



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: 28 April 2023

SIGNATURE:

Case No. 48248/2020

In the matter between:

TATA CHEMICALS SOUTH AFRICA (PTY) LTD

First Applicant

TATA CHEMICALS SODA ASH PARTNERS

Second Applicant

And

INTERNATIONAL TRADE ADMINISTRATION COMMISSION

1ST Respondent

MINISTER OF TRADE AND INDUSTRY

2ND Respondent

MINISTER OF FINANCE

3RD Respondent

BOTSWANA ASH (PTY) LTD

4TH Respondent

Coram: Millar J

Heard on: 31 January 2023

Delivered: 28 April 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 28 April 2023

Summary: Application for review of the imposition of anti-dumping duties – calculation of period for which duties applicable – whether sunset review initiated timeously and whether withdrawal of company specific duty permissible – 5 year period to be calculated in accordance with the Regulations and the decision of the Supreme Court of Appeal in *Associated Meat Importers v ITAC* – sunset review initiated timeously and decision to withdraw company specific duty in consequence of non- co-operation found to be permissible – application dismissed with costs.

ORDER

It is Ordered:

1. The application is dismissed.
 2. The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the respondents on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel (where engaged).
-

JUDGMENT

MILLAR JINTRODUCTION

- [1]. This is an application by the first and second applicants (TATA)¹ for an order reviewing and setting aside certain duties imposed in respect of the importation into the Republic by them of disodium carbonate (also known as soda ash) from the United States of America (USA).
- [2]. The duty which TATA wishes to have set aside is a residual 'anti-dumping' duty of 40% imposed on their imports from the United states of America. The first respondent (ITAC)², the second respondent (MOTAI) and fourth respondent (BOTASH) oppose the application.
- [3]. The application for review was brought in terms of the Promotion of Administrative Justice Act³ (PAJA) on three grounds. Neither MOTAI nor BOTASH took issue with this. ITAC however contended that having regard to the decision of the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Lt*⁴ (SCAW) that a review in terms of PAJA was not competent and that at best, TATA ought to have brought a legality review.
- [4]. The argument of ITAC was premised on the finding by the court that:

*"When a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, it must do so only in the clearest of 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."*⁵

And

¹ The first and second applicants are the importer and exporter respectively.

² Established in terms of the International Trade Administration Commission Act 71 of 2002.

³ 3 of 2000.

⁴ 2012 (4) SA 618 (CC).

⁵ SCAW at para [101].

"It seems to me self-evident ⁶that the setting, changing or removal of an anti-dumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade policy. That power resides in the kraal of the national executive authority."

- [5]. The reliance on this passage in the circumstances of the present matter is misplaced. The facts are distinguishable. In *SCAW*, an order had been granted by the High Court interdicting the making of a recommendation by ITAC to MOTAI. The recommendation had neither been made nor accepted or any decision taken in consequence. In the present matter, the recommendation was accepted, and a decision taken to implement it. In the present matter, the executive decision-making process was completed and the decision, which is the subject of this review, to my mind, falls squarely within the ambit of PAJA.⁷
- [6]. TATA asserted three grounds of review. The first is that the continued imposition of the anti-dumping duty was unlawful, the second is that there was no basis established for the continuation or recurrence of injurious dumping and lastly that the approach that was adopted by ITAC in the matter, insofar as its recommendations were concerned, was flawed.

BACKGROUND

⁶ Ibid para [103].

⁷ This was recognized by the court in *SCAW* when it held: "..... *It is of course perfectly entitled to require that ITAC must act within the bounds of the Constitution and the law. Its right is to fairness in decision making. This it may exact from ITAC through judicial review.*" At para [104]. See also *International Trade Administration Commission v South African Tyre Manufacturers* [2011] ZASCA 137 (23 September 2011) at para 40.

[7]. What are anti-dumping duties and what is the legal framework within which they are determined, imposed, and renewed? The Constitutional Court in SCAW⁸ explained this as follows:

- “ [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 Organisation (WTO). Its international obligations on tariffs and trade arise from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (Anti-Dumping Agreement). These obligations are honoured through domestic legislation that governs the imposition of antidumping duties and other trade remedies. In the main the legislation consists of the International Trade Administration Act, 2002 (the Act) the Anti-Dumping Regulations made under the Act which must be read together with the Customs and Excise Act, 1964 (Customs and Excise Act) and where appropriate, the Board of Tariffs and Trade Act, 1986 (BTT Act). I address the legislative regime more fully later.*
- [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 (the minister) who, in turn, may ask the Minister of Finance to lift or impose antidumping duties on specified goods introduced into the commerce of the Republic.”*

⁸ SCAW at paras [1]-[3] and [34]-[40].

and

[34] *The Act repealed the whole of the BTT Act. However, a number of its provisions have not come into operation. It remains necessary to read its provisions together with the BTT Act because its transitional provisions require that ITAC must investigate, evaluate and report on anti-dumping duties in accordance with the BTT Act as if it had not been repealed. The Act makes it clear that ITAC is the successor in title to the Board. More importantly, the transitional provisions preserve the statutory functions of the two ministers provided for in the BTT Act and the Customs and Excise Act in relation to the determination of C anti-dumping duties. The consequence of this is that ITAC is required to investigate and evaluate applications for anti-dumping duties in accordance with s 32 of the Act read with the BTT Act, as if the latter Act had not been repealed. In order to complete the picture, one must add that ch. VI of the Customs and Excise Act deals, amongst other things, with anti-dumping duties. Of importance, is that s 56(2) provides that the Minister of Finance may from time to time, by notice in the Gazette, withdraw anti-dumping duties in accordance with the request from the minister.*

[35] *It is now convenient to have a closer look at some of the applicable provisions of the Act. It defines 'anti-dumping' with a domestic tilt. 'Dumping' means the introduction of goods into the commerce of the Republic or the Common Customs Area at an export price less than the normal value of those goods. Much of the detailed provisions on anti-dumping are to be found in the Anti-dumping Regulations. Subpart IV of the regulations and, in particular, regs 53 – 59, provide for sunset reviews before the anti-dumping duties lapse.*

[36] *Absent a sunset review or a judicial review, the term of an anti-dumping duty is five years. That much all the litigants before us agree. This reading of the regulations is well supported by Article 11.3 of the Anti-dumping Agreement which provides in peremptory terms that any definitive anti-dumping duty 'shall' be terminated on*

a date not later than five years from its imposition. Also, Article 11.1 requires that E duties 'shall' remain in force only as long as and to the extent necessary to counteract injurious dumping.

[37] *The Anti-dumping Regulations echo the related provisions of the Anti-dumping Agreement. Regulation 38.1 is emphatic that dumping duties 'lapse' after a five-year period. Regulation 38.1 provides: 'Definitive anti-dumping duties will remain in place for a period of five years from the date of publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period.'*

[38] *It is, however, so that the scheme of the Anti-dumping Agreement contemplates that if a sunset review is initiated before the date of expiry of the anti-dumping duty, it shall remain in force pending the outcome of that sunset review. Article 11.4 requires a sunset review to be carried out expeditiously and that it 'shall' normally be concluded within 12 months of the date of initiation. On the other hand, Article 5.10 makes plain that an investigation 'shall' be concluded within '1 year' and in no case more than '18 months' after its initiation.*

[39] *The domestic regulations again echo the provisions of the Anti-dumping Agreement. Regulation 38.1 creates the caveat that the term of an anti-dumping duty may be extended if it is reviewed prior to the lapse of the five-year period. This is again made clear by regs 53 and 54.1. In particular, reg 54.1 provides that the anti-dumping duty shall remain in force 'until the sunset review has been finalised', provided that the sunset review is initiated approximately six months before the lapse of the B anti-dumping duty.*

[40] *Regulation 20 provides that all investigations and reviews 'shall' be finalised within '18 months' after initiation."*

[8]. Turning now to the present application. On 21 June 2013 ITAC began an investigation into the dumping of soda ash imported from the USA into the Southern African Common Customs Area (SACU). In consequence of the investigation, with which TATA co-operated, provisional duties were imposed

from 20 December 2013. The rate at which the provisional duties were imposed was variable. For those importers who had co-operated with ITAC, a lower 'company specific' duty was imposed. In the case of TATA this was 8%.⁹ For those companies that did not co-operate with ITAC, a residual duty of 40% was imposed.

- [9]. Provisional duties are imposed by the Minister of Finance acting in terms of the Customs Act.¹⁰ In terms of Section 57A, the Commissioner for the South African Revenue Services "may impose a provisional payment" upon request by ITAC. A provisional payment may only be imposed once an investigation has been initiated into the necessity of the imposition of a definitive anti-dumping duty. The payment of provisional duties is made entirely without prejudice in that if no duty is subsequently imposed, the provisional payment is refundable¹¹ or, if a duty is imposed retrospectively and is higher than the provisional amount which has been paid, then there is no obligation to pay the higher amount.¹²
- [10]. The payment of the provisional amount is "as security"¹³ and depending upon the particular circumstances, will not necessarily equal the definitive anti-dumping duty imposed. If the final duty is greater than the amount of the provisional duty, the obligation to pay for the period that the duty was provisional would only be for the lesser amount actually paid.

⁹ Besides TATA, other companies also co-operated with ITAC and had their own company specific duties imposed.

¹⁰ Sections 55, 56(2) and 57A.

¹¹ Section 57A(4) "*If no anti-dumping . . . is imposed before expiry of the period for which a provisional payment in relation to the goods concerned has been imposed, the amount of such payment shall be refunded*".

¹² Section 57A(5) "*If the amount of any such provisional payment on the said goods –*
 (a) *Exceeds the amount of any anti-dumping, . . . retrospectively imposed on such goods under section 56, 56A or 57, the amount of the difference shall be refunded; or*
 (b) *Is less than the amount of the anti-dumping. . . so imposed, the amount of the difference shall not be collected.*"

¹³ Section 57A(3) "*Such provisional payment shall be paid on goods subject thereto, at the time of entry for home consumption thereof, as security for any anti-dumping, countervailing or safeguard duty which may be retrospectively imposed on such goods under section 56, 56A or 57 and may be set off against the amount of the retrospective anti-dumping, countervailing or safeguard duty payable.*"

- [11]. On 19 June 2014, the provisional duties, both company specific and residual, were confirmed as definitive anti-dumping duties.¹⁴ The period for which the duties applied was 5 years.¹⁵
- [12]. Thereafter, on 25 May 2018, ITAC gave notice to interested parties that unless a substantiated request was made indicating the necessity for maintaining the anti-dumping duties on the importation of soda ash, the duties would expire on 18 June 2019. Subsequently, BOTASH made a substantiated request and a sunset review was initiated on 26 April 2019.
- [13]. It is not in issue between the parties that TATA did not, after 25 May 2018, co-operate in the way that it had during 2014 when the duties had first been imposed. However, TATA made written representations to ITAC on 14 August 2019 and at a hearing on 8 October 2019, made oral representations on why the original dumping duties had already expired prior to the initiation of the sunset review.
- [14]. Thereafter, on 29 October 2019, ITAC made 2 recommendations. The first was that the anti-dumping duties be maintained and the second that since there had been no co-operation from any importers or exporters, specifically TATA, that the applicable amount of the duties that was to be retained was the residual duty of 40%. The effect of TATA's failure to co-operate during the sunset review was that its previous company specific duty of only 8% was now increased to 40%.
- [15]. The amendment of the Gazette of 19 June 2014 was effected on 30 March 2020¹⁶ by withdrawing the company specific duties and imposing, for a further 5 years and across the board, a residual anti-dumping duty of 40%.

THE FIRST GROUND OF REVIEW

¹⁴ These were published in Government Gazette GG No 37756 on that day and that they were "with retrospective effect from 20 December 2013".

¹⁵ Scaw supra at paras [36] – [37].

¹⁶ Government Gazette No. 11071 of 30 March 2020.

[16]. The crux of the first ground of review advanced on behalf of TATA was that the duties had expired before the initiation of the sunset review. The 5-year period for which the duties were to be extant commenced on 20 December 2013 and expired on 19 December 2018, 4 months before the initiation of the sunset review on 26 April 2019. The argument proffered was that the 5-year period was to be reckoned as an actual payment period and thus of necessity was to be conflated together with the period for which the duties had been retrospectively imposed.

[17]. Regulation 38 of the Anti-Dumping Regulations¹⁷ provides:

“38. Definitive anti-dumping duties

38.1 *Definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of the Commission’s final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period.*

38.2 *Definitive anti-dumping duties may be imposed with retroactive effect as provided for in terms of the Customs and Excise Act, 1964 (Act No 91 of 1964).”*

[18]. The period for which the anti-dumping duties are payable is a period of 5 years from the date of their ‘publication’ as provided in Regulation 38(1). In the present matter, the date of publication was 19 June 2014 and thus the 5-year period would expire on 18 June 2019. Leaving aside the date of publication, it was argued for the applicants that Regulation 38, properly construed, could only ever mean the 5-year period.

[19]. Thus, if the duties were to be imposed retrospectively, a situation permitted by Regulation 38(2), then the ‘imposition’¹⁸ of the duty and the period for which it is to be levied should then be calculated from the date of retrospective imposition. TATA argued that Regulation 53, within the context of a sunset

¹⁷ Published in Government Gazette No 25684 of 14 November 2003.

¹⁸ The ordinary meaning of which is “the action of imposing a charge, obligation, duty” The Shorter Oxford English Dictionary, Volume 1, Oxford Press, 2007.

review and the scheme of the Regulations as a whole, was consonant with their argument regarding the calculation of the 5-year period.

[20]. Regulation 53 provides:

“53 Duration of anti-dumping duties

53.1 Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.

53.2 If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalized”.

[21]. In the present instance, the applicants argued that the 5-year period was to be calculated from 20 December 2013, and to expire on 19 December 2018.

[22]. It is not in issue that the duties may be extended if reviewed prior to the lapse of the 5-year period. It is the meaning of ‘imposition’ and the date upon which the duties were imposed and the date of expiry (or otherwise) about which TATA and the respondents disagree that is at the heart of this application.

[23]. In the present matter, the provisional duties became payable from 20 December 2013 and so on the argument of TATA, the subsequent confirmation of those duties on 19 June 2014 and retroactive imposition meant that the 5-year period for which the duties are to apply commenced on 20 December 2013 and lapsed on 19 December 2018.

[24]. The way in which the 5-year period is to be calculated is crucial to the determination of this matter. If the period is calculated as contended by TATA, then the initiation of the sunset review¹⁹ on 26 April 2019 was not timeous.

¹⁹ Regulation 54(1) provides: “A notice indicating that an anti-dumping duty will lapse on a specific date unless a sunset review is initiated shall be published in the Government Gazette approximately 6 months prior to the lapse of such anti-dumping duty.”

On TATA's argument, the sunset review ought to have been initiated in terms of Regulation 54(1) on a date prior to 19 December 2018.

- [25]. Since it was initiated after that date, the obligation to continue to pay any duty after 19 December 2018 lapsed because the duty did not remain in force. Regulation 53(2)²⁰ only finds application, pending the timeous initiation and finalization of a sunset review. Thus, if the sunset review is not initiated timeously, the entire process is invalidated, and the anti-dumping duty does not remain extant pending the sunset review.
- [26]. Accordingly, the argument on behalf of TATA was that ITAC was required to commence with an investigation *de novo* and the anti-dumping duties gazetted on 19 June 2014 were no longer of any force or effect. If a new investigation were commenced, there would be no duty payable at all by TATA or any other importer of soda ash.
- [27]. TATA relied on the decision of the Supreme Court of Appeal in *Progress Office Machines CC v South African Revenue Service and Others*.²¹ The context within which *Progress Office Machines* was decided was in respect of anti-dumping duties that had been retroactively imposed from 27 November 1998 by notice published in the Government Gazette on 28 May 1999. *POM* had argued successfully that the 5-year period was to be reckoned from 27 November 1998 and not 28 May 1999. Accordingly, the 5-year period expired on 26 November 2003. However, the ITA only came into operation on 1 June 2003 and the Regulations on 14 November 2003. Neither were in force at the time that this case was decided.²²
- [28]. Having neither the ITA Act nor the Regulations extant in the case, the court in *Progress Office Machines* looked to Article 11.3 of the World Trade Organization (WTO) Anti-Dumping Agreement which provides:

²⁰ "If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalized."

²¹ 2008 (2) SA 13 (SCA).

²² Regulation 68.1 provided that "These regulations shall apply to all investigations and reviews initiated after the promulgation of the regulations".

"11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition or from the date on the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph, unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

[29]. In considering the 5-year period referred to in Article 11.3, the court then looked to the Customs Act and held²³:

"[17] Perhaps the strongest indication for holding that the duty was 'imposed' on 27 November 1998 is to be found in s 57A(3) which leaves no doubt that the duty imposed is a 'definitive' anti-dumping duty for the payment of which any provisional payment already imposed serves as security. It was fully effective on that date just as if it had been 'imposed' on that very day. The definitive anti-dumping duty, it is common cause, endures for five years from its imposition."

[30]. They also sought to rely on the minority judgment in *Association of Meat Importers and Exporters and Others v ITAC*²⁴ (AMIE) in which the view was expressed that:

"[107] When one reads the Second Schedule there is no indication that the anti-dumping duties contained therein are of limited duration. However, in terms of South Africa's international obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the Anti-Dumping Agreement') 'any

²³ *Progress Office Machines supra*.

²⁴ [2013] 4 All SA 253 (SCA) at 278 - 279.

definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition'. Accordingly, when the duties in issue in this case were imposed South Africa was under a binding international obligation to limited their duration to a date not later than five years from their imposition. This court held in *Progress Office Machines CC v South African Revenue Service & others*, that South Africa's obligations under the Antidumping Agreement were binding and the Constitutional Court endorsed that in *Scaw Metals*. Accordingly, when the duties in issue in this case were imposed South Africa was under an obligation in international law to terminate them by not later than five years from their imposition."

And

"[109] In *Progress Office Machines*, this Court answered by holding the date of imposition of the duty is the date from which the duty became payable, that is, the date of its retrospective application. That decision binds us. It is plainly not open to us on a straightforward issue of construction, where the court was faced with two possibilities and selected one of them, to depart from that finding simply because we would reach a different conclusion."

[31]. It was argued on behalf of TATA that since the Supreme Court of Appeal did not overrule the decision in *Progress Office Machines*, that decision was binding upon it, and it was obliged to follow it unless it concluded that the decision was wrong. I was referred to *Ruta v Minister of Home Affairs*²⁵ in which the Constitutional Court held that:

"... The Supreme Court of Appeal has itself emphasised that respect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability, and coherence would dissipate. The courts would operate without

²⁵ 2019 (2) SA 329 (CC) at para [21], *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) at para 61.

map or navigation, vulnerable to whim and fancy. Law would not rule.”

(footnotes omitted)

[32]. In *AMIE* the Supreme Court of Appeal held:

[80] *It should be apparent that if the date upon which an anti-dumping duty is 'imposed' for purposes of regulation 53.1 is the antedate from which there is liability, the regulation would be hopelessly inconsistent with regulation 38.1 — the default period under regulation 38.1 would always exceed the maximum period for its existence under regulation 53.1. That could never have been intended and would be absurd. On the other hand, if the date of 'imposition' is the date the schedule is amended by notice in the Gazette, the two regulations are consistent — the default period will never expire after the guillotine comes down. Indeed, they would harmonise perfectly if the publication of ITACs final recommendation is to be taken as the date it is given effect by the relevant Minister.....”*

[81] *It is a well-established principle of construction (in truth an inference that might be drawn) that legislation must be construed in favour of consistency, and against inconsistency, if the language allows it. The only sensible construction that brings about consistency is if 'Imposition' in regulation 53 means the date upon which Schedule 2 is amended by notice in the Gazette,*

[82] *To give the regulation that meaning will not mean this country is in breach of its obligations under Article 11.3 of the WTO agreement. The meaning given to Article 11.3 in *Progress Office Machines* is authoritative only so far as that Article is applied domestically but is immaterial so far as this country's relations with its WTO partners are concerned. Perhaps they might see things in the same way as this court did in *Progress Office Machines* - which case the regulations no doubt call for amendment — but perhaps they might not — in which case all is well and good. It is not for us to speculate on how the WTO members understand their agreement.”*

- [33]. It was argued by TATA that while the decision in *AMIE* was also binding on this court, because it did not expressly decide that *Progress Office Machines* was wrong, the decisions stood to be considered alongside each other. It was argued by TATA that the reasoning adopted by the Court in paragraph [80] of *AMIE* was not persuasive on the basis that:

“First, it was wrong to determine the ‘date of imposition’ of the definitive duty with reference to the date of publication of a report by ITAC (an administrative organ), where the act giving rise to the imposition of the duty is a legislative act by the Minister of Finance, exercised in terms of powers under the Customs Act.

Second, the approach adopted in AMIE will, or may, give rise to various issues. The ITA Act and the Regulations do not expressly require ITAC to publish its final recommendation in the Government Gazette. In the absence of a statutory obligation on ITAC to publish its final report, it cannot be assumed that ITAC will always publish its report. In the absence of any “publication” by ITAC, the potential uncertainty is obvious.

Third, the majority in AMIE simply assumed and accepted ITAC’s publication “will necessarily occur before the respective notices of the Minister of Finance and the Minister of Trade and Industry are published. This is however not always the case. The present matter serves as an example that ITAC’s report is not necessarily published prior to the amendment to Schedule No. 2 to the Customs Act, effected by the Minister of Finance.”

- [34]. In the present matter, the final recommendation of ITAC was made on 29 October 2019. Schedule 2 was then amended by publication in the Government Gazette on 30 March 2020 and the final recommendation ‘published’ on 3 April 2020. It was argued that:

“The “guillotine” in Regulation 53.1 would come down on the duty on 30 March 2025, that is to say prior to the lapsing of the 5-year period provided for in Regulation 38.1, which would occur on 3 April 2025. Thus, if ITAC “published” after the amendment of Schedule 2, it would give rise to a mirror-image of the inconsistency between Regulation 53.1 and 38.1 that so troubled the majority in of the court in AMIE”.

- [35]. Is there an inconsistency? Regulation 38.1 falls under Sub Part IV – Final Investigation Phase and deals with the initial investigation and imposition of anti-dumping duties. This part of the process precedes the sunset review phase and relates to when the duties were first imposed. This is not an issue in the present matter as the final report referred to in Regulation 38.1 was published prior to the imposition of definitive anti-dumping duties and the amendment of Schedule 2 on 19 June 2014.
- [36]. Regulations 53 to 59 deal with sunset reviews. The only obligation to ‘publish’ is of the intention to initiate²⁶ a sunset review. The sunset review consists of a single investigation phase²⁷ which then results in a final recommendation which “*may result in the withdrawal, amendment or reconfirmation of the original anti-dumping duty.*”²⁸
- [37]. Once the final investigation report has been published and duties imposed, the requirements of Regulation 38.1 are fulfilled. The Regulation is not of application when it comes to sunset reviews and so it is inapposite to juxtapose and then conflate the periods referred to in the respective Regulations. For this reason, I am not persuaded that there is any inconsistency or conflict created with regard to the period for which the duties were to be extant.
- [38]. It is not open to this court to disregard the judgment of the court in *AMIE* or to decide on its persuasiveness or otherwise. The clear point of distinction between *Progress Office Machines* and *AMIE* lies with the interpretation before and after the regulations took effect. In *Progress* they were not of application because they were not extant at the time insofar as the issue before the Court was concerned. The position with *AMIE* is fundamentally different as when that matter was decided, the Regulations were extant and were considered by the court.

²⁶ Regulation 54.5 which provides “*If the Commission decides to initiate a sunset review, it shall publish an initiation notice in the Government Gazette prior to the lapse of such duties. Such notice shall contain the information as contemplated in section 41.*”

²⁷ Regulation 56.1

²⁸ Regulation 59

- [39]. The Regulations cannot be disregarded in favour of an interpretation reached before they became extant and without consideration of all of them. The very reason the Court came to the decision that it did in *Progress Office Machines* was because the Regulations were not part of the municipal law²⁹ applicable to the particular dispute and the WTO Agreement was the only source from which an interpretation could be drawn.³⁰ It is on this fundamental point that *AMIE* is to be distinguished from *Progress Office Machines* and why *AMIE* is binding authority for the calculation for the 5-year period for which the duties are extant as from the time of 'publication' referred to in Regulation 38.1 and not from the retrospective 'imposition' date.
- [40]. It was also argued on behalf of TATA that the interpretation to be given to the words "unless otherwise specified" in Regulation 38.1, was that when schedule 2 was amended to have retrospective effect, this in its terms falls squarely within the exception. It was also argued that such an interpretation would be consonant with Regulation 38.2. On a plain reading of Regulation 38.1, the words "unless otherwise specified" quite clearly relate to the 'publication' and not to the total period for which the duties would be payable considering any retrospective period.
- [41]. The Regulation is in its terms clear and unequivocal that anti-dumping duties will remain in place for a period of 5 years **from** the date of the publication of ITAC's final recommendation and not as a composite period. Since s 57A(3) of the Customs Act does not contain any reference to the period for which duties are to remain extant, the interpretation of the Regulation does not in any way affect the interpretation of the Act.³¹
- [42]. Insofar as the WTO Agreement is concerned, while the judgment in *Progress* may well be consonant with that agreement, this was considered by the court

²⁹ In terms of Regulation 68.1 "These regulations shall apply to all investigations and reviews initiated after the promulgation of the regulations" – 14 November 2003. See also *Azarian Peoples' Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at para [26].

³⁰ This was the finding in *Progress Office Machines* supra at para [6] in which it was held: "The WTO Agreement was approved by parliament on 6 April 1995 and is thus binding on the Republic in International Law, but it has not been enacted into municipal law."

³¹ *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice & Correctional Services and Others* 2016 (6) SA 596 (CC) at para [151].

in *AMIE*. While the Regulations remain extant, they are to be applied and the court in *AMIE* has clearly and unequivocally confirmed this and I am bound by it.³²

- [43]. For the reasons set out above, in my view, first ground of review is accordingly without merit and must fail.

THE SECOND GROUND OF REVIEW

- [44]. Turning now to the second ground of review. Was there any factual basis established for the finding that there would be a continuation or recurrence of injurious dumping?

- [45]. It was argued for TATA that ITAC was required "to provide interested parties with a reasoned conclusion and a "sufficient factual basis" for its determination" so that it could understand the "gist of the case against it".³³ In support of this argument, they relied on the provisions of Article 11.4 read together with Article 6.9 of the WTO Agreement³⁴ and to the decision in *US – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel (2004)*³⁵ in which it was held:

³² *FirstRand Bank Ltd v Kona and Another* 2015 (5) SA 237 (SCA) at para [21].

³³ *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at para [42].

³⁴ Article 11.4 provides: "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article" and Article 6.9 provides: "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

³⁵ At para [114].

³⁵ As required by Regulation 43 which provides "43.1 All interested parties will be informed of the essential facts to be considered in the Commission's final determination. 43.2 All parties will receive 14 days from the dispatch of the essential facts letter to comment thereon. 43.3 The Commission may grant parties an extension on reasonable grounds shown. 43.4 In its final determination the Commission will consider all relevant comments on the essential facts letter made by co-operating interested parties, provided such comments are received by the deadline contemplated in subsections 2 and 3."

"It is clear that an investigation authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."

- [46]. It was argued that ITAC's essential facts³⁶ letter failed in this regard because it did not contain the particularity which the applicants contend it ought to have. The letter provided:

"Recurrence of material injury

The Commission is considering making a final finding that the expiry of the duties would likely lead to the recurrence of material injury.

Determination

The Commission is considering making a final determination that the expiry of the anti-dumping duties would likely lead to the continuation or recurrence of dumping on the subject product originating in or imported from the USA and the recurrence of material injury."

- [47]. The response from ITAC regarding this aspect was furnished to TATA in a letter of 9 September 2019 in which it was stated:

"The information on which the Commission made this finding, is contained in the Application, a non-confidential version of which has been made available to all interested parties.

All comments regarding the information pertaining to the recurrence of material injury submitted by interested parties, will be taken into consideration by the Commission in making its final determination."

- [48]. It was argued for TATA it was not afforded a procedurally fair process and that ITAC was required to *"process, evaluate and consider the information provided by BOTASH in its application and then to provide interested parties with an opportunity*
-

to answer to ITAC's reasoned conclusions and preliminary findings, having evaluated BOTASH's information."

[49]. This argument disregards the provisions of Regulation 56 which provides:

"56. Review procedure

56.1 *A sunset review shall consist of a single investigation phase.*

56.2 *The Commission may verify such information as it deems necessary to confirm the accuracy and the adequacy of any information submitted by any interested party."*

[50]. It was argued by ITAC and the other respondents that having regard to the provisions of Regulation 56 which set out the procedure to be followed, it was not open to TATA to argue that because the procedure followed did not accord with what it considered to be a fair procedure, that it was not. It is well established that fairness is to be assessed in the circumstances,³⁷ this is so particularly where there is a prescribed procedure that is set out in the legislation.

[51]. ITAC was obliged to set out the 'essential facts' or put differently the 'gist'³⁸ of what was before it. It was required to afford TATA an opportunity to comment. This it did. It was also obliged to consider 'relevant' comments from 'co-operating parties' and here too it did so. For the reasons that have been set out above, I find that the second ground of review also has no merit and must also fail.

THE THIRD GROUND OF REVIEW

³⁷ Section 3(2)(a) of PAJA which provides "A fair administrative procedure depends on the circumstances of each case.", *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) at para [93] – "The rules of procedural fairness are not to be applied by rote, but flexibly and contextually, due regard being had to the empowering statute. The position was summed up in *Russell v Duke of Norfolk and Others*, in which the Court of Appeal stressed that the 'requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth'. When all is said and done, the test is one of fundamental fairness."(footnotes omitted)"

³⁸ *Brenco supra*.

- [52]. The third and final ground advanced for the review was that the approach adopted by ITAC was fundamentally flawed. This ground was predicated upon the decision to withdraw the company specific duties of 8% which TATA had enjoyed and to subject them to the residual duties of 40% after 30 March 2020.
- [53]. It was not in issue that unlike when the original investigation had been undertaken and TATA had co-operated, it had not done so in respect of the present sunset review. When the original investigation was undertaken and it had co-operated and had supplied required information to ITAC, it had benefited in consequence of doing so with the imposition of a company specific duty, substantially lower than the residual duty imposed upon those parties who had not co-operated.
- [54]. In its argument for this ground of review, TATA relied almost exclusively upon the interpretation of Articles 11, 11.2 and 11.3 of the WTO Agreement and the difference in construction between Regulation 47.1 and 59. Since the WTO Agreement is not part of our municipal law, this ground must of necessity be considered with regard to the Regulations which are.
- [55]. Regulation 47.1 deals with Interim Reviews and provides:

"47 Final recommendation

47.1 The Commission's final finding, in the form of a recommendation to the Minister, may result in an increase, decrease, the withdrawal or the reconfirmation of the existing anti-dumping duty."

- [56]. Regulation 59 which deals with sunset reviews, provides:

"59 Final recommendation

The Commission's recommendation may result in the withdrawal, amendment or reconfirmation of the original anti-dumping duty."

- [57]. The review in the present matter was a Sunset Review and not an Interim Review. The Regulations are framed differently for each type of review and cannot be juxtaposed and conflated to arrive at an interpretation of the Regulations³⁹ which serves the case for TATA in trying now to argue that it ought to be able to avoid the consequences of non-co-operation. Such an argument seems to me to be entirely contrived.
- [58]. Regulation 59 is clear in its terms. The nub of the argument for TATA on this ground of review was that Regulation 59 should be interpreted on the basis that the prior company specific duty would continue alternatively that there should be a one-sided recalculation of duties based on the information provided by BOTASH. The recalculation it was argued, would have resulted in a company specific duty of 11.34% being imposed and that this was, if the review was unsuccessful on the first ground, the appropriate duty to have been imposed upon TATA.
- [59]. This final argument completely overlooks the provisions of Regulation 58.2 which provides:
- “58.2 Where the SACU industry has supplied the required information and the exporter or foreign producer does not co-operate within the time frames contemplated in section 42, the Commission may rely on the facts available to reach its final decision.”*
- [60]. Having taken part in the initial investigation phase, TATA was aware of both the requirements of the Customs Act and Regulations. It must also have been aware of the judgments in both *Progress Office Machines* and *AMIE*. Having regard to the way in which it responded to the sunset review once initiated and subsequently, there can be no doubt that there was an advertent decision not to co-operate during the sunset review.

³⁹ Application of the now accepted principles of interpretation do not permit the interpretation which TATA seeks to cast on the Regulations. See *Road traffic Management Corporation v Waymark (Pty) Limited* 2019 (5) SA 29 (CC) at para [29]-[30].

[61]. It had an opportunity to participate in the sunset review process but chose to limit that participation to attempting to persuade ITAC that the duty had in fact lapsed. Regulation 58.2 read together with Regulation 59 makes clear what the consequences of non-co-operation may entail, and it does not now behoove TATA to complain that the company specific duty levied upon it in consequence of its co-operation has now been withdrawn (in consequence of non-co-operation). Self-evidently it is also not open to it to argue for the imposition of any other 'specific' duty considering its non-co-operation. The third ground of review is without merit and must also fail.

COSTS


[62]. The parties were agreed that the costs should follow the result and that the engagement of more than one counsel by those parties who did, was appropriate and in the circumstances the costs of two counsel where employed should be permitted. It is for this reason that I intend to make the costs order that I do.

ORDER

[63]. In the circumstances it is ordered:

64.1 The application is dismissed.

64.2 The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the respondents on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel (where engaged).



A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 31 JANUARY 2023

JUDGMENT DELIVERED ON: 28 APRIL 2023

FOR THE APPLICANT: ADV A JOUBERT SC

ADV E MULLER

INSTRUCTED BY: BAKER & McKENZIE

REFERENCE: MS V SUBBAN

FOR THE FIRST RESPONDENT: ADV N MAENETJE SC

ADV I CLOETE

INSTRUCTED BY: THE STATE ATTORNEY -
PRETORIA

REFERENCE: MS S KHOSA

FOR THE SECOND RESPONDENT: ADV V MALEKA SC

ADV L MAITE

INSTRUCTED BY: THE STATE ATTORNEY -
PRETORIA

REFERENCE: MS S KHOSA

**NO APPEARANCE FOR THE THIRD
RESPONDENT**

FOR THE FOURTH RESPONDENT:

ADV A COCKRELL SC

INSTRUCTED BY

WEBBER WENTZEL

REFERENCE:

MR S MELTZER