



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 13 December 2019

STATUS Immediate

Contango Trading SA v Central Energy Fund SOC Ltd (533/2019) [2019] ZASCA 191 (13 December 2019)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Central Energy Fund SOC Ltd (CEF) and its subsidiary, the Strategic Fuel Fund Association NPC (SFF), launched review proceedings to set aside sales contracts for the disposal of 10 million barrels of South Africa's strategic oil reserves to various companies. Three of those companies, Contango, Natixis and Glencore sought production of various documents referred to in the founding affidavit on behalf of the CEF and SFF. These were a 'legal review', two opinions furnished by senior counsel and reports by KPMG and PwC. The high court held that none of these should be produced.

On appeal the SCA held that the 'legal review' was not itself a document although various documents may have come into existence in the course of the review. However, the founding affidavit did not refer to any of those documents and accordingly there was no obligation to produce any document in this regard.

As regards the two legal opinions the court held that they were privileged and accordingly the CEF and SFF were not obliged to produce them. It rejected an

argument that by referring to those opinions and saying that they agreed with the outcome of the legal review there had been a disclosure of the contents of the opinion that was incompatible with their continued confidentiality and accordingly that the privilege had been waived. The judgment analysed the requirements for an implied waiver of privilege based on the objective conduct of the party vested with the privilege.

In regard to the reports by KPMG and PwC the court held that there was no attempt to establish that they had been brought into existence for the purpose of obtaining legal advice. Rather they had been commissioned for the purpose of dealing with the financial and fiscal consequences of the disposal contracts being invalid and liable to being set aside. Accordingly they were not privileged and the CEF and SFF were obliged to produce them.

Given the limited success enjoyed by the appellants the court held that it was fair that each party pay its own costs in the appeal, but that the CEF and SSF should pay the costs of the application in the high court.
