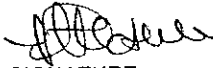




GAUTENG HIGH COURT
REPUBLIC OF SOUTH AFRICA

CASE NO: 51410/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
28/10/2013 DATE	 SIGNATURE

28/10/2013

In the matter between:

METAL RECYCLERS ASSOCIATION OF SOUTH AFRICA

Applicant

and

THE MINISTER OF ECONOMIC DEVELOPMENT

First Respondent

THE INTERNATIONAL TRADE
ADMINISTRATION COMMISSION

Second Respondent

THE NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA

Third Respondent

THE MINISTER OF TRADE AND INDUSTRY

Fourth Respondent

THE MINISTER OF WATER AND
ENVIRONMENTAL AFFAIRS

Fifth Respondent

JUDGMENT

MOTHLE J

INTRODUCTION:

1. This is an application for an interim interdict *pedente lite*, wherein an order is sought to restrain the implementation of policy guidelines, published to deal with the determination of prices at which scrap metal intended for exportation, will be sold domestically. The guidelines as well as the ministerial directive, whose policy informs the guidelines, are a subject review in a pending application (Part B of this application) The guidelines and the export permits are issued in terms of the International Trade Administration Act¹ ("ITA Act").
2. The application came by way of urgency in terms of rule 6 (12) of the Uniform Rules of Court. It was set down for hearing on 6 September 2013. The presiding judge in the urgent applications court could not adjudicate on the matter as the papers filed were prolix, exceeding 1000 pages.² The Deputy Judge President was approached to refer this application a special motion court. He

¹ Act 71 of 2002.

² According to the Practice Directives of North Gauteng High Court, any application in excess of 1000 pages cannot be heard in the urgent court due to the high volume of applications in that court. Alternative arrangements have to be made with the Deputy Judge President for allocation to another Judge.

issued special directives to the parties as to the delivery of outstanding affidavits and heads of argument. In doing so, the normal time frames for delivery of these documents and the forms of service were abridged. As at the date and time of the hearing of Part A of this application, all the parties, including intervening parties, had filed their affidavits and heads of argument. The issue of urgency had thus become redundant as the matter was then ripe for hearing. It thus became unnecessary to deal with the question of urgency.

THE PARTIES:

3. The Applicants are **METAL RECYCLERS ASSOCIATION OF SOUTH AFRICA** ("*MRA*"), a voluntary association whose members comprise 150 formal metal recycling companies, trading in the processing and recycling of scrap metal for exportation and domestic sale.
4. The First Respondent is **THE MINISTER OF ECONOMIC DEVELOPMENT** in the Government of the Republic of South

Africa (*"the Minister"*).³ The Minister is empowered by the ITA Act to issue Trade Policy Statements or Directives in the course of implementing the objectives of that statute.

5. The Second Respondent is **THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION** (*"ITAC"*), established in terms of the ITA Act. ITAC is the body that published the guidelines under attack in Part A and Part B of this application.
6. The Third Respondent is **THE NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA** (*"NUMSA"*), which is the union representing the workers in the scrap metal industry. Initially NUMSA was not cited in the proceedings. It later applied as an intervening party to which there was no objection. NUMSA joined the proceedings as the third respondent.
7. The Fourth Respondent is **THE MINISTER OF TRADE AND INDUSTRY** of the Government of the Republic of South Africa (*"Trade and Industry Minister"*), whose portfolio in the department has direct interest in the scrap metal industry.
8. The Fifth Respondent is **THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS** of the Government of the

³ The Minister has been entrusted by the President in terms of section 97 of the constitution of the Republic of South Africa, 1996 (*"the constitution"*), to administer the ITA Act which prior to that, was administered by the Minister of Trade and Industry.

Republic of South Africa (*Water and Environmental Affairs Minister*), whose portfolio and department also has a direct interest in the scrap metal industry, in particular the environmental aspect of the government policy applicable in the scrap metal industry.

9. Both the fourth and fifth respondents were also not cited in the proceedings and only joined on application as intervening parties.

THE ESSENCE OF THE APPLICATION

10. The Minister published a policy directive, which obligates ITAC to set conditions for time frames and control of prices at which the scrap metal exporters⁴ should first offer the sale of scrap metal⁵ intended for exportation, to domestic users. ITAC then published guidelines, setting out the conditions and percentage discount on the price at which the scrap metal intended to be exported, should first be offered for sale to domestic users.⁶

⁴ Some of whom are members of the Applicant.

⁵ Ferrous (predominantly iron) and non-ferrous (predominantly base metals including copper, zinc, aluminium, nickel, tin and lead.

⁶ Steel producers, including foundries and steel mills.

11. MRA contends in essence that the implementation of this policy will result in its members suffering loss of income. It now seeks to obtain an interim interdict, restraining the implementation of the policy guidelines, pending adjudication of a review application concerning both the guidelines and the directives.

BACKGROUND:

12. The scrap metal industry is one of the key sectors of economy in South Africa. According to MRA, "It trades approximately 3.5 million tons of scrap metal annually, with an estimated value of R17.5 billion". The MRA's members in particular trade in the processing and recycling, exporting and domestically supplying recycled scrap metal. The chain of supply starts with the collectors of scrap metal⁷ by peddlers, informal business operators (bucket shops) and the collectors of metal scrap from offcuts in larger industries. All these suppliers then sell such scrap metal to the recyclers. The recyclers, including members of MRA, in turn recycle and process the scrap metal and either export it or sell it to the local steel mills, mini mills and foundries. The local foundries then manufacture and sell vital steel and

⁷ Scrap metal is divided into production or industrial scrap, which is a by-product generated by manufacturing sector; and obsolete scrap, which has achieved end-of-life status and is generated by State utilities (Eskom, Transnet, Telkom), Industries in mining, construction and agriculture.

other products required by domestic entities, amongst others in the mining, automotive, construction and agricultural sectors.

13. Up until the publication of the Directives by the Minister in May 2013, followed by the publication of the Guidelines by ITAC in August 2013, the domestic price of exporting scrap metal, referred to as export parity price, was determined by the free market trade. The price, at which the scrap metal is exported, determined by the importers abroad, would have a bearing directly on the price of the scrap metal domestically. Basically, the markets determined the export price and the domestic price of the sale of recycled scrap metal.

14. It is common cause that in the last decade a number of steel mills, secondary smelters and foundries, closed shop as a result of being unable to survive in the competitive scrap metal industry. According to the Minister, this was caused by, amongst others, their inability to afford the prices at which the scrap metal was sold to them, being the price at which the scrap metal was exported. The foundries, smelters and mills could thus not compete with the price set by foreign importers of scrap metal from South Africa. As a result, some of the local foundries,

smelters and mills closed shop. This led to job losses in the industry and a reduction in the supply of steel products manufactured from recycled scrap metals for sale to the end users such as mining houses.

15. The Minister also contends that the exportation of scrap metal resulted in the low supply of quality scrap metal domestically. It is further alleged that the recyclers exported mainly high quality scrap metal and availed the low quality scrap metal for local sales and consumption. This situation, according to the Minister and NUMSA, developed an economic crisis which reached a point where the government had to intervene.
16. It appears to be common cause that the Minister conducted a consultative process which involved a number of stakeholders, including trade unions and MRA members, in the process leading to the publication of the Directives. MRA however contends that the Minister did not give them a hearing on the written representations they submitted. On the 10th February 2012 the Minister issued a notice in terms of section 6 of ITA Act, in terms whereof it was decided that various categories of

scrap metals may not be exported without a permit granted by ITAC.

17. On 10 May 2013 the Minister issued a policy directive (*"the Directive"*) in terms of section 5 of ITA Act, which provides that ferrous and non-ferrous waste and scrap metals should not be exported from the Republic of South Africa, unless they are first offered to domestic users of scrap for a period determined by ITAC and at a discounted price or by means of other formula determined by ITAC⁸. The Directive also prescribes that all permit applications must have a confirmation of quality, quantity and intended destination of the export, issued by a metallurgical engineer or suitably qualified person. These are the Directives under attack from MRA in Part B of this application.
18. Following the publication of the Directives, ITAC on 2 August 2013 published the Export Control Guidelines (*"the Guidelines"*) in order to give expression to the policy stated in the Directives. In the Guidelines, ITAC states that any scrap metals intended for exportation will first have to be offered for a determined period of circulation, to the domestic market at a 20% discount price of the

⁸ In the papers, this new price control is referred to as the "preferential price system", to distinguish it from the export parity price which has been in place before the publication of the Directives and the Guidelines.

international market price determined in terms of Scrapindex.com,⁹ prior to such exportation.

19. MRA contends, on a number of grounds in terms of Section 6 of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA"), that the Directives and Guidelines should be reviewed and set aside. Pending the adjudication of the review application, MRA contends that ITAC must be interdicted from implementing the Guidelines. This is Part A of the application which is before this Court.

20. It was submitted in Court that the record of proceedings is still to be filed for the review. There is therefore more evidence which might emerge, resulting in a possible amendment to the review grounds. It seems to me that it may take some considerable time before the review application is heard.

THE DISPUTE:

21. In essence the MRA contends that the preferential price system concerning the exportation of scrap metal will have an impact on

⁹ The formula to determine the preferential price system.

the domestic trade of scrap metal and therefore lead to price reduction and loss of income. In support of that contention, MRA submits that the Directives and Guidelines are reviewable on a number of grounds including the objection that the Minister, in publishing the Directives acted *ultra vires*; the contents of the published documents violate international law; they infringe property rights and are unreasonable. It is further contended that the implementation of the Guidelines pending the adjudication of the review application would lead to immediate loss, for example in the value of the stock at hand. Such stock, while acquired at a particular price will now have to be sold at the market price less 20%, to the domestic user before exportation. Such immediate losses, it is argued, will result in irreparable harm.

22. The Respondents, on the other hand, are unanimous in their submission that the intervention by the Minister in addressing the price distortions in the exportation of scrap metal is a policy matter which is the terrain of the national executive and the court is ill-suited to intrude on such matters. In support of this contention reference is made to the Constitutional Court judgments in OUTA and SCAW matters, referred to later in this judgment. The Respondents further point out that for the purposes of this interim interdict, the MRA fails to make out a

case of any irreparable harm that its members may suffer, should the Guidelines be implemented. Consequently, they argued, the balance of convenience favours the refusal to grant the interdict sought by MRA.

23. The nub of the dispute in my view centres on the price preferential system as introduced by the Directives. In particular, and for the purposes of Part A, whether the implementation of this system by ITAC on the basis of the percentage discount stated in the Guidelines and the application of the Scrapindex.com formula, will lead to immediate irreparable harm which should justify the granting of an interim interdict.

THE SEPARATION OF POWERS PRINCIPLE

24. In *Gool v Minister of Justice*¹⁰, the Court stated that where an applicant seeks to restrain a Minister of government from exercising the powers vested in him by an Act of Parliament, the Courts should only exercise that jurisdiction in exceptional circumstances and when a strong case is made out for relief. In

¹⁰ 1955 2 SA 682 (C)

the absence of any allegations of *mala fides*, the court should not readily grant such interdict.

25. Two recent judgments of the Constitutional Court, featured prominently in this case. The cases for these judgments are ***International Trade Administration Commission v SCAW South Africa (Pty) Ltd***¹¹ (“SCAW”), and ***National Treasury and Others v Opposition to Urban Tolling Alliance and others***¹² (“OUTA”). In both judgments, the Constitutional Court opines that courts should be cautious not to readily grant interim interdicts, primarily in matters concerning the exercise of statutory power and functions, where to do so, would invite the court to intrude into the terrain of other branches of government. Such interim interdict should only be granted where a strong case has been made out and only in the clearest of cases.
26. The Constitutional Court in SCAW and OUTA expanded on the principle in Gool. In doing so it reiterated the principle that the courts should refrain from usurping the powers and functions of other branches of government as to do so would “*frustrate the balance of power implied in the principle of separation of*

¹¹ 2012 4 SA 618 (CC).

¹² 2012 6 SA 223 (CC).

powers".¹³ These court decisions did not alter but rather expanded on the common law requirements for interim interdicts, in so far as they raise the question of separation of powers. In OUTA¹⁴ the Constitutional Court stated thus:

"The common law annotation to the Setlogelo¹⁵ test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out."

27. In SCAW¹⁶ the Constitutional Court emphasised that the formulation and implementation of international trade policy is a matter that resides in the terrain of the national executive functions. Similarly, *"the power to formulate and implement domestic and international trade policy... resides in the kraal of the national executive authority."* Cautioning the courts against granting orders of interim interdict, which may intrude in the terrain of the other branches of government, the learned Deputy

¹³ SCAW *supra* at para 95. The Court reiterated the earlier statement in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC)

¹⁴ OUTA paragraph 43.

¹⁵ *Setlogelo v Setlogelo* is the leading case on the requirements which must be proved for a successful interdict.

¹⁶ SCAW paragraphs 102 and 103.

Chief Justice Moseneke, writing for the Constitutional Court in SCAW, stated as follows in paragraph 101 of the judgment:

"When a court is invited to intrude into the terrain of the executive, especially when the decision-making process is uncompleted, it must do so in the clearest of the cases and only when irreparable harm is likely to ensue if interdictory relief is not granted. This is particularly true when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-suited to judge."

28. There is no doubt in my mind, nor is there any dispute that the Directives and the Guidelines raises questions of national economic policy and related polycentric matters. What MRA contends for in support of its application for an interim interdict is based on the grounds of review, in particular the *Ultra Vires* ground that the Minister acted unlawfully. Taken to its logical conclusion, the MRA submits, in essence, that its objection on the Minister's alleged *ultra vires* or unlawful conduct, makes out *a proper and strong case* as well as one of the clearest of the cases where it will be permissible for the court to grant the interim interdict by intruding on to the terrain of the national executive.

29. Counsel for the Minister submits that the SCAW and OUTA principle concerning harm to the separation of powers doctrine becomes relevant when the court considers the balance of convenience. I agree. However, the Minister goes further to contend that in OUTA, where a similar defence of unlawfulness was raised, the Constitutional Court "*nevertheless pointed to the separation of powers harm that would arise from restraining the exercise of a statutory power before it was ultimately found to be unlawful.*"
30. It seems to me that with this contention, counsel interprets the OUTA decision to mean that even in instances where a strong case is made out to demonstrate a clearest case of unlawful exercise of statutory power, granting an interim interdict before the review court has finally adjudicated on the unlawfulness objection, would harm the doctrine of separation of powers. I do not agree with this interpretation.
31. In my view the judgment of the Constitutional Court in both matters, sounds a word of extra caution to the courts, in adjudicating on such interim interdicts. The Constitutional Court

cautions courts to be "*astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, **provided they act lawfully.**"*¹⁷ I do not understand this statement as a prohibition to the courts that pending final adjudication of a review application where unlawful exercise of power is raised, a court cannot grant an interim interdict, even in the clearest of cases of unlawful exercise of power. The balance of convenience must be carefully considered, particularly where such unlawful exercise of power would irreparably harm a fundamental right.

32. It seems to me, therefore that where *Ultra Vires* or unlawful conduct is raised as a ground or one of the grounds of review in a review application, and the applicant elects to rely on the same ground in support of an application for an interim interdict *pendente lite*, the court adjudicating the latter application has a duty to consider such ground, together with the conspectus of the evidence available before it, at that stage of the proceedings. It does so in order to decide in which direction the balance of convenience scale will tilt, on the question of harm to the

¹⁷ OUTA paragraph 26.

separation of powers. Where it appears on the evidence, that the applicant has strong prospects of success on the *ultra vires* ground in the review application, the court adjudicating on the interim interdict application, should consider this fact in assessing the probability of irreparable harm to the separation of powers if the application is granted; as against the irreparable harm that may befall the applicant, if the interim interdict is not granted.

33. In OUTA the Court declined to define what would constitute the clearest case, but opined as follows:¹⁸ *"One important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.* To approach the matter as the Minister's counsel submits, is to imply that the unlawful exercise of statutory power, pending final review proceedings, is immunised from judicial scrutiny, in order for the courts not offend the doctrine of separation of powers, even if it may possibly be at the expense of irreparable harm to fundamental rights. On a practical level, it would make no sense for a court adjudicating on an interim interdict, to wait for the review court in

¹⁸ Paragraph 47

due course to make a finding on the objection of *ultra vires*, before it can decide on the application for interim interdict.

34. There is no doubt that this application for interim interdict invites the court to intrude in the policy-laden and polycentric terrain of the national executive. Such invitation if accepted will also no doubt harm the doctrine of separation of powers. The question is whether "*a proper and strong case has been made out for the relief, and even so, only (as) the clearest of cases.*"¹⁹

35. I now turn to consider whether MRA's application makes out a strong case for relief and also whether this is the clearest of the cases that would outweigh the harm to the doctrine of separation of powers.

DISCUSSION:

36. It should be stated from the outset that when a Court adjudicates and decides on an application for interim relief *pendente lite*, care should be taken not to anticipate the findings and decision of the Court which will adjudicate the review application. The difficulty with this delicate balancing is compounded by the fact

¹⁹ OUTA paragraph 65.

that an Applicant has to, in the course of establishing compliance with the requirements for interim interdict, demonstrate on the basis of the review grounds which are to be adjudicated in due course, that a *prima facie* case has been made out for the relief sought, stated otherwise there are prospects of success in the pending review application.

37. The trite and tested requirements for an applicant to successfully obtain relief in an application for an interim interdict are stated in the seminal case of ***Setlogelo v Setlogelo***,²⁰ and applied with approval and modification in many other subsequent decisions²¹. Essentially, the applicant must allege and prove:

- 37.1 A *prima facie* right to the relief sought;
- 37.2 A well grounded apprehension of irreparable harm, if the interim relief is not granted;
- 37.3 The balance of convenience must favour the granting of interim relief; and
- 37.4 There must be no other ordinary remedy that is available to give adequate redress to the Applicant.

²⁰ 1914 AD 221 at p227,

²¹ Some of which are *Ericson Motors Ltd v Protea Motors* 1973 3 SA 685 (A) at 691 C-E; *Webster v Mitchell* 1948 1 SA 1186 (W); *Ladychin Investments v South African National Roads Agency* 2001 3 SA 344 (N) at 353 F-J

38. In contending that the MRA had a *prima facie* right to obtain relief by way of interim interdict, it was submitted that:

38.1 The Minister in issuing the directives acted *ultra vires* the powers conferred on him in ITA Act;

38.2 The Directives as well as the Guidelines violate international law;

38.3 The implementation of the guidelines will infringe on the MRA members' rights to property as envisaged in Section 25 of the Constitution²²; and

38.4 The Directives and the Guidelines are unreasonable.

Prima facie right

39. MRA's contention is that the Minister, in issuing the Directives, sought to control the price of sale of scrap metal in South Africa, a power which the ITA Act does not confer on him. Considering the provisions of the ITA Act, it seems to me that Sections 2; 3 and 5 of ITA Act confers the Minister with authority and power to develop and implement economic policy relating to exportation of goods from South Africa. Section 2 of ITA Act provides:

²² Constitution of the Republic of South Africa, 1996.

"2. Object of Act – *The object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic of South Africa and within the Common Customs area by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU agreement."*

40. ITAC, in particular is empowered by Section 27 (2) (b)²³ of ITA Act, that in issuing permits, it may decide on the prices relating to exportation. In my view, the Minister's Directives appear to me to be giving expression to a policy concerning prices of scrap metals that are only destined for exportation, not all scrap metals sold domestically.
41. Section 3(1) of ITA Act provides that the Act applies to all economic activity within *or having an effect within* the Republic. The experts' reports²⁴ support the view that trade policy dealing with exports will invariably have an impact on the domestic economy. The export tariff will have the effect of lowering domestic prices. On its own version, MRA concedes that even

²³ Section 27 (2) (b) of ITA Act provides:

²⁴ Econex Report page181 and Conningarth Report page1250.

before the Directives and the Guidelines were published, the export parity price had a direct effect on the domestic price in the sale of scrap metal.

42. It will thus be the choice of the metal recycler whether to sell domestically or to export. If he sells domestically with no intend to export, the price will be determined by the impact of export parity prices domestically as has been the case. If, however, he decides to export the scrap metal, the condition is that he has to first offer it to the steel mills, mini mill and foundries operating domestically, at a price less 20% of the export price for a determined period, before it may be exported.
43. In ***New Clicks***²⁵ the Constitutional Court recognised and accepted the legislative authority and power to determine a price system as falling within the domain of the executive arm of government. Counsel for the Ministers of Trade and Industry and Water and Environmental Affairs submits that between 1987 and 1996 a price preference system concerning domestic sales of scrap metal was in force in South Africa. Scrap metal intended for export was first offered to domestic users at a price less than the international price, before an export permit was issued.

²⁵ Minister of Health and Another NO v New Clicks South Africa (Pty) Limited and Others (Treatment Action Campaign and Another as amici curiae) 2006 2 SA 311 (CC) at

Section 2 of the Import and Export Control Act 45 of 1963 authorised the imposition of conditions on an export permit, similar to the powers now conferred on ITAC under section 27 (2) (h) of the ITA Act.

44. It seems to me that the policy intervention by the Minister to introduce a price preference system is not new to South Africa. Thus the right or expectation as asserted by MRA to continue to trade on the export parity price, pending the review application cannot be sustained.
45. The *ultra vires* ground of review in so far as it relates to the Directives; will be dealt with in detail by the court adjudicating the review application. Of relevance to this application is the *Ultra Vires* ground in so far as it may relate to the Guidelines.
46. Section 60 of ITA Act provides that ITAC may issue Guidelines on the Commission's policy approach to any matter within its jurisdiction. Such Guideline must be published in the Gazette but is not binding on the commission, any SACU institution or any Court.

47. I did not understand the MRA's case as contesting the authority of ITAC to issue the Guidelines or the lawfulness or otherwise of the manner in which the Guidelines were issued. In fact the Directive does not obligate ITAC to issue a Guideline. The decision to issue a Guideline and to apply the Scrapindex.com as a method of determining export price is that of ITAC and it falls within the ambit of its statutory power. It seems to me that ITAC, independent of the Directives, is authorised and empowered by section 27 (2) (b) and (h) of ITA Act to prescribe the price at which goods may be imported or exported as well as impose any other related conditions.
48. MRA criticises the Scrapindex.com on a number of grounds, including that it does not contain price information for metals in metric tonnes. As at the time of the hearing of this case, ITAC had already amended its Guidelines. The amendment publishes information on prices of certain categories of scrap metal in metric tonnes. Therefore in my view, and at this stage of the proceedings, the objection of *ultra vires* or unlawful conduct against ITAC in the issuing of the Guidelines is without merit.

49. MRA contends further that the Directives and Guidelines violate international law. Section 60 of ITA Act clearly prescribes that the guidelines issued by ITAC are neither binding on it nor on a SACU Institution or a Court. Both the Directives and the Guidelines make provision for a clause which confer powers on ITAC to issue exemptions in instances where violation of international law may arise. In essence ITAC may depart from those guidelines during the process of implementation. The status of the Guidelines therefore becomes relevant as and when ITAC may choose to apply or not to apply them. An administrative body may apply internal policies as long as it will not preclude the exercise of discretion.²⁶
50. Further, as correctly submitted for ITAC, neither MRA nor any of its members are parties to international agreements and treaties.²⁷ If indeed there is a breach of any of these treaties or agreements, it is a matter which South Africa as a party to such treaties will have to answer for. It is my view that for the purposes of this application, I need not go further than what I have already stated in regard to this ground of review, save to state that at this stage of the proceedings, I am unable to see

²⁶ BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 5 SA 124 (W).

²⁷ Progress Office Machines CC v South African Revenue Service and Others 2008 2 SA 13 (SCA) at paragraph 6.

how the implementation of the Guideline, which is not binding on ITAC, should be restrained because it is said not to accord with international agreements.

51. On the question of the Applicant's contention that the guidelines infringe property rights, again the argument relating to whether the Guidelines are binding or not, becomes relevant. It cannot be said that the Guidelines *per se* infringe or will infringe property rights of the constituent members of MRA until such time that ITAC chooses to implement them. It is not correct, in my view, to seek to impugn the Guidelines on the basis that they are lacking in the processes for recourse and appeal procedures. ITAC is not bound by the Guidelines and may depart from them in appropriate cases.²⁸ ITAC must first choose to apply the Guidelines in a specific case and only then would its decision be subject to review on any ground as listed in section 6 of PAJA. The Guidelines *per se* do not deprive anyone of a property right as these may or may not apply in any specific case.

Apprehension of irreparable harm

²⁸ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 4 SA 490 (CC) at paragraph 57.

52. MRA contends that the implementation of the Guidelines by ITAC pending the finalisation of the review case will cause its members to lose income which may not be recoverable, should they succeed in their review application.
53. On the question of harm, MRA raised two instances which are in my view, destructive to their case. In the first instance MRA argues that any loss that may be suffered as a result of the 20% reduction on the export price will be passed on to the scrap metal suppliers and collectors. MRA took the position to champion the cause of the suppliers and collectors (referred to as the poorest of the poor), and positioned them as the ultimate losers in this new policy initiative. MRA in effect informs this Court that such harm will attach to the suppliers and collectors; not to the recyclers.
54. In the second instance, MRA in its own application argues that the foundries in South Africa do not have the capacity and the expertise to absorb all scrap metal for domestic purposes. In that case, the sale of such scrap metals at 20% less within South Africa will not slow down the exportation of scrap metal at

market prices determined abroad. Apart from the fact that in the affidavits before court in this application, there appears to be serious inconsistencies in regard to the calculations of what would constitute a loss on the part of the MRA members, I am of the view that for the two reasons stated above, the alleged apprehension of harm on the part of the MRA is speculative.

55. As against the apprehension of harm contended by MRA, NUMSA points out to the loss of employment which is being experienced currently and will continue if there is a delay in the implementation of the policy Directive and the Guidelines. It is submitted, that the continued loss of employment and supply of recycled scrap metal products is a public interest matter which should supersede the alleged harm experienced by MRA members, due to the 20% price reduction of scrap metal exports.
56. The introduction of price control measures as contained in the Directives and the Guidelines was, according to submissions by NUMSA and the Minister, executed in the least intrusive manner. Further, NUMSA submits that government had a choice of either putting a hold on exportation of such goods or levying taxes on such exportation, either or both of which would have resulted in

greater harm to all the parties involved. The Minister opted for a less intrusive manner of intervention which is aimed at striking a balance between developing the economy internally in controlling the export prices instead of sitting back and allowing the demise of foundries with the consequences of job losses and decline in supply of metal products for end users.

Balance of Convenience

57. The balance of convenience rests on where harm or prejudice will fall should the application be granted or dismissed. In particular in this case, the bar to make out a successful case is lifted by the fact that this application is an invitation to the court to intrude in the domain of the national executive. As already pointed out, it is not in dispute that the Directives and the Guidelines are an expression of economic policy by the executive branch of government. This Court is neither authorised nor suited to make policy choices for the national executive. In OUTA²⁹ the Court stated as follows:

"When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of

²⁹ OUTA paragraph 65

statutory power within the exclusive terrain of the executive or legislative government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has a power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief, and even so, only in the clearest of cases."

58. The grounds of review which were raised in support of this application do not; at this stage of the proceedings outweigh the considerations of avoiding harm to the doctrine of separation of powers. Initially when this application was launched, it was intended to restrain the implementation of the Guidelines scheduled for 16 September 2013. As at that date, this application had not being heard. ITAC in the meantime had amended the original version of the Guidelines and published the amendment in the Gazette. At this stage, the date of commencement of the implementation process has come and gone. The policy is being implemented. It will thus be inappropriate at this stage to "stop dead" the implementation of a policy addressing a public interest issue. In my view this is not a strong, exceptional or clearest case where the court should

intervene by granting an interim interdict. The balance of convenience favours the dismissal of this application.

No alternative remedy

59. The exportation of metal is not a compulsory option for MRA members. They have a choice. They may either sell their products in the local market at market prices or where they choose to export scrap metal, they have to first offer it to the local market at a price less 20%. In their own version, the bulk of the products envisaged for exportation will not be absorbed by the local market as the capacity to do so is limited. It therefore goes without saying that if their version is correct, the business of exportation at market prices will still thrive.

CONCLUSION

60. MRA in my view has not, for reasons stated above, succeeded to make out a strong case, justifying this Court to stop ITAC from implementing the Guidelines, as and when it chooses to do so.

61. Considering the evidence as a whole, as placed before me in support of this application for interim relief, I am not persuaded

that this is a instance where a strong case has been made out for this Court to intervene and grant the order without offending the doctrine of separation of powers. The application should therefore fail.

COSTS:

62. The Minister argued that the wasted costs of the appearance in the urgent court should be mulcted against MRA. It seems to me that MRA is correct in stating that the reason why the matter did not proceed on 6 September 2013 in the urgent Court is because the Practice Directives in this division do not permit the hearing of an application in excess of 1000 pages in the urgent court. The papers in this application are prolix for an urgent court. It therefore became necessary for the Deputy Judge President to constitute a special motion court to hear this application.
63. Consequently, the fact that the matter did not proceed on that date cannot be placed solely at the door of MRA. I am therefore of the view that the costs relating to the appearance on 6 September 2013 should be costs in the normal course of this application.

64. MRA claims that this case raises constitutional issues and consequently there should not be any adverse cost order, in the event the application fails. I do not agree. As correctly submitted by counsel for respondents, the principle in the *Bio Watch*³⁰ case does not apply in this instance. In *Bio Watch* the Constitutional Court stated the need not to burden a litigant with costs in matters which raises constitutional issues. In this case, the constitutional principles applicable are settled. This case concerns the application of those principles to the facts.

65. As far as the rest of the costs are concerned, these should, as a general rule, follow the result.

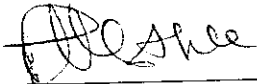
ORDER:

In the premises I make the following order:

1. This application for an interim interdict is dismissed.
2. The Applicant is ordered to pay :
 - 2.1 the costs of the applications to intervene;

³⁰ *Bio Watch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

2.2 the costs of all the Respondents including costs of junior and senior counsel who appeared on record on behalf of each Respondent in these proceedings.



MOTHLE J

GAUTENG HIGH COURT

PRETORIA

Date of Hearing:	10-11 October 2013
Date of Judgment:	28 October 2013
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