Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 15797/2017

In the matter between:

PIONEER FOODS (PTY) LTD

Applicant

and

MINISTER OF FINANCE

First Respondent

NATIONAL TREASURY

Second Respondent

MINISTER OF ECONOMIC DEVELOPMENT

Third Respondent

MINISTER OF TRADE AND INDUSTRY

Fourth Respondent

DEPARTMENT OF TRADE AND INDUSTRY

Fifth Respondent

INTERNATIONAL TRADE ADMINISTRATION COMMISSION **Sixth**

Respondent

Court: **Justice M I Samela *et* Justice J Cloete**

Heard: **Friday 10 August 2018**

Delivered: **Wednesday 5 September 2018**

JUDGMENT

CLOETE J:

Introduction

[1] On 1 September 2017 the applicant, a manufacturer and distributor of, amongst others, wheat based products, approached this court on an urgent basis to compel the Minister of Finance as well as National Treasury (unless otherwise indicated, "the respondents") to publish a certain adjusted wheat import tariff in the Government Gazette by not later than 8 September 2017. This relief was contained in Part A of the notice of motion, pending the determination of Part B – being the relief at issue in the present application.

[2] In Part B the applicant seeks orders declaring that: (a) the Minister of Finance ("the Minister") is under a duty, to publish in the Government Gazette, any adjustment to the variable tariff applicable to imported wheat upon receipt thereof from the Minister of Trade and Industry[1] within a reasonable period of such receipt; and (b) such a period is 10 working days, alternatively such other period determined by the court.

1 – At the commencement of the hearing the reference to *'fifth and/or sixth respondents'* in prayer 1.1 of Part B was amended to *'fourth respondent via the fifth and/or sixth respondents'*.

[3] The respondents opposed the relief sought in Part A and persist with their opposition in respect of Part B.

[4] Part A was heard by Sher AJ (as he then was) who dismissed it, with costs to stand over for determination with Part B. On 29 September 2017 he provided written reasons ("the Sher judgment") and subsequently granted the applicant leave to appeal to the Supreme Court of Appeal. As we understand it the latter declined to hear the appeal on the basis that Sher AJ's order was not appealable until determination of Part B.

[5] The relevant background facts are set out in the Sher judgment and are thus not repeated, save to the extent necessary.

Issue for determination

[6] The central issue is the proper characterisation of the Minister's powers under s 48(1)(b) of the Customs and Excise Act ("CEA"),[2] which authorises him to make amendments to the level of import duties reflected in Parts 1 and 2 of Schedule 1 thereof[3] pursuant to a request to do so from the Minister of Trade and Industry by publication in the Government Gazette.[4]

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2 – No 91 of 1964.

3 – It is common cause that Part 1 of Schedule 1 is at issue in the present matter.

4 – Section 48(1)(b) refers to the *'Minister of Trade and Industry and for Economic Co-ordination'*. There are currently two ministerial positions: Minister of Trade and Industry and Minister of Economic Development.

[7] If the amendments (or adjustments) are not published in the Government Gazette they will not be applied by customs and excise officials who oversee the off-loading and processing of imported wheat through customs, since they can only apply tariffs which are published in this manner. Put differently, the adjusted tariff has no force and effect until it is published.

[8] Section 48(1)(b) of the CEA reads as follows:

> *'**48. Amendment of Schedule No. 1.**—(1) The Minister may from time to time by notice in the* Gazette *amend the General Notes to Schedule No. 1 and Part 1 of the said Schedule or substitute the said Part 1 and amend Part 2 of the said Schedule in so far as it relates to imported goods--…*
>
> *(b) in order to give effect to any request by the Minister of Trade and Industry…'*

[9] The applicant's case is that in exercising this power the Minister performs an *'administrative function'* subject only to compliance with the principle of legality. On the other hand the respondents maintain that it is a wide and discretionary executive power which, when exercised, is in effect legislative in nature.

[10] In characterising the power as "administrative" the applicant essentially means "mechanical function" since it is not suggested that, if administrative, the power is discretionary and thus susceptible to review.

[11] Given the particular circumstances of this matter there are, as I see it, two interlinked elements to the enquiry. The first is the nature of the Minister's powers in terms of s 48(1)(b) when reacting to a request from the Minister of Trade and Industry. The second is whether, once the Minister has reacted favourably to such a request, he is thereafter bound – in mechanical fashion – to follow the same formula for adjustment which underpinned the first favourable reaction (subject always to compliance with the principle of legality) for further adjustments until such time as the underlying formula is changed.

Factual matrix

[12] The sixth respondent, the International Trade Administration Commission of South Africa ("ITAC"), is a public statutory body established in terms of s 7 of the International Trade Administration Act ("ITA").[5] One of ITAC's principal functions is to conduct tariff investigations and make recommendations on customs duties.

5 – No 71 of 2002.

[13] It was on ITAC's recommendation via the Minister of Trade and Industry that a particular adjusted variable wheat import duty tariff was implemented by the Minister on 23 June 2017. The tariff is described as *'variable'* given that it changes, in general terms, as a result of adjustments to the global price of wheat and the exchange rate.

[14] The formula recommended by ITAC for calculating these adjustments is as follows. On a weekly basis, a comparison is made between the three-week moving average of the United States *'Hard Red Wheat No 2 Gulf settlement price'* (also known as the *'World reference price'*) and the Dollar-based reference price over the same period. If the three-week moving average varies by more than $10 per ton, this will constitute what is termed a *'trigger event'* which triggers an adjustment to the tariff. The adjusted tariff is then converted to Rands at the prevailing rate of exchange on the date of the trigger event and then further adjusted based on the latest available effective real rate of exchange.

[15] Thus, whenever a *'trigger event'* occurs, the tariffs are required to be updated. According to the applicant, this is achieved by ITAC and/or the officials within the Department of Trade and Industry ("DTI") supplying the updated tariffs to the Minister, via the Minister of Trade and Industry, for publication in the Government Gazette in accordance with s 48(1)(b) of the CEA. According to the respondents however, amendments to the tariffs are made only after the Minister has considered all the relevant circumstances and has made a decision to amend, and therefore the applicant (and other affected parties) do not have a right to demand publication before the Minister has done so.

[16] The practical consequence of any delay in publishing the adjusted or updated tariff is that parties such as the applicant have to continue paying import duties in accordance with the existing tariff until any adjustment is published in the Government Gazette, notwithstanding that the *'trigger event'* has already occurred. The anticipated financial loss to the applicant in the instance which gave rise to this application was R28 393 000, and it would be irrecoverable (other than passing it on by way of price increases to consumers) because the published tariff adjustments do not operate retrospectively and thus no "rebate" can be claimed.

[17] The applicant provided a table setting out the Duty Trigger and Adjustment History for the period 23 June 2017 to 7 August 2018 which, for illustrative purposes, is set out below:

	Trigger Value	Trigger Date	Implement Date	Weeks of Delay
1.	R947.20 Implementation	23 June 2017	23 June 2017	
2.	R379.30	11 July 2017	8 September 2017	8
3.	R752.40	8 August 2017	29 September 2017	7
4.	R910.00	5 September 2017	3 November 2017	8
5.	R716.30	3 October 2017	15 December 2017	
10				
6.	R394.90	13 February 2018	6 April 2018	7
7.	R293.70	20 March 2018	21 May 2018	8
8.	R437.30	10 April 2018	25 May 2018	6
9.	R281.74	12 June 2018	13 July 2018	4
10.	R640.54	10 July 2018	Pending	4

[18] Whether or not the Minister's powers are administrative or legislative in nature, it appears that on each and every occasion he ultimately implemented the exact tariff adjustment requested by the Minister of Trade and Industry.

Background to ITAC's recommendation

[19] According to a media statement issued by National Treasury on 8 April 2016, during 1999 the Ministers of Finance and Trade and Industry took a policy decision to adopt a tariff-setting process for selected agricultural products,

including wheat. As part of this policy decision it was agreed that a variation (i.e. increase or decrease) in the customs duty on wheat, sugar and maize would be regulated and governed by formulae, also known as variable import duty formulae, based on a reference price system.[6]

6 – The ITAC report at p8 states that following the introduction of the variable tariff formula in 1999, it was used until 2005 when ITAC recommended an *ad valorem* tariff. This was reviewed in 2008 when ITAC recommended a reversion to the variable tariff formula.

[20] As the media statement reflects, the decision to adopt these formulae was taken:

> *'…after consideration of the unique circumstances surrounding the production of these agricultural products and the nature of the international market to which SA producers are exposed, inter alia, to afford protection and provide certainty for domestic producers against international price volatility.'*
>
> [my emphasis]

[21] The same media statement records that, after the Minister of Finance received a recommendation from the Minister of Trade and Industry in December 2015 for an upward adjustment in the rate, calculated in accordance with the applicable formula, National Treasury *'consulted with the relevant stakeholders with a view to assess the impact on food prices on upstream and downstream industries of the proposed increase in the import duty on wheat and wheaten flour as well as the appropriateness of the current formula'.* The Ministry of Finance thereafter decided to approve the adjustment but:

> *'…subject to a review of the current variable import duty formula on wheat, the timelines and process of which will be announced formally by ITAC.'*
>
> [my emphasis]

[22] The reason provided in the media statement for the review of the formula was the Minister's particular concern about the impact of imposition of higher import duty on the price of bread and other staple food, while at the same time being mindful of the need to *'ensure policy certainty'*, food security and the financial health of the farming industry.

[23] As was foreshadowed in the media statement the Minister of Trade and Industry then directed ITAC to investigate and evaluate the appropriateness of the formula in terms of s 16(1)(d)(i) of the ITA.[7] The ITAC report reflects that:

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7 In the ITAC report reference is made to the Commission having been directed to conduct the investigation and evaluation by the Minister of Economic Development, which reference the parties accept to be to the Minister of Trade and Industry.

> *'The directive was made in view of the fact that wheat, maize and sugar are basic necessities used by South Africans, and that the country is still in the grip of a drought coupled with large exchange rate fluctuations over the last couple of months. I* [i.e. the Minister of Trade and Industry] *direct ITAC to urgently review the current formulae, in particular taking into account the impact on the price of bread, maize and sugar.'*

[24] The intended review was published in the Government Gazette on 22 July 2016 for a period of four weeks to elicit comment from interested parties.

[25] ITAC subsequently produced its report (Report No. 538) on 5 December 2016. In numbered paragraph 4 thereof the following is stated:

> *'4. ESSENTIAL ISSUES PERTAINING TO THE REVIEW*
>
> *The essential issues <u>according to the policy directive</u> include: the effects of drought; food inflation (bread prices); exchange rate fluctuations; and the relationship between the cost of production and the level of protection.'*
>
> [my emphasis]

[26] The report reflects that both the National Chamber of Milling (NCM) and Grain SA gave significant input; that the Bureau for Food and Agricultural Policy (BFAP) conducted an impact analysis on the price effect of the formula on wheat production and the bread price; and that there was engagement with producers and downstream users of wheat (who are listed at numbered paragraph 6 of the report).

[27] It is evident from the ITAC report that in arriving at a recommendation a wide range of considerations were taken into account, many of which are of a technical and expert nature. The report itself is lengthy, detailed and comprehensive. ITAC noted in the report that *'rapid response'* to tariff adjustments is *'required due to the frequency of the sharp peaks and troughs evident in the price cycles of wheat'.*

[28] According to the applicant the adoption by the Minister of the ITAC recommendation was delayed from December 2016 to March 2017, and thereafter

further delayed until June 2017. On 23 June 2017 he formally implemented it by publishing updated tariffs – calculated in accordance with the new formula recommended by ITAC – in terms of s 48 of the CEA. Save for the reference to s 48 these allegations are denied by the respondents.

Process followed by respondents after request by Minister of Trade and Industry

[29] The respondents state that, before the Minister approves an amendment under s 48(1)(b), the amendment itself is subject to an intensive internal review process. This, it is said, is because s 85(2)(a) and (b) of the Constitution confer executive authority on the Minister, both as the head of National Treasury and as the member of Cabinet responsible for amending tariff duties in the CEA, *'to implement national legislation, develop national policy and to perform any other function provided in national legislation'*. In the formulation and implementation of national policy and in the performance of specified functions relating to the imposition of tariffs that have an economic impact, the Minister must consider all relevant information.

[30] To this end, when the recommendation of ITAC and the request by the Minister of Trade and Industry are received, extensive internal evaluation is undertaken by the various units within National Treasury because customs duty on wheat can affect inflation. Only when the Minister is satisfied that the competing interests of economic policies, the fiscus and farmers (agriculture) are balanced, will he make a decision.

[31] As I understand the argument, the respondents therefore contend that the decision by the Minister of Trade and Industry to adopt the ITAC recommendation of December 2016 did not render the executive decision-making process complete. It is only complete when the Minister has undertaken the exercise referred to above and decides to approve any tariff adjustment, whenever a request is made by the Minister of Trade and Industry, and irrespective of the formula that underpins it.

[32] The internal review process, according to the respondents, entails the following. The Minister directs the request for a tariff amendment to the Strategy, Legal and Policy Unit in SARS, whereupon statistical information is obtained in order to ascertain the possible effect of the amendment on the fiscus. SARS then drafts a submission to the Minister *'outlining the reasons for the request for the legislative*

amendment and any possible impact the Minister may need to consider'. The whole SARS process takes at least 10 to 15 working days, whereafter the product of its labours is delivered to National Treasury.

[33] National Treasury sends it to the Deputy Director-General (DDG) of Economic Policy *'for assessment and a decision'*. The office of the DDG forwards it to the Microeconomic Policy Unit which conducts an economic analysis and assessment of the main issues pertaining to the submission. According to National Treasury this is because *'ITAC submissions are made on a unique product and the specific circumstances of each submission will vary and must be assessed on a case-by-case basis'.*

[34] The key considerations are said to include the impact of trade support for the product on trade and industrial policy priorities, the competitiveness of the industry in question, the impact of movements in that industry on related industries (including upstream and downstream industries) and the structure of the industry and related industries *'to assess the creation or entrenchment of monopolies or barrier to entry for new entrants'.*

[35] Thereafter the submission is returned to the DDG Economic Policy for decision. Once he has made a decision it is despatched to the Tax and Financial Sector Policy Division. The role of the Tax Policy Unit of that division is to advise the Minister on tax policy issues arising from all three levels of government (National, Provincial and Local).

[36] The Tax Policy Unit considers *'issues relating to tax policy, the impact of the request regarding increase or decrease of the tariff on current or proposed tax policy, the financial impact of the request submitted by SARS, the legal issues and other administrative issues such as draft Notice issued by SARS and commodity codes used by SARS in the draft Notice'.* (These were not explained). After the Unit has considered the submission, it is forwarded to the Deputy Director-General: Tax and Financial Sector Policy, from there to the Minister via the Director-General's office, and *'after considering all the financial implications, the Minister will make a decision whether or not to amend the customs duty on wheat'.*

[37] According to the respondents this process is designed to enable the Minister to comply with *'the statutory duty imposed upon* [him] *that before* [he] *amends the tariffs or performs his statutory duty, he must satisfy himself that amending the tariff will not have detrimental consequences for the country'.*

Discussion

[38] The preamble to the ITA reflects that one of its purposes is to provide for the continued control of import and export of goods and amendment of customs duties. The object of the ITA is set out in s 2 thereof as follows:

> *'…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*[8] *by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU agreement.'*[9]

8 – Defined as *'the combined areas of the Member States of SACU'*.

9 – *'SACU'* means the Southern African Customs Union.

[39] As set out in s 3, the ITA applies to all economic activity within, or having an effect within, the Republic (subject to certain limited exceptions not relevant for present purposes). The Minister of Trade and Industry, as the responsible member of Cabinet, is empowered under s 5 to issue Trade Policy Statements or Directives for this purpose.

[40] The object of the CEA is to provide for the levying of customs and excise duties and certain other duties. Control of the CEA vests in the Minister of Finance (subject to certain Parliamentary oversight – for purposes of s 48, the applicable sub-section is s 48(6)). Put differently, it is the Minister of Finance who determines appropriate customs duties.

[41] In terms of s 2 of the CEA the Commissioner for SARS is, subject only to the control of the Minister of Finance, charged with the administration of the CEA including the interpretation of the Schedules thereto.

[42] In *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*[10] the Constitutional Court confirmed that a Schedule to an Act *'is as much a part of the statute, and is as much an enactment, as any other part'.*[11]

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10 – 1995 (4) SA 877 (CC) at para [33] quoting Craies *Statute Law* 7th ed.

11 – Subject to the proviso that if there is a conflict between a provision in the body of the Act and Schedule, the Act prevails.

[43] Section 48(5)(a) of the CEA reads as follows:

> *‘ (5) (a) Whenever any amendment made under this section has an effect which was not foreseen or intended, the Minister* [of Finance] *may, whether or not such amendment has ceased to have effect as such or has lapsed under subsection (6), after consultation with the Minister of Trade and Industry, by further notice in the* Gazette*, adjust such amendment, to the extent he deems fit, with effect from the date of such amendment or any later date, and any adjustment effected under this subsection shall be deemed to be an amendment under this section.’*
>
> [my emphasis]

[44] Section 48(6) of the CEA provides that:

> *‘ (6) Any amendment, withdrawal or insertion made under this section in any calendar year shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year, but without detracting from the validity of such amendment, withdrawal or insertion before it has so lapsed.’*

[45] Also of importance is the Public Finance Management Act[12] (PFMA) which in Chapter 2 established National Treasury with the Minister of Finance as its head. The applicable sections of the PFMA read as follows:

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12 – No 1 of 1999.

'NATIONAL TREASURY AND NATIONAL REVENUE FUND

Part 1: National Treasury

***5. Establishment.**---(1) A National Treasury is hereby established, consisting of---*

(a) the Minister, who is the head of the Treasury; and

(b) the national department or departments responsible for financial and fiscal matters.

(2) The Minister, as the head of the National Treasury, takes the policy and other decisions of the Treasury, except those decisions taken as a result of a delegation or instruction in terms of section 10.

***6. Functions and powers.**---(1) The National Treasury must---*

(a) promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;…'

[46] Section 41 of the Constitution sets out the principles of co-operative government and intergovernmental relations and in relevant part provides that:

'41. (1) All spheres of government and all organs of state within each sphere must-

…

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and…'

[47] The above quoted sections of the ITA and the CEA reflect the constitutional obligations imposed by s 41 on the Ministers of Finance and Trade and Industry, and accord with its spirit and purpose. What is envisaged is a high degree of co-operation in exercising their respective powers and performing their respective functions in a manner that does not encroach on the functional integrity of the other.

[48] In *Minister of Finance v Paper Manufacturers Association of South Africa*[13] the Supreme Court of Appeal explained the interface between the ITA and the CEA as follows:

13 – 2008 (6) SA 540 (SCA).

> *'[7] … One of the ITA Act's objects is to provide for the control of the import and export of goods on a continuous basis, and for the amendment of customs duties. For this, ITAC must investigate and evaluate applications for the amendment of customs duties and issue recommendations regarding the rates of duty and rebate provisions in the Customs and Excise Act. It is then required to take appropriate steps to give effect to its recommendations (s 22). A report is provided to the minister responsible for trade and industry who, if the recommendations are adopted, requests the Minister of Finance to amend schedules to the Customs and Excise Act (which is the responsibility of this Ministry) by notice in the* Government Gazette*.*
>
> *[8] 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).'*

[49] In *President of the Republic of South Africa v South African Rugby Football Union*[14] it was held that:

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14 – 2000 (1) SA 1 (CC).

'[141] …the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function… The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere… is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33 [of the Constitution]*. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive… will constitute "administrative action" as contemplated by s 33, but not all acts by such members will do so.*

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, although not necessarily decisive, is a relevant factor. So too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should or should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

[my emphasis]

[50] In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*[15] the Supreme Court of Appeal characterised administrative action as follows:

15 – 2005 (6) SA 313 (SCA).

> *'[24]…Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'*

[51] This interpretation was reinforced in *Minister of Defence and Military Veterans Association v Motau*[16] where the Constitutional Court held that:

16 – 2014 (5) SA 69 (CC) at para [37].

> *'…administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.'*

[52] There are conflicting decisions on the characterisation of the Minister's powers under s 48(1)(b) of the CEA. On the one hand there is the decision in *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade, and Others.*[17] On the other are the Sher judgment as well as the decision in *SA Sugar Association v Minister of Trade and Industry.*[18]

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17 – 1996 (1) SA 69 (T). The ITA repealed the Board on Tariffs and Trade Act 107 of 1986 and replaced the Board on Tariffs and Trade with ITAC – see *Paper Manufacturers* (*supra*) at para [7]

18 – [2017] 4 All SA 555 (GP)

[53] In *Kennasystems* Spoelstra J considered the nature of the Minister's powers within the context of an application in terms of uniform rule 53 for the review and setting aside of a ministerial decision to amend a Schedule to the CEA. The respondents contended *inter alia* that the decision was not reviewable since, in amending the Schedule, the Minister exercised legislative functions, because the Schedule formed part of the CEA and he thus in effect acted as Parliament. At 73G-J the learned Judge held as follows:

> *'I do not believe that there is any real substance in this argument. In my view s 48 of the Act is simply an empowering section authorising the Minister to effect, in certain circumstances and in a prescribed manner, amendments to the Schedules to the Act. The Minister clearly derives his powers from the Act and his powers are limited and defined by the relevant provisions of the Act. His powers seem even more limited than those granted to a person or body to make regulations, by-laws or similar subordinate legislation. This appears from the direct control exercised by Parliament over the Minister's measures and their limited lifetime unless extended by Parliament. The fact that the Minister may in the prescribed manner amend a Schedule to an Act of Parliament does not indicate that Parliament has transferred its powers to the Minister. He can do this simply because Parliament has authorised him to do so within the prescribed parameters. Accordingly I am of the view that the Supreme Court has jurisdiction to review the exercise of such powers.'*

[54] This line of thinking was followed – albeit in a different context – in *Lead Laundry Equipment (Pty) Ltd v Minister of Finance and Another*[19] where the issue was whether, if an amendment made by the Minister in terms of s 48 of the CEA was *ultra vires* his powers or otherwise invalid, it was subsequently validated by Parliament acting under s 48(6).

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19 – [1996] 3 All SA 516 (N).

[55] McCall J concluded that a court has no power to enquire into a ministerial amendment extended by Parliament in terms of s 48(6) of the CEA. Relevant for present purposes are the following findings made by the court at 527c-d and h-i:

> *'In my opinion it is undoubtedly the case that, as was held by Spoelstra J in the* Kennasystems *case (*supra*), any amendment made by the Minister in terms of Section 48 of the Act must be* intra vires *his powers in terms of the Act. At least until such time as Parliament has extended its life as contemplated by Section 48(6), it is merely a form of subordinate legislation which may prove to be of a temporary nature. …*
>
> *It must be assumed that the Legislature's purpose in enacting Section 48(6) of the Act was to ensure that an amendment made by the Minister in terms of Section 48 would not become a permanent and integral part of the Act unless it received the approval of Parliament.'*

[56] In support of its argument the applicant also relies on *Hoexter*: *Administrative Law in South Africa*[20] where Professor Hoexter identifies a category of administrative acts of a legislative kind. She explains that these refer to *'law made by administrators by virtue of power granted from a lawful source, usually a statute. Legislative administrative activity thus results in "delegated" legislation… The provenance or pedigree of delegated legislation is readily ascertainable as it invariably refers to the original legislation under which it has been made.'*[21]

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20 – 2nd Edition pp51 – 52.

21 – That *'the jury is still out'* on the question whether subordinate law-making is "administrative action" is pointed out in *Mostert v Registrar of Pensions Funds* 2018 (2) SA 53 (SCA) at paras [8] – [10].

[57] That amendments to Schedule 1 made under s 48(1)(b) of the CEA have a limited lifespan – as found in *Kennasystems* – was confirmed by the Supreme Court of Appeal in *Paper Manufacturers*.[22] However in my view this does not mean that they necessarily equate to *'subordinate legislation which may prove to be of a temporary nature'* and do not become an integral part of the CEA unless and until extended by Parliament.

22 – At para [2].

[58] In *Association of Meat Importers v ITAC*[23] Nugent JA, writing for the majority, held at para [44] that:

23 – [2013] 4 All SA 253 (SCA), also reported at 2014 (4) BCLR 439 (SCA).

'[44] Counsel for the authorities submitted that because the anti-dumping duties remain reflected in Schedule 2 they still purport to exist but that is not correct. It is not the writing in the Schedule that brought the anti-dumping duties into existence – they were brought into existence by the act of the Minister of Finance in publishing the amendment to the schedule. The writing then inserted in the Schedule merely recorded that amendment. Once the anti-dumping duties recorded in the Schedule cease to exist, the writing remains only as an historical record that they once existed. The authorities need no assistance from a court if they wish to expunge that historical record. They need only ask the government printer to do so when next the Schedule is printed.'

[my emphasis]

[59] The passage quoted above appears to favour an interpretation that it is the act of publication in the Government Gazette that amends the CEA which is national legislation. This is supported by the wording of s 48(6) that the lapsing of any amendment (unless extended by Parliament) shall not detract from the (legislative) validity of that amendment prior to the occurrence of either event. This is also consistent with what was said by the Constitutional Court in *Executive Council, Western Cape Legislature* (*supra*).

[60] Section 55(2)(a) of the CEA is concerned with the imposition of anti-dumping (and similar) duties and stipulates that they *'shall be in accordance with any request by the Minister of Trade and Industry under the provisions of'* the ITA. This notwithstanding, the Minister of Finance still retains a discretion whether or not to impose such a duty since s 56(1) provides that he *'may from time to time by notice in the Gazette amend Schedule No. 2 to impose an anti-dumping duty in accordance with the provisions of section 55(2)',* and section 56(3) provides that

'section 48(6) shall mutatis mutandis *apply in respect of any amendment made under section 56(1)'.*[24]

24 – Only the relevant part is quoted for present purposes. See however *Association of Meat Importers v ITAC* at para [9].

[61] In *International Trade Administration Commission v SCAW SA* [25] the Constitutional Court dealt with the powers conferred upon the Minister of Trade and Industry by the ITA as follows:

25 – 2012 (4) SA 618 (CC).

'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. The minister also wields the power to prescribe regulations in order to give effect to the object of the Act.'

[62] The High Court had granted an interim interdict – pending the final determination of a review application – restraining ITAC from forwarding its recommendation to the Minister of Trade and Industry, and furthermore restraining the Minister of Finance from implementing ITAC's recommendation. The intended effect of the interdict was to maintain the existing anti-dumping duty until the review was finalised.

[63] In confirming that the appeal involved constitutional issues, the Constitutional Court held that:

'[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…

[44] …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…'

(my emphasis)

[64] Referring to the Minister of Trade and Industry, the Constitutional Court stated:

'[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 relations, 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.'

[65] To my mind, and having regard to the legislative framework of the ITA, CEA and PFMA set out above, as well as s 41 of the Constitution, there is no reason why the same considerations should not apply to the Minister of Finance when exercising his powers under s 48(1)(b).

[66] First, he derives them from the CEA, a separate legislative instrument to the ITA. Second, just as the Minister of Trade and Industry is not obliged to follow the ITAC recommendation, there is nothing in the CEA which indicates that the Minister is obliged to follow the recommendation of the Minister of Trade and Industry.

[67] The use of the word *'may'* in s 48(1) of the CEA – while not of its own decisive of the issue – should, following the approach in *Endumeni,*[26] also be read together with s 48(5)(a), which makes it clear that, even after publishing a tariff adjustment, the Minister of Finance may amend it in his own discretion and *'to the extent he deems fit'* should it have an effect that was not foreseen or intended. The only proviso is that he must first consult with the Minister of Trade and Industry. Section 48(5)(a) is also not subject to any limitation in relation to an underlying formula previously adopted for purposes of implementing an earlier recommendation. The jurisdictional fact of an ITAC recommendation would no doubt still be necessary in light of *Paper Manufacturers* but it seems that this would only be part of the consultative process with the Minister of Trade and Industry.

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26 – *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[68] Third, the Minister has the final decision (subject to extension by Parliament after a fixed period under s 48(6)) to determine whether a tariff adjustment recommended by ITAC and thereafter by the Minister of Trade and Industry should be implemented. If he makes such a decision then publication in the Government Gazette is not merely the implementation of legislation because it is the Minister who amends the Schedule to the CEA and thus amends national legislation.

[69] Fourth, when regard is had to the factors set out in the *SARFU* judgment (*supra*), in reaching his decision the Minister exercises a public duty closely related to policy matters. This was summarised in *SA Sugar* (*supra*) as follows:

> *'[33] …The provisions of the CEA vest the Minister of Finance with the final decision (subject ultimately to Parliament) to determine appropriate customs duties. In this regard, I have made the point that the Minister is performing a legislative function. A legislator acts in a fiduciary capacity; he must so carry out the duties imposed on him in the interests of the Republic. This is reflected in the oaths of office of legislators as well as members of the executive and judicial officers in Schedule 2 to the Constitution which require the office bearer to swear or affirm to be faithful to the Republic. Such a fiduciary is obliged to carry out all such investigations as rationality require to qualify him to carry out the legislative task reposed in him. A legislator is self-evidently entitled to carry out such research as he may consider will best equip him to carry out his legislative task.*
>
> *[34] The National Treasury, with the Minister of Finance as its head, was established by section 5 of the Public Finance and Management Act 1 of 1999. Under section 6(1) of that Act, the Treasury must, amongst other things, promote the national government's fiscal policy and the co-ordination of macro-economic policy. The Treasury has rightly been described as the guardian of the nation's economy.'*

[70] Tuchten J also held in *SA Sugar* that:

> *'[35] I find nothing in the language of the CEA which reduces the role of the*

Minister in this regard to that akin to a registrar. I am prepared to assume, without deciding the point, that the wide power conferred on the Minister of Finance under section 48(1)(e) may only be exercised in instances which do not fall under sections 48(1)(a)-(d). But I think the use of the word "otherwise" in section 48(1)(e) supports the interpretation which I favour. I think that this word is a pointer to the conclusion that the power conferred on the Minister of Finance is one which he may generally exercise when he has come to the conclusion that it is in the public interest that he do so. The CEA is replete with powers conferred on the Minister of Finance in relation to duties which he may exercise when he deems it expedient in the public interest to do so.

[36] That there is an overlap in the decision making powers in the situation which culminates with a request to the Minister of Finance under section 48(1)(b) and that investigations are conducted by other organs of State do not detract in my view from this conclusion. There is nothing strange or anomalous in the situation that arises when the Legislature prescribes, in effect, that approvals by more than one decision maker are required for the ultimate effectiveness of the action contemplated.

[37] This point is to my mind demonstrated by the provisions of Chapter VI of the CEA which deals with anti-dumping, countervailing and safeguard duties and safeguard measures. In terms, the Minister of Finance is vested with powers to impose or vary anti-dumping and countervailing duties and impose or vary safeguard measures. But the Minister of Finance can only act in relation to these duties and measures in accordance with a request by the Minister of Trade and Industry. In the Chapter VI instances, the empowering provisions clearly restrict the Minister, in the exercise of his power to impose or vary duties or measures, to instances where the Minister of Finance has been requested by the Minister of Trade and Industry to impose such duties or measures. In such a case the Minister of Finance has an election: the Minister of Finance may either impose or vary the duty or measure in accordance with the view expressed by the Minister of Trade and Industry through his request or the Minister of Finance may decline to act at all in accordance with the powers conferred by Chapter VI of the CEA. In such cases the Minister of Finance may not act unilaterally. This is because the language (in accordance with ...) makes it clear that he may not. But there is nothing in the language of section 55 which indicates that the Minister of Finance

is obliged to concur with or defer to the Minister of Trade and Industry and that the former Minister is not precluded by law from conducting his own independent investigation and analysis of the subject matter of the request received from the latter.'

[71] I agree. In my respectful view *Kennasystems* (and the passage quoted from *Lead Laundry*) appear to overlook the independent policy considerations to which the Minister of Finance must have regard before acceding to a request from the Minister of Trade and Industry. While in the instant case the variable tariff formula relates exclusively to the industry in which the applicant operates, it is incumbent on the Minister of Finance, under s 6(1) of the PFMA, to co-ordinate macro-economic policy and promote national government's fiscal policy in relation to South Africa as a whole. I therefore also agree with much of the reasoning as well as the conclusion reached in the Sher judgment which need not be repeated herein.

[72] Although the request from the Minister of Trade and Industry in any given instance is effectively one to implement his policy decision, I am compelled to conclude that it must, for purposes of s 48(1)(b), be subject to the Minister of Finance's own policy decision to implement it. I thus cannot agree with the applicant's submission that the Minister of Trade and Industry *'has overall responsibility for policy formation around the amendment of customs duties'*. It follows that the application must fail.

Costs

[73] It cannot be said that the applicant pursued this matter frivolously, particularly when regard is had to National Treasury's own media statement of April 2016, which purports to convey to the South African wheat industry that the purpose of the past and intended exercises was to *'ensure policy certainty'* and *'provide certainty for domestic producers against international price volatility'.* Moreover the Constitutional Court itself emphasised in *SARFU* how difficult it can be to determine whether an action should be characterised as a policy decision or merely the implementation of legislation. To my mind the appropriate costs order is the one that follows.

[74] **In the result the following order is made:**

1. **The application for the relief sought in Part B of the Notice of Motion is dismissed.**

2. **There shall be no order as to costs, including the costs in relation to Part A of the Notice of Motion.**

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J I CLOETE

SAMELA J

I agree and it is so ordered.

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M I SAMELA