THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 4305/18

In the matter between

CENTRAL ENERGY FUND SOC LTD	**FIRST APPLICANT**
STRATEGIC FUEL FUND ASSOCIATION NPC	**SECOND APPLICANT**

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	**FIFTH RESPONDENT**
VESQUIN TRADING (PTY) LTD	**SIXTH RESPONDENT**
VITOL ENERGY (SA) (PTY) LTD	**SEVENTH RESPONDENT**
VITOL SA	**EIGHTH RESPONDENT**

MINISTER OF ENERGY **NINTH RESPONDENT**

MINISTER OF FINANCE **TENTH RESPONDENT**

Coram: Rogers J

Heard: Decided on the papers

Delivered: 22 December 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] The applicants in the main case seek leave to appeal paras 8-17 of my order in the main case. Vitol and CTSA/Natixis abide my decision on the application for leave to appeal. Vitol has filed a conditional application for leave to cross-appeal in the event that the applicants are granted leave to appeal. Vitol's conditional application is directed at paras 2 and 3 and 15-17 of my order. Taleveras opposes the application for leave to appeal in relation to paras 7(b), 7(c), 9 and 12, but only in relation to grounds which may adversely affect it.

[2] The parties have agreed that I may dispose of the applications for leave to appeal without an oral hearing. For reasons which are apparent from my main judgment, the case is one of complexity and public importance. There are reasonable prospects that another court may find that I should not have overlooked delay or that if delay was overlooked I should not have granted consequential orders for the setting aside of the impugned decisions and contracts. Conversely, there are reasonable prospects that another court, while upholding my decision to overlook delay and grant consequential setting-aside orders, will find that I should not have granted Vitol and CTSA compensation. The appeal warrants the attention of the Supreme Court of Appeal.

[3] In regard to Taleveras' opposition to the application for leave to appeal, the paragraphs in my order which it identifies would necessarily have to form part of the orders against which the applicants appeal. Taleveras' opposition is directed at ensuring that the paragraphs in question should not, on appeal, be varied adversely to Taleveras. Its concern is with the grounds of the proposed appeal. It

wishes to ensure that it can safely refrain from participating in the appeal proceedings.

[4] As to paras 7(b) and 7(c) of my order, Taleveras' concern is that the applicants may seek to persuade an appellate court that if compensation was appropriate, Taleveras should have been ordered to pay some part of it. This is not, however, foreshadowed in the application for leave to appeal. To the best of my recollection there was no argument that I was entitled, as part of the review proceedings, to order Taleveras to pay compensation to CTSA/Natixis. The applicants' argument was that I should leave CTSA/Natixis to pursue independent remedies against Taleveras and SFF, and that in delictual proceedings against SFF the latter could raise Taleveras' contributory fault.

[5] Para 9 of my order, which records CTSA/Natixis' undertaking to allay concerns raised by the applicants and Taleveras about double-compensation, is not the subject of a discreet attack in the application for leave to appeal. However, if paras 7 and 8 of my order are successfully impugned on appeal, para 9 would be redundant and fall away. If paras 7 and 8 survive appeal, I cannot see any basis on which the applicants could impugned para 9, which simply records an undertaking which CTSA/Natixis have given.

[6] In para 12 I ordered the applicants to pay CTSA/Natixis' costs. Taleveras' concern is that the applicants may seek to persuade an appellate court that Taleveras should have been ordered to pay some of CTSA/Natixis' costs. This is indeed foreshadowed in the application for leave to appeal. The applicants did not, in written argument, submit that Taleveras should be ordered to pay some part of CTSA/Natixis' costs nor, to the best of my recollection, was such a submission made in oral argument.

[7] The applicants' submissions in response to Taleveras' opposition acknowledge that I was not asked to consider ordering Taleveras to pay any part of CTSA/Natixis' costs, and counsel record that the applicants will not pursue, as a ground of appeal, that I did not exercise my discretion judicially in this respect. They do say, however, that if costs need to be revisited in consequence of appellate interference in my substantive orders, they will contend that Taleveras should be ordered to pay a part of CTSA/Natixis' costs.

[8] The applicants argue, however, that I erred in failing to order Taleveras to pay the applicants' legal costs or a portion thereof. Again, this is not something which was requested in written or oral argument. It is so that the applicants contended that I should depart from the *Biowatch* principle in relation to parties found to have been involved in unlawful conduct or corruption. This argument would certainly have come into play if Taleveras had opposed the relief sought by the applicants, but Taleveras did not do so. Recognising this, para 381 of the applicants' heads in the main case submitted that the respondents 'bar Taleveras and Venus' should be ordered to pay CEF's costs

[9] In conclusion on Taleveras' opposition, it seems to me that its concerns relate to grounds which have not been identified in the application for leave to appeal, the only formal document identifying the proposed grounds of appeal. Whether the applicants would be entitled to pursue such grounds at a later time, despite their absence from the application for leave to appeal, is not something that need concern me at the present time. From what I have said, it will be apparent that a contention that Taleveras should have been ordered to pay part of the costs of CTSA/Natixis and/or of the applicants is inconsistent with the submissions advanced by the applicants' counsel in the main case.

[10] However, and assuming that I were nevertheless entitled at this time to preclude the applicants from raising the suggested grounds of concern at a later time, I am disinclined to do so. Taleveras' object, in its opposition, is to immunise itself from adverse appellate variation of orders. It is not clear to me, even if I limited the applicants' grounds of appeal, that Taleveras would refrain from further participation in the appeal. I raised this question squarely with Taleveras' legal representatives when requesting short submissions from Taleveras and the applicants on Taleveras' opposition, since there seemed to be little point in limiting the applicants' grounds of appeal if Taleveras would in any event be represented at the hearing of the appeal. Taleveras' attorney's enigmatic reply was:

> 'Kindly note that the position of my client … is that it will abide your decision on the application for leave to appeal and thereafter, to the extent necessary, participate in any appeal as a respondent.'

[11] Depending on the outcome of the appeal on other issues, the SCA may need to consider afresh the question of just and equitable relief and appropriate costs orders. It would be undesirable, presumptuous and probably not competent for me to attempt to tie the SCA's hands by effectively saying that no revised order can be made which is more adverse to Taleveras than my current orders.

[12] There are a few matters I wish to address before making my order on the applications for leave to appeal. The first is that in assessing just and equitable relief, I came to the conclusion that there were really only possible outcomes which might be just and equitable in the light of all relevant circumstances: (a) to allow the contracts to stand, so that Vitol and CTSA could pursue their contractual remedies; or (b) to set aside the contracts against payment of just and equitable compensation (see para 488 of main judgment). If the applicants had persuaded me, on any of the grounds they wish to pursue in the appeal, that I was not entitled

to award Vitol and CTSA compensation, my order would have been a bare declaration of invalidity unaccompanied by any setting-aside. I would have allowed the contracts to stand. I would not have set aside the impugned decisions and transactions, leaving Vitol and CTSA to the vagaries and uncertainties of possible delictual and enrichment claims.

[13] In short, compensation was not an independent issue which I considered after deciding to set aside the decisions and contracts. Whether and to what extent I was entitled to order compensation were integral to the question whether I would set aside the decisions and contracts at all. That is why I distinguished it from a primary claim for compensation for the violation of constitutional rights.

[14] In paras 8-19 of the application for leave to appeal, the applicants deal with the *Plascon-Evans* rule, contending that in regard to compensation the rule should have operated against Vitol and CTSA since they were claimants for compensation. They should either have been required to deliver a counter-application or at least have been treated as being in substance counter-claimants.

[15] I explained in my main judgment why I did not consider compensation in the present case to be of that nature (see particularly paras 351-356). Compensation here featured as a potential antidote in striking the balance on the fundamental question whether or not the impugned decisions and contracts should be set aside. Where a court sets aside a contract but preserves accrued rights, as is sometimes done, the preservation of accrued rights is simply another form of antidote. A respondent in such a situation does not have to launch a counter-application for an order preserving accrued rights and is not treated, in regard to the question of preservation, as a counter-claimant. It is all part of the just and equitable relief to be granted on the applicant's case. The *Plascon-Evans* rule would not be reversed.

[16] Furthermore, the issues identified by the applicants in paras 18-19 as being potentially influenced by a reversal of the *Plascon-Evans* rule, ie alleged misconduct by Vitol and CTSA, were important to all aspects of just and equitable relief, including whether setting-aside orders should be granted and if so whether accrued rights should be preserved. Alleged misconduct might also be relevant to the anterior question whether delay should be overlooked. Since the applicants were seeking to have delay overlooked and to have decisions and contracts set aside, the *Plascon-Evans* rule operated against them in these respects. If I was entitled, in deciding whether or not to set aside the decisions and contracts, to have regard to compensation as a potential antidote to the harsh effects of a setting-aside order (rather than a preservation of accrued rights), it is difficult to see how I could have determined just and equitable relief by assessing the same facts partially from the perspective of the applicants as claimants and partially from the perspective of Vitol and CTSA as claimants. It was a unitary exercise.

[17] In any event, it was not my view that there were material disputes of fact insofar as misconduct by Vitol and CTSA is concerned, and my reading of paras 8-17 of the application for leave to appeal fortifies me in that view. The applicants sought to infer misconduct from documents (mainly correspondence). The documents were undisputed. The applicants will evidently argue in the appeal, as they did before me, that the documents, viewed in their context, justified a finding of misconduct. The fact that I disagreed with the applicants' argument was unaffected by the *Plascon-Evans* rule.

[18] The only aspect on which I applied the *Plascon-Evans* rule was the London conversation mentioned in para 8 of the application for leave to appeal. However, that conversation took place in February 2016, several weeks after the Vitol contracts were concluded. Even if Mr Ngqongwa's version of the discussion

were accepted, it would not have pointed to misconduct on Vitol's part in the conclusion of the contracts.

[19] In regard to the ATM payments as possible evidence of bribery by the respondents (paras 9.10 – 9.11 of the application for leave), my understanding of the applicants' counsel's submission is as I recorded it in the judgment. However, even if counsel and I were at cross purposes, it was simply not possible on the evidence to draw the inference that one or more of the present respondents were responsible for making the ATM payments. As I pointed out in the main judgment (para 221), a number of the payments were made months before the disposal of the oil stocks to the respondents came under consideration, and even before Gamede was appointed as Acting CEO. If those earlier ATM payments had an explanation unrelated to the disposal of the oil stocks, the same could have been true of the later ATM payments. As I remarked in the main judgment, the fact that a number of these deposits were made in the vicinity of casinos might have provided another explanation.

[20] The applicants complain, in paras 19 ff, that compensation should not have been determined without a trial. I did not consider that to be necessary. Vitol and CTSA gave full particulars of their out-of-pocket expenses, supported by documents. There were no disputes of fact regarding these expenses. The applicants did not ask that the quantum of compensation be referred to oral evidence, which they might done if they were able to satisfy me that although the relevant facts were not within their knowledge, they had good reason to doubt the veracity of what Vitol and CTSA alleged.

[21] I understood the applicants' argument, at the hearing of the main case, to be that compensation should be determined in separate action proceedings, a position still reflected in para 19.9 of the application for leave to appeal. However,

compensation was not something I could defer to other proceedings. It was part and parcel of the just and equitable relief which I, as the review judge, had to determine. As I have explained, the setting aside of the decisions and contracts, and the awarding of compensation, were in my mind integrally related. I could not set aside the decisions and contracts, leaving it to another judge to decide whether it was just and equitable for Vitol and CTSA to be awarded compensation and if so in what amounts.

[22] The applicants complain that, in a trial, the question of mitigation of damages would have been investigated, and they make specific reference to the late timing of Vitol's decision to close out its hedges. However, as I pointed out during oral argument in the main case, the applicants were benefited by Vitol's 'delay', because it hedges were closed out at a time when the oil price had sunk to very low levels in consequence of the Covid-19 pandemic (see para 397 of the main judgment). If Vitol had closed out its hedges at the earlier times suggested by the applicants, its hedging loss would have been higher. It follows that even if Vitol could reasonably have been expected to close out its hedges at an earlier time, its failure to do so fortuitously did not aggravate but mitigated its damages.

[23] With reference to para 19.7 of the application to leave to appeal, I did not pay regard to the late affidavit of Mr Foster. My post-hearing note invited submissions, not affidavits. Evidence of the prices of Dated Brent on a variety of dates is scattered across the voluminous record and is in any event, like the US dollar/rand exchange rate, readily ascertainable online.

[24] In para 6.6.3 of the application, the applicants complain that in dealing with what I styled the 'contractual qualification', I went far beyond anything Vitol or CTSA had pleaded or argued and far beyond the issues which the parties had asked me to determine. It is correct that this was not dealt with initially in

argument. However, in preparing my judgment, it appeared to me – for reasons I fully explained in my judgment – that it was or might be appropriate to have regard to the recoverable contractual damages when making a choice between (a) allowing the contracts to stand; or (b) setting them aside against the payment of compensation. My concern was one in the interests of the applicants and the public: if the respondents' claims for contractual damages might plausibly have been less than the out-of-pocket expenses they sought as compensation, the applicants might be better off, and the public interest, better served, by allowing the contracts to stand.

[25] I thus addressed a post-hearing note to counsel, and received detailed submissions. The issues I dealt with in my judgment were thus the subject of full argument. I do not accept that a court is obliged to adopt a blinkered approach to just and equitable relief, just because a factor which the court regards as relevant has not been raised by the parties. What is important is that the parties should be given due notice and be able to deal with the issue.

[26] Vitol and CTSA/Natixis, in their response to my post-hearing note, adopted the primary position that compensation in the review proceedings should not be made subject to the contractual qualification. They may persuade the SCA that it was unnecessary for me to decide whether or not the contractual qualification was satisfied, in which case the fact that I did so would have been misguided but irrelevant. The applicants' counsel, in their comprehensive response to my note (38 pages), agreed that if compensation were in principle to be awarded (which they said it should not), compensation should be subject to the contractual qualification (see paras 40-43 of those submissions).

[27] In para 6.6.5 of the application, the applicants say that since I concluded that Vitol and CTSA had an unanswerable case for damages in contract, there was

no justification to have awarded them compensation. However, Vitol and CTSA would only have had an 'unanswerable case' if I had refrained from setting aside the decisions and contracts (or if I had preserved all accrued rights, which in the present case would have amounted pretty much to the same thing). Because I concluded that Vitol and CTSA would have contractual claims in excess of their out-of-pocket expenses, I saw myself as balancing the interests of the applicants (and the public) on the one hand, and those of Vitol and CTSA on the other, by setting aside the contracts against the payment of compensation which was just and equitable even though it was less than their contractual claims.

[28] It was my view, having analysed the contractual qualification, that the applicants (and the public) would have been worse off if I had preserved Vitol and CTSA's contractual rights, because on my assessment the contractual claims would have substantially exceeded the compensation. And in CTSA's case, the preservation of its accrued rights would have entitled it to assert ownership of the oil in addition to claiming damages. This also shows, I think, the special function which compensation serves in a case such as the present. The applicants did not argue that a preservation of contractual rights (which was one of the options available to me) required a counter-application or a reversal of the *Plascon-Evans* rule. Since compensation served a similar function, but was more favourable to the applicants than a preservation of contractual rights, it is difficult to see why compensation should, from a procedural perspective, have been treated differently.

[29] In their submissions in response to my post-hearing note, and again in para 4.2 of their written submissions in response to Taleveras' partial opposition to the application for leave to appeal, the applicants' counsel submitted that if it came down to awarding compensation or preserving accrued rights, I should have chosen the latter rather than the former. Presumably this submission is made on

the footing that the relevant decisions and contracts would be declared invalid but would not be set aside. It would obviously be pointless to preserve contractual rights if, for example, the SFF board decision of 5 February 2016 were set aside, since this would pull the rug from under Vitol and CTSA's feet. Subject to this qualification, all I can say is that in my view the alternative remedy proposed by the applicants' counsel would have been less favourable to the applicants than the compensation I ordered. Indeed, I expect that Vitol and CTSA would have preferred the option suggested by the applicants' counsel to the one I ordered, and that is the outcome which Vitol will be seeking in its cross-appeal.

[30] Finally, on the question of the meaning of 'procurement' in s 217 of the Constitution (para 21 of the application for leave), this is indeed an important question on which there have been differing judgments at provincial level (see para 203 of the main judgment). I doubt, however, whether a different conclusion to mine on the interpretation issue would have made much practical difference. As appears from my main judgment (paras 205-210), I concluded that although s 217 was not directly relevant, the values which it expressed nevertheless informed the rational approach to the disposal of assets by public bodies. In effect, I applied similar standards in reaching the conclusion that the disposals were undertaken in an irrational way.

[31] The above observations do not, however, detract from my conclusion that both the appeal and the cross-appeal would enjoy reasonable prospects of success. I make the following order:

(a) The applicants are granted leave to appeal paras 7(b) to 15 and paras 15(b) to 17 of my order of 20 November 2020 ('the order').

(b) The sixth to eighth respondents are granted leave to cross-appeal paras 2 and 3 (insofar as those paragraphs relate to the sixth to eighth respondents), and consequentially paras 15-17, of the order.

(c) The aforesaid appeals shall lie to the Supreme Court of Appeal.

(d) The costs of the applications for leave to appeal shall be costs in the appeal and cross-appeal respectively.

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O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

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