice and for the reinstatement of the First Directive.[99] In the request, Mr Gamede makes the following proposal in respect of the strategic reserves:

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

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97 Founding Affidavit, p 32, para 62

98 Founding Affidavit, pp 32 - 33, paras 64 and 65

99 Founding Affidavit, p 33, para 69

76 On 8 October 2015, the Minister issued a directive granting the Ministerial Directive requested in Mr Gamede's letter dated 6 October 2015[100] (Second Directive). In the Second Directive, the Minister imposed the following conditions: [101]

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

77 On 13 October 2015, the Board convened for the first time since the Second Directive was granted. The Board noted in the minutes[102] of this meeting that *"…it required a project plan and an action plan with regards to how the [Second] Directive would be implemented setting out the short, medium and long term intentions, the resources that would be required and the decisions needed from the Board to ensure that implementation of the directive.*" The Board noted further that it did not have funds to implement the Second Directive and that clarification was required from the Minister regarding the funding of the strategic stocks and the infrastructure.[103]

78 The SFF Board further noted that "SFF would develop a policy for the rotation of the [Oil Reserves] and that the policy needed to be approved at SFF Board level whereafter it could be submitted to the Minister." It was further recorded that the

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100 Founding Affidavit, pp 34 - 35, para 73

101 Founding Affidavit, p 35, para 74

102 Founding Affidavit, p 35, para 76

103 Ibid

SFF Board needed to engage with the Interim Chairperson of the CEF regarding the Second Directive.[104]

79 Notwithstanding his presence at the Board meeting, on 13 October 2015, Mr Gamede issued request-for-proposal letter to Total, SKYDeck, GNI, Mercuria and Vitol. The Second Directive was attached to each letter.[105]

80 The letter stated as follows:[106]

> *"RE: REQUEST FOR PROPOSAL FOR ROTATION OF STRATEGIC STOCK*
> *The above matter refers.*
> *Following a Ministerial Directive dated 8 October, which authorises SFF to rotate strategic stock, SFF would like to invite your company to submit a proposal to participate in the Rotation of Strategic Stock,*
> *The above-mentioned document is attached for your information."* (Emphasis added)

81 The request for proposal (RFP) did not stipulate:[107]

81.1 bid specifications;

81.2 minimum requirements and functionality;

81.3 bid evaluation criteria; and

81.4 documentary requirements.

82 The RFPs did not stipulate a deadline for the submission of the bids.[108]

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104 Founding Affidavit, p 36, para 78

105 Founding Affidavit, p 37, paras 81

106 Founding Affidavit, p 37, paras 82

107 Founding Affidavit, pp 37 - 38, para 83 – 83.4

108 Founding Affidavit, p 38, para 84

83 On 16 October 2015, the SFF Exco convened. In the meeting it was resolved to incorporate the Second Directive into its operational and strategic plans going forward.[109] Mr Gamede did not inform the SFF Exco that:[110]

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

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

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

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

84 Mr Gamede issued further RFPs during late October and early November. The RFPs were sent to Enviroshore, Zittatu Oil & Gas Investment Holdings (Pty) Limited, Taleveras Oil SA (Pty) Limited and Taleveras.[111]

85 Mr Gamede claimed that he undertook his own due diligence investigation into international best practices regarding the rotation and facilitation of the strategic reserves. He also allegedly engaged with the producers of crude oil and refined petroleum products and developed *"Rules and Procedures for trading in strategic stock"*.[112]

86 On 22 October 2015 – between 17h02 – 17h40 in a series of ATM transactions – cash in the amount of R501 800 was deposited into Mr Gamede's bank accounts. The payment references contain a series of apparently random numbers.

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109 Founding Affidavit, p 39, para 89

110 Founding Affidavit, p 40, para 91

111 Founding Affidavit, p 40, para 92

112 Founding Affidavit, p 41, para 94

87 On 30 October 2015, the Board had a special SFF Board meeting. Mr Gamede did not inform the Board of the impugned transactions.[113]

88 On 2 November 2015, the SFF Exco convened. In the meeting a draft *"Action Plan to Address the New Ministerial Directive"* was discussed.[114] A copy of the agenda is annexed marked "FA22". Mr Mayaphi presented his draft Strategic Stock Rotation Policy to the SFF Exco. In terms of the draft rotation policy, it was proposed that 2 million barrels of the strategic reserves per rotation cycle, with a return period of between three to six months (clause 4 read with clause 6). Clause 8 of the draft policy proposed that potential customers would present rotation proposals to SFF. The proposals would initially be evaluated by EXCO members for commercial viability and then recommendations would be made directly to the Minister for consideration and approval.[115]

89 The draft Strategic Stock Policy was not deliberated upon or finalised. In item 7.1 of the unsigned minute, it was recorded that *"a draft or a finalised document need[ed] to be compiled for Exco members to go through prior to being submitted to [the SFF] Board."* The minutes of the meeting are attached as "FA24".[116]

90 Mr Gamede did not advise SFF Exco at this meeting that he was proceeding with the impugned transactions.[117]

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113 Founding Affidavit, p 41, para 95

114 Founding Affidavit, p 41 - 42, para 97

115 Founding Affidavit, p 42, para 97

116 Founding Affidavit, p 42, para 98

117 Founding Affidavit, p 42, para 99 to 99.2

91 On 11 November 2015, Mr Gamede wrote to the Minister in respect of a *"request for selling of strategic stock in Saldanha"*. The request states as follows ("FA25"):[118]

> *"Below is the proposal to review the scenario of replacing the current stock holding quantity with a fresh stock to ensure the security of supply is not impacted negatively by feedstock that is in line with future petroleum refining trends.*
> *REQUESTING THE MINISTER TO DIRECT THAT WE,*
> *1. Sell the entire quantity of 10.3 million Barrels,*
> *2. Every barrel will be sold at the prevailing market price,*
> *3. The proceeds from the sold stock will be used to purchase the 10.3 million Barrels of Crude Oil from the open market*
> *BENEFITS OF SELLING THE STRATEGIC STOCKS*
> *It is therefore envisage that the following benefits will accrue to South Africa with regards to ensuring the security of supply;*
> *SFF:*
> *SFF will access fresh stock of crude oil in the market that will be in line with the changing crude diet and invariably replacing the old crude oil stock.*
> *The quality integrity will be improved with new stock thus increasing its refining relevance (fit for purpose)*
> *The current stock level of 10.3 million barrels will be sold at prevailing market prices and will be replenished when the market prices are favourable for SFF to acquire such barrels. This will then ensure that SFF creates value that will yield a positive net margin on the selling and buying initiatives of crude oil."*

92 On 12 November 2015, the Minister approved Mr Gamede's request for the sale for the disposal of the entire strategic reserves. The letter of approval states:[119]

> *"I hereby approve the SFF proposed disposal plan of current Strategic Stock holding as submitted, as part of the security of supply mandate as per the Ministerial directive of 03 August 2015.*
> *I need to further emphasize that this plan must be executed in a manner that both addresses the needs of our country to have strategic stocks reserve that can respond adequately to our needs when such a need arise, but also as a catalyst towards ensuring financial self-sustainability of SFF as an organization.*
> *I trust that the SFF will regularly report on the progress thereof on the implementation of the disposal plan"*

93 In and around November 2015, Ngqongwa referred Mr Gamede and Mayaphi to the SFF procurement statutory framework. The legislation referred included section 217

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118 Founding Affidavit, p 43, para 102

119 Founding Affidavit, p 45, para 106

Constitution, the PFMA and the PPPFA. Mr Ngqongwa indicated that, in respect of the impugned transactions, approvals would be required from the SFF's executive authority, the Minister and the National Treasury. Mr Gamede did not respond.[120]

94 On 23 November 2015, the SFF Board convened. In item 3.2.8 of the unsigned Board minute it is stated:[121]

> *"Letters from Mr Gamede to the Minister dated 11 November 2015 requesting the sale of the entire strategic reserves and the letter from the Minister dated 12 November 2015 granting approval of the sale of the entire strategic reserves were included in the Board pack. It was noted that the Board had not been advised of the letters prior to their inclusion in the pack.*
> *It was noted further that it was unfortunate that the letter to the Minister did not make reference to stock rotation but referred to disposal of stock.*
> *Moreover, it was recorded:*
> *"Every sale would essentially be back to back with a purchase in the sense that SFF should first identify the purchase opportunity before it actually makes the sale;*
> *That it should be ensured that the selling price should be such that the margin between the selling price and the purchase price should be sufficient to cover all the incidental costs of the sale and thereafter SFF should still make a margin*
> *That it should be ensured that all purchase purchases are of the appropriate quality, which can be utilised in South African refineries, and is in line with the clean fuels policy;*
> *That any purchase or sale has to be pre-approved by the SFF-Board;*
> *That the SFF Supply Chain Management ('SCM') needs to ensure that any prospective purchaser, seller or agent should be on the supply database;*
> *That all Procurement and SCM Policies need to be strictly adhered to.*
> *It was reported that SFF would obtain a better price for the sale of the strategic stocks if SFF utilised the negotiated process with players in the market as opposed to following tender route subject to SFF adhering to procurement processes.*
> *For clarity purposes it was NOTED that the directive authorising the selling of strategic stocks by SFF should not be read in isolation but should be read in context of the previous directive regarding the rotation of stock*
> *The Board further NOTED that in relation to the trading division that SFF needed the specialist skills within SFF to ensure that the right price, quality etc is obtained. It was reported that SFF did have the required trading skills in-house as Mr Mayaphi (GM:SHEQ & Risk) and Mr Nkutha (COO) were traders previously and that SFF would be recommending in its detailed proposal for the establishment of the trading division to be submitted to the BARC and Board meetings in the January 2016 that Mr Mayaphi moves from SHEQ & Risk to head the trading division. It was further reported that there were two current employees of SFF that Vitol and Mercuria have undertaken to train as traders.*

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120 Founding Affidavit, p 46, para 110

121 Founding Affidavit, pp 46 - 48, paras 113 - 114

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

95 On 24 November 2015, Mr Gamede sent RFPs to Venus and Mbongeni Investments South Africa (Pty) Limited.[122] Before the RFPs were sent out, they were sent to Mr Oladeji of Venus for comment and approval – that is clearly improper.

96 Unlike previous requests for proposals, these requests limited the bids to 5 million barrels of Bonny Light Crude Oil.[123] These were the first bids where Mr Gamede attempted to provide bid specifications.[124]

97 Venus had played no part in the transactions up to this point.

98 Bids were ultimately submitted by Zittatu, Vitol, Taleveras, GNI, Skydeck and Enviroshore.[125]

99 On 28 November 2015 – between 16h21 – 17h35 – cash in the amount of R332 300 was deposited into Mr Gamede's bank accounts in a series of ATM transactions. The payment references contain a series of apparently random numbers.

100 On 29 November 2015 – between 09h37 – 10h10 cash in the amount of R206 500 was deposited into Mr Gamede's bank accounts in a series of ATM transactions. The payment references contain a series of apparently random numbers.

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122 Founding Affidavit, p 48, para 118

123 Founding Affidavit, p 49, para 121

124 Founding Affidavit, p 50, para 122

125 Founding Affidavit, p 50, para 123

101 On 30 November 2015 – between 08h15 – 08h23 – cash in the amount of R146 800 was deposited into Mr Gamede's bank accounts in a series of ATM transactions. The payment references contain a series of apparently random numbers.

102 On 30 November 2015, Mr Gamede wrote to the Minister requesting approval for the sale of the strategic reserves with Venus, Vitol, Taleveras and GNI. The request, *inter alia,* stated:[126]

> *"…In compliance with the Ministerial Directive of the 12 November 2015, authorising SFF to inter alia, Rotate Sale and Purchase of Strategic Stock Crude Oil Reserves, SFF has as part of the first phase, received a number of proposals from different local BEE companies, expressing their interest in participating in the Rotation Sale and Purchase of the Strategic Crude Oil Reserves.*
> *SFF has assessed the proposals and found the proposals of Venus Rays Trade (Pty) Ltd proposals as sound and acceptable. Given the size of the transaction, the SFF Management is required in terms of the CEF Policy and Limits of Authority to submit the proposal and its recommendations to the SFF Board for consideration and approval.*
> *For mitigation of all risks associated with this type of transaction, the transaction will be subject to the following conditions:*
> *The transaction will require SFF Board Approval*
> *A Sale and Purchase Agreement with Venus Trade*
> *Venus Trade will provide SFF with a letter of Credit from a reputable financial institution*
> *SFF will verify the Letter of Credit with the relevant financial institution*
> *We request that the Honourable Minister authorizes SFF to pursue this transaction on terms and conditions mentioned above."*

103 The Minister granted the request on 7 December 2015.[127]

104 On 15 December 2015, a sale and purchase agreement and storage agreement was concluded with Venus.[128] On 15 December 2015, storage agreements were concluded with Taleveras.[129]

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126 Founding Affidavit, pp 51 – 52, para 125

127 Founding Affidavit, p 56, para 133

128 Founding Affidavit, p 59, para 147

129 Founding Affidavit, p 73, para 174

105 On 17 December 2015 – between 08h29 – 16h19 – cash in the amount of R250 600 was deposited into Mr Gamede's bank accounts in a series of ATM transactions. The payment references contain a series of apparently random numbers.

106 On 28 December 2015, purchase and sale agreements were concluded with Taleveras.[130]

107 On 20 January 2016, a purchase and sale agreement as well as a storage agreement was concluded with Vesquin.[131]

DELAY - SUMMARY OF APPLICABLE LEGAL PRINCIPLES

108 Proceedings for judicial review under s7(1) of PAJA must be instituted without undue delay and before the expiry of 180 days from the date of the administrative action sought to be reviewed. However, s9 empowers a court to extend the prescribed period where the interests of justice so require.

109 A review under the principle of legality does not have a specified 180-day time limit. In the first place, the court must ask whether the delay in launching the review was reasonable.[132] If the court finds that the delay was unreasonable, then the court can exercise its discretion to condone the delay – if it is in the interests of justice to do so.[133]

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130 Founding Affidavit, p 67, para 162

131 Founding Affidavit, 77, para 180

132 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ("***Buffalo City***") at para 49

133 Ibid, para 50

110 For present purposes it makes no material difference whether the review is evaluated under PAJA or legality – the analysis of the delay is essentially the same.

111 The SCA has held that whether the interest of justice require the extension of the time frames for the institution of review proceedings in terms of s9 of PAJA depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors including the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.[134]

112 The factors to be considered in that enquiry, and the particular weight to give each one, will depend on the nature of the case.[135] In *City of Cape Town*, the court explained that an assessment of what the interests of justice require is "*particularly case-specific*"[136] and that "*a wide range of considerations*" are relevant to the enquiry.[137]

113 Parliament has not prescribed a maximum period beyond which there can be no prospect of an extension.[138] However, if an extension is not granted, a court has no

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134 *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) at para 54; *Aurecon South Africa (Pty) Ltd v City of Cape Town* (20384/2014) [2015] ZASCA 209 (9 December 2015) ("***Aurecon***") at para 17

135 *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA) at para 82; *City of Cape Town v South African National Roads Agency Ltd and Others* (6165/2012) [2015] ZAWCHC 135 (30 September 2015) ("***City of Cape Town***") at para 21

136 *City of Cape Town* at para 22. In para 22 the court went on to observe that, "*the broad nature of the exercise enjoins the court to have regard, amongst other matters, to what the review application is about, its prospects of success and the broader consequences, in the context of delay, of it being upheld or turned away*." (Emphasis added)

137 *City of Cape Town* at paras 25 and 30

138 *South African National Roads Agency Limited v City of Cape Town* 2017 (1) SA 468 (SCA) *("**SANRAL**")* at para 80

authority to entertain a review application and the decision is validated / rendered unassailable by the delay.[139]

114 Delay is not necessarily decisive because, as was acknowledged in *SANRAL*, "*whilst finality is a good thing, justice is better*".[140] Thus, condonation may be granted even where:

114.1 A review is brought years or even decades later.

114.2 Where the sufficiency of the reasons for the late filing may, when viewed in isolation, not be deemed to be particularly strong (which we submit does not in any event apply to the CEF's explanation in this case), if the merits of the application have strong prospects of success and if the application determines a question of fundamental importance.

114.2.1 A prime example of this reasoning is the case of *Glenister II* in which the application was filed 62 days late. While the Constitutional Court differed markedly on the merits, it was unanimous in relation to granting condonation. It held:[141]

> *"The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to*

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139 *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* (90/2013) [2013] ZASCA 148 (9 October 2013) ("***OUTA***") at paras 26 and 36

140 *SANRAL* at para 108

141 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("***Glenister II***") at paras 49 – 50. See also *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 24

> *establish an independent anti-corruption unit. These are constitutional issues of considerable importance ….*
> *It is, therefore, in the interests of justice to grant condonation."* (Emphasis added)

115 Indeed, even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the state's conduct unlawful. This is so because s172(1)*(a)* of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.

116 The Constitutional Court states that the *Gijima* rule applies where the unlawfulness of the impugned decision is clear and not disputed.

117 It does not matter whether an application for an extension is brought under PAJA or the principle of legality, the decision is based on the interests of justice.[142] In a legality review, the application must be initiated without undue delay and, as there are no prescribed time periods, there is no requirement for a formal application for an extension.[143]

118 The application of the delay rule involves a two-stage enquiry: (i) whether there was an unreasonable delay, and (ii) if so, whether the delay should be condoned.[144] The first stage is a factual enquiry upon which a value judgment is made in light of all the relevant circumstances.[145] In the second stage, the court exercises a judicial

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142 *Wolgroeiers Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B - D; *OUTA* at paras 78 – 80

143 *Khumalo and Another v Member of the Executive Council for Education: Kwazulu-Natal* 2014 (5) SA 579 (CC) ("***Khumalo***") at para 44

144 *Gqwetha v Transkei Development Corporations Ltd and Others* (242/2004) [2006] 3 All SA 245 (SCA) (30 May 2005) at para 22; *OUTA* at para 26

145 *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A), 86D-E; *Khumalo* at para 49

discretion with regard to all relevant circumstances.[146] The unreasonableness and extent of the delay assessed in the first stage are factors to be considered in the second stage of the enquiry.

119 The extent to which the delay rule is connected to the merits is evident in the exposition in *Aurecon*[147] of the relevant factors in the enquiry into the interests of justice, which include: (i) the nature of the relief sought; (ii) the extent and cause of the delay; (iii) its effect on the administration of justice and other litigants; (iv) the reasonableness of the explanation for the delay; (v) the importance of the issue to be raised; and (vi) the prospects of success.

THE DELAY IN LAUNCHING THE REVIEW APPLICATION SHOULD BE CONDONED

The nature of the relief and its effect on the administration of justice and other litigants

120 As stated above, CEF seeks to review and set aside certain administrative decisions. Although the nature of that relief is not unusual, it is rare that a state institution seeks to set aside its own decisions where corruption is discovered within its own ranks (in the case of SFF) and in the case of its subservient body. In doing so, CEF is complying with its constitutional duty.

121 The Constitutional Court recognised the positive duty on the state to take effective measures to combat corruption. The duty derives from section 7(2) of the Constitution, which creates a duty on the state "*to respect, protect, promote and fulfil*

146 *SANRAL* at para 79

147 *Aurecon* at para 17

the rights in the Bill of Rights",[148] and applies to the organs and institutions of the state.

122 South African academic – Bolton – notes that corruption "leads to the slackening of competition for government contracts and impacts negatively on the government's ability to obtain the best possible value for money."[149]

123 In respect of corruption, collusion or fraud in the tender process, the Constitutional Court in *City of Cape Town v Aurecon*[150] stated that in such instances "*the interests of clean governance would require judicial intervention.*"[151] It put the matter as follows:[152]

> *"The SCA held that the procedural irregularities as alleged were not I fact irregularities at all and, before this Court, the City did little to assuage that finding. If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation."*

The extent, cause and explanation for the delay

124 CEF's review application was launched in March 2018. The period of time from the date on which CEF's legal review process was concluded and the application being launched was just over 1 year. CEF has set out the reasons for the delay in launching the review in detail in its founding and replying affidavits.

125 We summarise the key benchmarks below.

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148 *Glenister II*, Majority judgment at paras 177 and 189; Minority judgment at paras 105 and 106

149 P Bolton - The Law of Government Procurement in South Africa (2007: LexisNexis) at p 59

150 *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC)

151 Ibid at para 50

152 Ibid

126 The SFF Exco was informed of the impugned agreements in January 2016.[153] The SFF Board was informed of the impugned agreements on 5 February 2016.[154]

127 In the board meeting of 5 February 2016, the Board purported to ratify the impugned agreements concluded with Taleveras and Vitol. The impugned agreement with Venus was not ratified.[155]

128 Contango submits that the review application should have been launched at this stage.[156] CEF has alleged that the SFF Board's decision itself was flawed and reviewable and we explain why this is so below.

129 The Board's stance on the transactions is, however, relevant to explaining why the transactions were not reviewed at that stage. That is so for at least three reasons:

129.1 First, at that stage the SFF Board had not even seen the impugned agreements. Contango submits that CEF expects the respondents to simply concede the merits but allege that it was reasonable to take seven months to decide that an investigation was even necessary.

129.2 Indeed, the applicants had to determine the circumstances under which the impugned decisions were taken and the impugned agreements were concluded.

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153 Founding Affidavit, p 84, para 193

154 Founding Affidavit, p 87, para 204 – this is confirmed by the erstwhile Chairperson of the SFF Board, Mr Jawoodeen in his Confirmatory Affidavit, p 5589, para 6

155 Founding Affidavit, p 57, para 137

156 Contango and Natixis Answering Affidavit, p 2755, para 109

129.3 The logic in Contango's statement is curious. The SFF board and CEF were not presented with the case like Contango has been. CEF had to determine the circumstances under which the impugned decisions were taken and the impugned agreements were concluded. The applicants had an obligation to determine these circumstances so as to place before this court as much information as possible to make a determination as to the lawfulness of the transactions.

129.4 Second, the SFF Board understood that further approvals would still be required from the CEF Board and the Minister – put differently on the Board's version there was no final decision with a direct, external legal effect that was capable of judicial review.

129.5 Third, Mr Jawoodeen's confirmatory affidavit, further, explains that his understanding was that if the approvals were not secured then "*the SFF management would be required to refund those entities who had paid to acquire ownership*" of the strategic stock. Put differently, plainly before obtaining legal advice the Board proceeded from the mistaken premise that the parties themselves could and would just reverse the transactions without the need to approach a court.

130 It was only after the 5 February 2016 meeting that the COO, Mr Nkutha, sent his scorching memorandum attacking the commercial rationale behind the transactions.[157] The COO laboured under the incorrect impression that renegotiating the commercial terms could cure the unlawful transactions.

131 Mr Gamede then attempted to take various steps to sanitise the unlawful transactions.

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157 Confirmatory Affidavit by Mr Jawoodeen, p 5590, para 9

132 Importantly however, after the memorandum was sent, Mr Gamede purported to put all the transactions on hold. In reality he did not do so. For instance, Mr Gamede's email to Mr Van der Vent of Venus on 11 February 2016 at 5h23 stated:

> *"considering the fact that we have put this matter in abeyance I would not be comfortable with sending such a confirmation before the review processes are complete. ... I will appreciate it if you can also inform Glencore about the developments. The issues will be resolved but continuing with other processes while we have the process outlined in my yesterday's letter exposes us to the vultures that want to devour on us".*

133 The commercial terms in the transactions were negotiated again and again by Mr Gamede. It is clear that Mr Gamede sought to clean up his mess by attempting to satisfy some of the conditions of the transactions after the fact. It is equally clear that his motivation for doing so was to try and have the transactions escape proper scrutiny. Critically, therefore, some of the steps that were attempted to sanitise the transactions occurred from February 2016 onwards.

134 It was clear to representatives of SFF that Mr Gamede yielded extensive political power.[158] Mr Nqgongwa also stated that:

134.1 Mr Gamede would switch off recordings of meetings in order "to mention political pressure to execute certain transactions and decisions".[159]

134.2 Mr Gamede also made threats and engaged in manipulation. Because of Mr Nqgongwa's memorandum he was considered to be the 'whistleblower' against the impugned transactions. Mr Gamede informed him that SFF was "married to these people (i.e. the traders) and if they are unhappy with you

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158 Replying Affidavit, p 5200, para 824

159 Ibid

then they approach outside people". Mr Nqgongwa has confirmed that his understanding of this was "that there were forces who would take any challenges very seriously and would threaten [Mr Nqongwa's] physical safety."[160]

135 Mr Nqgongwa also stated that Mr Gamede was able to manipulate the Minister – he was able to get the directives and did so without the Minister carrying out any oversight over whether what he was suggesting was rational.[161]

136 Mr Gamede was also dishonest – in order to discredit Mr Nqgongwa's memorandum, he stated that it was actually drafted by Mr Foster because Vesquin and Vitol were disgruntled about not being sold any Bonny Light. Mr Nqgongwa has stated that this allegation is false. CEF's deponent cannot, of course, speak for Mr Foster.[162]

137 The CEF first became aware of the transactions on 25 February 2016.[163]

138 In March 2016, Mr Ngqongwa prepared a draft request for condonation for non-compliance with s54 of the PFMA.[164]

139 In April 2016, Mr Gamede wrote a letter to the former Minister entitled "Request for Condonation of Crude Oil Sales" stating:[165]

"Honourable Minister,

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160 Ibid

161 Ibid

162 Ibid

163 Founding Affidavit, p114, para 303

164 Founding Affidavit, p115, para 308

165 Replying Affidavit, p 5030 – 5031, para 78

> *In our haste to ensure that the company's ability to deliver on its mandate of providing a security of supply for crude oil needs of the country is enhanced, we missed a few regulatory processes for which we are deeply remorseful. The regulatory processes that we missed are as follows:*
> *Public Finance Management Act 54(2)(c) – Acquisition or disposal of a significant asset (in our case disposal).*
> *In respect of this Act we should have informed in writing the National Treasury of the sale and also submit relevant particulars of the transactions.*
> *Delegation of Authority between SFF and CEF*
> *CEF Act section 1D(2) stipulates that the share capital of SFF Association is held by CEF (Pty) Limited and accordingly as SFF is then a subsidiary of CEF (Pty) Limited the relationship is governed by a delegation of authority policy that requires:*
>
> *'Approval of the strategy, corporate plans and annual budgets and of any subsequent material changes in strategic direction or material deviations in business plans'*
> *The sale of the crude oil stocks constitute [sic] a material change in strategic direction of SFF Association and as company we did not submit a request to CEF Board to approval [sic].*
> *Central Energy Fund Act 38 of 1977 section 3A reads as follows:*
> *There shall be paid into the Equalization Fund, in addition to the moneys raised by means of a levy.*
> *(c) the moneys obtained by CEF (Proprietary) Limited or SFF Association from the sale of crude oil, petroleum products and products determined by the Minister of Mineral and Energy Affairs, with the concurrence of the Minister of Finance.*
> *Compliance with this part of the Act will have catastrophic impact on the balance sheet of SFF Association and also it is our considered view that this would compromise the mandate of SFF Association as the company currently seeks to replenish the crude oil stock sold.*
> *Minister, we appeal to your mercy to condone and also request condonation on our behalf where applicable.*
> *Honourable Minister, Please receive my regards of the highest consideration".*

140 Mr Gamede did not disclose that his previous requests to the Minister were dishonest and that he knowingly proceeded without board approval or complying with the other requirements in the Ministerial Directives. He does not disclose that he sold the strategic stock before a Trading Division has been established or before SFF conducted any detailed due diligence.

141 In May 2016, National Treasury became aware of the disposal of the strategic oil reserves due to the media coverage.[166]

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166 Founding Affidavit, p 127, para 310

142 On 1 June 2016, officials from the National Treasury met with the Department of Energy ("**DOE**") and the applicants to discuss the disposal of the strategic stock reserves.[167] Following the meeting, the Minister directed CEF to conduct a legal review. The request was initially met with resistance.[168]

143 On 23 June 2016, Mr Jawoodeen submitted a report on the rotation of strategic stock and storage contracts.[169] That report (FA70 to the founding affidavit) was prepared by Mr Gamede and it contains various misrepresentations about the process followed by Mr Gamede.

144 On 26 August 2016, the National Treasury reviewed the 'supporting information' to determine whether there had been compliance with the PFMA and the CEF Act. It was suggested that the Minister should instruct the SFF to submit a written notification with reasons for the failure to notify National Treasury before the transactions were concluded.[170]

145 On 2 September 2016, the impugned agreements were discussed at a BARC meeting. It was noted in item 5.3 of the minute:[171]

> *"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"*

146 On 20 December 2016, the legal review process was completed.[172]

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167 Founding Affidavit, p 130, para 313

168 Founding Affidavit, p 133, para 319

169 Founding Affidavit, p 127, para 311

170 Founding Affidavit, p 130 - 132, paras 314-315

171 Founding Affidavit, p 132, para 318

147 Due to the concerns relating to the legality of the sale of the strategic reserves, the applicants considered it prudent to obtain legal advice. The first senior counsel provided his opinion in February 2017.

148 Between 6 and 9 June 2017, letters were sent to Taleveras, Venus and Vitol advising of the legal review.[173]

149 The KPMG engagement letter is dated 22 June 2017. The report was issued on 27 July 2017.[174] A second opinion was sought and obtained in July 2017.[175]

150 On 26 September 2017, letters were sent to Taleveras, Venus and Vitol giving notice of the invalidity of the impugned transactions.[176]

151 CEF considered it prudent to obtain a second accounting opinion following media reports on KPMG's unethical conduct. A second opinion was obtained from PwC. The engagement letter is dated 12 October 2017 and report was produced on 7 November 2017.[177]

152 Between 7 and 9 November 2017, without prejudice meetings were held with purchasers.[178]

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172 Founding Affidavit, p133, para 321

173 Founding Affidavit, p 135, para 328

174 Founding Affidavit, p 134, para 324

175 Founding Affidavit, p134, para 322

176 Founding Affidavit, p 135 - 136, para 329

177 Founding Affidavit, p 134 - 135 to 124, para 326

178 Founding Affidavit, p 135, para 329

153 During November 2017, the applicants were advised that their attorneys of record, Allen & Overy could no longer act on their behalf due to a potential business conflict. The applicants had to appoint their current attorneys of record who first had to familiarise themselves with the matter, consider the voluminous documentation and consult with the applicants before being able to advise and draft the review application.[179]

154 A second round of meetings took place on 12 and 13 December 2017. Glencore was not available on the proposed dates.[180]

155 In January 2018, some of the traders set out their approach to remedy on a without prejudice basis.[181]

156 Delays were further compounded by change in Ministers and change in leadership at the CEF and SFF, respectively.[182]

157 The review thus took two years, one month and one week from the time that the Board was advised of the Impugned Agreements.

158 The time it took to launch this application was reasonable in the circumstances given:

158.1 the reviews and investigations which had to be conducted. It would have been irresponsible for the applicants to rush into a litigation without having sought legal advice and without having conducted a financial analysis to

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179 Founding Affidavit, p 144, paras 366 - 367

180 Founding Affidavit, p 138, para 339

181 Founding Affidavit, p 138 - 139, para 342

182 Founding Affidavit, p143, paras 363 - 364

understand the implications this matter would have on the fiscus and to consider an appropriate just and equitable remedy;

158.2 the complexity of this matter; and

158.3 the voluminous documentation involved in this matter.

159 In the event that this court finds that the applicants have unduly delayed, it is submitted that the applicants acted in good faith and with the intent to ensure clean governance.[183]

160 CEF has, in any event, sought an extension in terms of s9 of PAJA and condonation for the legality review being launched.

The importance of the issues to be raised

161 SFF has a Supply Chain Management Policy that applies to all of its business units, all levels and types of procurement and, *inter alia*, all capital expenditure. The policy in place at the relevant time is attached to the founding affidavit.[184]

162 The courts have held that "*[p]rocurement law is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation*."[185] We submit that it is only by strict adherence to fair procedures and the provisions of section 217 that substantively just outcomes are ensured.

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183 *Buffalo City* at para 62

184 Founding Affidavit annexure, "FA66.1", p 616 - 644

185 *Sanyathi Civil Engineering and Construction (Pty) Ltd and Another v eThekwini Municipality and Others; Group Five Construction (Pty) Ltd v eThekwini Municipality and Others* [2012] 1 All SA 200 (KZP) at para 34, relying on *Minister of Social Development and Others v Phoenix Cash and Carry PmB CC* [2007] 3 All SA 115 (SCA) at paras 1 – 2

163 The Constitutional Court has emphasised that corruption erodes the spirit, values, institutions and objectives of the Constitution. The Constitutional Court has also recognised that corruption undermines the ability of the state to deliver on many of its obligations in the Bill of Rights, notably but not limited to those relating to social and economic rights.[186]

164 In *South African Association of Personal Injury Lawyers*,[187] the Constitutional Court held:

> *"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state."*

165 In *Glenister II* the Constitutional Court held: [188]

> "*There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.*"

166 It is widely accepted that evidence of corruption, collusion and dishonesty in procurement cases is typically difficult to uncover, and often only becomes available long after a contract has been awarded and through rigorous investigation.

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186 *Glenister II*, Majority judgment at paras 166, 175, 177; Minority judgment at para 83

187 *South African Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 833 (CC) at para 4

188 *Glenister II*, Majority judgment at para 166, see Minority judgment at para 83

167 We submit that, in general, state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution.

168 A tolerance for delay where corruption, collusion or fraud is found was recognised in *Aurecon,* where the Constitutional Court recently observed that, "*[i]f the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.*"[189]

169 We submit that to hold state institutions too strictly to the prescribed time periods, and thereby to shield the perpetrators, encourages the commission and concealment of egregious conduct of the nature found in this matter and discourages prosecution by state institutions. It also negatively impacts on the administration of justice.

170 The respondents attempt to claim that they had no knowledge if SFF followed its internal processes as if those processes were optional. The Constitutional Court in *Allpay* explained that the opposite is true:[190]

> *"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. <u>These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution…</u>"* (Emphasis added)

171 As held in Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another:[191]

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189 *Aurecon CC* at para 50

190 *Allpay* at para 40

> *"In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure a procurement process is fair, equitable, transparent, competitive and cost-effective. Where a procurement process is shown not to be so, courts have the power to intervene."* (Emphasis added)

172 A public institution or organ of state has a constitutional obligation, when confronted with a flagrant violation of s217, to take appropriate action. This puts enormous responsibility on it to ensure that public resources are used properly and prudently.[192]

173 This case also involves issues in relation to the delay in bringing review applications, and whether and to what extent the court should more readily condone such delay where a public body seeks to review its own decision, where the evidence before the court points to corruption and the public body has overwhelming prospects of success.

174 In addition, this case concerns the issue of the appropriate remedy where a contract that was concluded as a result of the corrupt tender process has already been partly implemented and whether a mere declaration of unlawfulness is sufficient in order to hold the relevant decision makers accountable and to discourage public administrators from engaging in similar conduct. The importance of this deterrent role of review proceedings should be viewed through the prism set out by the Constitutional Court, as quoted above, corruption, "*[i]f allowed to go unchecked and unpunished … will pose a serious threat to our democratic state*."

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191 2015 (5) SA 245 (CC) at para 1

192 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) ("***Gijima SCA***") at para 60

175 We submit that CEF has set out a full and reasonable explanation for the delay in launching this application. In any event, the issues raised may nevertheless justify condonation for delay, despite the inadequacy of the explanation, particularly where corruption is concerned.[193]

176 In *Glenister II* the Constitutional Court held that:[194]

> *"The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance ....*
>
> *It is, therefore in the interests of justice to grant condonation".*

177 The public has an interest in ensuring that State institutions comply with the rule of law and conduct themselves in good faith and in accordance with the requirements of fairness.[195] The public has an interest in the courts evaluating the serious allegations made in relation to the merits of the transactions that were concluded. The initial internal reports filed by Mr Gamede provided a whitewash of these significant allegations and should not be allowed to stand. In this regard, the Constitutional Court has emphasised the value (as an end in itself) of the Court making a declaration of invalidity.[196]

The type of review

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193 *Aurecon CC* at para 50

194 *Glenister II* at paras 49 – 50

195 *Eisenberg* and Associates v Minister of Home Affairs 2003 (5) BCLR 514 (C)

196 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 108

178 Where an organ of state is investigating whether a prior decision it took (or its subsidiary body) was unlawful – by their very nature these investigations will generally only occur sometime after the particular decision was taken.

179 That is significant because:

179.1 The Constitutional Court has held that the time period for measuring the delay begins from the date on which the impugned decision was taken – even if the illegality or unlawfulness is only discovered years later.[197]

179.2 A responsible organ of state cannot bring review proceedings against a large contract or deal without some form of legal review process or without seeking legal advice.

179.3 We refer in this regard to the decisions in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*[198] ("**PRASA**") and *Joburg Market SOC Ltd v Aurecon South Africa (Pty) Limited and Others*[199] which exemplify the key features outlined in this paragraph.

179.4 For example, in the *PRASA* decision, as in the present case, there were top executive members of the organ of state who were responsible for the unlawfulness. It was only after there was some degree of regime change (after the responsible senior officials had been removed) that the investigations reached their full potential.

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197 *Aurecon CC* at paras 41 and 42

198 2017 (6) SA 223 (GJ)

199 (360801/2015) [2017] ZAGPJHC 145

180 In *Khumalo*,[200] the Constitutional Court held that:

> *"In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia, by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power."*

181 If this court were to adopt a technical and overly-stringent approach against an organ of state (as the appellants incorrectly contend it should) this will stifle future reviews being brought by organs of state.

The prospects of success

182 The Constitutional Court has held that the nature of the impugned decision should be considered. This, in essence, requires a consideration of the merits of the legal challenge against that decision.[201] In other words, the prospects of success.

183 In *SANRAL*, the SCA explained that the merits are a *critical factor* in determining the dictates of the interests of justice.[202] In particular, *the degree of non-compliance with statutory prescripts* and whether the non-compliance was egregious.

184 CEF relies on various grounds of review. The grounds are set out in the founding affidavit.[203] We submit that each of the grounds on which CEF relies can be accommodated under PAJA or the principle of legality.

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200 *Khumalo* at para 45

201 *Buffalo City* at para 55

202 *SANRAL* at paras 8 and 81

203 Founding Affidavit, pp 92 – 125

185 We respectfully submit that CEF has an unanswerable case and, as in *SANRAL*, where the attack on the merits of the review was secondary, all of the respondents except for Vitol have elected not to engage in the merits of the review, and the same result should follow - the delay should be condoned and the application heard.

186 This is particularly so given the Constitutional Court's recent decision in *Buffalo City*[204] where it was held:

> *"Gijima dictates that where the unlawfulness of the impugned decision is clear and not disputed, then this Court must declare it as unlawful. This is notwithstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case."*

187 The sale of the strategic stock did not comply with the preconditions that the former Minister 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.

188 Additionally, there is *prima facie* evidence of corruption. Mr Gamede was paid in excess of R20 million Rand into his bank account during the period when the impugned agreements were concluded and whilst he was in the full-time employ of the SFF.

189 Further, there is no dispute that Venus and Mr Gamede colluded to adjust the prices of the Bonny Light transaction in order to avoid scrutiny of the transaction.

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[204] *Buffalo City* at para 66

190 In *Merafong*,[205] it was stated that it is the duty of state litigants to rectify unlawful decisions:

> *'This Court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. What is more, in Khumalo, this Court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it'."*

The conduct of the applicants in explaining the delay was bona fide and reasonable

191 State litigants seeking to review their own decisions are often best placed to explain their delay.[206]

192 The steps which have been taken by the applicants in respect of this matter have been set out above. As previously stated, the conduct of the applicants was reasonable in the circumstances. We emphasise three points.

193 First, Vitol claims that the two-year period was undue because there was no explanation why the additional investigations were required.[207] Vitol proceeds to conclude that the first two legal opinions did not support a case for judicial review otherwise additional advice and review would not have been necessary.[208] They allege the same in respect of the forensic investigations.

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205 *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) BCLR 182 (CC) at para 61

206 *Buffalo City* at para 59

207 Vitol's Answering Affidavit, p 3244, para 141

208 Vitol's Answering Affidavit, p 3244, para 143

194 According to Vitol, the SFF should have blindly proceeded to institute judicial review proceedings without procuring any legal advice or considering the financial implications that the impugned transactions would have on the SFF and, ultimately, the fiscus.

195 Second, and similarly, when considering whether the explanation for the delay was sufficient we submit that this court should also be mindful of the requirements for disclosure of documents under rule 35(12). The question is what an organ of state can permissibly plead in its founding papers in order to:

195.1 comply fully with its obligation to explain the entire period of delay when launching review proceedings, on the one hand; and

195.2 without waiving legal privilege in relation to documents protected by legal professional privilege (as well as when referring to a lengthy process of legal review undertaken by an organ of state), on the other.

196 It would clearly be impermissible for an organ of state to simply state in its founding papers that: (a) sometime after the impugned decision was taken, it conducted a legal review process in order to evaluate whether the decision was unlawful; (b) that process took approximately 24 months to complete; (c) thereafter the organ of state decided to review its own decision; and (d) the application was prepared as expeditiously as possible and launched. Quite plainly, this would have been an objectionable (the appellants would argue) and unacceptable (the court would find) explanation.[209]

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209 Rule 35(12) interlocutory record, Vol 2, Respondent's AA to Glencore, pp340 – 341, para 68.4.

197 CEF needed to explain the various steps that were taken but at the same time be careful not to disclose too much in relation to the documents otherwise the respondents (as they did) would claim that privilege had been waived. It is common cause that Contango and Glencore claimed that CEF's explanation around the legal review process, the two legal opinions and the accounting opinions was too extensive and thus that legal professional privilege had been waived over the documents.

198 Curiously, in the rule 35(12) proceedings, Contango's claim was that:[210]

> *"They disclosed the contents because the respondents wanted to secure the advantage to telling the court that two separate senior counsel had concluded that the impugned decisions were invalid. It was the respondents' choice to disclose that these were the findings of their counsel."*

199 Put differently, Contango's argument was that CEF could have explained less in order to preserve legal professional privilege. Now in the main proceedings Contango and Vitol seek to suggest that the detail provided by CEF was not sufficiently detailed.

200 Third, Vitol's contention that the various steps taken analysing the decisions were not necessary because as soon as the decisions had been discovered then judicial review proceedings should have been launched – is without merit.

201 CEF has explained that the allegations made in this review could not be, and have not been, made lightly. That is particularly so because it impugned the credibility and reputation of the former Minister as well as jeopardising commercial relationships with the entities involved.

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210 Contango's Heads of Argument in the interlocutory, p 17, paras 51 – 52

The respondents have not alleged trial-prejudice caused by the delay

202 The respondents contend that the applicants have unduly delayed in launching and prosecuting this application. Consequently, they have suffered financial prejudice.

203 Critically, the respondents do not contend that they have or will suffer any trial-related prejudice as a result of the delay. Trial-related prejudice is defined as by the SCA in *Zanner v Director of Public Prosecutions, Johannesburg*[211] as follows:

> *"Trial-related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial."*

204 In truth, the respondents' prejudice relates to the question of the just and equitable remedy. The prejudice to be suffered by the applicants and the fiscus in the event that the delay is overlooked outweighs the prejudice to be suffered by the applicants.

205 In *Sanderson v Attorney- General, Eastern Cape*[212] it was held:

> *"A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."*

206 Vitol, Glencore and Contango complain about the losses they suffered due to closing their hedging transactions without being able to sell the oil. Importantly, by the date of the hearing before this court the respondents will not suffer any greater financial prejudice if this court declined to consider the merits of the transaction than if this

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211 2006 (2) SACR 45 (SCA) at para 12

212 1998 (2) SA 38 (CC) at para 39

court considers the merits and makes a declaratory order that the transactions are unlawful. Thus, the prejudice that the respondents complain of can be addressed at the stage of the just and equitable remedy.

207 In *Buffalo City*,[213] the Constitutional Court held that it should be taken into account if the prejudice can be ameliorated by the court's power to grant a just and equitable remedy.

208 Contango, for instance, attempts to rely on the criticism of SFF's board in the Gobodo report.[214] This shows that the additional investigations, and the delay occasioned by those investigations, did not prejudice the respondents – they lessened any existing prejudice.

THE TIME TAKEN IN PROSECUTING THE REVIEW APPLICATION

209 On 29 May 2018 the supplementary founding affidavit in Part A was delivered. It followed that the respondents were due to deliver their answering affidavits within 20 days.

210 Instead, on 2 May 2018, Contango delivered a rule 35(12) notice requesting various documents.[215] On 20 June 2018, Glencore requested documents under rule 35(12) and rule 53. Both respondents made it clear that they could not deliver their answering affidavits before those requests had been finalised. Those requests were

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213 *Buffalo City* at para 54

214 Contango's Answering Affidavit, p 2757, para 113

215 Contango's Answering Affidavit, p 2763, para 136.1.1

only finalised on 13 December 2019, when the SCA handed down its judgment in the interlocutory application.

211 The applicants accept that it was within Glencore's and Contango's rights under the Uniform Rules of Court to deliver each of those notices, to bring each of those cases and to appeal them to SCA. But it does not, thereafter, lie in either of their mouths to complain about the delay – if the cause of that delay was, in substantial part, litigation to which they were a party and complicit in.[216]

212 From 2 May 2018 to 13 December 2019, Glencore's and Contango's applications were the cause of the delay. CEF's attorneys raised concerns about the delay being caused by Glencore's and Contango's applications before the High Court and, thereafter, appeal to the SCA on various occasions detailed in the replying affidavit.[217]

213 Both Glencore and Contango – notwithstanding their complaints about their significant financial prejudice that each was suffering – appealed against the decision of Saldanha J. CEF was ordered to disclose certain documents by the High Court but accepted that decision in order not to delay the main application further. CEF opposed the appeal and was substantially successful in defending the appeal.

214 In particular on 17 July 2019, CEF's attorneys sent the following letter to Glencore and Contango:[218]

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216 In criminal proceedings an accused cannot complain if he was to blame for the delay. The Constitutional Court made that clear in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para 33. CEF submits that it also follows that an accused cannot complain of a delay in which he was complicit (in which he participated). The same should be so where parties are effectively seeking a 'civil stay' of reviewable irregularities.

217 Replying Affidavit annexures "TM5", "TM6", "TM7", p 5224 - 5239

218 Replying Affidavit annexure "TM7", p 5238

> *"It is important to record that both [Contango] and [Glencore] have sought to establish a false narrative through reams of correspondence addressed by yourselves and Werksmans Attorneys, that our clients have unduly delayed in progressing the judicial review proceedings. Apart from this assertion being further from the truth, your client's election to proceed with the SCA appeals finally lays bare the truth that your client is not interested in having the judicial review determined as soon as reasonably possible. You are now surely compelled to accept that the hearing date in February 2020 is now unattainable as a result of your client's election to proceed with the SCA appeals."*

215 Notably, the SCA found at para 36 of its judgment that Glencore was on a fishing expedition:

> *"…Glencore sought a large number of documents in the high court and <u>was unsuccessful in obtaining disclosure of many of them. On appeal it abandoned its attempt to obtain the remainder of them on the day of the hearing</u>. It was unsuccessful in relation to the two opinions, but succeeded in obtaining an order for disclosure of the KPMG and PWC reports. <u>It is difficult to resist the inference that it embarked on a fishing expedition to obtain those documents</u>…"* (Emphasis added)

It was perfectly competent and sensible to separate Part A and Part B

216 The respondents complain that separating the determination of (a) the determination of the question of delay and the merits in Part A and (b) leaving the issue of the just and equitable remedy for Part B was a delay tactic, impermissible and aggravated the delay in the matter being finalised.

217 That is incorrect both at the level of principle and at the level of fact.

217.1 <u>At the level of principle</u>, there was nothing impermissible or untoward about the separation. The Constitutional Court has previously ordered a similar separation of issues.[219] Similarly, the SCA has recently decided the question

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[219] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 (4) SA 179 (CC)

of the merits of a review application as a separate issue from the question of delay or the question of remedy.[220]

217.2 At the level of fact, in the founding affidavit CEF explained that the precise contours of just and equitable remedy should stand over until the determination of Part B since the court may well require detailed evidence from various experts and the court will need to consider the respective positions of the respondents.[221]

217.3 Further and importantly, CEF made clear that the manner in which the transactions were concluded was suspicious and that a further forensic process would be launched and would be made available in Part B (i.e. the Gobodo report).[222]

217.4 The Gobodo investigation was able to extract Mr Gamede's apparent motive for why the impugned agreements were concluded in such a suspicious manner and in a hurry.

217.5 Critically, if the stance of separating the proceedings had been agreed to then there would have been no delay in Part A being determined (other than the rule 35(12) applications brought by Glencore and Contango) and there would have been no prejudice to any of the respondents. That is so, because as the Constitutional Court made clear in *Buffalo City*, the complaints about the delay could equally be dealt with at the level of the just and equitable remedy. None of the respondents allege that the <u>delay caused</u> trial prejudice

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220 See *Khutala* supra

221 Founding Affidavit, p 17, para 18

222 Founding Affidavit, p 104, paras 249.15

in the hearing taking place (Vitol's allegations of prejudice are not linked to the delay) thus there is no reason whatsoever that their concerns regarding the delay could not simply be dealt with at the level of remedy.

218 Tellingly, it is only Vitol that now actively defends the merits of the review. As set out above, Contango and Glencore's submissions and complaints regarding the issue of delay can be determined at the stage of the just and equitable remedy. Thus, it is difficult to appreciate why Contango and Glencore refused to have the proceedings heard in two parts – which would have given all of the parties certainty far more quickly regarding whether the transactions were lawful or not. A consequence of this is that the respondents would have closed out their hedges far earlier in the proceedings and would have incurred fewer loses.

The Gobodo investigation produced important evidence

219 Vitol claims that the Gobodo report does not do more than provide a chronology of some of Vitol's interactions with the SFF,[223] and takes the case against Vitol no further than the founding papers. Various averments against Vitol emerge from the Gobodo report, which have been set out elsewhere in these heads. Further, we submit that the emails uncovered during the Gobodo investigation demonstrate that the Taleveras transaction and the Venus transaction were concluded dishonestly.

220 Vitol also claims that there is '*no explanation*' regarding '*why it was made available to Gobodo, but not included in the record of this matter*'.[224] Vitol is incorrect – the facts in the Gobodo report were not available when the founding papers were

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223 Vitol's Answering Affidavit, p 3251, para 165.4

224 Vitol's Answering Affidavit, p 3238, para 123.2

launched. The Gobodo forensic team had access to Mr Gamede's work emails which were gathered from the CEF server and included in Gobodo's report. At p 170 para 6.6.2.2 of the redacted Gobodo report provided to the respondents the following is stated:

> *"For the purposes of our forensic investigation … we have accessed Mr Gamede's CEF mailbox (Sibusiog@cefgroup.co.za) which is maintained on a mail server belonging to the CEF and which is located in Johannesburg."*

THE MERITS

221 We have set out some of the grounds of review above. We expand on others below in order to demonstrate that the case made out by CEF is irrefutable. We do not, however, address each ground of review exhaustively – but CEF persists with all of its grounds of review as set out in the founding affidavits (as supplemented in the replying affidavit).[225] If necessary, we will do so in greater detail in oral argument.

The preconditions for the sale required in the Minister's directives were not complied with

222 Vitol does no more than assert that "*there is nothing in the statutory regime that precluded the SFF from selling the oil that it sold to Vitol and leasing its storage space, or the Minister from approving that transaction*".[226] It does not substantiate its conclusion.

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225 Founding Affidavit, p 92 – 125, paras 226 – 302

226 Vitol's Answering Affidavit, p3261, para 196

223 In terms of that Directive the following pre-conditions had to be met: [227]

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

224 None of the preconditions were met prior to the conclusion of the impugned transactions and the impugned agreements. CEF has set this out extensively in its founding and replying affidavits.[228] It is most surprising that Vitol contends that the conditions were substantially complied with.

225 Mr Foster claimed, for instance, that:

> *"After many years of blending activity in Tank 2, it was impossible to determine the exact origins of the remaining blended crude oil making it commercially difficult to supply to the South African refiners. It thus had to be classified as a "blend" of sour crude oil, and could no longer be marketed as Basrah Light crude oil. That reduced its value and its commercial acceptability to the local and international refineries".*[229]

226 As regards the due diligence relating to the oil, for instance, Mr Ara Barsamian states:[230]

> *"SFF had a poor crude oil quality monitoring and stock management for its inventory, and did not make any reasonable effort to scientifically determine the status of its crude oil stocks quality. SFF DUE DILLIGENCE effort undertaken before the sale transaction was a sham designed to support the crude oil stock sale.*
>
> - *The Bonny Light sale was not justified on a scientific basis.*

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227 Founding Affidavit, p 35, para 74

228 Founding Affidavit, p 116 – 117 paras 276 – 277; p 133 para 321.1; Replying Affidavit p 5082 – 5090 paras 242 – 272

229 Vitol's Answering Affidavit, p 3200 para 34

230 Replying Affidavit annexure, "TM9", p 5248

- *The Basrah Light Mix sale was not justified because it could have been "saved" by blending with another crude oil."*

227 But Mr Foster claim that it was "impossible" to determine origin and quality of the oil. Mr Barsamian makes the point that the detailed assay analysis on the crude oil that SFF had in its tanks before it took its decisions to sell the oil.[231] Mr Barsamian points out that there is no such thing as "bad" crude oil that cannot be fixed and used during the refining process – the only thing that may occur are 'headaches' to remove sludge from the oil and associated costs.[232]

The Board's further conditions were not complied with

228 Vitol further states that in the minutes of 23 November 2015, SFF approved a closed bid. Vitol is, unsurprisingly, cherry-picking provisions that will support the version it seeks to put before this court.

229 The minutes of 23 November 2015 also states:[233]

> *"In relation to the selling and replacing of the strategic stocks the Board RESOLVED as follows:*
>
> *that every sale should essentially be back-to-back with a purchase in the sense*
>
> *that SFF should first identify the purchase opportunity before it actually makes*
>
> *the sale that is should be ensured that the selling price should be such that the margin between the selling price should be sufficient to cover all the incidental costs of the sale and thereafter SFF would still make a margin;*
>
> *that it should be ensured that all purchases are of the appropriate quality, which can be utilised in the South African refineries, and is in line with the clean fuels policy;*

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231 Replying Affidavit, p 5021 para 47; p 5033 para 83.3; p 5098 para 302.2; p 5173 para 681

232 Replying Affidavit, p 5192 para 781

233 Founding Affidavit, p 46 – 47, para 113

that any purchase of the sale has to be preapproved by the Board

that the SFF Supply Chain Management ("SCM") needs to ensure that any prospective purchaser, seller, or agent should be on the supply database;

that all Procurement and SCM Policies need to be strictly adhered to."

230 The above was not adhered to by Mr Gamede. Vitol by its own admission states that it has no insight into what occurred within the SFF, or between the SFF and the Minister, in taking the impugned decisions besides what it can glean from the record.[234]

231 Further, Vitol concedes (at para 213 of Vitol's answering affidavit) that a "potential disadvantage of the Vitol transaction to SFF was that arising from the volatility in the oil price – that is, that SFF may have to buy oil back at higher price than it had sold it." Vitol exclaims that this risk is inherent in oil trading and that SFF could have hedged against this risk.

232 Importantly, when Vitol claims that SFF might potentially have to pay more for replacement oil that the stocks it sold – that is not merely a "potential disadvantage",[235] the manner in which the transaction was set up flouted the Minister's prerequisites for the transactions as well as the Board's conditions that were set out on 23 November 2015.

The Minister's decisions to grant the First Approval Notice was unlawful

233 The Minister's decision falls to be set aside as it was:

233.1 materially influenced by an error of law;

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234 Vitol's Answering Affidavit, p 3260, para 191

235 Vitol's Answering Affidavit, p 3267, para 213

233.2 irrational; and/or

233.3 unreasonable.

234 The First Approval Notice makes reference to "the Ministerial Directive of 3 August 2015". The Directive referenced herein was the Withdrawal Notice which had been replaced by the Second Directive on 8 October 2015. Due to the Second Directive being in place, the Minister should not have reached her decision to approve the outright disposal of the strategic reserves.

235 For reasons set out above, Mr Gamede's incorrect rationale for the disposal of the strategic stock, and the Minister's decision which was premised on these inaccuracies lead to the de on this bases amount to a material error of fact.

236 The Ministers decisions falls to be set aside under ss 6(2)(d), 6(2)(f)(ii) and 6(2)(h) of PAJA and or the principle of legality.

The Minister's decision in the second approval notice, dated 7 December 2015 is unlawful

237 The Minister in approving the second approval notice acted irrationally and unreasonably for a variety of reasons set out in the founding and replying affidavits, including for the following reasons.

238 The Minister failed to consider relevant considerations. Mr Gamede failed to put relevant information before the Minister such as the proposals of the bidders, information on the procurement process that had been followed, the necessary

applications and approvals that had to be given by the Minister in terms of the PFMA and the Practice Note.

238.1 In *Walele v City of Cape Town and Others,*[236] the Constitutional Court held that the failure to obtain approval plans in the absence of a recommendation that had to be made by a decision maker (so that they can consider the applications properly and in a balanced way) meant that a necessary jurisdictional fact was lacking and it followed that the approval was invalid and must be set aside.

239 The Minister took this decision without any facts before her that Mr Gamede had complied with the conditions set out in his request. The Minister's approved the entities in the transaction on the basis of Mr Gamede's claim that SFF had received proposals from different BEE companies. Mr Gamede failed to disclose that Taleveras and Vitol were not local BEE companies at all. Mr Gamede also failed to canvass the position of Glencore (another entity who had no BEE credentials) and was riding on Venus' coattails.

240 In *Pepcor,*[237] the SCA held:

> *"In my view, a material mistake of fact should be a basis on which a Court can review an administrative action. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to have been made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should…be reviewable…The doctrine of legality which was the basis of the decision in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly i.e. on the basis of*

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236 2008 (6) SA 129 (CC) at para 72

237 *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) at para 47

> *the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires."*

241 In *Chairpersons' Association v Minister of Arts and Culture and Others*[238] the SCA held:

> *"In my opinion the legal position as set out in the Pepcor case based as it is on the principle of legality still applies under PAJA, s 6(2)(e)(iii) of which provides that administrative action taken because 'irrelevant considerations were taken into account or relevant considerations were not considered' can be set aside on review. Where a decision is based on a material misstatement of fact it is clear that that subparagraph applies."*

The transaction was awarded to Vitol – not to Vesquin

242 CEF alleged in the founding affidavit[239] that Vitol submitted a bid, Mr Gamede sought permission to conclude the transaction with Vitol and the Minister approved the transaction with Vitol. A contract was thereafter awarded to Vesquin – which is a related company to Vitol. Plainly that is impermissible and the contract falls to be set aside on that basis alone.

243 Vitol alleges that "*Vesquin is a Vitol Group company, which is used to conclude transactions in the South African energy sector*".[240]

244 The question is - can a tender awarded to Vitol on the basis of Vitol's proposal - which does not refer to Vesquin - be concluded by Vesquin. The answer is that is cannot.

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238 2007 (5) SA 236 (SCA) at para 48

239 Founding Affidavit, p 77, para 181

240 Vitol's Answering Affidavit, p 3215 para 80.1

245 Vitol and Vesquin are separate legal entities. The Constitutional Court's reasoning in *Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others*[241] makes it plain why awarding a contract to Company A cannot simply be construed as a contract being awarded to Company B. If Vitol had not been awarded the contract after it submitted a bid, would Vesquin have been entitled to review the award? The majority of the Constitutional Court has held that it would not:[242]

> *"When each one of the two separate legal entities acts in its own right, no obligations or rights attach to the other simply by virtue of the fact that they both belong to the same group of companies. This purported defence is no defence at all in law. Just because company A belongs to the same group of companies as company B does not give any one of the two companies locus standi to institute court proceedings in its own right in a matter that only directly affects the other company. So, if company A submitted a bid for a certain tender and lost that tender to company C, company B cannot then institute review proceedings in its own right to set aside the award and to seek an order that the tender be awarded to it just because it and company A belong to the same group of companies.*
>
> *The proposition implied in WEBSA's second defence is as bad as would be the proposition that, if one brother submitted a bid for a tender in his own right and lost it to a competitor, any of his brothers or sisters may institute legal proceedings in his or her own right to have the award of the tender reviewed and set aside just because the two siblings belong to the same family. The issue here is about separate legal entities. In my view, Eskom's decision to award the tender to Areva did not affect any of WEBSA's rights or interests because WEBSA did not bid for the tender in its own right."*

246 By parity of reasoning, if Vesquin had no right to review the award of the tender (if Vitol were unsuccessful) - it follows that Vesquin had no right to be awarded the tender in the first place.

The transactions did not comply with section 54(2) of the PFMA

247 Section 54(2)(c) of the PFMA states:

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241 2017 (6) SA 621 (CC)

242 Ibid at paras 38 – 39

> *"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 …*
> *(d) acquisition or disposal of a significant asset"*
> *(e) commencement or cessation of a significant business activity..."* (Emphasis added)

248 In the letter dated 11 November 2015,[243] Mr Gamede requested approval from the Minister to *"sell the entire quantity of 10.3 million Barrels"*. The intention was clearly to dispose of the entire quantity of the strategic stock.

249 Vitol contends that section 54(2)(c) of the PFMA did not apply to the transactions. However, Vitol does not explain clearly why it says this is so.

250 Importantly, section 54(2)(d) and (e) must be read with the CEF Group Procurement Policy[244] which stipulates that:

> *"goods or services may not be deliberately split into parts or items of lesser value merely for the sake of procuring the goods, works or services otherwise than through the prescribed procurement process. When determining transaction values, a requirement for goods, works or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction."*

251 As stated above, s54 of the PFMA is applicable. Indeed, in Mr Gamede's draft letter to the Minister seeking condonation for non-compliance with various regulatory requirements,[245] Mr Gamede does not claim that s54 of the PFMA did not apply – quite the opposite he stated that it did apply.

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243 Founding Affidavit, annexure "FA25", p 220 - 221

244 Founding Affidavit, annexure "FA66.1", clause 13 p 634

245 Replying Affidavit, p 5030 – 5031, paras 78 – 79

252 The impugned transactions concluded by Mr Gamede also amounted to SFF commencing a significant business activity. It is common cause that PetroSA previously managed the strategic stock on behalf of SFF until 2010.

253 Section 54 of the PFMA obliges a public entity's accounting authority to seek prior approval from the relevant Executive Authority and to issue prior notification to the National Treasury.

254 The SFF Board, as the accounting authority, did not:

254.1 seek prior approval from the Minister. Mr Gamede, acting on his own accord, sought the approval;

254.2 issue or approve the request to sell the entirety of the strategic reserves; and

254.3 issue or approve the requests from ministerial approval to dispose the strategic reserves to Vitol, Venus, Taleveras and GNI.

255 Section 54(4) states that the executive authority may exempt a public entity listed in Schedule 2 or 3 from subsection 2. No such approval was sought or granted.

256 It is common cause that National Treasury was not provided with the necessary notification of the disposal of the strategic reserves.

257 Clause 4 of the PFMA Practice Note states:

> *"4 Applications for Approval*
> *4.1 A public entity should address an application in terms of section 54(2) (and section 51(1)(g) if applicable) directly to its Executive Authority (accountable Minister), and to the Minister of Finance, who is the head of National Treasury.*
> *4.2 Applications per 4.1 must be submitted simultaneously."*

258 Mr Gamede also did not comply with clause 7 of the Practice Note on s54. The Practice Note stipulates that the application must include, *inter alia*, the public entity's objectives for the transaction; the relationship between the transaction and the public entities core business; the transactions socio-economic objectives; the transaction's likely impact on the Government and public entity and the necessary board and third party approvals. Mr Gamede did not submit any of the necessary information to the Minister.

Sections 112 and 115 of the Companies Act were not complied with

259 Similarly, sections 112 and 115 of the Companies Act are also applicable as they concern the disposal of all or a greater part of a company's assets.

260 Section 112 of the Companies Act states:

> *"112 Proposals to dispose of all or greater part of assets or undertaking*
> *(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 section 115; and*
> *(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company."*

261 Section 112(3) sets out a host of detailed procedural requirements which are required to give adequate notice of a shareholders meeting to approve a disposal contemplated in subsection 112(2).

262 Importantly, s115 of the Companies Act, 2008 ("**Companies Act**") is one of the unalterable provisions as subsection (1) makes clear that it applies irrespective of

what is contained in a company's memorandum of incorporation, or any resolution adopted by its board. Section 115 is triggered where an entity seeks to dispose of "all or the greater part of its assets or undertaking". We submit that SFF disposing of all of its strategic stock triggers section 115.

263 Given that neither the SFF Board nor CEF were involved in the disposal of the strategic reserves, the requisite special resolutions by the SFF Board and CEF were not passed.

There was no ratification by the SFF Board on 5 February 2016

264 Vitol[246] and Contango[247] seek to raise the purported ratification of the Taleveras and Vitol agreements at the Board's meeting on 5 February 2016.

265 That supposed ratification is of no assistance for three reasons.

266 First, the impugned decisions and impugned transactions could not be ratified. Clause 13.3.1 of the Group Procurement Policy states that:[248]

> *"Ratification of procurement by the relevant authority will only happen where there was an emergency procurement that satisfies any of the emergency procurement criteria where normal procurement could not be feasible, reported to the Procurement Department within 24hrs of the effect. The settlement of the transaction will only be effected once approval is sort from the relevant authority."*

246 Vitol's Answering Affidavit, p 128.1, para 3239

247 Contango's Answering Affidavit, p 2754, para 106

248 Founding Affidavit, annexure "FA66.1", clause 13, p 635

267 As explained above (with reference to Mr Barsamian's expert report) there was no urgency whatsoever to conclude the impugned transactions. That brings Vitol back to the wall of RPM Bricks: estoppel – as set out above – is of no assistance.

268 Second, the terms of the ratification does not assist the respondents. There is no purported ratification of the Venus transaction whatever. There is no ratification of Mr Gamede concluding a transaction with Glencore. There is no ratification for Mr Gamede to conclude an agreement with Vesquin. There is no ratification in relation to the side-letter signed by Contango.

269 Third, even assuming that the Board had the power to ratify the impugned transactions (which it did not, because of clause 13 of the Group Procurement Policy) the Board's decision itself fell to be reviewed and set aside. Mr Gamede had not demonstrated to the Board that he had complied with the Minister's preconditions for executing the sale. Further, it is clear that the Board merely ratified the decision in principle and not without further input from SFF's Board, CEF's Board and the Minister. Mr Jawoodeen - the Chairperson of SFF's board from December 2015 - states that:[249]

> *"[The Board] did so on the understanding that approval was still required from the CEF Board and that condonation for non-compliance with the SFF's procurement policies and the Public Finance Management Act, 1999 would be obtained from the Minister of Energy and the Minister of Finance".*

269.1 Indeed, if that were not so then the COO's memorandum would have served no purpose. Mr Jawoodeen — who subsequently resigned with Mr Gamede in June 2016 following his involvement in the proposed acquisition of Chevron – admits that "*With hindsight, I accept that the SFF Board could*

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249 Mr Jawoodeen's Confirmatory Affidavit, p 5589 – 5590, paras 6 - 7

and should have done more to ensure that due process was followed."[250] Mr Jawoodeen explains that the impugned agreements "*were not included in the Board pack, nor did the SFF Board call for the agreements*".[251] There was no interrogation of the process Mr Gamede had followed, the commercial rationale for the transactions, why these three entities had been selected (instead of the other entities who submitted proposals) or the terms on which they were concluded.

269.2 The Board's decision was squarely targeted in the founding affidavit[252] and fell within the ambit of the Notice of Motion and Amended Notice of Motion.[253] However, to avoid any desperate technical arguments from the respondents on that score, a further Amended Notice of Motion was delivered with the replying affidavit which expressly refers to the Board's decision.

270 Third, and in any event, the Board's approval alone could not render the transactions lawful since the Minister, the CEF Board and the Treasury would have also needed to ratify the decisions. No such ratification ever took place. Vitol's claim that the transactions are lawful – in the face of these facts that are not in dispute – illustrates that Vitol's defence of the merits is an attempt to avoid the principles of the principles from *Gijima* and *Buffalo City* having application.

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250 Mr Jawoodeen's Confirmatory Affidavit, p 5590, para 11

251 Mr Jawoodeen's Confirmatory Affidavit, p 5590, para 8

252 Founding Affidavit, p 88, para 206 – 207; Replying Affidavit, p 5016, para 23.2; p 5027 para 67

253 Prayers 3.1 (in relation to the Venus agreement); 4.1 (in relation to the Taleveras agreement) and 6.1 (in relation to the Vitol agreement)

The procurement process followed by Mr Gamede was patently skewed and unfair

271 The requirements of procedural fairness are to be kept separate and distinct from the merits of the decision in question, since it is "*immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice*."[254] This principle holds true for the awarding of tenders.[255]

272 The SCM process of procuring goods and services by means of public advertisement gives effect to the Constitution's prescripts that all potential suppliers should be afforded the right to compete for public sector business through competitive bidding.[256]

273 As held by the Constitutional Court in *Allpay*:[257]

> *"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution…"* (Emphasis added)

274 The bidding process was manifestly unfair because:

274.1 Mr Gamede issued different requests-for-proposal to different bidders at different times.[258]

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254 See: *General Medical Council v Spackman* [1943] AC 627 at 644-645; Cited in *Yates v University of Bophuthatswana and others* 1994 (3) SA 815 BG at 835; see also *Administrator, Transvaal and others v Zenzile and others* 1991 (1) SA 21 (A) at 37 C-F; *John v Rees* [1970] Ch 345 at 402

255 *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) at para 24

256 Practice Note 6 paragraph 2.2

257 *Allpay* at para 40

258 Founding Affidavit, p 100, para 249.1

274.2 The bidders did not receive the same amount of time to prepare and submit their bids.[259]

274.3 The bidders were provided with materially different requests for proposals. The bidders were therefore provided with materially different bid requirements.[260]

274.4 Some bidders were only allowed to bid for a limited portion of the strategic reserves whilst others were allowed to bid more expansively.[261]

274.5 Contrary to the PPPFA, Mr Gamede did not publish the bid specifications, evaluation or adjudication criteria.[262]

274.6 Certain bidders were allowed revise their bids after the closing date. Venus was required to submit its bid by 27 November 2015 but the offer letter issued referred to a proposal submitted on 30 November 2015.[263] Importantly, after the validity period expired on 27 November 2015, it was not open to Mr Gamede to accept Venus' bid.[264]

274.7 Certain bidders, were provided with the request for proposal before it was officially sent to them to respond to. Venus, through Oladeji had helped compile two letters titled *"Invitation for Expression of Interest for Participation in the Rotation, Sales and Purchase of South African Strategic*

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259 Ibid

260 Founding Affidavit, p 101, para 249.2

261 Founding Affidavit, p 101, para 249.3

262 Founding Affidavit, p 102, para 249.5

263 Founding Affidavit, p 102, para 249.7

264 *Searle and Others v Road Accident Fund and Others* [2013] ZAECPEHC 60 (31 December 2013)

Crude Oil Reserves" which were ultimately sent to Mbongeni Investments South Africa (Pty) Ltd and the CEO of Venus.

274.8 As stated in *AllPay* above, tender processes require strict and equal compliance by all competing tenderers on the closing day for submission of tenders as a failure to do so undermines the demands of equal treatment, transparency and efficiency under the Constitution.

274.9 Certain bidders were allowed to submit revised bids. Vitol submitted three bids in total with the guidance of Mr Gamede.

274.10 Certain bidders such as Zittatu and Skydeck were excluded without any reason related to a published specification, evaluation or adjudication criterion.[265]

The price of the Bonny Light oil was sold for less than its true value

275 Vitol contends that the transaction were commercially sound and rational.[266]

276 We submit that whether the rubric of reasonableness or rationality is used it is clear that the conclusion of the impugned transactions in relation to the Bonny Light was unlawful.

277 The review on the basis of rationality is far more limited than a review on the grounds of reasonableness under PAJA (in the South African context).

278 In *Democratic Alliance*,[267] the Constitutional Court held (at para 32) as follows:

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265 Founding Affidavit, p 103, para 249.9

266 Vitol's Answering Affidavit, p 3264 – 3267, paras 206 to 213

267 *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC)

> *"The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."*

279 Was Mr Gamede's decision to conclude the impugned transactions rational?

280 That is, was it rationally connected to the purpose for which the power was conferred. The purpose for which the power was conferred was to rotate the oil subject to the various preconditions set by the Minister and the Board.

281 The Dated Brent was at an 11-year low. This information was readily available to Mr Gamede had he taken steps to seek it. Unfortunately, he elected to dispose of the oil when the market favoured the traders.

282 Given the experience of the traders, which Mr Gamede obviously lacked, they were able to negotiate contracts that were in their favour.

283 The expert for Glencore states that the oil was sold by Venus to Glencore at market related prices. This, however, is the incorrect premise to start from when analysing the merits of the transaction. The starting point is whether it was an opportune moment for SFF to conclude the impugned agreements. The answer is no.

284 Mr Driscoll states at paragraph 120[268] that a factor to be considered when negotiating oil prices, is the different environment and conditions when a large vessel loads. Factors such as security, reliability, efficiency and performance are also critical. Buyers factor these risks into their economics and buying strategies. Mr Driscoll agrees that given the security, efficiency and logistics advantages in South Africa (as compared to Nigeria), Bonny Light FOB Saldanha Bay would normally command a material premium over the Platts assessment of FOB Bonny Light.

285 Mr Foster has not taken issue with Mr Driscoll's evidence on this score – it would be surprising if he did – given that in the SCA case that Mr Foster refers to (which relied on Mr Foster as an independent expert – as he was in that particular case), Mr Foster testified:[269]

> *"[A]bout the risks involved in shipping. These included finding a suitable vessel for both the load port and the discharge port; availability within the loading window; the quality and quantity loaded; piracy along the West and East coasts of Africa; and arrival and discharge times, and the types of losses that Gird had described. While conceding that most of these risks were insured against, he considered that there was nonetheless risk where the insurer repudiated the policy on the basis that the shipper had not acted reasonably in guarding against the risk foreseen."*

286 Further, Mr Foster testified that although "the fees charged per barrel by [Sasol International Services Ltd] were low, the total sums earned when millions of barrels of crude oil were shipped were not to be underestimated".[270]

287 This accords with Mr Driscoll's evidence regarding why the 5 million barrels of Bonny Light (from Nigeria) which were already safely stored in Tank 6 in Saldanha

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268 Replying Affidavit, annexure "TM11", p 5306

269 *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* (923/2017) [2018] ZASCA 153 ("Sasol") at para 46

270 *Sasol supra* at para 47

Bay were worth more than the Free On Board price (where the price quoted leaves out all of the additional expenses that the purchaser will need to incur to get the product from port X to its final destination).[271]

288 Indeed, the piracy problems off the coast of West Africa, and in Nigeria in particular, have been highlighted by the International Chamber of Commerce / International Maritime Bureau (IMB) annual piracy report attached to the replying affidavit.

289 Mr Driscoll states further that, the US $3 premium paid by Taleveras and US $3.07 paid by Venus fell short of the true market value. And, further, Bonny Light conformed to the latest quality preferences of South African refiners. The decision to sell the entire stock of Bonny Light in a deteriorating market with a steep contango does not make any sense (i.e. the decision is irrational).[272]

Lack of criteria contained in the RFQ – no rational basis for selecting the successful entities

290 In *Metro Projects*,[273] the SCA held that an essential element of fairness was the equal evaluation of tenders.[274]

291 The purpose of an RFQ is to a large extent to compare apples with apples and select the bid that satisfies any technical requirements at the best price.

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271 Replying Affidavit, annexure "TM11", p 5306 – 5307, paras 121 and 122

272 Replying Affidavit, annexure "TM11", p 5307, paras 123 and 124

273 *Metro Projects CC and Another v Klerksdorp Local Municipality and Other* 2004 (1) SA 16 (SCA) ("***Metro Projects***")

274 *Metro Projects* at para 14

292 There is no evidence of any objective basis regarding how Mr Gamede arrived at the three winning bidders. Instead, what is known is that the winning bids went to:

292.1 Taleveras who it is common cause was awarded a contract as a quid pro quo to avoid Taleveras suing SFF for damages under a previous contract.

292.2 Venus Rays only received a RFP on 24 November 2015 and was required to submit its bid by not later than 27 November 2015. Venus failed to do so – it only allegedly submitted a bid on 30 November 2015 but was still awarded the contract.

293 What is even more curious is that the original price mechanism for both of these contracts was not reflective of an arm's length transaction: both entities offered to buy the Bonny Light oil for the price of Dated Brent less four US dollars per barrel. Bonny Light oil trades at a premium to Dated Brent.

294 Put simply, the BMW (the Bonny Light) was being sold not, as one would expect, at a premium to the Toyota Corolla but at a huge discount.

295 The COO's memorandum, dated 10 February 2020 made clear that these prices were flawed on a number of bases.

296 It was only after these concerns were raised that Taleveras and Venus 'renegotiated' their prices with Mr Gamede. Except that they did not. What was done was collusion in order to avoid detection and accountability – not an effort to secure SFF a better price in the deal. That is made absolutely clear in the email exchange

between Mr Gamede and Mr Van der Vent from Venus.[275] In particular, we refer this Court to Mr Gamede's email dated 16 February 2016 which states:

> *"I am still waiting for the text for amendment but the suggestion is that we don't refer you a discount in the contract but craft in such a way that we look at price windows take a window when the crude was selling at 28 and we sell it to you at Brent plus 3 which gives us 31 and in this way no one will allege inappropriate conduct and reckless trading (sic)".*[276]

297 The expert evidence of Mr Driscoll makes it clear that the practice of backdating the prices is reprehensible.[277]

298 Mr Sanomi from Taleveras DMCC claims that he did not have sight of the COO's memorandum. It is, however, not disputed by Taleveras or Mr Mulaudzi that Mr Mulaudzi was sent the COO's memorandum.

299 Mr Mulaudzi states that "when the letter was received from SFF – I immediately wrote back to request that any matter relating to SFF be directed and handled by Taleveras DMCC – for the record I am neither a director nor an employee of Taleveras Petroleum Trading DMCC".[278] That is not a correct interpretation of Mr Mulaudzi's response. Mr Mulaudzi's response only requested that Mr Gamede change the official recipient of the letter. Mr Mulaudzi thereafter passed that proposal on to Mr Sanomi.

300 Mr Mulaudzi contends that:[279]

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275 Replying Affidavit, p 5027, para 68; p5030 para 75; p 5136, para 477 and 5137, para 479

276 Replying Affidavit, p 5139, para 496

277 Replying Affidavit, p 5197 para 807; Replying Affidavit, annexure "TM11", p 5309, paras 131 - 132

278 Confirmatory Affidavit by Mr Mulaudzi, p5004, para 4

279 Confirmatory Affidavit by Mr Mulaudzi, p5004, para 4

> *"If indeed my relationship with Mr Gamede was one that sought to favour Taleveras's dealings with SFF – then why was Mr Gamede so hostile towards Taleveras?".*

301 It is common cause that Mr Mulaudzi concluded his consultancy agreement with Mr Gamede in June 2015.[280]

VITOL'S MISCELLANEOUS PROCEDURAL COMPLAINTS

Standing

302 It is difficult to understand Vitol's objection to CEF's standing. Vitol's contention is that CEF cannot act in the public interest.[281] And that an organ of state is precluded from exercising section 38 of the Constitution. This is an extraordinary claim. It is also wrong. In *Gijima*, similarly, in *Buffalo City* the separate concurrence by Cameron J and Froneman J summarised the Gijima principle as applying to a 'narrowly construed category of self-review applications':[282]

> *"[T]he judgment was not concerned with either (1) the scenario where an organ of state seeks to review the decision of another organ of state; or (2) the scenario of state self-review where the organ of state purports to act in the public interest under section 38 of the Constitution".*

303 There would have been no reason for the second clarification if such a self-review were not possible. In any event, CEF would equally be entitled to bring the review in the public interest under s7(2) of the Constitution as part of its duty to protect the rights in the Bill of Rights.

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280 Confirmatory Affidavit by Mr Mulaudzi, p5004, para 4

281 Vitol's Answering Affidavit, p 3258 – 3259, paras 187 to 188.3

282 *Buffalo City* at para 111 fnt 107

304 Mr Gamede's conduct in concluding the impugned transactions was not in the public interest.

304.1 It is a long-standing principle of administrative law that state entities must exercise their powers in the public interest.[283]

304.2 SFF maintains the strategic oil reserves as an agent and on behalf of the National Government of South Africa.[284] It is not the owner of the strategic oil reserves. SFF's memorandum of incorporation states that it conducts its business not for its own interest but for the interest of the general public.[285]

304.3 This application seeks to correct those instances in which SFF failed to act in the public interest.

305 As set out above, our courts have made it clear that organs of state have a duty to set aside unlawful exercise public power.[286]

306 Vitol also contends that CEF is not permitted to bring the application under s38 of the Constitution because the state only incurs duties under the Bill of Rights – not rights.[287]

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283 L Baxter "Administrative Law" (Juta & Co Ltd 1984) at page 100. Baxter explains that (while it is not always clear what is meant by this duty to act in the public interest) generally it "signifies a duty to advance the general interests of the community, directly or indirectly". (See p 100 fn 51).

284 Founding Affidavit, p 28, para 55

285 Rule 53 Record, Vol 1, p70 at clause 4 of Memorandum of Incorporation

286 *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 at para 23

287 Section 38 of the Constitution provides that: "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights*." The persons who may approach a court include: (a) anyone acting in their own interest; (d) anyone acting in the public interest. Read with s8(4) it means that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. There is no cogent reason why a public entity cannot bring an application alleging a breach of rights in the Constitution on

CEF is entitled to review the impugned transactions on the basis of all of the review grounds

307 In *Gijima*, the Constitutional Court held that an organ of state may only review its own decisions under the principle of legality.[288] However, the court did not extend its principle to situations in which (a) the organ of state was reviewing a decision in the public interest;[289] or (b) where a mother entity is reviewing a decision of the lower entity.

308 First, and importantly, CEF made it clear that it brings this review on its own behalf but also on behalf of the public interest. Accordingly, it is entitled to bring the review under PAJA as well as, in the alternative, under the principle of legality.

309 Second, and in any event, the grounds of review upon which the CEF relies are available under both PAJA and legality. Accordingly, it makes no practical difference in this case whether the review is decided under PAJA or under the principle of legality. The result will be the same.

310 The fundamental error that Vitol makes is to treat the CEF and the SFF as one legal entity. CEF and the SFF are separate legal entities. *Gijima* held that organ of state reviewing its own decision can only do so under the principle of legality, not PAJA. On that score, SFF brings these proceedings under the principle of legality. It relies on PAJA to the extent that it brings these proceedings in the public interest.

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behalf of the public interest. This case turns on the right to just administrative action under s33 of the Constitution.

288 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC)

289 *Gijima CC* at para 2

311 CEF as a separate legal entity to the SFF is not seeking to review its own decisions. The *Gijima* principle does not apply.

Vitol's belated complaints about the rule 53 record

312 Vitol complains that the rule 53 record lacks contemporaneous documents and consists of documents "*after the fact*".

313 Mr Foster was intimately involved in the transactions but he does not say what "*crucially relevant evidence*" is lacking or in what respects the record is "*incomplete*".

314 Importantly, Vitol's complaint about the record and the versions put forward are not raised as part of Vitol's complaint about the delay. Nor could they be, since on Vitol's own version (which is denied) the documentation relating to the impugned transactions improved over time. Put differently, this is a case where (on Vitol's own version) the lapse of time between the review being prepared and launched, and the review prosecuted assisted the respondents.

315 Importantly, Vitol's complaint about the rule 53 record is actually a complaint about how the decision was taken. There is no evidence of Mr Gamede considering the different proposals according to established, objective criteria and then ranking the proposals against these objective measures.

316 There is no indication at all of how Mr Gamede selected Taleveras, Venus and Vitol rather than other entities.

317 The Minister of Energy did not deliver any separate rule 53 record – none of the other respondents sought to compel the Minister of Energy to do so.[290]

318 The only party that took any formal legal step to complain about the adequacy of the rule 53 record was Glencore. In any event, Glencore plainly misconceived what a party is entitled to in terms of the Rule 53 record. For instance, Glencore initially sought all correspondence between the Minister of Energy and the department/Minister of Finance for the period from July 2015 to the end of December 2016. It remained steadfast in its replying affidavit that it was entitled to those documents in terms of Rule 53. Quite belatedly, Glencore appeared to accept its error and abandoned a significant number of documents it sought under Rule 53. Glencore, similarly, abandoned its appeal in relation to all of the items it sought under Rule 53 – on the day of the hearing before the SCA.

The hearsay evidence should be admitted

319 A discussion about whether the admission of any particular hearsay evidence is justified in terms of s3(1) of the Law of Evidence Amendment Act, 45 of 1988 ("**the Evidence Act**"), is legal in nature and need not be set out in the affidavit.

320 The founding affidavit complies with the requirements set out in *Galp v Tansley NO* and *The Master v Slomowitz*.[291]

321 We nevertheless submit that this court should find that those averments that amount to hearsay, are admissible in terms of s3(1) of the Evidence Act. The court has a

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290 Replying Affidavit, p 5010, para 15.1

291 *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558H; *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B

wide discretion in terms of s3(1) to admit hearsay evidence.[292] The test under s3(1) for the admission of hearsay is the interests of justice, having regard to all relevant factors including: the nature of the proceedings and evidence, the purpose and probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value depends, any prejudice, and any other factor which should in the opinion of the court be taken into account.

322 We submit that those seven broad considerations viewed collectively[293] should justify the admissions of the hearsay evidence in this matter for the following reasons:

322.1 The nature of the evidence is reliable.[294] The facts were mainly derived from contemporaneous documents. Copies of the contemporaneous documents, which form part of SFF's records and are under CEF and SFF's control, were attached as annexures to the founding and replying affidavits.

322.2 There is no reason to doubt the reliability of the evidence that emerges from the documents, which are in many instances, official documents and form part of SFF's records. This is particularly so where the facts and documents were discovered by independent investigators in the course of a broader investigation into a number of relationships and activities that the board suspected were generally corrupt.

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292 See, for instance, the application of the section to evidence by affidavit in application proceedings in *Hlongwane v Rector, St Francis College* 1989 (3) SA 318 (D) ("***Hlongwane v Rector***") at 324E–F and *Mnyama v Gxalaba* 1990 (1) SA 650 (C) ("***Mnyama***")

293 In *Hewan v Kourie* 1993 3 SA 233 (T) ("***Hewan***") the Court held, at 239B, that the seven factors "*requires the Court, in the exercise of its discretion, to have regard to the collective and interrelated effect of the considerations set out in paras (i) – (vi)*"

294 *Hewan* at 239

322.3 These are civil proceedings. Our courts have been more reluctant to admit hearsay evidence in criminal proceedings, where the operation of the presumption of innocence applies.[295] The lower standard of proof in civil proceedings compels the result that our courts more easily admit hearsay in such proceedings.[296]

322.4 Hearsay evidence will generally be more readily admitted in application proceedings than in trial proceedings.[297] We submit that this general proposition applies with even greater force to review proceedings – where the litigant has no procedural election and must bring the review by way of application. Further, it is common in tender review proceedings that the members of the public authority who feature in the record of the proceedings may not be before the court and may not depose to confirmatory affidavits. It could hardly be suggested that all the information in the record relating to the decision falls to be disregarded because it is hearsay.

322.5 CEF has provided a sound basis for why the evidence is not given by the particular persons or the persons who created the documents. The evidence is mainly derived from contemporaneous documents and SFF's official records. To require SFF to provide confirmatory affidavits from the persons who created each of the documents - which form part of SFF's official records – would be absurd.

323 There are additional facts justifying why individuals have not deposed to confirmatory affidavits. For instance, plainly it cannot be expected that Mr Gamede

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295 *Metedad v National Employers' General Insurance Co Ltd* 1992 1 SA 494 (W) 499

296 *Hewan* at 239

297 *S v Cek*iso 1990 4 SA 20 (E)

would willingly confirm the allegations made about him – particularly when there is a looming criminal investigation. CEF delivered various additional confirmatory affidavits as part of its replying affidavit. In some instances, documents were only recovered following forensic investigations – for instance, Gobodo was able to access Mr Gamede's emails from his work email account. These emails have demonstrated the levels of dishonesty, collusion and impropriety when Mr Gamede concluded the transactions.

324 The documents annexed to the papers provide the respondents with ample opportunity to investigate the reliability of the evidence and demonstrate if the documents are in some respect(s) inaccurate. The lack of prejudice to the respondents is demonstrated by their constant refrain that they have no knowledge of the internal procurement processes that SFF followed or able to place the allegations in issue. It cannot be suggested that confirmatory affidavits would have provided the respondents with any further means to investigate the allegations or assess the accuracy or otherwise of that evidence, and either confirm or deny the allegations in the founding affidavit.

325 The review deals with subject matter that is manifestly of significant public interest. The admission of hearsay evidence must be considered in the light of the other evidence before this court, which includes documents that have not been challenged and about which there can be little dispute (for instance the Ministerial Directives).

326 The respondents would accordingly suffer no prejudice by the admission of the hearsay evidence[298] and any prejudice is outweighed by the public interest in proper justification of the decisions.[299]

327 Accordingly, although the application of the relevant factors may have to be adapted to the precise evidence identified by Vitol, if and when it does so, we respectfully submit that in general the court should find that the evidence is admissible in terms of s3(1) of the Evidence Act.

JUST AND EQUITABLE REMEDY

328 It is now settled law that administrative action that does not satisfy the requirements of s33 of the Constitution is unlawful and must be declared invalid.[300] The c court, having done so, is then required to consider an appropriate, effective remedy. In doing so, the court should bear in mind that the primary focus of judicial review is the correction and reversal of unlawful administrative action.[301]

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298 In *S v Ndhlovu* 2002 (2) SACR 325 (SCA) the Supreme Court of Appeal held at para 50 that: "*A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requirements are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice.*"

299 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA)

300 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 ("AllPay Remedy judgment**"**), para 31

301 *AllPay Remedy* judgment at paras 29 – 30

329 The Constitutional Court made the same point in the remedial decision in the *AllPay Remedy* judgment.[302] In doing so the court relied on its decision in *Steenkamp* in which it held that:[303]

> *"Ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. … Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration, compelled by constitutional precepts and at a broader level, to entrench the rule of law."*

330 In determining the appropriate remedy, this court should be mindful of the purposes of public procurement legislation and the constitutional imperatives of s217. The defects in the award are egregious and allowing the impugned contracts to stand would reward dishonesty and collusion. Since without the unlawful behaviour of Venus, Taleveras and Mr Gamede then Contango and Glencore would not have been in a position to benefit from the unlawful transactions. To allow the contracts to continue would serve no remedial function[304] and cannot therefore constitute, "*just and equitable relief*", within the meaning of that requirement in s172 of the Constitution.

331 In considering the question of remedial correction, the Constitutional Court in the *AllPay Remedy* judgment emphasised that in the context of public procurement matters generally, priority should be given to the public good.[305]

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302 *AllPay Remedy* judgment at para 29

303 *Steenkamp* at para 29

304 *AllPay Remedy* judgment at para 29

305 *AllPay Remedy* judgment at para 32

THE REVERSAL OF THE ADMINISTRATIVE ACTION IS IN THE PUBLIC INTEREST

The public interest should be the lodestar

332 Our courts have made clear that the lodestar is the public interest.[306]

333 It is settled law that a court has a wide discretion whether or not to grant the remedy of setting aside reviewable administrative action.[307]

334 The primary reason that Contango, Glencore and Vitol provide for not setting aside the decision is the financial prejudice they will suffer if the tender is set aside.

335 Any prejudice to Contango, Glencore and Vitol must be viewed in the context of several key facts:

335.1 These entities are large multinational companies.

335.2 There is no suggestion that any employees would need to be retrenched or that the amounts involved would render the companies insolvent.

335.3 There is no explanation regarding whether the amounts claimed have been claimed from insurers.

336 We make four further submissions in this regard.

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306 *Allpay Remedy* judgment at para 33

307 Section 8 of PAJA and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 81 and cases there quoted. *Oudekraal Estates v City of Cape Town and Others* [2004] 6 SA 222 (SCA) at para 36

336.1 First, we contend that the respondents' innocence (or lack thereof) is relevant when this court considers what a just and equitable remedy will be in the circumstances of this case. We submit that it is but one of the factors in the test regarding a just and equitable remedy.

336.2 Second, the conduct and/or involvement of third parties in the irregularities is not examined in a binary way: either being innocent or not innocent. In many cases where the courts have set aside unlawful contracts concluded by organs of state, the counter-party was 'innocent' in the sense that it had no knowledge of the irregularity, which is not the case on the facts of the current case.

336.3 Rather, the examination takes place on a spectrum. On the one side of the spectrum there is the disinterested third party who is innocent and diligent. On the other side of the spectrum there is the dishonest third party. Between these two extremes, there is conduct that weighs in either direction. For instance, where a third party is reckless and does not behave reasonably then this is (or should be) a factor that weighs in favour of the administrative action being set aside.

336.4 Third, on the facts of this case, we submit that CEF has demonstrated that Venus and Taleveras are not innocent tenderers and that Vitol is culpable for the impugned transactions taking place. Further, Venus and Taleveras knew there were concerns raised about the transactions – at the very least – from 10 February 2016. Vitol admits that it was the catalyst to the impugned transactions taking place – which included the sale of 5 million barrels of

Bonny Light oil – when there was no rational or reasonable basis to sell a premium oil when the market was in a pronounced Contango.

336.5 In any event, and at the very least, we submit that CEF has cast considerable doubt on the respondents' claims to innocence. We submit that any weight attached to the respondents' alleged innocence should be considerably reduced when this court balances the various factors in determining a just and equitable remedy.[308]

337 In the circumstances any prejudice to Vitol who devised the scheme, or Venus and Taleveras who participated in the dishonest procurement process is immaterial in comparison to the prejudice to the public interest.

NONE OF THE TRADERS SHOULD BE AWARDED COMPENSATION BEYOND REFUNDING THE PURCHASE PRICE

Compensation is an extraordinary remedy – the traders have not made out a case for it

338 Three entities: Vitol, Glencore and Contango claim compensation of the consequential losses they have suffered by entering into the transactions. Compensation is, however, an exceptional remedy and the respondents have not pleaded any exceptional circumstances in this case. This is particularly so when the traders have alternative remedies.

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308 Replying Affidavit p 5095 – 5111 paras 294 – 354

339 As regards any financial hardship that the respondents will suffer, we draw this court's attention again to the manner in which Francis J put it in *PRASA v Swifambo*:[309]

> *"I accept that Swifambo will suffer some financial hardship if the tender is set aside. They simply brought this upon themselves when they had no right to have been awarded the tender in the first place and they cannot benefit from an unlawful tender. I do not deem it appropriate to consider what alternative remedy that Swifambo has."*

340 We pause to emphasise that the financial hardship that Swifambo was approximately R1 billion which is comparable to the amounts at issue in this case:[310]

> *"[127]The primary reason that Swifambo provides for not setting aside the decision is the financial prejudice it will suffer if the tender is set aside retrospectively. It submitted that by the time that the application was launched it expenses in terms of the contract had exceeded R2.5 billion.*
> *[128]Any prejudice to Swifambo must be viewed in the context of several keys facts: Swifambo is a start-up, it has virtually no employees, business, customers and suppliers, and is a wholly-owned subsidiary of Swifambo Rail Holdings. Any prejudice to Swifambo, and particularly Swifambo Rail Holdings who devised the scheme is immaterial in comparison to the prejudice to the public interest. The public interest and not the successful tender's is the guiding interest when a court is determining the appropriate remedy."*

341 Any additional losses that traders wish to claim can be handled in trial proceedings if the traders launch the necessary claims – where evidence can be subjected to cross-examination.[311] Expert evidence can be properly interrogated, and experts can be cross-examined. The fiscus should not be made to bear the losses that were brought about by dishonesty, collusion and a variety of improper conduct.

342 We submit that this is so because the conduct of the respondents was reckless, alternatively utterly unreasonable.

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309 *PRASA v Swifambo* at para 123

310 Ibid at paras 127 – 128

311 Replying affidavit, p 5019, para 35

The respondents' conduct was reckless, alternatively utterly unreasonable

343 Any person doing business with public entities in South Africa and who conducted the most basic legal due diligence would know that the exercise of public power: (a) must be lawfully conferred on a functionary; (b) the functionary may only exercise that power in the manner prescribed; (c) the power must be exercised in good faith; and (d) should not be misconstrued. The principle of legality "*exists to ensure that the repository of public power stays within the vital limits of the power conferred and being exercised*".[312] Public power must always be exercised within constitutional bounds and "*in the best interests of all our people*".[313]

344 Mr Gamede could not exercise any power or perform any function beyond that conferred upon him by law.[314] The respondents thus have detailed knowledge of procurement principles. The respondents, thus, never took any steps to check with SFF if the proper process had been complied with.

345 Put differently, if the respondents knew that certain regulatory approvals were required but not secured then they are not innocent. If the respondents elected not to ask if any regulatory approvals were required and secured, then they acted recklessly and/or negligently.

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312 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 48

313 Ibid at para 3

314 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 49

346 That is clearly the case here. The respondents are not babes in the woods. They are experienced and able businessmen representing companies which have many millions of turnover and assets.

347 Any reasonable businessman operating in South Africa would foresee that a project for a public entity must follow a procurement process. Even where the matter was alleged to be urgent the reasonable business person would take steps to enquire about whether the relevant empowering provisions were complied with, and for evidence on this score to be provided. This is particularly so since the reasonable business person knows that they cannot rely on estoppel if the organ of state acted beyond its powers. We submit that this principle has application not only for this case but in every case involving public procurement in South Africa.

348 In 2020 – large corporate entities like Glencore and Vitol should not be permitted to claim that they were not aware of the principles of public procurement, or the internal documents of the public entity or that they had no reason to suspect proper processes were not complied with.

349 This is all the more so in the present case where the RFQ that was sent attached the Ministerial Directives.[315] In a country like ours, based on a supreme Constitution which gives prominence to accountability, transparency and the rule of law - there is a duty on entities doing business with the state, to take diligent and proper steps to (a) find out what approvals are required and processes need to be followed; and (b) ensure that these preconditions have been satisfied.

350 As Nugent JA held (albeit in the context of an investigation by the Public Protector):

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315 Founding Affidavit, p 37, para 81

> *"Truth and deceit know no status or occupation. One expects integrity from high office but experience shows that at times it is not there. … It is the material that determines the veracity of the speaker and not the other way round, and that applies universally across status and occupation. It is the hallmark of this investigation that responses were sought from people in high office and recited without question as if they were fact. An investigation that is conducted in that state of mind might just as well not be conducted at all. The investigator is then no more than a spokesman, who adds his or her imprimatur to what has been said, which is all that really occurred in this case. I have said before that an investigation calls for an open and enquiring mind. There is no evidence of that state of mind in this investigation."*[316]

351 Where an entity is satisfied to take a risk on the basis of an alleged representation by a representative of a public entity that entity acts unreasonably and recklessly. In CEF's submission, where a private entity contracting with government alleges that – it had no knowledge of the processes that the public entity had to comply with – then that entity is conceding that they behaved recklessly and/or unreasonably. Thus, this is not a case where the entities sought constant assurances from SFF that the transactions were lawful and that the conditions had been complied with. Quite the opposite, the respondents sought repeated confirmation from Mr Gamede (he signed various warranties, he met with the traders in face-to-face meetings). However, the respondents could have simply called for an SFF board resolution. They were plainly reckless in not doing so.

In any event, the respondents have alternative remedies if the tender is set aside

352 It is true that the respondents will suffer some financial hardship if the tender is set aside. But the respondents have no right to benefit from an unlawful tender.[317] The respondents have clear alternative remedies.

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316 *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 143

317 *AllPay Remedy* judgment at para 67

353 First, the respondents may well have a delictual claim for damages. In *Steenkamp*[318] the Constitutional Court unanimously found that a successful tenderer has no claim in delict if the tender is later set aside. Importantly, however, the Court held:[319]

> *"Compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply."*

354 The facts outlined above in this case illustrate that the unlawful behaviour in the disposal process followed by Mr Gamede was not mere negligence or incorrect, but honest, decisions. As set out above, we submit that the decisions are tainted by bad faith, dishonesty, collusion and/or corruption.

355 Importantly, if the respondents are innocent as they claim to be then they have a potential alternative remedy under delict and accordingly the tender should be set aside. Similarly, the respondents will have potential enrichment claims as well as claims against insurers and Glencore has a clear claim against Venus, and Contango has a claim against Taleveras.

356 CEF submits that, at the very least, it has raised serious questions about the innocence of Taleveras, Venus and Vitol. This is all the more reason for this court to set aside the transactions and order the return of the purchase price to the respondents and any additional losses that the traders wish to claim can be handled should they choose to bring trial proceedings where the evidence can be subjected to cross-examination.

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318 *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) *("**Steenkamp**")*

319 *Steenkamp* at para 55

Vitol is not an innocent tenderer – alternatively it is culpable for the impugned transactions taking place

357 First, Vitol was the catalyst for the impugned transactions. As set out in detail above, Vitol admits that it "proposed the strategic stock rotation arrangement to SFF, and engaged with it in relation to it for a prolonged period".[320] Vitol was, therefore, a catalyst in the Bonny Light crude oil being sold. Importantly, it is irrelevant that Vitol was ultimately awarded the Basrah oil – Vitol has exclaimed that it was disappointed when it was not awarded any of the Bonny Light oil. We have shown above that CEF's expert evidence shows that the rationale for the transactions was flawed.

358 Second, Vitol attempted to get SFF to use a metric to evaluate the proposals that would unduly benefit Vitol to the exclusion of other bidders. The exchanges between Mr Ducrest and Mr Gamede are not the sort of exchanges one would expect between an impartial representative for a public entity and a potential bidder in a procurement transaction.

358.1 Mr Ducrest's email of 17 November 2015 states that "*I feel that we need to move as soon as possible to close our proposals as some vultures are turning around*".

358.2 Mr Ducrest's email of 23 November 2015 states: "*Mr brother, If you feel that you need to justify your actions by detailing such to the market, then I*

320 Vitol's Answering Affidavit, p 3269, para 218.1

> *suppose you need to do it. … <u>However, the more detail and reasoning you provide to the market the more this can be criticized</u>*."[321] (Emphasis added)

359 Mr Ducrest attempted to get Mr Gamede to conclude the "*sale/rotation of the strategic stock barrels per grade with ONLY one company*".[322] Mr Ducrest motivates that "*a single large placement of grade to Vitol/Vesquin works the best*".[323] What happens next is particularly improper – Mr Ducrest asks Mr Gamede to support a bid metric that would suit Vitol to the exclusion of most other companies:

> *"You should also emphasize to the top the importance of being able to pledge at most times the corresponding amount of crude rotate [sic] with other physical barrels stored independently in Saldanha Bay. Only few companies will be able to bid this way … Take good care my friend".*[324]

360 Read in the context of who Mr Gamede had been seeking approvals from and subsequently would be - we submit that "*the top*" was plainly a reference to the Minister. However, whether "*the top*" was referring to the Minister or SFF's board is of less importance. Critically, Mr Ducrest was trying to secure Vitol an unfair advantage.

361 Third, Vitol had a conflict of interest. Vitol accepts that it could not advise SFF on hedging arrangements in relation to an agreement with Vitol. Plainly, however, that reasoning is correct and applies, with equal or greater force, in relation to two further aspects of the transaction.

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321 Third Supplementary Founding Affidavit, annexure "MGM49", p 1075

322 Ibid

323 Ibid

324 Ibid

362 In the first place, Mr Gamede approached Mr Ducrest on 20 November 2015 and sent a draft expression of interest to Mr Ducrest and asked him to "see if it is in order before I sign and send it to you". Vitol's version is:

> *"Mr Ducrest confirms that Mr Gamede was seeking commercial recommendations from him, as an international oil trader with significant experience in these types of stock optimisation transactions, as to how to best optimise the proposed rotation deal for the benefit of SFF. The SFF commonly reached out to most companies in the industry for suggestions to ensure its approach held relevance for all parties, but served the ultimate benefit of SFF."*[325]

362.1 Vitol's version is so far-fetched that it can be rejected on the basis of the papers – particularly since the contents of the documents are contained in the emails before this Court. Mr Ducrest was not "*ensuring*" SFF's approach "*held relevance for <u>all</u> parties*" – Mr Ducrest was doing the opposite. He was calling for a bid specification that would benefit Vitol to the exclusion of most other entities. In his own words:

> *"You should also emphasize to the top the importance of being able to pledge at most times the corresponding amount of crude rotate with other physical barrels stored independently in Saldanha Bay. Only few companies will be able to bid this way."*[326]

362.2 In relation to how best to optimise the proposed rotation deal for the benefit of SFF and serving the ultimate benefit of SFF – Mr Ducrest was plainly conflicted. If Mr Ducrest were giving SFF impartial advice then he would have stated that Mr Gamede should not rotate the Bonny Light at that particular time. The rationale set out in the expression of interest does not justify the rotation of Bonny Light. Of course, that was Vitol's gold medal. The fact that Vitol only ended up with a silver medal (the Basrah) does not vindicate the conduct of Mr Ducrest. One would have expected him to state

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325 Vitol's Answering Affidavit, p 3214 para 77

326 Annexure "MGM49" to the Third Supplementary Founding Affidavit at p 1075

that he could not opine on the commercial recommendations because Vitol's interests were at odds with SFFS. Mr Ducrest did nothing of the sort.

363 In the second place, Vitol was meant to be advising SFF on setting up the Trading Division – which Vitol plainly could not do if Vitol was also seeking to benefit from the transactions, since what was in Vitol's interests was not necessarily in SFF's interests. Similarly, Vitol had agreed to train SFF's representatives from the Trading Division.[327] On 17 November 2015, Mr Ducrest sent an email to Mr Gamede in which he requested that Mr Gamede respond to various specific comments:[328]

> *"Mr brother, … Few comments I wanted to do concerning the entire situation:*
> *…*
> *We are hearing on the market that you are having the same discussions we are having on optimization but also with Mercuria, Chinese and others.*
> *[Mr Gamede's response] – You will remember that we sent out invitations for proposals on the rotation of the strategic stock to a number of people as we were asked to make the process as transparent as possible. Vittol and the Chinese are the only companies that responded. We are currently working on setting up a department within SFF on trading. We will be coming to you for assistance and cooperation. Until we have set up that department there will be no rotation of strategic stock. [I] have sent you the latest documents and I said to you lets meet and talk."*

364 Fourth, Vitol acted negligently / recklessly in concluding the transactions without requesting any evidence that the Ministerial preconditions for the transactions has been satisfied. The detailed expression of interest sent to Vitol on 20 November 2015 expressly referred to the Ministerial Directives as well as the PFMA and other regulatory requirements.

364.1 Thus, Vitol clearly knew about the detailed steps that needed to be followed. Vitol did not state at any point prior to submitting its proposal or afterwards

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327 Founding Affidavit, p 48, para 114

328 Third Supplementary Founding Affidavit, annexure "MGM46", p 1066

that the provisions that were referred to did not apply to the transaction. It could not do so – those were terms of the RFP that Vitol accepted when it submitted its bid.

364.2 Mr Gamede also accepted that those approvals were required when Mr Gamede sent his request for condonation to the Minister.[329]

364.3 SFF's COO, further, makes clear that when concerns were raised with Mr Foster in February 2016 about the process that Mr Gamede had followed (not seeking board approval etc.) in concluding the impugned transactions – Mr Foster stated that this was 'not his problem' because the acting-CEO had signed.[330] Mr Foster's stance is wrong as a matter of law.[331] Mr Foster's stance also illustrates that he was wilfully ignoring evidence that the transactions were vulnerable.

THE SECONDARY PURCHASERS (GLENCORE AND CONTANGO) SHOULD NOT BE PAID ANYTHING

365 The transactions between Mr Gamede and Taleveras, and Venus were occasioned by collusion and dishonesty. Assuming that the impugned transactions are set aside, then SFF will in terms of ordinary principles of enrichment refund the purchase price to Taleveras and to Venus.

366 The title that Glencore and Contango held to the oil was inextricably linked to the Venus and Taleveras transactions. Indeed, if Glencore and Contango need to persuade this Court that – notwithstanding the clear dishonesty involved in the

329 Replying Affidavit, p 5030 – 5031 paras 78 – 79

330 Replying Affidavit, p 5103, para 320; Replying Affidavit, p 5200, para 822

331 *RPM Bricks* supra

conclusion of the Taleveras and Venus agreements – this Court should keep the rights in those agreements alive. If this Court does not do so then, it is moot if Glencore and Contango only have their Side Letter and Tripartite Agreement alive (since Venus and Taleveras would have no title to the oil). Tellingly, Glencore and Contango have not defended the merits of those transactions – and would be hard pressed to do so.

367 Curiously:

367.1 Contango and Taleveras are now involved in a belated dispute before this court regarding which of the two entities should be refunded the purchase price.

367.2 Venus has not participated in these proceedings at all. There is no indication from Glencore whatsoever (a) what legal steps Glencore has taken to recover losses from Venus – and if not, why not; (b) what amounts have been recovered from Glencore's insurers.

368 Contango should look to Taleveras and its commercial arrangements for any compensation of its losses. The same is so for Glencore, whose claim lies against Venus.

369 Undoubtedly material disputes of fact may arise between the respondents themselves – the *Plascon-Evans* test does not apply to determining those disputes. This court should set aside the impugned agreements that were the direct consequence of the unlawful disposal process led by Mr Gamede.

370 The affected respondents (Glencore and Venus) will then have (a) contractual claims that can be launched by Glencore against Venus, and by Contango against Taleveras as well as (b) an enrichment action that can be launched against SFF.

Contango and Taleveras dispute which of them is entitled to the purchase price

371 On Taleveras' version, Contango has demonstrated a regrettable lack of candour, as Contango did not disclose to this court that it has already terminated its agreement with Taleveras (at paras 117 – 120 of Taleveras' affidavit):[332]

> *"[On] 14 May 2018, Contango also issued a notice to Charmondel, in which it called on the guarantee in favour of Contango, triggered by Taleveras's alleged breach of warranty. …*
> *Surprisingly, Contango has not taken the Court into its confidence by disclosing these material documents or making known these significant facts. Presumably this is because both notices evidence that Contango had actually accepted, by May 2018 at the latest, that the sale of the crude oil by SFF to Taleveras was invalid…" (My underlining)*

372 The upshot is that Contango has commercial claims against Taleveras for damages. Mr Gamede and Taleveras behaved dishonestly – they concluded an agreement for an improper purpose and this purpose was never disclosed in any of Mr Gamede's correspondence to the Minister, to the Board or in his belated reports attempting to sanitise the transactions.

373 Taleveras attaches two documents "IS 55" and "IS 56" in support of its contentions. Contango's letter to Charmondel Holdings Limited – the Guarantor under Contango's agreement states:[333]

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332 Taleveras Explanatory affidavit, p 4671, paras 119 -120

333 Taleveras Explanatory affidavit, annexure "IS56", p 4948, paras 3-5

> *"We enclose a letter notice from Contango to Taleveras Petroleum Trading DMCC ("Taleveras") dated 14 May 2018, which explains that Taleveras is in breach of the MPSA and that Contango has terminated the MPSA with immediate effect as of 14 May 2018.*
> *Under the Guarantee, Charmondel has given an absolute, unconditional and continuing guarantee for the performance of Taleveras' obligations under the MPSA (Clause 1). Further, Charmondel has undertaken to indemnify Contango against all "loss, debt, damage, interest, cost and expense" incurred by Contango due to Taleveras' failure to perform its obligations under the Transaction Documents (including the MPSA) (Clause 2).*
> *Contango holds Charmondel responsible for all and any losses caused by Taleveras' breach of the MRA and Contango fully reserves all of its rights."*
> (Emphasis added)

374 Importantly, compensation as a public law remedy is an exceptional remedy – Contango has not pleaded any exceptional circumstances which warrant the award of compensation under PAJA or the principle of legality. Quite the opposite, Contango has a full claim against Taleveras, and/or Charmondel "*for all and any losses caused by Taleveras' breach of [Contango's agreement]*".

375 Contango claims amounts both from SFF in this court and from other parties. The result of Contango's conduct, according to Taleveras, is that Contango could (if it achieves everything that it seeks) be compensated at least twice for the same losses it alleges to have suffered. Taleveras' allegations presently stand uncontradicted by Contango. Our courts have previously taken a dim view of attempts at double-dipping.[334] Similarly, as set out in CEF's replying affidavit – Contango's supposed reasonable steps fell far short of what one would have expected. Particularly since Contango made it clear that in the type of financial transaction at issue, Contango needed to do more than just satisfy itself of Taleveras' ability to pay Contango the money back. Contango needed to satisfy itself that it had lawful title to the oil

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334 See, for instance, *Kapa v RAF* [2018] ZALMPPHC 67 (7 December 2018)

following a due diligence and legal vetting process. CEF has explained in its replying affidavit that Contango's alleged due diligence was virtually non-existent.[335]

Glencore acted negligently / recklessly in concluding the transaction

376 Annexure "GA8" to Glencore's answering affidavit[336] makes it clear that Glencore was confronted with various facts which strongly suggested that: (a) the proper procedures were not being followed; (b) the transactions were taking place at break-neck speed; and (c) Mr Gamede had put the draft contracts together without any input or approval from the Board. Glencore simply turned a blind eye. For instance, in "GA9" to Glencore's answering affidavit,[337] Mr Van der Vent stated that *"I served as [Mr Gamede's] typist so excuse some of the formatting"* and Mr Van der Vent explains that the agreement was drafted personally by Mr Gamede yesterday (there is no mention of the Board).

377 The negotiations by Mr Van der Vent then differed considerably from what had first been envisaged and even Glencore itself realised that things were occurring in a peculiar and rapid fashion. On 15 December 2015, Mr Stimler from Glencore sent an email to his team regarding the manner in which the transactions were being finalised stating:

> *"Here comes the scary bit. In a haste, late this evening Venus Rays signed an SFF crappy SPA version and storage agreement but at the same time got the CEO to sign our whole C/P page as an appendix to both docs … They've been told that we can propose amendments to the SPA and storage agreements which*

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335 Contango's Answering Affidavit, p 5024 – 5026 paras 58 – 63

336 Glencore Answering Affidavit, annexure "GA8", p 4274 - 4275

337 Glencore Answering Affidavit, annexure "GA9", p 4276 - 4312

> *we will have in word form first thing tomorrow and that these can supersede, but at least we have a fall back signed (really not my style at all).''*[338]

378 At "GA10",[339] Mr Stimler later sent an email to Glencore's other representatives stating:[340]

> *"All I can say is CRICKEY!!!" (all capitals used for emphasis in the original email by Glencore's representatives).*"

379 Glencore does not put up a version regarding how its decision to proceed in the face of these facts was reasonable. I emphasise again that Mr Van der Vent had been told that the transactions were to be held in abeyance until the legal review process had run its course, and to inform Glencore of this. Similarly, Glencore has not put up any version from Mr Anthony Stimler who was the main point of direct contact with Mr Van der Vent – thus there is no evidence that Mr Van der Vent did not inform Glencore of the COO's memorandum or that the transactions had been placed on hold. Indeed, it would be peculiar that Glencore would agree to alter its price in its agreement without Venus disclosing the Board's concerns regarding the transaction.

CONCLUSION

380 For all the reasons advanced above, we submit that this application should be granted in terms of the Amended Notice of Motion and that the impugned decisions and transactions fall to be set aside.

381 We submit that the respondents – bar Taleveras and Venus – should be ordered to pay CEF's costs, and because of the nature and complexity of this matter, as well as

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338 Glencore Answering Affidavit, annexure "GA8", p 4274

339 Glencore Answering Affidavit, annexure "GA10" p 4313 - 4314

340 Ibid, p 4314

the volume of the papers, we submit that this order should be for the costs of three counsel.

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STUART SCOTT

UNATHI GCILISHE

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SANDTON

31 JULY 2020