THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal.

Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others

[2022] ZASCA 54

The Supreme Court of Appeal (SCA) today dismissed with costs, an appeal by the appellants, the Central Energy Fund SOC Limited (CEF) and the Strategic Fuel Fund Association NPC (SFF), against an order by the Western Cape Division of the High Court, Cape Town (the high court), in terms of which it granted the respondents, Contango Trading SA (Contango), Natixis SA (Natixis) and Vitol Energy (SA) (Pty) Ltd (Vitol) just and equitable compensation for their out-of-pocket expenses, arising from the review and setting aside of certain decisions by the SFF in 2015 to rotate South Africa's strategic stock of some 10 million barrels of crude oil (the strategic stock).

In 2017 the appellants launched an application in the high court to review and set aside their own decisions relating to the rotation of the strategic stock and the transactions that followed. The SFF concluded three sale and purchase agreements with the third respondent, Taleveras Petroleum Trading DMCC (Taleveras), for the sale of 4 million barrels of crude oil at the SFF's storage facility in Saldanha Bay. These transactions were financed by Contango and Natixis. The SFF entered into a sale and repurchase agreement with Vitol for 3 million barrels of crude oil, and a storage agreement in terms of which the SFF leased to Vitol storage space for 3 million barrels of crude oil, for three years.

The high court set aside the impugned decisions and transactions on the following grounds. The CEO of the SFF, Mr Sipho Gumede, had been bribed by a person associated with Taleveras, to procure the transactions – four deposits totalling R2.6 million were paid into his account. Between January and April 2016 Mr Gamede received payment of R20 million into his bank accounts through anonymous cash deposits. The decision by the Minister of Energy (the Minister) to dispose of the strategic stock was tainted by misrepresentations by Mr Gamede, who acted with improper motives. The SFF failed to follow a fair, equitable, transparent and competitive process, in violation of its constitutional duties and the CEF's procurement policy. The Board failed to intervene to ensure that the SFF's and the country's interests were safeguarded. The Minister failed to apply her mind when taking the decision to approve the sale of the strategic stock. Despite being aware of the transactions, the CEF did nothing to prevent or challenge them.

The high court found that a delay of some four years by the appellants in the institution and prosecution of the review proceedings was unreasonable, egregious and unexplained. It held that an order setting aside the impugned decisions and transactions, subject to payment of compensation for out-of-pocket expenses (such as hedging losses, insurance and letters of credit, which excluded profit) incurred by Contango, Natixis and Vitol, who were innocent parties, effectively vindicated the rights violated and was fair to the affected parties.

The SCA held that this approach could not be faulted. It rejected the appellants' arguments that the high court paid insufficient regard to the public interest in preventing parties from benefiting from unlawful contracts, as Contango, Natixis and Vitol were not innocent parties; that a separate counter-application should have been launched for just and equitable relief; and that the order for compensation infringed the principle of subsidiarity, because the compensation order was not made in terms of section 8(1) of the Promotion of Administrative Justice Act 3 of 2000, nor as an award of constitutional damages .

The SCA found that Contango and Natixis were not accused of nor did they engage in any wrongdoing. They acted as reasonable credit providers by ensuring that the contract they concluded was regular. The appellants' claim that Vitol attempted to skew the procurement process in its favour and was aware that the ministerial preconditions for the transactions had not been met, had no basis in the evidence. Although Vitol sought to promote its own interests in its engagements with the SFF, it had acted properly throughout. The public interest in preventing bribery is not advanced by requiring innocent parties to make losses. The appellants disregarded the public interest in the secure provision of credit: it is adversely

affected if creditors cannot safely finance transactions with organs of state, who are at risk of incurring losses if it turns out that the State acted unlawfully. The order that the appellants should pay just and equitable compensation was a consequence of restitution: Contango, Natixis and Vitol were placed in the position in which they would have been had the agreements with the SFF not been concluded.

It was not necessary for Contango, Natixis and Vitol to institute a counter-application for payment of their out-of-pocket expenses, because the issue of compensation was an integral part of the assessment as to whether setting aside orders in the review application should be granted. Moreover, the appellants had invited the respondents to place evidence on affidavit before the high court as to what would constitute a just and equitable remedy if the review were to succeed, which they did. There was no infringement of the principle of subsidiarity: the high court did not imply nor create a new category of compensation.

The SCA held that the appellants could not, on appeal, seek a costs order against Taleveras because it had not opposed the review proceedings, and the appellants in those proceedings had asked that any costs order should exclude it. Televeras was therefore entitled to its costs of appeal, limited to the costs of one counsel. The appellants failed to establish that the court erred in law or reached a plainly unreasonable decision. The appeal was accordingly dismissed with costs, including the costs of three counsel.