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

REPUBLIC OF SOUTH AFRICA

Case Number: 66248/2014

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	YES/NO
(2)	OF INTEREST TO OTHER JUDGES:	YES/NO
(3)	REVISED	
	DATE: 14 February 2020	
	SIGNATURE:	....

In the matter between:

CASAR DRAHTSEILWERK SAAR GMBH Applicant

And

INTERNATIONAL TRADE ADMINISTRATION COMMISSION First Respondent

MINISTER OF TRADE AND INDUSTRY Second Respondent

SCAW SOUTH AFRICA (PTY) LTD Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant seeks an order to review the following decisions:

1.1 the first respondent's final determination and recommendation that the applicant's Interim Review in respect of anti-dumping duties on wire ropes and cables exported by the applicant to South Africa, should be terminated;

1.2 the decision by the second respondent to terminate the Interim Review;

1.3 the first respondent's final determination and recommendation, pursuant to a Sunset Review, to maintain the anti-dumping duties imposed on the applicant in respect of the rope wire and cables exported by the applicant;

1.4 the second respondent's decision to maintain the anti-dumping duties.

[2] I pause to mention that the "*review*" in respect of the Sunset Review was introduced belatedly in an amended notice of motion accompanied by a supplementary affidavit. Casar did not rely on any grounds of review in respect of its prayer for the review of the Sunset Review. Faced with this difficulty, Mr Seale SC, counsel on behalf of Casar, stated that the setting aside of the decisions in respect of the Sunset Review should rather form part of the remedies prayed for by Casar in the event that the review in respect of the Interim Review succeeds.

[3] I agree and will deal with the issue in respect of the Sunset Review accordingly. Any wasted costs occasioned by the belated concession will be dealt with at the appropriate time.

[4] The legislation and international trade agreements pertaining to an Interim Review that will be referred to *infra* are:

4.1 the International Trade Administration Act, 71 of 2002 ("the ITA Act");

4.2 the Anti-Dumping Regulations published as GN 3197 in *Government Gazette* 25684 on 14 November 2003. Any reference to a regulation herein, refers to the aforesaid Regulations;

4.3 the Board on Tariffs and Trade Act, 107 of 1986 ("the BTT Act");

4.4 the Customs and Excise Act, 91 of 1964 ("the Customs Act");

4.5 the General Agreement on Tariffs and Trade, 1994 ("GATT"); AND

4.6 the World Trade Organisation Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 ("the Anti-Dumping Agreement").

PARTIES

[5] The applicant is Casar Drahtseilwerk Saar GmbH ("Casar"), a German company that exports wire ropes and cables to South Africa.

[6] The first respondent is the International Trade Administration Commission ("ITAC"), a statutory body established in terms of section 7 of the ITA Act.

[7] The second respondent is the Minister of Trade and Industry ("the Minister"). The Minister, acted in terms of section 4(2) of the BTT Act, in reaching the decisions that forms the subject matter of the review application.

[8] The third respondent is Scaw South Africa (Pty) Ltd, a South African company and competitor of the applicant.

BACKGROUND

[9] In August 2002 an anti-dumping duty of 12,9% was imposed in respect of ropes and cables manufactured and exported by the applicant to South Africa. In terms of regulation 38 and 53 anti-dumping duties will remain in place for a period not exceeding five years unless reviewed prior to the lapse of the five-year period.

[10] During August 2007, prior to the expiry of the five-year period and pursuant to an application by Scaw ITAC initiated a Sunset Review as contemplated in Article 11.3 of the Anti-Dumping Agreement.

[11] The review was finalised in 2009 and resulted in an increase of the prevailing anti-dumping duties from 12,9% to 93%.

[12] It is against the aforesaid background that Casar on 10 January 2013, lodged, in terms of the provisions of Regulation 45, an application for the Interim Review of the anti-dumping duties imposed on it during 2009.

[13] Regulation 45.1 provides that ITAC may only initiate an Interim Review "*if the party requesting such interim review can prove significantly changed circumstances".* In respect of changed circumstances, Casar relied on a change of ownership that occurred during August 2007 that resulted in a change in its pricing policy which is strictly enforced.

[14] On 19 April 2013 ITAC published a notice of initiation of the Interim Review as per Casar's request, in the *Government Gazette*. The basis for the initiation of an Interim Review was set out in the notice as follows:

"The Applicant submitted information for the Commission's consideration to demonstrate that it no longer dumps the subject product in the South African Customs Union (SACU); and that the dumping margin has decreased significantly and is in fact significantly negative.

The normal value was determined based on the domestic sales by the Applicant in Germany. The Applicant claimed adjustments on the normal value for cost of payment terms, delivery and packaging costs to arrive at the net ex-factory weighted average normal value. The export price was determined based on the export sales by the Applicant to the SACU market. The Applicant adjusted the export price to arrive at the net ex-factory weighted average export price. The dumping margin for the Applicant was determined to be negative.

On this basis, the Commission found that there was prima facie proof that dumping no longer takes place."

[15] The notice invited submissions by interested parties within a stipulated time-line.

[16] Subsequent to the publication of the notice, ITAC conducted a verification process at the offices of Casar and provided its verification report to Casar on 4 July 2013. On 5 August 2013, Scaw through its attorneys provided a response to the verification report to ITAC, which response in essence denies that Casar

presented sufficient evidence of changed circumstances that would cause the anti-dumping duties to be lifted. On 6 August 2013 Casar submitted an extensive response to the allegations contained in Scaw's letter to ITAC.

[17] The responses were considered by ITAC and on 14 October 2013 ITAC issued an Essential Facts letter. Two main issues were addressed in the letter, to wit changed circumstances and dumping. In respect of changed circumstances ITAC stated the following:

"Although you have submitted information to substantiate your claim of change circumstances, the Commission is of the opinion that the arguments submitted are not convincing. There is no guarantee that the pricing policy will not be changed again and therefore that dumping will not recur in future." (sic)

[18] In respect of dumping, the following is stated:

"The Commission is of the opinion that although you provided information to indicate that Casar did not dump the subject product into the SACU during the period of investigation, the volumes exported on which this determination is based, were very low in relation to your domestic sales. The low volumes exported make it difficult to determine whether or not dumping will recur, once the current anti-dumping duties are withdrawn."

[19] ITAC invited all interested parties to comment on the Essential Facts letter within 14 days and indicated that a final determination and recommendation to the Minister will only be provided once all the submitted comments have been considered.

[20] Casar submitted an extensive written response to the Essential Facts letter and indicated that it is willing to provide a price undertaking to address the concerns of ITAC. ITAC did not respond to the offer.

[21] On 31 January 2014 ITAC published a Notice of Termination of the Interim Review investigation in the *Government Gazette*. In terms of the Notice, the Commission stated that it has made a final determination to recommend to the Minister that the investigation be terminated. The Minister accepted the recommendation on the same day.

[22] On the same date ITAC, following an application by Scaw, initiated a new Sunset Review. Casar alleges that it attempted to participate in the review, but that ITAC refused the information supplied by it.

POINTS *IN LIMINE*

Unreasonable delay

[23] Casar submits that ITAC's recommendation was *investigative* and not administrative in nature. Consequently, ITAC's decision should be reviewed under the principle of legality and the decision of the Minister, being administrative action, under the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The distinction is important in as far as a review under the principle of legality does not have a defined time period to institute proceedings whereas PAJA has.

[24] Mr Puckrin SC, counsel for ITAC, pointed out that the Supreme Court of Appeal has authoritatively established in *ITAC v South African Tyre Manufacturers* 2001

JDR 1161 SCA at paragraph 40, that ITAC's decisions constitute administrative action that should be reviewed under PAJA.

[25] Casar did not pursue the point any further and both the decisions of ITAC and the Minister falls to be reviewed under PAJA.

[26] In terms of section 7(1) of PAJA, Casar had to institute the present application within 180 days after the date it became aware of ITAC's recommendation and the Minister's decision to terminate the Interim Review. Should a party fail to institute the proceedings with 180 days as envisaged in section 7(1), the court may, in terms of section 9 (1) extent the period of 180 days.

[27] As set out *supra* ITAC's recommendation to terminate the Interim Review was accepted by the Minster and published on 31 January 2014.

[28] In the result, the present proceedings should have been instituted on or before 30 July 2014.

[29] Casar instituted the present proceedings on 4 September 2014, some 45 days out of time.

[30] Casar's explanation for the delay can succinctly be summarised as follows:

30.1 In correspondence directed to ITAC and the Minster on 23 May 2014 Casar enquired whether Report No. 455 fully sets out the reasons for ITAC's recommendation and the Minister's decision to accept the recommendation;

30.2 On 27 May 2014 ITAC confirmed that the Report contained the full reasons;

30.3 On 25 June 2014 Casar notified both ITAC and the Minster, in terms of Regulation 64.2, of its intention to institute the present application;

30.4 On 29 July 2014, a day prior to the expiry of the 180-day period, Casar addressed letters to both ITAC and the Minster seeking an extension of the 180-day period. The reason for the extension appears in paragraph 3 of the letter, to wit:

"Casar has not yet instituted proceedings. This is due to the fact that Casar was trying its utmost to avoid unnecessary judicial review proceedings. As you are aware a Sunset Review was initiated on the same date though Notice No 44 of 2014 ("the Sunset Review") as the termination of the Interim Review. As Casar had previously submitted information that was accepted and verified by the Commission and which proved that Casar was in fact not dumping and not causing injury, Casar hoped that it could avoid any judicial review proceedings by participating in the Sunset Review."

30.5 Casar further stated that it is unsure whether its submissions will be accepted by ITAC and requested a 20-day extension of the prescribed period from the date that Casar receives the Commission's final determination in the Sunset Review to institute the present proceedings;

30.6 On 5 August 2014 ITAC granted the requested extension. The Minster did not respond to the request;

30.7 The Sunset Review was concluded on 8 August 2014 and the extension granted by ITAC lapsed on 28 August 2014;

30.8 Casar explained that, once it became aware of the final decision in the Sunset Review, it immediately instructed its attorney to proceed with the drafting of the present application.

[31] In respect of ITAC, the application was, therefore a mere seven days out of time.

[32] It is unclear why the Minster, having acknowledged receipt of Casar's letter, did not respond to Casar's reasonable request for an extension of time.

[33] The position in respect of Scaw is somewhat different. Casar did not request Scaw for an extension of the 180-day period. Although Casar stated that Scaw is merely cited in these proceedings insofar as it may have an interest in the proceedings and that no relief or costs is claimed against Scaw, Scaw maintains that it is a *"party"* as contemplated in section 9(1) of PAJA. As such, Casar should have requested Scaw for an extension of the 180-day period. Having failed to do so the application was instituted 45 days out of time.

[34] Although Casar dealt with the aforesaid chronology of events in the body of its founding affidavit and submitted under the heading ***"PAJA TIME PERIOD"*** that an extension of the time period provided for in PAJA should be granted, it did not include a prayer seeking condonation in the original Notice of Motion. On 15 December 2015 Casar filed an amended Notice of Motion which included a

prayer for condonation. In the supplementary affidavit that accompanied the amended Notice of Motion Casar explained the delay between 28 August 2014 to 4 September 2014 as set out *supra*.

[35] The respondents contend that both the delay in instituting the proceedings and the delay in formally requesting condonation is inordinate and condonation should be refused. According to the respondents, the period for the delay in requesting condonation runs until 15 December 2015.

[36] Casar clearly submitted in its founding affidavit that condonation for the late institution of the proceedings should be granted. To penalise Casar due to the oversight of including a prayer dealing with condonation in its original Notice of Motion would be to prefer form over substance. In the premises, I accept that Casar's request for condonation was made on 4 September 2014.

[37] The principles pertaining to a request for an extension of time is trite and was restated in *Camps Bay Rate Payers' & Residents' Association v Harrison* 2010 JDR 0099 SCA at paragraph 54, as follows:

"A full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

[38] I am satisfied that Casar has provided a full and reasonable explanation for the delay in the institution of the application. Although the Minster and Scaw did not

formally agree to an extension, I am of the view that the period of 45 days has been explained and is not unreasonable.

[39] The main contention of the respondents in respect of the delay, is the prejudice caused by the delay. Casar indicated all along to both ITAC and the Minster that it intended to launch the present application. ITAC did not state to what extent it was prejudiced by the seven-day delay and it is not clear from the Minister's affidavit how the 45-day delay has prejudiced him.

[40] Scaw submits that it has adjusted its affairs according to both the Interim Review and the Sunset Review and is as a result prejudiced by the delay in the finalisation of the matter. The test at this stage is whether the delay in instituting the proceedings was unreasonable, not whether the finalisation of the matter has been inordinately delayed. It is not clear exactly how Scaw's business interests have been negatively affected by the 45-day delay.

[41] These proceedings are no doubt of utmost importance to Casar and Casar will be seriously prejudiced if condonation is not granted. In my view Casar's conduct was, in the circumstances and at least insofar as ITAC and the Minster is concerned prudent.

[42] In the premises, I am of the view that the proper administration of justice will not be negatively affected should condonation be granted and such is granted.

New reasons raised in the answering affidavit impermissible

[43] Casar's first complaint deals with a so-called "*price undertaking*" it provided to ITAC. In response to ITAC's Essential Facts letter, Casar addressed a letter to ITAC on 25 October 2013. In paragraph 7 of the letter Casar stated the following:

"If it would assist the Commission, Casar ***is willing to provide*** *the Commission with a price undertaking based on its changed pricing policy as well as the negative dumping margin calculated. Although we accept that this does not present a guarantee, which we submit cannot be insisted upon, this will allow the Commission to monitor that Casar's new pricing policy is in fact maintained."* (own emphasis)

[44] ITAC did not respond to the contents of paragraph 7 and did not deal with "*the price undertaking*" in its final recommendation report.

[45] Casar alleged that ITAC's failure to deal with the "*price undertaking*" constitutes an effective refusal of the undertaking. ITAC did not provide any reasons for the refusal of the offer of a "*price undertaking*" and as a result ITAC's conduct is reviewable.

[46] In its answering affidavit ITAC responded to the allegations pertaining to a "*price undertaking*" and pointed out that regulation 39 that deals with price undertakings were not complied with. The introductory portion of Regulation 39.1 reads as follows:

"39.1 Proceedings may be suspended or terminated following the ***receipt of a satisfactory price undertaking ….*** *"* (own emphasis)

[47] A price undertaking as envisaged in regulation 39 was never received from Casar and consequently there was nothing for ITAC to consider.

[48] Casar deemed ITAC 's aforesaid exposé of the legal position as constituting new reasons for ITAC's effective refusal of the "*price undertaking*" and contended that the allegations should be struck.

[49] Casar's contention is misconceived. It is clear that ITAC merely explained the legislative imperatives pertaining to a price undertaking and did not provide "new" reasons.

[50] Secondly, Casar submitted that ITAC's reliance in its answering affidavit on the unverified information supplied by Casar in 2006 in support of the recommendation by ITAC and the acceptance thereof by the Minister is impermissible due to the fact that these facts were not alluded to during the Interim Review.

[51] In support of its contention Casar relies on the dictum in *National Lotteries Board v South African Education and Environmental Project* 2012 (4) SA 504 SCA at paragraph 27:

"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable …. For in truth the later reasons are not the true reasons for the decision, but rather ab ex post facto rationalization of a bad decision."

[52] The dictum pertains to the "*reasons*" provided for the decision and not the process that was followed in arriving at the decision. In its Final Report ITAC under the heading ***Other factors considered*** did refer to the prices and export volumes in 2006 and 2007, albeit not in the same detail than it did in its answering affidavit.

[53] In the result, ITAC did not rely on *"new"* or "*further reasons"* but merely provided more detail in respect of the reasons stated in the Final Report.

[54] In the premises, the point *in limine* is dismissed.

Non-joinder of the Minister of Finance

[55] Scaw raised the non-joinder of the Minister of Finance subsequent to the filing of the amended Notice of Motion. According to Scaw, the Minister of Finance has a direct and substantial interest in the matter due to the relief claimed in prayers 8 and 9.3 of the amended Notice of Motion in terms of which Casar seeks an order directing the Minister to request the Minister of Finance to amend the relevant schedule so as to provide for the exemption of Casar from the prevailing anti-dumping duties.

[56] The relief sought is premised on section 4(2)(b) of the BBT Act which reads as follows:

"4(2) Upon receipt of the report and recommendations referred to in subsection (1)(b), the Minister may –

(a) ….

(b) If he accepts the report and recommendations concerned, request the Minister of Finance to amend the relevant schedule to the Customs and Excise Act, 1964 (Act 91 of 1964)."

[57] The schedule in issue is referred to in section 55 of the Customs Act as Schedule 2 and provides for the prescribed duties payable on goods specified in it which are subject to anti-dumping and other duties.

[58] Casar submitted that no relief is claimed against the Minister of Finance and as a result the Minister of Finance has no direct and substantial interest in the relief claimed herein.

[59] The test applicable to non-joinder was restated in *ABSA Bank Ltd v Naude NO and Others* 2016 SA (6) SCA 541 at 542 I to 543 B, namely:

"[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, KwaZulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the rights of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

[60] Applying the aforesaid test to the relief claimed herein, I am of the view that the relief claimed in prayers 8 and 9.3 does not prejudice the Minister of Finance. The relief is aimed at directing the Minister to exercise his powers contained in section 4(2)(b) of the BBT Act and does not concern the Minister of Finance.

[61] In the premises, the point of non-joinder is dismissed.

GROUNDS OF REVIEW

[62] Casar relied on the following grounds of review:

[62.1] Misconception of the correct legal test;

[62.2] ITAC applied the wrong standard of proof;

[62.3] ITAC's methodology not rational;

[62.4] Unauthorised and/or ulterior motive;

[62.5] Failure to consider Casar's offer of a price undertaking;

[62.6] Effective refusal of price undertaking offer was arbitrary;

[62.7] Recommendation and decision unreasonable

[62.8] Irrational reliance on export volume as a predicator of probable dumping; and

[62.9] Procedural unfairness and/or procedural irrationality.

Misconception of correct legal test

[63] Casar firstly submitted that ITAC and in consequence the Minister committed a material error in law by applying the incorrect test to an Interim review in terms of Article 11.2.

[64] Article 11.2 reads as follows:

"11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, … provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by an interested

party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

[65] According to Casar, the first ground mentioned in Article 11.2 only entails an enquiry into *"whether the imposition of the duties is necessary to offset dumping".* This is a factual enquiry into whether dumping is occurring and should it be established that dumping is not occurring, the duties should be terminated.

[66] ITAC did find that Casar, on the facts before it, was not dumping during the period of investigation and consequently, Casar has satisfied the requirements of ground 1.

[67] The respondents did not agree. Mr Puckrin SC pointed out that the first ground mentioned in Article 11.2 is *"whether the* ***continued imposition*** *of the duty is necessary to offset dumping"*.

[68] In considering the meaning of "*continued imposition*", Mr Puckrin referred to *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabite or Above from Korea* (WT/DS99/R -

29 January 1999), in which the WTO Panel dealt with meaning of "*continued imposition*" at paragraph 6.27:

"….. [The] second sentence of Article 11.2 requires an investigating authority to examine whether the 'continued imposition' of the duty is necessary to offset dumping. The word 'continued' covers a temporal relationship between past and future. In our view, the word 'continued' would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset present dumping. Thus, the inclusion of the word 'continued' signifies that the investigating authority is entitled to examine where the imposition of the duty may be applied henceforth to offset dumping."

[69] More pertinently in *MTZ Polyfilms Ltd v Council of European Union* [2009] ECR, Case T-143/06 917 November 2009), the European Court of Justice held at paragraph 16, that an investigating authority is entitled, in considering an application in terms of Article 11.2, to examine whether the changed circumstances were lasting.

[70] Casar's incorrect interpretation of ground 1, emanates from its failure to sufficiently or at all, consider the meaning of "*continued*" as explained in the authorities *supra*.

[71] In the result, ITAC and the Minister did not commit an error of law in this respect.

[72] In respect of the second ground mentioned in Article 11.2, Casar submitted that ITAC erred in not examining the question whether the injury would be likely to continue or recur should Casar be exempted from anti-dumping duties.

[73] Prior to considering the submissions by the parties, it is apposite to consider the grounds mentioned in Article 11.2, on which interested parties may request an authority to review anti-dumping duties imposed on it, to wit:

73.1 whether the continued imposition of the duty is necessary to offset dumping (“dumping”);

73.2 whether the injury would be likely to continue or recur if the duty were removed or varied (“injury”); or

73.3 both.

[74] Ground 1 and 2 constitutes separate and distinct characteristics and should be considered independently on the evidence presented by an applicant. Should an applicant rely only one of the two grounds, the investigating authority may *“examine one of the three matters specified in the second sentence of Article 11.2”.* [See: *United States – Anti-dumping Measures on Certain Shrimp from Vietnam* (WT/DS429/R-17 November 2014) at paragraph 7.368]

[75] The respondents deny that Casar relied on the second ground and contends that the Interim Review was essentially a dumping as opposed to a dumping and injury review. In its application for the Interim Review, Casar expressly relied on both grounds, to wit:

“1. CASAR submits that there are significantly changed circumstances which justify the initiation of an interim review. These significantly changed circumstances are that:

(a) CASAR no longer dumps the subject product in the South African Customs Union;

(b) The dumping margin has decreased significantly; and

(c) CASAR's imports no longer cause injury to the domestic industry, in particular SCAW.

2. In this respect we again draw your attention to the information submitted that demonstrates that CASAR no longer dumps the subject product in the South African Customs Union and that the dumping margin has decreased significantly and is in fact significantly negative. Due to the fact that the subject product is not dumped, CASAR's imports cannot cause injury to the domestic injury (sic) *and in particular to SCAW. We also submit substantiated justification as to why these significantly changed circumstances arose after the imposition of the anti-dumping duties imposed pursuant to the Sunset Review."*

[76] Casar then proceeds to deal with the two grounds under two separate headings:

[76.1] <u>Significantly Changed Circumstances</u>

Under this heading Casar dealt in detail with the change in its pricing policy and with the fact that it no longer dumps products in the SACU;

[76.2] <u>CASAR's imports cause no injury to the domestic industry</u>

Under this heading Casar dealt, *inter alia*, in detail with the volumes it exports to the SACU; the market shares of its exports and with a price comparison between its products and that of Scaw.

[77] Different factors are dealt with under each separate heading.

[78] In its final determination, ITAC formulated the grounds as follows:

"3.2 Casar therefore had to prove:

- *Changed circumstances with regard to dumping* ***and*** *that dumping was not likely to continue or recur should the anti-dumping duty be removed;* ***and/or***
- *A changed circumstance with regard to material injury* ***and*** *that material injury was not likely to continue or recur should the inti-dumping duty be removed."* (own emphasis)

[79] It is clear from ITAC's formulation of the issues, which they accepted and understood that the Interim Review pertains to both dumping and injury.

[80] Notwithstanding the clear lineation of the issues, ITAC in its Final Report only dealt with dumping. In paragraph 3 of the report ITAC dealt with Changed Circumstances and concluded in paragraph 3.13 as follows:

"The Commission determined that although Casar had submitted information on changed circumstances, the arguments submitted were not convincing that pricing policy could not be changed again and therefore that dumping would not recur. Based on the information supplied, the Commission made a final determination that Casar did not indicate sufficient significant changed circumstances with regard to dumping of the subject product.'

[81] Paragraph 4 dealt with dumping and the conclusion in paragraph 4.5 reads as follows:

"*4.5 The Commission determined that despite Casar not having dumped the subject product into the SACU during the period of investigation, that the volumes exported on which this determination were based, were very low in relation to the domestic sales of Casar. The low volumes exported by Casar made it difficult to* *determine whether or not Casar would resume dumping in future, once the current anti-dumping duties were withdrawn.*

Based on the aforesaid information supplied, the Commission made a final determination that there was no sufficient information to indicate that dumping was not likely to continue or recur should the anti-dumping duties applicable to Casar be withdrawn."

[82] No reference is made to the injury enquiry.

[83] The respondents did not deny that ITAC failed to deal with the injury ground in its Final Report.

[84] In the result, ITAC's failure to consider the second ground mentioned in Article 11.2 constitutes a material and reviewable error of law. The Minster's decision to accept ITAC's Final Report and recommendation suffers the same fate.

[85] In view of the aforesaid finding it is not necessary to deal with the remaining grounds of review.

REMEDY

[86] Section 8 of the Act sets out the remedies available in proceedings for judicial review. Section 8(c) is applicable *in casu* and reads as follows:

"(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation."

[87] Casar submitted that the matter should not be remitted to ITAC and that this court is in just as good a position as ITAC to grant Casar's application for a termination of the anti-dumping duties.

[88] In this regard, Casar alleges that ITAC, in failing to investigate the question of material injury was acting with an ulterior motive. The motive, according to Casar, was to protect the domestic industry from any dumping regardless of whether it was materially injurious or not.

[89] In my view, ITAC's failure to consider the second leg of the test referred to *supra* does not, without any further facts, amounts to an ulterior motive. Save for the conclusion reached by Casar that ITAC had an ulterior motive in not investigating the question of material injury, Casar has provided no other facts to substantiate its conclusion. On the facts before court there is no justification for such finding and the submission is rejected.

[90] In considering an appropriate remedy, the principle of the separation of powers should be taken into account. The principle was summarised in *International Trade Administration Commission v SCAW SA* 2012 (4) SA 618 CC ("*SCAW")* at paragraph 95, as follows:

"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[91] Insofar as the powers of ITAC and the Minister in terms of the legislation *in casu* is concerned, the Constitutional Court agreed in *SCAW supra* with the following submissions made on behalf of ITAC in respect of its powers:

"ITAC accordingly urged us to decide that the order of the high court breaches the doctrine of separation of powers. In particular, it sought us to find that a court may not interfere with the discretionary and polycentric discretion conferred on ITAC and on both ministers under the BTT Act. They argued that courts are not well suited to judge international trade policy and related polycentric decisions, properly suited to specialist bodies such as ITAC and the executive government." [para 100]

[92] It is no doubt for the aforesaid reasons that section 8(1)(c)(ii) contains the words "*in exceptional circumstances*".

[93] Casar has dismally failed to satisfy this jurisdictional factor and I am not prepared to grant relief in terms of section 8(1)(c)(ii).

[94] Furthermore, due to the fact that ITAC did not investigate the issue of material injury, this court has no facts whatsoever to enable it to find in favour of Casar on the second leg of the enquiry.

COSTS

Present application

[95] In view of Casar's belated attempt to request the review of the Sunset Review without alleging any facts or grounds of review substantiating such relief, I am of the view that no order as to costs should follow.

Interlocutory applications

[96] The interlocutory application pertains to Casar's application for an Amendment of its Notice of Motion to include prayers pertaining to the extension of the 180-day period and the setting aside of the decisions in respect of the Sunset Review.

[97] The opposition of the application was clearly justified insofar as the review of the Sunset Review was ill conceived and without any merit.

ORDER

[98] In the premises, I grant the following order:

1. The time-limit of 180 days contained in section 7 of the Promotion of Administrative Justice Act, 3 of 2000 is extended in terms of section 9(1) of the Act.
2. The First Respondent's final determination and recommendation that the Applicant's Interim Review in respect of anti-dumping duties on wire ropes and cables exported by the Applicant to South Africa, should be terminated, is reviewed and set aside.
3. The Second Respondent's decision to terminate the Interim Review is reviewed and set aside.
4. The Applicant's request for an Interim Review is remitted to the First and Second Respondents for reconsideration.
5. No order as to costs.
6. The Applicant is ordered to pay the costs of the application for leave to amend its Notice of Motion, such costs to include the costs occasioned by the employment of two counsel, if applicable.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	6^{th} and 7^{th} of November 2019
JUDGMENT DELIVERED	7^{th} of February 2020

APPEARANCES

Counsel for the Applicant:	Advocate M.C. Seale SC and
	Advocate U.K. Naidoo
Instructed by:	Geldenhuys Joubert Inc
	(021 403 6324)
	Ref: C006/20181218
Counsel for the First Respondent:	Advocate C. Puckrin SC and Advocate E. Muller
Instructed by:	The State Attorney
	Ref: Mr Kopman - 6167/14/Z3/nk
Counsel for the Second Respondent:	Advocate H. Maentje SC and M.D. Stubbs
Instructed by:	The State Attorney
	Ref: Mr Kopman - 6167/14/Z3/nk
Counsel for the Third Respondent:	Advocate A. Cockrell SC
Instructed by:	Webber Wentzel Attorneys
	(011 530 5000)
	Ref: Stephen Meltzer 2536613