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

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

VESQUIN AND VITOL'S HEADS OF ARGUMENT

INTRODUCTION

1. On 20 January 2016, Vesquin Trading (Pty) Ltd entered into two agreements[1] with the Strategic Fuel Fund Association:

    1.1. A sale and re-purchase agreement in terms of which the SFF sold to Vitol 3 million barrels of sour blend crude oil from Tank 2 at Saldanha Bay. The SFF agreed to re-purchase the same quantity of crude oil at a future undetermined date.[2]

    1.2. A storage agreement in terms of which the SFF leased to Vitol up to 3 million barrels of storage space in Tank 2 from 1 February 2016 to 31 January 2019 (subject to options to renew).[3]

2. On the back of these agreements, Vitol entered into hedging and insurance contracts to manage its risk arising from its purchase of the sour crude blend.[4] Hedging arrangements are invariably concluded by oil traders like Vitol on the back of oil trades.[5] The applicants accept that they are a standard and appropriate step to take pursuant to transactions of this kind.[6]

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1 Vesquin is a Level 3 BEE subsidiary of Vitol and is typically the entity through which Vitol concludes business in South Africa: Vitol Answering Affidavit (**Vitol AA**), p 3190 para 2. In these proceedings, Vesquin and Vitol share an identity of interests and we refer to them collectively as "Vitol".

2 Vitol AA, p 3220, para 92.2.1 read with Vitol Sale Agreement, annexure "HF2" (p252), p 3539.

3 Vitol AA, p 3220, para 92.2.2 read with Vitol Storage Agreement, annexure "HF2" (p 269), p3556.

4 Vitol AA, p 3192 para 14

5 Vitol AA, p 3227 para 104.

6 See Replying Affidavit (**RA**) p 5080 para 239.7 stating "*Hedging is a common industry practice that is necessary to mitigate the risks of the fluctuating market"* (emphasis added).

3. Vitol duly performed in terms of its agreements with the SFF. It paid the SFF US$78 606 000 for the sour blend crude on 29 February 2016,[7] as well as monthly storage fees in a total amount of US$8.22 million for the use of Tank 2 from January 2016 to March 2018.[8] The SFF accepted those payments without demur.

4. The SFF mutually implemented the agreements by issuing invoices to Vitol for both the sale and storage of the oil, and accepting Vitol's payment for its sale and storage. The SFF also stored the oil that had been purchased by Vitol in Tank 2 for a substantial period of time. Its board and its senior executives, as well as its shareholder, the Central Energy Fund, all embraced, endorsed and implemented the Vitol Agreements for more than two years after it was concluded.

5. However, the SFF has not otherwise performed in accordance with the agreements. In breach of their terms, the SFF has permitted the sour blend crude in Tank 2 to be contaminated. In addition, at this stage, some of the oil that Vitol purchased cannot be pumped out of Tank 2 and the remainder has been removed from Tank 2 without Vitol's permission and stored elsewhere. The SFF has also refused Vitol access to the oil on demand. Vitol consequently cancelled the Sale and Storage Agreements, and intends to claim contractual damages for its loss arising out of the SFF's breaches.[9]

6. In March 2018 – more than two years after the transaction was concluded – the SFF, together with the CEF, launched these proceedings, impugning the validity of the SFF's decisions to sell its oil (including the sour blend crude that Vitol bought) and

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7 Vitol AA, p 3227 para 103.

8 Vitol AA, p 3227 para 105.

9 Vitol letter of 8 June 2020, "MCA2" p 5603; Vitol AA, p 3273 para 230; Moagi affidavit, p 5603 para 5.

to conclude the Vitol agreements (among others), as well as the Minister of Energy's approval of those decisions. They seek to review and set aside both the impugned decisions, and the contracts to which they gave rise. The applicants submit that the just and equitable remedy to be granted in the review is the restoration of the oil and the storage space to the SFF, in return of the purchase price and storage fees, plus interest, to Vitol. [10]

7. Vitol opposes the review application on two grounds. First, it contends that the review has been brought and prosecuted only after an unreasonable delay that ought not to be condoned by this Court. Second, it submits that the relief sought by the applicants is not just and equitable in the circumstances of the case.

8. Vitol concedes that its Sale and Storage Agreements with the SFF were not lawfully made because the SFF failed to meet the Minister's prerequisites to such transaction. The Minister required that the SFF undertake a detailed due diligence on the strategic stock rotation, and establish a trading division, before any transactions to dispose of the oil could lawfully be concluded. These conditions were not met before the Vitol agreements were concluded (although the SFF's then CEO, Mr Sibusiso Gamede appears to have misled the Minister into believing they had been).[11] Vitol was unaware of the SFF's failure to meet these prerequisites at the time and indeed was led to believe, through its engagements with various SFF personnel, that the trading division had been established and that a detailed due diligence had been undertaken.

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10 Third SFA, p 921, para 256; RA, p 5096, para 298

11 See Founding Affidavit p 40 para 94; p 105, para 249.21; p 116 para 277; p122, para 294(i); p 133, para 321.1; Third SFA Gobodo Report, p 1500, para iv; p 1550, para 7.2.8; and RA: p 5021, para 47; p 5031, para 79; p 5069, para 198; pp 5086 to 5087, paras 258 to 259; p5070, para 201.4; p 5166, para 639; p 5200, para 823.

9. Nevertheless, because the prerequisites to the contracts were not met, the agreements were unlawfully concluded and are invalid. If the Court entertains the review, it will declare them invalid in terms of section 172(1) of the Constitution. The Court then has a discretion, in terms of section 172(1)(b), to make such remedial order as is just and equitable in the circumstances of the case.

10. The applicants and Vitol agree that the agreements should be set aside with full retrospective effect and that the Court's remedial order must provide for full restitution by both sides, at a minimum.[12] It means that, at a minimum, the SFF would recover ownership of the oil and the storage space it let to Vitol, against repayment of the purchase price and the rentals it received, together with the interest it earned on both.

11. But Vitol contends that restitution of only those amounts would be incomplete. That is because another consequence of the contracts was that Vitol carried the risks inherent in ownership of the oil for the duration of the agreements for more than four years:

    11.1. The main risk inherent in ownership of the oil is the risk of fluctuation of its price in a volatile international market. Vitol carried and protected itself against this risk by entering into hedging contracts at considerable expense. It incurred hedging costs of US$18 078 928.

    11.2. Another expense inherent in ownership of the oil is the risk of loss of some of it. Vitol insured itself against this risk at a cost of US$919 840.

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12 Vitol AA, p 3270, para 222

11.3. Vitol's assumption of the risks inherent in ownership relieved the SFF of those risks. SFF accordingly benefited from the agreements, in that it was relieved of the risks of ownership for their duration for more than four years at Vitol's expense. It follows that full and proper restitution requires that the SFF repays to Vitol the hedging and insurance costs and losses it incurred for the duration of the contracts.

12. Vitol also incurred further expenses in the implementation of the agreements. They include the cost of US$37 530 of the letter of credit it had to provide to the SFF, and its cost of capital of US$7 939 610.

13. Vitol submits that if the review is entertained and upheld, a just and equitable remedy would be one which places Vitol in the position that it would have been in had the agreements not been concluded at all.[13] That would entail not just the return of the purchase price and storage fees with interest, but also compensating it for its insurance and hedging costs, the costs associated with procuring a letter of credit and the capital costs it incurred.[14] That is an appropriate remedy because:

13.1. Vitol acted reasonably and in good faith throughout its lengthy negotiations with the SFF, and after the conclusion of the agreements with it. It believed, on sound grounds, that the Vitol agreements were valid and binding.

13.2. The flaws in the impugned decisions arise out of alleged corruption on the part of Mr Gamede and others, coupled with a reckless failure on the part of the SFF's executive management, its board and its sole shareholder

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13 Vitol AA, p 3275, para 237.

14 Vitol AA, p 3274, paras 232 and 234 to 234.3.

representative, the CEF, to exercise accountability and oversight over the SFF. Their egregious bad faith, on the one hand and functional malfeasance, on the other, have resulted in the unlawfulness of the Vitol agreements.[15] The invalidity of those agreements is, in short, wholly attributable to the SFF's own conduct. Vitol ought not to suffer the consequence of their misconduct.

13.3. It is, moreover, unfair to permit the SFF to invalidate transactions like the oil trades at issue after the fact, when Vitol has borne the risk of the trade (and the associated price fluctuations) for the intervening period. If the transaction is to be invalidated, the cost of carrying that risk must be borne by the SFF, not Vitol.

13.4. Moreover, Vitol has a contractual claim against the SFF for its breach of contract. The SFF should not be permitted to invoke a public law remedy to avoid the private law damages claimable against it.

14. In these submissions, we begin by setting out the background to the Vitol transaction from its point of view, to show that it acted reasonably and appropriately throughout.

15. Its conduct was in no way unlawful.

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15 Vitol Supplementary Affidavit, para 17.

BACKGROUND INTRODUCTION

16. Vitol has given a comprehensive account of the background to the conclusion of the agreements with the SFF. Its version of events differs, in some respects, from that of the applicants.

17. Vitol's version must be preferred to that of the applicants because Vitol's deponents have personal knowledge of the facts to which they depose. They were directly involved in the events leading up to the conclusion of the Agreement. The deponents to the applicants' founding affidavits and its reply, on the other hand, have no personal knowledge of the facts. Their accounts are based on their reading of the documents made available to them, and the report of the Gobodo forensic investigation. Their version amounts to little more than a one-sided and biased interpretation of events, based on an incomplete record and is inadmissible hearsay. In addition, Vitol's evidence must prevail over that of the applicants under the *Plascon-Evans* rule.[16]

Introduction

18. Despite their extensive and long-running investigations into the SFF's affairs, the applicants have been unable to find any evidence of misconduct or bad faith on Vitol's part. That is because there is none: Vitol has not engaged in any corruption, collusion or fraud.[17] Its engagements with the SFF have been professional, transparent and wholly in good faith.

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16 *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634D-635C.

17 Vitol AA, p 3267 para 214.

19. In the absence of evidence of any misconduct by Vitol, the applicants resort to implying bad faith on its part, or on the part of its personnel. In particular, the applicants imply that Vitol had privileged access to Mr Gamede which it leveraged to procure a benefit in its negotiations with the SFF, and that Vitol somehow improperly triggered the SFF's decision to rotate its strategic fuel stock.

20. The applicants' imputations are not supported by the facts. Vitol's proposals to and engagements with the SFF, through Mr Gamede and others, were consistent with its past interactions with the SFF, and known to many of the SFF's staff. There is no substance to the applicants' mischievous imputation of bad faith.

Vitol's relationship with the SFF

21. Vitol has a long-standing commercial relationship with South African public entities, including the SFF, which pre-dates the appointment of both the former Minister and Mr Gamede.[18] That relationship has been professional, productive and mutually beneficial to both parties. It is not limited to crude oil but extends to an array of energy products.[19]

22. Vitol holds various storage contracts with SFF,[20] and has also negotiated with the SFF to partner with it, in respect of its terminals and infrastructure investment project in Cape Town harbour. This engagement arose out of various proposals sent openly

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18 Vitol AA, p 3194, para 17. See also RA, p 5174, para 684.

19 Vitol AA, p 3197, para 27.

20 Vitol AA, p 3197, para 28.

to the SFF by Vitol, in a bid to further the commercial engagement of the two parties,[21] and in a manner that promoted the strategic aims of South Africa.[22]

23. Harvey Foster, Vitol Group's South Africa country manager, also has a long-standing professional relationship with the SFF. Mr Foster worked at Masefield Energy Holdings prior to his appointment to Vitol. He was personally involved in negotiations with PetroSA (which managed South Africa's strategic fuel stock on behalf of SFF) on behalf of Masefield.[23]

24. Mr Foster has frequently dealt directly with the SFF's CEOs on commercial proposals and negotiations over the years. He engaged directly with Mr Gamede's predecessors, Mr Pieter Coetzee (between 1994 and 2012) and Ambassador Bheki Gila (between 2012 and 2014).[24]

25. Chevron, Mercuria, Morgan Stanley, Taleveras and Total (each of which also held storage contracts with the SFF) similarly engaged directly with the SFF CEO and its staff.[25] There was nothing special or unusual in Mr Foster's direct interactions with Mr Gamede. In fact, as we will show below, they were expressly authorised by the Minister in this case.

26. There was also nothing unusual, from Vitol's point of view, in the SFF's decision to rotate its strategic fuel stock. While in Masefield's employ, Mr Foster concluded five

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21 Vitol AA, p 3198, para 29.

22 Vitol AA, pp 3206 to 3207, para 53 read with Vitol's letter dated 15 September 2015, annexure "HF2" (p49), p 3336. See also Third SFA, p 852, para 107.9 read with Vitol's letter of 15 September 2015, annexure "MGM36", p 1035.

23 Vitol AA, p 3195, para 19.

24 Vitol AA, pp 3197 to 3198, para 28.

25 Vitol AA, p 3198, para 30.

stock rotations with PetroSA, on the SFF's behalf. Some of those stock rotations comprised of the sale and physical removal of the crude oil from the storage tanks, while others entailed the loan and physical removal of crude oil stock by Masefield against a letter of credit in SFF's favour.[26] Agreements of this nature were not uncommon.[27]

27. Simply put, Mr Foster and Vitol have made many proposals to various people within the SFF over the years, some of which have triggered commercial engagements and deals; others of which have not. There is nothing untoward in the fact of those proposals having been made.

The genesis of the strategic stock rotation

28. Mr Foster's affidavit shows that he, on behalf of Vitol, from as early as 2011, suggested various ways to the SFF in which it could optimise its strategic fuel stock.[28] The details of these proposals varied – depending, among others, on whether the market was in backwardation or contango[29] – but they all broadly entailed the SFF relinquishing its ownership or control over the oil reserves to a trader on terms that would allow it to access supply in an emergency, whilst also commercialising its storage space.

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26 Vitol AA, p 3196, para 22.

27 Vitol AA, p 3196 para 23.

28 Vitol AA, p 3201 para 37 read with Vitol's letter of 10 June 2011 annexure "HF2" (p1), p 3288 and p 3291.

29 Contango is when the futures price is above the expected future spot price. Normal backwardation is when the futures price is below the expected future spot price.

29. Vitol considered it commercially sound and beneficial for the SFF to dispose of or relinquish its control over the oil, for the following reasons:

29.1. First, the SFF no longer had the same need for a strategic oil stock.[30] Prior to 1994, South Africa held large quantities of crude oil to guard against shortages caused by the oil embargo. However, after 1994, South Africa no longer needed to hold the same levels of strategic oil because the embargo had been lifted.[31] In addition, South Africa has an allocation of crude oil from the Nigerian government, which means its supply is more secure.[32] The SFF has, for some time, been examining the benefits of holding a strategic stock of finished petroleum products instead of crude oil.

29.2. Second, the South African market no longer had an appetite for high sulphur content crude oil (such as Basrah Light or the sour crude blend) because South African refineries increasingly refine lower content sulphur crude oil into finished petroleum products.[33] Mr Foster confirms, based on his extensive trading experience and expertise in South Africa, that local refineries have never sought to procure the oil in Tank 2 and consistently buy alternative, identified stock.[34]

29.3. Third, the crude oil in Tank 2 had been held in the tank for a number of years, resulting in its degradation. The SFF had also permitted other oils to be

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30 Vitol AA, p 3199, para 33.

31 Vitol AA, p 3199, para 33.1.

32 Vitol AA, p 3199, para 33.2.

33 Vitol AA, pp 3199 to 3200, para 33.2.

34 Vitol Supplementary affidavit, para 26.

pumped into the same tank, which resulted in the blending and contamination of these oils.[35] While local and global refiners may choose to buy different known grades of oil, and blend them together at their refinery systems, they would not acquire an unknown blend that has been in a tank and mixed with unknown grades over the years. Doing so simply presents too much risk.[36] Some refineries are prohibited from acquiring oil from some regions and South African refineries do not possess the capacity to reduce the sulphur content of some sour blend crude oils.[37] In short, the oil in Tank 2 was not suitable for local use or easily saleable and provided no practical benefit to the SFF.

30. Moreover, the SFF's storage space could be let for commercial rental. (Storage space is particularly valuable when the market is in contango because the low spot price relative to the forward price indication means that oil is stored for later trade.)[38] The SFF could obviously only let its storage capacity if the storage space was not occupied by the SFF's own oil.[39]

31. There is nothing in the statutory regime that precluded the SFF from selling its oil, or leasing its storage space, provided it was done in a lawful manner.[40]

32. By late 2014, the SFF (under Ambassador Gila as CEO) was itself considering how to optimise its strategic stock pursuant to a Ministerial Directive calling on it to do so.

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35 Vitol AA, p 3200, para 34.

36 Vitol Supplementary Affidavit, para 27.1.

37 Vitol Supplementary Affidavit, para 27.3.

38 Vitol AA, p3195 para 21.2; p3212 para 72. See also RA p 5080 para 239.4.

39 Vitol AA, p3199, para 32.

40 Vitol AA, p3261 para 196

The market was in contango and so the SFF wished to free up and use its storage capacity to generate revenue. Vitol and the SFF discussed a potential transaction to this effect at the time, but nothing came to pass.[41] (Contrary to the applicants' belated claims in reply, Mr Foster was never told that the strategic stock was not to be transacted with,[42] and the SFF's own documents do not bear this out.)

33. On 11 August 2015, Vitol sent a further stock optimisation proposal to the SFF's CEO Ambassador Gila; its General Manager: Commercial, Marion de Wet; its Business Development Manager, Cynthia Beukes; its Financial Manager, Susanna Pretorius and its then General Counsel, Mr Gamede.[43] Vitol proposed that it would lease the SFF's Bonny Light Crude oil, stored in Tank 6, for a fee of US$50 000 per million barrels, against a pledge of Vitol's Qua Iboe oil already stored in Tank 5. Ambassador Gila asked Mr Foster to discuss the proposal further with the SFF's staff, through Mr Gamede as the contact person.[44] Mr Gamede and Ms de Wet later met with Mr Foster and told him that the SFF were considering a strategy to maximise the value from the SFF's strategic stock, and that they would welcome ideas from Vitol in that regard.[45]

34. Congruent with that, on 15 August 2015, the SFF made a presentation to Parliament's Energy Committee highlighting the SFF's intention to move away from

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41 Vitol AA, p3202 para 40

42 Vitol supplementary affidavit, para 42.2.

43 Vitol AA, p 3202, para 41 read with e-mails between Vitol and SFF dated 12 to 18 August 2015 annexure "H2" (p 13), p 3300.

44 Vitol AA, p 3202 para 41.

45 Vitol AA, pp 3203 to 3204, para 44. Ms de Wet has denied ever meeting with Mr Foster but her denial is not credible. As the SFF's commercial manager, she would have had dealings with him – and the documents bear this out. She also had delegated authority to contract on the SFF's behalf.

holding crude oil, to procuring finished products in its stead.[46] Shortly thereafter, in late August 2015, Vitol was invited to form part of an industry task team to provide information to the Minister on stock optimisation. Mr Foster accepted the invitation on 4 September 2015, and later made some proposals in line with global practices and attended a workshop as part of the industry task team.[47] The SFF's official position, by that stage, was that a stock rotation or disposal was on the cards.

35. On 4 September 2015, Mr Foster sent the same proposal he had previously made to the SFF, directly to the Minister – that is, proposing that Vitol lease some of the strategic oil for a specified period and fee, against a pledge to provide an equivalent amount of oil should the SFF need it in an emergency.[48] Mr Foster sent the proposal first to Mr Gamede, to check that the language and modalities he had used were appropriate. At that point, Mr Gamede was the General Counsel of the SFF (and Mr Foster had interacted with him as such), but he was also the special advisor to the Minister.[49] Mr Foster made a range of further proposals to the Minister on 15 September 2015.[50]

36. On 10 October 2015, the Minister, through Mr Lucas, responded that she was *"delighted"* with the recommendations made in Vitol's letter, and directed Mr Foster to communicate with Mr Gamede "*who is mandated to look at the details of your*

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46 Vitol AA, p 3204 para 46.

47 Vitol AA, p 3204, para 47 read with e-mail between Vitol and Mr Gamede dated 4 September 2015 annexure "HF2" (p40), p3327.

48 Vitol AA, p 3205, para 49

49 Vitol AA, p 3205, para 50.

50 Vitol AA, p 3206, para 51 read with Vitol's letter dated 15 September 2015 annexure "HF2" (p46), p3333.

proposition and to formally engage with you in this regard".[51] Mr Gamede had, by that stage, been appointed the interim CEO of the SFF.

37. Consistent with the content of that letter (but unknown to Vitol), the Minister had, on 8 October 2015, authorised the rotation of the SFF's strategic stock through the sale and re-purchase of all 10.3 million barrels of crude oil stored at the Saldanha Bay Storage Terminal, subject to certain conditions.[52] They were that:

37.1. A strategic stock rotation could only be undertaken with Ministerial approval, after a detailed due diligence by the SFF and on a comprehensive motivation being made to the Minister;

37.2. The integrity of South Africa's strategic stock levels would be assured;

37.3. A trading division would be established in the SFF to undertake trading activities; and

37.4. A monthly report would be provided to the Minister.

38. Consequently, by October 2015, it appeared both to Vitol and objectively that:

38.1. The SFF intended to dispose of and replace its oil supply at Saldanha Bay;

38.2. The SFF and the Minister were both aware of the anticipated rotation, and approved of it; and

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51 Vitol AA, p 3208, para 58 read with e-mails between Ministry of Energy and Vitol dated 16 September 2015 to 10 October 2015 annexure "HF2" (p53), p3340.

52 Vitol AA, p 3208 para 56.

38.3. Mr Gamede was the senior official with whom Vitol was required to engage in respect of its proposals in this regard.

Vitol's negotiations with the SFF

39. On 13 October 2015, Mr Gamede requested Vitol to submit a proposal for the rotation of stock. (His letter enclosed the Minister's directive of 8 October 2015.)[53]

40. On 16 October 2015, Vitol submitted a proposal suggesting that Vitol would buy and then sell-back the oil stored in Tanks 2 and 6, against a warrant or pledge covering the same volume of crude oil in the intervening period. Vitol anticipated that the buy-back would occur 36 months after the initial transaction, and that the SFF would acquire the new grades of oil, to meet its strategic requirements.[54] Mr Foster discussed the proposal, in person, with Mr Gamede and Mr Mayaphi later that month.[55]

41. On 29 October 2015, Vitol submitted an expanded proposal to Mr Gamede and Mr Mayaphi, proposing five different possible arrangements based on the fact that the market was in contango. The proposals ranged from Vitol leasing the SFF's unutilised storage space, to a straight sale of crude oil to SFF on commercial terms.[56]

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53 Vitol AA, p 3209, para 61, read with Minutes of SFF board of 13 October 2015 annexure "HF2" (p57), p 3344.

54 Vitol AA, p 3210, para 65 read with e-mail between Vitol and Mr Gamede dated 16 October 2015 annexure "HF2" (p66), p 3353.

55 Vitol AA, p 3212, para 71.

56 Vitol AA, p 2122, para 72 read with e-mail between Vitol and Mr Gamede dated 29 October 2015 annexure "HF2" (p79), p 3366.

Mr Foster again met with Mr Gamede and Mr Mayaphi to discuss the proposal with them,[57] and Mr Mayaphi later undertook to revert in respect of them.[58]

42. Between 29 October 2015 (when Vitol submitted its expanded proposal) and 17 November 2015, Mr Ducrest of Vitol heard rumours in the market that the SFF was engaging with other traders in respect of the strategic stock. Mr Ducrest wrote to Mr Gamede to clarify the position as to Vitol's proposal. Mr Gamede confirmed that that the SFF had requested proposals in respect of the stock rotation from a number of parties, but that a decision would only be taken once a trading department had been set up within the SFF.[59]

43. It was thus clear, by the end of October 2015, that the SFF was proceeding by way of a closed bid and negotiation process and that it was in the process of setting up a trading department. But there was nothing inherently suspicious in that since:

43.1. The SFF had engaged in the same direct negotiation process with Vitol and the market in the past.[60]

43.2. The SFF was permitted, under regulation 16A.7 of the Treasury Regulations and its own direct negotiation policy (included on pp 221 to 230 of the record), to sell the oil by procuring price quotations rather than by way of open tender, if this was advantageous to the State.[61]

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57 Vitol AA, p 3210, para 65 and p 3212, para 72.

58 Vitol AA, p 2122, para 72 read with Vitol's letter dated 29 October 2015 annexure "HF2" (p84), p 3371.

59 Vitol AA, pp 3213 to 3214, para 76 read with e-mails between Vitol and Mr Gamede dated 17 November 2015 annexure "HF2" (p90), p3377.

60 Vitol AA, p 3263 para 203

61 Vitol AA, p 3262 para 199.

43.3. It seemed to Vitol that there were sound reasons for the SFF to proceed by way of closed bid and negotiation, rather than an open tender. The SFF held varying grades of oil in different tanks. Engaging in negotiations with different traders allowed it to solicit bids from different counter-parties, on different terms and with different pricing mechanisms. A closed bid process therefore allowed the SFF to develop nuanced, bespoke terms for each deal by taking advantage of the traders' knowledge and skill and the varying terms they could offer. It also made sense for the SFF to engage only with reputable traders with whom it had existing contracts or prior business dealings. It needed to ensure that they were credit-worthy, had the requisite experience and reliable.[62]

44. In fact, the SFF board subsequently approved the sale of the strategic stock by way of a closed bid because it was likely to fetch a better price (although Vitol had no knowledge of this at the time.)[63]

45. On 20 November 2015, Mr Gamede sent Mr Ducrest a draft expression of interest for his professional input for the benefit of SFF. (The SFF commonly reached out in this way to companies in the industry for suggestions on commercial transactions.)[64] Mr Ducrest emphasised in his response that the SFF should call for a pledge of the corresponding oil for the duration of any rotation, to ensure that bidding traders could meet the SFF's needs for oil in an emergency to ensure continuity of security of

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62 Vitol AA, p 3262 para 200.

63 Vitol AA, p 3262 para 201; Minutes of SFF Board on 23 November 2015 annexure "HF2" (p 100-107), p 3387.

64 Vitol AA, p 3214, para 76

supply.[65] But the final request for expressions of interest did not in fact include this term.[66]

46. The formal RFP was later sent to Vitol and Vitol submitted its proposal in response on 1 December 2015. The SFF, through Mr Gamede, acknowledged receipt on 3 December 2015 and warned that it would need time *"to engage with our internal processes, which will include but not [be] limited to Board approval".*[67]

47. It thus appeared that the sale of the strategic stock was being undertaken by Mr Gamede and Mr Mayaphi (who in late November 2015 had been put forward to the SFF board to manage the SFF Trading Division),[68] in accordance with the SFF's internal processes and requirements. Vitol had no reason to believe otherwise.

The award and conclusion of the Agreements

48. In early December 2015, Mr Gamede informed Vitol, through Mr Foster at a meeting at SFF's Cape Town office, that the SFF had determined to enter into a sale and storage agreement with Vitol in respect of the 3 million barrels of sour crude blend in Tank 2.[69] (No formal award letter was sent at the time.)[70]

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65 Vitol AA, p 3214, para 78 read with e-mail between Vitol and Mr Gamede dated 23 November 2015 annexure "HF2" (p 99), p 3386.

66 FA, SFF's letter dated 24 November 2015 annexure "FA30", p238 and SFF's letter dated 24 November 2015 "FA29" p 235

67 Vitol AA, p 3214 to 3215, para 79 read with SFF's letter dated 3 December 2015 annexure "HF2" (p 109), p 3396.

68 Board minutes, annexure HF2 p 102

69 Vitol AA, p 3215 para 81.

70 Vitol AA, p 3215 para 81.

49. On being informed of the award, Vitol immediately took steps to implement it:

49.1. Mr Foster met with the SFF's General Counsel, Ms Chili, at SFF's Johannesburg office around 15 December 2015 to discuss the terms of the storage and sale agreement.[71] On 18 December 2015, Mr Foster sent Ms Chili (and copied Mr Gamede) an e-mail to which a draft sale agreement was attached.[72] Mr Foster made it clear, on 18 December 2015, that he would be available to sign the agreement on the same date.[73]

49.2. On 22 December 2015, Mr Foster sent Ms Chili and Mr Gamede a draft storage agreement. In that e-mail he sought clarity on the time for a meeting so as to finalise and sign the agreements.[74]

49.3. On 23 December 2015, Ms Chili approved the storage agreement from a legal viewpoint. She said that she would leave the commercial terms to the Trading Department as that was their domain,[75] suggesting that Trading Department had indeed already been created within the SFF and was participating in the contractual negotiations.

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71 Vitol AA, p 3217, para 84.1.

72 Vitol AA, e-mail between Vitol, Mr Gamede and Ms Chili dated 18 December 2015 annexure "HF2" (p168), p 3455.

73 Vitol AA, e-mails between Vitol and Mr Gamede dated 18 December 2015 annexure "HF2" (p182), p 3469.

74 Vitol AA, e-mail between Vitol, Mr Gamede and Ms Chili dated 22 December 2015 annexure "HF2" (p 187), p 3474.

75 Vitol AA, p 3217, para 84.3 read with e-mails between Vitol, Mr Gamede and Ms Chili dated 23 December 2015 annexure "HF2" (p 188), p 3475.

49.4. On 23 December 2015 Mr Foster requested feedback from Ms Chili and once again indicated that he looked forward to signing the agreements that week.[76]

50. The SFF did not respond.

51. On 13 January 2016, Vitol received the formal award letter (dated 8 December 2015) from the SFF. It notified Vitol that its proposal to purchase and sell 3 million barrels of Basrah crude in Tank 2 had been approved, "*following authorization and approval in terms of a letter dated 7th December 2015 from the Minister of Energy regarding your proposal".*[77] The award letter imposed the following conditions to the award:

- The conclusion of a sale and purchase agreement;

- The issue of a letter of credit in the SFF's favour;

- A storage agreement to be concluded at a rate of US$0.13/bbl/month;

- That the product would be rotated every six months from the contract commencement date; and

- That the SFF would be granted an option to purchase the product in tank, at a price discounted by US$2 per barrel.[78]

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76 Vitol AA, e-mails between Vitol, Mr Gamede and Ms Chili dated 23 December 2015 annexure "HF2" (p 188), p 3475.

77 Vitol AA, p3215, para 80.2 read with SFF's letter dated 8 December 2015 annexure "HF2" (p 111), p 3398.

78 Vitol AA, p 3215, para 80.2 read with SFF's letter dated 8 December 2015 annexure "HF2" (p 111), p3398.

52. None of those conditions related to the SFF's own procurement processes. The terms of the award letter suggested that any prerequisites that the SFF had, had already been met. (The SFF has never disclosed who prepared the award letter, or when.)

53. Also on 13 January 2016, Mr Foster followed up on the negotiations with the SFF. He sent an email to Mr Gamede summarising Vitol's initial counter terms in respect of the sale agreement. The price stated in that e-mail was Dated Brent (5 days after buyer's nominated ITT date) with a proposed quality differential / discount of US$10 per barrel.[79] Mr Gamede asked that Mr Foster place the contents of his e-mail on a Vitol letterhead which he then forwarded to Mr Mayaphi.[80] Mr Foster sent the agreement that had been approved by Ms Chili to Mr Gamede the same day, and requested that he forward it to Mr Mayaphi.[81] (Mr Mayaphi was the General Manager: Trading within the SFF[82] and Mr Foster had been informed that he was heading the SFF's Trading Department.)[83]

54. On 15 January 2016, Mr Foster requested a meeting to finalise the terms of the agreements.[84] Mr Foster met with Mr Gamede, Mr Mayaphi and Ms Chili on 18 January 2016 and the terms of the agreement were finalised. Mr Foster recorded

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79 Vitol AA, p 3217, para 85 read with e-mails between Vitol and Mr Gamede dated 13 January 2016 annexure "HF2" (p 191), p 3478.

80 Vitol pp3217 to 3218 , para 85, read with e-mails between Vitol, Mr Gamede and Mr Mayaphi dated 13 January 2016 annexure "HF2" (p 193), p3480 and Vitol's letter dated 13 January 2016 annexure "HF2" (p 194), p3481.

81 FA, e-mails between Vitol, Mr Gamede and Ms Chili dated 23 December 2015 to 13 January 2016 annexure "HF2" (p 197), p 3484.

82 Vitol AA, p 3212 para 72.

83 Vitol supplementary affidavit, para 20.

84 Vitol AA, p 3218, para 87 read with e-mails between Vitol, Mr Gamede and Ms Chili dated 13 to 15 January 2016 annexure "HF2" (p 241), p 3528.

them in an e-mail to Mr Gamede, Mr Mayaphi and Ms Chili. Among the terms that had been finalised at the meeting was that the purchase price would be based on a discount of US$8 per barrel off the Dated Brent reference list price (down from a previous discount of US$10 per barrel).[85] Mr Gamede confirmed the terms of the agreement by e-mail.[86]

55. The agreed terms permitted Vitol to nominate the delivery date, which in turn would determine the Dated Brent reference dates for calculating the price of the sale. This is standard market practice. On 19 January 2016, Mr Foster sent an e-mail recording that the nominated date for the delivery would likely be 22 January 2016 and therefore the Dated Brent quotation dates would thus be 25 to 29 January 2016 for the purpose of price calculation.[87]

56. In an e-mail dated 20 January 2016, Ms Chili confirmed that there were *"no major legal issues with the [sale] contract"*.[88] By that stage, then, the terms of both the Sale and the Storage Agreements had been signed off.

57. The Sale Agreement and the Storage Agreement were signed at Vitol's office in Geneva on 20 January 2016. Mr Gamede, Mr Mayaphi and the SFF's General Manager of Operations, Mr Ndlela, were present on the SFF's behalf.[89]

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85 Vitol AA, p 3218, para 87 read with e-mail between Vitol, Mr Gamede, Ms Chili and Mr Mayaphi dated 18 January 2016 annexure "HF2" (p 245), p 3532. The emails make clear that, contrary to what he states in this affidavit, Mr Mayaphi specifically engaged on the proposed discount price.

86 Vitol AA, p 3218, para 88 read with e-mails between Vitol, Mr Gamede, Ms Chili and Mr Mayaphi dated 18 January 2016 annexure "HF2" (p 246), p 3533.

87 Vitol AA, p 3218, para 88 read with e-mails between Vitol, Mr Gamede, Mr Mayaphi and Ms Chili dated 13 to 19 January 2016 annexure "HF2" (p 247), p 3534.

88 Vitol AA, p 3219, para 91 read with e-mail between Vitol, Mr Gamede, Mr Mayaphi and Ms Chili dated 20 January 2016 annexure "HF2" (p 250), p 3537.

89 Vitol AA, p 3224, para 95.

58. As set out above, the Vitol agreements provided for the purchase price of the oil to be calculated based on an agreed quality differential or discount off the average quoted price of Dated Brent calculated over five days from a nominated delivery date after the conclusion and signature of the sale and purchase agreement. That was a fair and objective mechanism that meant that Vitol and the SFF each took an equal risk on the movement on the underlying oil price in the coming days. It is also a standard mechanism that is used when oil is bought and sold.[90]

59. The discount to Dated Brent that was agreed reflected a number of general and specific price-relevant factors applicable to the oil in question.[91]

    59.1. Basrah Light crude oil (which was the grade purchased by the SFF originally, but which had been commingled and had lost its identity over its many years in storage) is a relatively heavier and higher sulphur crude (compared both with the grades that make up Brent, but also compared with many other grades of crude oil). Generally speaking, heavier crude oils are lower in value; and more sulphurous crude oils are lower in value because these quality parameters are directly related to the value, quality and quantity of oil products (such as gasoline and diesel) that a refinery can produce from processing that grade. Vitol and the SFF's experts agree that it would be normal for Basrah Light to trade at a discount to Dated Brent as a quality differential.

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90 Vitol AA, p 3220 para 93.

91 Vitol AA, p 3222 para 94.

59.2. The particular sour blend crude Vitol purchased from the SFF was even less desirable to a purchaser because it was blended and had lost its identity as a marketable / "known" grade of crude, particularly for sale in South Africa.[92] Because South African refineries do not accept unknown blends,[93] Vitol anticipated that it would have to sell the sour crude blend into Europe, and compete with similar quality Basrah Light and other comparable grades from other sources.[94] The transportation costs of doing so had to be taken into account in the price (and therefore in the discount offered off the dated Brent list price).[95]

60. Vitol has explained the considerations and calculations that underpinned the discount, and has confirmed that the price offered was in accordance with market practice and fair.[96] Although the experts retained by the SFF in reply have queried Mr Foster's evidence (pointing out that he is not independent and claiming that he lacks the requisite knowledge and expertise to talk to price),[97] they have not themselves suggested that the price was not market related.

Subsequent negotiations

61. Soon after the agreements were signed (on 20 January 2016), Mr Foster met with Messrs Mayaphi, Nkutha and Ngqongwa of the SFF who requested advice on how SFF could hedge its price risk arising from the transaction (indicating their clear

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92 Vitol supplementary affidavit, para 32.

93 Vitol supplementary affidavit, paras 26-30.

94 Vitol supplementary affidavit, para 33.

95 Vitol AA, p 3222 para 94.

96 Vitol AA, p 3223-4 para 94.4-94.6.

97 RA p 5098 para 302.4

knowledge of it and its consequences). Mr Foster was not in the position to advise them on this, but sent them some reading material to assist them in their deliberations.[98]

62. After the agreements had been signed, Mr Gamede unexpectedly backtracked. On 21 January 2016, Mr Foster wrote to request the signed tank warranty, and reiterated the relevant dates for the calculation of the price (i.e. 25 January 2016 to 29 January 2016). Mr Gamede disagreed, saying instead that *"the price is based on the date of the approval letter"* (even though the award letter was only sent to Vitol on 13 January 2016).[99]

63. The trigger for the debate is obvious. The oil price had reduced between the date of the award and the date that the agreements were signed.[100] Indeed, between early October (when Vitol proposed the transaction) and 25 December 2015 (when the agreements could notionally have been signed), Dated Brent crude oil prices averaged US$44.13 per barrel. By the time the Vitol Contracts were signed, the 5-day average of Dated Brent over the agreed pricing dates had dropped to US$31.7020.[101] Had the SFF acted with due expedition after the decision to award the Tank 2 oil to Vitol, it would have procured a better price. But the delay was solely that of the SFF; Vitol had been ready to sign.

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98 Vitol AA, p 3224, para 96.1 read with e-mails between Vitol, Mr Mayaphi, Mr Nkutha, Mr Ngqongwa dated 29 January 2016 annexure "HF2" (p 345), p 3632.

99 Vitol AA, p 3224, para 97 read with e-mails between Vitol and Mr Gamede dated 21 January 2016 annexure "HF2" (p 315), p 3602.

100 Vitol AA, p 3265, para 208.4.

101 Vitol AA, p 3265 para 208.4.

64. Vitol accordingly stood by its rights under the agreements. It was entitled to do so. Moreover, it is irregular and unfair to backdate the price of an oil trade and to afford one party the benefit of hindsight on the price.[102] Mr Gamede then threatened to cancel the Vitol sale agreement saying: *"The price [yo]u are proposing is not acceptable it should be the 8 of [D]ecember. Please put everything in abeyance until [M]onday when [I] am back end we can talk".*[103]

65. In the face of Mr Gamede's attitude and to safeguard its longstanding relationship with SFF, Vitol agreed to decrease the discount it would procure off the price, to a discount of US$5.5 per barrel with a corresponding adjustment to the price in Part B of the agreement to a discount of US$5.75 per barrel.[104] (It had previously agreed, in negotiations, to decrease the discount from US$10 to US$8 per barrel with corresponding adjustments to the discount in Part B of the agreement.)

66. It is therefore clear that the price ultimately struck for the purchase of the sour blend crude was the product of negotiations between the SFF and Vitol, which resulted in Vitol increasing the price that it would pay SFF.

67. Vitol and SFF also negotiated the quantity of the crude oil purchased under the Agreement from an initial maximum of 3 300 000 barrels to 3 000 000 barrels because the SFF did not have the greater volume available. This change was adverse to Vitol.

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102 Vitol AA, p 3225 para 97.

103 Vitol AA, p 3225, para 97 read with e-mails between Vitol and Mr Gamede dated 21 January 2016 annexure "HF2", (p 315), p 3602.

104 Vitol AA, p 3226, para 98.

The Agreements were at arm's length

68. We submit that this history demonstrates, beyond doubt, that Vitol bid and negotiated for the Tank 2 oil and storage in good faith, on commercial terms and without procuring any advantage at all from the SFF. It did not bribe Mr Gamede – or anyone else at the SFF – and did not receive preferential treatment from him.

69. That is clear from the following:

69.1. Vitol had made various proposals for rotation or optimisation of the strategic stock over a number of years. For a lengthy period, the SFF did not take up those proposals and, ultimately, only did so after reporting its intention to Parliament and procuring approval from the Minister. It then engaged not only with Vitol, but with a number of other traders. Vitol enjoyed no exclusivity, favouritism or advantage consequent on its proposals.

69.2. On the contrary, Vitol procured the least beneficial deal of all of the parties. It had hoped to acquire the five million barrels of the Bonny Light grade crude oil stored in Tank 6, which was the grade that refineries often use domestically and abroad.[105] Instead, it was offered only 3 million barrels of the sour blend crude in Tank 2 – a lesser volume of the worst grade oil that the SFF had available to sell. The oil in Tank 2 was originally a Basrah crude which fetches less value on the open market relative to the Bonny Light grade. The SFF had allowed it to be contaminated, affecting the integrity of the grade and further diminishing its value.[106] At this stage, it does not even

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105 Vitol AA, p 3216 para 82.

106 Vitol AA, p 3216 para 82; supplementary affidavit, para 32.

qualify as strategic stock because it is not a suitable grade to be used by domestic refineries.

69.3. In negotiating the agreements, Vitol engaged not just with Mr Gamede, but also with Mr Mayaphi (the SFF's trading manager) and Ms Chili (its General Counsel). Indeed, in contrast to the other respondents, Vitol's agreements were reviewed and expressly signed off by the SFF's legal function. (Tellingly, no affidavits from Ms Chili have ever been put up by the SFF.) Vitol thus had every reason to believe that they were lawfully concluded.

69.4. Despite Vitol's attempts to finalise the deal speedily, the SFF delayed in concluding it. Vitol had sought to negotiate an oil transaction from as early as October 2015, and had been ready to agree terms and finalise the transaction in December 2015. The SFF – in particular, Mr Gamede – procrastinated in finalising the deal. His tardiness – rather than any conduct on Vitol's part – led to the SFF procuring a worse price for the oil. If the transaction had been done when Vitol wished to close it, the oil price would have been around US$44 per barrel and the SFF would have secured a price of around US$30 million more than it did on the sale of the oil to Vitol.[107]

69.5. With the benefit of hindsight, it is clear that the terms of the deal struck between the SFF and Vitol were beneficial to the SFF, at the time that they were agreed. It was the SFF's neglect, rather than any conduct or inducement on Vitol's part, that resulted in the sale being concluded when the oil price was at a low.

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107 Vitol AA, p 3265 para 208.4.

69.6. The SFF also negotiated down Vitol's price on both the oil and the quantity of oil originally concluded. Indeed, when Vitol resisted Mr Gamede's attempts to procure a higher discount or backdate the price of the crude, he threatened to cancel the agreements in their entirety.

70. There was, moreover, nothing to suggest to Vitol that the impugned decisions were unlawful or that its agreements were in any way invalid:

70.1. Vitol was instructed by the Minister's office to engage with the SFF, through Mr Gamede, in respect of its strategic stock proposals. Both the Minister and the SFF supported, and appeared to have authorised, the disposal of the stock.

70.2. A large number of people within the SFF were aware of and participated in the engagements with Vitol – including its CEO (Mr Gamede), its CFO (Mr Ngqonwa), its COO (Mr Nkutha), its General Counsel (Ms Chili) and its commercial and trading managers (Ms de Wet and Mr Mayaphi respectively). Besides Mr Gamede, all of these people remain officials of the SFF. Among them, only Ms de Wet denies her engagements with Mr Foster.[108] None of those people ever suggested to Vitol that the transaction was unauthorised or irregular. That suggestion only emerged considerably later, after the review proceedings had belatedly been launched.

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[108] Mr Mayaphi alleges to have forgotten some of the engagements and claims ignorance as to the substance of the discussions. His claims are not credible.

70.3. The correspondence sent to Vitol by the Minister and the SFF (and outlined above) represented to it that:

- Internal processes were being followed, and Board and ministerial approval obtained;

- A trading department had been established (under Lucky Mayaphi who directly participated in the negotiation and conclusion of the agreements);[109] and

- The agreements were lawfully concluded and were binding.

71. Contrary to the SFF's claims, there was nothing to alert Vitol to the alleged flaws underpinning the impugned decisions.

72. As far as Vitol was concerned, the process followed by the SFF, and the impugned decisions, were rational, reasonable, fair, transparent and appropriate.[110]

IMPLEMENTATION OF THE AGREEMENTS

Vitol's performance

73. Vitol duly performed under the agreements: [111]

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109 Vitol supplementary affidavit, para 20.

110 Vitol AA, p 3263 para 204.

111 Vitol AA, p 3227, para 106.

73.1. On 29 February 2016, the SFF invoiced Vitol US$78 606 000 for three million barrels of blended sour crude oil that it had sold to Vitol at a price of US$26.202 per barrel.[112] Vitol paid the purchase price.[113]

73.2. From January 2016 to March 2018, the SFF invoiced Vitol for the storage space in Tank 2, and Vitol duly paid US$300 000 per month between January 2016 and December 2016, and US$330 000 per month between January 2017 and March 2018. Over a period of two years Vitol paid rent to SFF in the amount of US$8 220 000.[114] Vitol continued to tender payment of the storage fees even after the present review was instituted and the SFF refrained from invoicing it.[115]

74. The SFF derived significant value and benefit from the agreements. As noted in the financial analysis prepared by PriceWaterhouseCoopers, the SFF generated millions of US dollars in storage fees, reduced the burden on its working capital, and was no longer exposed to stock losses and other risks associated with storing crude oil.[116] It shifted the risk of the oil to Vitol for the duration of the agreements.

75. Since ownership of the oil passed to Vitol in terms of the sale agreement, it carried the risk of crude oil price fluctuations. Those fluctuations are unpredictable and are driven and affected by geo-political and macro-economic factors. The oil price fluctuations placed Vitol at significant risk due to the volume of oil it held. A decrease

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112 Vitol AA, p 3227, para 103 read with SFF's invoice dated 29 February 2016 "HF2" (p401), p3688.

113 Vitol Aa, p 3241, para 134.2.

114 Vitol AA, p 3270, paras 222.3 to 222.5 read with Vitol's schedule of rental payments annexure "HF9", p 3923; also attached to these Heads of Argument.

115 Vitol AA, p 3227 para 105.

116 Vitol AA, p 3266, para 211.

of only US$1 per barrel in the price of oil would reduce its value by US$3 million.[117] As such, Vitol had to take steps to hedge its exposure. Hedging is a natural consequence of buying crude oil, it follows from that process organically.

76. As part of its implementation of the agreements and in reliance on their terms, Vitol entered into a number of further transactions in good faith:

76.1. Vitol paid US$37 530 to procure the letter of credit that the SFF required.[118]

76.2. Vitol concluded hedging contracts with the Intercontinental Exchange (ICE), London to hedge its price risk exposure (which at times was in excess of US$100 000 000).[119] Vitol sold an equal and opposite amount of ICE Brent Futures. These hedging contracts removed its exposure to the absolute price of oil (represented by the ICE Brent Futures price).[120] It is standard for oil traders and the industry to enter into hedging contacts of this kind.[121]

76.3. In order to derive the benefit of its hedges, Vitol would have had to sell and deliver the physical oil at the time the hedges expired.[122] Vitol was unable to do so because of the SFF's conduct.

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117 Vitol AA, p 3253, para 170.3 and p 3253, para 170.6.

118 Vitol AA, p 3274, paras 234.1 to 234.3.

119 Vitol AA, p 3272, para 228.

120 Vitol AA, p 3227 para 104.

121 See RA, p 5080 para 239.7 stating "*Hedging is a common industry practice that is necessary to mitigate the risks of the fluctuating market"* (emphasis added).

122 Vitol AA, p 3254, para 170.8.

76.4. Ultimately, when it became clear that the SFF could not perform under the sale agreement, Vitol cancelled it and unwound the hedges.[123] It incurred unwinding costs in doing so of US$18 078 928.[124] This cost would have been far higher but for the drop in the oil price. If the Vitol sale agreement had been reversed on 8 February 2017, for example, Vitol would have suffered a loss of US$25 million; if, by contrast, it had been reversed on 30 May 2019 (30 days after the Gobodo report was finalised), Vitol would have suffered a loss of over US$65 million.[125]

76.5. Vitol also insured the oil at a cost of US$919 840 for the oil for the period January 2016 to March 2020.[126] That insurance covered it against loss or damage to the value of the oil (in the event of a contamination incident or other damage) and against physical loss (in the event that an insured peril caused a physical loss such as a fire). It did not cover financial loss associated with an adverse movement in the price of crude oil and would not have expected to have covered such financial losses.[127]

76.6. In addition, Vitol's capital costs of carrying these expenses was US$7 939 610.45 over the relevant period.

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123 Vitol AA, p 3273, para 230. See also Moagi Confirmatory Affidavit, p5600, para 5 read with Vitol's letter of 8 June 2020 annexure "MCA2", p 5603.

124 Vitol AA, p 3274, para 232.

125 Vitol AA, p 3257, paras 180 and 181.

126 Vitol AA, p 3274, paras 234.1 to 234.3.

127 Vitol Supplementary Affidavit, para 48.

77. In total, then, it cost Vitol US$113 801 908.45 (including the sale amount as well as the rental amount) to implement the Vitol agreements.[128] In addition to the purchase price and rental paid, Vitol suffered loss in the amount of US$26 975 908.45 in giving effect to the Vitol agreements.[129]

The SFF's performance

78. The SFF performed, in part, in terms of the Vitol agreements.

79. In January 2016, the SFF furnished a Tank Warranty for the oil stored in Tank 2.[130]

80. On 29 February 2016, the SFF invoiced Vitol in the amount of US$78 606 000 for the sale of the oil,[131] and accepted Vitol's payment of that amount. It also invoiced Vitol monthly for storage fees from January 2016 until March 2018.[132]

81. The SFF also repeatedly elected to stand by the Vitol agreements:

    81.1. On 5 February 2016, the SFF's board ratified the Vitol agreements.[133]

    81.2. In March 2016, Mr Ngqongwa prepared a letter of condonation to the Minister of Finance for the SFF's non-compliance with the notification requirements.[134]

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128 Vitol AA, p 3274, para 235.

129 Vitol AA, p 3274, para 235.

130 Vitol AA, p 3219, para 90 read with SFF's tank warranty annexure "HF2" (p190), p 3477.

131 Vitol AA, p 3227, para 103 read with SFF's invoice annexure "HF2" (p401), p 3688.

132 Vitol AA, p 3227, para 105 read with SFF's invoices annexure "HF2" (p402), p 3689.

133 Minutes of 5 February 2016, FA61, pp 593-99; Vitol AA, p3227 para 102.2.

134 Vitol AA, p 3230, para 108 read with Minister of Energy's budget speech annexure "HF2" (p410), p3697.

81.3. On 5 July 2016, following Mr Gamede's resignation, the SFF's acting CEO addressed a letter in which he assured Mr Foster that Mr Gamede's *"resignation will not have a material impact on the daily operations of the SFF. The internal policies and processes designed to safeguard your crude oil currently stored in our Saldanha Bay terminal are still effective and are unaffected by the changes announced last week. The executive management remains committed in providing valued services to your company."*[135]

81.4. On 11 May 2017, then Minister of Energy alluded to the strategic fuel transactions in her budget speech, saying that Government and its state-owned entities were "*focussing on leveraging the current low oil price environment towards ensuring that our country benefits optimally"*.[136] The Minister was clearly not only aware of the oil transactions, but in support of them.

81.5. On 23 June 2016, Mr Jawoodeen, the SFF's then Board Chairperson submitted a report to the Minister in order to meet the requirements of the Second Directive and said:

> *"The process of negotiation without prior tendering is provided for in the Central Energy Fund Procurement Policy, previous and current ministerial directives and is in accordance with Treasury regulations. This process is permitted in all transactions where open or close competitive tendering is not suitable, where a supplier or service provider is the only supplier or service provider , and also where the supplier or service provider is preferred supplier or service provider.*

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135 Vitol AA, p 3242, para 134.7 read with SFF's letter dated 5 July 2016 annexure "HF2" (p 482), p 3769.

136 Vitol AA, p 3230 to 3231, para 109.

> *SFF has used this process in all its rental contracts since the commercialization of its facilities."*[137]

81.6. Tellingly, Mr Jawoodeen's affidavit, filed together with the reply, records that he prepared this memorandum after Mr Nkutha had raised concerns about the commercial rationality of disposing of the strategic stock.[138] Despite that, Mr Jawoodeen prepared and submitted the memorandum and has not disavowed its contents. He does no more than admit that, in hindsight, it is clear that the SFF Board exercised insufficient oversight.[139]

81.7. The SFF's sole shareholder, the CEF, also reported positively on the oil transactions in its 2015/2016 Annual Report.[140] It recorded that the Minister had authorised the rotation of strategic stock; 8.8 million barrels of crude oil had been sold; income generated by the sale improved SFF's liquidity; the CEF group would develop a stock replenishment programme; and the CEF group had received an unqualified audit.

The SFF's breaches

82. However, the SFF did not perform all of its obligations under the agreements.

83. The SFF was obliged under the sale and storage agreements to hold the sour crude blend available to the SFF, to safeguard its condition and not allow contamination, and to afford Vitol access to the oil on demand. In addition, the SFF warranted to

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137 Vitol AA, p 3231, para 110 read with SFF's Report on the Rotation of Strategic Stock and Storage Contract annexure "HF2" (p 431), p 3718, para 3.2.

138 Jawoodeen affidavit, p 5590 para 9-10.

139 Jawoodeen affidavit, p 5590 para 11.

140 Vitol AA, p 3231, para 111 read with CEF's Annual Report annexure "HF2" (p 517), p 3804.

Vitol, in the tank warranty, that it would: (a) keep the oil in Tank 2 in a safe, segregated, secure and good condition; and (b) not perform any acts that would prejudice Vitol's interests.[141]

84. The SFF breached these obligations, in at least four different ways.

85. First, the SFF simply does not have available for sale and delivery the three million barrels of sour blend crude that it sold to the SFF. Initially, it contracted with Vitol for 3.3 million barrels of oil, but the Sale Agreement had to be amended because it only had three million barrels available.[142] Vitol has subsequently discovered that a further 750 000 barrels is unavailable because it is regarded by the SFF as unpumpable.[143] The SFF has, since July 2017, knowingly invoiced Vitol for the storage of oil that it knew could not be delivered to Vitol.

86. Second, the SFF has allowed a third party to discharge or cross-pump into Tank 2 in contravention of the Vitol storage agreement, further contaminating the oil in the tank. Vitol's objections to this conduct (sent in March 2016 and February 2017) have gone unanswered.[144]

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141 Vitol AA, p 3219, para 90.1 and 90.3 read with SFF's tank warranty annexure "HF2" (p 190), p 3477.

142 Vitol AA, p 3225 para 98.

143 Vitol AA, p 3228, para 106.1 read with SFF's summary to clients' crude oil dated June 2017 annexure "HF2" (p 509), p 3796; RA, p5198, para 816; Vitol supplementary affidavit, para 33.

144 Vitol AA, p 3229, para 106.4; Vitol supplementary affidavit, para 33.5.

87. Third, the SFF moved Vitol's oil from Tank 2 to Tank 5 without Vitol's consent or knowledge and now leases Tank 2 out to a third party.[145] This is in clear breach of the terms of the storage agreement.

88. Finally, the SFF has refused Vitol's repeated requests to take possession of the oil by pumping it out of Tank 2. These requests were made on 8 February 2017, 19 April 2017 and 4 May 2017 – each time to no avail.[146] It was only in September 2017 that the SFF responded that Vitol could not remove the oil in Tank 2 pending the outcome of its investigation and review of the impugned decisions.[147] Notwithstanding the position taken by the SFF, it continued to charge Vitol storage fees.[148]

89. In the absence of procuring interdictory relief to prevent performance under the Vitol agreements, the SFF ought to have allowed Vitol to act in accordance with their terms. It could have negotiated a holding position that allowed Vitol to do so, whilst mitigating both their risk – by, for example, allowing Vitol to trade the oil but requiring an undertaking or guarantee that it would pay the price achieved to the SFF should its review succeed. Rather than doing so, the SFF resorted to unlawful self-help.[149]

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145 Vitol AA, p 3230, para 106.5.

146 Vitol AA, p 3228 to 3229 para 106 read with e-mails between Vitol, Ms Beukes, Mr Mayaphi and Mr Moagi dated 8 February 2017, 19 April 2017 and 4 May 2017 annexure "HF2" (p 499, 505, 508), pp 3786, 3792, 3795.

147 Vitol AA, p 3229, paras 106.2.1 to 106.2.3 read with SFF's letter dated 26 September 2017 annexure "HF2" (p 512) p 3799.

148 Vitol AA, p 3229, para 106.3 read with Vitol's letter dated 6 October 2017 annexure "HF2" (p 514), p 3801.

149 See, by analogy, *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) paras 87-89.

90. The SFF does not meaningfully dispute any of these breaches. It implicitly accepts that it is incapable of performing in accordance with the sale and storage agreements.

91. In March 2020, Vitol cancelled the sale and storage agreements and reserved its right to claim damages for breach.[150] Its private law contractual claim would entitle Vitol to restitution of the purchase price and storage fees (with interest) against the return of the oil to the SFF, and damages for its consequential loss.

92. We submit that the SFF is not permitted to avoid these damages, by resort to a public law remedy. We return to this issue below.

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150 Letter, MCA2 p 5603; Vitol AA, p3273 para 230; Moagi affidavit, p5600 para 5.

DELAY

Principles governing delay

93. Review proceedings must be brought without unreasonable delay, whether they are pursued under the Promotion of Administrative Justice Act[151] or the principle of legality.[152] The rule clearly applies to decision-makers that seek to review their own decisions.[153]

94. Considerations of both policy and practicality underpin the rule against delay. At the level of policy, the rule promotes certainty and finality, and safeguards the administration and those affected by it against prejudice.[154] As a matter of practicality, reviews become harder to prosecute and to determine fairly after the effluxion of time. These factors were summarised by the Constitutional Court in *Khumalo* as follows:

> *"This requirement [to bring a review timeously and without unreasonable delay] is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.*

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151 Section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 provides that:

> "*Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date*
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> . . .
>
> *(b) . . . on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably be expected to have become aware of the action and the reasons".*

152 *Merafong Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) para 73; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 40

153 *Gijima*, paras 22-25.

154 *Merafong* para 73

> *In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."*[155]

95. The principle was expressed similarly in *Tasima*:

> "*While 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', it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action*."[156]

96. A party bringing a review after a prolonged delay must therefore explain and give reasons for the full period of the delay, to show that it is reasonable.[157] If the delay is unreasonable, the litigant must demonstrate that there are nevertheless considerations that warrant the court hearing the review despite the unreasonable delay.

The extent of the delay

97. The period for bringing the review – and therefore for calculating the delay – begins to run from the date on which the applicant for review became aware of the decision

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155 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) paras 47-48.

156 *Department of Transport and Others v Tasima* (Pty) Ltd 2017 (2) SA 622 (CC) para 160.

157 *Van Wyk v Unitas Hospital and Another (*2008 (2) SA 472 (CC) para 22, dealing with condonation generally.

and its reasons – even if it was at that stage unaware of the irregularities entailed in the decision.[158]

98. In this case, the SFF was aware of the impugned decisions from the moment they were taken (since, regardless of whether Mr Gamede acted with authority or not, his conduct is attributable to the SFF). At the very latest, it had knowledge of them in late January 2016 (when the disposal of the strategic stock was reported to the Board).[159] As a matter of law, the applicants cannot reset the clock, by counting the period of delay from the conclusion of their internal investigation which, they say, uncovered the flaws underpinning the impugned decisions.[160] (They also cannot do so as a matter of fact. As we show below, the impugned decisions were taken with the knowledge of a number of other personnel within the SFF who remain employed there to date. The suggestion that only Mr Gamede was party to and aware of the flaws in the impugned decisions is, with respect, not credible.)

99. The review was instituted in March 2018 – more than two years later. That is, on any version, an unreasonable delay. The Constitutional Court has repeatedly found that delays of this magnitude are unreasonable.[161]

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158 *Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC*) para 41-42.

159 The SFF's affidavit and that of Mr Jawoodeen claim that the Board was only notified of the transactions at the meeting of 5 February 2016. This is not borne out by the affidavits of Mr Ngqongwa (p 5594 paras 7-8) and Ms de Wet (p 5606 para 5), both of whom confirm that the SFF Board was aware of the disposal of the strategic stock in January 2016. Tellingly, Mr Nkutha claims not to have seen copies of the agreements until early February 2016 but does not claim ignorance of the transactions before then (Nkutha affidavit p 5586 para 5). He could not credibly do so since he discussed hedging arrangements arising out of the Vitol Agreements with Mr Foster on 20 January 2016.

160 As they attempt to do in their heads, para 124.

161 See, for example, *Khumalo* para 50 dealing with a 20-month delay; *Gijima* paras 45, 53 dealing with a 22-month delay.

No excuse for the delay

100. The question is then whether the Court should nevertheless exercise its discretion to condone the delay and to permit the review to proceed. A court will not do so lightly, and must "*exhibit vigilance, consideration and propriety before overlooking a late review*".[162] A court will only condone the delay where the interests of justice militate in favour of doing so. That is a context driven enquiry that considers, among others, the nature of the impugned decision, the nature and extent of the illegality, the conduct of the review applicant, the extent and reason for the delay, and the prejudice entailed by a late review.[163]

101. In support of their claim for an extension of time, the applicants contend that (*a*) they are organs of state acting in the public interest, and (*b*) the impugned decisions are tainted by corruption on the part of (at least) Mr Gamede militate strongly in favour of delay.

102. But, with respect, these factors do not assist the applicants in justifying their delay, for the following reasons.

103. First, Vitol disputes that the applicants pursue this review in the public interest. Rather, it submits that one of the driving factors underpinning it is the applicants' desire to avoid the contractual damages that they will be liable to pay consequent on the SFF's breaches of the Sale and Storage Agreements. In reply, the applicants continue to assert their public interest standing.[164] But they do not meaningfully

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162 *Tasima* para 160.

163 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) para 48-63.

164 RA, p5092-94 para 282-288.

engage with the allegations of breach, beyond admitting that Vitol's cancellation is relevant to determining the appropriate remedy in the review.[165]

104. But in any event, organs of state are subject to a constitutional obligation to act with due expedition and to avoid delay, including in bringing review proceedings where appropriate:

> "*Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.*"[166]

105. It means that the applicants had a higher obligation to bring their review proceedings timeously, and their delay is more difficult to overlook, than that of an ordinary litigant.[167] Organs of state are "*the Constitution's primary agent*". Courts will not readily provide them "*a procedure-circumventing lifeline*".[168] That is even more the case where the need for condonation arises from the organ of state's own brazen conduct.[169]

106. Second, contrary to the applicants' suggestion, the mere taint of corruption in the impugned decisions does not mean that the Court will disregard the applicants' delay and engage the review. Rather, that is one of the factors that will be taken into account, together with all the others. Although the Constitutional Court found in *Gijima* that a court may declare conduct unlawful and invalid under section 172(1)

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165 Moagi reply, p5601 para 7.

166 *Khumalo* para 46, quoted with approval in *Gijima* para 43.

167 *Buffalo City* para 60-61.

168 *Kirland* para 82.

169 See, by analogy, *Chisuse and Others v Director-General, Department of Home Affairs and Another* (CCT155/19) [2020] ZACC 20 (22 July 2020) para 16-17.

of the Constitution even where unreasonable delay has not been condoned, it has since confirmed that that principle will be restrictively applied to ensure that "*the valuable rationale behind the rules on delay are not undermined*".[170]

107. As we will demonstrate in detail below, in this case the interests of justice militate against overlooking the applicants' egregious delay. The following factors are relevant:

107.1. During the period of delay and prior to instituting the review, the SFF consistently indicated that it would adhere to the Vitol agreements, and conducted itself in accordance with them. It did not raise any concerns or potential invalidity until September 2017.

107.2. In that period, Vitol relied on and implemented the agreements – and incurred significant costs in doing so. Among others, it bore the risk of the oil for the entire intervening period until it was forced to cancel the agreements in March 2020. The applicants acquiesced in that arrangement for a number of years. They sought to invalidate the agreements only after (a) the oil price had increased where the SFF had undertaken no hedging activities to protect itself against oil price movements, (b) Vitol had discovered that it had paid for the purchase and storage of oil that the SFF could not deliver to it; (c) the SFF, in flagrant disregard of its obligations to safely store and care for the oil sold, had allowed Vitol's oil to be contaminated further by allowing lower quality oil from a third party to be commingled with it, and (d) such third party's oil was effectively blocking Vitol from withdrawing its oil

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170 *Buffalo City* para 71.

from tank.[171] In doing so, they seek to avoid the damages that Vitol would otherwise be entitled to claim in private law. It is inherently unfair to permit the applicants the benefit of a risk-based commodity transaction for four years, and then to reverse it when, with the benefit of hindsight, the SFF determines it is favourable to do so (even though it has not borne the risk or the costs of the oil for the intervening period).[172]

107.3. In addition, Mr Gamede's corrupt conduct is attributable to the SFF. The Constitutional Court has confirmed that the state may be held vicariously liable for unlawful acts committed by its employees,[173] if there is a sufficiently close link between the unlawful act, and the purpose and business of the employer.[174] The SCA has confirmed that the corrupt behaviour of a state employee in the award of a tender meets this threshold.[175]

107.4. The SFF is itself solely to blame for the corrupt conduct at issue. (We expand on this below.) By contrast, Vitol had no hand in it, and was unaware of it.

107.5. Moreover, the applicants did not just delay in bringing the review; they substantially delayed in their prosecution of it. That has compounded the uncertainty, the lack of finality and the prejudice to Vitol.

108. We submit that these factors militate strongly against the Court condoning the applicants' unreasonable delay in bringing the review.

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171 Vitol AA, p3192 para 14.

172 Vitol AA, p3254 para 171.

173 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), para 57.

174 *K*, para 32.

175 *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA), para 29.

109. Against that background, we set out the timeline on which the review was brought and prosecuted in more detail.

The period prior to the review

110. As set out above, the Vitol agreements were concluded on 20 January 2016. Thereafter, and until September 2017, the SFF repeatedly represented to Vitol that the Vitol agreements were valid and binding on it. It warranted that it was authorized to enter into the transaction, ratified the agreements shortly after their conclusion, publicly lauded their effect, and accepted the benefits of their terms repeatedly, and over a number of years.[176]

111. As set out above, the SFF invoiced Vitol for the purchase price on 29 February 2016, and for monthly storage fees from February 2016 to March 2018. It accepted payment of the purchase price and storage fees without demur. It also repeatedly elected to abide and by bound by the Agreements (as set out in paragraphs 78 to 81 above).

112. It was only on 26 September 2017 – nineteen months later – that the SFF indicated in a letter to Vitol that it was investigating the disposal of the oil, and that it intended to bring review proceedings to review and set aside the Vitol Agreements.[177]

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176 Vitol AA, p 3271, para 225.

177 Vitol AA, p 3232, para 112.

The launch of the review

113. The applicants launched the review in March 2018, a further six months later.[178]

114. The only explanation they have proffered for that delay is the internal investigations they apparently had to undertake before they could confidently institute review proceedings. That apparently entailed procuring three legal opinions and two financial reports before preparing and launching the review.[179]

115. The applicants have declined to detail the content or outcome of those investigations, and refuse to make the opinions available to the respondents. In the circumstances, those steps cannot provide an explanation for the applicants' delay at all:

    115.1. In the first place, the investigations appear to have been preliminary at best. On the applicants' own version, they had to be supplemented by a forensic investigation before the review was ripe. The forensic investigation was initiated in July 2018, only after the review was brought and culminated in the Gobodo Report (which forms a central point of the applicants' case). No explanation has been proffered for why the forensic investigation was not commenced and completed earlier. There has also been no explanation as to why a forensic report was necessary to carry out a search of the SFF's own e-mail servers (where all the evidence which seems to have been reviewed by Gobodo was found). It should have been a simple matter for

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178 Viol AA, p 3232, para 113 and p3243, para 137.

179 A legal review by an unidentified person completed on 20 December 2016; a legal opinion which was provided on 10 February 2017; a KPMG Financial Analysis Report which was issued on 25 July 2017; a second legal opinion which was provided on 27 July 2017; and a PriceWaterhouseCoopers Financial Report which was provided on 7 November 2017: Vitol AA, p 3244, para 141.1 to 141.5.

the applicants to access and review the content of the SFF's servers before instituting the present proceedings.

115.2. Second, the applicants claim that these investigations were necessary because the SFF was unaware of what had occurred and consequently could not assess the lawfulness (or otherwise) of the transactions. But that claim, with respect, does not ring true. The applicants' central complaint is that Mr Gamede unlawfully took the decisions and concluded the transactions on his own and without the authority of the SFF's board or executive committee. That is an issue that the members of the Board and its exco could presumably readily attest to. Many of them remain in the same positions and/or in the SFF's employ, and have belatedly deposed to affidavits in support of the case. Once that is so, it is not clear why the applicants needed so much time to establish the basis for their case.

115.3. Third, it is reasonable to infer, from the SFF's need for repeated opinions coupled with its refusal to disclose their content, that the opinions that it obtained did not all support a case for judicial review.[180] (The applicants deny that this is a reasonable inference, but do not unequivocally state that the opinions all supported a review.)[181]

115.4. Moreover, the opinions must have alerted the applicants of the need to bring and prosecute review proceedings expeditiously and without delay, and the consequences of failing to do so. The applicants must also have been

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180 Vitol AA, p3245 para 144.

181 RA, p 5032-33 para 83.3.

aware that the fluctuating oil price continued to expose the respondents to significant losses. Their delay, in light of this, is the more reprehensible.

115.5. – and the prejudice

116. We therefore submit that the applicants have failed to provide a complete and acceptable explanation for their delay – particularly in light of their earlier conduct.

The conduct of the review

117. The application was launched in March 2018, but had to be re-issued in May 2018 because of flaws in the commissioning of affidavits.[182]

118. At that stage, the review was not competently brought. It pursued a so-called "bifurcated" approach. The applicants sought to have the competence and the merits of the review determined separately from, and in advance of, the remedy, and did not plead what a just and equitable remedy would be. That approach was impermissible and the parties objected to it.

119. The applicants failed timeously to deliver a Rule 53 record, and only did so in mid-May 2018, at the insistence of Vitol's attorneys.[183]

120. Only after they had instituted the review and before they filed their first supplementary founding affidavit — on 7 May 2018 — the applicants put out a request for tender for an independent forensic investigation into the circumstances surrounding the disposal of the Strategic Oil Reserves between December 2015 and

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182 Third SFA, p810, para 3.2; Vitol AA, p3246-47 para 150.

183 Vitol AA, p 3246 para 148.

January 2016.[184] Gobodo was appointed to conduct the forensic investigation on 27 July 2018.[185] The investigation itself only commenced on 13 August 2018.[186]

121. In the interim, the applicants filed their first supplementary founding affidavit, widening the basis for their standing and the subject of their review.[187]

122. The applicants were not entitled to file that supplementary affidavit (or any of the further supplementary affidavits that followed it). They are public bodies taking their own decisions on review. They have had the record of the decisions that they impugn from the outset. They were consequently obliged to file the record of decisions under rule 53, but were not entitled to supplement their founding affidavit thereafter.

123. On 28 August 2018, Mr Justice Hlophe, who was case managing the matter at the time, directed the applicants to supplement their papers to deal with remedy (among others). In other words, he rejected the applicants' entitlement to pursue bifurcated proceedings.[188] The applicants were required to file their comprehensive supplementary founding affidavit by 15 October 2018.[189] That date was:

- Almost three years after the Vitol transaction was concluded (34 months after the award was made to it, and 33 months after the agreements were concluded);

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184 Second SFA, p793, para 17.

185 Third SFA, p831, para 57.

186 Second SFA, p793, para 18.

187 Vitol AA, p3246 para 152/

188 Vitol AA, p3248 para 156.

189 Second SFA, p791, para 7.

- More than a year after the SFF had indicated its intention to review the Vitol transaction;

- Seven months after the review had been brought; and

- Two months after the forensic investigation had commenced.

124. The applicants failed to file.[190] Instead, on 1 October 2018, their attorneys notified Vitol's attorneys that their supplementary founding affidavit would not be ready by 15 October 2018 because they had commissioned yet another forensic investigation.[191] That triggered another case management meeting on 7 November 2018.

125. At that meeting, the applicants stated that the forensic investigation was at an *"advanced stage of completion"*[192] but that they could not confirm when they would be in a position to file supplementary papers. The Judge President directed them to file a second supplementary founding affidavit by 21 November 2018.[193]

126. The applicants then filed a second supplementary founding affidavit on 21 November 2018 but it did not advance the matter at all. It merely recorded that a forensic investigation was underway and that the applicants were *"not in a position*

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190 Vitol AA, p3248, para 157.

191 Vitol AA, p3248, para 157

192 Second SFA, p791, para 11.

193 Second SFA, pp 791 to 792, para 12.

to give an undertaking regarding when the forensic investigation process [would] be finalised".[194]

127. It transpires that Gobodo had furnished the applicants with preliminary reports in September 2018 and October 2018, and issued their final report on 29 April 2019. The final Gobodo report adopted by the SFF Board on 25 June 2019.[195]

128. Despite that, it took a further eight months for the applicants to file their third supplementary founding affidavit. They lodged it on 28 February 2020, after being directed to do so by Mr Justice Nuku (who was case managing the matter by that time).[196]

129. The applicants thus arrogated to themselves the right to file supplementary founding affidavits and, indeed, ultimately filed three such affidavits. As a result of their irregular conduct, their case against the respondents was only completed when they filed their third supplementary founding affidavit on 28 February 2020. Their application for review was in substance only finally brought in February 2020 – that is, more than four years after the event.

130. Moreover, even though the Gobodo report formed the basis for the allegations made in the third supplementary founding affidavit, the applicants did not attach it to their

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194 Second SFA, p 789, para 6.2.

195 Third SFA, p 821, para 34 and Minutes of SFF Board of 25 June 2019 annexure "MGM7", p952.

196 Vitol AA, p 3250, para 164.

papers.[197] Vitol gave appropriate confidentiality undertakings to the applicants to procure the report, but were still not given it.[198]

131. The applicants provided the Gobodo report only in the week of 20 April 2020, after two further case management meetings. Vitol was unable to prepare its answering affidavit until it had obtained the report.[199]

132. In other words, the applicants' complete founding papers in the review were only served on Vitol on 20 April 2020. That was:

- More than four years after the impugned decisions were taken and the Vitol Agreements concluded;

- 31 months after the SFF had first indicated to Vitol that it intended to impugn the Vitol transaction;

- Two years after the review had been instituted; and

- Nine days short of a year after the Gobodo report had been finalised.

133. In each instance, the applicants had to be compelled to file. They repeatedly failed to comply with directives that they had either agreed to or that had been issued against them, to ensure the orderly management and hearing of the case.

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197 Vitol AA, p 3250, para 165.1.

198 Vitol AA, p 3250, para 165.1.

199 Vitol AA, pp 3250 to 3251, para 165.3.

Summary

134. It is clear from this chronology that the applicants not only delayed egregiously in instituting the review; they were entirely dilatory in pursuing it. They acted with reckless disregard both for the processes and directives of this Court, and the rights of (and prejudice to) the respondents.

135. We submit that their conduct – taken alone or in conjunction with the factors set out in paragraph 107 above – renders them ineligible for the assistance and condonation of this Court. It is not in the interests of justice to condone their delay.

136. We submit that the review should be dismissed with costs, including the costs of three counsel where employed, on the basis of delay alone.

JUST AND EQUITABLE REMEDY

137. If the Court is nevertheless inclined to engage the merits of the review, then we submit that the relief sought by the applicants is not just and equitable in the circumstances of this case.

138. As traversed in paragraph 8 above, Vitol concedes that its Sale and Storage Agreements with the SFF were not lawfully made because the SFF failed to comply with the conditions that the Minister had imposed as prerequisites to the transaction. Unknown to Vitol, the SFF had failed to undertake a proper due diligence process or to establish a trading division before concluding the Vitol Agreements. The Vitol Agreements were unlawful as a result.

139. The only issue between the parties at this stage is thus whether the SFF should only be required to restore the purchase price and rentals with interest, or whether it

should also be obliged to compensate Vitol for its hedging costs, insurance costs, cost of its letter of credit and its cost of capital.

140. We submit for the following reasons that it would be just and equitable to order the SFF to pay these costs:

140.1. Vitol was unaware of the flaws in the impugned decisions. It was neither party to any corruption on the part of the SFF nor reckless in its conclusion of the agreements.

140.2. The invalidity of the impugned decisions is wholly attributable to the SFF, the CEF and the Minister, who were either party to the corruption at issue in the transactions unrelated to Vitol, or failed to exercise proper oversight to prevent it.

140.3. Vitol would be entitled to recover all of its losses in terms of its private law contractual claim. It should not be left worse off by the applicants' invocation of a public law remedy, to ameliorate their own misconduct.

141. We deal with each of these factors in turn, after addressing the general principles governing a just and equitable remedy.

The principles governing just and equitable remedy

142. A court in review proceedings has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the case.[200] In exercising

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200 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) paras 8-185; *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) para 71.

that discretion, it must consider all relevant facts – not just what is in the interests of the fiscus. Moseneke DCJ (writing for the majority) summarised the proper approach in *Steenkamp*, as follows:

> *"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that 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."*[201]

143. The Constitutional Court thus held that in each case "*the remedy must fit the injury*" and "*must be fair to those affected by it and yet vindicate effectively the right violated*".[202]

144. In *Allpay II*,[203] the Constitutional Court considered what would constitute a just and equitable remedy where a contract had been declared constitutionally invalid by it in a prior judgment.[204] The Court reiterated that the remedy should be directed toward correcting or reversing the defect and its consequences.[205]

145. The Court adopted the following principles in the determination of an appropriate remedy in a case such as this one:

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201 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), para 29; footnotes omitted.

202 *Steenkamp* para 29.

203 *Allpay Consolidated Investment Holdings v CEO, SASSA* 2014 (4) SA 179 (CC).

204 *Allpay II*.

205 *Allpay II* para 29.

145.1. It adopted, what it called, the "corrective principle" which it described as follows:

> "*Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.*"[206]

145.2. The second was the "no-profit-no-loss" principle which it articulated as follows:

> "*it is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.*"[207]

146. In this case, the *Allpay* principles have the following implications:

146.1. The corrective principle requires full restitution by both sides. It requires the SFF to compensate Vitol for the fact that, for the duration of the contracts, the SFF was relieved of the burden of ownership of the oil which was assumed and carried by Vitol. Proper restitution accordingly requires the SFF to compensate Vitol for its hedging and insurance costs.

146.2. The no-profit-no-loss principle also requires the SFF to compensate Vitol for its hedging and insurance costs. It also requires the SFF to compensate Vitol for the cost of the letter of credit and the cost of its capital.

147. In *Gore*,[208] the Supreme Court of Appeal upheld a claim for damages in delict brought by an unsuccessful tenderer against the state for the fraudulent and corrupt failure by its employees to award a contract to the plaintiff. Justices Cameron and

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206 *Allpay II* paras 30 & 32.

207 *Allpay II* para 67.

208 *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA).

Brand, who delivered the judgment of the Court, made it plain that public policy requires the State to be held liable for the fraudulent and corrupt conduct of its employees. The SCA put it as follows:

147.1. The Court distinguished *Steenkamp* on the basis that it concerned a claim for mere negligence while Gore's claim was based on fraud and corruption:

> "*Drawing on these decisions (including Steenkamp) the province argued that, for the same considerations of policy, this court should refuse to extend Aquilian liability to loss caused by fraud in the tender process. The province conceded that, unlike those cases, the conduct of the defendants' employees here consisted of deliberate dishonestly and corruption, as opposed to bona fide negligent bungling.*[209]

147.2. The Court held that it was "*hard to think of any reason why the fact, that the loss was caused by dishonestly (as opposed to bona fide negligent) conduct, should be ignored*"[210] and continued:

> "*In our view, speaking generally, the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded. In Olitzki and Steenkamp the cost to the public purse of imposing liability for lost profit and for out-of-pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high*."[211]

147.3. The Court concluded as follows:

> "*Thus understood, the question is: is there any conceivable consideration of public or legal policy that dictates that Louw and Scholtz (and, vicariously, their employer) should enjoy immunity against liability for their fraudulent conduct? We can think of none. The fact that the fraud was committed in the course of a public-*

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209 *Gore* para 85

210 *Gore* para 87.

211 *Gore* para 88.

> *tender process cannot, in our view, serve to immunise the wrongdoers (or those vicariously liable for their conduct) from its consequences. And we find no suggestion in Olitzki and Steenkamp that the tender process itself must provide government institutions with a shield that protects them against the vicarious liability for the fraudulent conduct of their servants. The wrongfulness issue therefore cannot shield the defendants."*[212]

148. We submit that, in this case, the same principles should guide this Court's exercise of its remedial discretion in the determination of a just and equitable remedy:

    148.1. The corrective principle requires full restitution of the benefits received under the contracts. One of the benefits the contracts conferred on the SFF was that it was relieved of the risk and cost of the ownership at Vitol's expense. The SFF should accordingly reimburse Vitol's hedging and insurance costs.

    148.2. The no-profit-no-loss principle also requires that the SFF reimburse all Vitol's expenses including its hedging and insurance costs, the cost of the letter of credit and its cost of capital.

    148.3. These outcomes accord with Steenkamp's requirement that the court's remedy "*must be fair to those affected by it*" and "*must be just and equitable*".[213]

149. The public policy considerations emphasised by the SCA in *Gore* would be satisfied only if the SFF compensated Vitol in full for the loss caused to it by Mr Gamede's dishonest conduct and the reckless neglect of the SFF's board and senior executives. Vitol is an innocent counterparty to the SFF's corruption and

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212 *Gore* para 90.

213 *Steenkamp* para 99

maladministration. It is entitled to put in the position it would have been, but for the impugned decisions.

Vitol acted in good faith

150. Vitol conducted its negotiations with the SFF and concluded the Vitol agreements in good faith and in the *bona fide* and reasonable belief that the SFF had complied with its own processes and that the Vitol transaction was lawful.[214] It was neither aware of, nor party to, any corruption. Indeed, it is clear that it received no preferential treatment from the SFF. It procured a smaller amount of lower grade oil than it had initially bid for; was stalled in its negotiations by Mr Gamede's failure to engage with it over December 2015, and ultimately paid a higher price for the oil than it had initially agreed with the SFF.[215] It is inconceivable that it would have been treated this way, had it paid a bribe. In contrast to the other traders, the SFF's general counsel reviewed and expressly approved the terms of its agreements.

151. The applicants' papers imply that it paid inducements on two grounds, each of which is far-fetched and without any substance:

151.1. First, the applicants read a reference to a $50 000 fee in an e-mail by Marc Ducrest to be a reference to a bribe. But that e-mail has an innocent explanation. Mr Ducrest was referring to the once-off fee of $50 000 (calculated as $0.05c per barrel) that the SFF would be paid if Vitol's proposal of 15 September 2015 for the proposed loan of one million barrels

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214 Vitol AA, p 3193, para 12-13; p 3213, para 75.

215 See paragraphs 68 to 69 above.

of Bonny Light crude oil came to pass.[216] There is nothing sinister in the exchange at all.

151.2. Second, the applicants accuse Mr Foster of *"wining and dining"* SFF officials to curry favour. They belatedly refer to a letter and a number of e-mails sent during 2015 to imply that Mr Foster paid inducements, or improperly covered the SFF's travel expenses. The letter was given in the form requested by the applicants' own personnel, in order to assist its representatives in obtaining a travel visa. Further, each of the e-mails has an innocent explanation which Mr Foster provides in his supplementary affidavit.[217] But the SFF could have established, through its own investigations, that it – and not Vitol – had paid for the trip in question and requested the visa letter. Its accusation of impropriety on Vitol's part without first having undertaken these investigations is mischievous and unbecoming of an organ of state.

152. There is simply nothing on the papers to show – or even suggest – that Vitol acted improperly or in bad faith.

Vitol acted reasonably

153. In reply, the applicants suggest, for the first time, that Vitol was reckless in concluding the agreements. That allegation is presumably made because they realise they cannot sustain their complaints of bad faith on its part.

154. The nub of the applicants' complaints is that Vitol ought to have done more to ensure that its agreements, and the decisions underpinning them, were lawful. They allege

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216 Vitol AA, p 3207, para 55 read with e-mail between Vitol and Mr Gamede dated 15 September 2015 annexure "HF2" (p 50), p 3337 and p 3268, para 216.1.

217 Vitol supplementary affidavit, para 11.

that it was an *"extremely simple exercise to ensure"* that the SFF's internal prerequisite to the stock rotation had been complied with, and that Vitol did not take steps to ensure as much because it did not care to know.[218]

155. But the applicants are wrong on both fronts. As a matter of law, Vitol was not obliged to ensure that the SFF had complied with its own requirements and that Mr Gamede had authority. And, as a matter of fact, it took more than adequate steps to satisfy itself in that regard.

The law

156. Section 20(7) of the Companies Act entitles any external[219] person dealing with a company in good faith to presume that the company, in making a decision in the exercise of its powers, has complied with all formal and procedural requirements in terms of the Companies Act, the Memorandum of Incorporation and the rules of the company itself. The only exception arises where that person knew or ought reasonably to have known that the company had in fact failed to comply with such requirements.[220]

157. Section 20(7) prevents a company from relying on its own failure to comply with its own internal procedures to escape its obligations in terms of an agreement.[221] It applies if the company's counterparty has dealt with a person who has actual or ostensible authority to bind the company – that is, with anyone who is held out as

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218 RA, p5024, para 57.

219 Not a director, prescribed officer or shareholder. Section 1 read with section 66(1) read with regulation 38 of the Companies Regulations (GNR 351, *Government Gazette* 34239, 26 April 2011) define a prescribed officer is a person who exercises general executive control over and management of a business.

220 Section 20(7) of the Companies Act, 71 of 2008.

221 *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13, para 54.

being authorised to manage the company's affairs and to contract on its behalf.[222] A managing director – and, we submit, an acting CEO – will usually qualify.[223]

158. Section 20(7) applies concurrently with, and not in substitution of, the common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.[224] At common law, the *Turquand* Rule provides that a third party is bound to read the company's articles but to do no more than that. Such third party is not, upon learning that a director is subject to certain conditions prior to concluding a transaction on behalf of the company, obliged to *"investigate whether there was compliance with the condition"* as this is *"an internal matter which a third party could not typically be expected to know."*[225] The applicants' contentions that Vitol was obliged to take further steps to interrogate Mr Gamede's authority are directly at odds with the operation of the *Turquand* rule.

159. In addition, the *Turquand* rule operates in conjunction with the doctrine of vicarious liability, to bind companies to agreements concluded by their employers even where they acted beyond their authority, but in the ordinary course and scope of their business. As set out above, in concluding the Vitol Agreements, Mr Gamede acted in the course and scope of his role, and the SFF is liable for his conduct even if it was corrupt and *ultra vires*.

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222 *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC), para 56 and 57.

223 *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T), p15, para 4(b) read with para 5.

224 Section 20(8) of the Companies Act.

225 *One Stop*, para 21.

160. Both section 20(7) and the *Turquand* rule apply to state-owned companies,[226] and thus bind the SFF.

161. On either basis, the SFF cannot escape the Vitol agreements by disavowing Mr Gamede's authority to conclude them.

162. The applicants invoke the SCA's decision in *RPM Bricks*[227] to contend that Vitol could not rely on Mr Gamede's assurances as to authority. But *RPM Bricks* does not assist them, for the following reasons:

    162.1. First, in *RPM Bricks* the counterparty to the contract sought to compel performance by the organ of state.[228] The SCA found that it could not order performance because it would perpetuate an illegality.[229] In this case, by contrast, Vitol does not seek to bind the SFF to perform. It accepts that the Vitol agreements should be invalidated.[230] Vitol's request is not based on estoppel, but rather on establishing a just and equitable remedy in the circumstances of the case.

    162.2. Second, in *RPM Bricks*, the SCA drew a distinction between *"an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other."*[231] In the second category persons contracting with the organ of state in good faith are not, in the absence of

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226 Sections 9(1) and 10(1) of the Companies Act.

227 *City of Tshwane Metropolitan Municipality v RPM Bricks* (Pty) Ltd 2008 (3) SA 1 (SCA).

228 *RPM Bricks*, paras 5 to 8.

229 *RPM Bricks*, para 13.

230 *Khutala Property Consortium (Pty) Ltd v Mtubatuba Municipality* 2020 JDR 0558 (SCA) is also distinguishable on this point.

231 *RPM Bricks*, para 11.

knowledge to the contrary, required to enquire into whether internal arrangements or formalities have been satisfied. They are entitled to assume that such arrangements have been complied with.[232] That is the category into which this case falls.

163. As a matter of law, then, Vitol was not obliged to interrogate Mr Gamede's authority to conclude the agreements, or the lawfulness of the impugned decisions. The applicants' claim to the contrary is misplaced.

The facts

164. Factually, Vitol was simply not in a position to ensure, beyond any doubt, that the SFF had complied with its own requirements and those imposed by the Minister. Those were matters for the SFF and the Minister to attend to.[233]

165. The evidence available to Vitol suggested that the agreements were properly authorised and their conclusion lawful:

165.1. As set out above, the Vitol agreements were the product of lengthy and transparent engagements between Vitol and a number of SFF personnel, as well as the Minister. Those engagements led Vitol reasonably to believe that the Vitol transaction was duly authorised and approved, and properly undertaken.

165.2. Much of the correspondence confirmed the view that the transaction was being lawfully and transparently undertaken:

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232 *RPM Bricks*, para 12.

233 Vitol AA, p 3208, para 57.

165.2.1. The Minister indicated that she was "*delighted*" with Vitol's proposal and directed it to engage with Mr Gamede.

165.2.2. The Directive provided to Vitol by Mr Gamede on 13 October 2015 recorded that the SFF was authorised to rotate the strategic stock, subject to certain conditions.

165.2.3. Mr Gamede confirmed, at various points in the negotiations with Vitol, that (*a*) the SFF was also negotiating with other counterparties; (*b*) Board approval would be obtained, and internal processes followed, before the transaction could be finalised; and (*c*) a trading division would be established before agreements were signed. Vitol had no reason to mistrust his assurances.

165.3. The Vitol agreements were negotiated between Vitol, on the one hand, and the SFF's acting CEO, its General Counsel and its Trading Manager. They appeared to have the knowledge and approval of the SFF's executive management. Vitol understandably relied on the approval of the contract terms from the SFF's General Counsel as an indication, beyond any doubt (if there had been any in Vitol's mind), that the SFF's internal legal processes and approvals had been complied with.

165.4. The agreements were ultimately signed by the SFF's acting CEO, in the presence of its trading and operations managers. The agreements and their addenda all included appropriate warranties as to authority.[234]

165.5. The SFF board endorsed the Vitol Agreements, and the SFF implemented them for some two years, after their conclusion.[235]

166. There was, with respect, nothing more that Vitol could reasonably have been expected to do to ensure that the proper processes and authorisations were in place.

The SFF was corrupt, and it, the CEF and the Minister were reckless

167. The flaws in the impugned decisions, and consequently in the Vitol Agreements, were solely attributable to the bad faith and lack of oversight on the part of the applicants and the Minister.

168. The applicants admit that the impugned decisions were taken in bad faith by Mr Gamede – and, in all likelihood, others within the SFF. Their papers strongly suggest that the former Minister may well also have been implicated. We have already pointed out that the SFF is vicariously liable for Mr Gamede's misconduct, which took place in the ordinary course and scope of his employment by it.

169. The position is compounded by the clear failure in oversight by the SFF, the CEF and the Minister.

170. Their oversight obligations arise from a range of provisions:

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234 FA, Vitol Sale Agreement annexure "FA54", p538; Amendment to Vitol Sale Agreement annexure "FA55", p539; Vitol Storage Agreement annexure "FA56", p541; Amendment to Vitol Storage Agreement annexure "FA57", p583.

235 See paragraphs 111 to **Error! Reference source not found.** above.

170.1. Section 217(1) of the Constitution obliges an organ of state who contracts for goods and services to do so in a manner that is *"fair, equitable, transparent, competitive and cost-effective"*. The principle of transparency promotes openness and accountability.[236] The Constitution (at section 1(d)) lists accountability and openness as one of the founding values of our constitutional democracy.

170.2. The Public Finance Management Act (**PFMA**) regulates the financial management within organs of state.[237] Its stated objective is to *"secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities"* of state institutions.[238] Mogoeng CJ held, in *EFF*, that *"accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."*[239]

170.3. In terms of the PFMA, the National Treasury must monitor and assess the implementation of the PFMA and intervene by taking appropriate steps where there has been a serious or persistent breach of the PFMA.[240] The Minister, as the executive authority of the SFF, *"must exercise that executive's ownership control powers to ensure that that public entity complies with [the PFMA] and the financial policies of that executive".*[241]

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236 G Penfold and P Reyburn, 'Public Procurement' in S Woolman et al (eds) *Constitutional Law of South Africa*, at 25.11.

237 Long Title, Public Finance Management Act 1 of 1999.

238 Section 2 of the PFMA.

239 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para 1.

240 Section 6(2)(c) and (f) of the PFMA.

241 Section 63(2) of the PFMA.

170.4. The Constitutional Court has confirmed that a Minister who represents the State as the sole shareholder of a state-owned company is charged with the high-level supervision of the company to ensure that it discharges its statutory mandate and operates in the national interest.[242] The Minister has the power to supervise high-level public office-bearers in the performance of their official duties and does so by means of the corporate relationship that she has with the Board members.[243]

170.5. Under the PFMA, the SFF Board is its accounting authority, and also has fiduciary duties to it. It must *"exercise the duty of utmost care to ensure reasonable protection of the assets"* of the SFF.[244] The SFF Board is responsible for the management and safe-guarding of the assets of the SFF and must take effective and appropriate disciplinary steps against an employee who contravenes or fails to comply with the PFMA or commits an act of financial mismanagement.[245] It is the SFF Board's obligation to submit reports, returns, notice or other information to the Minister or National Treasury.[246] The SFF Board must inform the National Treasury of the disposal of a significant asset or the commencement of a significant business activity promptly and in writing and must submit the relevant particulars of the transaction to the Minister for approval.[247] A board who

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242 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC), para 46.

243 *Motau*, para 49.

244 Section 50(1)(a) of the PFMA.

245 Sections 51(1)(c) and (e)(i) and (ii) of the PFMA.

246 Section 51(1)(f) of the PFMA.

247 Section 54(2)(d) and (e) of the PFMA.

fails to comply with the with the obligations set out above, commits an act of financial misconduct.[248]

170.6. The Constitutional Court has confirmed that the Board of a state-owned company is tasked with managing the affairs of the company and controlling its decisions and actions. Any widespread or systemic failures of the company are attributed to the Board which must account and take responsibility for the company's conduct.[249] In *Motau*, the Constitutional Court held that a board member's lack of knowledge did not justify the failures of the company regarding various procurement projects that constituted a dereliction of statutory duties.[250]

170.7. The Companies Act also imposes duties on the CEF (as shareholder representative) and the SFF Board. The High Court has confirmed that directors of state-owned companies bear obligations not only in terms of the PFMA, but also under the Companies Act.[251] The Companies Act provides that the directors of a company must exercise their powers and perform their functions:

170.7.1. in good faith and for a proper purpose;

170.7.2. in the best interests of the company; and

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248 Section 83(1)(a) of the PFMA.

249 *Motau*, para 61.

250 *Motau*, para 64.

251 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] ZAGPPHC 169, para 18.

170.7.3. with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director.[252]

170.8. A director acts in the best interests of the company and with reasonable care, skill and diligence where they take reasonably diligent steps to become informed about a matter.[253] Diligence *"includes conscientious attendance at board meetings and also an appropriate commitment to acquiring and maintaining a sufficient standard of knowledge of the company's business to enable the director to properly discharge his or her duties."*[254]

171. In other words, the Constitution and legislation imposes substantial obligations on the Minister, the CEF and the SFF board to oversee its conduct and to safeguard its interests.

172. It is clear that each of these functionaries failed to exercise the necessary oversight.

173. The Minister failed to comply with her obligation to supervise the SFF. Indeed, the applicants criticise her for failing to question and interrogate whether Mr Gamede had complied with the legal prerequisites before approving the transactions.[255] On the applicants' version, she failed to apply her mind.[256]

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252 Section 76(3) of the Companies Act.

253 Section 76(4)(a)(i) of the Companies Act.

254 RC Williams, 'Companies: Part 4' in the *Law of South Africa*, vol 4(2), para 151.

255 RA, p 5036, para 83.6.7.

256 First SFA, pp 786.5 to 786.6, para 16.1.

174. The CEF similarly did not do so. On the contrary, it lauded the transactions in its 2015/2016 annual financial statements.

175. The SFF Board and its executive management failed in their obligation to manage the affairs of the company and to control the decisions made by it. Indeed, Mr Jawoodeen belatedly concedes that the board did not exercise its oversight role with the "*rigour and detail"* required.[257] That is also clear from the versions put up by the applicants:

175.1. Mr Jawoodeen claims that the Board was informed of the oil transactions at its meeting of 5 February 2016, and approved the Taleveras and Vitol transactions.[258] But he claims that it did so without reviewing the terms of those agreements at all because they were not included in the Board packs.[259] If that claim is true, it is astonishing. It would be a clear and serious dereliction of the Board's oversight duties to approve agreements in ignorance of their terms.

175.2. Matters are made worse by the fact that Mr Jawoodeen claims that Mr Nkutha raised concerns with him about the commercial rationality of the transactions.[260] Neither Mr Jawoodeen nor Mr Nkutha describes the substance of these engagements in any detail. But on 23 June 2016, Mr Jawoodeen prepared and submitted a report to the Minister on the stock rotation. The report characterised the transaction a valid and successful. If

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257 Jawoodeen confirmatory, p 5590 para 11.

258 Jawoodeen affidavit, p 5589 para 6.

259 Jawoodeen affidavit, p 5590 para 8.

260 Jawoodeen Confirmatory Affidavit, p 5590, para 8.

the potential invalidity of the agreements had already been raised with him, that conduct was clearly inappropriate.

175.3. Mr Nkutha and Mr Ngqongwa both allege that they had sight of the transaction agreements in early February 2016.[261] Indeed, Mr Ngqongwa expressly alleges that they were available for review at the board meeting of 5 February 2016, although not all board members obtained or reviewed copies thereof.[262] (That is, again, evidence of a serious lack of oversight by the board.) Mr Ngqongwa further says that he and Mr Nkutha reviewed the contents of the agreements and were concerned that they "*had obvious irregularities"* – including the Vitol agreements.[263] Yet neither of them raised their concerns with the Board or escalated them to the CEF or the Minister. They took no steps at all to invalidate the agreements. Instead, they engaged Mr Foster about the possibility of hedging the SFF's risk and, later, Mr Ngqonwa prepared the draft request to the Minister, seeking condonation for the transactions.[264] These steps suggest that Mr Nkutha and Mr Ngqongwa did not in fact view the Vitol Agreements as irreparably flawed and invalid. If they did, their conduct constituted a clear dereliction of their fiduciary duties to the SFF.

175.4. Apart from instances cited above, Ms de Wet – the SFF's General Manager: Commercial at the time – expressly states that her responsibilities included negotiating the commercial terms of storage agreements, but that she had

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261 Nkutha affidavit, p 5586 para 5; Ngqongwa affidavit, p 5595 para 11.

262 Ngqongwa affidavit, p 5595 para 11.

263 Ngqongwa affidavit, p 5596 para 13.

264 Ngqongwa affidavit, p 5596 para 14-19.

been side-lined by Mr Gamede and relegated to carrying out administrative duties.[265] She appears to have done nothing to remedy this situation or to ensure the proper discharge of her functions.

176. In short, the applicants' papers demonstrate that the Minister, the CEF and the SFF were all delinquent in the discharge of their oversight functions. Had they acted properly and with due regard to their roles, the flaws in the impugned decisions may well have been uncovered earlier and the Vitol transaction not concluded.

177. The invalidity of the impugned decisions, and consequently of the Vitol agreements, is thus wholly attributable to the misconduct and maladministration of the Minister, the CEF and the SFF. Vitol should not suffer the consequences of their dereliction of duty.

Summary

178. In all of these circumstances, Vitol submits that it would be just and equitable for it to be repaid not just the purchase price and storage fees, with interest, pursuant to the return of the oil, but also its other wasted costs – namely, the transaction, hedging and insurance costs it incurred, and its costs of capital, over the relevant period.

179. Compensating Vitol for these amounts would not permit it to profit from the Vitol Agreements (or their setting aside). It simply places Vitol in its cost-neutral position.[266] That is the just and equitable remedy in the circumstances of the case.

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265 De Wet Confirmatory Affidavit, p 5605, para 3.

266 Vitol AA, p 3275, para 237.

180. In respect of these follow-on costs, the applicants do not dispute that they were reasonably incurred as a result of the agreements. Nor could they; one of their central complaints in reply is that the Vitol transaction was unreasonable where the SFF failed to enter into the very kind of hedging arrangements that Vitol adopted. Instead, they suggest that Vitol must bring a separate claim for damages or enrichment to recover these costs.[267] We submit that that suggestion is misplaced for the following reasons:

180.1. Compensation for wasted costs is part-and-parcel of the just and equitable remedy. It need not be pursued through separate enrichment proceedings.

180.2. It is moreover appropriate for Vitol's entitlements flowing from the setting aside of the agreements to be determined once and for all in these proceedings. It is not in the interests of justice and finality, nor a good use of Court and State resources, to require a separate follow-on claim.

180.3. Finally, the applicants cannot be permitted to invalidate the Vitol agreements on public law grounds and pursuant to their own unlawful conduct, but then invoke the public law nature of their remedy to preclude Vitol from recovering the losses owing to it. That, with respect, is an abuse of process.

181. We accordingly submit that if the Vitol agreements are set aside, then the SFF must be directed to repay Vitol <u>all its wasted costs</u> incurred in the course of implementing the Vitol Agreements. The costs are particularised in the answering affidavit,[268] but

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267 RA, p5097, para 300 and Applicants HoA, p17, para 25.

268 Vitol AA, p3270 para 222; p2374 paras 232 and 234.

Vitol has tendered to provide further particularity to an independent expert, on a confidential basis, for verification.[269]

CONCLUSIONS

182. For all the reasons set out above, Vitol asks the Court for an order dismissing the application with costs, including the costs of three counsel (where employed).

183. In the alternative, Vitol ask for an order:

183.1. reviewing and setting aside the Vitol agreements;

183.2. directing Vitol to restore the oil in Tank 2 to the SFF (to the extent necessary);

183.3. directing Vitol to restore to the SFF, the storage space in Tank 2 (to the extent necessary);

183.4. directing the SFF to pay Vitol the following amounts:

183.4.1. US$78 606 000 plus interest *a tempore morae*, from 29 February 2016 to date of payment, as restitution of the purchase price paid;

183.4.2. US$8 220 000 plus interest *a tempore morae*, from the date of payment of each storage fee to date of payment, in respect of the storage fees paid;[270]

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269 Vitol AA, p3274 para 233.

270 See schedule of storage rental paid, "HF9" p3923 (and extracted below for ease of reference).

183.4.3. US$18 078 928 plus interest *a tempore morae* from the date that Vitol's answering affidavit was filed (being date of demand) to date of payment, in respect of Vitol's hedging costs;

183.4.4. US$919 840 plus interest *a tempore morae* from the date that Vitol's answering affidavit was filed (being date of demand) to date of payment, in respect of Vitol's insurance costs;[271]

183.4.5. US$37 530 plus interest *a tempore morae* from the date that Vitol's answering affidavit was filed (being date of demand) to date of payment, in respect of the letter of credit procured by Vitol; and

183.4.6. US$7 939 610.45 plus interest *a tempore morae* from the date that Vitol's answering affidavit was filed (being date of demand) to date of payment, in respect of Vitol's cost of capital;

183.5. Costs of the application, including the costs of three counsel, where employed.

WIM TRENGOVE SC

ISABEL GOODMAN

NOMONDE NYEMBE

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271 See schedule of monthly insurance premiums paid, "HF8" p3920-21.

Sixth to eighth respondents' counsel

Chambers, Sandton

21 August 2020

LIST OF AUTHORITIES

Legislation

1. Companies Act, 71 of 2008
2. Public Finance Management Act, 1 of 1999
3. Promotion of Administrative Justice Act, 3 of 2000

Regulations

4. Companies Regulations (GNR 351, *Government Gazette* 34239, 26 April 2011)

Case Law

5. *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)
6. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)
7. *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC)
8. *Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC*)
9. *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20
10. *City of Tshwane Metropolitan Municipality v RPM Bricks* (Pty) Ltd 2008 (3) SA 1 (SCA)
11. *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C)
12. *Department of Transport and Others v Tasima* (Pty) Ltd 2017 (2) SA 622 (CC)
13. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC)

14. *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)

15. *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC)

16. *Khutala Property Consortium (Pty) Ltd v Mtubatuba Municipality* 2020 JDR 0558 (SCA)

17. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC)

18. *Merafong Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC)

19. *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC)

20. *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA)

21. *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC)

22. *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] ZAGPPHC 169

23. *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ)

24. *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

25. *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13

26. *Shabangu v Land and Agricultural Development Bank of South Africa and Others* 2020 (1) SA 305 (CC)

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

28. Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)

29. *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA).

30. Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T)

31. *Van Wyk v Unitas Hospital and Another (*2008 (2) SA 472 (CC)

Academic Texts

32. G Penfold and P Reyburn, ‘Public Procurement’ in S Woolman et al (eds) *Constitutional Law of South Africa*

33. RC Williams, ‘Companies: Part 4’ in the *Law of South Africa*, vol 4(2)

SCHEDULE OF STORAGE RENTAL PAID BY VITOL

Vitol AA, “HF9” p3923

Vesquin - SFF - extract

	Booking Date	Due Date	Name	Voucher	Text	Currency	Amount	Month on invoice	Payment date	POP amount	Other invoices paid
CI.	01-Aug-16	30-Sep-16	STATE FUEL FUNDS ASS	P1600476	1616773 SALDANHA BAY /B STO CR	USD	-300 000,00	Jan-16	30/09/2016	300 000,00	
CI.	29-Feb-16	15-Mar-16	STATE FUEL FUNDS ASS	P1600045	1617935 SALDANHA BAY /B STO CR	USD	-300 000,00	Feb-16	16/03/2016	300 000,00	
CI.	14-Apr-16	21-Apr-16	STATE FUEL FUNDS ASS	P1600073	1634854 SALDANHA BAY /B STO CR	USD	-300 000,00	Mar-16	21/04/2016	300 000,00	
CI.	30-Apr-16	13-May-16	STATE FUEL FUNDS ASS	P1600106	1652229 SALDANHA BAY /B STO CR	USD	-300 000,00	Apr-16	13/05/2016	1 050 000,00	721
CI.	31-May-16	10-Jun-16	STATE FUEL FUNDS ASS	P1600162	1670298 SALDANHA BAY /B STO CR	USD	-300 000,00	May-16	10/06/2016	1 050 000,00	732
CI.	30-Jun-16	08-Jul-16	STATE FUEL FUNDS ASS	P1600219	1689223 SALDANHA BAY /B STO CR	USD	-300 000,00	Jun-16	08/07/2016	1 050 000,00	743
CI.	01-Aug-16	12-Aug-16	STATE FUEL FUNDS ASS	P1600318	1706436 SALDANHA BAY /B STO CR	USD	-300 000,00	Jul-16	12/08/2016	1 050 000,00	749
CI.	31-Aug-16	14-Sep-16	STATE FUEL FUNDS ASS	P1600415	1720699 SALDANHA BAY /B STO CR	USD	-300 000,00	Aug-16	14/09/2016	1 050 000,00	759
CI.	30-Sep-16	11-Oct-16	STATE FUEL FUNDS ASS	P1600489	1733568 SALDANHA BAY /B STO CR	USD	-300 000,00	Sep-16	11/10/2016	1 050 000,00	767
CI.	31-Oct-16	04-Nov-16	STATE FUEL FUNDS ASS	P1600543	1753310 SALDANHA BAY /B STO CR	USD	-300 000,00	Oct-16	04/11/2016	1 050 000,00	776
CI.	29-Nov-16	23-Dec-16	STATE FUEL FUNDS ASS	P1600647	1769137 SALDANHA BAY /B STO CR	USD	-300 000,00	Nov-16	22/12/2016	1 050 031,32	787 & 783
CI.	15-Dec-16	20-Jan-17	STATE FUEL FUNDS ASS	P1600683	1787815 SALDANHA BAY /B STO CR	USD	-300 000,00	Dec-16	20/01/2017	1 050 000,00	797
CI.	30-Jan-17	21-Feb-17	STATE FUEL FUNDS ASS	P1700022	1805779 SALDANHA BAY /B STO CR	USD	-300 000,00	Jan-17	21/02/2017	1 050 000,00	805
CI.	31-Mar-17	24-Apr-17	STATE FUEL FUNDS ASS	P1700171	1805779 SALDANHA BAY /B STO CR	USD	-30 000,00	Jan-17	24/04/2017	968 325,66	837 & 836 & 838 & 840
CI.	27-Feb-17	20-Mar-17	STATE FUEL FUNDS ASS	P1700084	1826994 SALDANHA BAY /B STO CR	USD	-700 000,00	Feb-17	20/03/2017	1 050 000,00	815
CI.	31-Mar-17	24-Apr-17	STATE FUEL FUNDS ASS	P1700170	1826994 SALDANHA BAY /B STO CR	USD	-30 000,00	Feb-17	24/04/2017	968 325,66	837 & 836 & 838 & 839
CI.	31-Mar-17	24-Apr-17	STATE FUEL FUNDS ASS	P1700169	1844085 SALDANHA BAY /B STO CR	USD	-330 000,00	Mar-17	24/04/2017	968 325,66	837 & 836 & 839 & 840
CI.	30-Apr-17	24-May-17	STATE FUEL FUNDS ASS	P1700210	1861386 SALDANHA BAY /B STO CR	USD	-330 000,00	Apr-17	24/05/2017	573 110,79	852
CI.	30-Jun-17	10-Jul-14	STATE FUEL FUNDS ASS	P1700342	1871643 SALDANHA BAY /B STO CR	USD	-330 000,00	May-17	vsa paid directly 10/7/17		
CI.	07-Jul-17	24-Jul-17	STATE FUEL FUNDS ASS	P1700351	1889869 SALDANHA BAY /B STO CR	USD	-330 000,00	Jun-17	25/07/2017	678 544,97	876 & 877 & 872 & 884
CI.	31-Jul-17	24-Aug-17	STATE FUEL FUNDS ASS	P1700387	1906998 SALDANHA BAY /B STO CR	USD	-330 000,00	Jul-17	24/08/2017	404 547,65	888
CI.	05-Sep-17	22-Sep-17	STATE FUEL FUNDS ASS	P1700438	1919957 SALDANHA BAY /B STO CR	USD	-330 000,00	Aug-17	22/09/2017	345 858,38	898
CI.	20-Oct-17	24-Oct-17	STATE FUEL FUNDS ASS	P1700502	1938531 SALDANHA BAY /B STO CR	USD	-330 000,00	Sep-17	24/10/2017	425 557,50	908
CI.	31-Oct-17	24-Nov-17	STATE FUEL FUNDS ASS	P1700515	1956651 SALDANHA BAY /B STO CR	USD	-330 000,00	Oct-17	24/11/2017	371 195,81	920
CI.	01-Dec-17	22-Dec-17	STATE FUEL FUNDS ASS	P1700569	1980049 SALDANHA BAY /B STO CR	USD	-330 000,00	Nov-17	22/12/2017	333 354,61	939
CI.	31-Dec-17	24-Jan-18	STATE FUEL FUNDS ASS	P1700602	2261785 SALDANHA BAY /B STO CR	USD	-330 000,00	Dec-17	24/01/2018	380 623,28	963 & 958
CI.	31-Jan-18	23-Feb-18	STATE FUEL FUNDS ASS	P1800046	2276763 SALDANHA BAY /B STO CR	USD	-330 000,00	Jan-18	23/02/2018	334 751,30	990
CI.	28-Feb-18	23-Mar-18	STATE FUEL FUNDS ASS	P1800120	2295757 SALDANHA BAY /B STO CR	USD	-330 000,00	Feb-18	23/03/2018	330 000,00	

Total amount of invoices	- 8 220 000,00
Paid by Vesquin	7 890 000,00
Paid by VSA	330 000,00