IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 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 FOR ORAL ARGUMENT

A. OUTA'S APPROACH TO THIS APPLICATION

1. OUTA's core aim is to ensure that tax revenue is expended in a frugal and lawful manner, unimpeded by the rising tide of the inappropriate use of state authority and power.

2. What one sees in the present matter, are transactions riddles with impropriety which culminate in massive claims for compensation against the state. Unfortunately such claims, if successful, will be borne by taxpayers and not by the real culprits - state functionaries but also private sector players chasing financial gain.

3. Against that over-riding submission, OUTA intends to address the Court on:

   3.1. Condonation

   3.2. Just and Equitable relief – setting aside and restitution

   3.3. Compensation claimed by Vitol, Contango and Glencore.

B. CONDONATION

4. The applicants concede that the delay was unreasonable. They seek condonation for this unreasonable delay.

5. In exercising its discretion on whether or not to grant condonation, we submit that there are 5 factors which are key to the exercise of this Court's discretion on the question of condonation:

5.1. **Factor 1: State entities who, in compliance with their constitutional obligations, approach the Court to set aside transactions tainted by irregularity**. We have made the point in our heads of arguments that there are important policy reasons why this should be encouraged.

5.2. **Factor 2: Serious allegations of impropriety**. In *Aurecon* the CC held that if the irregularities raised had 'unearthed manifestations of corruption, collusion or fraud in the tender, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention' (para 50).

5.3. Vitol's culprits note, albeit incomplete, is a useful summary of improper conduct on the part of the state functionaries. Unfortunately the note does not present a complete picture in that:

5.3.1. It does not exhaustively deal with Mr Gamede's misconduct. In particular it does not deal with Mr Gamede's improper interaction with bidders in the run up to the conclusion of the impugned transactions; and

5.3.2. It does not deal with improper conduct on the part of the traders.

5.3 In order to address this, we have prepared a document titled "OUTA's note on impropriety" (attached to the note for oral argument) which summarises the evidence relating to conduct on the part of other roleplayers which we submit is improper.

5.4 **Factor 3: The respondents concede the merits of the review**.

5.5 **Factor 4: The respondents accept that the impugned agreements must be set aside.**

6. The combined effect of factor 2 and 3 is the unlawfulness of the impugned decisions is undisputed.

7. In these circumstances, this Court's obligation under section 172(1)(a) is triggered. This was reaffirmed by the CC in ***Buffalo City*** where the Court held that "*Gijima* dictates that where the unlawfulness of the impugned decision is clear and not disputed, then this court must declare it as unlawful. This is notwithstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case". [1]

8. In Notyawa the CC held (at para 49) that:

   "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 s 172(1)*(a)* of the Constitution which requires every competent court to declare invalid law or conduct that is inconsistent with the Constitution".

9. We submit that in view of these 5 factors, there is an overwhelming (if no answerable) case for condonation to be granted.

C. JUST AND EQUITABLE RELIEF

[1] Buffalo City Metro Municipality v Asla Construction (Pty) Ltd ~~2019 (4) SA 331 (CC)~~ para 66

Questionable conduct

10. Despite the fact that the merits of the review has become settled, OUTA wishes to highlight the following issues that emerge from the facts and that should not be muted or masked by the review having become settled.

11. We also submit that these issues are relevant to the question of just and equitable delay:

    11.1. The conduct of functionaries within the SFF as well as the erstwhile Minister of Energy raise serious cause for concern. These functionaries conducted themselves with scant regard for applicable procurement prescripts even though what they were dealing with was one of South Africa's most precious national assets. Vitol's note on SFF culprits is a useful summary of the highly questionable conduct on the part of the Minister of Energy, the Board of SFF, the Executives of SFF and last but definitely not least, the shameful and shocking conduct of its CEO at the time, Mr Gamede; .

    11.2. OUTA's note on impropriety should be read with Vitol's culprits note and presents a more complete picture of improper and even corrupt conduct;

    11.3. We submit that this conduct, which forms the genesis of the impugned transactions, but also the basis for this review, is relevant to the question of relief.

    11.4. More worrying, is the conduct of the traders once the matter is ventilated before this Court. Rather than than that, is the attempts when the matter

comes before court, to provide artificial explanations for conduct that is self-evidently improper and in some instances plainly corrupt.

11.5. By way of example:

11.5.1. The explanation provided by Taleveras for:

11.5.1.1. The quid pro quo arrangement in terms of which they were guaranteed success in the tender in exchange for not taking legal action against SFF in a different matter;

11.5.1.2. payments made by Mr Mulaudzi and Lengard to Mr Gumede is completely unsustainable and actually raises more questions than answers. How could it ever be legally tenable for payments to be made to Mr Gamede for unrelated legal work performed during the time that Taleveras was submitting a bid for the strategic oil;

11.5.2. The explanation provided by Vitol for Mr Fosters conduct in advising Mr Gamede on the specifications for the very same tender in which Vitol was to be a bidder. Other instances where Mr Foster acted as an advisor to SFF and the Minister despite Vitol being one of the players in the game.

12. These factors that this Court should take into account in deciding whether it should exercise its discretion in favour of finding that exceptional circumstances exist which warrant granting the compensation claims. But, more importantly, the claims by the respondents that they innocent parties bears close and careful scrutiny.

Appropriate relief

13. OUTA submits that, once the impugned contracts are set aside, appropriate relief is the default position of setting aside of impugned contracts. We note that all the parties are ad idem. Restitution means undoing each parties performance under the respective contracts (ownership of oil returned to SFF; repayment of purchase price; repayment of storage fees and interest).

14. What remains then is whether it is just and equitable for this Court to grant the additional costs or compensation claims made by Glencore, Contango and Vitol.

15. At the outset, we emphasise that the claim for compensation is an exceptional remedy:

    15.1. We have been unable to locate a single case in which a court has granted compensation of the type sought in this matter in a legality review;

    15.2. Allpay, Gijima and Buffalo City are distinguishable. In these cases the Court kept intact the rights and obligations in terms of a contracts because either (i) a public good was at jeopardy or (ii) the contracts had run its course or (iii) the innocent party had performed in terms of an invalid contract.

    15.3. What the Court did not do is set aside the contracts and then grant compensation for losses incurred.

16. In PAJA cases, courts have emphasised that section 8 is an exceptional remedy[2].

[2] Trustees of Simcha Trust and others v De Jong and Others 2015 (4) SA 229 (SCA)

17. OUTA contends that it is not just and equitable for this Court to grant these claims. More importantly, there are no exceptional circumstances that warrant these claims. In addition to the grounds relied upon by the applicants, OUTA wants to emphasise the following reasons:

17.1. The claims relate to additional losses incurred in performing under the impugned agreements (and related agreements). These are best suited to action proceedings based either in contract, delict or unjust enrichment.

17.1.1. Vitol have cancelled the agreement with SFF and appear poised to institute a contractual claim;

17.1.2. Contango have already given notice of claims against Taleveras;

17.2. Upholding these claims is precedent setting and may open the floodgates for other claimants who will eschew contractual and delictual claims in favour of this "quick and easy" remedy. It is relevant that cumulatively the claims in this matter amount to approximately R4,7 billion. This is a staggering amount of money. If successful, they will result in an enormous loss to fiscus. The cost will not be borne by the wrongdoers but by unsuspecting taxpayers.

17.3. A common feature of all 3 claims is that the claimants go to great lengths to depict themselves as innocent parties. However this is not an accurate reflection of what transpired. As the evidence collated in OUTA's improprieties note suggests:

17.3.1. Taleveras is tainted

17.3.2. Venus is tainted

17.3.3. Vitol is tainted.

The implication of Taleveras being tainted is that casts a shadow over Contango given that, through the MRA, Contango stepped into the shoes of Taleveras. The same applies in respect of Venus and Glencore. We note that neither Contango nor Glencore deal with the implications of improper conduct on the part of the primary rights holders.

17.4. The claimants have not demonstrated that they took appropriate steps to mitigate their losses:

17.4.1. The applicants have already highlighted the failure to conduct proper due diligence on the part of Contango and Glencore;

17.4.2. The claimants could have resorted to interdict proceedings to protect their interests.

D. RELIEF

18. In addition to the review and setting aside of the impugned decision, an order should be granted in accordance with the tender of restitution by the applicants.

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15 September 2020