



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **9233/2022**

(1)	REPORTABLE: YES/NO ✓
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO ✓
(3)	REVISED
	
.....12 OCTOBER 2023.....	
DATE	

In the matter between:

**THE ASSOCIATION OF MEAT IMPORTERS AND
EXPORTERS**

Applicant

and

**INTERNATIONAL TRADE ADMINISTRATION
COMMISSION**

First Respondent

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

Second Respondent

MINISTER OF FINANCE

Third Respondent

SOUTH AFRICAN REVENUE SERVICE

Fourth Respondent

SOUTH AFRICAN POULTRY ASSOCIATION

Fifth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be the 12 October 2023.

JUDGMENT

RETIEF J**INTRODUCTION**

[1] This is a judicial review arising from a decision taken by the Third Respondent [Finance Minister] to, subsequent upon accepting a final report by the First Respondent, to effect a ministerial amendment to the tariffs in Schedule 2 of the Customs and Excise Act 91 of 1964 [Customs Act]. The ministerial amendment gives effect to the continuation of the imposition of anti-dumping duties imposed on frozen bone-in portions of fowl of the species "*Gallus domesticus*" (chicken) [the product] originating in or imported from Germany, the Netherlands, and the United Kingdom.

[2] The original imposition on the product was effected on 25 February 2015 [initial imposition]. The recommendation to continue such imposition emanated from a review process [sunset review], which process was duly initiated and finalised by the First Respondent, the International Trade Administration Commission [ITAC].

[3] ITAC is the investigating authority who is statutorily mandated by the International Trade Administration Act 71 of 2002 [ITA Act] to, *inter alia*, conduct investigations pertaining to the introduction, continuation, or amendment of anti-dumping duties for the Southern African Customs Union [SACU].

[4] The Applicant [AMIE], is a voluntary association who represents the meat importers and exporters of South Africa. Importers of the product are the parties liable for the payment of such anti-dumping duties. AMIE, an interested party in the sunset review, opposed the continuation of the imposed anti-dumping duties on the product.

[5] AMIE, in bringing this judicial review, saw fit, out of an abundance of caution, to cast its relief net wide by way of its amended relief. In so doing, AMIE seeks to review and set aside the initiation of the sunset review, ITAC's final recommendation and both the Second Respondent [Trade Minister] and Finance Ministers' decisions in the administrative chain. AMIE brings its judicial review by way of the Promotion of Administrative Justice Act 3 of 2000 [PAJA], alternatively by way of a legality review.

[6] The Fifth Respondent [SAPA], is an association who represents the poultry industry in South Africa. SAPA was instrumental in achieving the initial imposition and its application triggered the sunset review.

[7] ITAC, SAPA and the Trade Minister oppose AMIE's relief.

[8] The Finance Minister and the Fourth Respondent [SARS] have not filed opposing papers, the Finance Minister however, served a notice to abide.

BACKGROUND AND LEGISLATIVE FRAMEWORK

[9] The subject matter of the review essentially deals with the 'manipulation' of economic activity within the poultry industry by preventing Germany, the Netherlands, and the United Kingdom from dumping the product into South Africa's established poultry market without consequences. By dumping one generally refers to the introduction of goods into the commerce of a country or its common customs area at an export price less than the normal value of those goods in the country of origin. According to the General Agreement on Tariffs and Trade of 1947 [GATT], of which South Africa is a signatory, dumping is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or if it materially retards the establishment of a domestic industry.¹

[10] In circumstances of harm or in the likelihood thereof, anti-dumping duties are permissibly raised on such offending goods. Permissible in terms of GATT and under our municipal law. The municipal law referred to is the International Trade Administration Act 71 of 2002 [ITA Act] and its regulations. One of the objects of the ITA Act is to provide for the control of the import of goods, and for the amendment of custom duties. Anti-dumping duties are levied on such goods. Such duties are subject to ministerial amendment from time to time following a process which commences with an issued recommendation by ITAC.²

¹ Article VI par 1.

² Section 26(1)(c) of ITA Act.

[11] The use of a tariff becomes a potent instrument to manipulate economic activity.³ Consequently, the necessity to gain insight into the need for ministerial amendments to the Schedules of the Customs Act and the importance of a lawful administrative process to achieve it, becomes apparent.

[12] To advance such insight, I consider the apt description of the process pencilled by the Constitutional Court [CC] in **International Trade Administration Commission v SCAW South Africa (Pty) Ltd**⁴ as regulated by the ITA Act when they stated:

- "1. *In the parlance of international trade, dumping means the introduction of goods into the commerce of a country or its common customs area at an export price less than the normal value of those goods. An international agreement binding on the Republic and so too our municipal law regulates dumping that harms or is likely to harm domestic trade and industry. At both levels, it is permissible to impose anti-dumping duties on offending export goods. Anti-dumping duties are harnessed to counteract or reduce harmful dumping and other adverse trade practices.*
2. *South Africa is a member of the World Trade Organization (WTO). Its international obligations on the tariff and trade arise from the WTO agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). The Republic's*

³ See explanation by RC Williams in LAWSA Volume 22(2) par 566.

⁴ 2012 (4) SA 618 (CC).

obligations in terms of the anti-dumping agreement are honoured through domestic legislation. The main source of legislation is the International Trade Administration Act of 2002 (the Act), the anti-dumping regulations promulgated in terms of the Act read together with the Customs and Excise Act, 1964 (Customs Act), and where appropriate, the Board of Tariffs and Trade Act of 1986 (BTT Act).

3. *The Act has established and charged the International Trade Administration Commission (ITAC) with the duty to make recommendations to the Minister of Trade and Industry (Minister) who, in turn may ask the Minister of Finance to lift or impose anti-dumping duties on specified goods introduced into the commerce of the Republic."*

[13] The administrative process described by the CC in the **SCAW** matter was aptly described by ITAC in its papers as a three-tiered process between ITAC, the Trade Minister and the Finance Minister. Of significance in this three-tiered process is ITAC's final issued recommendation. Significant in that, absent ITAC's recommendation, the Trade Minister may not on his or her own request the Finance Minister to exercise his or her discretion to impose anti-dumping duties.

[14] The was highlighted by Harms, ADP (as he then was) in the **Minister of Finance and Another v Paper Manufactures Association of South Africa**⁵ matter when he stated that:

⁵ 2008 (6) SA (SCA).

"- ITAC's report is not only an important link (own emphasis) in the administrative and legislative chain; it is indeed a jurisdictional fact for the ministerial actions that follow. It is consequently not surprising that the ITA Act makes special provision for the review of any determination, recommendation or decisions of ITAC (s46). A fatal flaw in the process at the ITAC stage affects the whole process."

[15] AMIE did not bring a self-standing challenge against ITAC's decision to initiate the sunset review and subsequent final determination in terms of section 46 of the ITA Act but brings its judicial review at the end of the administrative chain, contending that the decisions taken at the Finance Minister's stage will be dispositive of the matter. I deal with this aspect hereunder.⁶

[16] SAPA and ITAC do not hold this view and argue that all the decisions at every stage of the three-tiered process stand to be set aside, including ITAC's decision to initiate the sunset review. The PAJA versus legality review dispute too remained alive between the parties.

[17] To settle the dust, I will first deal with the ambit of the determinable issue/s and whether they stand to be reviewed by way of PAJA, alternatively by way of a legality review before I deal with the merits of the grounds raised.

ISSUE/S FOR DETERMINATION AND PAJA vs LEGALITY REVIEW

⁶ See para [18] hereof.

Whose decision/s stand to be reviewed?

[18] AMIE in its amended relief, out of caution only, seeks to review all the decisions at every stage in the administrative chain including ITAC'S initiation of the sunset review. However, abandoning caution in argument argues that the Finance Minister's decision to continue the imposition of the anti-dumping duties and his subsequent decision to effect the ministerial amendment to Schedule 2 of the Customs Act will be dispositive of the entire application [Finance Minister's decision].

[19] Relying on this proposition AMIE referred the Court to the Supreme Court of Appeal [SCA] matter of **PG Group and Others v National Energy Regulator of South Africa**⁷ [PG matter] stating that the SCA dealt with a similar stage process as in this matter in that, the determination of the maximum gas prices was made by way of a staged process which only became binding on its completion when NERSA gave its decision on the Sasol Gas's application.⁸ The fact that there were various steps in the process did not render each step individually an administrative action which adversely affected the rights of any person⁹.

[20] The SCA in the PG matter also considered the reasoning of the CC in **Minister of Health and Another N.O v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)**¹⁰ [Clicks

⁷ 2018 (5) SA 150 (SCA) at par [30].

⁸ *supra* at par [35].

⁹ Notably having regard to the definition of an administrative action as defined in section 1 of PAJA.

¹⁰ 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14.

matter] in which the CC was confronted with a stage/tiered decision process involving a final decision to be taken by the Minister of Health to amend regulations to the Medicine Act. The Minister of Health was obliged to consider the recommendations of a Pricing Committee, a similar stage process as in this matter with the Finance Minister. Chaskalson CJ in his judgment reasoned that having regard to the process of making regulations by the Minister as the starting point and said:¹¹

"The making of the regulation.....involves a two-stage process. First a recommendation by the Pricing Committee and, second a decision by the Minister as to whether or not to accept the recommendation.....In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions (own emphasis) each on its own having to be subject to PAJA, would be to put form above substance. The Minister was not obliged to act on the Pricing Committee's recommendations. She had a discretion whether to do so. But ultimately there had to be one decision (own emphasis) to which both the Pricing Committee and the Minister agreed. Neither had the power to take a binding decision without the occurrence of the other. It was only if and when agreement was reached that the regulations could be made."

[21] On a similar process of reasoning in this case, the decision to continue the imposition of anti-dumping duties on the product was a three tiered/stage process which only became binding on its completion. ITAC's final recommendation,

¹¹ *supra* at par 136-139.

although called "final" in itself, possessed no finality as it was subject to the Trade Minister's approval and if not approved, remittance or rejection. The Trade Minister's approval of ITAC's final recommendation also possessed no finality as such approval did not complete the decision process. It was only when the Finance Minister was in agreement with both ITAC and the Trade Minister to continue the imposition and, at what proposed tariff, that the amendment was affected. None of the decisions in the administrative chain were independent. Decisions which are not independent are not each subject to administrative review. This statement is however qualified having regard to section 46 of the ITA Act which statutorily enables an affected person to review a determination, recommendation, or decision of ITAC's. As previously mention, AMIE does not rely on section 46 of the ITA Act nor does it seek to review the decisions taken at the ITAC stage in isolation. AMIE invites the Court to view the entire process in the administrative chain and argues that the Finance Minister's decision is decisive of the entire process.

[22] Both ITAC and SAPA do not hold this view and both rely on the principle stated by the SCA in the **Oudekraal Estates (Pty) v City of Cape Town**¹² matter, namely that: a decision, albeit unlawful, stands if not set aside by a Court in proceedings for judicial review. On this basis SAPA contended that ITAC's decision to initiate the sunset review would have legal consequences, namely, that the initiation serves as the basis for ITAC's ultimate recommendation to the Trade Minister. Although this is correct, whether such basis is relevant requires further consideration.

¹² 2004 (6) SA 222 (SCA).

[23] In the **Oudekraal** matter the principle arose as a result of a collateral defence against the validity of an Administrator's permission which, on the facts, itself possessed finality. It was one final decision and not part of a tiered process. In other words, in **Oudekraal**, if the decision was not dealt with at the outset, its consequences (in this case unlawful and invalid consequences) stood as the final say on the matter. Conversely, only the Finance Minister's decision stands as the final say in the matter before me. I agree that setting aside the final decision would not, as AMIE incorrectly contended, automatically render all the other recommendations or decisions at the various stages *ab initio*.¹³ The initiation decision serves more than a bases for ITAC's final recommendation but triggers it. However, absent the Finance Minister's approval it possess no effectiveness.

[24] I therefore find AMIE's argument more compelling in the circumstances and notably in line with the CC in the **Clicks** matter. In consequence only the Finance Minister's decision stands to be reviewed.

By way of PAJA or legality review?

[25] AMIE in their papers brought the review relief against the Finance Minister's decision by way of PAJA, alternatively by way of a legality review. AMIE, however, correctly, in argument conceded that the Finance Minister's decision stands to be reviewed on the principles of legality rather than PAJA. This concession is well made having regard to what Khampepe J, writing for the majority in the **Minister of Defence and Military Veterans v Motau**¹⁴ had to say in which the application of

¹³ AMIE does not rely on any authority for this proposition.

¹⁴ [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).

PAJA, alternatively a legality review was discussed. Khampepe J emphasised that the correct order of enquiry in review matters is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law. If the powers of the decision-maker are more closely related to the formulation of policy (executive nature) then a legality review follows; and if the decision relates to the implementation of legislation (administrative nature) then PAJA applies.

[26] Applying the enquiry, *supra*, it is common cause that the Finance Minister derives his power to make his final decision from the Customs Act. However, as is borne out of section 85(2) (b-d) of the Constitution read with section 1(i)(aa) of PAJA, the Finance Minister when executing such derived powers, does so as described in the **SCAW** matter, within the realm of the development and implementation of national policy on international trade as catered for in section 85(2) (b-d) of the Constitution. Such powers are specifically excluded in section 1 of PAJA. Therefore, to venture into the applicability, compliance of, and applying the provisions of PAJA¹⁵ becomes unnecessary. The Finance Minister's function is executive of nature and AMIE's concession is well made and in line with the contentions of ITAC, the Trade Minister and SAPA.

[27] It now flows that the Finance Minister's decision is to be dealt with through the legality lens. I proceed on this basis and as such do not deal with AMIE's reliance on any PAJA grounds including their reliance on section 5(3) thereof.

¹⁵ See Professor Hoexter's discussion of the meaning of 'direct, external legal effect,' in her seminal work *Administrative Law in South Africa* (2 ed) at 227-8.

[28] The doctrine of legality is part of the rule of law and emanates from section 1(c) of the Constitution and is a mirror image of administrative law - under a different name.¹⁶ Legality grounds are not codified however, our courts have recognised a wide range of review grounds in terms of the principle of legality. Whilst PAJA review grounds are codified and enumerated in section 6 of PAJA, section 6(f)(ii)(aa) includes a recognised legality ground, namely that "*the action itself...is not rationally connected to the purpose for which it was taken.*"

[29] AMIE in argument advanced the grounds of lawfulness and rationality as against the Finance Minister's decision. Expanding those grounds, the issues for determination are:

29.1 An enquiry into the Deputy Minister's authority and power to take the Finance Minister's decision; and

29.2 The rationality of the Deputy Minister's decision.

[30] The chronology of the events are mostly common cause. I however deal with them to place complaints of procedural fairness and bias levied against ITAC in context and to set the background upon which the rationality test, as against the Finance Minister, can be determined.

CHRONOLOGY OF EVENTS

¹⁶ Hoexter & Penfold, Administrative Law in South Africa 3rd ed at 357.

[31] In 2015 anti-dumping duties were imposed on the product at a 7-digit tariff heading level.¹⁷

[32] The original duties imposed have a lawful lifespan and as a result were due to expire on 26 February 2020. The expiration could be prevented by the receipt of a duly substantiated request [application] by or on behalf of the SACU industry to review the position, a sunset review.¹⁸ The purpose of a sunset review is for ITAC to evaluate whether the removal of the original duty would likely lead to the continuation or recurrence of injurious dumping.

[33] On 24 May 2019 ITAC, in terms of regulation 54.1 of the anti-dumping regulations [regulations], published a notice¹⁹ advising interested parties of the lawful expiry date and calling for SACU industry applications to initiate a sunset review. Applying the 30 (thirty) day period in the regulations, applications were to be submitted to ITAC by 24 June 2019; ITAC possessing the discretion to grant extensions for such submission of information on good cause shown.²⁰

[34] ITAC received SAPA's application on 3 October 2019. ITAC granted SAPA a number of extensions. AMIE's complaint lies against the jurisdictional requirements of SAPA's application itself and not the extensions granted by ITAC to submit. AMIE contends that on the date of SAPA's submission, ITAC was not in receipt of a substantiated request. This is premised on ITAC's concession that it

¹⁷ Anti-dumping duties set at the same level for all bone-in chicken cuts (i.e all cuts viewed similarly).

¹⁸ See ITA Act anti-dumping regulations 53-59.

¹⁹ Government Gazette No. 42474, Notice 284 of 2019.

²⁰ Regulation 1 "good cause" in terms of regulation 42.4 and 43.3 dealing with reviews in general, does not include insufficient time as a reason.

only received a properly documented application from SAPA on 20 February 2020, and that such information was only verified by ITAC after the date of expiration (during March 2020).

[35] ITAC contends that as per the notice, a party's information may need to be verified and that the determination of such need is at their discretion in the pre-initiation phase. Furthermore, that the consideration of information is only to determine whether *prima facie* evidence exists to justify the initiation of a review.²¹ The determination of what constitutes a proper application lies with ITAC.²²

[36] ITAC, during the period of 3 October 2019 to 20 February 2020, issued six letters of deficiency to SAPA. The first letter was on 7 November 2019. SAPA only responded by updating its information on 4 December 2019. Notwithstanding, ITAC continued to engage with SAPA up and until 20 February 2020. AMIE does raise ITAC's acceptance of the initial delayed response as a jurisdictional requirement complaint.

[37] Furthermore, if a party felt affected by the acceptance of documents or information not in accordance with the initial notice, it was mandatory for it to inform ITAC so as to assist with the proper administration of the investigation. No record of such submissions by any party, at this stage, is on the record.

[38] On 21 February 2020, the Commission convened to consider SAPA's application to initiate the sunset review. The minutes of such meeting were not part

²¹ Regulation 54.4.

²² Regulation 54.5.

of the record however, they were attached to ITAC's answer. It appears that the Commission accepted that SAPA's application was properly documented. In consequence and on 24 February 2020, ITAC by notice [the initiation notice],²³ resolved to initiate the sunset review on the strength of SAPA's "*detailed response*". Having regard to the use of the phrase a "*detailed response*" in the initiation notice, by parity of reason it must be by reference, the "*substantial request*" in the initial notice. ITAC being entitled to call for further information after such receipt *via* deficiency requests until such time as it, ITAC, decides to accept the application as properly documented before it. This appears to be the sequence of events.

[39] This decision by ITAC to initiate the sunset review triggered a single investigation phase into the reconsideration of the imposition. Of significance is the period of investigation was determined to be 1 June 2018 to 31 May 2019 for dumping; and material injury, 1 June 2016 to 31 May 2019, plus estimates of 1 June 2019 to 31 May 2020 should the anti-dumping be removed.

[40] Factually, the sunset review was initiated prior to the 5-year deadline. The duties remained intact pending the finalisation of the sunset review as provided for in regulation 53 and, in terms of regulation 20, ITAC had to finalise the review within 18 (eighteen) months after the initiation. The deadline was 24 August 2021.

[41] During the investigation phase, ITAC invited interested parties to respond and comment on SAPA's application and to submitted further information to assist ITAC. A public file is used for the consideration of all non-confidential information accessible to all interested parties in the process. AMIE contends that ITAC's failure

²³ Government Gazette No. 43044.

to update the public file during 24 May 2021 to early July 2021 [the crucial time] appears to conceal the circumstances surrounding SAPA's request for an oral hearing on 8 June 2021 when similar requests for oral hearing by other parties, including AMIE and Merlog Foods (Pty) Ltd [Merlog], were denied.

[42] Merlog, a South African importer and member of AMIE who, on the 21 March 2020 submitted an importer questionnaire and responded to ITAC regarding SAPA's application. Merlog highlighted certain noted deficiencies, such deficiencies dealing with the information supplied by SAPA. The complaint/comment pertained to the use of non-current and the supply of incomplete non-confidential information by SAPA.

[43] On 4 May 2020, AMIE too submitted a detailed response to ITAC on SAPA's application.

[44] On 28 April 2021, ITAC issued an essential facts letter to all interested parties in terms of regulation 37. ITAC at this stage, which it in argument, referred to as the preliminary stage, considered recommending that the 8-digit level tariff be used and not the 7-digit tariff level as per the initial imposition of 2015. In the event that ITAC was to recommend maintaining the imposition, then AMIE was satisfied with the 8-digit recommendation. SAPA on the other hand maintained that as the product was defined at the 7-digit level and anti-dumping duties were imposed at that subheading, an 8-digit level should not be entertained.

[45] ITAC's essential facts letter was clear in that the content did not constitute the final determination. Furthermore, ITAC informed interested parties that it was

considering making a final determination to disregard Merlog's response in the calculation of dumping duties in that it did not import the product from Germany, the Netherlands, and the UK during the period of investigation.

[46] Parties were invited before 12 May 2020 to comment on the essential facts in the letter. Requests from various interested parties for an extension to respond by 12 May 2020 were received but refused.

[47] On 5 May 2021, ITAC received correspondence from Merlog who alerted ITAC of possible material fraud committed by Daybreak Chicken [Daybreak], (SACU producer and member of SAPA) from September 2019.²⁴ ITAC alleges that its investigating team investigated the allegation. However, none of the supporting affidavits filed by the investigating team deal with this issue. Furthermore ITAC's letter of response to the Trade Minister in which, Daybreak was mentioned, created the impression that the investigation of Daybreak was confined to unverified media releases.

[48] ITAC received comments from various interested parties including SAPA and several foreign producers. On 12 May 2021, SAPA responded to the essential facts letter which included a detailed response to their objection to the proposed use of the 8-digit tariff structure. AMIE did not respond to the material facts letter nor to SAPA's proposed 8-digit tariff structure at this stage.

²⁴ A date after the investigation period into material injury but in the estimate, period should dumping be removed.

[49] SAPA however twice, and after the 12 May 2021 deadline submitted additional comments on the essential facts and requested an oral hearing. Although ITAC determined not to take these additional comments into account they did allow SAPA an oral hearing on 8 June 2021. This was during the crucial period.

[50] AMIE contends that ITAC granting SAPA an oral hearing and its failure to update the public file during the crucial time constituted procedural unfairness and bias in the ITAC process. The complaint of procedural unfairness and bias must be seen in context.

[51] In context, regulation 5 permits oral hearings both during the preliminary and final phase of an investigation. However, both AMIE and Merlog's request for oral hearings (on 28 June 2021 and 7 July 2021 respectively), were made after the finalisation of the investigation by ITAC and as a consequence ITAC could not lawfully grant them a hearing.

[52] The late requests for oral hearings however appear to be during the crucial time when the public file was not being updated. This prevented interested parties from gauging ITAC's process and providing a reasonable opportunity to make representations before ITAC's investigating team presented their submissions to the Commission, which occurred on 8 June 2021, the same day as SAPA's oral hearing and during the crucial time.

[53] AMIE contends that this was not transparent and not in line with regulation 5.3 - particularly having regard to the imminent final deadline for the finalisation of the investigation. Interested parties obtaining access or a copy of the material critical

facts after the final determination was presented was prejudicial. I agree with this argument.

[54] On 8 June 2021, ITAC's investigating team presented the submissions to the Commission. The Commission deliberated on the matter and referred the submissions back to the investigating team to make certain amendments.

[55] On 10 June 2021, the investigating team presented the amended submissions to the Commission. The Commission concluded that there was a likelihood that injurious dumping may recur and resolved to reimpose the residual anti-dumping duties imposed following the original investigation.

[56] On 15 June 2021, ITAC submitted the signed submission and report to the Trade Minister.

[57] On 12 July 2021, Merlog sent a letter to ITAC, the Trade Minister and the Finance Minister, raising, *inter alia*, concerns about flaws in the ITAC process including allegations of fraud. Merlog issued a warning: that if the matter was not referred back to ITAC for consideration to enable it to deal with before a decision was made, the final decision would be taken on review.

[58] On 12 July 2021, AMIE too addressed a letter to the Trade Minister requesting his intervention to ensure that a lawful, reasonable, and procedurally fair decision was taken. The Trade Minister did intervene before he made his decision and ITAC responded to the Trade Minister's queries on 20 July 2021.

[59] ITAC in its response of the 20 July 2021, to the Trade Minister did not deny that access to the updated public file occurred and that other documents were missing (which documents are unclear). ITAC deflects and simply states: AMIE failed to explain how such absence impaired its ability to defend its clients during the investigation. However, the complaint is that it could not defend its clients at the material time as the investigation was finalised after they acquired knowledge.

[60] On 4 August 2021, the Trade Minister approved ITAC's recommendation and forwarded a letter to the Deputy Minister of Finance [Deputy Minister] requesting him to reconfirm the anti-dumping duties in accordance with ITAC's recommendation. A copy of the final report was attached. No further correspondence between the Trade and Deputy Minister are on record.

[61] On 19 August 2021, the Deputy Minister accepted the request from the Trade Minister. On 23 August 2021, the residual dumping duties were reconfirmed and published in the Government Gazette. The notice was signed by the Deputy Minister. On 24 August 2021, ITAC submitted its final determination to various interested parties including AMIE.

GROUND OF REVIEW

Was the decision taken the Deputy Minister, a functionary who possessed the requisite authority and power to do so?

[62] AMIE contends that the Finance Minister's decision was not taken by a functionary who possessed the requisite authority and powers to do so. AMIE's

challenge on authority is premised on section 48(1)(b)²⁵ and 56 of the Customs Act in that reference to "Minister" can only be the Finance Minister who is empowered by Parliament to exercise such authority and powers.

[63] This contention was common cause on the papers, as too on the facts, that it was the Deputy Finance Minister, Dr D. Masondo, MP [Deputy Minister] who took the final decision.

[64] AMIE's challenge was advanced in circumstances when both the Deputy Minister, the Finance Minister and SARS failed to file papers. In consequence, the lack of evidence on the papers relating to the circumstances under which the Deputy Minister took the final decision was aggravated by the lack of documentary evidence in support of the Deputy Minister's authority. No written delegation in support of the Deputy Minister's authority was filed nor did it form part of the rule 53 record. This state of affairs remained unaddressed notwithstanding numerous requests made to the office of the Finance Minister by the parties to do so. AMIE is requesting this Court to make a negative inference from the Finance Minister's failure.

[65] In an attempt to overcome such an evidentiary *lacuna*, SAPA, at the commencement of the hearing moved an unopposed interlocutory application seeking leave to file a supplementary affidavit to adduce further evidence. Leave was granted. The supplemented evidence included a copy of a memorandum by SARS together with a signed delegation dated 8 May 2018 referred to as annexure

²⁵ Section 1 of the Customs Act defines the "Minister", meaning the Minister of Finance.

"A" [2018 delegation]. Annexure "A" was signed by the then Minister of Finance, Mr Nhlanhla Nene, MP.

[66] The 2018 delegation effectively took the sting out of AMIE's initial authority challenge on the papers. In consequence, AMIE advanced two further challenges in argument. Although SAPA correctly challenged the permissibility of such challenges, all the parties recognised that to deal with this issue was pivotal in that a Court is enjoined to set aside an administrative action which was performed by a functionary without authority to do so.

[67] AMIE's first attack on authority was that the 2018 delegation by its wording, limited the Deputy Minister's duties by reference, namely: "*duties referred to in section 57*"²⁶ only and not duties referred to in section 56,²⁷ which in fact were required [limited delegation]. AMIE's second attack was on the Deputy Minister's lack of power to make the decision by relying on section 55(2) of the repealed Customs Act of 2006 [section 55(2) challenge].

Did the Deputy Minister possess authority to perform the function?

[68] The thrust of the limited delegation challenge centred around two documents which were directed to the Deputy Minister by reference. The first document was a letter dated 4 August 2021 authored by the Trade Minister [the

²⁶ Section 57 of the Customs and Excise Act does not regulate import duties. It regulates the imposition of safeguard measures.

²⁷ Section 56 of the Customs and Excise Act regulates the imposition of safeguard measures and the imposition of anti-dumping duties.

Trade Minister's letter]. The second document was a SARS memorandum dated 16 August 2021 [SARS letter].

[69] Both documents dealt with the same subject matter, namely ITAC's *"report No. 666, the sunset review"*.

[70] The Trade Minister's letter requested the Deputy Minister to, in terms of section 56 of the Customs Act,²⁸ amend Schedule 2 to the Act in order to give effect to his approval of the recommendation.

[71] The SARS letter requested the Deputy Minister to approve and give effect to the request by the Trade Minister. It too, dealt with the legislative framework, informing the Deputy Minister that the proposed amendment was to be effected in terms of section 57(1) of the Customs Act.²⁹ SARS referred to the 2018 delegation informing the Deputy Minister that he was duly authorised to effect the ministerial amendment. The notice was attached to the SARS letter³⁰ [ministerial notice].

[72] The ministerial notice published and eventually signed by the Deputy Minister confirms that he was effecting the ministerial amendment in terms of section 56 of the Customs Act.

[73] Notwithstanding the content of the ministerial notice, AMIE's authority challenge on the limited delegation, is centred around the SARS letter. As I

²⁸ Section 56 of the Customs Act deals specifically with anti-dumping duties.

²⁹ Section 57(1) of the Customs Act deals specifically with safeguard duties.

³⁰ The notice duly signed by the Finance Minister on the 23 August 2021, published in the Government Gazette No.45032.

understand the argument, they contend that as a result of the reference to section 57 instead of section 56 in the SARS letter, the Deputy Minister, when signing the ministerial notice, did so without consciously appreciating that he had the authority to do so in terms of section 56 (lack of awareness of authority). This argument is advanced in the absence of papers filed by the Deputy Minister, the Finance Minister, a concession that the 2018 delegation includes reference to section 56 and 57 and the Trade Minister's request. In support of the lack of awareness of authority argument, AMIE relied on the matters of **Minister of Education v Harris**³¹ and the matter of **Liebenberg N.O and Others v Bergriver Municipality**.³²

[74] The **Harris** matter dealt with a challenge of the validity of a notice on a number of grounds, one being that the notice was *ultra vires* the Minister's (Minister of Education) powers in that, the empowering provision relied on by the Minister did not provide the Minister with the requisite power to issue the notice for the manifest intended purpose. The argument advanced for the Minister was on the basis of a purported mistake (conscious election enquiry). In other words, that the notice mistakenly made reference to the incorrect empowering provision. This was done in circumstances where the papers made no suggestion that the Minister had made a mistake and where the notice clearly cited the empowering provision. The Minister's argument was rejected.

[75] Applying the CC's reasoning in this matter, reliance on **Harris** matter must fail. I cannot speculate to determine a conscious election enquiry or a mistake but, on the facts, I can accept that the Deputy Minister, at the time, possessed both the

³¹ 2013 (5) SA 246 (CC) at par [93].

³² 2001 (4) SA 1297 (CC) at par [18].

Trade Minister's (reference to section 56) and the SARS letter (reference to section 57) and considered them both when making his final decision. He then elected. Furthermore, the ministerial notice clearly cites the correct section and Act as section 56 of the Customs Act as the source of the Deputy Minister's authority. The 2018 delegation supports the powers exercised by Deputy Minister. In consequence, the facts support that the Deputy Minister elected and acted in terms of section 56.

[76] The **Liebenberg** matter concerned the validity challenge of an administrative action taken by the Municipality in circumstances when the empowering provision relied on by the Municipality was no longer in force. AMIE highlighted an observation made by the CC being: administrative actions performed in terms of an incorrect provision are invalid, even if the functionary is empowered to perform a function concerned by another provision.

[77] It is clear from the ministerial notice that the Deputy Minister performed the function (ministerial amendment) in terms of the correct provision. Reliance on this matter too, does not advance AMIE's challenge.

[78] Considering the challenge further, the following is of relevance:

78.1 It is common cause that the Finance Minister may from time-to-time delegate powers in terms of section 118 of the Customs Act. The content of the 2018 delegation is not in dispute and is headed "*Delegation of Powers and Assignment of Duties to the Deputy*

Minister of Finance" duly signed by the then erstwhile Minister of Finance, Mr Nhlanhla Nene, MP;

78.2 The 2018 delegation directed the current and the future Deputy Finance Ministers and makes no specific mention to a particular Deputy Minister, by reference. The conferral of such power to a holder of such office, at the time and the interpretation thereof to include same is permissible in terms of the Interpretation Act 33 of 1957;³³

78.3 The 2018 delegation includes the functions in terms of section 56 and section 57 of the Customs Act;

78.4 No evidence was presented that the delegation had been withdrawn. To the contrary, the SARS letter dated in 2021 refers to the 2018 delegation.

[79] It flows that the Deputy Minister was empowered to effect the ministerial amendment and that it was performed in terms of section 56 of the Customs Act after he elected to do so. AMIE's challenge on this point must fail.

Did the Finance Minister or his Deputy possess the power to make the final decision?

³³ See section 6 of the Interpretation Act 33 of 1957.

[80] AMIE's challenge is that the Finance Minister could not "*satisfy*" himself "*that circumstances as set forth in subsection (5) (with reference to section 55 (own emphasis) exist*". In doing so, AMIE relies on the statutory framework of section 55(2) of the Customs Act of 2006 and not the current and applicable Customs Act.

[81] The statutory framework relied on by AMIE has been repealed. This mishap was not explained in argument, but it is one which ITAC, the Trade Minister and SAPA identified in their answering papers. AMIE did not formally abandon its reliance on section 55(2). Notwithstanding, this challenge must fail on applicability and relevance.

[82] I now turn to rationality.

RATIONALITY

Was the Finance Minister's decision rational?

[83] The nub of AMIE's challenges against the Deputy Minister regarding rationality is the fact he ignored serious allegations levied against ITAC in respect of the administrative process - in particular Merlog's complaints of 12 July 2021 which appear not to have been considered at all. In essence an enquiry into procedural fairness at the Finance Minister stage by taking diverse and conflicting considerations into account.

[84] AMIE in argument expanded the challenge to include the 'conditions' in the SARS letter in which SARS informed the Deputy Minister that they, at that time, were not in a position to confirm that all the factors and potential implications of the

request to approve had been identified, considered, and disclosed [SARS statement].

[85] To unpack and consider the challenge I need to set a basis upon which a rationality challenge is to be resolved.

[86] For the exercise of the public power, in this case, the Deputy Minister's, to meet the standard of rationality, it must be rationally related to the purpose for which the power was given and not made arbitrarily. This is an objective test and is distinct from reasonableness. For reasonableness, on the other hand, is a test of the decision itself, whereas a review for rationality is testing whether there is sufficient connection between the means chosen and the objective sought to be achieved.

[87] In **Albutt**.³⁴

"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are some other appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they rationally related to the object sought to be achieved. What must be stressed is that the purpose of the inquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally

³⁴

Albutt v Centre for Study of Violence and Reconciliation 2010 (3) SA 293 (CC) at par 51.

related to the object sought to be achieved. And if, objectively speaking they are not, they fall short of the standard demanded by the Constitution."

[88] The test in short therefore entails the consideration of relevant factors considered between means and objectives.

[89] In considering factors I do so against the backdrop of the following: that the Finance Minister is not obliged to follow the recommendation of the Trade Minister and, that the Finance Minister is the only organ of state (other than parliament through national legislation), which can impose, withdraw, or amend any such duty or measure.

[90] One of the Deputy Finance Minister's permissible objectives, at the material time, was to be satisfied that the competing interests of economic policies, the *fiscus* and the industry participants' interests were balanced before he made the decision.³⁵

What are the factors raised by AMIE?

[91] I commence by considering the Deputy Minister's consideration of the economic and fiscal policies. In doing so, I consider AMIE's challenge in respect of the condition in the SARS letter. SARS states that it is not in a position to confirm that all the factors and potential implications of the request to approve had been

³⁵ *South Africa Sugar Association v Minister of Trade and Industry and Others* [2017] 4 All SA 555 (GP).

identified, considered, and disclosed. Although the extract relied upon accurately records the SARS statement, SARS does qualify it.

[92] Contextualising the SARS statement, SARS, directly after the condition goes on to say that: *"Trade policy factors of this nature (own emphasis, referring to the SARS statement) fall within the ambit of the International Trade Administration Act No. 71 of 2002, administered by the Commission."*

[93] Common sense dictates that SARS can only confirm factors within its own domain, namely: determining the effect on the *fiscus*. This SARS did. That which falls in the domain of the Trade Minister he can only do. This is the point made.

[94] Furthermore, the SARS letter indicates that its own motivation to the Deputy Minister to approve, is on condition that an economic analysis is conducted by the Economic Policy and Tax and Financial Sector of National Treasury. Both Division heads, at the time, duly signed indicating that they recommended the approval. Only the Deputy Director-General: Economic Policy's analysis dated 15 August 2021 formed part of the rule 53 record. No challenge was brought as against the lack of economic analysis by both divisions of National Treasury.

[95] In consequence, SARS inability to confirm all the factors, in context, as complained of is not a relevant factor to be applied in the rationality test.

[96] I now consider the Deputy Minister's consideration of the industry participants in considering AMIE's complaint of fairness in that the Finance Minister failed to have regard to both their and Merlog's detailed letters of warning and complaint. Such expressing diverse and conflicting interests compared to ITAC's

final recommendation. The exact content of AMIE's letter to the Finance Minister is unclear from the papers however, AMIE's complaint to the Trade Minister is however well documented.

[97] To unpack this complaint, I first consider the process followed by the Trade Minister before he issued the trade letter. The Trade Minister in his papers sets out a well-considered process which included considering ITAC's response to AMIE's concerns of 12 July 2021, ITAC's Report 666, the poultry sector Master Plan and the memorandum from the Agro-Processing unit before accepting ITAC's recommendation. The Trade Minister considered AMIE's concerns, requested ITAC to respond and then considered ITAC's response itself. This he did even though he was in possession of ITAC's final report. He gave ITAC an opportunity to respond.

[98] The Trade Minister however, only provided the Deputy Minister with ITAC's recommendation. Whether he was obliged to furnish the Deputy Minister the response received by ITAC is unknown. The record of the Finance Minister however records receipt of Merlog's detailed letters of 12 July and 2 August 2021.

[99] Merlog's letters contained serious allegations, conflicting views about why their submissions should be considered and complaints including fraud, procedural irregularities during the ITAC investigation, the consequences of avian influenza going forward and a stern warning of launching review proceedings. The opening paragraph of Merlog's letter dated 2 August 2021 indicates that the Finance Minister did not respond to their letter of 12 July 2021. From the record filed both letters remain unanswered. In the absence of evidence to the contrary the content of such

letters appears unconsidered. For that matter, no consideration is to be found on the record, not even an attempt to contact the office of the Trade Minister.

[100] Driving the point home, the Court was invited to consider the **Pioneer Foods** matter.³⁶ In this matter, reference was made to the following statement by the Court: *"the statutory duty imposed upon [him] before [he] amends the tariffs or performs his statutory duty, he must satisfy himself (own emphasis) that amending the tariff will not have detrimental consequences for the country"*.

[101] AMIE's point is that the Deputy Minister, by not entertaining possible complaints which may have disturbed the balance, he did not perform his statutory duty. The final decision affects industry participants and diverse and conflicting views must be considered³⁷. How to resolve the conflicting and diverse interests is a question of policy. The Finance Minister is silent.

[102] I agree, and without evidence to the contrary and viewing the Court's obligation alluded to by the CC in the **Albutt** matter that *"-courts are obliged to examine the means selected to determine whether they rationally related to the object sought to be achieved"*, it flows that the Deputy Minister failed in this regard.

³⁶ **Pioneer Foods (Pty) Ltd v Minister of Finance and Others** (15797/2017) [2018] ZAWCHC 110; [2018] 4 All SA 428 (WCC) (5 September 2018) at par 30 to 37.

³⁷ Footnote 10 para [153-154].

[103] The enquiry into whether it would have made a difference if the Deputy Minister had, is of no moment as this Court is not equipped to determine that. AMIE's complaint of rationality must succeed on this point.

[104] The constitutional breach which has occurred is regrettable but the decision-makers in Treasury and the Finance Minister or the delegate at the time, must approach their task as they see fit, as long as the manner in which they do so is rational.

[105] In considering AMIE's relief as against the Finance Minister, I too am mindful of SAPA's submissions with regard to an appropriate equity remedy. I consider the balance of the interests to be served between all the parties that the result that ITAC's recommendation still remains a jurisdictional fact and the the Trade Minister's decision stands. It will be for the Finance Minister now to consider the weight of the complaints and interests, if any, and to exercise his powers in terms of the Customs Act.

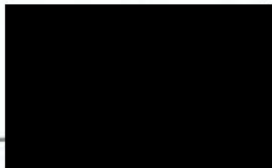
COSTS

[106] In the absence of argument to the contrary, I can find no reason why the costs should not follow the result.

In so doing, I make the following order:

1. The Third Respondent's decision to approve the Second Respondent's recommendations, in respect of the First Respondent's final determination is hereby set-aside.

2. The decision to approve the Second Respondent's recommendations, in respect of the First Respondent's final determination, referred to in prayer 1, is hereby referred back to the Third Respondent.
3. The Third Respondent must exercise his discretion and make his decision in respect of the Second Respondent's recommendations of the First Respondent's final determination within 12 (twelve) months from date of this order.
4. Notwithstanding prayer 1 hereof, the ministerial amendment of Schedule 2 of the Customs and Excise Act 91 of 1964 published in Gazette 45032 shall remain of force and effect until such time as the Third Respondent has made his final decision referred to in prayer 2 and 3 hereof.
5. The First, Second and Fifth Respondents are, jointly and severally liable, for the costs, which costs include the employment of two Counsel.



L.A. RETIEF

Judge of the High Court

Gauteng Division

Appearances:

For the Applicant:

Adv. H Epstein SC

Instructed by: Adv. S Tshikila
Malatji & Co Attorneys
c/o Macintosh, Cross & Farquharson

For the First Respondent: Adv E Muller
Adv JW Kiarie
Instructed by: State Attorney: Pretoria

For the Second Respondent: Adv. N H Maenetje SC
Adv. M Salukazana
Instructed by: State Attorney: Pretoria

For the Fifth Respondent: Adv. A Cockrell SC
Instructed by: Webber Wentzel
c/o Hills Incorporated

Heard on: 17 and 18 July 2023
Judgment granted: 12 October 2023