IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO 4305/19

In the matter between:

CENTRAL ENERGY FUND SOC LIMITED	First Applicant
STRATEGIC FUEL FUND ASSOCIATION	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
VERQUIN TRADING (PTY) LIMITED	Sixth Respondent
VITOL ENERGY SA (PTY) LIMITED	Seventh Respondent
VITOL SA	Eight Respondent
MINISTER OF ENERGY	Ninth Respondent
MINISTER OF FINANCE	Tenth Respondent

HEADS OF ARGUMENT ON BEHALF OF THE SECOND RESPONDENT ("GLENCORE")

INTRODUCTION

1. This is a review application (**"the application"**) brought by the Central Energy Fund Soc Limited (**"the CEF"**), as first applicant, and the Strategic Fuel Fund Association NPC (**"the SFF"**), as second applicant (where appropriate, jointly, **"the applicants"**).

2. The background to the review application, in short, is the conclusion of a series of agreements (**"the Impugned Agreements"**) by the SFF, the net effect of which was the disposal of South Africa's approximately ten million barrels of strategic oil reserves (**"the oil reserves"**).

3. The transactions that seek to give effect to the disposal of the oil reserves, which the applicants wish to have set aside, are referred to in these heads of argument as "**the Impugned Transactions"**.

4. What is at issue, further, are certain decisions which preceded the conclusion of the Impugned Agreements (**"the Impugned Decisions"**).

5. The Impugned Decisions include a decision by the SFF to sell three million barrels of Bonny Light crude oil (**"the Glencore crude oil"**) to the first respondent (**"Venus"**). The Glencore crude oil was on-sold by Venus to Glencore.

6. The SFF is a non-profit company of which the CEF is the sole shareholder. The Government of South Africa acquires and holds the oil reserves through the SFF.

7. The CEF and the SFF are both state-owned companies with a legislative mandate to advance the commercial interests of South Africa in the energy sector, and are Organs of State as contemplated in section 239 of the Constitution and section 1 of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**).

8. The applicants fall under the control and authority of the ninth respondent, the Minister of Energy (**"the Minister"**).

9. The founding affidavit was commissioned on **12 March 2018**[1], but the amended notice of motion initially relied upon by the applicants is dated **29 May 2018**.[2]

10. Glencore submits that the applicants delayed inordinately in bringing this application, a matter which is dealt with in due course in these heads of argument. Indeed, the notice of motion of **29 May 2018** acknowledges this.

11. Paragraph 1 reads as follows:[3]

"Granting the applicants an extension in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for launching this application outside the 180 day period contemplate in s7(1) of PAJA, and/or to the extent necessary, condoning the applicants' delay in bringing this application."

12. In essence, the applicants initially sought the following relief:

[1] Record, p 148
[2] Record, p 8
[3] Record, p 2

12.1. to review and set aside the allegedly unlawful decision(s) taken by the Minister to approve the Impugned Agreements and Impugned Transactions;

12.2. to review and set aside the allegedly unlawful decision(s) taken by Mr Sibusiso Gamede (**"Mr Gamede"**), the former acting Chief Executive Officer of the SFF, to conclude the Impugned Agreements and the Impugned Transactions;

12.3. to have the Impugned Agreements and the Impugned Transactions declared as constitutionally invalid and unenforceable;

12.4. to have the process that was followed by Mr Gamede in procuring the first to eighth respondents' services for the Impugned Transactions declared as constitutionally invalid; and

12.5. to obtain an order for a just and equitable remedy.

13. The application was initially launched in two parts: Part A sought an Order reviewing and setting aside the Impugned Decisions and the Impugned Agreements (**"the Part A relief"**), while Part B was intended thereafter to deal with the issue of what would constitute just and equitable relief (**"the Part B relief"**).

14. The Part A relief and the Part B relief were, however, consolidated pursuant to the directive issued by the Judge President of this Division, on **29 August 2018**.

15. In their replying affidavit the applicants – without seeking leave to do so as contemplated in Rule 28 of the Uniform Rules of Court – have sought unilaterally to amend the relief sought in the notice of motion (**"the amended notice of motion"**).[4]

16. At paragraph 23.3 of the replying affidavit[5] it is said that the amended notice of motion *inter alia* makes provision for the fact that *"the proceedings have been consolidated with the result that there is no longer a 'Part A' and a 'Part B'."*

17. However, what is noticeably absent from the amended notice of motion is any reference to just and equitable relief. In short, the amended notice of motion does not appear to achieve what it is said to achieve, namely to take into account the consolidation of the Part A and Part B relief.

18. We submit that this is impermissible.

19. Quite apart from the fact that the amended notice of motion now conflicts with the directive issued by the Judge President, it blithely ignores the fact that Glencore has prepared its answering affidavit – and engaged with an expert – for purposes of dealing primarily with the question of just and equitable relief.

20. The purported amendment to the notice of motion sought, to the extent that it deletes the Part B relief, should accordingly be refused. The applicants cannot unilaterally remove the substance of the application and thereby prevent a determination of the appropriate relief as required by the Constitution.

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[4] The amended notice of motion is annexure "TM2" to the RA, record, p 5208
[5] Record, p 5016

21. The papers in the application are voluminous, and run to almost 6000 pages. The founding papers alone comprise the following:

21.1. a notice of motion, and a founding affidavit deposed to by Mr Luvo Lincoln Makasi (**"Mr Makasi"**), commissioned on **12 March 2018**;

21.2. a first supplementary founding affidavit deposed to by Mr Makasi, commissioned on **29 May 2018**;

21.3. an interim supplementary founding affidavit deposed to by Mr Makasi, commissioned on **21 November 2018**; and

21.4. a supplementary founding affidavit deposed to by Mr Mojafela Godfrey Moagi (**"Mr Moagi"**), commissioned on **28 February 2020**.

22. Glencore takes issue with what is proposed by the applicants by way of just and equitable relief and motivates what it submits would be appropriate just and equitable relief as required to be determined by the Constitution. In particular:

22.1. the applicants' approach to just and equitable relief envisages the SFF retaining ownership of the oil reserves (including the Glencore crude oil) and the SFF repaying the purchase price and storage fees to the traders with whom it concluded the Impugned Agreements;

22.2. the just and equitable relief so proposed notably and concerningly does not apply to and ignores the position of Glencore, because Glencore did not enter into a sale and purchase agreement with the SFF[6]; and

22.3. the net effect of the applicants' approach is that Glencore, having purchased from and paid for the Glencore crude oil in an arms-length commercial agreement with Venus, would suffer a massive loss in respect of which no restitution is tendered by the applicants. Nor do the applicants appear to be concerned about Glencore's position.

23. We submit that there is no basis for the applicants to assert, as they do impermissibly in the replying affidavit, that Glencore is not entitled to anything by way of just and equitable relief, and that its claim lies against Venus.[7]

24. In an apparent attempt to justify why this is so, the deponent to the replying affidavit on behalf of the applicants says *inter alia* the following at paragraph 549:[8]

"Moreover, Glencore failed to take reasonable steps to ensure that the regulatory prerequisites had been complied with. Moreover, the Venus agreement was concluded with Mr Gamede dishonestly on the basis of the initial price set (giving a discount of USD 4 from the Dated Brent price – that is not a market related by any stretch of the imagination). Thereafter, Mr Gamede and Venus engaged in price manipulation."

[6] We explain the transaction relevant to Glencore in some detail in these heads of argument.
[7] RA, paragraph 549, record, p 5148
[8] Record, p 5148

25. We submit that there is no factual or other basis for these allegations made by the applicants.

26. Against that introduction, these heads of argument will deal with the following topics:

    26.1. the Venus-Glencore transaction (and why there is no evidence or basis to suggest that Glencore was party to any malfeasance in regard to that transaction);

    26.2. the expert report of Ms Catherine Jago (**"Ms Jago"**) relevant to Glencore's transaction and the appropriate remedy;

    26.3. the issue of the applicants' inordinate delay;

    26.4. the appropriate just and equitable relief; and

    26.5. certain concluding remarks.

THE VENUS - GLENCORE TRANSACTION

27. The Venus – Glencore transaction is described in detail in the answering affidavit filed on behalf of Glencore.

28. Given that the applicants seek final relief in motion proceedings, the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 H finds application here:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

29. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (*"Kirland"*) the Constitutional Court, in the context of a review application, endorsed the *Plascon-Evans* rule as follows:[9]

"The Plascon-Evans rule is to the effect that in motion proceedings, if disputes of fact have arisen on affidavit, a final order may be granted only if the facts averred by the applicant and which are admitted by the respondent, together with the facts alleged by the respondent, justify the granting of the order. This rule was endorsed by this court in Thint." [10]

30. In this section of the heads of argument we accordingly provide a summary of the Venus – Glencore transaction, and we set out the reasons why Glencore asserts that it was not party to any untoward conduct, as is suggested by the applicants. Importantly too, the applicants are unable to dispute Glencore's version.

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[9] At para 34 of the judgment, 493 D

[10] See *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at para 8.

31. First, we emphasize that, apart from the conclusion of the agreements relevant to the Venus – Glencore transaction, Glencore:

31.1. had no prior trade, dealings or commercial relationship with Venus;

31.2. had prior dealings with the SFF in the context of other transactions; and

31.3. had no contemporaneous interactions with the SFF in relation to other transactions.[11]

32. Second, and as far as Glencore was aware, authorised representatives of the SFF (including Mr Gamede, its acting Chief Executive Officer) were involved in the conclusion of the Impugned Agreements and made a series of representations to Glencore as to Glencore's title and ownership of the Glencore crude oil.

33. Glencore was, moreover, at all material times unaware of the allegedly unlawful actions of the applicants and officials in the employ of the SFF.[12]

34. Third, Glencore was not approached by Mr Gamede or any other representative of the SFF, and did not participate in the process involving inviting parties to express an interest to the SFF for the purchase of the crude oil. Glencore was approached by a third party, which led to a subsequent engagement with Venus.

[11] AA, para 16.1, record, p 3989
[12] AA, paras 16.2 and 16.3, record, p 3990

This, in turn, gave rise to Glencore purchasing the Glencore crude oil from Venus and paying for it on a *bona fide* arms-length commercial basis.[13]

35. Fourth, Glencore's purchase of the Glencore crude oil must be viewed in the following context:

35.1. representations made by SFF's then acting chief executive officer, Mr Gamede, as well as the then Minister, to the effect that the transactions contemplated by it had necessary approvals and were in compliance with the requisite procedures;

35.2. there was a recognition by the SFF that Glencore had an immediate right of ownership and possession of the Glencore crude oil which was unconditionally held at Glencore's free disposal for export or otherwise pursuant to a Tank Warrant issued by the SFF to Glencore (**"the Tank Warrant"**);

35.3. the acknowledgement by the SFF and Venus that *inter alia* Glencore had title to the Glencore crude oil being stored in Tank 6 of the Saldanha Bay storage terminal, and there was no encumbrance in relation to the Glencore crude oil pursuant to a Tripartite SFF Terminal Agreement between the SFF, Venus and Glencore (**"the Tripartite Agreement"**); and

[13] AA, paras 16.4 to 16.6, record, p 3990

35.4. the representations made by the SFF that they were in compliance with the applicable laws and regulations also pursuant to the Tripartite Agreement.[14]

36. Fifth, Glencore – as the end buyer of the Glencore crude oil – required sight of the documents underlying the transaction between the SFF and Venus in order to satisfy itself as to the existence and nature of the underlying sale and accompanying storage arrangements in respect of the oil it was going to purchase.

37. Moreover, Glencore was never party to the negotiations between the SFF and Venus in regard to the amounts that Venus agreed to pay the SFF either for the purchase of the Glencore crude oil, or for the storage thereof, and such pricing differential and storage fee was redacted from the documents provided by Venus to Glencore.[15]

38. Sixth, the Glencore SPA contains industry standard commercial terms including those relating to the price Glencore paid Venus for the Glencore crude oil, as is confirmed in the expert report of Ms Jago, dealt with in greater detail below.[16]

39. Seventh, Glencore did not seek to hide from the SFF the fact that it was purchasing the Glencore crude oil from Venus. Indeed, this was disclosed by

[14] AA, para 16.7, record, p 3990 – 3991
[15] AA, para 16.8 and 16.11, record, p 3992 and 3993
[16] AA, para 16.13, record, p 3994

Venus from the outset, when Venus concluded its sale and purchase agreement with the SFF.[17]

40. Eighth, Glencore justifiably assumed that Venus would seek to earn a margin pursuant to the on-sale of the Glencore crude oil to Glencore. This has been confirmed by the fact that both the price and the storage fee paid by Glencore in respect of the Venus – Glencore transaction was higher than the price paid by Venus under its transaction with the SFF.[18]

41. Ninth, Glencore had (and continues to have) no relationship with Mr Gamede other than through limited interactions in the context of the implementation of the Impugned Agreements. It has paid no monies to Mr Gamede, directly or indirectly, has not funded any trip on his behalf or provided him with any gifts, nor has it otherwise sought to influence Mr Gamede in any way.[19]

42. Tenth, Glencore is an innocent party in this application. The applicants have produced no evidence to implicate Glencore in any wrongdoing, and none of the numerous reports that they have commissioned (including the Gobodo report) have provided any evidence suggesting that Glencore is anything other than an innocent party in this application.[20]

43. Indeed, as is stated in paragraph 16.20 of the answering affidavit:[21]

[17] AA, para 16.14, record, p 3994
[18] AA, para 16.16, record, p 3995
[19] AA, para 16.17, record, pp 3995 – 3996
[20] AA, para 16.18 and 16.20, record, pp 3996 – 3997
[21] AA, para 16.20, record, pp 3996 – 3997; Glencore Supplementary Affidavit paragraph 6 (not paginated at the time of preparing these heads

"None of these detailed investigations, opinions and reports detracts from, or disputes, any of the facts set out above. None of them alleges illegal conduct on the part of Glencore. None of them in any way criticises Glencore or its conduct."

44. In conclusion, there is no basis for this Court to conclude that Glencore was in any way a party to the misconduct alleged to have been committed by Mr Gamede.

45. It is an innocent third party, and is entitled to be treated as such in this application.

THE EXPERT REPORT OF MS JAGO

46. Glencore has filed an expert report authored by Ms Jago.[22]

47. Ms Jago records her experience at paragraph 2.1 of her report, as follows:[23]

"I have been involved with the commercial side of the oil industry for over 38 years and have considerable experience in the issues upon which I comment and express opinions."

48. The SFF have filed two expert reports. Neither of those reports, however, seeks to contradict what Ms Jago says in her expert report in any material fashion. The two reports, in particular, do not deal pertinently with the issue of hedging.

[22] The report is annexure "GA4" to the Glencore AA, record, p 4103. Ms Jago's status as an independent expert is not challenged by the applicants.
[23] Record, p 4105

49. The following important facts are established by Ms Jago's expert report:

49.1. First, Ms Jago has analyzed the subject of price in her expert report. She concludes as follows at paragraph 3.28 of her executive summary:[24]

"I have had regard to the market prices for Bonny Light basis Saldanha Bay at the time Glencore agreed to purchase the Crude from Venus and can confirm that the price agreed and paid was a market price."

49.2. Second, Ms Jago has reviewed the contractual documents forming the subject matter of the Venus – Glencore transaction. Her conclusion is at paragraph 4.89 of her report:[25]

"In my opinion, these are all clauses that I would expect an experienced trader such as Glencore to include in a contract of this nature."

49.3. Third, Ms Jago deals comprehensively in her report with the issue of hedging.

49.4. As Ms Jago points out, the SFF would have been aware of the concept of hedging.

49.5. At paragraphs 4.136 to 4.138 of her report Ms Jago deals, too, with market structure, saying the following:[26]

[24] A more detailed analysis is to be found at paragraphs 4.75 to 4.82 of the report, at record, pp 4128 – 4131
[25] Record, p 4133
[26] Record, p 4141

"4.136 Anyone involved with commodities, including those who buy and sell oil and those who are involved in storage, would be aware that the price of oil is very volatile. SFF was involved in both of these activities. Not only did they originally purchase the Bonny Light to store in Saldanha Bay, they sold it to Venus and sold Bonny Light and Basrah crude oil to other buyers.

4.137 Owners of oil storage facilities will be aware of features in the market that either make their storage attractive to prospective clients or unattractive. For example, when the market structure is in contango then traders will have more interest in accessing storage than if the market is in backwardation. If there is little demand for oil, as there is right now, the price is very low and traders may be forced to find tankage to store the oil until the market recovers, the price goes up and they can find buyers. In my opinion, it is not possible that a company like SFF could be unaware that the price of oil varied.

4.138 I note that in August 2015 Mr Nkutha, Chief Operating Officer SFF, and Mr Nqgongwa, Acting General Manager SFF, delivered a presentation as part of a briefing to the Portfolio Committee on Energy in which on page 13 they make reference to the volatility of the oil market and on page 19 refer to 'Beyond Contango'."

49.6. Ms Jago, moreover, says the following at paragraphs 3.24, 3.26 and 3.27 of her expert report (dealing *inter alia* with hedging):[27]

"3.24 I have considered the hedges Glencore show they undertook for the contango strategy of buying and storing the Crude in

[27] Record, pp 4109 – 4110

Saldanha Bay, and the calculation they have undertaken to determine the profit / loss associated with these hedges. In my opinion, the way in which Glencore hedged their risk is in line with normal risk management policies. There is no way to hedge and to roll a hedge, but Glencore's hedging is in line with what I would expect a reasonable trader of Glencore's experience and size to undertake. I also consider that the calculation of their hedging losses has been correctly undertaken.

…

3.26 I also consider it reasonable that Glencore did not continue to hold the hedge after June/July 2018 when the signs in the market were that the structure of the market had changed from contango to backwardation, thereby causing their hedge to lose money every time it was rolled. In addition, by then their hedge position was losing over $100 million. This may have been considered to be an unsustainable position to maintain in a market which had continued to rise, thereby exacerbating this huge loss.

3.27 Similarly, I consider it reasonable that Glencore did not maintain their hedge position until an unspecified date when the dispute was to be resolved by the court. Glencore had no knowledge of when that might be. To continue to hold a huge loss-making hedge on their books, and have to regularly review and manage it with no certainty about how the market would move nor the decision of the court, would be unreasonable in my opinion."

49.7. As regards the position in **September 2017**, being the point at which Glencore was effectively deprived of any right to sell the Glencore crude oil, Ms Jago says the following at paras 4.97 to 4.99 of her expert report:[28]

[28] Record, pp 4134 - 4135

"4.97 Also on or around 26 September 2017 Glencore was informed by Venus that the SFF was contending that the SFF – Venus Sale and Purchase Agreement, the Storage Agreement and the Tripartite Agreement did not have the required regulatory approvals, and were therefore invalid. The SFF further informed Venus that by virtue of this, the Crude could not be removed from the Terminal.

4.98 From this point on Glencore was deprived of their right to sell the Crude. As I explained above, Glencore would have also then had to consider whether to maintain their hedge position to protect themselves against adverse market price movements. If Glencore lifted their hedges upon first learning of SFF's apparent position and the market had moved against Glencore, if then SFF's position had changed and Glencore was permitted to remove the Crude from the Terminal, Glencore could have been facing huge losses with no hedge in place and no legal or other recourse to recover their losses. They therefore decided to maintain the hedge to protect themselves from adverse price movements.

4.99 I consider that this was a prudent action bearing in mind the contractual arrangements Glencore had in place, including the Tripartite Agreement and Tank Warrant pursuant to which SFF acknowledged Glencore's title to the Crude. On the face of it, I believe that Glencore's traders would have found it highly unlikely that SFF's assertions, coming over 18 months after the various agreements had been concluded and all the time while the SFF continued to collect storage fees in respect of the Crude, had any credibility."

49.8. In short, Ms Jago confirms that the hedging strategy adopted by Glencore was both appropriate, and to be expected.

49.9. Fifth, Ms Jago confirms that she has considered Glencore's claims for additional losses, and that these losses are, in her opinion, the types of losses she would expect Glencore to have incurred in implementing its contango strategy, and are of the order of magnitude what she would expect.[29]

50. Ms Jago then confirms the calculation of the total loss suffered by Glencore as a result of it being deprived of the Glencore crude oil to be **$282 949 203.32**, as at **18 May 2020**.[30]

51. We submit that there is no reason for this Court to reject the independent expert evidence of Ms Jago. It has not been challenged, in any meaningful way, by the applicants. Indeed, the applicants have not filed an expert report which deals squarely with the principal issues addressed by Ms Jago and, in particular, one which disputes what she has to say in regard to the question of hedging. In short, we submit that her expert report – and her confirmation of the calculation of the losses suffered by Glencore – should be accepted by this Court.

[29] Paragraph 3.30 of the report, record, p 4111
[30] Record, pp 4146 – 4147

THE ISSUE OF DELAY

52. We submit that the issue of delay, for purposes of this application, operates at two levels.

53. First, there is the delay in the applicants having launched this application and, second, there is the delay in the manner in which this application has been prosecuted since it was launched. Each instance of delay is relevant to the appropriate remedy.

54. As to the second level of delay, this is dealt with in considerable detail in the answering affidavit. The nub of Glencore's submission in this regard is that the applicants have unnecessarily delayed the prosecution of this application *inter alia* by refusing to disclose relevant documents (until compelled to do so by the High Court and thereafter the Supreme Court of Appeal), and by failing to file their supplementary affidavits timeously.

55. We submit that the issue of delay is directly relevant to the question of just and equitable relief. The delays occasioned by the conduct of the applicants have significantly aggravated the substantial losses suffered by Glencore and which are dealt with extensively in the expert report of Ms Jago.

56. Delay, moreover, in the context of a review application such as this one, is a matter considered by our Courts to be most serious.

57. In *Khumalo and Another v MEC for Education Kwa-Zulu Natal* 2014 (5) SA 579 (CC)[31] the Constitutional Court (**"the CC"**) said the following at para 44 of the judgment:

"Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have an inherent power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution."

(emphasis added)

58. This must be seen, further, in the context of the duty of the State to respect the law, and to act appropriately in that regard.

59. This duty was described as follows by the CC in *Kirland* at para 82:

"On the contrary, there is a higher duty on the State to respect the law, to fulfill procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedural lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

60. Delay was also pertinently dealt with by the CC in its judgment in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (*"Gijima"*) where the CC, dealing with a Court's discretion to overlook

[31] Cited with approval by the CC in *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at footnote 42, at 241 B.

a delay, quoted the following passage[32] from paragraph 160 of the judgment in *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 662 (CC):

"While a court 'should be slow to allow a procedural obstacle 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. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."

61. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) (*"Buffalo City"*) the CC, once more, dealt with the question of delay.

62. Paragraph 80 of the judgment makes the following pertinent observation:[33]

"A party applying for condonation must give a full and honest explanation for the whole period of the delay."

63. Moreover, we refer this Court to paragraph 79 of the judgment in *Buffalo City*:

"Though the threshold for such an explanation would not require proving the allegation, the Municipality ought to be held to a rigorous standard. As an organ of State, it bears constitutional obligations and thus, where an explanation may be obtained or is available the Municipality should provide it or take the court into

[32] At 39E
[33] See, too, *Camps Bay Rate Payers' and Residents Association v Harrison* [2010] 2 All SA 519 (SCA) at para 54

its confidence and explain its failure to provide an explanation. It is trite that the Municipality, as an organ of State, is subject to a higher duty to respect the law."

64. At paragraph 105 of the judgment in *Buffalo City*, and dealing with the question of the appropriate relief to grant, the CC went on to say the following:

"In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights that have already accrued but does not permit a party to obtain further rights under the invalid agreement."

65. The CC accordingly recognised that the respondent in that matter should not be prejudiced by the dilatory conduct of the municipality. It permitted the respondent to retain the rights that had already accrued to it.

66. By parity of reasoning, we submit that Glencore should not be deprived from claiming the losses that it has suffered as a consequence of the dilatory conduct of the applicants in launching the application.

67. Ms Jago has explained in her expert report not only why Glencore embarked upon an exercise in hedging, but also why this strategy would have come as no surprise to the applicants. She has also explained why it was ultimately reasonable for Glencore not to have continued to maintain the hedge.

68. To reiterate:

"3.27 Similarly, I consider it reasonable that Glencore did not maintain their hedge position until an unspecified date when the dispute was to be resolved by the court. Glencore had no knowledge of when that might be. To continue to hold a huge loss-making hedge on their books, and have to regularly review and manage it with no certainty about how the market would move nor the decision of the court, would be unreasonable in my opinion."

69. The applicants seek to explain the delay *inter alia* in the replying affidavit.

70. They do so, for example, by saying the following at paragraph 75 in regard to the Gobodo report:[34]

"As has been explained elsewhere, the full extent of Mr Gamede's malfeasance only became clear after Gobodo was able to extract and analyse Mr Gamede's emails from his work computer. These emails illustrated that Mr Gamede had told the Minister, Venus, Taleveras and the board that the transactions were being held in abeyance while the issues raised by the COO were being investigated. Mr Gamede also told Vitol that the transactions would not take place until a Trading Division was established. However, notwithstanding Mr Gamede's claims, he then proceeded to finalise the transactions."

71. But this after the fact justification does not accord with the following:

71.1. the allegations made at paragraphs 211 to 225 of the founding affidavit.[35] In these paragraphs, the applicants deal *inter alia* with a report from a Mr

[34] Record, p 5030
[35] Record, pp 89 – 92

Nkutha, dated **8 February 2016**, which raised a number of objections to the disposal of the crude oil;

71.2. the fact, as highlighted in paragraph 73 of the answering affidavit[36] that:

*"From as early as **February** and **March 2016** persons on the board of the SFF, on the applicants' case, were of the view that the impugned agreements presented multiple concerns and difficulties. I refer in this regard, by way of example, to paragraphs 210, 303 and 308 of the founding affidavit and annexures **'FA 63'** and **'FA 65'**."*

71.3. the fact that this application was only launched on **12 March 2018**, that is some two years after the concerns that manifested themselves in **February 2016** and **March 2016**;

71.4. the fact that it was only on **28 May 2018** that the applicants filed their first supplementary founding affidavit; and

71.5. the facts, as set out in paragraph 85.3 of the answering affidavit:[37]

*"The applicants effectively admitted delaying, apparently without having made any real attempt to establish the relevant facts during all that time (and even prior to the launching of the review application). The relevant facts confirmed that the forensic investigation process culminating in the Gobodo report was only initiated as a tender on **7 May 2018**, which was nearly 2 (two) months after the review application was launched, and that the actual investigation itself only began in mid-**August 2018**, which was 5*

[36] Record, p 4030
[37] Record, p 4033

(five) months after the review application was launched (as appears from paragraph 18 of the second supplementary founding affidavit)."

72. Paragraph 59 of the judgment in *Buffalo City* is relevant here. This paragraph states *inter alia* the following:

"A third factor to consider when deciding to overlook delay is the conduct of the applicant. This is particularly true for State litigants seeking to review their own decisions for the simple reason that often they are the best placed to explain the delay."

73. The explanation given for the delay by the applicants is, we submit, far from satisfactory.

74. It follows that there is simply no proper explanation given for the delay in launching this application.

75. As to the delay in prosecuting (and finalizing) the application, the facts in this regard are set out comprehensively at paragraphs 71 to 104 of the answering affidavit.[38] A consideration of these facts show that there is no basis to attribute blame to Glencore for the delay in prosecution of the application.

76. But in any event a single example will suffice to demonstrate the applicants' misplaced efforts to blame Glencore for the delay in the finalization of this application.

[38] Record, pp 4029 - 4041

77. Glencore (together with the fourth and fifth respondents) launched interlocutory applications in this Court to compel the production of certain documents which had been relied upon by the applicants but which the applicants refused to disclose. These interlocutory applications were ultimately resolved by the Supreme Court of Appeal by way of a judgment dated **13 December 2019**.[39]

78. Glencore was successful in obtaining certain of the documents it sought.

79. Paragraph 35 of the replying affidavit, in dealing with these events, reads as follows[40]:

"Thus, from Glencore's list of 30 documents that it originally sought – and which the applicant claimed Glencore had no entitlement to – Glencore was successful in obtaining only a handful of documents. The applicants were successful in the majority."

80. The applicants then use this as pretext for suggesting that it is Glencore's fault that the hearing of this application has been substantially delayed.

81. But, we submit, the applicants miss the point. Even if Glencore had only succeeded in obtaining one document, that would have been justification enough for bringing the interlocutory application it did. The fact remains that it was the failure on the part of the applicants to make available documents to Glencore, in circumstances where they were later found *inter alia* by the Supreme Court of Appeal to have been obliged to make those documents available, which resulted in further and inordinate delay.

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[39] Reported as *Contango Trading SA and Others v Central Energy Fund SOC and Others* 2020 (3) SA 58 (SCA)
[40] Record, p 5051

82. The delay in the prosecution (and finalization) of the application, therefore, is attributable to the applicants, and not to Glencore (or indeed any of the other respondents).

83. In the premises, there has been an undue delay on the part of the applicants in prosecuting the application. Given the delay, it is hardly surprising that Glencore took the decision – as confirmed in Ms Jago's report – not to maintain their hedge position indefinitely.

GLENCORE HAS NO EFFECTIVE REMEDY

84. The just and equitable relief contended for by the applicants would leave Glencore with no effective remedy.

85. Glencore would not have a contractual claim against the SFF in the event of the SFF succeeding in setting aside its transaction. Furthermore, assuming any claim against Venus were possible, Glencore will be faced with the real risk that, in the event that the Court orders relief in favour of Venus (and not Glencore), the monies that Venus receives from the applicants will be beyond Glencore's reach.

86. Insofar as Glencore has any claim for unjustified enrichment, that cries out for determination right here and now under the broad *"just and equitable"* constitutional discretion which this Court is clothed with.

THE APPLICANTS' CONDUCT

87. The applicants contend for a just and equitable remedy that leaves Glencore, an innocent third party purchaser, with no effective remedy, yet at the same time ignores the applicants' conduct altogether. As set out above, the applicants ignore their delay in bringing their review application and their failure to provide a cogent or full explanation for such delay. The applicants also ignore the fact that they continued to collect storage fees and also to this day continue to issue monthly inspection reports despite, on their own version, concerns in regard to the transactions having been raised as early as **February** or **March 2016**.

88. But the applicants' questionable conduct is of far wider scope. The applicants have on their own version been party to unlawful conduct. In short, as Organs of State, the applicants had a higher duty to respect the law. This notwithstanding, they have failed/refused to disclose any details of the extent of their complicity in this alleged unlawful conduct. This is demonstrated by the following:

88.1. Far from the applicants making full and proper disclosure of all material facts and documents, Glencore (and the other respondents) were forced to compel disclosure of documents and information.

88.2. The record of documents from the Minister, a critical player in the unlawful activity complained of, is non-existent. One would have at the very least expected the Minister to provide a full and cogent explanation for her

conduct in the impugned decisions, and a detailed paper trail of events. The applicants have produced neither of these.

88.3. The applicants do not explain at all, or with any degree of cogency, why their papers have three different deponents to their various affidavits. Mr Makasi deposed to the founding affidavit, the first supplementary founding affidavit and the interim supplementary founding affidavit. Mr Moagi deposed to the third supplementary founding affidavit. Mr Maqubela deposed to the applicants' replying affidavit.

88.4. This is exacerbated because the applicants studiously avoid providing any cogent explanation for the sudden removal of the deponent to most of their founding affidavits, Mr Makasi, on what appears to be serious grounds involving this litigation, including reported bribery.[41] Instead, the applicants rely on a subsequent Minister's declaration, several months later simply to the effect that Mr Makasi voluntarily resigned,[42] as if that somehow miraculously expunges the allegations of impropriety against Mr Makasi and absolves the applicants (and the Minister) from their duty to provide an explanation to this Court.

88.5. The applicants instead have adopted the approach of blaming Mr Gamede as a rotten apple who was on a frolic of his own in a bid to deflect any criticism and absolve themselves and the Minister of any responsibility and

[41] AA, paras 13.5-13.5.6, record, pp 3985-7
[42] RA, paras 445-7, record, pp 5130-1

any duty to provide a full and material explanation to the court with complete disclosure. [43]

89. In short, the applicants have on their own version been party to unlawful conduct involving the Minister - the political head of the applicants. Despite this, the applicants have (again) failed in their constitutional obligation to provide a full and proper explanation of their conduct and make full disclosure. In short, per *Kirland*, the applicants have failed to adhere to the "*higher duty on the State to respect the law, to fulfill procedural requirements and to tread respectfully when dealing with rights*". The effect of this is that in arguing for just and equitable relief, the applicants cannot saddle an innocent third party purchaser with all the adverse consequences whilst preserving their risk free position. Just and equitable relief in the circumstances instead should give rise to a remedy that more fairly addresses the consequences of the applicants' shortcomings. .

THE POSITION OF VENUS

90. The applicants contend for a just and equitable remedy that leaves Glencore, an innocent third party purchaser, with no effective remedy, yet at the same time returns the purchase consideration to Venus. This is a remarkable proposition given that Venus has suffered no loss, and any compensation to it by way of just and equitable relief would constitute a windfall to it.

[43] AA, paras 13-13.4, record, pp 3983-5; RA, paras 442-443.1, record, pp 5129-30

91. In other words, on the applicants' version, an appropriate remedy would be for this Court to order the return of the purchase price to a party which is not out of pocket, and which has not sought to defend the allegations the applicants have levelled at it, instead of to an innocent third party purchaser, Glencore, the party which is in fact out of pocket. That simply needs be stated to be demonstrated as unjust and inequitable.

JUST AND EQUITABLE RELIEF

92. The principles applicable to just and equitable relief have been considered in a number of decisions of the CC.

93. The starting point of the enquiry is section 172 (1)(b) of the Constitution, which provides *inter alia* that, following a declaration of constitutional invalidity, a Court:

"may make any order that is just and equitable, including - "

94. The section is of wide import.

95. Indeed, the CC in *Gijima* said the following at paragraph 53 of the judgment:

"However, under s 172 (1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make 'any order that is just and equitable'. So wide is that power that it is bounded only by considerations of justice and equity."

96. As such, the import of the section is not, we submit, limited in its application to an order only in relation to the party or parties who were party to the contract (or contracts) declared to be invalid. Moreover, inherent in the section is that the just and equitable relief granted should be finally dispositive of the matter. A declaration of invalidity would itself be influenced by an appropriate remedy and a piecemeal determination of the relief is not possible.

97. Put differently, the affected parties (which would plainly include Glencore) should not be required to litigate disputes that arise directly from the declaration of invalidity in another Court. This Court has all of the necessary facts before it, and is enjoined by section 172(1)(b) of the Constitution to make an order as to what constitutes just and equitable relief, in the circumstances, taking into account considerations of justice and equity. The remedy is an inextricably indivisibly determined one and should appropriately be determined in a single enquiry.

98. In dealing with the proper approach to the remedy, the CC in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) quoted with approval the following passage from *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paragraph 29:

"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 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 … Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance the efficient and effective public law administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

99. The CC, accordingly, has cast the net wide when it comes to the approach to the remedy.

100. For the remedy to be fair to Glencore – which is plainly a party which will be affected if the Part A relief is granted – we submit that this Court should not exclude Glencore from the ambit of any just and equitable relief to be granted. Being a public law remedy the relief as concerns Glencore must be determined in these proceedings. Another Court cannot re-consider what this Court in these proceedings considers to be just and equitable.

101. In *Gijima*, in dealing with the appropriate remedy, the CC said the following at paragraph 54 of the judgment:

"Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be

declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled."

102. We submit that similar considerations would apply in this application.

103. Justice and equity dictate that Glencore, an innocent third party purchaser, should not be prejudiced, first by the dilatory conduct of the applicants in launching this application and, second, by the dilatory conduct of the applicants in progressing the application (the effect of which was that Glencore could not be expected to hold its hedging position indefinitely, as explained by Ms Jago in her expert report).

104. Moreover, the additional losses asserted by Glencore – and dealt with in particular at paragraph 5 of Ms Jago's expert report – are reasonably a part of the just and equitable relief that should be granted to Glencore.[44]

CONCLUSION

105. It is submitted that Glencore has made out a proper case for just and equitable relief, and that it is entitled to an Order in the following terms:

105.1. payment in the amount of **$282 949 203.32**, being the aggregate of the losses suffered by Glencore as at **18 May 2020**; and

[44] Record, pp 4145 – 4146

105.2. interest as from **18 May 2020.**

106. As to costs, these should be paid by the applicants, jointly and severally. The applicants' unreasonable delays and their unreasonable refusal to acknowledge what is eminently a just and equitable remedy in favour of Glencore has occasioned additional prejudice and unnecessary substantial costs. Given the complexity and volume of the application, the importance of the matter as also the substantial sums of money at stake, it is submitted that the costs of three counsel are warranted.

107. In this regard, we mention that the applicants also seek the costs of three counsel in the amended notice of motion.[45]

A Subel SC

A M Smalberger SC

F Ismail

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Chambers, Sandton and Cape Town
21 August 2020

[45] Record, p 5213. The applicants have throughout employed the services of four counsel.