



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 119/2021

In the matter between:

CENTRAL ENERGY FUND SOC LTD **FIRST**
APPELLANT

STRATEGIC FUEL FUND ASSOCIATION
NPC **SECOND**
APPELLANT

and

VENUS RAYS TRADE (PTY) LTD **FIRST**
RESPONDENT

GLENCORE ENERGY UK LTD **SECOND**
RESPONDENT

TALEVERAS PETROLEUM
TRADING DMCC **THIRD**
RESPONDENT

CONTANGO TRADING SA **FOURTH**
RESPONDENT

NATIXIS SA RESPONDENT	FIFTH
VESQUIN TRADING (PTY) LTD RESPONDENT	SIXTH
VITOL ENERGY (SA) (PTY) LTD RESPONDENT	SEVENTH
VITOL SA RESPONDENT	EIGHTH
THE MINISTER OF ENERGY RESPONDENT	NINTH
THE MINISTER OF FINANCE RESPONDENT	TENTH
ORGANISATION UNDOING TAX ABUSE CURIAE	AMICUS

Neutral citation: *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* (Case no 119/21) [2022] ZASCA 54 (13 April 2022).

Coram: MAYA P, DAMBUZA, SCHIPPERS and PLASKET JJA and MEYER AJA

Heard: 24 February 2022

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Summary: Review under principle of legality and Promotion of Administrative Justice Act 3 of 2000 – rotation of country’s strategic oil stock – decisions and resultant transactions reviewed and set aside – just and equitable relief – factors

relevant to assessment – misconduct by state officials – contracting parties innocent – compensation for out-of-pocket expenses appropriate – appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Rogers J sitting as court of first instance):

The appeal against paragraphs 7(b) to 14 and paragraphs 15(b) to 17 of the order of the court below is dismissed, with costs. Such costs shall in relation to the third respondent, be limited to the costs of one counsel, and as regards the fourth to eighth respondents, include the costs of three counsel.

JUDGMENT

Schippers JA (Maya P, Dambuza and Plasket JJA and Meyer AJA concurring)

[1] This appeal arises from a successful application by the appellants, the Central Energy Fund SOC Limited (CEF) and the Strategic Fuel Fund Association NPC (SFF), to review and set aside certain decisions taken in 2015 and 2016, concerning the rotation of South Africa's strategic stock of some 10 million barrels of crude oil (the strategic stock), and the transactions that followed. The strategic stock comprised 5 million barrels of Basrah Light, an Iraqi oil, and 5 million barrels of Bonny Light, a Nigerian oil. The SFF is responsible for the management of the strategic stock and is a wholly owned subsidiary of the CEF. The decisions and transactions were approved by the ninth respondent, the Minister of Energy (the Minister). Neither the Minister nor the tenth respondent, the Minister of Finance, participated in the proceedings below.

[2] The Western Cape Division of the High Court, Cape Town (the high court), reviewed and set aside the decisions and resultant transactions. It made an order granting the fourth and fifth respondents, and the sixth to eighth respondents, compensation for their out-of-pocket-expenses as contemplated in s 172(1)(b) of the Constitution and s 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The issue in this appeal, which is before us with the leave of the high court, is whether that order is appropriate.

The basic facts

[3] The basic facts are uncontroversial. The rotation of the strategic stock was done by way of sale and purchase agreements, coupled with storage agreements in terms of which the SFF continued to store the oil in underground tanks at its storage facility at Saldanha Bay in the Western Cape. The SFF sold

3 million barrels of crude oil to the first respondent, Venus Rays Trade (Pty) Ltd (Venus). Venus immediately on-sold it to the second respondent, Glencore Energy UK Ltd (Glencore). Venus played no part in the proceedings in the high court. Glencore opposed the review application but in the course of those proceedings came to a settlement with the appellants.

[4] On 28 December 2015 the SFF, acting through its then Chief Executive Officer (CEO), Mr Siphon Gamede, entered into three sale and purchase agreements with the third respondent, Taleveras Petroleum Trading DMCC (Taleveras). Two of these agreements were for the in-tank sale to Taleveras of 2 million barrels of Basrah Light crude oil in Tank 2 at the SFF's storage facility, and 2 million barrels of Bonny Light in Tank 6. The third agreement was a back-to-back purchase agreement in terms of which the SFF undertook to purchase 4 million barrels of crude oil from Taleveras. On 29 January 2016 the SFF and Taleveras concluded an addendum to the first and second sale and purchase agreements after the quality of the oil was established and certified, and the price determined.

[5] These transactions were financed by the fourth respondent, Contango Trading SA (Contango), and the fifth respondent, Natixis SA (Natixis). Natixis undertook a risk analysis and required that the financing arrangement be structured with certain guarantees in place to address potential risks. The financing risk was met by ensuring that Contango became owner of the oil. The risk of Taleveras defaulting on its obligation to repurchase the oil was addressed by the fact that Contango would be able to sell the oil to a third party.

[6] On 2 February 2016 Natixis approved a \$165 million repo credit line granted to Contango in order to conclude a repo transaction for the 4 million barrels of crude oil. On 5 February 2016 Contango entered into a put option

agreement with Total Oil Trading SA, which provided Contango with a ready buyer for the oil in the event of Taleveras defaulting on its obligation to repurchase the 4 million barrels of crude oil.

[7] In accordance with the approval of the repo transaction by Natixis, on 8 February 2016 Contango and Taleveras concluded a Master Repurchase Agreement (MRA). The MRA provided that upon purchasing the oil from the SFF, Taleveras simultaneously on-sold it to Contango and transferred to Contango all its rights in respect of the oil (including those against the SFF under the sale and storage agreements) for a total sale price of \$164 322 400. Taleveras was obliged to repurchase the same or equivalent oil from Contango on the repurchase date (5 April 2018) at a price based on the average Dated Brent price for March 2018. If Taleveras failed to repurchase the oil on the repurchase date, Contango was entitled to terminate the agreement and sell the oil at market price to a third party.

[8] On 10 February 2016 Natixis provided a letter of credit to the SFF in respect of the purchase by Taleveras of the 4 million barrels of crude oil ‘in tank’ from the SFF. The funds were paid by Natixis around 25 February 2016.

[9] The SFF sold 3 million barrels of crude oil to the sixth respondent, Vesquin Trading (Pty) Ltd (Vesquin), a subsidiary of the seventh respondent, Vitol Energy (SA) (Pty) Ltd (Vitol SA). Vesquin appointed Vitol SA to execute the agreement on its behalf. In what follows these entities will be referred to as ‘Vitol’, because they share an identity of interests. The Vitol agreement was concluded on 20 January 2016 and comprised two transactions: (i) a sale and repurchase agreement in terms of which the SFF sold to Vitol 3 million barrels of crude oil from Tank 2 at Saldanha Bay, and the SFF agreed to repurchase the same quantity of crude oil at a future date; and (ii) a storage agreement in terms

of which the SFF leased to Vitol up to 3 million barrels of storage space in Tank 2 for three years (subject to options to renew).

[10] The oil was still in the tanks at the SFF's storage facility when in September 2017, the appellants gave notice of their intention to launch a review application to declare the above agreements and related transactions unlawful and invalid (the review notice). The review application was launched on 12 March 2018 – more than two years after the agreements were concluded.

[11] The SFF brought the review application essentially as a self-review under the doctrine of legality. The CEF applied in terms of PAJA. Taleveras did not oppose the review but filed an explanatory affidavit in which it denied that it had engaged in collusion or corruption in the sale of the oil, and stated that it accepted the appellants' offer to refund the purchase price and storage fees plus interest. Contango, Natixis and Vitol opposed the review application and asked that it be dismissed with costs. Alternatively, and in the event that the impugned decisions and transactions were reviewed and set aside, they contended that they should be compensated for the losses they had suffered as a result of the impugned agreements being declared invalid.

[12] The appellants' review papers were materially incomplete when they launched the application. They had not yet commissioned a forensic investigation of the transactions by Gobodo Forensic Investigative Accounting (Pty) Ltd (Gobodo), upon which they came to rely. Gobodo furnished its report to the appellants on 30 April 2019, in the light of which they supplemented the review papers on 28 February 2020. The Gobodo report was provided to the respondents only on 20 April 2020.

[13] The application came before Rogers J. He observed that it was only on 28 February 2020, when the appellants' delivered their supplementary founding papers, that the respondents finally knew the case they had to answer – more than four years after the trigger date for launching review proceedings. Even then, the supplementary founding papers did not represent the appellants' complete case. The replying papers delivered on 22 July 2020 contained new matter and as a result, the respondents had to file supplementary opposing papers.

[14] The high court found that the appellants' delay in instituting and prosecuting the review was 'unreasonable, egregious, and unexplained or unsatisfactorily explained'. It held that the delay was unreasonable for legality purposes, and the inadequacy of the explanation for the delay was a factor against condonation as envisaged in PAJA.

[15] The court however condoned the delay. It held that the principle enunciated in *Gijima*¹ was applicable – even where an unreasonable delay is not condoned, s 172(1)(a) of the Constitution may nonetheless oblige a court to declare the impugned conduct invalid. The court declared the impugned decisions invalid because their illegality was clear and indisputable.² Further, the respondents had admitted that the decisions were invalid on some of the review grounds. The judge was of the view that the remaining grounds, even if not admitted, had clearly been established.

[16] There were other reasons why the appellants' delay had to be condoned, which the judge explained as follows:

¹ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC) para 52. See also C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 730.

² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paras 66 and 71.

‘Although the *Gijima* principle compels this result, there are other factors which justify condoning/overlooking the delay, at least for the limited purpose of a declaration of invalidity. The decisions related to the national interest in energy supply and to a quantity of oil of large value. The oil was sold for \$280,831,000, equating to R3,317 billion in March 2018 and R4,36 billion in November 2020. The illegalities were serious and pervasive with wholesale disregard of corporate governance and transparency. In the case of Taleveras, the irregularities included bribery, while in Venus’ case there must have been an improper basis for its being favoured.’

[17] The grounds upon which the impugned decisions and transactions were reviewed and set aside, included the following. The Minister’s decision approving the disposal of the strategic stock was tainted by misrepresentations by Mr Gamede, who had acted with improper motives. The SFF did not follow a fair, equitable, transparent and competitive process, in violation of its constitutional duties to observe administrative justice and legality, and the CEF’s procurement policy. Mr Gamede’s insistence on private negotiation rather than competitive bidding, and the disposal awards, were irrational.

[18] Mr Gamede’s conduct was riddled with improprieties, and he had no problem with taking bribes. He issued requests for proposals even before he had obtained the Minister’s approval to sell the strategic stock. He failed to disclose this to the Executive Committee or the Board of the SFF, and excluded the officials and structures of the SFF from the evaluation of the bids to purchase the oil. He repeatedly misled the Minister. He justified the rotation of the strategic stock on the basis that it was losing its relevance to the South African market, when this was not true for the Bonny Light oil. He obtained the approval for the relevant transactions by stating that they had been assessed by the SFF, when in fact the SFF was unaware of them and no due diligence had been carried out. He failed to inform the Minister of the terms of the transactions and that the conditions for their conclusion had not been met.

[19] The most serious and troubling review ground was that Mr Gamede had accepted bribes to procure some of the transactions. Between 24 November 2015 and 4 February 2016, he received four deposits totalling R2.6 million into the trust account of his dormant legal practice, from a person associated with Taleveras. These payments, the high court found, were bribes. Between 29 January 2016 and 7 April 2016, Mr Gamede received payment of R20 million into his bank accounts through anonymous cash deposits, made in tranches of between R15 000 and R20 000.

[20] The high court concluded that the SFF was itself culpable. It said:

‘Although Gamede was driving the improper disposal process and to a large extent made decisions on his own, he could not have achieved what he did without the acquiescence or supineness of SFF’s senior managers and directors.’

[21] The court specifically criticised the SFF’s executives, Mr Luvuyo Mayaphi and Ms Daphne Chili, for their role in the transactions. Mr Mayaphi, the SFF’s General Manager, had not been frank about his involvement in the transactions. In November 2015 he had been informed that prior approval for the transactions had to be obtained from the Minister and the national Treasury. He failed to ensure that those approvals were obtained. He instructed the SFF’s legal department to prepare the Vitol agreements in mid-December 2015, witnessed the Taleveras transaction on 28 December 2015 and was present when Mr Gamede signed Vitol’s contracts on 20 January 2016. At each stage he knew that the SFF’s internal prerequisites for these transactions had not been met, but allowed the transactions to go ahead nonetheless. The court found that Ms Chili, the SFF’s Acting General Counsel, had ‘vetted disposal contracts without raising red flags . . .’.

[22] Concerning the role of the directors of the SFF, the court stated:

‘[T]he directors lamely approved the Taleveras and Vitol transactions and effectively did the same for the Venus transactions even though they must have known that they did not have enough information and that such information as they did have had been sprung on them at the last moment. They knew what CEF’s procurement policy required, yet they were supine in the face of a patently uncompetitive process. The board did not proactively intervene to ensure that SFF and the country’s interests were safeguarded.’

[23] The SFF Executive Committee became aware of the impugned transactions by 19 January 2016, yet no one informed the Board that the strategic stock had been sold until 5 February 2016. The high court described this non-disclosure as a ‘staggering conspiracy of silence’.

[24] The SFF Board failed in its duty of oversight of the SFF. It approved the Vitol transaction and ratified the Taleveras transaction at a Board meeting on 5 February 2016. On the appellants’ own version:

‘[T]he SFF board made no enquiry into the process in terms of which the traders had been selected, the content of the bids, the evaluation and adjudication criteria adopted in relation to the bids, the extent to which Mr Gamede had complied with the applicable regulatory and policy framework in concluding the agreements or the extent to which the necessary approvals had been obtained. Moreover, the SFF Board did not have copies of any of the sale contracts before it when it deliberated on the Impugned Agreements concluded at that stage.’

[25] Mr Jawoodeen, the Chairperson of the Board, conceded that it should have done more to ensure that due process was followed. Despite having been informed on 8 February 2016 about concerns relating to the sale of the strategic stock, in a report to the Minister dated 23 June 2016, he supported a written submission by Mr Gamede that the process followed in concluding the agreements was in accordance with the CEF’s procurement policy, ministerial directives and Treasury regulations.

[26] The SFF was also reckless in entering into the transactions without any hedge instruments in place, thereby exposing the SFF (and indirectly, the fiscus) to substantial risk, since an increase in the price of oil in the market would ultimately be borne by the SFF when it replaced the strategic stock. This risk was amplified by the fact that the SFF sold the stock when the market was in contango (put simply, the oil market was likely to experience increased prices over time)³, without having taken any steps to protect itself against a change in the oil price by the time the SFF replenished the strategic stock.

[27] The Minister and the CEF likewise failed in their duty. The high court found that the Minister did not apply her mind prior to approving the SFF's decision to dispose of the entire strategic stock, and the transactions for the rotational sale and purchase of the stock. She also failed to exercise proper executive authority over the CEF and SFF, as required by the Public Finance Management Act 1 of 1999.

[28] The CEF was aware of the transactions by 5 February 2016 but did nothing to prevent or challenge them. Instead, the CEF justified them in the media and later lauded them in the 2015/2016 annual financial statements. Even after being advised that the disposal of the oil and the consequent transactions were unlawful, the CEF delayed in instituting review proceedings.

[29] As to the procurement of the impugned decisions and the transactions that followed, the high court came to the following conclusion:

‘Accordingly, and quite apart from the gross and unsatisfactorily explained delay, the rot which allowed the impugned transactions to be concluded and implemented was pervasive, even if one man was the linchpin.’

³ Contango markets are in effect when the futures price is higher than the current or expected spot price, implying that future prices are rising over time (*Contango: Definition and Backwardation Differences – 2022 – MasterClass* <https://www.masterclass.com>).

[30] The court held that since the decisions of the SFF and the Minister were invalid, the contracts concluded on the strength thereof could not stand. It examined, in detail, the role of each party in the conclusion of the contracts. It rejected Taleveras' denials of corruption as far-fetched and untenable, and concluded that the bribes to Mr Gamede were paid with a view to advancing Taleveras' interests. The court found that Glencore's failure to call for a board resolution did not show that it had turned a blind eye to rogue conduct, and that it was an innocent third party. Contango, which had taken proactive steps to ensure that things were in order, was also an innocent third party. And there were no peculiar improprieties in the conclusion of the contracts with Vitol: it too, was an innocent third party.

[31] Given the appellants' egregious delay and misconduct, and the fact that Contango and Vitol were innocent parties, the high court formed the view that either their contracts should be allowed to stand so that they could pursue contractual remedies, or be set aside subject to payment of compensation for out-of-pocket expenses. It chose the latter remedy which, it held, effectively vindicated the rights violated by the impugned decisions and transactions, and was fair to the affected parties. The compensation was limited to out-of-pocket expenses and excluded profit. This remedy, the court said, would give Vitol and Contango less than their contractual rights, but would ensure that they did not suffer fruitless expenditure because of the unlawful conduct of the SFF and the Minister.

[32] Consequently, the high court declared the impugned decisions and contracts invalid, and set them aside. It made the following orders in relation to Taleveras, Contango, Natixis and Vitol:

'Taleveras, CTSA and the fifth respondent ("Natixis")

- (7) The applicants jointly and severally must pay CTSA:
- (a) \$123,865,600 as restitution of purchase price and storage fees;
 - (b) \$84,837,048 as just and equitable compensation for out-of-pocket expenses other than interest;
 - (c) further amounts, in dollars, as just and equitable compensation in respect of interest, compounded monthly in arrears and calculated on the following amounts and from the following dates up to 4 April 2018 at the rate of 0.695% and from 5 April 2018 to date of judgment at the rates set out in the schedule attached hereto as “J1”:
 - (i) on \$112,000,000 from 25 February 2016;
 - (ii) on \$800,000 from 5 February 2016;
 - (iii) on storage fees totalling \$11,865,600, on each month’s fee from the “assumed date of payment” reflected in the schedule attached as “J2”,
 - (iv) on insurance premiums totalling \$408,853, from each date of payment to the extent that a date of payment is reflected in the schedule attached as “J3”, and on the remaining premiums from 1 June 2018;
 - (v) on inspection fees totalling \$28,195, from the first day of the second month following the month of “invoice date” in the schedule attached as “J4”;
 - (vi) on \$83,600,000, from 5 April 2018.
- (8) The total of the compensation set out in para (7) shall bear interest, from date of judgment to date of payment, at the rate of 1.81%, compounded monthly in arrears.
- (9) The following undertaking, given by CTSA and Natixis, shall be operative in relation to the compensation awarded to CTSA in terms of this order:
- “CTSA and Natixis will not seek to recover from Taleveras or Charmondel Holdings Ltd any amounts which they receive pursuant to this order, and any such amounts will be taken into account, in accordance with English law, to reduce their claims in any other proceedings they may bring against Taleveras or Charmondel.”
- (10) Subject to the fulfilment of the conditions stated in (11) below, the applicants jointly and severally must pay further compensation to CTSA in the amount of \$22,568,426 (being the net amount of the purchase price for the oil paid by CTSA to Taleveras in terms of the sale conformation dated 5 February 2016 issued in terms of the master repurchase agreement concluded between CTSA and Taleveras on 5 February 2016).
- (11) The liability to pay the compensation in (10) above shall only come into existence and be enforceable if, and to the extent that, CTSA is unable to recover the said amount from Taleveras after exhausting all reasonable steps to do so.

(12) The applicants must pay CTSA and Natixis' costs, including the costs of three counsel.

(13) No restitution or compensation shall be payable by the applicants to Taleveras pursuant to the setting aside of the contract between those parties.

(14) No order as to costs is made as between the applicants and Taleveras.

Vitol

(15) The applicants jointly and severally must pay Vitol:

(a) \$86,826,000 as restitution of purchase price and storage fees;

(b) \$19,049,944 as just and equitable compensation for out-of-pocket expenses other than interest;

(c) further amounts, in dollars, as just and equitable compensation in respect of interest, calculated at the rates set out in the schedule attached as "J5" up to 31 October 2020 and at the rate of 1.81% thereafter to date of judgment, compounded monthly in arrears, as follows:

(i) on \$78,606,000, from 11 March 2016 to 31 October 2020 in the amount of \$6,874,030 plus further interest from 1 November 2020 to date judgment;

(ii) on each month's storage fees, in total \$8,220,000, from date of each payment to 31 October 2020 in the amount of \$668,817, plus further interest from 1 November 2020 to date of judgment;

(iii) on \$37,530 (cost of letter of credit), from 21 January 2016 to date of judgment;

(iv) on each month's insurance premiums (in total \$933,487), from the first day of the month immediately following the month in which such premium was paid as set out in the schedule attached as "J6" to date of judgment;

(v) on \$18,078,928 (hedging losses), from 7 May 2020 to date of judgment,

(16) The total of the compensation set out in para (15) shall bear interest, from date of judgment to date of payment, at the rate of 1.81%, compounded monthly in arrears.

(17) The applicants must pay Vitol's costs, including the costs of three counsel.'

[33] The appellants were granted leave to appeal paragraphs 7(b) to 14 and 15(b) to 17 of the high court's order. Vitol was granted leave to cross-appeal

paragraphs 2 and 3 (insofar as those paragraphs related to Vitol), and consequentially paragraphs 15 to 17 of the high court's order granting it just and equitable relief.

[34] Vitol's initial stance was that the effect of declaring the Vitol contracts invalid from inception and setting them aside, deprived it of a contractual damages claim it would otherwise have been entitled to pursue. Those damages would have included a claim for lost profits. However, shortly before the hearing of the appeal, Vitol abandoned its cross-appeal.

[35] Consequently, the remaining issues to be decided are firstly, whether the relief granted by the high court was just and equitable in the circumstances, and secondly, costs. The appellants, Contango and Vitol accepted that if the impugned agreements were set aside, the oil should be restored to the SFF, and the purchase price and storage fees, plus interest, repaid. The dispute relates to whether the SFF should, in addition, pay the expenses that Contango and Vitol incurred in reliance on the transactions (their out-of-pocket expenses).

Just and equitable relief: principles

[36] A court in review proceedings, whether under the principle of legality or the provisions of PAJA, has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the case.⁴ The remedy must be fair to all those affected by it, and yet effectively vindicate the rights violated.⁵ In terms of s 172(1)(b) of the Constitution, a court is authorised to make any order that is just and equitable pursuant to a declaration of constitutional invalidity.⁶

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC) para 71.

⁵ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) BCLR 300 (CC); 2007 (3) SA 121 (CC) para 29.

⁶ Section 172(1) of the Constitution provides that when deciding a constitutional matter, a court:

[37] It is settled law that s 172(1)(b) of the Constitution confers on the courts very wide powers to craft an appropriate or just remedy even in ‘exceptional, complex or apparently irresolvable situations’.⁷ The Constitutional Court has held that ‘[t]he power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion . . . ’ and enables them ‘. . . to address the real dispute between the parties’.⁸

[38] Section 8(1) of PAJA gives effect to the wide remedial discretion conferred by s 172 of the Constitution.⁹ The relief it permits is not narrower than that available under a court’s original remedial discretion. The language and context of s 8(1) make that clear: a court in judicial review proceedings may grant ‘any order that is just and equitable, including orders . . . setting aside the administrative action’ and in exceptional cases, ‘directing the administrator or any other party to the proceedings to pay compensation’.¹⁰ The orders listed in s 8(1) do not comprise a closed list.

[39] The Constitutional Court has developed two guiding principles for crafting an appropriate remedy in cases that entail setting aside a contract. The first is the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what

‘(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’

⁷ *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) para 132.

⁸ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) para 211.

⁹ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama -ye-Maswati Royal Council Intervening)*; [2010] ZACC 26; 2011 (3) BCLR 229 (CC); 2011 (4) SA 113 (CC) paras 82 and 83.

¹⁰ Section 8(1)(c)(ii) of the Promotion of Administrative Justice Act 3 of 2000.

has been performed under a contract that no longer exists. In *Allpay (No 2)* the Court described the rationale for the corrective principle as follows:

‘Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed when they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.’¹¹

[40] The application of the corrective principle was explained thus:

‘This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social security matters.’¹²

[41] The second guiding principle is the ‘no-profit-no-loss’ principle which the Court articulated as follows:

‘It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.’¹³

[42] The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be

¹¹ *Allpay No 2* fn 4 para 30. See also paras 29 and 32.

¹² *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC) para 32.

¹³ *Ibid* para 67.

required to suffer losses.¹⁴ On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.¹⁵

[43] The exercise of a remedial discretion under s 172(1)(b) of the Constitution and s 8(1) of PAJA, constitutes a discretion in the true sense. It may be interfered with on appeal only if this Court is satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which ‘could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’.¹⁶ Put simply, the appellants must show that the high court’s remedial order is clearly at odds with the law.¹⁷

The compensation order

[44] After declaring the various impugned decisions and agreements unlawful and invalid, the high court made an order granting Contango and Vitol compensation for their out-of-pocket expenses, including hedging losses, insurance, letters of credit, the costs of inspections and in the case of Contango, the option fee with Total SA.

[45] At the outset, it should be noted that the appellants’ case is based on the misconception that the award of out-of-pocket expenses amounted to compensation akin to damages for the loss of the contracts in question. But properly understood, requiring the SFF to repay those expenses is a

¹⁴ *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others* [2008] 2 All SA 145 (SCA); 2008 (2) SA 481 (SCA) para 26; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ); [2017] 3 All SA 971 (GJ) para 118, confirmed on appeal in *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

¹⁵ *Black Sash Trust v Minister of Social Development and Others (Freedom under Law intervening)* [2017] ZACC 8; 2017 (3) SA (CC) 335 (Black Sash I) paras 40 and 50.

¹⁶ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (10) BCLR 1199 (CC); 2015 (5) SA 245 (CC) para 88.

¹⁷ *Ibid* para 89.

consequence of restitution: it serves to restore Contango and Vitol to the status quo ante. The obligation to repay out-of-pocket expenses accords with the guiding principles for crafting appropriate relief, referred to above.

[46] Counsel for the appellants submitted that the compensation order for out-of-pocket expenses was neither competent nor appropriate, on three main grounds. The first was that the court gave insufficient attention to the public interest in preventing parties from benefiting from unlawful and corrupt contracts; the second, that Contango and Vitol should have brought a counter-application for just and equitable relief; and the third, that the order for compensation ‘infringes the principle of subsidiarity’.

[47] The thrust of the appellants’ argument on the first ground of appeal was that the high court did not properly consider the public interest in preventing bribery and ‘protecting the public purse from funding corrupt transactions’. The court, so it was argued, failed to have proper regard to the no-profit principle, since Contango and Vitol had failed to do basic due diligence and were not innocent parties.

[48] The argument that Contango was not an innocent party or that it failed to conduct basic due diligence, is unsustainable on the evidence. Contango and Natixis were not accused of nor did they engage in any wrongdoing. They acted as reasonable credit providers, by ensuring that the contracts they had concluded were regular. They deliberately structured the financing transaction so that they would take ownership of the oil, and not be reliant on any remedies against Taleveras. They sought and were repeatedly given assurances by the SFF that Contango’s title to the oil was good. After Mr Gamede departed as CEO of the SFF, Contango representatives met with the SFF in Saldanha Bay in January 2017, to ensure that Contango’s interests were protected. They were told that

Contango remained the holder of valid legal title to the oil. Contango and Natixis relied on these assurances, as they were entitled to do.

[49] Then there is the appellants' egregious and unexplained delay in instituting the review proceedings. It is an established principle that where a court condones a delay, it must factor that delay into the determination of a just and equitable remedy.¹⁸ The SFF failed to inform Contango and Vitol that there were doubts about the validity of the transactions until the review notice in September 2017. Throughout the period that the appellants delayed in instituting review proceedings, the SFF repeatedly assured Contango that it recognised its ownership of the oil, continued to invoice Contango for storage fees up to March 2018 and permitted inspections of the oil. Contango and Natixis continued to rely, in good faith, on the impugned decisions and agreements, and expended significant costs in doing so.

[50] In November 2017 Contango and Natixis put the SFF on notice as to the prejudice caused by its approach, setting out the impending losses that Contango would suffer, including hedging costs, if it was not given possession of the oil by 6 April 2018. The SFF refused to release the oil to Contango, no repurchase by Taleveras could take place and Contango had to meet its hedge obligations of \$83,680,000.

[51] It was submitted that Vitol was not an innocent party for the following reasons. First, it was the 'catalyst' for the impugned transactions, which were 'flawed and a sham from the outset'. Second, Vitol knew that a procurement process was being followed and attempted to skew it in Vitol's favour through improper exchanges with Mr Gamede. Third, Vitol had a conflict of interest that

¹⁸ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC) paras 53 and 54.

precluded it from advising the SFF on an appropriate stock rotation strategy or the terms of its request for proposal. Fourth, Vitol must have known that the Ministerial preconditions to the transactions had not been met and proceeded with its contract nonetheless.

[52] These submissions also, have no basis in the evidence. Vitol, which had a long-standing relationship with the SFF, made a number of overt proposals to the SFF regarding optimisation of the strategic stock between 2011 and 2015. There was nothing improper in doing so. Mr Harvey Foster, the South Africa Country Manager of the Vitol Group, had often made commercial proposals directly to both PetroSA and the SFF over the years. Chevron, Mecuria, Morgan Stanley, Taleveras and Total (all of whom also had storage contracts with the SFF) similarly engaged directly with the SFF CEO and staff.

[53] Vitol's stock optimisation proposals broadly entailed the SFF relinquishing control over its oil reserves to a trader on terms that would allow it access to a supply in an emergency, whilst also leasing its storage space. The statutory regime does not preclude the SFF from doing this. From November 2014 (prior to the appointment of both the relevant Minister and Mr Gamede) the SFF itself considered stock optimisation plans. There is no reason to believe that the plan to rotate its stock and commercialise its storage space was a sham or that the SFF would not follow a proper process in doing so.

[54] The appellants sought to draw an adverse inference from the fact that Mr Gamede had sent a draft expression of interest to Mr Marc Ducrest, Vitol's Managing Director, for his professional input, and the latter's response that SFF should call for a pledge of the corresponding oil for the duration of any rotation. The evidence however shows that the SFF commonly reached out to companies in the industry for suggestions on commercial transactions. And as the high

court found, '[i]t was natural that Ducrest should promote his company's interests', and the idea that the SFF should favour a party which could pledge a quantity of oil equivalent to the strategic stock purchased, was not sinister. Apart from this, the SFF's final request for expressions of interest did not include the term that Mr Ducrest had proposed, and Vitol derived no benefit from having been sent an earlier draft of the expression of interest.

[55] Although Vitol was aware by late October 2015 that the SFF intended to invite proposals for participation in the rotation, sale and purchase of the strategic stock, by way of a closed bid and negotiation process, there was nothing inherently irregular in that process. The SFF was permitted under regulation 16A.7 of the Treasury Regulations and its own direct negotiation policy, to sell the oil by procuring price quotations rather than by way of open tender and had done so in the past. In fact, the strategic stock was sold in a closed bid because that process was likely to fetch a better price.

[56] Vitol provided a full account of its conduct, put up all the relevant documents and explained all the exchanges between Mr Foster and Mr Ducrest on the one hand, and the SFF personnel, including Mr Gamede, on the other. The evidence demonstrates that Vitol sought to promote its own interests in its engagements with the SFF, but acted properly throughout.

[57] Finally, on this aspect, the failure to meet the Minister's preconditions for the transactions cannot be attributed to Vitol. A person contracting with an organ of state in good faith is entitled to assume that the latter has complied with its internal arrangements and formalities.¹⁹ And the evidence shows that Mr Gamede had misled Vitol into believing that its transaction had been

¹⁹ *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) paras 11-12.

properly approved and that internal prerequisites had been met. Thus, Vitol's understanding that its transaction was authorised was reasonable, and the high court's conclusion that it was an innocent party cannot be faulted.

[58] That brings me to the appellants' contention that the high court failed to properly consider the public interest when granting the compensation order. It is true that the public interest ought to feature prominently in the exercise of a court's remedial powers. But the public interest in preventing bribery is not advanced by requiring innocent third parties, such as Contango and Vitol, to make losses.

[59] The appellants also disregard the public interest in the secure provision of credit in relation to transactions involving the State, which, in my opinion, promotes both transparency and accountability in public procurement. The public interest is adversely affected if creditors cannot safely finance transactions with organs of state, and are constantly at risk of incurring losses if it turns out that the State acted unlawfully.

[60] As the appellants would have it, innocent third-party financiers such as Contango and Natixis, are required to incur significant losses when the State acts unlawfully, even when they are given assurances by the state entity concerned, and take steps to secure the loans. If these are indeed the risks involved in providing credit, then there is a real danger that it will have a chilling effect on financing, which may become prohibitively expensive. International banks and finance institutions would be reluctant to finance major transactions – crucial to the economy – not only in oil but also in infrastructure and capital projects. Accordingly, the compensation order in this case, it seems to me, serves the broader public interest.

[61] The appellants have demonstrated a startling failure to accept any responsibility for the unlawfulness of the transactions. They go so far as to portray themselves as the victims of the unlawfulness, rather than its perpetrators. They say that the wrongs in this case were not committed against Contango and Vitol, but against them. But as the high court rightly found, it was the appellants who sought a public law remedy to vindicate the rule of law; it was the SFF, not Contango and Vitol, which violated the principle of legality in taking the impugned decisions and concluding the transactions that followed; and it was the appellants who violated the principle of legality by grossly delaying the institution of review proceedings.

[62] The court, correctly in my view, held that requiring Contango and Vitol ‘to suffer the loss of their out-of-pocket expenses, while allowing SFF to keep the oil and do no more than return the money would [not] promote an efficient and effective public administration grounded in the rule of law’. The court recognised that there is significant public interest in holding state entities to account for their irregular transactions. There would otherwise be little incentive to avoid loss by running an efficient and honest administration. When those transactions result in losses suffered by innocent third parties, requiring the State to make good such losses is likely to have a deterrent effect on future unlawful conduct. Not compensating innocent parties for their losses would, as the judge put it, ‘send out a message to officialdom that no matter how poorly they administer a State entity’s affairs, the court will see to it that the entity suffers no loss’.

[63] The no-profit-no-loss principle required Contango and Vitol to be compensated for their out-of-pocket expenses (including hedging costs) incurred in reliance on the relevant agreements and transactions, but not for lost profits. As the high court observed, such compensation resulted in complete

restitution: the position in which they would have been had they never contracted with the SFF.

[64] The appellants, however, contended that no compensation in relation to the hedging transactions was permissible because the hedging costs were not incurred for purposes of acquiring the strategic stock, but were directed at preserving profits. That is not so. Contango and Vitol entered into hedging arrangements to protect themselves against the risk of incurring losses, as a result of oil price fluctuations – an intrinsic feature of oil sale agreements throughout the world.

[65] What is more, on the papers, the appellants accepted that hedging arrangements are a standard and appropriate step to take on the back of oil transactions of this kind. In fact, they criticised as irrational, the SFF's failure to enter into hedging agreements to protect its position when the strategic stock was sold. Having done so, they cannot belatedly claim, on appeal, that those costs were not incurred in reliance on and in direct consequence of the impugned transactions.

[66] The remaining grounds of appeal – that Contango and Vitol should have brought a counter-application for out-of-pocket expenses and that the principle of subsidiarity precluded their award – can be dealt with shortly. They are insupportable in law and on the facts.

[67] The high court emphasised that its order of compensation for out-of-pocket expenses was not an award of either contractual or constitutional damages. The former would have been computed differently to include lost profits but exclude wasted costs, and have far exceeded the out-of-pocket expenses claimed. Instead, Contango and Vitol sought restitution of the status

quo ante, and therefore were not required to counterclaim for their losses or prove their damages in action proceedings.

[68] On the contrary, Contango and Vitol were entitled to claim payment of their out-of-pocket expenses pursuant to the relief sought by the appellants. In Part A of the notice of motion they sought an order reviewing and setting aside the impugned decisions and agreements, and the notice stated that the parties were entitled to file additional affidavits addressing the issue of a just and equitable remedy, after the orders sought in Part A were handed down. In Part B the appellants asked for an order for just and equitable relief on the basis of the affidavits filed in Part A, together with the additional affidavits, if any. Thus, the appellants asked the court to set aside the impugned agreements and to craft appropriate relief.

[69] Concerning the relief sought, three points are required to be made. First, no counter-application was necessary because the issue of compensation was an integral part of the assessment as to whether setting aside orders should be granted and if so, on what terms, as the high court observed. Second, the orders sought by the appellants were not confined to the repayment of the purchase price and storage fees. And third, the respondents were invited – by the appellants, no less – to place evidence on affidavit before the court as to what would constitute a just and equitable remedy if the review were to succeed, which they did.

[70] Moreover, there were no factual disputes relating to the claim for compensation by Contango and Natixis, and in the case of Vitol, the appellants failed either to place the expenses incurred properly in issue or to establish a basis for limiting them. For these reasons, this case is distinguishable from *Simcha Trust*,²⁰ upon which the appellants relied for their contention that a

²⁰ *Simcha Trust v De Jong and Others* [2015] ZASCA 45; [2015] 3 All SA 161 (SCA); 2015 (4) SA 229 (SCA).

claimant for compensation must initiate its own proceedings. There, it was held that a compensation remedy is not available where remittal has been ordered.²¹ Application proceedings were therefore plainly appropriate in this case. Further, and as noted by the high court, no party sought a referral to oral evidence.

[71] It was submitted that the high court judgment infringes the principle of subsidiarity, in that there are ‘suggestions’ in the judgment that the compensation order was not made in terms of s 8(1) of PAJA nor as an award of constitutional damages. The appellants say that the court ‘implied’ that a third category of compensation was possible: as an antidote to the harshness of a setting-aside order, which may not be contemplated in s 8(1), and may instead be sourced in the broad just and equitable jurisdiction conferred by the Constitution and PAJA. However, the court did not decide this question.

[72] The high court did not imply nor create a new category of compensation. The appellants elected to launch the review application under both the principle of legality and PAJA. Having done so, they cannot criticise the high court for considering the remedies available under both. It is not open to the appellants to argue that the compensation award breaches the principle of subsidiarity because they do not like the remedy ultimately selected by the court.

[73] In conclusion, the high court was called upon to determine just and equitable relief in a case where the issue was not simply whether an administrative decision should be set aside, but one presenting a combination of features of substantial importance. The irregularities were a serious violation of the rule of law. The agreements had been in existence for some years. Contango and Vitol were innocent parties who had incurred significant expenses in

²¹ *Ibid* para 27. This Court also expressed the view that in circumstances where a dispute about the validity of an impugned decision had been settled and only the question of costs remained, it was inappropriate to permit a respondent to file an affidavit seeking compensation against a co-respondent.

reliance on the appellants' conduct and those agreements. The extent of those costs was exacerbated by the appellants' delay in launching and prosecuting review proceedings. Setting the agreements aside would deprive Contango and Vitol of their contractual rights. In that event, a balance had to be struck taking into account the public interest, and whether the status quo ante could be restored to an equitable extent.

[74] The high court considered that justice and equity would best be served by an order setting aside the impugned decisions and agreements, and granting Contango and Vitol compensation for the losses they suffered as a result of the impugned agreements being declared invalid.²² The appellants have not established that the court erred in law or reached a plainly unreasonable decision. It follows that the appeal must be dismissed.

Costs

[75] The appellants contend that they should not have been held liable for Contango and Vitol's costs; that at the very least, there should have been no order as to costs; and that they were substantially successful. As regards Taleveras, it was submitted that its explanatory affidavit was 'in opposition to the relief sought by the appellants', which they were required to address, and Taleveras 'should have been ordered to pay at least a portion of the appellants' costs'.

[76] In the review proceedings the appellants sought costs against only the opposing respondents. Taleveras did not oppose the review. In their replying affidavit the appellants excluded Taleveras from the category of opposing respondents. In their heads of argument, they submitted that any order for costs

²² *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) para 132.

should exclude Taleveras. So, the prospect of a costs order adverse to Taleveras did not arise on the papers in the proceedings in the high court, and cannot now be sought on appeal.

[77] For the same reason, the costs orders sought in the appellants' notice of appeal, namely that the appellants and Taleveras be held liable, jointly and severally, for the costs of Contango and Natixis, cannot be granted. Aside from this, any order that Taleveras pay the appellants' or Contango and Vitol's costs would be punitive. It is impermissible to seek a punitive costs order without hearing the party against whom such order is sought.²³ Given that Taleveras' participation in the appeal related solely to the question of costs, the costs of two counsel are not justified.

[78] It is a settled principle that courts exercise a true discretion in relation to costs orders.²⁴ An appellate court will not likely interfere with the exercise of a true discretion, which involves a choice between the number of equally permissible options.²⁵ The appellants have not identified any factual or legal misdirection by the high court that would warrant this Court's interference in its costs award.

[79] Contango and Natixis achieved substantial success and were accordingly entitled to their costs. As for Vitol, the appellants' basic complaint is that Vitol's opposition to the review was unreasonable because it included a challenge to the CEF's standing and the merits of the review. But those challenges were made in good faith, based on the information available to Vitol at the time. After disclosure of relevant information in the answering papers of the other parties and in reply, Vitol did not persist in opposing the merits of the

²³ *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) para 19.

²⁴ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) para 144.

²⁵ *Zuma v Office of the Public Protector and Others* [2020] ZASCA 138 para 20.

review (if the appellants' delay was condoned). Even in the absence of Vitol's opposition, the appellants had to deal with their grounds of review in full. As the high court pointed out, those grounds were relevant to assessing condonation of the delay, but also had to be comprehensively traversed in the interests of transparency and accountability.

[80] As the high court observed, the most contentious issues concerned compensation. On this aspect Contango, Natixis and Vitol achieved substantial success. They were appropriately awarded costs. There is no basis for interfering with the high court's discretion in this regard.

[81] In the result the following order is made:

The appeal against paragraphs 7(b) to 14 and paragraphs 15(b) to 17 of the order of the court below is dismissed, with costs. Such costs shall in relation to the third respondent, be limited to the costs of one counsel, and as regards the fourth to eighth respondents, include the costs of three counsel.

A SCHIPPERS
JUDGE OF APPEAL

Appearances:

For appellants:	T Motau SC (with him R Tshetlo, S Scott, U Gcilishe and A Pillay)
Instructed by:	Webber Wentzel Attorneys, Cape Town Phatshoane Henney Attorneys, Bloemfontein
For third respondent:	L Kuschke SC (with him U Naidoo)
Instructed by:	Knowles Husain Lindsay Inc, Cape Town McIntyre Van der Post, Bloemfontein
For fourth and fifth respondents:	G Marcus SC (with him K Hofmeyr SC and M Mbikiwa)
Instructed by:	Norton Rose Fulbright SA Inc, Johannesburg Webbers Attorneys, Bloemfontein
For sixth to eighth respondents:	W Trengove SC (with him I Goodman and N Nyembe)
Instructed by:	Herbert Smith Freehills SA LLP, Johannesburg Symington De Kok Attorneys, Bloemfontein