CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 59/09
[2010] ZACC 6

In the matter between:

INTERNATIONAL TRADE ADMINISTRATION COMMISSION	Applicant
and	
SCAW SOUTH AFRICA (PTY) LTD	Respondent
with	
BRIDON INTERNATIONAL LIMITED	Intervening Party

In re:

SCAW SOUTH AFRICA (PTY) LTD	Applicant
and	
INTERNATIONAL TRADE ADMINISTRATION COMMISSION	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
MINISTER OF FINANCE	Third Respondent
BRIDON INTERNATIONAL LIMITED	Fourth Respondent
AFRICAN MARITIME SERVICES (PTY) LTD	Fifth Respondent
NU-QUIP CC	Sixth Respondent

Heard on : 12 November 2009

Decided on : 9 March 2010

JUDGMENT

MOSENEKE DCJ:

Introduction

[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).[1] These obligations are honoured through domestic legislation that governs the imposition of anti-dumping duties and other trade

[1] As a member of the WTO, South Africa is also a signatory to the General Agreement on Tariffs and Trade (GATT). This agreement was approved by the South African Parliament through the Geneva General Agreement on Tariffs and Trade Act 29 of 1948. The international rules relating to dumping are contained in Article VI of the GATT and the Anti-Dumping Agreement.

remedies. In the main the legislation consists of the International Trade Administration Act, 2002[2] (the Act); the Anti-Dumping Regulations[3] made under the Act which must be read together with the Customs and Excise Act, 1964[4] (Customs and Excise Act); and where appropriate, the Board of Tariffs and Trade Act, 1986[5] (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 (Minister) who, in turn, may ask the Minister of Finance to lift or impose anti-dumping duties on specified goods introduced into the commerce of the Republic.

[4] ITAC is before us as an applicant in an application for leave to appeal. It is aggrieved by the order made by Bertelsmann J in the North Gauteng High Court, Pretoria (High Court) on 5 January 2009 and urges us to set it aside. The order was granted at the instance of SCAW South Africa (Pty) Limited (SCAW or first respondent). On 20 October 2008, SCAW launched an urgent application in the High Court. It sought and was granted an order:

[2] 71 of 2002.

[3] *Government Gazette*, GG 25684, GN 3197, 14 November 2003. The Anti-Dumping Regulations were made under section 59 of the Act.

[4] 91 of 1964.

[5] 107 of 1986.

(a) Interdicting and restraining ITAC from forwarding to the Minister its recommendation to terminate the existing anti-dumping duty in force against stranded wire, ropes and cables, of iron or steel, not electrically insulated, of a diameter exceeding 8mm (excluding that of wire of stainless steel, that of wire-plated, coated or clad with copper and that identifiable as conveyor belt cord) imported from Bridon International Limited (UK) (existing anti-dumping duty);

(b) Interdicting and restraining the Minister from accepting ITAC's recommendation and from requesting the Minister of Finance to terminate the existing anti-dumping duty;

(c) To the extent that the Minister may already have requested the Minister of Finance to terminate the existing anti-dumping duty, interdicting and restraining the Minister of Finance from giving effect to this request by terminating the existing anti-dumping duty.[6]

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[6] In *SCAW South Africa (Pty) Ltd v The International Trade Administration Commission and Others,* North Gauteng High Court, Pretoria, Case No 48829/2008, 5 January 2009, unreported, the court order provides:

> "1. An order is granted in terms of prayers 2 and 3 of the Notice of Motion."

Prayers 2 and 3 of SCAW's Notice of Motion sought an order in the following terms:

> "2.1. Interdicting and restraining the First Respondent from forwarding to the Second Respondent its recommendation to terminate the existing anti-dumping duty imposed in respect of stranded wire, ropes and cables, of iron or steel, not electrically insulated, of a diameter exceeding 8 mm (excluding that of wire of stainless steel, that of wire plated, coated or clad with copper and that identifiable as conveyor belt cord) imported from the Fourth Respondent ("the existing anti-dumping duty");
>
> 2.2. Interdicting and restraining the Second Respondent from accepting the First Respondent's recommendation and from requesting the Third Respondent to terminate the existing anti-dumping duty;
>
> 2.3. To the extent that the Second Respondent may already have requested the Third Respondent to terminate the existing anti-dumping duty, interdicting and restraining the Third Respondent from giving effect to this request by terminating the existing anti-dumping duty;

[5] The High Court granted the interdictory relief pending the final determination of an application to be instituted by SCAW to review and set aside ITAC's recommendation to terminate the existing anti-dumping duty. The review application which has since been initiated was launched on 3 December 2008, after the hearing of the urgent application, but before the interim order was granted during January 2009. At the hearing in this Court, we were informed that the review application was still pending before the High Court. The parties were uncertain about when the review application was likely to be finalised.

Parties

[6] I describe briefly the parties and the respective interests they harbour. ITAC is a juristic person and a statutory body that bears specialist responsibility for the administration of international trade. Its functions include adopting measures for the continued control of imports and exports of goods and the regulation of customs duties. It is clothed with the power to investigate, evaluate and make recommendations to the Minister on the imposition, amendment or removal of customs, anti-dumping and countervailing duties.

[7] Before the High Court, the Minister and the Minister of Finance were cited as second and third respondents. The Minister opposed the granting of the restraint

3. That the relief set out in prayer 2 operate with immediate effect pending the final determination of the application referred to in prayer 4 below".

order. However, interdictory relief was granted against both of them. In this Court, they have not entered the fray. ITAC is a lone applicant. However, it must be said that there is obvious privity of interest between ITAC and the two Ministers in relation to the outcome of the application for leave to appeal.

[8] SCAW is the largest South African manufacturer of steel products of a wide variety, including rolled steel and alloy iron castings, cast alloy iron, for steel grinding media, chain, steel wire rope, and strand wire products. SCAW lodged with ITAC the petition that led to the imposition of the existing anti-dumping duties. More recently, SCAW initiated the sunset review that led to the impugned decision of ITAC to recommend the lifting of anti-dumping duties on the product imported into South Africa by Bridon International Limited (Bridon UK). A sunset review is an investigation, initiated relatively shortly before the duties would otherwise lapse, which concerns the withdrawal, amendment or re-confirmation of an original anti-dumping duty on imported goods.

[9] Bridon UK is by far the largest manufacturer of steel wire ropes in the United Kingdom. Its products are for use in various sectors including mining, industrial, oil and gas, and fishing industry worldwide. Its steel wire exports pose a direct competition to the domestic products and sales of SCAW. Bridon UK was joined by SCAW as a respondent before the High Court. No relief was sought against it. For obvious reasons, Bridon UK resisted the granting of the restraining order. The

order had the effect of stalling the recommendation of ITAC to remove the existing anti-dumping duties.

Preliminary issues

[10] Before I consider the issues that fall to be decided, I dispose of two preliminary issues: whether Bridon UK should be joined in these proceedings as a party and whether ITAC's application to amend its notice of motion should be granted.

[11] Somewhat belatedly, Bridon UK asks to be joined as a party to these proceedings. The application is not opposed by any of the other parties. The attitude of the other parties is an important, but not the only, consideration. The Court remains obliged to satisfy itself whether Bridon UK is entitled to intervene in the proceedings. Intervention of a party in proceedings is regulated by Rule 8(1)[7] of the Rules of this Court which must be read together with Rule 12[8] of the Uniform Rules of the High Court. The latter Rule requires that a party seeking to intervene must have a "direct and substantial interest in the subject matter" of the litigation.[9]

[7] Rule 8(1) provides:

> "Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."

[8] Rule 12 provides:

> "Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."

[9] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at para 17; *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 20; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA

However, in this Court, the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.

[12] In considering where the interests of justice lie, the question whether the party seeking to be joined has a direct and substantial interest in the subject matter of the proceedings will rank highly along other relevant considerations.[10] These would include the stage at which the application for joinder is made; whether the party has furnished adequate explanation for the delay, if any, in seeking to be joined; and the nature of the relief or opposition the intervening party puts up. Whether the intervention would materially prejudice the case of any of the other parties to the litigation is also a relevant factor.

[13] Bridon UK explains that it delayed in seeking to intervene because it was advised that an interim restraining order of the High Court is ordinarily not appealable. However, when it came to know that ITAC's application for leave to appeal had been set down for hearing in this Court, it decided to join the proceedings. There can be no gainsaying that Bridon UK has a pressing commercial interest in the fate of the existing anti-dumping duties against its product. For, as long as the restraining order is in place, ITAC and the two Ministers of state would be precluded from taking steps that would bring the sunset review to fruition and that

1151 (CC); 2001 (7) BCLR 652 (CC) at para 30; and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at paras 7-9.

[10] *Independent Newspapers* above n 9 at para 17.

may lead to the ending of the anti-dumping duties. The duties would remain in force to the obvious commercial detriment of Bridon UK's potential exports into South Africa. Lastly, none of the parties suggested that the intervention of Bridon UK would occasion prejudice to them. I find none. It is clearly in the interests of justice that we hear Bridon UK's submissions as a party. I will without more grant the application for Bridon UK to intervene as a party.

[14] On 2 November 2009, eight days before the hearing, ITAC delivered a notice of intention to amend its notice of motion by inserting an additional prayer for a declaratory order that the anti-dumping duty imposed on the product of Bridon UK lapsed on 16 February 2009. The notice was followed by a formal application to amend lodged only three days before the hearing. The first respondent put up strenuous objection to the proposed amendment on several grounds. Given the fate of the application to amend, I need not recite any of them. On the morning of the hearing, ITAC, correctly so, in my view, withdrew the application and tendered wasted costs occasioned by the abortive notice and application. In due course, I will make an appropriate order related to the wasted costs.

Issues

[15] This case raises three primary issues. They are:

(a) whether it is in the interests of justice to entertain an appeal against a temporary restraining order granted by the High Court; and if it is,

(b) whether it was appropriate for the High Court to grant the restraining order; and

(c) what relief, if any, should be granted?

[16] I narrate the facts first and thereafter discuss the applicable statutory regime before I dispose of each of the issues.

Background and facts

[17] In 2002, the Board on Tariffs and Trade (Board),[11] the predecessor to ITAC, carried out an investigation into alleged dumping of stranded wire, rope and cables of iron or steel originating in or imported from various other countries including the United Kingdom (original investigation). Based on the recommendation of the Board to the Minister, the Minister of Finance imposed an anti-dumping duty on certain products classified under two tariff subheadings.[12] The anti-dumping duties imposed on products from Bridon UK amounted to 42.1%. These substantial duties shielded domestic manufacturers of steel products, including SCAW, from the competition posed by the dumped product of Bridon UK.

[11] The Board was established in terms of section 2 of BTT Act.

[12] Section 4(1)(a) of the BTT Act empowered the Board to investigate dumping, and section 4(1)(b) required the Board to report and make recommendations to the Minister. Section 4(2)(a) provides that the Minister may accept or reject or remit the recommendation back to the Board for reconsideration. If he accepts the recommendation, section 4(2)(b) provides that he may request the Minister of Finance to amend the duties.

[18] Regulation 45[13] of the Anti-Dumping Regulations provides that ITAC may conduct an interim review of anti-dumping duties in a case of "significantly changed circumstances." In August 2006, at the request of Bridon UK, ITAC initiated a "changed circumstances" review. In May 2007, ITAC published a report in which it made a determination that, although Bridon UK did not dump the classifiable product, it could not prove whether the product was dumped or not, as there were no exports of the subject product to the Southern African Custom Union (SACU). However, ITAC found that during the period of investigation, exports made by Bridon UK were far lower in quantity compared to the volume of exports it made prior to the imposition of current anti-dumping duties. ITAC's finding meant that the changed circumstances review had been decided against Bridon UK and that the existing anti-dumping duties would continue in force.

[19] On 19 February 2007, SCAW applied to ITAC to conduct a sunset review before the expiry of the existing anti-dumping duty imposed in 2002. SCAW requested the sunset review with a view to persuading ITAC to extend the life of the existing anti-dumping duties. Ordinarily, anti-dumping duties remain in place for a period

[13] Regulation 45 provides:

> "45.1 The Commission will only initiate an interim review if the party requesting such interim review can prove significantly changed circumstances.
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> 45.2 Where an importer, exporter or foreign producer has not cooperated in the Commission's investigation that led to the imposition of the anti-dumping duty and such importer, exporter or foreign producer is subsequently willing to supply such information, this change in disposition will not qualify as significantly changed circumstances.
>
> 45.3 No party shall be precluded from requesting an interim review simultaneously with a sunset review in order to expand or limit the scope of application or level of any anti-dumping duties."

not exceeding five years from their imposition or their last review.[14] However, if a sunset review is initiated before the lapse of an anti-dumping duty, it "shall remain in force until the sunset review has been finalised".[15] A sunset review may be requested by any interested party.[16] At the end of a sunset review, ITAC's recommendation may result in the termination, amendment or reconfirmation of the original anti-dumping duty.[17]

[20] On 17 August 2007, ITAC heeded the request of SCAW and initiated a sunset review. It investigated whether the removal of the anti-dumping duties would be likely to lead to the continuation or a recurrence of injurious dumping. On completion of the investigation, ITAC considered making a recommendation to the Minister which it first set out in an "essential facts letter".[18] Regulation 43 requires

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[14] Regulation 53.1 provides:

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

[15] Regulation 53.2 provides:

> "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 finalised."

[16] Regulation 54.3 provides:

> "Interested parties will receive 30 days from the publication of the notice contemplated in subsection 1 to request a sunset review."

[17] Regulation 59 provides:

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

[18] Regulation 43 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.

ITAC to inform all interested parties of the "essential facts" it will consider in its final finding or determination and the parties may furnish ITAC with their comment on the contents of the "essential facts letter". ITAC is obliged to consider all relevant comments before making its final determination.

[21] The "essential facts letter" recorded that ITAC had reason to believe that further dumping by other foreign exporters and producers would occur, but that it did not anticipate that there would be dumping of the product of Bridon UK.

[22] In its investigation into whether to remove the duties, ITAC found that, while steel fishing ropes produced by Bridon UK were stored in South Africa, they were kept in bonded warehouses and sold to foreign vessels. They did not enter the SACU or South Africa for "home consumption".[19] No Value Added Tax or customs duties were raised in respect of the fishing ropes. ITAC reasoned that in terms of section 55(3) of the Customs and Excise Act,[20] the owner of goods held in a bonded

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43.4 In its final determination the Commission will consider all relevant comments on the essential facts letter made by cooperating interested parties, provided such comments are received by the deadline contemplated in subsections 2 and 3."

[19] Section 55(1) of the Customs and Excise Act provides:

"The goods specified in Schedule 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate anti-dumping, countervailing or safeguard duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods."

[20] Section 55(3) of the Customs and Excise Act provides:

"(a) Whenever any anti-dumping, countervailing or safeguard duty is imposed on any goods under the provisions of this Chapter, the owner of any such goods stored in a customs and excise warehouse shall produce the invoice and other documents relating to such goods to the Controller not later than the time of entry of all or any part of such goods for removal from such warehouse.

warehouse or, to use the language of the statute, held "for export from a customs and excise warehouse" need not produce invoices and other documents relating to the goods to the Controller of Customs.[21] In the view of ITAC, the goods were to be treated as if they never entered the country for "home consumption". It concluded that there was no evidence to suggest that dumping had occurred and that the fishing ropes in the bonded warehouses had to be excluded from the enquiry on whether to lift existing anti-dumping duties. This meant that ITAC had restricted its sunset review to exports of crane ropes that also fell into the category affected by the anti-dumping duties. ITAC concluded that the lifting of existing anti-dumping duties would not result in further dumping by Bridon UK.

[23] On 14 October 2008, ITAC made a decision to recommend to the Minister that the existing anti-dumping duty on imports of the product by Bridon UK should be terminated.

[24] On 20 October 2008, SCAW launched an urgent application in which it asked for interdictory relief against ITAC, the Minister and the Minister of Finance. During January 2009, the High Court granted the temporary interdict sought and later refused ITAC leave to appeal its decision. ITAC approached the Supreme Court of Appeal. It too turned down the application for leave to appeal.

(b) The provisions of paragraph (a) shall not apply in the case of such goods entered for export from a customs and excise warehouse."

[21] Id.

Applicable law

[25] Parliament ratified South Africa's membership of the WTO on 2 December 1994 and approved the Anti-Dumping Agreement on 6 April 1995. In *Progress Office Machines*,[22] the Supreme Court of Appeal correctly concluded that the Anti-Dumping Agreement is binding on the Republic in international law, even though it has not been specifically enacted into municipal law. In order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations.[23]

WTO rules on anti -dumping

[26] International rules on anti-dumping duties are contained in the Anti-Dumping Agreement. Article 2.1 provides that a product is to be considered as being dumped when it is "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product destined for consumption in the exporting country."

[27] Article 1 of the Anti-Dumping Agreement read with Article VI of the General Agreement on Tariffs and Trade 1994, makes it clear that anti-dumping duties are

[22] *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) at para 6.

[23] Above n 3.

exceptional, remedial measures that may be imposed only if a duly conducted investigation reveals that dumping has taken place and that it causes or poses a threat of material injury to the local industry. Article 9.1 provides that even where all pre-requisites for the imposition of a duty have been fulfilled, the actual imposition remains discretionary. On the other hand, in terms of Article 11.1, dumping duties must remain in force only as long as and to the extent necessary to counteract the dumping which is causing material injury.

[28] The duration of a dumping duty is regulated by Article 11. Article 11.3 in relevant part provides:

> "Notwithstanding the provisions of paragraph 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 of 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 shall remain in force pending the outcome of such a review."

[29] The review contemplated in Article 11.3 is the sunset review and its duration is circumscribed by Article 11.4. Article 11.4 states:

> "Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review."

[30] Article 5.10 provides:

> "Investigations shall, except in special circumstances, be concluded within one year and in no case more than 18 months, after their initiation."

Domestic statutory regime

[31] The Act is the primary domestic legislation for controlling anti-dumping duties and other harmful trade practices associated with international trade. This it does in order to pursue its overarching object to foster economic growth and development which, in turn, would "raise incomes and promote investments and employment within the Republic and within the Common Customs Area". The object is to be achieved, in part, by establishing an efficient and effective system for the administration of international trade.[24]

[32] The Act clothes the Minister with far-reaching authority in relation to trade policy. It includes the power to issue, subject to the Constitution and the law, trade policy statements or directives and the power to regulate imports and exports. ITAC exercises its functions subject to these powers of the Minister.[25] The Minister also

[24] Section 2 of the Act provides:

> "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 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."

[25] Sections 5 of the Act provides:

> "The Minister may, by notice in the *Gazette* and in accordance with procedures and requirements established by the Constitution or any other relevant law, issue Trade Policy Statements or

wields the power to prescribe regulations in order to give effect to the object of the Act.[26]

[33] Before the passage of the Act in 2002 and of the complementary Anti-Dumping Regulations in 2003, anti-dumping measures were regulated under two separate,

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Directives."

Section 6 of the Act provides:

"(1) The Minister may, by notice in the *Gazette*, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be—

(a) imported into the Republic;

(b) imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission;

(c) exported from the Republic; or

(d) exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.

(2) For the purpose of subsection (1) goods may be classified according to—

(a) their source or origin;

(b) their intermediate or final destination;

(c) the channels along which they are transported;

(d) the manner in which they are imported or exported;

(e) the purposes for which they are intended to be used;

(f) the methods or processes by which they are produced;

(g) the use of non-renewable natural resources in their production, and their life-cycle impact on the natural environment; or

(h) any other classification methods determined by the Minister.

(3) A notice issued in terms of this section applies to any person who, at the time of the import of particular goods into the Republic, or the export of particular goods from the Republic—

(a) owns those goods;

(b) carries the risk of those goods;

(c) takes or attempts to bring those goods into, or takes or attempts to take those goods from, the Republic;

(d) in any manner whatsoever has a beneficial interest in those goods;

(e) acts on behalf of a person referred to in paragraph (a), (b), (c) or (d); or

(f) pretends to be a person referred to in paragraph (a), (b), (c), (d) or (e).

but complementary pieces of legislation. These are the BTT Act[27] and the Customs and Excise Act.[28] The former established a Board whose primary objects include the promotion of industrial growth within the framework of economic policy by conducting investigations into any matter which affects or may affect trade and industry of the Republic or of the SACU. One of its primary functions is to investigate dumping and other forms of disruptive competition and to make

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(4) Despite any other provision of this Act, a notice issued in terms of this section in respect of goods that are the subject of a notice issued by the Minister of Defence in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968, is deemed to have been revoked as from the date of the latter notice."

Section 7 of the Act provides:

"(1) The International Trade Administration Commission is hereby established, and—

(a) has jurisdiction throughout the Republic;

(b) is a juristic person; and

(c) must exercise its functions in accordance with this Act and any other relevant law.

(2) The Commission—

(a) is independent and subject only to—

(i) the Constitution and the law;

(ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and

(iii) any notice issued by the Minister in terms of section 6; and

(b) must be impartial and must perform its functions without fear, favour or prejudice.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively."

[26] Section 59 of the Act provides:

"The Minister may make regulations—

(a) regarding the proceedings and functions of the Commission, after consulting the Commission;

(b) to give effect to the objects of this Act; and

(c) on any matter that may or must be prescribed in terms of this Act."

[27] Above n 5.

[28] Above n 4.

recommendations to the Minister who may accept or reject the report and recommendations or refer them back to the Board for reconsideration. If the Minister accepts the report and recommendations he or she may request the Minister of Finance to amend the Schedule to the Customs and Excise Act.[29] The Schedule in issue contains the prescribed duty payable on goods specified in it which are subject to anti-dumping and other duties.[30]

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[29] Section 4(2) of BTT Act provides:

> "Upon receipt of the report and recommendations referred to in subsection (1)(b), the Minister may—
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> (a) accept or reject such report and recommendations, or refer them back to the Board for reconsideration; and
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> (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)."

[30] Section 55 of the Customs and Excise Act read together with Schedule 2.

Section 55 of the Customs and Excise Act provides:

> "(1) The goods specified in Schedule No. 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate anti-dumping, countervailing or safeguard duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods.
>
> (2)(a) The imposition of any anti-dumping duty in the case of dumping as defined in the International Trade Administration Act, 2002 (Act No. 71 of 2002), a countervailing duty in the case of subsidized export as so defined or a safeguard duty or quota in the case of disruptive competition as so defined and the rate at which or the circumstances in which such duty or quota is imposed in respect of any imported goods shall be in accordance with any request by the Minister of Trade and Industry under the provisions of the International Trade Administration Act, 2002.
>
> (b) Any such anti-dumping, countervailing or safeguard duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping, countervailing or safeguard duty is imposed in respect of those goods under section 57A.
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> (3)(a) Whenever any anti-dumping, countervailing or safeguard duty is imposed on any goods under the provisions of this Chapter, the owner of any such goods stored in a customs and excise warehouse shall produce the invoice and other documents relating to such goods to the Controller not later than the time of entry of all or any part of such goods for removal from such warehouse.
>
> (b) The provisions of paragraph (a) shall not apply in the case of such goods entered for export from a customs and excise warehouse.
>
> (4) An anti-dumping, countervailing or safeguard duty or quota imposed under the provisions of this Chapter shall not apply to any goods entered under the provisions of any item

[34] The Act repealed the whole of the BTT Act.[31] 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.[32] More importantly, the transitional provisions

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specified in Schedule No. 3 or 4 unless such item is specified in Schedule No. 2 in respect of such goods.

(5) Notwithstanding the provisions of section 56, 5A or 57, the Commissioner may, subject to such conditions as he may impose in each case, exempt from payment of any anti-dumping, countervailing or safeguard duty, any goods which are imported in such circumstances or in such quantities that the importation of such goods does not, in his opinion, constitute regular importation of such goods for trade purposes."

[31] Section 63(2) of the Act provides:

"The laws specified in Schedule 3 are, subject to subsection (3) and Schedule 2, repealed to the extent indicated in the third column of that Schedule."

[32] See section 2(1) and (2) of Schedule 2 of the Act, read together with sections 3, 4(1) and 5.

Section 2 of Schedule 2 of the Act provides:

"(1) Before the sections listed in section 64(2) come into operation, the Commission must investigate, and evaluate applications received by it in terms of section 26(1)(c) or (d) in accordance with section 32, read with the Board on Tariffs and Trade Act, as if that Act had not been repealed.

(2) For the purposes of this item—

(a) section 26(1)(c) must be regarded as if it read:

'(c) the amendment of customs duties, including an amendment in respect of any of the following matters arising in respect of goods imported into the Republic—

(i) anti-dumping duties;

(ii) countervailing duties; or

(iii) safeguard duties; or';

(b) section 26(2)(b) must be regarded as if it read:

'(b) received in terms of subsection (1)(c) or (d), in accordance with the provisions of item 2 of Schedule 2'; and

(c) a reference in the Board on Tariffs and Trade Act to the Board must be regarded as referring to the Commission."

Section 3 of the Act provides:

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 anti-dumping duties. The consequence of this is that ITAC is required to investigate and evaluate applications for anti-dumping duties in accordance with section 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 Chapter VI of the Customs and Excise Act deals, amongst other things, with anti-dumping duties. Of importance, is that section 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

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"(1) Subject to subsection (2), this Act applies to all economic activity within, or having an effect within, the Republic.

(2) Sections 6, 26(1)(a) and 26(2)(a) and Part B of Chapter 4 do not apply to the export or import of goods in respect of which the Minister of Defence has issued a notice in terms of section 4C(1)(a) of the Armaments Development and Production Act, 1968 (Act 57 of 1968), prohibiting the—

(a) export or import of those goods; or

(b) export or import of those goods except under authority of and in accordance with the conditions stated in a permit referred to in section 4C(1)(a)(ii) or (vi) of that Act."

Section 4(1) of the Act provides:

"The Minister is the head representative of the Republic to the SACU Council."

See section 5 above note 25.

detailed provisions on anti-dumping are to be found in Anti-Dumping Regulations. Sub-Part IV of the Regulations and, in particular, regulations 53 to 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.[33] Also, Article 11.1 requires that duties "*shall*" remain in force only as long as and to the extent necessary to counteract injurious dumping.[34]

[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."

[33] See Article 11.3 at [28] above.

[34] Article 11.1 provides:

> "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

[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.[35]

[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 made again clear by regulations 53 and 54.1. In particular, regulation 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 anti-dumping duty.[36]

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[35] See Article 11.4 at [29] above and Article 5.10 at [30] above.

[36] See regulation 53.1 above n 14 and regulation 53.2 above n 15.

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."

See also the WTO Panel Report in "United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan", WT/DS244/R, at p 9, para 7.8 and pp 15-6, para 7.39, footnote 43.

[40] Regulation 20 provides that all investigations and reviews "*shall*" be finalised within "*18 months*" after initiation.[37]

Is it in the interests of justice to entertain an appeal against a temporary restraining order?

[41] The leave to appeal sought is against a restraining order pending a review to set aside the impugned decision of ITAC. The question whether to grant leave to appeal depends on two important considerations. They are whether a constitutional issue has arisen and if it has, whether it is in the interests of justice to grant leave to appeal. Whether it is in the interests of justice to grant leave to appeal hinges on a cluster of interactive considerations. I need hardly add that when this Court is seized with that enquiry it must consider each case in the light of its own facts. Prospects of success would be a crucial consideration but would not alone be decisive.[38]

Constitutional issues

[42] The litigants are at one that the application for leave to appeal involves constitutional matters. That is indeed so. First, the order of the High Court restrains two members of Cabinet from exercising executive powers conferred

[37] Regulation 20, which provides for "Deadlines", reads:

"All investigations and reviews shall be finalised within 18 months after initiation."

[38] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19, *De Freitas and Another v Society of Advocates of Natal* [1998] ZACC 12; 1998 (11) BCLR 1345 (CC) at para 17; and *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 11.

upon them by the Constitution and national legislation. It is plain from section 85(2)(a), (b) and (e) of the Constitution,[39] that the two Ministers exercise executive authority by "implementing national legislation"; by "developing and implementing national policy"; and by "performing any other executive function" provided for in national legislation. As we have seen, the Act and the BTT Act variously require the two Ministers to formulate and implement national policy and to perform specified executive functions related to exports and imports of goods and other international trade activities. More pertinently, they are required to impose, change or remove anti-dumping duties in order to realise the primary economic and developmental objects of the statutes.

[43] Second, the impugned recommendation of ITAC too has been made in terms of national legislation that regulates the administration of international trade and also seeks to give effect to the international obligations of the Republic. The construction of provisions of the operative domestic legislation consistent with the Constitution, in itself raises a constitutional issue.[40] In any event, we are required

[39] Section 85(2) provides:

> "(2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> . . .
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

[40] See *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, Case No CCT 40/09, 14 October 2009, as yet unreported, at paras 42-3; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10)

by the Constitution to interpret domestic legislation governing the duration of anti-dumping duties consistently with these international obligations.[41]

[44] Third, the restraining order brings to the fore important issues related to the separation of powers between the courts and the national executive, and the issue of the potential breach of the state's international obligations in relation to international trade. The setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy. That power resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should observe any level of "deference"[42] in making orders that perpetuate anti-dumping duties beyond their normal lifespan is a constitutional matter of considerable importance. Fourth, in the High Court and in this Court, SCAW has invoked procedural justice rights under the Promotion of Administrative Justice Act[43] (PAJA) legislation that is founded on the constitutional right to fair administrative action.

BCLR 1027 (CC) at para 31; *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23; and *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 1-5.

[41] Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[42] See in general *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 46.

[43] 3 of 2000.

[45] In these circumstances, the application for leave to appeal presents important constitutional matters for determination.

Appealability of the "interim" order

[46] Looming large in this case is the fact that the target of the appeal has assumed the form of an interim order. That is indeed a relevant and important but, again, not a determinative consideration in ascertaining where the interests of justice reside. The respondent, SCAW, set much store by the contention that the interim order does not have a final effect and thus that it is not in the interests of justice to grant leave to appeal. In contrast, ITAC and Bridon UK contend that the interdict is of a kind that has a final effect and is accordingly appealable. In order to decide these conflicting contentions, I first set out the test for appealability and then ask the question whether the "interim" interdict is susceptible to an appeal.

The test for appealability

[47] The question whether an appeal against a decision of the High Court may lie directly to this Court is governed by section 167(6)(b)[44] of the Constitution read

[44] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

with Rule 19.[45] The constitutionally prescribed standard is whether it is in the interests of justice for this Court to hear an appeal. In *Khumalo and Others v Holomisa*[46] this Court held that it is not a jurisdictional requirement for an appeal to this Court that the matter must involve a "judgment or order" within the meaning of section 20(1) of the Supreme Court Act.[47] However, the Court pointed out that it will not often be in the interests of justice for this Court to entertain appeals against interlocutory rulings which do not have a final effect on the dispute between the parties.[48]

[48] The same point was made again in *Minister of Health and Others v Treatment Action Campaign and Others (No 1)*[49] (*TAC(1)*):

> "The policy considerations that underlie the non-appealability of interim execution orders in terms of s 20 of the Supreme Court Act, are also relevant to the decision whether it is

[45] Rule 19 provides:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.
>
> (2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[46] [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 8.

[47] 59 of 1959.

[48] *Khumalo and Others v Holomisa* above n 46 at para 8.

[49] [2002] ZACC 16; 2002 (5) SA 703 (CC).

in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order."[50] (Footnotes omitted.)

[49] In this sense, the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni v Minister of Law and Order*[51] which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.[52]

[50] The "policy considerations"[53] that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court *a quo* when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.

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[50] Id at para 8.

[51] 1993 (1) SA 523 (A) at 532I-533A.

[52] For example, see *Van Niekerk and Another v Van Niekerk and Another* 2008 (1) SA 76 (SCA) at para 9; *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) at para 36; *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 690A–691G; and *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 47H-49A.

[53] *TAC (1)* above n 49 at para 8.

[51] After *Zweni*, the Supreme Court of Appeal has recognised that the general rule against piecemeal appeals could conflict with the interests of justice in a particular case. Howie P, writing for a unanimous court in *S v Western Areas*,[54] was required to decide, in an application for leave to appeal in a criminal matter, whether the dismissal of an objection to an indictment was appealable in terms of section 21(1) of the Supreme Court Act.[55] After surveying its case law on the appealability of a "judgment or order" in civil and criminal cases and after referring to the interests of justice test set by this Court in *Khumalo v Holomisa*,[56] he concluded that the general principles enunciated in *Zweni*[57] are neither exhaustive nor cast in stone. He further held that:

> "[I]t would accord with the obligation imposed by s 39(2) of the Constitution to construe the word 'decision' in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that *what the interests of justice require* depends on the facts of each particular case."[58] (Emphasis added.)

[54] Above n 52 at para 20.

[55] Above n 47.

[56] Above n 46.

[57] Above n 51.

[58] Above n 52 at para 28.

[52] More recently, in *Philani-Ma-Afrika v Mailula*,[59] the Supreme Court of Appeal had to decide whether an order of the High Court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the Court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as *S v Western Areas*[60] that "what is of paramount importance in deciding whether a judgment is appealable is *the interests of justice*".[61] (Emphasis added.)

[53] As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice, favoured by our Constitution. In any event, the *Zweni* requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form.[62] In *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service*[63] the Court held, correctly so, that where an interim

[59] *Philani-Ma-Afrika & Others v W M Mailula & Others*, Supreme Court of Appeal, Case No 674/08, 25 September 2009, unreported. The issue of the appealability of an interim execution order was considered by the Supreme Court of Appeal after this Court in *Machele and Others v Mailula and Others* [2009] ZACC 7; 2009 (8) BCLR 767 (CC) had reserved that issue for decision by the Supreme Court of Appeal.

[60] Above n 52 at para 20.

[61] *Philani-Ma-Africa* above n 59 at para 20.

[62] *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

[63] 2005 (3) SA (1) (SCA) at para 24. Also see *South African National Defence Union v Minister of Defence and Others* 2007 (1) SA 402 (SCA) at para 39 (although the Supreme Court of Appeal decision was reversed this portion

order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect.

[54] Lastly, when we decide what is in the interests of justice, we will have to keep in mind what this Court said in *Machele and Others v Mailula and Others*.[64] In that case, the Court had to decide whether to grant leave to appeal against an order of the High Court authorising execution of an eviction order pending an appeal. In granting leave to appeal, Skweyiya J, relying on what this Court held in *TAC (1)*,[65] reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution:

> "The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted."[66]

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of its reasoning was not questioned).

[64] *Machele and Others v Mailula and Others* above n 59.

[65] *TAC (1)* above n 49.

[66] *Machele* above n 59 at para 24. Paragraphs 22-3 of *Machele*, in which Skweyiya J quoted from *TAC (1)*, state:

> "[22] It is generally not in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. The rationale underlying the non-appealability of interim orders was stated by this Court in the following terms:
>
> > '[T]he effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal that, in turn, would suspend the order.' (Footnote omitted.)
>
> [23] I pause to note, however, that while the rationale for the non-appealability of interim orders is generally sound, it does not always provide for situations where the injustice that arises falls not on the party in whose favour the interim order or special relief is granted, but on the party who would, in the ordinary course of events, seek to appeal against the interim order. This matter presents one of those situations. Such a concern is acknowledged by the decision in *TAC I* where, after holding that "it will generally not be in the interests of justice for a litigant to be granted

[55] I am alive to the fact that unlike in *TAC (1)* and in *Machele*, here we are not dealing with an interim order of execution but an interim order against the exercise of statutory power. Even so, the question whether an interim order may result in irreparable harm if leave to appeal is not granted is an important but not the sole requirement for granting leave to appeal. The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.[67]

Is the "interim" interdict appealable?

[56] SCAW submitted that the interim interdict is not appealable because it is not finally dispositive of the issues in dispute. That however, is not the test. It is not a

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leave to appeal against an interim order of execution", the Court continued to say the following:

> '[F]or an applicant to succeed in such an application, *the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted* – a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail.'" (Original emphasis.)

[67] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3, Case No CCT 72/09, 18 February 2010, as yet unreported, at para 15 and *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, Case No CCT 54/09, 23 February 2010, as yet unreported, at para 23.

requirement that the interim relief should be dispositive of all the issues in dispute before it becomes appealable. It is sufficient if the order disposes of "at least a substantial portion of the relief claimed in the main proceedings".[68] Also, it is adequate if the interim order is intended to and does have an immediate effect and is not susceptible to be reconsidered on the same facts in the main proceedings.[69]

[57] As I see it, the immediate consequence of the order is that it is final and causes irreparable harm. First, the order maintains the existing anti-dumping duty where it would otherwise have ended either by operation of the law, on ITAC's version of the lawful lifespan of the anti-dumping duties, or as a result of ITAC's decision to recommend that the duty end on completion of the review. In effect, the court order instantly stopped the sunset review, prevented its completion and precluded the exercise of any ministerial discretion that is dependent on ITAC's recommendation arising from the sunset review.

[58] Second, every import of the subject product of Bridon UK is liable to bear a 42.1% duty and that will continue until a court decision on the pending review. The duty is not refundable at the end of the pending review even if ITAC were to succeed in the review. In addition, Bridon UK correctly argues that the existing anti-dumping duty is of such a high order that it effectively excludes its goods from domestic

[68] *Zweni* above n 51 at 532I-533A.

[69] *Metlika Trading* above n 63 at paras 22-4.

markets and from the SACU markets. So, while existing anti-dumping duties remain in place, Bridon UK products remain expensive or unaffordable and that must lead to loss of sales. Similarly, whilst the interdict is in force neither the two Ministers nor ITAC will be free to perform their statutory obligations related to the existing anti-dumping duty. Whatever the outcome of the review, the order has irreparable consequences and an immediate and final effect in the sense stated in *Metlika Trading*.[70]

[59] I am satisfied that although the interdict granted by the High Court carries an interim tag, it is susceptible to an appeal. The decision on the lawful lifespan of the existing anti-dumping duty is not open to alteration by the court of first instance. It is final in effect. It is definitive of the rights of the parties on the duration of the anti-dumping duty and therefore has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Should leave be granted?

[60] I have found that this case raises important constitutional questions and that the "interim" decision of the High Court is appealable. That however, is not the end of the matter. In the final instance I still have to assess whether it is in the interests of justice to grant leave to appeal. SCAW has urged us not to grant leave to appeal.

[70] Above n 63 at para 24.

[61] I think it is in the interests of justice for this Court to pronounce on: (a) the lawful extent of the legislatively prescribed lifespan of an anti-dumping duty; (b) whether the interdict had the effect of extending the lifespan of the existing anti-dumping duty; and if so, (c) whether the order trenches on separation of roles and powers between the national executive and the courts; (d) whether the judicial extension of the anti-dumping duties threatens South Africa's trade relations and other obligations under international law; (e) whether the matters to be determined by this Court on appeal will come up for decision in the final review before the High Court and therefore will not require this Court to prejudge the outcome of the review; and lastly, (f) whether there are reasonable prospects that this Court may find that whilst it may have been competent for the High Court to make the order it did, it was not constitutionally permissible or appropriate for it to do so.

[62] Before I move on to the merits of the appeal, I find it necessary to explain further why I am of the view that this Court, by hearing this appeal, will not fall foul of prejudging the review pending in the High Court.

[63] SCAW makes the point that the urgent application before the High Court was decided in great haste and without adequate opportunity for it to traverse the issues in a comprehensive manner. SCAW submits that it will be only after the outcome of the review that this Court will have the benefit of a fully reasoned judgment based on a comprehensive set of affidavits. The submission goes that if leave to

appeal were granted this Court would be required to sit as a court of first and final instance. SCAW adds that if this Court were to grant leave to appeal, its judgment would place the High Court hearing the review in an invidious position because this Court would have prejudged the outcome of the review.

[64] A brief review of the issues that served before the High Court will shed considerable light on whether there is a risk of this Court prejudging the pending review. In the High Court, SCAW attacked the recommendation on four grounds of review. First, that ITAC misdirected itself when it held that Bridon UK's exports into the SACU did not include fishing ropes. Second, that ITAC was wrong when it excluded fishing ropes from the determination of dumping margins. Third, that Bridon UK's sales of crane ropes should not have been considered in support of the recommendation. And fourth, that ITAC failed to observe procedural fairness by not allowing SCAW to make oral representations.

[65] The High Court upheld the second ground and found that ITAC misdirected itself when it excluded steel fishing ropes from the determination of dumping margins. The Court did not decide the merits of the first and third grounds and refused to uphold the fourth ground. On the strength of a favourable finding to SCAW on one of its four grounds the Court found itself persuaded that SCAW had established a "clear right" that entitled it to an interim interdict.

[66] In the present appeal this Court is not called upon to pre-determine whether the "clear right" the High Court refers to is well founded. The appeal is about the constitutional appropriateness of granting an interdict that extends an existing anti-dumping duty in a manner that implicates the separation of powers and the international trade obligations of the Republic. That is not a matter which will be the subject of the review court. It is a constitutional matter which is not susceptible to re-consideration by the High Court, but one which, given that the Supreme Court of Appeal had declined to hear the matter, only this Court may properly decide.

[67] I am satisfied that it is in the interests of justice to grant leave to appeal to this Court.

Merits of the appeal

Was it appropriate for the High Court to grant the interim interdict?

Introduction

[68] This Court directed the parties to make written submissions on whether it was "competent" or "appropriate" for the High Court to grant an interdict. Their respective written submissions diverged on what each word conveyed. It seems to me that "competence" points to the legal power or authority to grant an interdict, and "appropriateness" relates to whether, if the court had the competence to make

the order, it applied the operative law properly or exercised its discretion judiciously.

[69] It is beyond doubt that the High Court has the power to entertain and grant an application for interim relief.[71] The real question is whether, in granting the relief, it made an order that is constitutionally permissible or appropriate.

Appropriateness and the lifespan of an anti-dumping duty

[70] It is helpful to recap on the facts. The existing anti-dumping duty was imposed on 28 August 2002 and was due to end after five years on 28 August 2007. On 19 February 2007 SCAW lodged an application for the initiation of a sunset review. On 17 August 2007 ITAC initiated a sunset review. On 14 October 2008, ITAC decided to recommend that the existing duty be ended. Within three days SCAW

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[71] *National Gambling Board v Premier, KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 48.

Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

Section 46(1) of the Act provides:

> "A person affected by a determination, recommendation or decision of the Commission in terms of section 16 or 17 or this Chapter, may apply to a High Court for a review of that determination, recommendation or decision."

See Erasmus et al *Superior Court Practice* (Juta, Cape Town 2009) at E8-1 to E8-4, E8-8A to E8-14 (Revision Service 33).

initiated interdictory proceedings and procured an interdict. The parties agree that the intended effect of the interdict is to maintain the existing anti-dumping duty until the review is finalised. However on this matter the High Court was silent when it granted the interdict.

[71] Whilst it is true that ordinarily an appeal lies against an order and not against the reasoning in a judgment,[72] it is permissible and sometimes necessary to look at the reasons advanced by a court for making the order sought to be appealed against so that one fully grasps the reach and effect of the order.[73] Not infrequently, a court considering an application for leave to appeal its decision, furnishes additional reasons for the order it originally made. Often the additional reasons throw light on the ambit and effect of the order sought to be appealed against.

[72] When it refused leave to appeal, the High Court shed considerable light on the reach and impact of the order it made:

> "Once a sunset review is initiated timeously as is the case with the present review, the subject matter of the dispute between the parties, the anti-dumping duties remain in place. If judicial intervention prevents a sunset review from being finalised within 18 months, the expiry of that period can neither interrupt the finalisation of a judicial review nor

[72] In *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E it was held that:

> "When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment."

See further *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 12 (A) at 43A.

[73] *Administrator, Cape, and Another v Ntshwaqela and Others* above n 72 at 715C-716C.

emasculate the power of the court to ensure that the sunset review is conducted in a lawful fashion.

It follows that the obligation to pay anti-dumping duties persists while the judicial review winds its weary way through the courts. This would have been the natural consequence of the review having been instituted. The interim interdict has therefore merely confirmed the ordinary consequences arising from an as yet undetermined judicial review.

A similar result would follow if a sunset review was concluded with the recommendation to the second [Minister] and third respondents [Minister of Finance] to terminate existing duties but the second and third respondents fail to act within 18 months period upon such a recommendation. In such event, the duties would continue until such time as the second and third respondents had investigated the situation and had come to the conclusion to accept the recommendation. If the recommendation had been rejected by the second and third respondents in the principal application the duties would have continued while the matter was referred back to first respondent."[74]

[74] *SCAW South Africa (Pty) Ltd v The International Trade Administration Commission and Others* North Gauteng High Court, Pretoria, Case No 48829/2008, 16 February 2009, unreported (the judgment in the application for leave to appeal against the order of 5 January 2009), at 6-7.

[73] The Court owes this conclusion to its reasoning that regulation 64[75] regulates judicial reviews and intervention during investigations of ITAC and does not prescribe a time limit for the conclusion of the judicial reviews which, in that Court's view in any event, suffer from interminable delay.[76] Also after hearing argument on regulation 20, it concluded that its provision that all investigations and reviews "*shall be finalised within 18 months after initiation*", does not provide "a cut off date for judicial reviews"[77] before a sunset review is completed.

[74] In effect the Court ruled that the duty will remain in force until the judicial review, however long it may take, has been finally determined and the Minister concerned has ultimately made a decision on the fate of the duties.

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[75] Regulation 64 provides:

> "64.1 Without limiting a court of law's jurisdiction to review final decisions of the Commission, interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that—
>
> (a) the Commission's has acted contrary to the provisions of the Main Act or these regulations;
>
> (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
>
> (c) such prejudice cannot be made undone by the Commission's future final decision.
>
> 64.2 Interested parties must give the Commission at least 30 days' notice prior to filing any judicial review relating to preliminary or final determinations.
>
> 64.3 Any Commission decision may be varied to give effect to a ruling of a Dispute Panel or the Appellate Body under the World Trade Organisation Dispute Settlement Mechanism.
>
> 64.4 A Commission decision may be varied to give effect to negotiations under the World Trade Organisation Dispute Settlement Mechanism, provided the Commission has consulted with the affected interested parties regarding any proposed variation."

[76] Section 46 of the Act gives parties the right to apply to the High Court for a review of the Commission's recommendations, determinations or decisions. See section 46 above n 71.

[77] High Court judgment in the application for leave to appeal above n 74 at 5.

[75] In this Court, SCAW has defended the reasoning of the High Court by submitting that an anti-dumping duty remains in force for as long as a judicial review of the impugned determination of ITAC is pending and that the High Court was correct in granting the interdict to that effect. ITAC and Bridon UK contend that the interdict was intended to and in effect has extended the duration of the anti-dumping duty. They argue that the Court had no power and that it was not appropriate for it to extend the lifespan of the anti-dumping duty.

[76] SCAW advanced the argument that anti-dumping duties do not lapse if after five years a timeous sunset review has not been completed within 18 months, and that anti-dumping duties shall remain in force until the sunset review is finalised. They submit that the time limit in Article 5.10 does not apply to the present matter, but in the event that the Court finds that it does, that the initiation of a sunset review suspends the running of the 18 month period prescribed by Article 5.10[78] and regulation 20.[79] They urge us to hold that anti-dumping duties remain in force for as long as the conclusion of a sunset review is delayed, even if it is beyond 18 months. Counsel made much in this regard of the fact that no regulation provides, in discrete and express terms, that anti-dumping duties lapse without more if judicial review proceedings that interrupt the conclusion of ITAC's review process continue after the five-year plus 18-month period.

[78] See [30] above.

[79] Above n 37.

[77] In my view, this contention hangs too much on literalism. It is at odds not only with the foundational rationale and scheme of the international and domestic anti-dumping regime, but with the plain import of regulation 20 (which commands that "[a]ll investigations and reviews shall be finalised within 18 months after initiation"). Counsel invited us to regard regulation 20 as conveying no more than an exhortation to ITAC to finalise all its processes within 18 months. That it does. But it does more. Read, as it should be, with regulation 53, which envisages no more than a five-year term for anti-dumping duties, although they remain in force until any sunset review "has been finalised", its effect is best understood as imposing a guillotine.

[78] This conclusion accords with the internationally accepted rationale and scheme of anti-dumping duties. Duties may be imposed only after a full investigation which has led to a definitive finding of injurious dumping and not by judicial decree. Duties are remedial and punitive and for that reason are imposed on a fixed term and may be extended on proof of dumping that causes injury to the home industry affected after a conclusive and fair investigation by a specialist body established for that purpose. A crucial building block of the anti-dumping regime is that duties must be appropriately tailored to the injury the dumping of exports causes to the commerce of the country imposing the duties. A measure of proportionality is

required. A duty must be imposed only for so long as it is necessary to ward off proven harmful dumping into the commerce of the country imposing it.

[79] This is especially so if one keeps in mind the purpose anti-dumping duties are meant to serve. They are short-term punitive measures against offending export goods destined for domestic markets. They are meant to protect domestic commerce and industry from the harmful impact of under-priced imports. However, they are not meant to inhibit permissible competition within the domestic economy. As a general proposition, anti-dumping duties should cease as early as possible and without causing harm to the domestic market. Furthermore, they should remain in force only for so long as it is necessary to counteract dumping that is harmful to the domestic market.

[80] Simply put, duties must remain in force only as long as and to the extent necessary to prevent injurious dumping. An indefinitely elastic term of duties, as contended for by SCAW, would lead to a routine breach of international obligations on account of the laxity or tardiness of domestic authorities, and industries or because of the "interminable delay" that the High Court found "impossible to restrain". In fact, it would be impossible to police or enforce the international law obligations created by the Anti-Dumping Agreement to the economic detriment of the member states of the WTO as well as exporters and consumers.

[81] Whatever textual doubt there may be about whether the guillotine falls on the anti-dumping duties at the latest after five years plus 18 months, a purposive understanding of the domestic regulatory regime is persuasive because it achieves the beneficial outcome of discouraging or stopping venturesome judicial proceedings that can drag out the life force of the duties in plain conflict with the overall policy of the international and domestic regimes.

[82] Ordinarily, after the initiation of the sunset review, the existing anti-dumping duty against the product of Bridon UK would have lapsed on 16 February 2009. Its duration may not be extended beyond 18 months after the expiry of the first five year term from its initiation (in August 2007). This understanding of the domestic legislative regime is to be preferred also because it is by no means onerous to SCAW or others similarly situated. It is open to any interested party to seek an initiation of a fresh investigation by ITAC into Bridon UK's trading conduct in relation to the whole market and that of member states of the SACU. In effect, no horse has bolted, as the High Court suggested might happen if an interim interdict is not granted. The right to initiate an investigation into anti-dumping is virtually evergreen once an existing duty has lapsed.[80]

[80] See regulation 45.3 above n 13 and regulation 66.

Regulation 66 provides:

> "Where the Commission, following an interim review, recommends that the existing anti-dumping duty be decreased or withdrawn, the relevant importer or importers may request that anti-dumping duties be refunded in line with the Commission's findings."

[83] The High Court expressed a legitimate concern that if regulation 20 were interpreted as providing "a cut off date for judicial reviews" that would "emasculate the power of the court."[81] It is so that, in conformity with the constitutional dictates of procedural justice, section 46[82] of the Act read with regulation 64 gives an interested party the right to challenge "preliminary decisions" of, and "procedures prior to the finalisation of an investigation" by ITAC. In other words, an interested party need not wait for a final recommendation by ITAC or a decision by the Minister on whether to follow or remit ITAC's recommendation before requiring judicial review of ITAC's decision. Regulation 64[83] accords with Article 13[84] of the Anti-Dumping Agreement which compels members to maintain judicial or administrative tribunals that permit prompt review of administrative actions relating to final determinations on anti-dumping duties.

[84] In this Court too SCAW contended that if regulation 20 requires that the duration of existing duties is not suspended by the institution of judicial review, then the lapse of the duties by operation of law would render regulation 20 unconstitutional.

[81] High Court judgment in the application for leave to appeal above n 74 at 6.

[82] Above n 71.

[83] Above n 75.

[84] Article 13 provides:

> "Every Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."

It argued that regulation 20 would have the effect of depriving SCAW of its right to lawful, reasonable and procedurally fair administrative action under section 33(1) of the Constitution.

[85] This argument improperly conflates the legislatively permissible duration of existing duties with the right to judicial review related to any determination of ITAC on existing duties. It is so that delays in judicial reviews are endemic in most jurisdictions. This fact must be deemed to be notorious to most member states of the WTO. It is highly probable that delays in courts and tribunals may extend beyond the prescribed lifespan of anti-dumping duties. However, the lapsing of an existing duty does not and should not stand in the way of a fulsome ventilation of court disputes on dumping duties. The anti-dumping duties need not be extant for justice to be done. The procedural lapses may be properly set aside, but that should not ordinarily mean that the court itself may impose anti-dumping duties or keep alive expired duties or that the claimant has a right to an extension of duties beyond the duration of dumping duties that the law permits.[85]

[85] This conclusion appears to be supported by the following:

In the matter of "Brazil – Measures Affecting Imports of Retreaded Tyres", WT/DS332/AB/R at pp 98-9, paras 248-252 and p 101, the WTO Appellate Body found that steps taken under the direction of a domestic court order may nevertheless place a Member state in breach of its international obligations. South Africa was at risk of being in breach of its international obligations in terms of the Anti-Dumping Agreement when, in 2008, Indonesia lodged a request for consultations with the WTO against South Africa under Dispute WT/DS374/1, for its continued imposition of anti-dumping duty on imports of uncoated woodfree white A4 paper from Indonesia. The complaint acknowledged that interim orders issued in domestic judicial proceedings had prevented the final determination of the sunset review, but contended that this nevertheless constituted a failure to complete the sunset review within an appropriate time under clause 11.4 of the Anti-Dumping Agreement. The request for consultation was withdrawn on 25 November 2008, when South Africa terminated the anti-dumping duty on uncoated woodfree white A4 paper imported from Indonesia. This product was the subject matter of the dispute in *Progress Office Machines* above n 22.

[86] If it were so, parties in a position similar to SCAW would in effect hold to ransom domestic high national executive office-bearers charged with the power to make international trade policy, at the expense of competitors, whose goods are burdened with anti-dumping duties, and all others concerned, whilst judicial reviews meander through slow judicial processes. As I remarked earlier, protracted litigation would render nugatory the obligations which a member state bears under the Anti-Dumping Agreement. Another important consideration is that a country's commercial relations with others would suffer, as would consumers who seek to procure the products which continue to carry punitive duty. All of these would have deleterious consequences for domestic custom and for mutually beneficial international trade.

[87] Therefore, it was inappropriate for the High Court to extend the term of the existing anti-dumping duty or to prevent its lapsing. A court should be slow to override mandatory legislative provisions buttressed by international obligations.

Furthermore, in the matter of "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities", WT/DS341/R, at pp 40-1, paras 7.117-7.123, a WTO panel found, albeit in the context of an investigation on the imposition of countervailing measures under Article 11.11 of the Agreement on Subsidies and Countervailing Measures, that the requirement that an investigation be completed within 18 months is mandatory and does not allow the period to be prolonged.

Compare, however, the WTO Panel Report in "United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan" above n 36 pp 8-9, para 7.8 and pp 15-6, para 7.39; the WTO Panel Report on "Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico", WT/DS156/R, at p 335, para 8.102; and WTO Panel Report on "United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')", WT/DS294/R, at p 132, para 7.220.

[88] Before I conclude this section of the judgment it is appropriate that I refer to two decided cases relied upon by SCAW. Both appear to be at odds with the decision this Court has reached in the present matter. In *African Explosives Ltd v ITAC and Others*[86] the applicant, African Explosives Limited, had instituted a review application in terms of section 46(1) of the Act. ITAC contended that the proceedings were moot and only of academic interest because anti-dumping investigations are time-specific and had become time-barred. ITAC argued that if the court held in favour of the applicant, it would not be possible for it to continue with its investigation as it had to be completed by a fixed future date. However, the Court found that the 18 month period in regulation 20 was suspended by the institution of a review application and that this period would not continue to run until the review application had been finalised. A similar finding was made by the High Court in this case.[87]

[89] In *Algorax (Pty) Ltd v ITAC and Others*[88] the Court granted an interdictory order against ITAC almost identical to the one granted by the High Court in this case. In *Algorax*, the Court granted an order interdicting ITAC from forwarding its recommendation to the second respondent (presumably the Minister, although it is not clear from the judgment), pending the finalisation of a review application. In the light of the decision I reach, the decisions of the North Gauteng High Court in

[86] North Gauteng High Court, Pretoria, Case No 15027/2006, 5 August 2008, unreported.

[87] See [72] above.

[88] North Gauteng High Court, Pretoria, Case No 25233/05, 10 September 2005, unreported.

African Explosives and in *Algorax* are overruled to the extent that they are inconsistent with this decision.

Separation of powers

[90] The Constitution makes no express provision for separation of powers. In the *First Certification* judgment,[89] the Court was satisfied that the new Constitution did comply with the requirement for separation of powers envisaged in Constitutional Principle VI.[90] It reasoned as follows:

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."[91]

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[89] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[90] Schedule 4 to the Interim Constitution of the Republic of South Africa, Act 200 of 1993 contained a set of constitutional principles with which the final Constitution of the Republic of South Africa had to comply. Constitutional Principle VI provided:

> "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

In the *First Certification* judgment above n 89 at para 1, this Court was required to "pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new Constitution comply with certain principles contained in the country's current Constitution."

[91] *First Certification* judgment above n 89 at para 109. See also *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 88; *Bato Star* above n 42 at para 46; and *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45.

[91] It is now clear from a steady trickle of judgments that the doctrine of separation of powers is part of our constitutional architecture.[92] Courts are carving out a distinctively South African design of separation of powers. It must be a design which in the first instance is authorised by our Constitution itself. In other words it must sit comfortably with the democratic system of government we have chosen. It must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history.[93] For instance, it must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively provided that the laws and policies in issue are consistent with constitutional dictates.

[92] In our constitutional democracy, all public power is subject to constitutional control.[94] Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are

[92] *Bato Star* above n 42; *Van Rooyen and Others v S and Others* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC); *Pharmaceutical Manufacturers* above n 91; and *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[93] As Ackermann J foresaw in *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 60.

[94] *Pharmaceutical Manufacturers* above n 91 at paras 19-20; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 38; 2006 (12) BCLR 1399 (CC) at 1417F.

the ultimate guardians of the Constitution.[95] They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.[96]

[93] It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.[97]

[94] For example, not infrequently courts are invited by litigants to intervene in the domain of other branches of government. That was the situation in *Doctors for Life*.[98] This was the case in which pregnancy and abortion-related legislation was challenged on the ground that Parliament had failed in its duty to facilitate public involvement. The purpose of this constitutional requirement is to facilitate

[95] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 38; 2006 (12) BCLR 1399 (CC) at 1417F-G.

[96] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 25.

[97] See *Bato Star* above n 42 at para 47 where the following dicta of the House of Lords in *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) at para 76 was quoted with approval:

> "This means that the courts themselves often have to decide the limits of their own decision-making power."

[98] Above n 94.

participatory democracy. The Court had the following to say about the separation of powers:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[99] (Footnote omitted.)

[95] 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.

[99] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 37; 2006 (12) BCLR 1399 (CC) at 1417C-E.

[96] In the High Court the Minister joined issue with ITAC and opposed the granting of the interdict. In a deposition filed on his behalf, he contended that the interdict would prevent him from exercising his power and discretion to act in terms of the statutes and frustrate the exercise of his duties related to the determination of anti-dumping duties. He contended that if the interdict were to be granted it would be an unjustified limitation of his functions under the Act and the BTT Act. He added that an applicant similarly situated to SCAW, which has asked that duties be imposed on the products of a competitor in order to protect its financial interest, would through the courts be able to frustrate the exercise of the ministerial discretion.

[97] The affidavit explains that no decision has been made in relation to the existing anti-dumping duty. Once the recommendation of ITAC has been received, there would be extensive internal evaluation and only then would the Minister make a decision in terms of the statutes. Lastly, the Minister draws attention to the fact that in the past he has referred recommendations back to ITAC for further evaluation and consideration. He makes the final point that an interdict would hinder the proper administration of economic policy, a matter which the Constitution entrusts to the national executive.

[98] The statutory discretion the Minister commands is indeed wide. Barring the predictable requirement that he must wield the power subject to the Constitution

and the law, he or she may accept, or reject the recommendation or remit it to ITAC. Nothing obliges the Minister to follow slavishly the reasoning and findings of ITAC. It is open to the Minister, in making a decision, to weigh in polycentric considerations such as diplomatic relationships, the country's balance of payments, the regional or global trading conditions, goods needed to foster economic growth and so forth. Thus, the recommendation of ITAC may be important but it is not the sole predictor of what the Minister is likely to decide.

[99] It is a matter of some concern that the High Court does not refer to the Minister's legislative power and discretion in relation to the imposition, alteration or removal of duties. Its judgment is silent about the fact that the Minister opposed the granting of the urgent interim relief sought and put up separation of powers as a reason why the interdict would be constitutionally impermissible. There is no indication in the judgment that the High Court had properly considered the role of executive power and policy formulation in matters of national and international trade and industry. Equally so, the judgment is silent on South Africa's international trade obligations in relation to anti-dumping duties. In effect, once the High Court reached its conclusion that ITAC had botched its factual findings, it concluded that SCAW had established a clear right to an interdict. That was the essence of its error.

[100] 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.

[101] That submission is well made. 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.[100] 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. In *Bato Star* this Court made the point that a "court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."[101] In any event, the formulation and implementation of international trade policy is a matter, as I have earlier said, that resides in the heartland of national executive

[100] *TAC (1)* above n 49 at para 12.

[101] See *Bato Star* above n 42 at para 48.

function. That much the Minister asserted when the matter came before the High Court and opposed the granting of the interim interdict.

[102] It seems to me self-evident that 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.

[103] In particular, SCAW has not established, nor is it open to it to contend, that it has a right to a decision that favours the continuation of the anti-dumping duty. It has no right to and cannot contend that ITAC should recommend that anti-dumping duties should be imposed. Even less so, SCAW has no right to require the Minister to accept any recommendation that may favour the continuation of anti-dumping duties. By parity of reasoning, SCAW cannot claim as a right that the Minister of Finance may not give effect to the request of the Minister to terminate the existing anti-dumping duty. 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.[102]

[102] See section 46 of the Act above n 71.

[104] I have found that the effect of the interdict the High Court has granted is to extend the legislatively determined duration of the existing anti-dumping duty. In my view, when the Court extended the existing anti-dumping duty it ventured into the constitutional terrain of the national executive. The order trenches on the principle of separation of powers. Courts may not without justification trench upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive.

[105] The High Court felt constrained to grant an interim interdict because the recommendation of ITAC on the existing anti-dumping duty is an important jurisdictional fact for any action the Minister might take in relation to the fate of the anti-dumping duty.[103] For this proposition, the High Court relied on the remarks of Harms ADP in *Minister of Finance and Another v Paper Manufacturers Association of South Africa*.[104]

[106] In *Paper Manufacturers* the Minister of Finance gave notice of his intention to submit a Taxation Laws Amendment Bill to Parliament. The respondent objected to certain items of the proposed amendment and made an application in the High Court to interdict the Minister, in the form of an interim interdict, from introducing

[103] *SCAW South Africa (Pty) Ltd v The International Trade Administration Commission and Others* above n 6 at para 94.

[104] 2008 (6) SA 540 (SCA) at para 8.

the Bill into Parliament to the extent that it related to items the respondent objected to. The High Court granted the interdict. On appeal, the Supreme Court of Appeal set aside the interim interdict on the grounds that although the order was framed as an interim interdict, it was in effect final and that the applicant had to prove a clear right which it had not done. The Court also held that the applicant had no right to the relief it sought and therefore, no right to the interdict. The Court reasoned that traditionally, courts resisted intrusions into the internal procedures of other branches of government and that courts took the general view that, where there was a flaw in the law-making process, which would result in an invalid law, the appropriate time to intervene would be after the completion of the legislative process. Then, the appropriate remedy would be to have the resulting law declared invalid.[105]

[107] In the course of analysing the provisions of the Act, Harms ADP remarked that:

> "The ITAC report is not only an important link in the administrative and legislative chain; it is indeed a jurisdictional fact for the ministerial actions that follow. It is consequently not surprising that the ITA Act makes special provision for the review of any determination, recommendation or decision of ITAC (s 46). A fatal flaw in the process at the ITAC stage affects the whole process".[106]

[105] Id at para 18 where Harms ADP quoted the dictum in *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 69; 2006 (12) BCLR 1399 (CC) at 1425C-D.

[106] *Minister of Finance and Another v Paper Manufacturers Association of South Africa* above n 104 at para 8.

[108] It seems to me correct that the Minister may discontinue, amend or impose an anti-dumping duty only after considering a recommendation of ITAC. I accept that, in this sense, the recommendation is a jurisdictional fact for the decision of the Minister. Absent a preceding investigation and recommendation, the Minister may not, on his or her own, request the Minister of Finance to impose an anti-dumping duty. I therefore agree that "[a] fatal flaw in the process at the ITAC stage affects the whole process".[107] It must however be kept in mind that firstly *Paper Manufacturers* is not only distinguishable on the facts but also it is not authority for the proposition contended for by SCAW, which the High Court accepted, namely that if ITAC has botched its investigative processes the High Court is entitled to extend the legislatively fixed lifespan of the anti-dumping duty.

[109] The fact that the recommendation is a "jurisdictional fact" does not entitle an aggrieved party to an interdict that gives new life to an anti-dumping duty whose duration would otherwise end. This is so because the lawful lifespan of a duty is legislatively limited and the Minister has a wide discretion to accept or reject the recommendations. The High Court was wrong in taking the view that it was obliged to grant an interdict because a fatal flaw in the investigative process entitled it to do so.

[107] Id.

[110] For all these reasons I think that the interdict improperly breached the doctrine of separation of powers which is an integral part of our Constitution. It was inappropriate for the High Court to grant an interim order which invaded the terrain of the national executive function without appropriate justification.

[111] Given the conclusion I reach on the legislatively prescribed duration of an anti-dumping duty and on separation of powers, I need not decide any of the alternative contentions advanced by the parties.

Appropriate relief

[112] As I have intimated earlier, it is indeed in the interests of justice that this Court grant ITAC leave to appeal. I again make it clear that SCAW is entitled to proceed with its final review before the High Court should it so choose. On the view I take, the outcome of the review has no bearing on the lawful duration of the anti-dumping duties. This is consistent with the attitude I adopt that expiry of existing duty does not impede finalisation of judicial review. The right to procedural justice does not translate to a right to have the legally permissible term of dumping duties extended beyond its limit. In the final instance I consider it just and equitable that I uphold the appeal and set aside the "interim" interdict made by the High Court.

Costs

[113] This is an out and out commercial matter. In the final instance, the dispute is about economic competition in the terrain of international trade and commerce. SCAW is anxious to protect its domestic manufacturing outputs at markets. The judicial review initiated by SCAW is driven by a profit motive. On the other hand, Bridon UK too seeks to advance its global market in steel products. It may do so only within the confines international and domestic law. Although ITAC is a state organ, its specialist role in international trade is no reason for costs not to follow the event. ITAC and Bridon UK have been substantially successful and there is no reason why that favourable outcome should not translate into a cost order in their favour.

[114] I am minded to order that ITAC pay the tendered wasted costs of the abortive applications for amendment and for direct access including the costs of two counsel. However, I will require SCAW to pay costs of the application for leave to appeal and of the appeal of ITAC including costs consequent upon the use of two counsel.

Order

[115] The following order is made:

(a) The application to join Bridon International Limited as a party to the litigation is granted.

(b) The application for leave to appeal is granted.

(c) The appeal succeeds.

(d) The interdict granted by the North Gauteng High Court, Pretoria on 5 January 2009 is set aside.

(e) In place of the order of the High Court the following is substituted:

"The application is dismissed with costs including costs of two counsel."

(f) The International Trade Administration Commission is ordered to pay the wasted costs of SCAW South Africa (Pty) Ltd occasioned by the abortive application for the amendment of its Notice of Motion. The costs shall include costs of two counsel.

(g) SCAW South Africa (Pty) Ltd is ordered to pay the costs of the application for leave to appeal and of the appeal of the International Trade Administration Commission and of Bridon International Limited which shall include costs of two counsel.

Ngcobo CJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Moseneke DCJ.

For the Applicant:	Advocate S du Toit SC and Advocate I Goodman instructed by the State Attorney.
For the Respondent:	Advocate G Marcus SC, Advocate D Unterhalter SC and Adv Cockrell instructed by Webber Wentzel Attorneys.
For the Intervening Party:	Advocate JL Van der Merwe SC and Advocate LB Van Wyk SC instructed by Van der Merwe Attorneys.