

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

CASE: 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) 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

ORGANISATION UNDOING TAX ABUSE

Amicus Curiae

OUTA'S NOTE ON IRREGULAR CONDUCT

MR GAMEDE'S MISCONDUCT THAT INVOLVED THE TRADERS

1. In respect to Vitol:
 - 1.1. Vitol proposes to Gamede the requirements of the RFP;
 - 1.2. Vitol is permitted by Gamede to change its proposal after it is submitted;
 - 1.3. Vitol implored Gamede to 'move quickly' and close the deals.
2. In respect to Venus:
 - 2.1. Venus is permitted to comment on the draft invitation before it is sent to traders;
 - 2.2. Venus and Gamede change purchase price of the oil on three occasions
 - 2.3. Venus sends Gamede a letter of Credit after Gamede had informed Venus that the contracts had been put in abeyance.
3. In respect to Taleveras
 - 3.1. Taleveras and Gamede amend the sale agreement after Gamede informed Taleveras that the transactions are placed in abeyance.
 - 3.2. Taleveras makes payments into the trust account of Gamede's dormant legal practice. The invoice submitted by Gamede is questionable, and purportedly reflects work done a few weeks/months prior to the awarding of the contract when Gamede was in full-time employment with SFF.
 - 3.3. Taleveras secured a quid pro quo arraignment to Gamede (in exchange for not suing in terms of 2015 agreement, Taleveras proposed that it be awarded oil contracts).

THE ROLE OF VITOL

Vitol Was Improperly Involved in the Design of the RFP

4. On 11 August 2015, Vitol proposed to the Department of Energy a stock rotation agreement in terms of which Vitol would lease the strategic oil and pledge its own oil in return.¹
5. On 4 September 2015, which is the date on which Mr Gamede was appointed, Vitol sent Gamede a proposal for the leadings/pledging. Vitol also expressed an interest in being part of a core team in respect of new ideas around the management of South Africa's strategic stock.²
6. On 15 September 2015, Vitol offered its assistance to SFF in order to set up a task team to write a 'position paper' for the Minister on a strategic stock policy.³
7. On 16 October 2015, Vitol is informed that that SFF is receiving proposals from other companies⁴ (which showed that Vitol was planning to contract with a state entitt without any competitive bidding process).
8. On 23 November 2015, Vitol informed Gamede that SFF should only contract with:
 - 8.1. One Company when rotating stock per tank (i.e. per grade of oil);
 - 8.2. Companies that can pledge the corresponding amount of crude oil to rotate with other physical barrels stored in Saldanah Bay as "only few companies will be able to bid this way".⁵

¹ Vitol AA, p 3202, para 41; p 3269, para 218.1.

² Third SFA, page 849, para 197.

³ Third SFA, page 851, para 107,6.

⁴ Vitol AA, page 3211, para 66.

⁵ Third SFA, p 868, para 140.

Vitol Accepted an Unlawful Offer

9. In the latest note, Vitol accepts that the RFP issued to it was unlawful on the face of it because it did not stipulate (i) bid specifications; (ii) minimum requirements and functionality; (iii) bid evaluation criteria; (iv) documentary requirements; (v) a deadline. Vitol nevertheless submits a proposal to this clearly unlawful RFP, and, when accepted, concludes a contract with SFF. In other words, Vitol either knew it was unlawful, or ought to have known it was unlawful but carelessly concluded the agreement. Vitol therefore accepted the risk that the award and resultant contracts would be reviewed and set aside.
10. Vitol accepted that the RFP drew its attention to the second ministerial directive (which set out the Minister's conditions).⁶
11. Vitol bids for and is awarded the tender (which makes no reference to Vesquin).⁷ It is nevertheless Vesquin that concludes the agreement with SFF (and claims consequential losses).

Vitol is Permitted to Change Its Proposal After Submission

12. On 16 October 2015, two days after receiving the RFP, Vitol submitted its proposal.⁸
13. On 22 October 2015, Vitol enquired with Gamede whether it wished to discuss Vitol's proposal.⁹

⁶ Vitol AA, p 3209, para 62.

⁷ FA, p 77, para 181.

⁸ Third SFA, p867, para 112

⁹ Vitol AA, p 3212, para 70.

14. On 23 October 2015, Vitol meets Gamede at SFF offices, and Vitol indicated that it is willing to adapt its proposals to meet SFF requirements.¹⁰
15. On 26 October 2015, Gamede sought an urgent meeting with Vitol (which appears to be held at 3pm that day).¹¹
16. On 29 October 2015, Vitol re-submitted an 'expanded' proposal.
17. On 1 December 2015, Vitol sent a further proposal to Gamede (and Gamede requested Vitol to engage in internal processes including board approval).¹²

Vitol is Favoured and has a Conflict of Interest

18. On 15 October 2015, Vitol requested access to draw samples from the oil (which Gamede grants on the same day).¹³ It appears that no other tenderer received or was offered this benefit.
19. On 9 November 2015, Vitol urged Gamede to "move quickly".¹⁴
20. On 10 November 2015, Gamede met Vitol to ensure that SFF was clear on what Vitol was offering.¹⁵
21. On 17 November 2015, Vitol pressured Gamede to move quickly on the deal as 'vultures are turning around'. Vitol also requested information on SFF's relationship with other entities, which Vitol could use for its own benefit.¹⁶
22. On 18 November 2015, after Vitol's email from the previous day, Gamede responded to Vitol and implies that Vitol would be successful.¹⁷

¹⁰ Vitol AA, p3212, para 71.

¹¹ Third SFA, p 859, paras 115.

¹² Vitol AA, p 3215, para 78.

¹³ Third Supplementary Founding Affidavit, para 109 (record page 855)

¹⁴ FA, p 41, para 94.

¹⁵ Third SFA, p 861, para 124; Vitol AA, p 3212, para 73.

¹⁶ Third Supplementary Founding Affidavit, para 131 (record page 863)

¹⁷ Third Supplementary Founding Affidavit, para 134 (record page 864)

23. On 20 November 2015, Gamede sent Vitol a draft letter regarding an expression of interest to be sent to other traders and requests Vitol to 'see if it is in order before I sign and send it to you'.¹⁸

Vitol Does Not Conduct Due Diligence

24. Vitol acted negligently when—

24.1. It tendered for and accepted an award which was not preceded with any public tender process; and

24.2. It failed to require proof of (i) the Minister's authorisation and (ii) Board Approval.

24.3. It failed to make proper enquiries or initiate review proceedings when strong suspicions of impropriety are drawn to its attention. This included:

- On 31 May 2016, Vitol forwarded Gamede a list of questions received from the *Financial Mail*. The questioned pertained to issues as to why it received a contract (from a closed tender process) and how the government is entitled to buy back the oil.¹⁹ Vitol fails to request proof or compliance or initiate review proceedings.
- On 6-9 June 2017, SFF informed Vitol that a legal review would be undertaken.²⁰ Vitol fails to request proof of compliance or initiate review proceedings.

¹⁸ Third Supplementary Founding Affidavit, para 136 (Record page 865)

¹⁹ Third SFA, para 186,

²⁰ FA, p 135, para 328.

THE ROLE OF VENUS

Venus Was Improperly Involved in the Design of the RFP

25. On 22 November 2015, Venus emails a draft letter titled “Invitation for Expression of Interests” (which is intended to be sent to the CEO of Venus) and a request that Gamede looks through it and make amendments if necessary.²¹
26. Two days later, On 24 November 2015, Gamede sends Venus the “Invitation for Expression of Interest”.²²

The Price of the Oil Kept Changing

27. On 29 December 2020, Gamede and Venus amended the purchase price.
28. On 8 February 2020, Gamede and Venus concluded a second amendment to the purchase price.²³
29. On 29 February 2020, Gamede and Venus concluded a third amendment to the purchase (which is after Gamede told Venus to wait until crude is selling at \$28 dollars per barrel).²⁴

Venus Ignores Notice

30. On 10 February 2020, Gamede informed Venus that the transactions have been put ‘in abeyance’ until the issues raised in the *Nkhutha* memo are addressed. The next day, however, Venus sends letter of Credit to Gamede.²⁵

²¹ Third SFA, p 881, para 190.1.

²² FA, p 48, para 118; “FA29”, p 235.

²³ Third SFA, p899, para 152.

²⁴ Third SFA, p 908, para 244; Third SFA, para 216.

²⁵ Third SFA, p 903, para 207.

31. Despite receipt of the *Nkhuta* memo, Gamede proposed that Venus changes the sale price and “wait for a period where crude was selling at 28 dollars and then add 3 dollars”.²⁶

THE ROLE OF GLENCORE

Glencore contracts with SFF and Venus despite Red Flags

32. On 14 December 2015, Glencore received the draft agreement between SFF and Venus.²⁷ On 15 December 2015, however, Glencore received confirmation that SFF and Venus signed an agreement but that the agreement is not the document that was presented to Glencore the previous day.²⁸
33. On 16 December 2016, Venus sent documents to Glencore in terms of a storage agreement “drafted personally by Mr Gamede”.²⁹ (There is no mention of the Board’s approval).
34. On 15 December 2020, Glencore realizes that the transactions between SFF and Venus are moving at a rapid pace. In an email, Glencore acknowledges that “Venus signed an SFF crappy SPA version and storage agreement but at the same time go the CEO to sign our whole C/P page as an appendix to both docs”. The email also confirmed that Glencore could propose amendments to the SPA and storage agreement and then these will supersede ... but at least we have a fall back signed”.³⁰ Glencore sends another email internally saying “*All I can say is Crickey*”.³¹

²⁶ Third SFA, p905, para 214-216.

²⁷ Glencore AA, p 4001, para 25.

²⁸ Glencore AA, p4001, para 25.

²⁹ Glencore AA, p4001, para 27.

³⁰ Glencore AA, “GA8”. p 4274.

³¹ Glencore AA, “GA8”, p 4274.

35. On 12 January 2016, Glencore concluded the tripartite agreement with Venus and SFF. The main purpose of the agreement is to ensure that SFF recognised Glencore as the owner of the oil.³² This agreement was subsequently terminated,³³ but a second agreement was carried into effect.³⁴
36. Glencore knew that SFF-Venus were amending the agreements (they received redacted versions) outside proper procurement processes.

Glencore Fails To Act with Due Diligence

37. On 4 March 2016, Glencore paid the purchase price to SFF after having satisfied itself that the condition precedents (which sought to protect itself from the dealing of SFF and Venus) had been complied with.³⁵ *It is unclear how Glencore could indeed satisfy itself as Glencore never requested the SFF Board Resolution.*
38. Glencore never requested confirmation of Board approval that (i) SFF is entitled to contract with Venus and (ii) SFF is entitled to contract with Glencore and recognise Glencore as the owner of the oil.

³² Glencore AA, p3993, para 16.9.3; p4003, para 32.

³³ Glencore AA, p

³⁴ Glencore AA, p4005, para 35.

³⁵ Glencore AA, p 4021, para 57.

THE ROLE OF TALEVERAS

Taleveras Accepts Unlawful Offer

39. On 2 November 2020, Gamede invites Taleveras to submit a proposal for the Rotation of Strategic Stock. The invitation attaches the Ministerial Directive of 8 October 2015. The proposal does not however outline: (i) bid specifications; (ii) minimum requirements; (iii) bid evaluation criteria; (iv) documentary requirements; and (v) deadline for submission.³⁶
40. Despite the RFP being blatantly unlawful, two days later, on 4 November 2020, Taleveras submits its proposals. Taleveras therefore accepted the risk that the award and resultant contract would be reviewed and set aside.

Taleveras Engages in Risky Trading

41. On 10 February 2020, Gamede sends the *Nkhuta* memo — which raises suspicions about the lawfulness of the transactions — to Taleveras and indicated that the transactions would be placed in abeyance until all issues in the memo are resolved.
42. Nevertheless, on 22 February 2020, Taleveras and Gamede amended the sale agreement. A novation agreement was also concluded on 24 June 2016.³⁷

Taleveras Proposed and Accepted Quid-Pro-Quo

43. Taleveras was awarded the contract because Taleveras agreed not to litigate in relation to the (cancelled) 2015 Commodity Swap Agreement if it was awarded a contract for the purchase of strategic oil.³⁸

³⁶ FA, p 40, para 92; “FA20” p206.

³⁷ FA, rec 71, FA para 172.

³⁸ RA, p 5014, para 22.3

44. Taleveras proposed the rotation agreement in order to prevent it from suing SFF in relation to the 2015 swap agreement.

Taleveras makes payments to Gamede

45. Between 24 November 2015 and 4 February 2016, Gamede received four deposits totalling R2,6 million into his trust account for his dormant legal practice from a direct of, or an entity associated with, Taleveras.³⁹

THE ROLE OF CONTANGO

Improper Meetings with SFF

46. Despite the fact that SFF did not award a contract to Contango, Contango nevertheless insisted that SFF recognised Contango as the owner of the oil (as Taleveras was seeking finance).⁴⁰ *The fact that Contango insisted that SFF recognise it as owner of the oil means one of two things:*

- 46.1. Best case scenario for Contango, it knew that the transaction between SFF and Venus was high-risk (and it therefore sought to protect its interests). On this scenario, the court should therefore accept that Contango voluntarily agreed to a risky transaction and there is accordingly no need to protect its losses. Contango took a high-risk gamble that didn't pay off.
- 46.2. Worst case scenario for Contango, Contango was in fact the main party to the agreement and was merely using Talevears as a front company.

Contango was suspicious before the deal took place

³⁹ Third SFA, p830, para 54.4.4.

⁴⁰ Contango AA, p 2734, para 54.

47. As explained, Contango required SFF to recognise it as the owner of the oil before it would pay Taleveras.
48. At the meeting between the parties on 22 January 2020, Contango enquired why SFF was selling its strategic stock.⁴¹ The explanation given — that is, SFF wanted to ensure a good quality mix — did not make sense. Particularly in regard to the high-grade Bonny Light oil, there was no need to rotate that oil at a time when the oil prices were depressed.

Contango was directly involved in the transaction

49. The agreement between SFF and Talevaras only takes place because:
- 49.1. SFF undertakes to recognise Contango as the owners of the oil; and
- 49.2. Natixis provided a guarantee to SFF on the financing of the transaction.⁴²

Contango fails to take action after suspicion is raised

50. In May 2016, Contango hears adverse media reports about the transactions. It enquires from Taleveras, and thereafter raises the media reports with Gamede.⁴³ *It is telling that Contango accepts mere say-so of Taleveras and Gamede that everything is in order. Contango did not request proof of legislative and governance compliance (e.g. Minister's approvals and Board Resolution).*

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Michael Dafel

Counsel for OUTA

⁴¹ Contango AA, p 2735, para 58.

⁴² FA p 71, para 171; Contango AA, para 72.

⁴³ Contango AA, p 2748, para 88.