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

CASE NO: 4305/18

In the matter between:

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

and

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

APPLICANTS' NOTICE OF APPLICATION
FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that the Central Energy Fund SOC Limited (**CEF**) and the Strategic Fuel Fund Association NPC (**SFF**) (collectively, **the applicants**) intend to apply, on **10 December 2020**, for leave to appeal to the Supreme Court of Appeal, *alternatively* to the Full Bench of this Court against certain aspects of the judgment and Order handed down by His Lordship Mr Justice Rogers on Friday, 20 November 2020.

TAKE NOTICE FURTHER that the applicants appeal against the following paragraphs of the High Court's order:

1. Paragraphs 7(b) – 14 in relation to Contango (fourth and fifth respondents) and Taleveras (third respondent);
2. Paragraphs 15(b) – 17 in relation to Vitol (sixth to eighth respondents),

as well as those portions of the judgment that are relevant to the High Court arriving at the conclusions in these paragraphs of the order.

TAKE NOTICE FURTHER that the applicants contend that the appeal has reasonable prospects of success and that there are other compelling reasons it should be heard as provided for in s17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013, on the grounds set out below.

First ground of appeal: permitting a respondent to claim compensation in the absence of a counter-application and at the same time affording the respondent the benefit of *Plascon-Evans* is incorrect as a matter of law

3. The learned Judge erred in concluding that Contango and Vitol could claim compensation in terms of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) without launching any formal counter-application. The High Court found that Contango and Vitol could simply indicate in their answering affidavits, as respondents in the review proceedings, that they claimed compensation. Nevertheless, when determining whether it is just and equitable to grant Contango and Vitol's respective claims for compensation, the High Court found the *Plascon-Evans* rule would still operate in their favour.

3.1. The High Court accepts that the general position is that a counter-application would be necessary to claim compensation. The High Court held that if a party claims compensation as relief on the basis of a violation of its constitutional rights then:

> *"[T]he party would be a claimant in relation to such relief. If for any reason the party already featured as a respondent, it would need to bring a counter-application to assert the violation of its rights and claim appropriate relief."* (Emphasis added)

3.2. The learned Judge claimed that the present case was distinguishable from the ordinary case on two bases and thus those procedural requirements (for Vitol and Contango) and procedural protections (for the applicant in the case – i.e. CEF and SFF) did not apply in this case. Both of these distinctions were incorrect.

3.3. First, the High Court claimed that in this case, Vitol and Contango did not claim relief on the basis of asserting a violation of a constitutional right – they merely sought to maintain the *status quo*. The Court erred at the level of principle and at the level of fact.

3.3.1. At the level of principle, the learned Judge erred by confusing and conflating: (a) whether a respondent was claiming relief in the form of compensation; and (b) the motivation and reasons why the respondent was claiming compensation. Whether a party seeks relief in the form of compensation because their right was infringed or because of some other reason (they sought to maintain the *status quo*) – the key feature is that, in relation to compensation, they are the party seeking a new form of relief. To claim that relief that party must launch a counter-claim.

3.3.2. At the level of fact, the High Court erred by finding (at para 353) that Contango and Vitol did not seek compensation on the basis that their constitutional rights have been infringed but on the basis that they seek to restore the *status quo*. Both parties in their written heads of argument, and oral argument, sought compensation precisely on the basis of their rights to lawful, reasonable and procedurally fair administrative action (under the Constitution or under PAJA).

3.4. The second purported distinction between the current case and the ordinary review case (at para 359) was that the issue was not simply whether administrative decisions should stand – here "*contracts have actually been concluded and have been in existence for some years. I am not called upon to decide merely whether certain decisions should be set aside but whether these contracts should be nullified. The*

respondents might or might not have delictual claims if their contracts are nullified, but they certainly have contractual claims unless their contracts are set aside."

3.4.1. With respect, in virtually every single review case related to procurement there is: (a) an administrative decision to award a contract to Bidder X; and (b) a contract concluded between the organ of state and Bidder X giving effect to that decision. By the time many reviews are heard, the contract has been in force for "*some years*". In any event, those might be factors that would weigh in favour of a respondent's counter-claim for compensation succeeding. However, it is no legal basis to: (a) excuse the respondent from following the correct procedure; or (b) apply the *Plascon-Evans* rule in the respondent's favour even for relief they uniquely claim.

3.5. The High Court's decision was at odds with the Supreme Court of Appeal's findings in the *Simcha Trust* decision, where the Court made clear that a party seeking compensation cannot merely deliver a further affidavit to convert its position as a respondent into the party claiming relief in the form of compensation. The Supreme Court of Appeal held:

> *"[13] I do not understand how the dispute, concerning the correctness of the City's approval of the plans, transformed from litigation in respect of which Simcha, was a co-respondent with the City, to litigation in terms of which Simcha was now seeking redress against the City on the basis of the latter's asserted reckless or negligent conduct in approving the plans. And that transformation occurred purely on the strength of a 'further affidavit'. What was required was some new process to be instituted by Simcha against the City, which would then have been adjudicated on the merits. By permitting this unjustifiable metamorphosis, Rogers J allowed an extension of the litigation.*
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> ...

> *[23]The court below considered causation to be a further problem confronting Simcha. In that regard Rogers J rightly asked whether a properly motivated report by the building control officer might, in any event, have led to the plans being rejected or, if approved, be overturned on review. It brings into sharp focus the manner in which Simcha required the issue to be determined, namely, by way of its further affidavit and unacceptably transforming the litigation in the manner described above."*

3.6. The Supreme Court of Appeal's judgment makes clear that the *ratio* attached to the dismissal of Simcha's claim for compensation was that it could not claim compensation merely by an indication in its affidavit. The High Court's analysis of s8 of PAJA in *Simcha* was (according to the SCA) all *obiter*:

> *"[34] Whilst it might, with hindsight, be argued that the exercise engaged in by the court below in adjudicating the claim for compensation was useful and will provide future guidance, a court must guard against embarking on exercises it considers jurisprudentially useful, when the effect is an unjustifiable extension of litigation which must be prejudicial to a contesting party."*

3.7. A counter-application is not a needless formality. The majority of the Constitutional Court in *Kirland* – found (at para 85) that a state department could not review a decision without a formal counter-application because (amongst other things) permitting this approach would deprive Kirland of important procedural rights.

> *"[I]n the Department's counter-application, Kirland will be the respondent. This will afford it important protections. In the absence of oral evidence, its version, and not that of the Department, will be decisive. This is because the Plascon-Evans rule operates in favour of the respondent in the counter-application. The facts set out by the respondent in that application must, subject to the operation of the rule, form the basis of any findings. To decide the validity of the approval on the papers before us will thus deprive Kirland of an important procedural right."*

3.8. The same rationale applies to claims for compensation by respondents. Even assuming that a Court could (in some particular circumstances) relax the requirement of a formal counter-application being launched, then arriving at a just and equitable remedy (where the public interest is the lodestar) would require that the application of *Plascon-Evans* be reversed when assessing the claim for compensation.

3.9. Put differently, when the review court is assessing the respondent's contentions on compensation and loss suffered then (even assuming for the purpose of argument that no counter-application is required) the review court must hypothetically treat the respondent's facts as though it were an applicant. Accordingly, the respondent should only succeed on the papers in a claim for constitutional damages and/or PAJA compensation where it succeeds on the basis of the applicants' version as well as the undisputed (or proven) facts.

3.10. As will be submitted in the appeal – having regard to the entire mosaic of evidence throughout the record – (some key features of which are highlighted in this application) neither Vitol nor Contango should have succeeded in their claim for compensation if the *Plascon-Evans* rule operated against them. In the alternative, any compensation granted would have been substantially reduced because Vitol and Contango were negligent in the face of obviously suspicious transactions and failed to take steps to mitigate their loss.

3.11. Critically, the High Court's finding does not only affect the current case. It has negative consequences for all self-reviews brought by public entities. The public interest in unlawful administrative action being set aside does not only extend to a declaration of unlawfulness and the unlawful conduct being set aside – there is also

acute public interest and policy considerations which weigh against private entities being awarded compensation where they: (a) have been improperly involved; and (b) were negligent or turned a blind eye to unlawfulness or suspicious state processes from being awarded compensation. The High Court recognised that the innocence, guilt or negligence of the respondents was critical. But then analysed the facts on the basis of the respondents' factual version applying the *Plascon-Evans* rule.

<u>Second ground of appeal</u>: the High Court's judgment is at odds with the principle of subsidiarity

4. The High Court judgment and orders for compensation are also at odds with the constitutional principle of subsidiarity.

5. Once PAJA is applicable, the only form of compensation that is permissible is the compensation envisaged under s8(1)(c) of PAJA. The Court cannot rely on s172 of the Constitution, nor on some other form of compensation that is not included in PAJA.[1]

5.1. Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively, challenge the legislation as being inconsistent with the Constitution.[2]

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1 See in the context of s8(1)(c) of PAJA the SCA's decision in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA) where Conradie JA held: "*Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. The Promotion of Administrative Justice Act does not provide for the kind of relief afforded to the appellant in paras 2(c) and 3 of the order.*"

2 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 73

5.2. Neither Contango nor Vitol made out a claim for compensation in terms of s8(1)(c) of PAJA. The High Court, however, effectively established a new form of compensation in terms of the Constitution which does not require a violation of a constitutional right.

5.3. Curiously, the High Court found that compensation under PAJA needed to follow the requirements of s8(1)(c). The learned Judge found that compensation could be granted where it was not possible to remit the decision and where substitution was not appropriate or warranted. But the High Court also found that the kind of compensation it was awarding was not the kind of compensation set out in s8(1)(c) of PAJA. Apart from the subsidiarity problem, it is contradictory to find that compensation (which is not the kind envisaged under s8(1)(c) of PAJA) could only be granted where the requirements of s8(1)(c) have been satisfied.

5.4. On this basis alone, the order for compensation falls to be set aside. The Court should have – at best for the respondents – found that the contractual rights would be retained and the parties should institute action proceedings to recover damages under contract or delict.

<u>Third ground of appeal</u>: in the alternative to grounds 1 and 2 – the public interest lodestar was not served by the Court's order on remedy

6. Our courts have made it clear that when considering the just and equitable remedy the public interest must be the lodestar[3].

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3 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC at para 33

6.1. Even if the High Court were correct that technically it is possible to grant compensation (a) in the absence of a counterclaim and (b) on the basis of *Plascon-Evans* applying, the High Court's order was still incorrect since in doing so it failed to grant a just and equitable remedy that kept the public interest as the lodestar.

6.2. Instead, the guiding light for the Court was the losses suffered by the respondents and the delay in the review application being brought.

6.3. The Court found that "*on balance*" between keeping the respondents' contractual rights alive and ordering specific amounts of compensation in these proceedings themselves, the Court concluded that the latter was just and equitable.

6.4. The Court's analysis on just and equitable remedy made a material misdirection by failing to consider various factors when deciding between keeping the contractual rights that Vitol and Contango had alive (subject to a cap that such claims could not pursue lost profit).

6.5. Resolving factual disputes in favour of the respondents using *Plascon-Evans* is not in the public interest

6.5.1. If the public interest had been the benchmark, then the Court should have found that it could never be in the public interest to order specific amounts of compensation in application proceedings – where there were real disputes of fact regarding the level of involvement of the respondents.

6.5.2. In addition, the public interest would demand that the precise quantum claimed must be proved by the respondents (as all claims for damages must be) and tested in action proceedings – so that public entities (not merely in this case) are not made to pay amounts higher than they should only on the basis of the respondents' *ipse dixit*.

6.5.3. What weighed heavily on the Court was the need to demonstrate to officials that irregular conduct and corruption would not be tolerated by the Courts. The Court found that the way to emphasise this was ordering financial compensation.

6.5.4. The message is important – at the level of principle – the applicants do not take issue with state entities being held accountable for dishonest conduct by key representatives. But that message is only part of what is necessary in the public interest: there is no stern message in the judgment sent to private entities. Quite the contrary, the judgment sends a signal to private parties that they can turn a blind eye to suspicious transactions, and they can even risk participating positively in the conduct. Once it is a self-review the respondents' facts will – by the application of *Plascon-Evans* – govern not only decisions on the merits but also a claim for compensation. No counter-application is needed. A respondent only need indicate in its answering affidavit that compensation is sought.

6.5.5. In this regard, there are various real disputes of fact between SFF, on the one hand, and Vitol and Contango, on the other. Any contractual, delictual or enrichment claim (whether in court or an arbitration) would consider

these critical issues on the factual basis that is most beneficial for the public interest and public purse: trial proceedings where witnesses can be cross-examined rather than on the respondents' factual version.

6.6. The analysis of available alternative remedies

6.6.1. In addition, an applicant for compensation under PAJA must demonstrate the absence of alternative remedies – either because no legal basis for claiming the loss exists or because on the particular and peculiar facts of that case, they would not be able to satisfy the requirements under established legal mechanisms for recovering loss. In this case, even if this Court sets aside the relevant contracts and there is no possibility of a contractual claim, the applicants squarely took the point in reply that neither Vitol nor Contango properly pleaded that this is an exceptional case, as required by s8 of PAJA.[4] While Contango contended that certain features made the circumstances exceptional, there is absolutely no mention whatsoever of Contango's alternative remedies. Neither Vitol nor Contango demonstrated that their possible delictual or enrichment claims would not offer adequate compensation.

6.6.2. The High Court's approach in examining the success of available alternative remedies was inconsistent. As regards the delictual claims available (on the respondents' versions) the Court found:

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4 Replying affidavit at p 5109 para 347

"I cannot determine in the present proceedings whether delictual claims would succeed. The courts are reluctant to impose delictual liability for the improper but honest exercise of powers, which might apply to the MoE and SFF's board. To the extent that Gamede was dishonest, questions would arise as to whether SFF is vicariously liable." (para 358)

"Since I cannot prejudge delictual liability, I need to determine just and equitable relief in the light of the possibility that, as a matter of law, delictual claims would be found not to be competent. The applicants certainly do not accept that delictual claims are available. Since the respondents might not receive compensation through delictual claims, I need to consider whether, in the light of all relevant circumstances, I should allow the contracts to stand (so that the respondents can exercise their contractual rights) or whether I should set them aside. In striking that balance, it seems to me that I must be entitled, if justice and equity so demand, to set the contracts aside but on the basis that the respondents receive compensation, to an equitable extent, for the deprivation of their contractual rights. If this course were not available to me, it might strongly tilt the balance in favour of allowing the contracts to stand". (para 360)

6.6.3. However, in relation to the potential enrichment or contractual claims, the High Court traversed these claims until their end point and concluded that an enrichment claim would not be available for out-of-pocket expenses not paid to SFF (para 361) and a contractual claim would be successful. The level of analysis by the Court (leaving aside whether it is correct or not for present purposes) goes far beyond anything pleaded or argued by Contango or Vitol in their answering affidavits and far beyond the issues that the Court was requested by the parties to determine (on the papers). At para 516, the Court states "*[t]he remaining issue on the contractual qualification is whether a contractual claim would succeed on the merits.*" The Court found based on (para 517) that:

"Vitol's contracts were ratified by the board on 5 February 2016. Unless the board's decision were set aside on review, the ratification would stand. In addition, the applicants defended

the disposals a few months later when they attracted adverse media coverage. SFF billed Vitol for storage fees for several years. In those circumstances, it is not plausible that SFF could avoid liability on the contracts in private law proceedings."

6.6.4. Further, even if the contractual remedy were not available, the delictual remedy and enrichment claim together would cater for out-of-pocket expenses and restitution.

6.6.5. CEF emphasises that the finding was that *"[i]n those circumstances, it is not plausible that SFF could avoid liability on the contracts in private law proceedings*". (para 517). In other words, the High Court actually found that the respondents have an unanswerable alternative remedy – why then would it be in the public interest to part with state finances when the only benefit was to save the private entity potential loss (if it were found to have been part of the unlawful conduct or failed to mitigate its losses).

6.6.6. It could never be in the public interest to pay compensation to an entity where an entity was involved in the unlawful conduct (where it participated knowingly or negligently) or to pay an entity full compensation when that entity failed to mitigate its losses. Similarly, the public interest requires the court to select a remedy which provides the better opportunity to consider disputed facts regarding the moral turpitude of the respondents and/or their contributory negligence, attempts to mitigate their losses as well as the procedure which enables the state entity to dispute the quantum claimed. In addition, if the respondents missed out on a delictual claim, it could only have been because of the trial court

finding that they had some part (or a significant part) to play in the wrongful conduct.

6.7. The failure to give proper consideration to the investigation by the Hawks

6.7.1. Moreover, the judgment is silent on the referral of this matter to the Directorate for Priority Crime Investigation (**Hawks**) under case number 282/11/2018 in which fraud as well as contraventions of the Organised Crimes Act 121 of 1998; Prevention and Combating of Corrupt Activities Act 12 of 2004; Companies Act 71 of 2008 and the Public Finance Management Act 1 of 1999 are being investigated.

6.7.2. The investigation may well impact on the moral turpitude of the respondents, because the Hawks would be duty-bound to investigate the factual disputes which appear to imply involvement or knowledge of the unlawfulness (at least on the part of Vitol) which is crucial in the determination of a just and equitable remedy.

Examples of key factual disputes decided in favour of Vitol and Contango

7. Both Vitol and Contango benefitted from *Plascon-Evans* in circumstances where it would be in the public interest for their versions to be tested in an appropriate forum. The record is replete with various factual disputes on this score, which the applicants will highlight in their written argument in the appeal. For present purposes the applicants highlight the following key examples.

8. In relation to Vitol, if *Plascon-Evans* applied in favour of the applicants then, Mr Nqgongwa's evidence would have been accepted as the correct version. That evidence was that a meeting took place with Vitol in London in June 2016 in which SFF's CFO flagged the procurement concerns with Vitol and emphasised that the correct processes had not been followed. Mr Foster (for Vitol) responded that it was not his problem because the SFF CEO had signed. Critically, Mr Foster did not contend that none of the provisions of the Constitution or the PFMA or the Treasury Regulations did not apply because it was a disposal. His version was merely that none of that mattered if the CEO signed.

9. The representatives understood at the level of fact that SFF was intending to follow a process of proposals being submitted by various bidders. Similarly, as the High Court found in paragraph 72 of its judgment "*in back-to-back transactions such as the board was insisting on, there would be a disposal and an acquisition*". Once that was the understanding, it was manifestly inappropriate for Vitol's representatives to (a) hold private meetings with Mr Gamede; (b) to continue to amend its proposals in the light of the discussions with Mr Gamede; and (c) suggest various points that Mr Gamede should emphasise to the Minister (as if the points came from Mr Gamede's objective analysis, not from Vitol). Vitol could not possibly have thought that these forms of engagement were acceptable.

9.1. On 20 November 2015, Mr Gamede emailed Mr Ducrest a draft request for proposal (**RFP**) requesting that Mr Ducrest confirm that the letter was in order before it was signed and sent to Vitol. At this point Mr Gamede was affording Vitol an opportunity to amend the RFP in a manner that suited Vitol. To involve a bidding party in the process of crafting or checking the terms of reference for a bid of this nature should disqualify that party from further participation in the bidding process as it would

give rise to a reasonable perception that the entity gained an unfair advantage to that afforded to other bidders, having regard to the process that the parties understood to be applicable and to have been undertaking.

9.2. On 23 November 2015 Mr Ducrest (for Vitol) sent an email to Mr Gamede stating:

> *"My brother,*
> *If you feel you need to justify your actions by detailing such actions to the market, then I suppose you need to do it...However, the more detail and reasoning you provide to the market, the more it is criticized.*
> ...
> *2) You should also emphasize to the top the importance of being able to pledge at most times the corresponding amount of crude rotate with other physical barrels stored independently in Saldanha Bay. Only few companies will be able to bid this way.:."* (Emphasis added)

9.3. In respect of this communication, the court finds that:

> *"Ducrest's reply may justify the inference that he realised that Gamede's justification for selling the strategic stock was dubious. On the other hand, he may have meant no more than that an elaborate explanation, even though sound, would merely give an aggrieved party material for criticism."*

9.4. Once it is so that "Ducrest's reply may justify the inference that he realised that Gamede's justification for selling the strategic stock was dubious" then it is in the public interest that compensation is not awarded to Vitol on the basis of Mr Ducrest's version. The Court also failed to deal with Mr Ducrest's advances to Mr Gamede that he should emphasise a metric to judge bids that would suit Vitol. This was not part of any written proposal submitted by Vitol (so the Minister would appreciate that it was Vitol's view) – what Mr Ducrest sought was that Mr Gamede should emphasise, as the official considering the proposals, a factual metric that suited Vitol. Once it is so that Vitol accepted that the process followed by SFF had to be fair – Mr Gamede could not hold meetings with one entity but not with other entities.

Nor could Mr Gamede receive amended proposals from one entity but not from others.

9.5. What further demonstrates that Vitol was not an innocent party is that the contents of Vitol's answering affidavit mirrors the facts in various respects set out by Mr Gamede's report to the Minister on the sale of the transactions (dealt with at paragraph 153 of the judgment):

> *"SFF's crude oil, or at least the Basrah, had to be rotated as part of the move towards clean fuel. South African refineries were no longer using Basrah. (This justification did not apply to the Bonny. The applicants have obtained evidence from two local refineries contradicting this statement in relation to Basrah. The applicants' expert, Mr Ara Barsamian, a chemical engineer and crude oil blending expert, says that there is no such thing as a 'bad' crude oil – blending to achieve desired qualities is a common practice."*

9.6. At paragraph 33.3 of Vitol's answering affidavit it states that "*[T]he strategic stock had also lost its relevance to an extent due to changes in the dietary requirements of the South African refineries…*"

9.7. Vitol's representatives deal oil in South Africa on a regular basis and would know that Mr Gamede's claims about the oil needing to be rotated were patently false in relation to the Bonny Light. But Vitol actively sought to acquire that oil. Vitol also knew that Basrah oil was still being accepted by the local refineries – but in its answering affidavit it claimed that the oil would not be accepted. Vitol would not have done so if it were an innocent party.

9.8. Indeed, when Vitol was invited to participate in the task team to assist SFF, on 4 September 2015, Mr Foster sent an email to Mr Gamede stating that "*it will be our*

great honour and pleasure to be part of a core team established to discuss and review ideas in respect of the position around strategic stock policy in South Africa".

Among the core aspects that Mr Foster suggested would be explored in detail was:

> *"[The] suitability of current crude oil grades held by SFF relative to the South African refiners diet. Study potential grade optimisations and cost implications, if any".*

9.9. Only three entities were successful in being awarded oil. The High Court found dishonesty and corruption associated with the transactions awarded to Venus and Taleveras. It is clear that Mr Gamede was conducting the transactions purely for his personal gain.

> *"[235] In my view, Taleveras' denials of corruption are so far-fetched and untenable that they can be dismissed on the papers. The four payments I have identified were bribes. The evidence does not allow me to say who within the Taleveras group, apart from Mulaudzi, was privy to the corruption, but the bribes must have been paid with a view to advancing Taleveras' interests."*

9.10. However, in Mr Gamede awarding the contract to Vitol, the High Court assumes that this transaction was conducted for the good of SFF. A critical question is why Vitol rather than any of the other entities who participated by submitting proposals was preferred. On this score the High Court found (at para 221):

> *"Gobodo reported that over the period January 2015 to April 2016 large amounts of cash were paid into Gamede's bank account at ATMs. Often multiple deposits were made at a single ATM over short spaces of time. While these deposits raise eyebrows, and while some of them might be linked to significant events in the disposal of the strategic stock, the applicants' counsel did not argue that I could find that any of them were bribes."*

9.11. With respect, that was not the applicants' stance. The applicants' stance was that the ATM payments could not be tied in these proceedings to any particular respondent but the applicants argued that the payments are certainly bribes paid in relation to the sale of the strategic stock by Mr Gamede. Thus, the fact that there are unassigned bribes, which could have been paid by Venus or Vitol is a relevant factor that warrants action proceedings rather than ordering compensation to Vitol in this application.

9.12. The High Court found that Taleveras paid bribes to Mr Gamede. There were 4 payments made, each in the region of 50 000 USD to Mr Gamede (two of which were expressly listed in invoices as USD 50 000). That is also the amount of the fee offered by Mr Ducrest in his email. Vitol's explanation is that this fee was to be part of its proposals. Mr Driscoll (whose report was delivered with the applicants' replying affidavit) found that even assuming that the fee was not untoward it would be a very poor commercial deal for SFF. The applicants submit that this demonstrates that the explanation from Mr Ducrest was so untenable that it could rejected on the papers (or at the very least warranted claims for compensation being pursued by action proceedings).

10. In respect of Contango, the court erred in finding that Contango as a French financer had no reason to assume that an open tender process was a legal requirement.

11. In relation to Contango, for instance, the applicants squarely alleged in reply that Contango was negligent and reckless in the way in which it concluded the transactions with Mr Gamede:

> *"The applicants deny that Contango and Natixis are simply 'innocent third parties' who were completely divorced from the negotiation process. This is not a case where Contango and Natixis are complete strangers to the process. Quite the opposite, at paragraphs 15 – 15.7 of Contango's affidavit it seeks to demonstrate the steps it took to obtain contractual assurances and undertakings 'directly from SFF'.*
>
> *Except – as I have set out elsewhere in this affidavit – Contango simply blindly accepted that Mr Gamede was authorized to conclude the Side Letter with Contango, or the agreements with Taleveras without ever requesting, for instance, that Mr Gamede provide the board resolution authorizing Mr Gamede to act. The warranties that Contango secured and representations that Contango acted on were from an individual purporting to act as SFF's agent -not from the principal (SFF). It would have been extremely simply for Contango to verify the true position ... by, for example, requesting that board resolutions approving the transactions be provided to Contango. Similarly, in large transactions of the kind involved in this matter it is fairly common that financiers require a senior counsel opinion to conclude that the transactions appear to have been lawfully concluded. Had Contango done so, then it is very likely that the problems with the transactions would have been discovered before the agreements were entered into. ... Moreover, if Contango had asked Taleveras about the regulatory requirements in the matter – Taleveras (according to its version before this Court) would have said that there was no procurement process involved whatsoever, and that the agreement was [a] quid pro quo for Taleveras agreeing not to sue SFF under the 2015 Commodity Swap Agreement."*[5]

12. Importantly, the High Court found that the award of the contract to Taleveras as a *quid pro quo* to offset a claim from Taleveras was irregular and unlawful. Contango emphasised throughout the case that Contango financed the deal – for better or worse – on the strength of Taleveras' good title to the oil (it accepted any defects in Taleveras' title as a risk) and in order to offset that risk it conducted a detailed due diligence into the transaction. Contango, however, failed to:

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[5] Replying affidavit at p 5149 – 5150 paras 553 – 556

12.1. Ask about the basis on which Taleveras was concluding the deal. If so, Taleveras would have stated that it had received the contract as a *quid pro quo*; or

12.2. The contract was secured on the basis of a procurement process in terms of the letter of award (which stipulated the Minister's conditions). Contango should have sought some form of confirmation that these approvals and requirements were satisfied. Contango did nothing more than ask Mr Gamede orally. The High Court found that Contango could not be criticised because it could not have known that Mr Gamede was acting dishonestly. With respect, the High Court holds Contango (in a billion Rand deal) to a lower standard than an ordinary person seeking a loan from a bank for a few thousand Rand. The bank would demand written proof of the person's salary and various other supporting documents. The bank would not accept the *ipse dixit* of the person seeking the loan. But Contango could do so from Mr Gamede – not once, not twice – but even after there were public media reports about the irregularity of the deal. Even at that stage the High Court found that no fault could be attributed to Contango.

12.3. Contango claimed that part of its due diligence was that the agreement between Taleveras and SFF included "*an agreement to sell the crude oil to Taleveras and then there was a back-to-back agreement in terms of which SFF would purchase an equivalent quantity of oil from Taleveras*" (Contango's AA at para 59). It follows that Contango knew that the relevant principles of s217 and the PFMA were applicable to the transactions. That realisation should have prompted further queries. Contango failed to do even the most basic research or to call for any board resolution from SFF (even though the structure of its transactions in the record illustrates that Contango did call for board resolutions from Taleveras). Contango could not have

participated in the deal itself as it was not a local BEE company, but its agent for its involvement was found guilty of corruption. Contango made much of the fact that in a repo transaction it was inheriting Taleveras' title to the oil – Contango thus was the beneficiary of Taleveras' corruption. Compensation to Contango (and the quantum thereof) should only be paid once the extent of Contango's reasonable steps and knowledge have been tested in action proceedings. On this score, the applicants note that Contango does not give a full account of the dates on which Taleveras first approached Contango for financing the second opportunity and the basis on which Taleveras stated it had acquired the opportunity.

13. Even on the Court's findings, Contango was not blameless. The High Court found:

> *"[437] One criticism of CTSA is that the extent of the profit which Taleveras stood to make must have been apparent to it (CTSA's position in this respect is distinguishable from Glencore's), and that this should have caused it to question the terms on which Taleveras was buying the oil, particularly the Bonny. Quite what CTSA could and should have done about this, however, is debatable."* (Emphasis added)

14. What Contango should have done about it – on paper – is debatable but resolved in favour of Contango on the basis of *Plascon-Evans*. Once it is so that a private entity was not blameless then the extent of that blame (which would affect any amount of compensation ordered) should be the subject of action proceedings not application proceedings.

15. In addition, in annexure "PV57" which sets out the finance instructions in the transaction between Contango and Taleveras, documents required for the transaction included a *"legal opinion S Africa – legal opinion UK (true sale)"*. Contango was therefore well aware or should have been aware of the legal requirements for a valid sale from a government entity.

In annexure "PV8", one of the documents sought from Taleveras was a board resolution. It was therefore available to Contango to seek a board resolution from the SFF.

16. It is also a justification that Contango kept seeking assurances from Mr Gamede. As was held by the Supreme Court of Appeal in *Mail and Guardian Ltd*:[6]

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

17. In addition to the above, the court has found that criticism that may be levelled against Contango in that the profit that Taleveras stood to make should have prompted it to question the terms on which Taleveras was purchasing the oil, particularly Bonny.

18. However, both Vitol and Contango, despite the gaps in their versions, are given the benefit of *Plascon-Evans* and are awarded a precise amount of compensation. The order falls to be set aside as the commercial interest of the respondents cannot trump public interest.

Fourth ground of appeal (in the alternative to grounds 1 to 3) – determining the quantum of damages without an action

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6 *Public Protector v Mail and Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 143.

19. The High Court did not simply make an order that compensation or damages was payable in principle. Instead, it took the extraordinary step of fixing the precise amounts of compensation that each respondent was entitled to.

19.1. The general principle is that appeals against quantum concern the exercise of discretionary powers vested in trial courts – and that an appeal court will be slow to interfere with that discretion judicially.

19.2. The High Court's exercise in calculating the various amounts involved considerable effort and complexity on the Court's part. There are various issues of principle that are not only canvassed and addressed in the Court's judgment in order to arrive at the precise figures of compensation.

19.3. The High Court erred in ordering those amounts which are not liquid without them being debated in action proceedings. Importantly, this is not a case where the court is making an order for general damages, for example, for reputational harm to Vitol's or Contango's reputation where such claims for general damages are by their very nature the Court's award that is not necessarily tied to any actual proved loss.

19.4. Importantly, the applicants were at a procedural disadvantage in interrogating the amounts furnished by Vitol and Contango. The applicants made the point that they were constrained to interrogate those amounts and challenge them in application proceedings.

19.5. First, the applicants also took issue with the date on which Vitol closed its hedges. Vitol claimed (on the one hand) that Vitol could not be certain of the case against

Vitol, or that the applicants "*intended to pursue its application*" until the third supplementary founding affidavit filed in February 2020.[7] However, Vitol's heads of argument and its 'culprits' note relied extensively on how patently unlawful the transactions were based on dozens of references to the first founding affidavit in March 2018.[8] Further, Vitol and Contango (in attacking delay) took the point that the very first time there was a hint of unlawfulness from the first legal review process (before counsel were approached for opinions) the applicants should have approached the courts because the applicants had a legal duty to do so to correct the unlawfulness. Knowing that, how could Vitol have been under any illusion that the applicants would see through the application to the end. At the very least, the reasonableness of Vitol's conduct in mitigating its losses should have been debated in action proceedings, and its potential effect on the amount of quantum payable. Indeed, Vitol did not even place its hedging contracts before the Court. Instead, it tendered those contracts to an expert if requested.[9]

19.6. Second, leaving aside the points above about the culpability of Contango and Vitol, based on the factual disputes (identified by the High Court) that were determined in Vitol's and Contango's favour on the basis of *Plascon-Evans*, those factual questions also have a key bearing on the amount of quantum claimed at the level of mitigation of loss. A person claiming damages must mitigate its loss. The court may refuse to award those amounts of damages where an aggrieved bidder had failed to mitigate

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7 AA p 3272 paras 228 - 229

8 The following footnote numbers all deal with references to the founding affidavit: 1 – 11; 14; 17 – 21; 24 – 26; 32; 37 – 41; 45 – 47; 49; 55 – 57; 63; 64; 73 – 78; 84.

9 Vitol AA p 3274 para 233

their loss.[10] For instance, if Mr Foster was indeed warned about the irregularities in 2016 then this would have had (at the very least partially) an impact on the amount payable to Vitol.

19.7. Third, in the Court's memorandum on 31 October 2020 requesting supplementary submissions on particular topics relating to the just and equitable remedy it stated (at 4(f)):

> *"Unless I could be satisfied that the envisaged constitutional/PAJA compensation would not exceed recoverable damages, it would seem that the just and equitable course (assuming I were not prepared to allow the recovery of profit) would be to preserve Vitol's accrued right to claim damages, subject to a cap that such damages may not exceed full restitution together with out-of-pocket expenses. The various issues raised above could then be determined in the action/arbitration for damages."*

19.7.1. The applicants' core submission was that, on the papers before the High Court, it was not apparent whether the constitutional or PAJA compensation would not exceed recoverable contractual damages. Indeed, that was illustrated by Vitol filing a <u>further affidavit</u> in which it sought to place that information before the Court. The applicants objected to the introduction of that affidavit (for which no leave was sought, nor were the established tests for the delivery of further affidavits satisfied). The Court then decided the matter without providing the applicants with an opportunity to deliver a further affidavit.

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10 See, *Darson Construction (Pty) Ltd v City of Cape Town 2007* (4) SA 488 (C) 506F-H; *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 at para 39; *Eskom Holdings Limited v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at paras 12-13

19.8. The Court also omitted to give sufficient consideration:

19.8.1. Assuming that it is correct that a respondent need not file a counter-application and the Court can simply order that any party pay compensation to any other party – then it is unclear why the Court would not have made an order that Taleveras was jointly and severally liable towards Contango.

That the applicants launched the application in two Parts – where Part A would have far more quickly determined the merits of the dispute. On the basis of the founding papers alone there was no plausible legal basis on which Vitol or Contango could dispute that the merits of the transactions were unlawful.

19.8.2. The proceedings would have been immeasurably shortened if Vitol and Contango had conceded the merits of the application and raised the issue of delay at the level of the just and equitable remedy. By contrast, Vitol and Contango since inception of the matter disputed unlawfulness of transactions. Contango only changed its stance when it delivered the answering affidavit. And Vitol only changed its stance in the final stages of the review application when it delivered its heads of argument.

19.9. In the event that the above factors had been duly considered, the court would not have ordered the applicants to pay a specific amount of compensation and costs in this review application. The quantum of the damages to be paid would be resolved in action proceedings where the amounts could be liquidated and where the amounts

could have been apportioned between Taleveras and SFF (and with the amounts owing to Vitol and Contango being reduced in accordance with their failure).

20. Accordingly, even if the other grounds of appeal canvassed above fail there are reasonable prospects of success in having the amount of the compensation to be paid transferred to trial or arbitration proceedings.

Fifth ground of appeal: the applicability of s217 of the Constitution to disposals

21. The High Court found that s217 of the Constitution is not applicable when an organ of state disposes of assets. The applicants make two points.

21.1. First, at the level of principle, there are conflicting provincial judgments on this point and it is in the interests of justice that the Supreme Court of Appeal pronounces on this issue. The applicants submit that on a proper purposive construction of s217 bearing in mind s39(2) of the Constitution (which demands that a court must prefer a construction that better gives effect to the rights in the bill of rights) there are reasonable prospects that the Supreme Court of Appeal will reach the opposite conclusion to the High Court.

21.2. Second, at the level of fact, this Court erred in finding that s217 of the Constitution, and the associated provisions of the PFMA, were not applicable to this review application when analysing the conduct of the respondents at the level of fact.

21.2.1. There was no dispute before the High Court that s217 would apply to SFF purchasing strategic oil from particular traders. But that is precisely what the Minister demanded if the sales were to go ahead.

21.2.2. Thus, assuming that the initial Ministerial approvals were correct (which mandated Mr Gamede to sell the strategic oil) then SFF was required, *inter alia,* to replenish those stocks through a 'rotation'. Rotation encompassed a sale and concomitant back-to-back purchase.

21.2.3. Both contracts between Vitol and Taleveras purported to make provision for a back-to-back purchase by SFF and this was plainly procurement within the meaning of s217 of the Constitution. Indeed, the High Court found as much at paragraph 72 of its judgment. Both Contango and Vitol thus knew that the oil could only be procured if an open tender process was followed or if a permissible deviation was demonstrated by SFF. Neither took sufficient steps in the face of suspicious transactions. Vitol's representatives – notwithstanding their understanding that the procurement principles in s217 were applicable, decided to participate in a process that it could tell from the scant detail of the RFP was suspicious; continued to have private meetings with the decision-maker; submitted amended proposals on the basis of those meetings, when there was never any indication that other traders would have the same opportunity.

21.2.4. The High Court failed to consider that it was understood between the parties that the procurement principles set out in s217 of the Constitution

were applicable. The draft RFP sent to Mr Ducrest on 20 November 2015 states plainly:

> *"In compliance with the Public Finance Management Act 1 of 1999, Preferential Procurement Policy Framework Act 5 of 2000, the National Treasury Regulations and the SFF procurement policies, SFF intends to engage qualified and reputable companies for the rotation, sale and purchase of the Strategic Crude Oil Stocks"*

21.2.5. Again, on a factual level, Vitol did not dispute applicability of the provisions. The parties therefore understood that s217 was applicable as well as the PFMA. In any event, the principles of PAJA and s33 of the Constitution demand procedural fairness – which could never entail certain bidders getting an opportunity to meet privately with the decision-maker and to submit further proposals, while other entities were not. Notwithstanding that understanding at the level of fact, the respondents conducted themselves in the way they did. Therefore, a legal defence later introduced by Vitol's legal representatives *ex post facto* cannot provide assistance to assessing the culpability of the respondents.

21.2.6. The parties understanding that s217 and the procurement principles under the PFMA applied to the transactions was critical at the level of fact when examining whether the respondents were innocent or (at the very least) whether their innocence or involvement should be debated in action proceedings or finally resolved in the review proceedings where *Plascon-Evans* was applied in favour of Vitol and Contango.

Sixth ground of appeal: costs

22. The High Court concluded that, although CEF and SFF succeeded in having the impugned decisions and transactions set aside, Vitol and Contango had also achieved substantial success. It ordered the applicants to pay the costs of Vitol and Contango, and Taleveras to bear its own costs.

23. In relation to Taleveras, regardless of the outcome of the substantive grounds of appeal, the applicants submit that Taleveras should have been ordered to pay a portion of the applicants' costs, as well as being jointly ordered to pay Contango's costs. The High Court concluded that Taleveras misconducted itself and paid bribes in the course of concluding the impugned agreements. That irregular and unlawful conduct resulted in Contango not being able to assert title to the oil it had purchased and in the applicants being obliged to initiate the review proceedings. Taleveras only indicated when delivering its answering affidavit, that the restitutionary relief proposed by the applicants was just and equitable and that it did not oppose the proceedings. Prior thereto, Taleveras had filed a notice of intention to oppose the review application and opposed the bifurcation of the review application. In other words, it conducted itself as a party that was opposing the application.

24. Even after delivering its answering affidavit, Taleveras sought to defend the claims of bribery and corruption and claimed that Taleveras should receive restitution from SFF, which claim Contango contested. The High Court ruled in favour of Contango.

25. The High Court also concluded (at para 235) that '*Taleveras' denials of corruption are so far-fetched and untenable that they can be dismissed on the papers.*' Instead of assisting the Court in determining the relevant facts, Taleveras muddied the waters with a patently untenable version that the other parties, as well as the Court, were forced to deal with.

26. Contango's legal costs arising from this conduct were directly attributable to Taleveras. His Lordship Mr Justice Rogers therefore erred in failing to require Taleveras to pay Contango's costs, or at least a portion thereof, and in requiring SFF to pay for legal costs that were incurred as a result of Taleveras' conduct. Taleveras should, furthermore, have been ordered to pay a portion of the applicants' costs, commensurate with Taleveras' corrupt activities in concluding the impugned agreements and its introduction of demonstrably false allegations into these proceedings.

27. Accordingly, Taleveras was unsuccessful in respect of both issues it sought to defend in these proceedings. The costs should accordingly follow the result. Taleveras should pay the costs of the applicants to the extent of its opposition of these proceedings.

28. As regards Vitol and Contango – in the event that the applicants are successful in respect of the first ground of review it follows that neither Vitol nor Contango could succeed in their claim for compensation in the High Court.

29. In the event that the applicants' other substantive grounds of appeal succeed and the result is that Vitol and Contango will be entitled (in respect of these proceedings) to be paid only the restitution amounts, it should be factored into the cost order that there were no bases for these parties to oppose the review being split between Part A and Part B or the just and equitable relief proposed by the applicants in the very first set of founding papers.

Dated at CAPE TOWN on this 7th day of December 2020.

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