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

Case Number: 4305/18

In the matter between:

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

and

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

and

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| **ORGANISATION UNDOING TAX ABUSE** | Amicus Curiae<br>(Subject to Admission) |

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**OUTA'S WRITTEN SUBMISSIONS**

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**INTRODUCTION**

1 The Organisation Undoing Tax Abuse ("**OUTA**") seeks admission as an *amicus curiae* to lodge written submissions and present oral argument at the hearing of the matter. OUTA abandons its prayer to adduce evidence.

2 OUTA sought the consent of the parties.

2.1 The applicants granted consent.[1]

2.2 The respondents that are actively participating in these proceedings indicated that they will not oppose OUTA's application for admission as an *amicus curiae* subject to two conditions.[2] The first is that OUTA files its written submissions by 28 August 2020 and the second is that OUTA takes no measure that delays the hearing. OUTA has met the deadline, and has taken no steps to jeopardise these proceedings. The leave of the court is therefore sought to admit OUTA as an *amicus curiae*.

3 For the reasons set out below, OUTA submits that it has an interest in this matter and that its submissions will be of assistance to the court in the

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1 Amicus Founding Affidavit, "OUTA9".

2 Amicus Founding Affidavit, "OUTA10"; "OUTA14" (the third respondent indicated that it does not oppose the application); Amicus Supplementary Affidavit, "OUTA 12" (the second respondent does not object); "OUTA 13" (the fourth and fifth respondents agree with the position of the third respondent); "OUTA17" (the sixth, seventh, and eight respondents do not object to OUTA's application).

determination of the main application. In particular, OUTA makes submissions on two issues that are in dispute, namely condonation and remedy.

## OUTA'S APPLICATION

4 Before turning to OUTA's substantive submissions, it is necessary to deal with two procedural aspects. The first is to set out the grounds as to why OUTA should be admitted as an *amicus curiae*, and the second is to request the court to dispense with the time periods prescribed in Rule16A.

### *Application to Intervene as an Amicus Curiae*

5 Although the decision to admit a party as an *amicus curiae* ultimately falls within the discretion of the court, it is nevertheless trite that a party who intends to be admitted as an *amicus curiae* must demonstrate three requirements.[3]

6 OUTA satisfies the three requirements.

6.1 **OUTA has an interest in the matter.** OUTA is a civil society organisation, and its main objective is to ensure that tax revenue is spent in a frugal and lawful manner.[4] Corruption and poor governance bear a large measure of responsibility for poor service delivery and the non-delivery of public goods. OUTA fulfils its mandate by

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3 See *In re Certain Amicus Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 715 (CC) para 3; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 9.

4 Amicus Founding Affidavit, paras 9, 11.

investigating, reporting and combatting through litigation allegations of corruption and maladministration. Indeed, OUTA was among the first organisation to raise questions over the purported 'rotation' of the country's strategic oil reserves. OUTA accordingly supports the applicants' review application. It is ultimately in the public interest that the impugned decisions — which saw the country's strategic oil reserves sold in a manner that blatantly disregarded proper procedure and caused harm to the public purse — is set aside and reversed. In a nutshell, OUTA's interest in this matter is to ensure that the public purse should not pay for the consequence of the maladministration that was perpetuated in this matter.

6.2 **OUTA's submissions are relevant to the proceedings.** If admitted, OUTA will make submissions on two issues that are relevant to the dispute, namely (i) whether the court should condone the late filing of the review proceedings; and (ii) factors the court should consider in the determination of a just and equitable remedy.

6.3 **OUTA raises submissions that are new and useful.** In addition to setting out new and useful submissions (which are set out below), OUTA submits that it is useful for the court in a matter like to have an entity making submissions purely in the public interest. All the parties in the matter are, to some extent, motivated by their commercial interests.

7 OUTA's application is not opposed.

8 Accordingly, in terms of Rule 16A(5) of the Uniform Rules of Court, the court should exercise its discretion in favour of admitting OUTA has an *amicus curiae* and to afford it an opportunity to submit these written submissions and present oral argument.

***Dispensing the Rule16A Time Periods***

9 Rule16A provides that a party that is interested in intervening in a constitutional matter must seek and lodge the written consent of the parties in matter within 20 days of the filing of the affidavit or pleading which raises the constitutional issues, and, should the party not be able to obtain such consent, the application for admission as an *amicus curiae* must be filed within 5 days of the expiring of the 20 day time period. OUTA did not request the consent of the parties within 20 days of the applicants filings the Rule16A Notice.

10 Therefore, in terms of Rule16A(9) of the Uniform Rules of Court — which states that the court may dispense any of the requirements prescribed in Rule16A if it is in the interests of justice to do so — OUTA requests the court to dispense with the time periods prescribed in Rule16A and to extend the 20-day period prescribed in Rule16A to the date on which the application was instituted.

11 There are three reasons why it is in the interests of justice to dispense the time periods, and permit OUTA to participate in the proceedings.

11.1 First, OUTA seeks to make submissions in the public interest. The submissions are particularly useful in a matter of this nature where (i) significant public resources have been squandered and plundered

through gross maladministration (and possibility corruption); (ii) the matter has attracted the attention of the public; (iii) the cabinet minister responsible for the applicants elected not to participate in order to secure government's interests. There is an overwhelming public interest in this matter, and a compelling need to ensure that our state entities do not sell the country's strategic oil reserves in secret and on terms that appear to defy commercial sense.

11.2 Second, OUTA has a justifiable reason for the late filing of its application. The matter has proceeded at a gradual pace. Prior to this year, the litigation focused on issues in which OUTA has no direct legal interest. Indeed, the respondents only filed their answering affidavit to the main application this year,[5] and the replying affidavit was filed in July 2020. After OUTA received notification that the replying affidavit had been filed and that the matter was set down for hearing in September 2020, OUTA's attorney sent the request to intervene on 4 August 2020.[6] Given the nature of the case, OUTA submits that it was sensible for it to wait for the issues to crystallise between the parties before it decided whether it was necessary to apply to join as an *amicus curiae*.

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5 The answering affidavits were filed between May and July 2020 (the sixth, seventh, and eighth respondents affidavit in the possession of OUTA is undated).

6 Amicus Founding Affidavit, para 29.1, "OUTA8".

11.3 Third, the application is unopposed and there is no indication that any party to these proceedings will suffer prejudice if OUTA is admitted.

12 For these reasons, OUTA submit that it is in the interests of justice to dispense with the time periods prescribed in Rule16A.

**OUTA'S SUBMISSIONS**

13 OUTA makes submissions on two issues in dispute. The first is whether the court should grant condonation, and the second is the considerations the court should have regard to when determining a just and equitable remedy.

***Condonation***

14 In support of the applicants' request for condonation, OUTA advances three submissions.

14.1 First, OUTA submits that the overriding consideration in this matter is the need to declare unlawful the sale of our country's strategic oil reserves in circumstances that are clearly illegal and in no way facilitated the public good.

14.2 Second, OUTA draws the Court's attention to two recent rulings of the Constitutional Court and the Supreme Court of Appeal. The first decision held that prejudice caused by delay is <u>not</u> as weighty of a consideration compared to the need to declare unconstitutional conduct invalid in circumstances where the unlawful behaviour is

clearly established and the prejudice can be mitigated at the remedy stage. The second decision held that an unreasonable delay of four years — which was never fully explained and was caused partly due to state incompetence — should nevertheless be overlooked because of clear violations of procurement processes and the strong prospects of the merits of the review application.

14.3 Third, to the extent that the court finds the above submissions not sufficiently compelling on their own, OUTA submits that there are two further considerations that should tilt the court to the side of condoning the applicants' delay in bringing this application.

*The Overriding Consideration*

15 The applicants and the respondents' heads of argument set out the test and the jurisprudence for condoning the late filing of a review application, and no purpose will be served by repeating those submissions here except to reiterate that a weight consideration is always the need to ensure that unlawful decisions are declared invalid.

16 OUTA submits that this must be the overriding consideration in this matter The impugned decisions are manifestly irrational and unlawful. Indeed, the merits of the review are now unopposed. In these circumstances, there is a compelling and overwhelming public need to ensure that the impugned decisions are at the very least declared unlawful.

16.1 There was a blatant disregard for proper procedure and corporate governance; the decisions failed to comply with regulatory and ministerial requirements; the oil was sold on false pretences; and there are strong suspicions that the impugned decisions are tainted with corruption.

16.2 In addition, the impugned transactions in no conceivable way facilitated the public good. It defied commercial sense for the state to sell its strategic oil reserves at an 11-year low (but it of course made commercial sense for the trading companies as they stood to gain from state's irrational economic behaviour). And this resulted in a double-loss for the state. Not only does the fiscus lose money when it sells its assets at discount, it incurs additional losses when it is required to purchase new oil in order to restore the strategic reserves.

17 These reasons alone justify the granting of condonation.

*Two Recent Decisions*

18 The applicants and respondents differ over whether condonation should be granted. The former relies on the strength of the merits of the review application and the public interests involved, and the latter emphasising the prejudice the delay has caused them.

19 OUTA submits that two recent decisions have settled this debate in favour of condoning the delay.

20 The first decision is *Notyawa v Makana Municipality and Others*.[7] In this matter, the Constitutional Court was called upon to determine whether the high court exercised its discretion judiciously when it refused to overlook the state's unreasonable delay in launching the review proceedings. The apex court held that notwithstanding the differences in granting condonation under PAJA and the principle of legality, those differences did not have bearing on the outcome of the matter, and it was therefore unnecessary to determine under which branch the review the matter had to be entertained.[8]

21 The *Notyawa* court confirmed that that the need to declare invalid clear and serious unconstitutional conduct is a weighty consideration.

> "The nature and extent of the illegality raised in respect of the impugned decision constitutes a weighty factor in favour of overlooking a delay. Where, as in *Gijima* and *Tasima I*, the illegality stems from a serious breach of the Constitution, a court may decide to overlook the delay in order to uphold the Constitution, provided the breach is clearly established on the facts before it. This flows from the obligation imposed by section 172(1)(a) of the Constitution which requires every competent court to declare invalid law or conduct that is inconsistent with the Constitution."[9]

22 The *Notyawa* court continued to explain that prejudice is not as weighty of a consideration when the illegality is clear and the prejudice can be cured or mitigated at a later stage.

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7 2020 (2) BCLR 136 (CC).

8 ibid paras 35 and 36.

9 ibid para 49.

> "As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial power to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. At common law, courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power which may be exercised to protect rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1)(b) of the Constitution.
>
> It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA. The key point being that the issue of prejudice may adequately be regulated by the grant of a just and equitable order. And where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise. In an appropriate case the presence of these factors would tilt the decision in favour of overlooking an unreasonable delay. What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing the unlawful decision while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision."[10]

23 On the facts of that case, the *Notyawa* court concluded that the high court exercised its discretion judicially when it refused to overlook the delay because the alleged breach was not a serious violation of the Constitution and the illegality of the impugned decision was not clearly established.[11] It bears mentioning that these factors are opposite to the facts of this case: the second

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10 ibid para 50 and 51.

11 ibid para 52.

applicant committed a serious breaches of the Constitution and there are numerous illegalities that are clearly established on the papers.

24 In sum, *Notyawa* stands for the proposition that courts should favour granting condonation in instances where the irregularity is clear and the prejudice suffered by an innocent party can be mitigated at the remedy stage.

25 The second decision is *Valor IT v Premier, North West Province and Others*.[12] Here, the Supreme Court of Appeal had to determine whether a settlement agreement was correctly ordered, which, in turn, required the SCA to determine whether it was appropriate for the high court to condone the state's four-year delay in initiating review proceedings under the principle of legality. The decision pertained to a series of contracts that were granted in violation of public procurement procedures.

26 The SCA held that the high court acted judiciously when it condoned a four-year delay despite the fact that the state's conduct in bringing the review was unreasonable.[13] The state failed to give a proper account for the delay, and it portions of the delay was due to the incompetence of the state (including that the department received palpably bad legal advice and it appears that the wrongdoing was only treated seriously when there was a change in administration).[14] Nevertheless, in overlooking the delay, the appellate court found that the merits of the review were strong. In the end, the SCA concluded

12 [2020] 3 All SA 397 (SCA).

13 ibid para 39.

14 ibid paras 32 to 34.

that the high court correctly rescinded the earlier order which made the settlement agreement an order of court. The contractual arrangement between the parties was unlawful, and the settlement agreement would have given effect to an unlawful arrangement.[15]

27 It bears noting that the respondents did not allege any prejudice which to some extent differentiates *Valor IT* decision from this case. But OUTA submit that the difference is not material. As the *Notyawa* ruling makes clear, prejudice is not weighty when determining condonation if it can be mitigated at the remedy stage.

28 In sum, the *Notyawa* and *Valor IT* decisions favour the granting of condonation in this matter.

*Further Considerations*

**29** To the extent that the court finds the above submissions not dispositive of the issues, OUTA submits that the court must take into account the following two considerations when exercising its discretion as to whether to grant condonation.

29.1 First, the courts must actively encourage parties to come forward and disclose irregular activity (even if late). This is particularly the case

[15] ibid para 55. See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 30 (In this matter, the Constitutional Court held that a contract in breach of section 217 of the Constitution is unlawful and the inconsistency cannot be cured by a settlement agreement).

when large and significant public resources — like the country's oil reserves — are at stake. Courts are the final bulwark against unlawful state practices, and should therefore actively encourage the ventilation of disputes alleging the irregular spending of public fund. The courts should not shrink their role, and should not take an unduly restrictive approach to the court's discretion on condonation as this will discourage parties from coming forward at a later date. Within its constitutional mandate and limits, the courts must aid in combating corruption and other irregular spending in civil proceedings. It is ultimately in the public interest that the alleged (but substantiated) irregularities which are ventilated in open judicial proceedings, and, if proved, declared unlawful.

29.2 Second, the courts must acknowledge that the proper and diligent fulfilment of state duties requires time. There can be no dispute that state entities have a constitutional duty to investigate corruption and other irregular acts that harm the public. The South African public rely upon government departments and agencies to investigate and root out corruption. And government is best placed to do so for a number of reasons – not least because it is able to investigate its own departments. And, when those efforts demonstrate unlawful conduct, the respondents are correct to argue that the state is duty-bound to act expediently in order to review flawed administrative decisions.

29.3 OUTA accepts that the applicants may have fallen short of that standard. It took too long to initiate proceedings, and parts of the

explanation for the delay are wanting. Four years should not have to wait between the impugned decisions and the hearing of the matter. But, in fairness to the applicants, it must be accepted that, in order to execute this constitutional duty diligently, the complexity involved in investigating and reporting maladministration and the bureaucratic nature of the state means that setting aside the decision may cause a delay. In particular, there are reasons why it may be difficult to investigate matters and launch proceedings. Corruption and maladministration bloom behind closed doors, and it is often difficult for those that come after the fact to build a complete puzzle. This can be made more difficult because those involved in wrongdoing are often still in the employ of the state.

***Remedy***

30 If the court declares the impugned decisions unlawful, the matter turns to the determination of a just and equitable remedy. The parties in the main application have narrowed the dispute on the appropriate relief.

30.1 In line with the corrective principle — which provides that the default position is that the consequences of invalidity must be reversed or corrected if the invalidity can no longer be prevented[16] — all the

[16] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (4) SA 179 (CC) at para 30.

parties agree (or at least do not dispute) that the strategic oil reserves must be returned to the state.

30.2 The applicants also accept that the second applicant should return the proceeds of the sale. But a follow up question is to whom those proceeds should be paid, and, more pressingly, whether any of the respondents are entitled to additional financial relief from the applicants. In different ways, Contango, Glencore and Vitol allege that the applicants should cover their financial losses on account of the applicants own corruption and the delay in launching and prosecuting the application.

31 OUTA makes one submission on the issue as to whether the respondents are entitled to recover their financial losses from the state in these review proceedings. The submission is premised on the applicants' submission that Contango, Glencore and Vitol do not have clean hands because either they were aware of the procedural irregularities and nevertheless concluded the transactions or carelessly failed to conduct their own due diligence despite red flags.[17]

32 In the determination of an appropriate remedy in review proceedings, the Constitutional Court has held that—

> "Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance the efficient and effective public law

[17] Applicants, Heads of Argument, paras 357-364, 375, 376-379

administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."[18]

33 A party should accordingly only be entitled to claim its financial losses against the state if they were indeed and innocent and prejudiced party, and the compensation for their financial losses promotes an efficient and effective public administration grounded in the rule of law.

34 OUTA submits that these conditions will not be satisfied in two circumstances.

34.1 First, a party cannot recover its financial losses against the state if it does not have clean hands on the basis that they either knew of irregularities or ignored red flags. The state must always act in accordance with the law and within the public interests, and so the only logical inference is that private companies contracting and dealing with the state do so on the clear understanding that the state entity must <u>always</u> act in the public interest and within the legal framework. A party cannot claim to be prejudiced if it knew or ought to have known that the impugned decisions were at risk of being reviewed and set aside. In these circumstances, if a private entity contracting with the state has sufficient reason to believe — or ought reasonably to believe — that a contract with the state is irrational and unreasonable and could be set aside in the future, then that private

[18] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (4) SA 179 (CC) para 29.

company assumes the financial risk that a court will someday set aside the contract. In such circumstances, the courts should not protect the private company from financial loss. This principle is designed to discourage private companies from bidding for and accepting procedurally-deficient contracts or otherwise trying to benefit from state contracts that were awarded on dubious grounds.

34.2 Second, the company seeking to recover its financial loss must provide the court a full and candid explanation of their dealing with the state (including their dealings with the middle person who connected the party to the state). In public law review proceedings, a court should refrain from protecting the financial interests of a company if the court is not fully satisfied that they have indeed been innocently prejudiced, and the court can only be satisfied that this condition is true when the party seeking relief has disclosed to the court everything that it knows. If the party fails to do so, the party should not be entitled to relief that aims to insulate it from financial loss. The principle of requiring full disclosure is supported by three further principles.

34.2.1 In terms of the default rule, the correction and reversal of the unlawful action is the ordinary consequence of invalidity. And the court should only depart from the default rule where there are compelling reasons in the public interest for doing so. The recovery of financial losses is a departure from the ordinary relief, and so the party requesting indemnity from its financial loss in the form of a

payment from the state has the burden to demonstrate why the relief would be in the public interest. And, at a minimum, that would require a full and candid exposition of their involvement in the matter. The court cannot grant remedies to private companies if it is not satisfied that they are s innocent. If there is doubt, the court should refrain from making such an order.

34.2.2 If the court does not grant the respondents financial losses in the proceedings, the respondents are not necessarily without recourse. All parties suffering prejudice are free to institute proceedings to claim what they believe is due to them. And this would be in the interests of justice because parties claiming relief would have to lead evidence on the terms of the agreements, the conduct between the parties, and, importantly, the culpability of the contracting parties.

34.2.3 The court should take cognisance of a practice that has emerged in our courts (or, more correctly, outside the court rooms). It is not uncommon for the merits of a dispute to be conceded at a late stage of proceedings, which makes the only live issue before the court the just and equitable remedy. And one of the reasons these concession take place is to prevent the court from making adverse findings against those involved (which no doubt would impact the relief ordered). The fact that a party does not oppose the

merits of the review should not detract from the fact that a party must provide a full and frank disclose all material facts before they are entitled to seek financial relief against the state particularly when serious and supported allegations are made against a party which may no longer need to be answered because the merits were conceded. As the decisions in *Asla Construction* and *IT Valor* confirm, the courts may not order a remedy that would be inconsistent with the Constitution. If the court's ability to consider serious and substantiated allegations when deciding a just and equitable remedy in neutered through concessions (which often happens when agreements are struck outside the court room), it would make a mockery of all the safeguards our Constitution and the legislature puts in place to ensure that public money is dealt with lawfully and carefully.[19]

35 In a nutshell, there were numerous and significant violations of proper process, and the second applicant sold the country's oil on terms that were irrefutably

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[19] See *Government of the Republic of South Africa v Oppressed ACSA Minority 1 (Pty) Ltd* (Case No. 27286/2015), 15 July 2020, para 87 (In the context of settlement agreements which are made orders of court, the high court held that the parties cannot be allowed to enforce an unlawful agreement simply because the parties agreed to it. It would make a mockery of the laws designed to guard against abuse, and would permit non-government parties to benefit regardless of what the law provides.) The judgment is currently subject to a leave to appeal application. The reasoning should apply with equal measure to proceedings where the merits of the review are conceded, and non-government entities seek financial relief against the state.

irrational and detrimental to the state (but beneficial to the oil traders). If the court accepts the applicants' version that the respondents acted recklessly or culpably, including if the court is not satisfied that the respondents have not provided a full exposition to demonstrate their innocence, then there is no public interest served in protecting the financial interests of the respondents.

**CONCLUDING REMARKS**

36 The significance of this application should not be overlooked. Despite the ever-rising tide of corruption and maladministration in our country, it is unfortunately still a rare event for a state entity to initiate review proceedings of its own accord. While the applicants' conduct in this matter has not always met the standards required of it as a state entity, the relief it ultimately pursues in these proceedings is in the public interest. More particularly, the applicants have placed before the court evidence that clearly establishes wrongdoing. The court should invalidate and reverse that decision, and ensure that the public does not suffer financial harm because of the unlawful behaviour. This includes granting financial relief in favour of those entities who knew or ought to have known about the unlawful behaviour.

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**MICHAEL DAFEL**
Counsel for the *Amicus Curiae*

Chambers, Sandton
28 August 2020

## CASE LAW REFERENCES

*Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (4) SA 179 (CC)

*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC)

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