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

Case No. **4305/2018**

In the matter between:

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

and

VENUS RAY 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

THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Third Respondent ('**Taleveras**') contracted with the Second Applicant ('**SFF**') on 28 December 2015 to purchase 2 million barrels of Bonny Light grade crude oil ('**Bonny Light**') and 2 million barrels of Basrah grade ('**Basrah**')).[1] For convenience

[1] Taleveras's explanatory affidavit ('**Taleveras EA**'): p 4663, paras 91.3 and 91.2.

we refer to the respective contracts as the '**Bonny Light Purchase Agreement**' and the '**Basrah Purchase Agreement**' (collectively the '**Purchase Agreements**').

2. Taleveras and SFF concluded two contracts for storage of the 2 million barrels of Bonny Light and the 2 million barrels of Basrah in SFF's tanks at its Saldanha Bay facility. Tank 2 was for Basrah, while Tank 6 was for Bonny Light.[2] We refer to the respective contracts as the '**Tank 2 Storage Agreement**' and the '**Tank 6 Storage Agreement**' (collectively the '**Storage Agreements**').

3. Taleveras took possession of the oil, which was already in SFF's Tank 2 and Tank 6, through *constitutum possesorium*.[3] Taleveras transacted directly with SFF in this regard. Taleveras financed the deal with SFF through a separate, private transaction with the Fourth Respondent ('**Contango**') and the Fifth Respondent ('**Natixis**').[4] SFF was not party to that financing arrangement.[5]

4. When it submitted its proposal to purchase the oil, Taleveras was not aware that it would be participating in a public tender process.[6] It understood SFF's request for proposal ('**RFP**') to be an invitation to make an offer for the rotation of oil, in the wake of their earlier failed attempt to conclude and perform a similar deal.[7]

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[2] Taleveras EA: p 4663, paras 91.1 and 91.2.

[3] Taleveras EA: p 4663, paras 91.3 and 91.4.

[4] Taleveras EA: p 4669, para 110; p 4662, para 90; p 4670, para 112.

[5] Taleveras EA: p 4668, para 104.

[6] Taleveras EA: p 4648-4649, para 51.

[7] Taleveras EA: p 4649, para 51. In May 2015, Taleveras and SFF concluded a Commodity Swap Transaction ('CSA'), which permitted Taleveras to procure the shipment of oil from Saldanha Bay and incur an obligation to replace the exported volumes. See Taleveras EA: p 4639-4640, paras 14-16.

5. The negotiations between Mr Gamede (SFF's Acting CEO at the time) and Mr Sanomi (Taleveras's Executive Chairman)[8] that culminated in SFF's RFP were designed: **(a)** to help Taleveras recover some of the losses that it had suffered in the preceding unsuccessful transactions with SFF;[9] **(b)** to avoid the SFF being sued by Taleveras for damages owing to those losses.[10] They were conducted at arm's length and in good faith.[11]

6. When the First Applicant ('**CEF**') and SFF instituted these proceedings, Taleveras first learnt of the public procurement nature of its latest transaction with SFF. This had not been an issue in an earlier transaction with SFF.[12] It also first learnt of the facts, on the basis of which SFF repudiated the Purchase Agreements and Storage Agreements.

7. Taleveras had, and has, no direct knowledge of whether the requisite statutory approvals were obtained for the SFF validly to conclude the Purchase Agreements and Storage Agreements.[13] However, it had no reason to doubt the validity of the Ministerial approval, SFF Board ratification or Mr Gamede's representations that led to the conclusion of the Purchase Agreements and Taleveras's subsequent transactions.[14]

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[8] Taleveras EA: p 4632, para 1.

[9] Taleveras EA: p 4646, para 42; p 4649, para 53. Taleveras had incurred losses to the tune of USD 28.8 million in a failed deal with SFF to gain exclusive storage rights over Tank 3, Saldanha Bay. The dispute culminated in litigation, and Taleveras ultimately lost its exclusive use rights. See Taleveras EA: p 4636-4638, para 10. The breakdown in the commercial relationship as a result of SFF failure to honour the CSA is detailed in Taleveras EA: p 461-4646, paras 19-39. The relationship between Taleveras and Mr Gamede of SFF had become antagonistic from as early at 2015.

[10] Taleveras EA: p 4646, para 43.

[11] Taleveras EA: p 4633, para 4.6; p 4650, para 56.

[12] The history of the CSA and its repudiation by SFF are set out in Taleveras EA: p 4639-4647, paras 11-45

[13] Taleveras EA: p 4670, para 115.

[14] Taleveras EA: p 4633, para 4.5; p 4633-4634, para 4.7.

8. Since the totality of the facts, about whether the statutory requirements were met, lie within SFF's and the former Minister Joemat-Petterssen's exclusive ken, Taleveras is in no position to contradict the Applicants' allegations to the contrary and thereby to oppose their challenge to the validity of the decisions.[15] For convenience, we refer to those aspects of the application challenging the validity of the decisions as the '**merits**' (formerly Part A).[16]

9. Taleveras, therefore, does not oppose the Applicants' case on the merits. However, it strongly disputes the Applicants' allegations that it acted corruptly or collusively with Mr Gamede, on which the Applicants place reliance for the purpose of the merits.[17] To dispel these aspersions of malfeasance, Taleveras delivered an explanatory affidavit ('**EA**'), setting out the correct factual position.

10. Taleveras's involvement in these proceedings is primarily directed at the question of the appropriate just and equitable relief that the Court should grant (formerly Part B). for convenience we refer to this aspect of the application as '**remedy**'.

11. Taleveras had accepted the SFF's tender of restitution of the purchase price and the storage fees paid to it, along with interest, as an appropriate remedy. The Applicants made this tender in their ('**FA**') and supplementary founding affidavit ('**SFA**').[18]

12. Although the Applicants dispute that Taleveras's acceptance of that proposal on remedy amounts to an agreement to settle the dispute, insofar as it pertains to Taleveras, it

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[15] Taleveras EA: 4670, para 115.

[16] Part A and Part B were consolidated by order of the Judge President.

[17] Taleveras EA: 4648-4661, paras 46-86.

[18] Taleveras EA: p 4634, para 4.10, p 4674, para 129; 4675, para 131.7.

ultimately matters not: the Applicants have repeated the '*offer*' in their replying affidavit ('**RA**'), which Taleveras confirms is acceptable; and given the common ground between the Applicants and Taleveras on remedy, it ultimately remains for the Court to approve the Applicants' offer, if it upholds the case on the merits.

13. In its EA, Taleveras put up relevant facts to establish that, on a proper application of restitutionary principles, it should be refunded monies paid to SFF pursuant to the Purchase Agreements and Storage Agreements, if the merits succeed. The Applicants agree. The dispute as to restitution is between Taleveras, on the one hand, and Contango and Natixis, on the other, on the basis of their private commercial arrangement, which had nothing to do with SFF.

14. Contango and Natixis have, irregularly, delivered a further affidavit without seeking prior leave of the Court, in terms of Rule 6(5)(e) and as directed during case management by The Hon. Mr Justice Nuku. We submit that, apart from being presumptuous, its contents, in any event, retard rather than advance their claim to restitution.

15. In these heads of argument, we address these matters in greater detail in the following sequence:

    15.1. Taleveras' acceptance of the Applicants' tender of restitution.

    15.2. The administrative law relationship between Taleveras and SFF, which is in issue before this Court; the nature of Taleveras's separate commercial relationships with Contango and Natixis; and why only Taleveras, and not Contango or Natixis, should receive restitution, if the merits succeed.

15.3. Contango and Natixis's concession that Taleveras never had proper title to on-sell the oil to them, thereby effectively conceding the merits.

15.4. The lack of merit in the allegations of corruption and collusion levelled against Taleveras.

15.5. Conclusion.

ACCEPTANCE OF APPLICANTS' TENDER OF RESTITUTION

The offer and acceptance

16. It is necessary to quote the relevant parts of paras 375-376 of the FA:

> '*375. Put differently, as set out above, the applicants' own stance on remedy is straightforward: the Impugned Transactions are manifestly unlawful. It follows that they are void ab initio. In the present instance, the applicants submit that the just and equitable remedy is for restitution to take place.*
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> *376. . . . The respondents should not be forced to incur the costs in relation to Part A or to seek to defend obviously unlawful and indefensible decisions and contracts when they merely wish to participate in the remedy that this court should order.*'[19]

17. And paragraphs 254-257 of the SFA:

> '*254. Given that the rule of law can only be vindicated through the reversal of the constitutionally invalid conduct, the appropriate remedy would be to set aside the impugned decisions void ab initio and order restitution.*
>
> *255. A declaration of invalidity in this matter would be effective in that the applicants will retain the strategic oil reserves which, in turn, will guarantee South Africa strategic reserves in the event of an emergency. Further, given*

[19] FA: p 146, paras 375-376.

the involvement of the Traders in the conceptualization of the idea to sell the strategic reserves, the collusion and fraud which resulted in the strategic reserves being sold at a discount during a period when oil prices were already suppressed, a declaration of invalidity would be effective and the interests of those who perpetuated unlawfulness (the Traders) would not be protected at the expense of the general South African public, that in any event will end up footing the bill for the unlawful sale.

256. Restitution is appropriate in this manner in that it will place the parties in the position they were in prior to the constitutionally invalid conduct. The practical effect of any order of this nature is that SFF would have to pay the Traders the monies received in respect of the Impugned Transactions, i.e. the purchase prices and the storage fees received to date.

257. SFF, as a result, would retain ownership of the strategic oil reserves.'[20]

18. In correspondence to SFF, Taleveras indicated that it accepted, unconditionally, the Applicants' tender of restitution of the purchase price and storage fees, together with interest.[21] Taleveras submits that this was sufficient to constitute an agreement with the Applicants to settle the dispute, insofar as Taleveras was concerned.

19. However, even if Taleveras erred in concluding that a compromise had been reached, at that stage, as the Applicants' suggest, the position in the RA leaves no doubt as to the Applicants' intention to make an offer to Taleveras.

20. Paragraphs 327 to 344 of the RA are unambiguous:

20.1. First, it is stated at paragraph 327 of the RA:[22]

[20] SFA: p 920-921, paras 254-257.

[21] Taleveras EA: p 4675, para 131.7.

[22] Applicants' RA: p 5104, para 327.

'*SFF therefore proposes to pay the respective traders a total amount of USD334,038, 187.67 as of 31 May 2020 which includes repayment of the purchase price, payment of capitalised interest on the purchase price, repayment of storage fees received, and payment of interest in the storage fees. The amount can be summarised as follows in respect of each respective trader:*

327.1 Taleveras: repayment of the purchase price in the amount of USD112,000,000.00; capitalised interest in the amount of USD9,380,680.93 as on 31 May 2020, repayment of the storage fees received in the amount of USD11,865,600.00; and interest on the storage fees paid in the amount of USD922,782.25. As on 31 May 2020, the total amount to be paid to Taleveras was therefore USD134,169,063.18.' (Emphasis added.)

20.2. Secondly, it is stated at paragraph 336 of the RA:[23]

'*As part of restitution, the applicants have therefore offered to repay the amount of USD280,830,970.50, being the purchase price, to the respective traders.*' (Emphasis added.)

20.3. Here, the Applicants use the perfect tense, denoting that they have already made an offer to repay Taleveras, among other traders. This is consistent with Taleveras's understanding of the position.

20.4. Thirdly, it is stated at paragraph 340 of the RA:[24]

'*SFF will therefore pay the capitalised interest earned on the purchase price to the respective traders as part of restitution.*' (Emphasis added.)

20.5. The amounts proposed to be repaid to Taleveras are indicated in the tabular summary in the previous paragraph 339: USD112,000,000.00 for capital and USD9,380,680.93 for interest.

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[23] Applicants' RA: p 5107, para 336.

[24] Applicants' RA: p 5108, para 340.

20.6. Fourthly, it is stated in paragraph 342 of the RA:[25]

> '*So even though SFF has invoiced the respective traders a total amount of USD 30,764,463.44 in the period between 1 January 2016 to 31 March 2018, it has only actually received total of amount of USD 27,543,843.44. SFF has therefore tendered to pay back the respective traders the total amount of storage fees actually received as part of restitution.*' (Emphasis added.)

20.7. The amounts proposed to be repaid to Taleveras are indicated in the tabular summary in the previous paragraph 341: USD12,944,256.00 for capital and USD11,865,600.00 for interest.

20.8. Again, the Applicants use the perfect tense to denote that they have already made the tender to repay Taleveras, among other traders. This too coheres with Taleveras's understanding the of the true position. In having made these tenders under oath, Taleveras also reasonably assumes that SFF has obtained the requisite approvals and authorisations for a Court order in the terms proposed to be effective forthwith.

21. If any spectre of uncertainty as to consensus reached between Taleveras and the Applicants concerning restitution existed before the delivery of the RA, we submit that the Applicants' most recent explication under oath puts the matter beyond doubt. The Applicants made a tender to Taleveras to settle the dispute, and Taleveras accepted it unconditionally. Should the Court find differently, then at the very least the clear import of the RA is to make such an offer; and, if so, Taleveras's instructions are to accept it.

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[25] Applicants' RA: p 5109, para 342.

22. Taleveras, of course, accepts that any agreement to settle the dispute with the Applicants must be satisfactory to the Court, as the impugned conduct is administrative action.[26] To permit a decision-maker to rescind its own decision by mere consensus would offend the precept against administrative self-help.[27] However, the Court's *imprimatur* is not an ingredient for consensus between the parties, which we submit has been firmly established given the terms of the Applicant's '*offer*'; it is relevant, rather, to the legal efficacy of that agreement.

Agreement to settle is legally competent

23. In *Eke v Parsons*,[28] the Constitutional Court (per Madlanga J) unanimously identified three requisites for making an agreed settlement an order of court:

23.1. First, the order must relate directly or indirectly to an issue or *lis* between the parties.[29] (We return to this issue later in explaining why ordering restitution to Contango and Natixis would be incompetent.)

23.2. Secondly, the terms must be legally and practically capable of performance. This implies consistency with the Constitution, any other laws and public policy.[30]

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[26] Taleveras EA: 4676, para 133.

[27] *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC) at para 97, referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) and *MEC for Health, Eastern Cape v Kirland Investments (Pty)* 2014 (3) SA 481 (CC).

[28] 2016 (3) SA 37 (CC).

[29] Id at para 25.

[30] Id at para 26.

23.3. Thirdly and lastly, the agreement must hold some practical and legitimate advantage.[31]

24. The Constitutional Court applied the *Eke v Parsons* test in the context of administrative law in *ACSA v Big Five*.[32]

25. We submit that, if this Court accepts that Taleveras and the Applicants have reached a compromise, that agreement would meet the test in *Eke v Parsons* for the following reasons:

25.1. An order of restitution to Taleveras would flow directly from the invalidation of the administrative decisions at issue (i.e. the conclusion of the Purchase Agreements and associated Storage Agreements). It would, therefore, be directly related to the *lis* before this Court.

25.2. Ordering that Taleveras be placed back in the position that it would have been in, had the Purchase Agreements and Storage Agreements not been concluded has been recognised as a competent just an equitable remedy for invalid administrative action.

25.3. In this regard, the Constitutional Court held (per Froneman J) in *Allpay (remedy)*,[33] in respect of the successful tender, Cash Paymaster, the award to

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[31] Id.

[32] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC) ('***ACSA v Big Five***'). In this case, the Constitutional Court was not satisfied that the agreed settlement complied with the second element of the test. However, it is plain from the judgment that the test in *Eke v Parsons* is applicable to agreements settling disputes about administrative decisions.

[33] *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) ('***Allpay (remedy)***').

which was declared invalid, that invalidation of the tender should not result to any loss to Cash Paymaster. Equally, Cash Paymaster should not derive a benefit from the unlawful contract.[34]

25.4. In doing so, Froneman J drew on the principles underpinning our common law on restitution:

'The dissolution of a contract creates reciprocal obligations seeking to ensure that neither contracting party unduly benefits from what has already been performed under a contract that no longer exists. This is evidenced in cases of rescission or cancellation of a contract where a party claiming restitution must usually tender the return of what she received during the contract's existence or, if return is not possible, explain the reasons for impossibility.'

25.5. Accordingly, we submit that restitution to Taleveras would be consonant with the law and principles of equity, as recognised by the Constitutional Court.

25.6. It bears repetition that Taleveras – unlike Contango and Natixis – is not seeking consequential loss or any other benefit which should not flow from an invalid administrative decision.

25.7. Additionally, restitution would accord with Courts' favourable disposition towards settlement, which provides for the orderly and effective administration of justice,[35] and achieves an important policy objective of bringing finality to litigation.[36]

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[34] Id at para 67.

[35] *Eke v Parsons* above n 28 at para 23, citing with approval the dictum in *PL v YL* 2013 (6) SA 28 (ECG) at para 36.

[36] *Eke v Parsons* above n 28 at para 59.

25.8. Lastly, it is the Applicants' case that the legitimate and practical advantage of invalidity coupled with restitution is that SFF would retain its strategic oil reserves, and ownership of it, which would insure the public against the risk of an emergency oil shortage.[37]

25.9. It is Taleveras's complimentary case that the legitimate practical advantage to Taleveras is that restitution would place it in a position to potentially to resolve the contractual disputes that have arisen with Contango and Natixis, as a result of the impugned administrative decisions. We elaborate on the nature of this relationship in the next section.

25.10. We submit, as Madlanga J identified in *Eke v Parsons*,[38] that any suggestion that what Taleveras regards as an agreement of settlement with the Applicants, is merely conditional upon the Court's approval would be formalistic. The Court must, in any event, sanction the agreement for it to be effective in law, but it remains an agreement.

25.11. As the Supreme Court of Appeal (per Dlodlo AJA, as he then was) recently held in *Gridmark CC v Razia Trading CC*:[39] '*The offer of compromise must therefore be accepted in its terms in order to form a contract. The acceptance ought to be a mirror image of the offer in order to constitute a contract.*'[40]

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[37] SFA: p 921, para 255-256.

[38] Above n 28 at para 20.

[39] [2019] ZASCA 18.

[40] Id at para 16.

25.12. We submit that Taleveras's unconditional acceptance of the Applicants' tender of restitution fits seamlessly with this dictum. It satisfies the qualities of consensus, certainty, legality and possibility of performance.[41]

26. If, however, the Court does not find that Taleveras has now reached agreement with the Applicants, which agreement requires only the Court's sanction, we submit that given their common stance, one would arrive at the same result in terms of section 172(2)(b) of the Constitution or section 8 of the Promotion of Administrative Justice Act 3 of 2000.

27. On either approach, we submit, restitution to Taleveras as offered in paragraphs 327, 336, 340, 342 and 344 would be competent and appropriate.

ONLY TALEVERAS ENTITLED TO RESTITUTION

28. Taleveras has explained in its EA why it – and not Contango or Natixis – is the correct party to receive restitution of the purchase price and storage fees, together with interest.[42] Significantly, the Applicants make common cause with Taleveras in this regard.[43]

29. In what follows, we elaborate on the contractual relationships, and the absence of any contractual *vincula* among SFF, Contango and Natixis that are pertinent to the matter of restitution.

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[41] Id at para 15. Indeed, there is nothing to suggest in the Applicants various statements under oath that there is any impediment that might render performance impossible. Such an about-turn would be surprising.

[42] Taleveras EA: p 4672-4674, para 123-129.

[43] Applicants' RA: p 5104, para 327; p 5012, para 21.

30. At the outset, it must be mentioned that Contango and Natixis have delivered a supplementary affidavit without prior leave of the Court with a view to requesting leave only at the hearing of the main application. Taleveras submits that the Court should take a dim view of this irregular procedure. We submit that the affidavit should be disallowed for that reason, as well as the fact that it, insofar as it concerns Taleveras, adds naught to the debate.

31. Underpinning our submission is the following:

31.1. It is common cause among the Applicants, Taleveras, Contango and Natixis that the latter two are strangers to SFF's decision to conclude the Purchase Agreements and Storage Agreements with Taleveras.[44]

31.2. Taleveras's contractual arrangements with Contango and Natixis were not grounds on which its proposal to SFF was evaluated and awarded.

31.3. SFF is not bound by, or in any way affected by, the commercial terms that Taleveras agreed to with third parties, regardless of the fact Taleveras may have putatively transferred ownership to one of the third parties.

32. Taleveras and SFF have between them the following contracts: the Basrah Purchase Agreement; the Bonny Light Purchase Agreement (both of which had been amended,[45] and novated, was subsequently rescinded);[46] the Tank 2 Storage Agreement; and the Tank 6 Storage Agreement.

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[44] Taleveras EA: p 4634, para 4.11; p 4673, para 127.

[45] Taleveras EA: p 4665, para 94-95.

[46] Taleveras EA: p 4666-4667, paras 98.1-98.2.

33. On 16 January 2016, SFF issued tank warrants to Taleveras to uplift the Basrah in Tank 2 and Bonny Light in Tank 6.[47]

34. Taleveras and Contango concluded a Master Repurchase Agreement ('**MRA**') for Contango to purchase the oil from Taleveras (following receipt of ownership from SFF), and for Taleveras to repurchase the oil from Contango at a later stage. The MRA was concluded on 8 February 2016, after Taleveras had submitted its proposal to SFF and been awarded the contracts.[48]

35. Also on 8 February 2016, Taleveras's parent company, Charmondel Holdings Limited ('**Charmondel**'), undertook to guarantee Taleveras's performance under the MRA by concluding a deed of guarantee with Natixis in favour of Contango.[49]

36. On 10 February 2016, Natixis provided financing to Taleveras, which Taleveras used to purchase the oil from SFF.[50] Neither Contango nor Natixis were the purchasers.

37. A few days prior, on 5 February 2016, Taleveras had concluded a Logistics Services and Agency Agreement with Contango.[51] However, when Taleveras submitted its proposal to SFF, on 4 November 2015, when SFF awarded the contract to it, and when Taleveras paid for the oil, Taleveras was not acting as Contango's agent. None of the parties dispute this or the fact that Taleveras acquired ownership in its own right.

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[47] Taleveras EA: p 4665, para 93.

[48] Taleveras EA: p 4669, para 108.

[49] Taleveras EA: p 4669, para 109.

[50] Taleveras EA: p 4669, para 110.

[51] Taleveras EA: p 4669, para 106.

38. Indeed, on 4 February 2016, in an earlier contract among Taleveras, SFF and Contango ('**Side Letter**'), it was expressly acknowledge that Taleveras was the owner of the oil and that it would, in terms of the Side Letter, cede its rights in the oil to Contango with SFF's consent.[52] The Side Letter merely recorded that the basis of the cession was to give effect to the MRA, which Taleveras and Contango subsequently concluded.

39. Notable about the Side Letter are the following:

39.1. First, Taleveras did not cede or assign the Tank 2 Storage Agreement or Tank 6 Storage Agreement to Contango. The Side Letter expressly provides for the contrary.[53] (Taleveras did not do so in terms of any other instrument, which would also have required SFF's consent.)

39.2. Taleveras, therefore, remains the principal contracting party under the Storage Agreements with SFF and liable for storage fees, as recorded in the Side Letter.[54] (It also did not act as Contango's agent at the time of concluding the Storage Agreements or thereafter.)

39.3. Secondly, SFF was not privy to Taleveras's commercial arrangements with Contango, other to the fact that ownership was to be transferred to give effect to the MRA.

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[52] Taleveras EA: p 4634, para 4.8, p 4668, para 102.

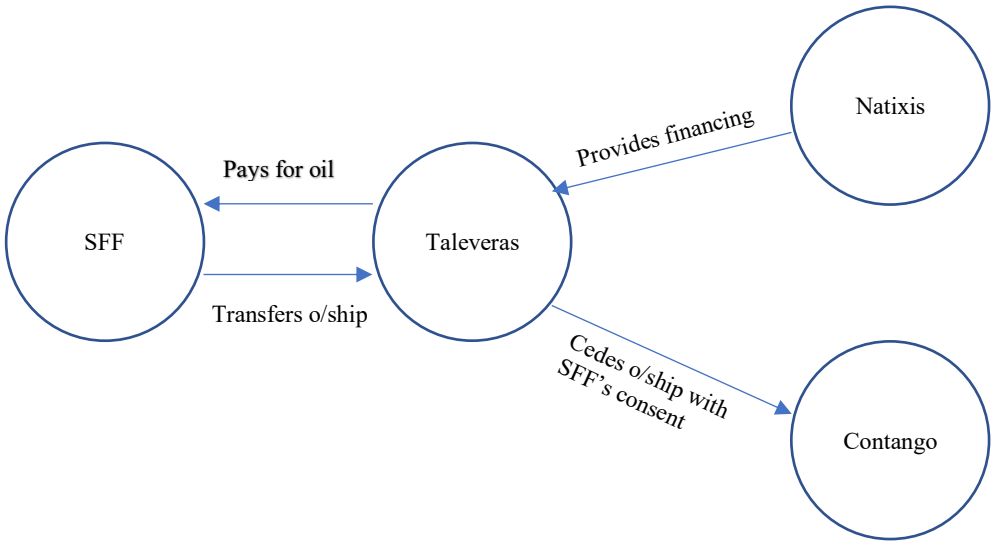
[53] Annexure PV2 to Contango's AA: p 2834, para 3.1(d): '*CTSA is not a party to or bound by the terms of the Storage Agreements*'.

[54] Annexure PV2 to Contango's AA: p 2833, para 2.3:

> 'Taleveras hereby confirms, in accordance with clause 16.3 of each Storage Agreement, that it remains liable to pay all storage fees and other related costs in accordance with clause 4 of each Storage Agreement.'

39.4. In particular, SFF was not involved in envisaged repurchase of the oil by Taleveras from Contango, and significantly, it was not party to any of the financial arrangements related to the MRA. Contango's motive and conditions for requiring that a repo transaction be concluded with Taleveras are irrelevant to these proceedings.[55]

40. The relationships among Taleveras, SFF, Contango and Natixis may be represented graphically as follows:



41. Apart from having consented to cession of ownership of the oil from Taleveras to Contango, and acknowledging Contango's entitlement to the oil in Tanks 2 and Tank 6, there is no *vinculum iuris* between SFF and Contango. Taleveras remains the counterparty to the Storage Agreements with SFF and liable in its own capacity.

42. Equally, there is no *vinculum iuris* between SFF and Natixis.

43. It follows, we submit, that if the decision to sell the oil to Taleveras and to conclude the Purchase Agreements and Storage Agreements, are declared invalid, it would mean that

[55] Contango's irregular further answering affidavit ('**FAA**'): p 5621, para 26.

neither Taleveras nor Contango acquired ownership from SFF. SFF remained the owner of the oil all along.

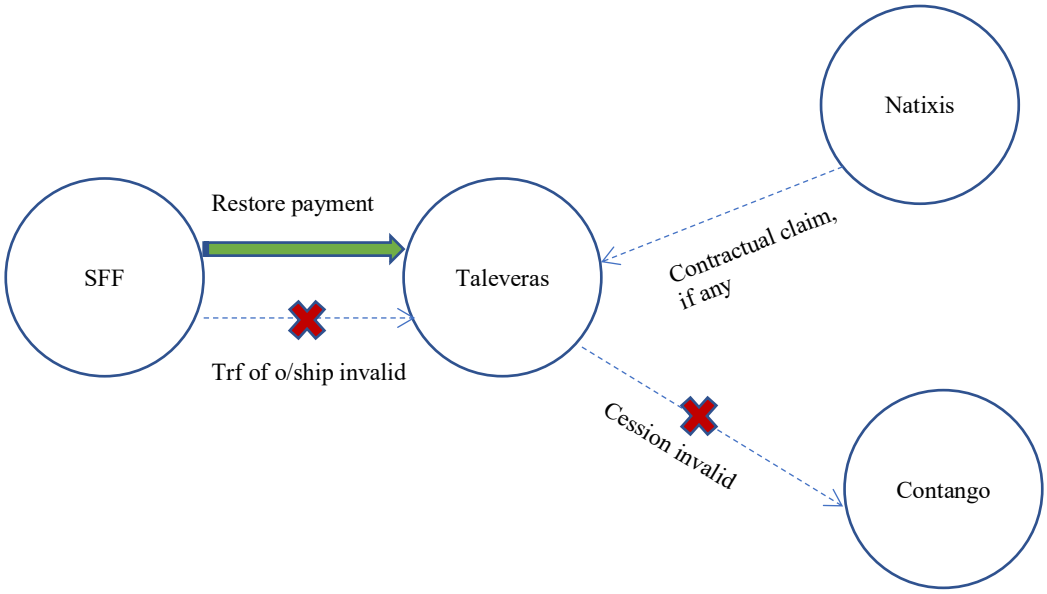
44. On ordinary principles of restitution, therefore, the undoing of the transactions would entail the following:

44.1. SFF must restore the purchase price, storage fees actually paid, together with interest, to Taleveras, as purchaser.

44.2. SFF would have no obligation to restore anything to Contango. All SFF did was to acknowledge Contango's assumed title to the oil, for which it received no consideration from Contango.

44.3. SFF's relationship to Natixis is even more remote, as it had nothing to do with the financing arrangement between Taleveras and Natixis.

45. The restorative ebb may be depicted graphically as follows:



46. Restoration of the purchase price and paid storage fees, together with interest, which Taleveras made to SFF in its own right, would place Taleveras in a position to address its contractual obligations to Contango and Natixis.

47. The Applicants, evidently, accept that it would be inappropriate for them to intercede, potentially disrupting the contractual matrix among Taleveras, Natixis, Contango and Charmondel, which provided a guarantee Natixis in favour of Contango.

48. Were the Applicants, say, to pay Natixis instead, Taleveras and potentially Charmondel would be exposed to contractual claims by Contango and Natixis (through no fault of Taleveras's), who will already have received undue compensation from SFF. This would be unduly harsh and contrary to the interests of justice, we submit. The Applicants accepts this too.[56]

49. Importantly, the Court is not in a position to resolve the contractual knot among Taleveras, Contango, Natixis and potentially Charmondel, as those issues are alien to the *lis* before the Court.

50. Further, there is an important policy reason for this Court not 'short circuiting' the web of relationships by paying Contango or Natixis directly: doing so would treat Contango and Natixis as if they were the tenderers themselves and the true beneficiaries of a favourable administrative decision. It would reduce Taleveras to nothing more than a front for Contango, which would be incongruous with the truth of the matter and proper procurement.

[56] Applicants' RA: p 5012-5013, para 21.2.

CONTANGO'S CANCELLATION OF MRA

51. Taleveras has raised in its EA the fact that Contango had, as early as May 2018, effectively accepted that the sale of oil by SFF to Taleveras, and the latter's cession of ownership to Contango, was invalid.[57]

52. In its irregular further affidavit, Contango denies that it ever accepted that the merits of this application were good by cancelling the MRA with Taleveras. It attempts to shift the emphasis of breach notice, yet steers clear from its actual terms. Contango tries to argue that its reason for cancelling the MRA was because Taleveras did not perform its obligation to repurchase the oil on time.[58]

53. Naturally, Taleveras could not have done so, as SFF refused to release the oil and had instituted these proceedings.

54. The true reason for Contango's cancellation is inescapably memorialised in the notice of cancellation. Because Contango has placed the import of the notice in dispute, it has become necessary to quote from it and the applicable clauses of the MRA. The notice of cancellation provides in relevant part:

> *'This is a notice of termination. Contango hereby terminates the MRA with immediate effect as of the date of this letter 14 May 2018 under Clause 12.1(f) of the MRA, and additionally under Clause 13.3(c) of the MRA.*
>
> *Per the Repurchase Confirmation dated 8 February 2016, the Repurchase Date under the MRA was 5 April 2018. However, on 5 April 2018 the Repurchase of the Product by Taleveras did not take place as specified in Clause 11 of the MRA.*

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[57] Taleveras EA: p 4672, para 119.

[58] Contango's SAA: p 5623-5624, paras 30-31.

On 12 March 2018 Central Energy Fund SOC Limited ("CEF") and Strategic Fuel Fund Association ("SFF") filed a Notice of Motion and Founding Affidavit in the Western Cape High Court, Cape Town, South Africa (the "Proceedings"). The stated purpose of the Proceedings is to set aside as invalid and void ab initio the sale and purchase contracts dated 28 December 2015 under which SFF sold the oil that is the subject of the MRA (the Product) to Taleveras, and all related agreements. The Product is currently stored in Tank 2 and Tank 6 at Saldanha Bay under the control of SFF pursuant to the storage agreements between Taleveras and SFF dated 15 December 2015. However, SFF has refused to release the Product to Contango pending resolution of the Proceedings.

Taleveras is in breach of the MRA, including (without limitation) the warranties at Clauses 8.1(b), 8.1(e), 8.1(f), 8.1(h), 8.1(i), 8.1(i), 8.1(n) and/or 8.1(p)(i) and (ii). Breach of the representations and warranties in Clause 8.1 constitutes a Termination Event under Clause 12.l(f) of the MRA. Accordingly, Taleveras confirms that the MRA is hereby terminated pursuant to Clause 12.1(f).

Further and alternatively, the circumstances described above constitute a Force Majeure Event within Clause 13 .1 of the MRA preventing and/or substantially delaying Contango from carrying out its obligations under the MRA. These circumstances have been continuing for more than one month, and accordingly pursuant to Clause 13.3(c) Contango is entitled to terminate its obligations under the MRA (including any outstanding Transaction), which it now does with immediate effect. Contango holds Taleveras responsible for all and any losses caused by Taleveras' breach of the MRA and Contango fully reserves all of its rights.' (Emphasis added.)[59]

55. The paragraphs in Clause 8.1 of the MRA, on which Contango relied in cancelling the MRA – clauses 8.1(b), 8.1(e), 8.1(f), 8.1(h), 8.1(i), 8.1(i), 8.1(n) and/or 8.1(p)(i) and (ii) – all relate to warranty of title.[60] They do not relate to failure to repurchase the oil, in terms of clause 11. Contango linked its ground for cancelling the MRA (in clause 12.1) expressly to the warranty of title (in clause 8.1).

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[59] Annexure IS55 to Taleveras's EA: p 4946-4947.

[60] Annexure PV2 to Contango's AA: p 2885-2887, clause 8.1.

56. We submit that, properly construed, the reason for Contango's cancellation of the MRA was because it believed that Taleveras's warranty that it was owner of the oil at the time of concluding the MRA was false. It did so in the light of the institution of this application. Contango's insistence that it is owner, despite cancelling the MRA, we submit should be viewed with circumspection.[61]

57. This is not inconsistent with the stance Contango takes in its AA. It opposes the application on two bases: undue delay and in relation to remedy.[62] It does not defend all the bases on which the Applicants allege the Purchase Agreements, Storage Agreements and Side Letter are invalid (i.e. the merits). Contango's protestations otherwise are unsupported.[63]

58. Although Contango's cancellation of the MRA should not alter the fact that Taleveras should receive restitution, it is important to debunk the unfounded allegations that Taleveras has acted opportunistically and dishonestly by misleading the Court – a most grave accusation.[64] Taleveras has, to the contrary, endeavoured to be frank and open in these proceedings. The tone of Contango's irregular further affidavit is also intemperate and regrettable.

59. As to the restitution of storage fees, Taleveras at all material times was, and is, the principal counterparty to the Storage Agreements with SFF. This is expressly recorded in the Side Letter. Contango's assertion that Taleveras was acting as its agent in paying

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[61] Contango's FAA: p 5620, para 20.

[62] Contango's AA: p 2721-2723, paras 20-25.

[63] Contango's FAA: p 5632, paras 53-54.

[64] Contango FAA: p 5618, para 13; p 5618, para 9.3;

the storage fees is contradicted by the Side Letter and the absence of contrary evidence.[65] It falls to be rejected.

ABSENCE OF TURPITUDE

60. Taleveras has endeavoured, painstakingly, to present the Court with as much detail as possible to meet the allegations of corruption levelled at Taleveras with reference to activities allegedly involving **(a)** Lengard Projects Limited ('**Lengard**') and Mr Gamede and **(b)** Mr Godfrey Mulaudzi and Mr Gamede.

61. The Applicants' theory is that Mr Gamede received illicit payments from Lengard and Mr Mulaudzi, presumably to have Taleveras's response to SFF's RFP unduly preferred. Taleveras denies this and has put up a detailed factual response in answer. Before canvassing the genuine disputes of fact to which these give rise, we first point out relevant concessions made by the Applicants.

61.1. First, as far as ATM payments to Mr Gamede are concerned, the Applicants concede that '*[t]here is no evidence at this stage directly tying these ATM payments to any particular respondent.*'[66]

61.2. Secondly, the Applicants accept that '*the true reason*' that the SFF sold the oil to Taleveras was to settle their historical disputes over the SFF's repudiation of the 2014 Storage Agreement and the cancellation of the 2015 Commodity Swap

[65] Contango's FAA: p 5627, para 39; para 5635, p 61.4.

[66] Applicants' RA: p 5018, para 35.

Transaction ('**CSA**').[67] The details of these transactions are in Taleveras's EA and only the inferences to be drawn from them are addressed below.

61.3. Thirdly, notwithstanding the porous theory that Taleveras acted corruptly or collusively with Mr Gamede, the Applicants believe that restitution of the purchase price and storage fees, together with interest, to Taleveras would be just and equitable.

61.4. Wisely, with respect, they do not suggest that Taleveras should not receive restitution owing to alleged turpitude on its part. Nonetheless, Taleveras regards the imputations of misconduct as potentially damaging to its reputation. It has, therefore, taken the task of responding to the accusations most seriously.

62. The Applicants argue that Taleveras's explanation for the payments to Mr Gamede '*is so far-fetched that it should be rejected on the papers.*'[68] However, they cannot meet the threshold for rejecting uncreditworthy disputes of fact. The test was articulated best by the Supreme Court of Appeal (per Cameron JA, as he then was) in *Fakie v CCII Systems (Pty) Ltd*:[69]

> '*More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In* Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or*

[67] Applicants' RA: p 5116, paras 378, 379, 380.2.

[68] Applicants' RA: p 5013, para 22.

[69] 2006 (4) SA 326 (SCA).

bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.' (Emphasis added. Footnotes omitted.)

63. We submit that the Applicants cannot show on the facts that Taleveras's denial of the allegations of corruption are uncreditworthy, palpably implausible, fictitious, demonstrably and clearly unworthy of credence or so far-fetched as to be rejected on the papers alone.

64. As regards Lengard, Taleveras has explained,[70] at some length and with reference to supporting documentation, that—

64.1. Lengard is a company that was owned by Mr Sanomi. It proposed to provide SFF with additional financial comfort by issuing a bank letter of credit in support of Taleveras's response to the SFF's RFP.

64.2. Lengard's incorporation details, shareholder make-up, business activities and employees were explained in the EA with supporting documentation and statements under oath by Ms Eva Tolentino and Ms Ejus Arubi, who are also employees of Taleveras in Dubai.

[70] Taleveras EA: p 4651-4656, para 63-73.

64.3. Lengard did not receive any invoices from Mr Gamede for unspecified legal services. The Applicants have presented evidence of nothing more than Mr Gamede having furnished those invoices to his own bankers. Nothing links them to Lengard.

64.4. Lengard did not make payment of any sums of money into Mr Gamede's bank account. Nothing in the FNB in-Contact payment advice put up by the Applicants establishes any link to Lengard.

65. As regards Mr Mulaudzi, Taleveras has explained,[71] also at some length and with reference to supporting documentation that—

65.1. Mr Mulaudzi is a respected former diplomat for the Republic of South Africa, who was formerly posted to Nigeria. He had established a business relationship with a Nigerian company called Omuza Global Services Nigeria Limited ('**Omuza**').

65.2. When he returned to South Africa he did work with Omuza by providing a consultancy service. Mr Mulaudzi's venture with Omuza had nothing to do with Taleveras or with Taleveras Oil (SA) (Pty) Ltd, of which became a director.

65.3. Mr Mulaudzi admits and explains the nature of his relationship with Mr Gamede. He explained that Omuza wanted him to engage Mr Gamede's

[71] Taleveras EA: p 4656-4661, para 74-86.

services to obtain legal advice on the investment regulatory framework in SADC and for protection of foreign investments in Botswana.

65.4. Mr Gamede invoiced Mr Mulaudzi for his work, and Mr Mulaudzi, in turn, obtained the funds from Omuza. In respect of the first of Mr Gamede's two invoices, Mr Mulaudzi received a payment from Omuza, which he immediately transferred to Mr Gamede. In respect of the second invoice, payed Mr Gamede in full and final settlement himself and then recouped the money from Omuza.

65.5. The details of Mr Mulaudzi's dealings with Mr Gamede have been confirmed by the former in a confirmatory affidavit. If necessary, the details of the transactions will be addressed in oral argument.

66. We submit that, having regard to the explanation and the supporting documentation, whose authenticity is not impugned, the version put up by Taleveras is not one falling into the extreme category being demonstrably, clearly incredible or untenable as to be rejected. Taleveras's version raises a genuine dispute of fact, which ought to be resolved in its favour, especially having regard to the impact on Taleveras's and Mr Sanomi's reputation.

CONCLUSION

67. We submit that, whether the Court should find that an agreement of settlement has been reached between Taleveras and SFF or whether the parties are merely at one as to the appropriate remedy the Court should order, it would be just and equitable to order restitution of the purchase price and storage fees, together with interest to Taleveras.

68. We shall make submissions on costs at the hearing, if necessary.

L S KUSCHKE SC
U K NAIDOO
Chambers, Cape Town
21 August 2020

LIST OF AUTHORITIES

1. *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC) at para 97, referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) and *MEC for Health, Eastern Cape v Kirland Investments (Pty)* 2014 (3) SA 481 (CC)

2. *Eke v Parsons* 2016 (3) SA 37 (CC)

3. *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC)

4. *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)

5. *PL v YL* 2013 (6) SA 28 (ECG) at para 36

6. *Gridmark CC v Razia Trading CC* [2019] ZASCA 18

7. *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)