IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

_____ _____

DATE SIGNATURE

DATE: 5 January 2021

In the matter between 12160/18

BOSCH HOME APPLIANCES (PTY) LTD t/a BOSCH Applicant

and

INTERNATIONAL TRADE AND ADMINISTRATION COMMISSION OF SOUTH AFRICA First Respondent

MINISTER OF FINANCE Second Respondent

DEFY APPLIANCES (PTY) LTD Third Respondent

And

In the matter between 67553/18

BOSCH HOME APPLIANCES (PTY) LTD t/a BOSCH Applicant

and

MINISTER OF TRADE AND INDUSTRY First Respondent

INTERNATIONAL TRADE AND ADMINISTRATION COMMISSION OF SOUTH AFRICA Second Respondent

MINISTER OF FINANCE Third Respondent

DEFY APPLIANCES (PTY) LTD Fourth Respondent

JUDGMENT

MABUSE J

[1] In this matter two applications, case numbers 12160/2018 and 67553/2018 were fused together and heard as one application. Because these two applications are predicated precisely on the same allegations, there is inextricably a great deal of overlap in the allegations made in the Applicant's affidavits in the respective applications. In fact, most of the allegations in the founding and supplementary founding affidavits are simply repetitions of the founding and supplementary founding affidavits in each application. Accordingly, it was only proper, in the circumstances, to avoid protracted proceedings and to save time and costs, that the two applications be consolidated into one and be heard simultaneously.

[2] The Applicant, Bosch Home Appliances (Pty) Ltd t/a Bosch ("Bosch"), is a company duly incorporated in terms of the company statutes of this country, with its principal place of business at 15th Road, Rantjiespark, Midrand. Bosch is a non-appliances manufacturer which imports most of its products from Turkey and distributes them within South Africa.

[3] In the above-mentioned matters Bosch seeks the following relief that:

[3.1] the recommendation of the International Trade and Administration Commission of South Africa (the Commission) that the Minister of Trade and Industry and Defy Appliances (Pty) Ltd.'s ("Defy") application to increase the general rate of customs duties on gas stoves classified under tariff heading 7321.11 (application for Increase) for a 15% increase be approved by the Minister of Finance as set out in Report 534 dated 23 February 2017;

[3.2] the Minister of Finance's approval of the Commission's recommendation for the approval of the application for an increase in the tariff and the publication thereof, as set out in the Government Gazette Nr. 41065, Regulation dated 25 August 2017;

[3.3] the decision and action of the Minister of Trade and Industry, to approve, recommend and request that the Minister of Finance approve the recommendation of the Commission as per its Report 534 dated 23 February 2017, that a 15% increase in the general rate of customs duties be imposed for gas stoves classifiable under tariff heading 732.11, be reviewed and set aside;

[3.4] Defy's application for an increase in the general rate be dismissed;

[3.5] alternatively, that the Defy's application for an increase in customs duties be referred to the Commission for reconsideration.

[4] For purposes of convenience in this judgment Bosch Home Appliance (Pty) Ltd t/a Bosch shall be referred to as "Bosch"; the International Trade and Administration Commission of South Africa shall be referred to as "the Commission"; Defy Appliances (Pty) Ltd shall be referred to as "Defy"; the Minister of Finance and the Minister of Trade and Industry shall be referred to by their respective titles.

[5] Bosch launched these review proceedings against the Commission in terms of the Promotion of Administrative Justice Act 3 of 2002 (PAJA). The Commission's decision or recommendation is reviewable under s 46 of the ITA Act. Bosch seeks the review and setting aside of the decision of the Commission to recommend to the Minister of Trade and Industry that an application brought by Defy for an increase in the general rate of customs duties on gas stoves for gas fuel classifiable under tariff heading 7321.11 and gas oven classified under tariff heading 732.11 be recommended for approval to the Minister of Finance. The grounds of review relied on in respect of the decisions of the Minister of Finance and of the Minister of Trade and Industry are under the principle of legality.

[6] The issues to be decided in this matter are:

[6.1] whether the recommendation of the Commission was flawed and falls to be set aside, as sought by Bosch, on the basis that the decision:

[6.1.1] was based on alleged mistakes of fact and is arbitrary and so unreasonable that no reasonable decision maker could have made it;

[6.1.2] was made ultra vires having regard to the provisions of s 26 (1) (c) of the International Trade administration Act 71 of 2002.

[6.2] if they were flawed, whether a flaw in the Commission's investigations, once established, was sufficiently material as to render the entire investigation by the Commission invalid;

[6.3] the nature and scope of the statutory powers of the Minister of Finance, including his obligation to thoroughly interrogate and satisfy himself on the merits of the application for an increase, and whether such increase would promote economic development and growth;

[6.4] whether the decisions of the Minister of Finance and the Minister of Trade and Industry meet the standard set by the principle of legality; and

[6.5] the proper interpretation of, *inter alia*, section 26(1)(c) read with section 16(1) of the International Trade Administration Act 71 of 2002 ("ITA Act"), and related matters.

[7] One of the purposes of import duties is to protect local industry from some of the effects of competition with firms outside our borders. The powers of the Republic of South Africa ("the

Republic") to legislate in this connection are shaped to a significant effect by the International Agreements to which the Republic is a party.

[8] The import duties relevant for present purposes are to be found in Schedule 1, Chapter 5 to the Customs and Excise Act 91 of 1964 ("CEA").

[9] Under s 48 of the CEA the Minister of Finance is empowered to effect changes to import duties by notice in the Government Gazette. In doing so the Minister of Finance amends the national legislation, which is usually within the province of the Parliament.

[10] Under national legislation in the Republic the implementation of tariffs and trade remedies follow the following route:

[10.1] first, the investigating authority, currently the Commission, investigates and evaluates applications for the imposition, amendment or withdrawal of tariffs and trade remedies. The Commission is also empowered to amend a recommendation in terms of s. 48 of the International Trade Administration Act 2002 (Act 71 of 2002) ("the ITA Act"), and to initiate its own investigation into the amendment of customs duties in terms of s 16(1)(d)(ii) of the ITA Act;

[10.2] secondly, following an investigation, the Commission makes a recommendation to the Minister of Trade and Industry who has a discretion to accept or reject the Commission's recommendations or refer a recommendation back to the Commission for further re-consideration;

[10.3] thirdly, if the Minister of Trade and Industry accepts the Commission's recommendation, he may request the Minister of Finance to amend the CEA accordingly. The Minister of Finance may, by publication in the Government Gazette, amend the schedules of the CEA, to give effect to the request of the Minister of Trade and Industry.

Currently, the executive authority responsible for the functioning of the Commission is the Minister of Trade and Industry.

[11] One of the Commission's duties under the ITA Act, as stated in paragraph [10.1] *supra*, is to investigate and evaluate the amendment of the customs duties. It communicates its findings in reports. The powers of the Commission are circumscribed by the specific provisions of s. 26 of the ITA Act.

[12] The Minister of Finance is given wide powers to legislate custom duties in terms of s 48 of the CEA. The powers of the Minister of Finance are circumscribed by the provisions of the CEA and these powers would be required to be exercised having due regard to the principles of legality and compliance with the ITA Act.

[13] In terms of the provisions of s. 48(1)(b) of the CEA, the Minister of Finance exercises his powers at the request of the Minister of Trade and Industry. He exercises the statutory duties or powers in terms of sections 2, 5, 6 of the ITA Act. As set out in paragraph [10.1] *supra*, the Commission may initiate its own investigations in terms of s 16(1)(d)(ii) of the ITA Act and may, on its own accord, vary, amend, or rescind a recommendation in terms of s 48 of the ITA Act. In this application Bosch seeks to set aside the Minister of Trade and Industry's as well as the Minister of Finance's decision for the reasons set out in the application. Bosch invokes the powers of the Court to review the decision that it contends are irrational, unreasonable and fall outside the ambit of the Act.

[A] THE BACKGROUND

[14] On or about August 2015 the Commission received an application from Defy for an increase of the general rate of customs duties on Defy gas stoves for gas fuel classifiable under tariff heading 7321.11 from 15% to 30% *ad valorem*, by way of creating an additional 8-digit tariff subheading.

[15] Defy had furnished the following reasons in support of its application:

[15.1] because of imports from abroad, Defy is not price competitive with imports, considering the current levels of plants, utilisation and economies of scale, which leads to higher unit costs of production and reduced profitability and employment;

[15.2] an increase in Customs Duty would enable Defy to compete with low price imports into South African Customs Union ("SACU");

[15.3] an increase in tariffs will ensure job retention and allow the company to gain market share through an increase in local production resulting in additional employment; and

[15.4] an increase in tariffs would support future for the introduction of the additional gas stoves, and especially the planned production of two new models in the factory based in Durban.

In keeping with the requirements of the law the application aforesaid was published in the Government Gazette on 20 November 2015 for comment by interested parties.

[16] Defy is one of the two domestic manufacturers of the subject product in SACU region, the other is the Edenvale Based Zero Appliances (Pty) Ltd.

[17] The relevant products which were subject to the application for an increase in customs duties are gas stoves for gas fuel, having two or more plates with gas burners and gas ovens with gross capacity not exceeding 100 litres.

[18] Defy invested a total of R6 million in new machinery used for manufacturing of the subject product and currently employs a total of 26 employees whilst Zero Appliances invested approximately R335,579 in research and development as well as skills development training and currently employs a total number of 148 employees for the manufacture of the subject product.

[19] Defy has committed to invest an additional R3.3 million in plant and machinery. Furthermore, Defy will increase production volumes by approximately 43% in the next three years starting from 2016 and it is also expected that it will increase its staff component with an additional 29 employees over the same period.

[B] THE COMMENTS RECEIVED AS WELL AS CONSIDERATIONS BY THE COMMISSION

[20] Stingray Group (Pty) Ltd, D.K. Appliances (Pty) Ltd t/a Home of Living Brand (Pty) Ltd, Topaz Tradenet (Pty) Ltd, EFBA Electrical Home Appliances, Inc, Masstores (Pty) Ltd and SBS Household Appliance (Pty) Ltd t/a SMEG and VSH Appliances (Pty) Ltd and Bosch objected to the application to increase custom tariffs. The comments submitted by the objectors centred on the wide scope of Defy's application, namely:

[20.1] the depreciating Rand/Dollar exchange rate that should discourage imports;

[20.2] the effect of the duties on low-income households;

[20.3] the perceived dominance and price competitiveness of Defy in the household appliance market;

[20.4] the confidential nature of Defy's application about pricing and employment information;

[20.5] the limited period given to stakeholders to make submissions to the commissions;

[20.6] Defy's relatively low extent of assembly/manufacturing;

[20.7] the possible loss of employment of importers because of import duties, and;

[20.8] that the tariff would encourage inefficiencies to creating a limited number of jobs at a relatively high cost to the economy.

[21] Subsequent to the comments raised by the objectors concerning the wide scope of the application that included other gas stoves not manufactured domestically and the potential negative impact of duties on low-income households, the Commission recommended that the investigation be limited to gas stoves for gas fuel, having two or more plates with gas

burners and gas oven with a gross capacity not exceeding 100 litres. This excludes other gas stoves such as gas stoves without an oven mostly used by low-income earners.

[22] The Commission carefully considered the objections around the confidential nature of certain information contained in Defy's application as is provided for in s 3 of the Commission Regulations and noted that the Commission Regulations permit the deeming of certain information as confidential. In terms of s 3 of the Commission Regulations, a person may, when submitting correspondence to the Commission, identify certain information as confidential or otherwise that the person wishes recognised as confidential.

[23] The Commission noted that the objections centred on the depreciating Rand/Dollar exchange rate which may provide additional protection for Defy by further discouraging imports. The Commission considered that several parts used in the manufacture of the subject product are important and therefore also increase input costs for domestic producers.

[24] The Commission deliberated on the possible trade-off between employment created by importers and manufacturing jobs because of import duties. The Commission took a view that manufacturing jobs require skills that are not comparable to the jobs created by importers. Such skills are transferable to similar production processes making workers more marketable and employable in other sectors of the economy.

[25] Some of the objectors indicated that assembled products cannot enjoy production because it is a simple and basic process. The Commission considered that as a matter of policy and practice, assemblers have received tariff relief before, therefore the importation of components is a common practice by nearly all manufacturers given the prevalence of international supply chains. The Commission also considered the opportunities presented by the alleged shift of consumers of electric to gas products because of constraints in electricity supply. However, the Commission noted that the growing gas products market would not only benefit Defy but would also increase sales from importers. Comments supporting Defy's application were received from the Botswana Minister of Trade and Industry and Zero Appliance (Pty) Ltd.

[26] Despite Bosch's written and oral submissions, and despite furthermore the numerous other objections raised by objectors against Defy's application, on 25 August 2017 a notice was published in the Government Gazette No. 41065, regulation 901 which indicated that, *inter alia*, Defy's application for the increase in tariff had been approved. Accordingly, on 25 August 2017, the date on which the Government Gazette No. 41065, regulation 901 was published, the rate of customs duty of gas stoves for gas fuel, having two or more plates with

gas burners, and gas ovens with gross capacity not exceeding 100 litres classifiable under tariff subheading 7321.11 was increased from 15% to 30% *ad valorem*.

[27] On 28 August 2017 the Commission forwarded its Report No. 534 titled "Increase in the General Rate of Customs Duty on Certain Gas Stoves For Gas Fuel" to Bosch's attorneys. In the said report the Commission had recommended, for two reasons, that Defy's application for the tariff increase be approved to enable Defy to compete with imports into SACU Area and secondly, to ensure the economic viability and sustainability of the local industry. The Commission's decision to recommend Defy's application for the tariff increase was based on the following considerations:

[27.1] *"the rising level of imports and the concomitant declining market share of SACU manufacturers of gas stoves;*

[27.2] *the low level of productive capacity utilisation and profitability of the domestic industry;*

[27.3] *significant increases in the cost of steel products used in the manufacture of gas stoves;*

[27.4] *increase in the cost of imported inputs due in part to the depreciating rand;*

[27.5] *the price disadvantage experienced by the domestic industry vis-a-vis imports of the subject product; and*

[27.6] *the initial wide scope of the application covering all cooking appliances for gas and other fuel.*

The Commission decided and recommended below that a tariff subheading be introduced covering only those gas stoves with ovens that are manufactured locally and will have no negative impact on low-income earners and the poor."

[28] The decision by the Commission to recommend that Defy's application for the increase tariff be approved led to Bosch launching, in case number 12160/2018, a review application against the Commission and the Minister of Finance on 21 February 2018, which was followed, in case number 67553/2019, by an application to review and set aside the decision of the Minister of Trade Industry to, *inter alia*, recommend and request the Minister of Finance to approve the recommendation of the Commission as per its Report 534 dated 23 February 2017 at a 15% increase in the general rate of customs duties be imposed for gas stoves classifiable under tariff heading 732.11.

[29] Bosch admits that the reasons for Defy's application recorded in the Government Gazette are the same as the reasons described in the application brought by Defy but contends that they seem to have been an embellished in certain respects.

[30] It is Bosch's case that the factors which the Commission recorded as having been considered were not supported by the material which had been placed before the Commission. In brief, Bosch contends that the economic data which was provided by Defy does not support the conclusions reached by the Commission. Bosch contends furthermore that, therefore, the absence of evidence to support the factors considered by the Commission renders its decision irrational and fundamentally flawed.

[31] Bosch submits that there is no basis on which the Commission should have recommended that Defy's application for the increase in tariff be approved by the Minister of Finance, nor is there a basis for the said Minister to accept the recommendation and cause such acceptance to have been published in the Government Gazette.

[32] In Case Nr 12160/2019 the decision of the Commission was challenged on the ground that there was no basis on which the Commission should have recommended that the application for the increase in tariff be approved by the Minister of Finance, nor for the Minister of Finance to accept the recommendation and cause such acceptance to have been published in the Government Gazette.

[33] Bosch contends that the administrative action undertaken by the Commission in recommending the approval of the application in tariff and the administrative action undertaken by the Commission in recommending the approval of the application in tariff and the administrative action undertaken by the Minister of Finance in approving the recommendation by the Commission is unlawful, as:

"1. The basis for the decision is patently incorrect;

2. *The evidence and/or information before the Commission and the Minister of Finance was not properly evaluated;*
3. *The administrative action undertaken by the Commission and the Minister is patently incorrect;*
4. *It is also alleged that the Commission and the Minister's decision are factually and substantially incorrect;*
5. *The Commission's determination is illegal in that the Commission failed to take relevant factors into account and based its determination on irrelevant considerations;*
6. *Bosch has suffered prejudice and irreparable harm as a result of the decisions of the Commission and the Minister."*

[34] In Case No. 6753/2018 Bosch contends that the decision of the Minister of Trade and Industry falls to be reviewed and set aside on various grounds listed in s 6 of PAJA. In the alternative, the decision of the Minister of Trade and Industry falls to be reviewed and set

aside on the grounds that it contravenes the conditional principle of legality. The grounds upon which such decision is challenged are as follows:

[34.1] the determination by the Minister of Trade and Industry was not lawful;

[34.2] the basis for the decision was patently incorrect;

[34.3] the evidence and information before the Minister of Trade and Industry was not rigorously evaluated;

[34.4] the decision made by the Commission and the Minister of Trade and Industry was patently incorrect;

[34.5] the decision of the Minister of Trade and Industry was factually and substantially incorrect;

[34.6] Bosch has suffered prejudice and irreparable harm because of the decision of the Minister of Trade and Industry; and

[34.7] the Minister of Trade and Industry has failed to consider relevant factors as he took irrelevant factors into consideration.,

The Minister of Trade and Industry's decision is not rationally connected to the reasons given by the Administrator.

[35] Section 46 of the ITAC Act provides that a person affected by the determination, recommendation, or decision of the Commission in terms of s 16 or 17 or this chapter, may apply to a High Court for a review of that determination or recommendation or decision. Bosch felt emboldened by the judgment of **ITAC and Another v South African Tyre Manufacturers Conference (Pty) Ltd & Others [2011] ZASCA 137,** in which the Supreme Court of Appeal stated that:

"The manufacturers were entitled, in terms of s 46(1) of the ITAC Act, to apply to the High Court for a review of any determination, recommendation or decision of ITAC that affected them. The grounds for review are to be found in the Promotion of Administrative Justice Act 3 of 2000."

No-one has challenged Bosch to bring this application for review in terms of s 46(1) of the ITAC Act.

[C] THE COMMISSION's CASE

[36] The Commission denies that its recommendation was influenced by incorrect facts. It will be recalled that one of the grounds upon which Bosch challenges the Commission's recommendation is that the Commission failed to consider the relevant factors and furthermore that it considered irrelevant factors. The Court will go into the evidence of the Commission to establish the merits of this ground of review. The Commission submits furthermore that the fact that Bosch does not agree with the factors on which it made its recommendation, is not sufficient to vitiate the legal validity of a polycentric recommendation

that the Commission is statutorily required to make. Provided that the Commission conducts itself rationally, it is the Commission's assessment of the factors that are relevant that counts. The weight of those factors, in the final analysis, constitutes the decision of the Commission. The Commission was required to make the decision under attack based on the facts before it. It is the Commissions' submission that in the circumstances, its recommendation was justified.

[37] According to the Commission, customs duties are instruments that bear upon international trade. International trade concerns transnational commerce. When sovereign states such as South Africa open their markets to external contenders, they expose their domestic market and domestic manufacturers to the risk that they will not be able to compete with the same goods being brought into the domestic market by importers, to the detriment of domestic economic growth. The stifling of economic growth is harmful to the objective of any government and has the potential to undermine the government's industrial policy goals and the desired model of the country's economic expulsion.

[38] In the circumstances, where the effect of unfettered access to the domestic market would be pernicious, the imposition of tariffs on imported goods is a long and accepted permissible method of protection. Tariffs may impact upon domestic productivity, growth, and employment. When imposed judiciously, these factors, and South Africa's economy and more generally, may be enhanced. The work of assessing the relevant risks and benefits in this context is firmly within the Commission's area of authority and expertise. The Commission is the independent statutory authority responsible for tariff amendments in SACU. It conducts tariff investigations within the framework of the ITA Act, in terms of ss 16, 26, 30, of the **ITA Act, the Amended Tariff Investigations Regulations ("the Regulations") and the Policy directive** on matters ITAC shall consider in evaluating applications for amendment of custom duties (the Policy directive). Therefore, in its investigation and evaluation of applications for the amendment of custom duty tariffs the Commission must perform its statutory duties in accordance with the ITA Act, the Regulations, and the Policy directive. It must make sure that the procedures which it follows in investigating applications and making recommendations are conducted in accordance with the ITA ACT, the Regulations and the Policy directive.

[39] Section 26(1)(c) of the ITA Act provides that any person can apply to the Commission for the amendment of custom duties. Ss 26(2)(b) and 30(3) of the ITA Act provide, *inter alia*, that the Commission must evaluate and make recommendations upon the merits of any such application. S 16(1) provides that:

"The Commission must investigate and evaluate applications in terms of s 26 with regard to:

(a)……..

(b)……..:

(c) applications in terms of section 26 with regard to amendment of custom duties in the Common Customs Area;

Quite clearly, s 16(1)(c) refers to the amendment of custom duties such as the application brought by Defy.

S 26(2) of the ITA Act states that;

"The Commission must, subject to section 30(1) and (2), evaluate the merits of every application received by it and dispose of each application:

(a)……...

(b) received in terms of subsection (1)(c) or (d), in accordance with Part C of this Chapter."

This is as clear as crystal that the subsection refers to an application to amend custom duties. This is precisely what Defy's application was about.

To complete the picture, s 30(1) of ITA Act states that:

"*The Commission must, upon receipt of an application to amend custom duties:*

(a) notify the SACU secretariat of the application:

(b) ascertain whether an application dealing with a substantially similar matter pending before the relevant SACU institution has been decided upon the relevant SACU institution within the previous six months from the date of the application

(3) if the Commission determines that an application before it does not deal with a substantially similar matter contemplated in subsection 1(b) the Commission must evaluate the merits of the application and recommend to the Tariff Board that the application be approved or rejected.

(4) The Commission must, when evaluating a matter in terms of this section, apply:

4.1 any relevant rules of analysis established by SACU Council through the formulation of policy mandates;

4.2 procedures;

4.3 guidelines contemplated in Article 8(2)."

[40] In paragraph 19 of its answering affidavit, the Commission states that Defy's application was brought under section 26(1)(c) of the ITA Act. But Bosch contends, on the contrary, that no one of the respondents contends that the application was brought in respect of:

[40.1] anti-dumping duties.

[40.2] countervailing duties.

[40.3] safeguarding duties,

as envisaged by section 26(1)(c) of the ITA Act or in terms of the Regulations.

Bosch contends that consequently it is difficult to determine the basis on which the application was brought or the reasons why it is suggested that Defy's application was brought in terms of section 26(1)(c). According to Bosch the

procedures for the determination of applications brought under section 26(1)(c) are redefined not only in the Act but also in the Regulations relating to:

[40.4] anti-dumping Regulations promulgated on 14 November 2003 under Government Gazette number 25684 (the anti-dumping Regulations).

[40.5] countervailing Regulations promulgated on 15 April 2005 under Government Gazette No. 27475.

[40.6] safeguarding Regulations.

[41] Bosch contends that the application brought by Defy did not relate to anti-dumping, countervailing or safeguarding duties. These types of duties, according to Bosch, are clearly defined in the Act and or Regulations and are unrelated to the type of application brought by Defy.

[42] This interpretation of section 26(1)(c) by Bosch is flawed and cannot be sustained. For the purposes of this application section 26(1)(c) reads as follows and, in my view, this is how Bosch should read it:

"A person may, in the prescribed manner and form, apply to the Commission for:

(c) the amendment of tariffs, ".

This is precisely what Defy has done in this application. It is clear from the said part of section 26(1)(c) that a person may apply to the Commissioner for the amendment of custom duties without necessarily applying for anti-dumping, countervailing, and safeguarding duties. The Commission was, in my view, correct when in paragraph [19] of its answering affidavit it stated that:

"Section 26(1)(c) of ITA Act provides that any person can apply to the Commission for the amendment of custom duties."

A person does not have to apply for anti-dumping, or countervailing duties or safeguarding duties if he only wants to apply for the amendment of custom duties, such as Defy has done in the instant matter and such as I made it clear in paragraph [39] *supra.*

[43] In his heads of argument advocate Maenetje SC dealt extensively with the interpretation of section 26(1)(c) of ITA Act. I agree with him. In his heads of argument, he pointed out to what he called Bosch's interpretative error of section 26(1)(c) of the ITA Act. Bosch's interpretative error captured in its counsel's heads of argument where it is stated as follows:

"If it is found that the application was brought by Defy under section 26(1)(c) it could only have been brought under the provisions relating to safeguarding...

If the application was an application of safeguarding duties under section 26(1)(c) the Commission was required to investigate Defy's Application in terms of the Safeguarding Regulations."

[44] As the Commission is an organ of state it is accepted that as such it "*may exercise no power and perform no function beyond that conferred it by the law"*. Mr Maenetje submitted that interpretation of section 26(1)(c) contended for by Bosch is incorrect. It his further submission that the source of such an error emanates from the reading of section 26(1)(c) incorrectly:

[44.1] on Bush's interpretation of the provision, the amendment of custom duties may only occur where it is concerned with one of three trade remedies, namely, anti-dumping duties: countervailing duties or safeguard duties;

[44.2] the contention that the Commission is empowered to accept applications in respect of the latter three trade remedies is similarly not disputed. What Bosch overlooks is the fact that over and above being permitted to investigate applications in respect of the three trade remedies referred to above, s 26(1)(c) also explicitly permits for an application to be made for the amendment of customs duties;

[44.3] according to Adv Maenetje SC the error appears to proceed from misapprehension of the language of section 26(1)(c) of the word *"including*", although Bosch appears to interpret the word as it is used in s 26(1)(c) as providing for an exhaustive list. Mr Maenetje submits that there is no basis for a conclusion that this is the case. He submitted furthermore that it is also consistent with trite principles of statutory interpretation. His submission is supported by the relevant case law on the matter in which the word "*includes"* falls to be interpreted. In support of his submission, he referred the Court to the judgment of **Nieuco Properties 1005 and Another v Trustees for the time being of Inkululeko Community Trust and Others [2018] ZASCA paragraph [123]** in which the Supreme Court of Appeal ("SCA") pertinently held that *"[a]s a general rule, the word "includes" is used as a term of extension".* Accordingly, this means that the general rule is that the three remedies referred to in s 26(1)(c) are not exhaustive of the amendments of the "*amendments of customs duties";*

[44.4] he also pointed out that the same general rule applied by the SCA in Nieuco Properties follows on the application of the same principle by the SCA in **Ndlovu v Ngcobo, Bekker and Another v Jika (1) [2002] 4 All SA 384 (SCA) at para. [20].**

[44.5] the Constitutional Court weighed in on the application of the general rule in relation to the meaning of the word "includes" in **De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2004 (1) SA 406 (CC).** In the said judgment the court made it clear that:

"*The correct sense of "includes" in a statute must be ascertained from the context in which it is used. Debele provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by "includes" go beyond that primary meaning, the purpose of that list is then usually taken to be to add to their primary meanings so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning- if it is a word in ordinary, non-legal usage- fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in Debele (R v Debele 1956 (4) SA 570 AD at 575) as "'n moeras van onsekerheid" (a quagmire of uncertainty) in the application of the term."*

[44.6] In my view, applying the principles set out in the above judgments, the use of the term *"including"* in section 26(1)(c) is clearly non-exhaustive, in that the three trade remedies referred to in the provision are not exhaustive of the definition of customs duties, in other words, the phrase "custom duties" is not confined to the three trade remedies referred to in the said section.

[44.7] The term falls to be interpreted in accordance with the general rule. For instance:

[44.7.1] the term *"customs duties"* is defined in section one of the ITA Act, as being custom duties as defined in section 1 of the CEA.

[44.7.2] *"customs duties*" are defined in the CEA as being any duty leviable under Schedule number 1 or 2 on goods imported into the Republic.

[44.7.3] "*the customs duties leviable*" in terms of schedule 1 or 2 of the CEA include more than simply those duties which may be levied as anti-dumping duties, countervailing duties, or safeguarding duties. It is the Commission's case that it is therefore entitled to accept applications for the amendment of custom duties which go beyond the three trade remedies. I accordingly disagree with the contrary contention held by Bosch.

[44.8] Counsel for Defy, Advocate MA Wesley, joined issue with adv Maenetje SC in the way in which s 26(1)(c) of the ITA Act should be interpreted. He disagreed with Bosch's interpretation of the said section. According to him, s 26(1)(c) of the ITA Act provides for an application for *"the amendment of customs duties".* On its face, this includes an application for the amendment of any of the duties set out in Schedule 1 of the CEA. Bosch contends though that this right is qualified by the phrase *"with regard to"* at the end of the sub-section and the

three types of duties specifically identified in sub-sections (i) – (iii). This is an error. The phrase *"with regard to"* is a continuation of the phrase that begins with the word *"including"* after the general phrase at the start of s 26(1)(c).

[44.9] He argued that what Bosch does not appear to appreciate the difference between a general customs duty, contemplated in the opening phrase in the sub-section and the three specific forms of duty identified in sub-sections (i) – (iii). The former applies to all countries in the world automatically, while the latter three only apply to a specified country or countries (generally based on conduct by that country, for example dumping, subsidized imports or a surge of imports into the SACU). The latter are therefore duties in respect of goods imported *"from a country that is not a Member State"*. The latter three duties are best understood as trade remedy instruments, in contrast to ordinary customs tariffs imposed in line with the maximum tariff levels agreed to during the so-called Uruguay Round of trade negotiations in 1994.

[44.10] According to him when read properly, the phrase *"with regard to"* in s 26(1)(c) of the ITA Act qualifies the types of duty that may be imposed on goods being imported from a specific country or countries, not a general customs duty at all. Confirmation of the distinction between the two types of duties appears in the Schedules to the CEA. Schedule 1 contains the general customs duties applicable to products from all countries. Schedule 2 contains the duties imposed as trade remedies (i.e., Safeguard duties, anti-dumping duties, countervailing duties) and applicable to products imported from specified countries.

Further confirmation of this distinction appears from s16 of the ITA Act. The heading of the section distinguishes *"customs duties", "antidumping duties", "countervailing duties"* and *"safeguard measures"*. The various sub-sections then deal with each of these four types of duty. S 16(1)(c) identifies applications for the *"amendment of customs duties"* as separate applications.

[44.11] In the circumstances, there is no merit in Bosch's argument that the Commission acted *ultra vires* in considering Defy's application for an increase in the general tariff and in recommending an increase in that tariff in the manner it did. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by the statute have not been complied with or followed or if the rule of natural justice has not been adhered to. In this instant matter, the court cannot intervene to overturn the decision of the Commission simply because of the divergent views regarding the interpretation of section 26(1) (c) of the ITAC Act. I am satisfied that the Commission acted within its statutory

powers when it classified Defy's application as one falling under s 26(1)(c) of ITA ACT.

[45] The process involved in completing an evaluation of applications for the amendment of tariffs is inherently polycentric. The object of the ITA Act is instructive in appreciating the policy laid in nature of the work that the Commission performs. Section 2 of the ITA Act describes the object as being:

"To foster economic growth and development in order to raise income 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 internal trade subject to this Act and the SACU agreement."

[46] Several types of tariff amendments are administered by the Tariff Investigations Unit of the Commission: investigations regarding potential increases or reductions in ordinary customs duties and the creation of rebate and drawback provisions. To ensure that custom duties can meet their intended economic objectives, they are permitted to take a variety of forms. These include the following:

[46.1] *Ad valorem* duties; these duties are expressed as a percentage of the free on board of the value of the imported goods;

[46.2] Specific duties; the duties are mostly expressed in rand per kilogram or a unit.

[47] Tariff investigations, consistent with the policy laid such enquiries, are conducted on a case-by-case basis. They are informed by the particularities of a sector. Section 16(1)(c) of the ITA Act directs the Commission to investigate and evaluate, among others, applications which it receives regarding the amendment of custom duties. S. 16(1)(c) of the ITA Act provides that:

"The Commission must investigate and evaluate –

(c) applications in terms of section 26 with regard to amendment of customs duties in the Common Customs Area."

As instruments of policy tariffs are a different kettle of fish to other instruments that form part of the treaty formwork created under the World Trade Organisation ("WTO"). Antidumping and countervailing duties, for example, are, if anything, less policy laden not least because, under the WTO agreements, the latter two instruments are reactive and remedial measures by their definition but because they are regulated far more specifically.

[48] As set forth in the regulations, the Commission's evaluation of applications concerning the amendments to tariffs and its findings in investigations are informed by the industrial policy and economic objectives of Government (in this regard see Regulation 10.1). In this way, the Regulations echo and reinforce the objects that the ITA Act sets out.

[49] The Regulations provide further flash to the objectives of the ITA Act, in several ways. Importantly for present purposes they provide, *inter alia*, that tariff support is conditioned on how the domestic industry "will perform against the government's set policy objectives, including its plans to increase production, investment and employment." In other words, in return for government support, applicants are expected to foster economic growth, particularly in areas identified by the executives and strategically important areas for the regional economy, through increased economic activity.

[50] The fact that regard to Government policies is necessary in relating to tariffs as a legal obligation makes it necessary for the Commission to stay abreast of such policies. The Commission did so, in relation to the decisions that Bosch is attacking. One critically important consideration in this regard was a Policy Directive (entitled *"Policy Directive" on matters [the Commission] shall consider in evaluating applications for amendment of customs"*) published in the Government Gazette by the Minister of Economic Affairs on 21 April 2016 ("the Policy Directive") attached to the Commission's answering affidavit and marked 'AA1'. The following points in the Policy Directive are of utmost importance:

[50.1] the Policy Directive reiterates an important purpose of the ITA Act, which is to *"foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and common customs area" of SACU";*

[50.2] the Policy Directive underlines that:

"economic growth and development" where "particularly pressing problems at that time".

The Policy Directive makes explicit that it was issued by the Minister of Economic Development to address these issues and "improve the realisation of the objects of the Act".

[50.3] "In relation to an application for amendment of custom duties", the Policy Directive goes on to state, it is "preferable that the Commission should consult with the Applicant" with regards to the following matters:

[50.3.1] the "desirability of the Applicant to making an objectively verifiable and binding commitment as to what action it will take in order to ensure the raising of incomes, the promotion of investment or the promotion of employment, if the proposed measure is implemented";

[50.3.2] "what such commitments, if any, the Applicant has made in that regard"; and

[50.3.3] the "likely impact of those commitments on incomes, investments, or employment".

The Policy Directive explicitly calls upon the Commission, in the context of the economy, to determine whether such commitments would be desirable. Surprisingly, Bosch does not deal with the overall industrial policy directives that guided the Commission in its decision-making or the commitment made by Defy as part of its application to increase production, investment and employment Commission also considered or the support expressed for Defy's application by Botswana, another member of SACU, by Zero Appliances, the only other local manufacturer of the subject product and finally by the DTI.

[51] In a further demonstration of the central importance of the current Industrial Policy, the Policy Directive provides that the Commission must, in "each instance" assess the likely impact of the commitments made on the following factors:

[51.1] "job creation or job retention, including commitments for specified categories such as youth employment";

[51.2] "industrial output";

[51.3] "investment in plant, equipment, skills and research and development";

[51.4] "economic investment, such as support for participation in manufacturing and related activities by small businesses, black owned or black managed enterprises, and common customs area supply chains"; and

[51.5] "pricing of outputs".

[52] On the aforegoing basis the Commission submits that quite clearly prior to making the decision under attack, the Commission considered all the necessary factors which the Commission, in its discretion, deemed to be relevant. In doing so, the Commission did no less than what the law requires. Further factors over and above those set out above were considered by the Commission as well. In addition, the Commission was required to consider various other factors such as they relate to the product under investigation. Specifically, the Commission was at large to consider the following:

[52.1] the domestic industry production capacity and potential;

[52.2] employment, including considerations of labour intensity and labour demographics of the relevant industries;

[52.3] investment;

[52.4] price differentials between the domestically manufactured product and the imported product;

[52.5] market shares;

[52.6] import and export data;

[52.7] demand in supply conditions;

[52.8] the financial state of the domestic industry including the profitability and return ratios;

[52.9] price and cost structures;

[52.10] the rate of effective production; and;

[52.11] the availability of domestically manufactured identical or substitute products.

[53] Mr Mbambo states that, among other things, the regulatory formwork permits the Commission to consider the operational and financial condition of the applicant. However, support for the applicant is not conditioned on finding that the applicant is doing poorly or that it is suffering material harm from imports or otherwise. The sole conditionality expressed in the Regulations in the commitment to perform as against governments "set policy objectives".

[54] In addition to more general policy related considerations, the Regulations permit the Commission to consider a long list of other polycentric factors. See in this regard Regulation 10.2. As further evidence of the breath of the Commission's discretionary permit, the Regulations make it clear that in deciding in any given case, the Commission may go beyond even this long list of considerations (my underlining). The Regulations themselves state explicitly that this list of factors "is not exhaustive" and that the Commission "will decide the relative weight to be given to any one factor on a case-by-case basis". This process is followed where amendments to custom duties are effected.

[55] An amendment to a custom duty requires compliance, not only with the ITA Act but also with other legislation as well. Custom duties, for example, are regulated under the provisions of the CEA legislation which falls under the executive authority of the Minister of Finance. Where any amendment to custom duties occurs, it follows a three-tiered process:

[55.1] the Commission evaluates an application in terms of, *inter alia*, sections 16 and 26 of the ITA Act and makes a recommendation to the Minister of Trade and Industry;

[55.2] the Minister of Trade and Industry may accept or reject the Commission's recommendation or refer the matter back to the Commission for reconsideration in terms of s 4(2)(a) of the Board of Tariffs and Trade Act 107 of 1986 ("the BTT Act"). If the Minister accepts the Commission's recommendation, he requests the Minister of Finance to amend the relevant schedule to the CEA as provided for in s 4(2)(b) of the BTT Act;

[55.3] the Minister of Finance may amend Schedule 1 to the CEA to give effect to any request by the Minister of Trade and Industry in terms of s 48(1)(b) of the CEA. Exhibit 'KT1' in case no. 67553/18 is an example of such a request.

[56] In regard to the role of the Minister of Finance, the third step, the Commission states that it should be noted that ordinary customs duties are levied under the CEA, which falls under the executive authority of the Minister of Finance. Schedule 1 to the CEA contains the rates

of duties. The products are categorised under various chapters, sections, and tariff headings (4-digit headings). Each product is classified under the most appropriate tariff subheading (6-digit heading). The 6-digit tariff subheadings in Schedule 1 are set out in accordance with the Harmonised Commodity Description and Coding System (Harmonised System) of tariff nomenclature, maintained by the World Customs Organisation. The Harmonised System is an internationally standardised system of names and numbers to classify traded products. Under the World Trade Organisation, of which South Africa is a member, each country can create its own 8-digit tariff headings to allow the country self-flexibility in the administration of customs duties, other duties, service, and rebates.

[57] The South African Revenue Service ("SARS"), which is subject to the executive oversight of the Minister of Finance, is an organ of state responsible for administering the clearance of imported products. SARS is empowered to classify products and make tariff determinations under s 47 of the CEA. Tariff classifications fall outside the scope of the Commissioner's expertise, powers, and duties. Consequently, when the Commission investigates the product, SARS is consulted on the appropriate tariff classification of the product.

[D] THE RELEVANT FACTS
THE BASIS FOR DEFY's APPLICATION

[58] There are only two domestic manufacturers of the subject product in South Africa. Defy is one of the two. As the former importer, Defy commenced the domestic manufacturing of gas stoves in the Republic of South Africa in 2014. This is not in dispute. Defy applied for an increase to the customs duty on the subject product, *inter alia*, for these reasons. Further reasons recorded in Defy's application and considered by the Commission in its Final Findings were as follows:

[58.1] Defy's inability to be price competitive arose from "current levels of plant utilization and economies of scale", which was leading to "higher unit costs of production and reduced profitability and employment";

[58.2] "an increase in customs duty would enable Defy to compete with low priced imports into SACU";

[58.3] "an increase in tariffs which supports future plans from introduction of additional ranges of gas stoves and especially the planned production of two new models in the factory based in Durban".

Bosch admits the contents hereof insofar as they correspond to the contents of the final findings.

[59] According to the Commission, Defy had invested a total amount of R6 million in new machinery for the manufacture of the subject product and at the time of the Commissioner's

Final Findings, it had employed a total of 26 employees. In motivation of its application Defy stated that:

"The increase of tariff will not only ensure job retention, but also will allow the Company to gain additional market share and therefore increase local production which will result in additional employment. The increase in tariffs will also support future plans for the introduction or additional gas stoves into the range, and especially the planned production of two new models in the second half of 2015 in Durban."

BOSCH denied the contents hereof simply on the basis that it had no knowledge thereof. Defy had made certain undertakings to the Commission. Such undertakings were:

[59.1] to invest an additional R3.3 million in plant machinery;

[59.2] to increase production volumes by approximately 43% over the following two years starting from 2016; and finally,

[59.3] to add an additional 29 employees during the same period.

It is Bosch's contention that the Commission ought not to have had no regards to the purported undertakings and to have dismissed Defy's application. The Commission was required to evaluate Defy's application on its merits and in accordance with the applicable regulatory framework, including the relevant industrial policy objective. Defy's application for the tariff increase was submitted on 17 August 2015. On 20 November 2015, the application was published for comment by interested parties in the Government Gazette.

[E] THE COMMISSION HAS MET OR EXCEEDED THE PROCEDURAL REQUIREMENTS OF THE REGULATORY PROCESS

[60] The Commission submitted that in coming to its recommendations it followed a rigorous and legally valid process. It went ahead and summarised such process as follows:

[60.1] on 28 and 29 September 2015 the Commission, through its staff, conducted a verification inspection of Defy's premises. The Commission's staff prepared a verification report on 20 October 2015, a non-confidential version of which is attached hereto as 'AA2';

[60.2] on the same date as the completion of the verification report, the Commission sent a letter to the Department of Trade and Industry ("DTI") asking for its comments on the application. The Commission then sent a similar letter to Zero Appliances (Pty) Ltd ("Zero Appliances"). Both parties supported the application;

[60.3] on 10 November 2015 at a meeting of the Commission, it was resolved to publish Defy's application for the comments of interested parties. That was done on 20 November 2015;

[60.4] thereafter, the Commission received submissions and objections from interested parties up until May 2016. One of the letters of support that the Commission received was from Botswana Minister of Trade and Industry. During this

process, the Commission raised queries with Defy in relation to its application, *inter alia*, based on the submissions the Commission had received. Defy responded to the queries;

[60.5] DK Gas Appliances CC t/a Total ("Total") was one of the firms that objected to Defy's application. Total was afforded an opportunity to make an oral presentation explaining its objections in August 2016;

[60.6] the Commission staff considered all objections and responses and incorporated these into a submission supporting an increase in the customs duty. The submission was presented at a meeting of the Commission on 16 August 2016. On the strength, *inter alia*, of the report, the Commission resolved, to recommend an increase in the customs duty;

[60.7] Bosch objected that it had not been granted an opportunity to make an oral representation thereafter. Even though there was no requirement in principle that demanded Bosch to be afforded such an opportunity, the Commission decided to grant Bosch an opportunity to submit its objections to the application;

[60.8] on 20 October 2016 the Commission held a meeting with Bosch to better understand Bosch's concerns. The Commission allowed Bosch to make oral representations on 6 December 2016. By this time, the Commission had also permitted BOSCH to deliver a further written objection. Bosch did so on 2 August 2016;

[60.9] the Commission went as far as it possibly could to accommodate Bosch's concerns. After hearing Bosch's oral presentation and meeting to consider this representation on the same day the Commission decided to rescind the previous decision to recommend an increase in the custom duty;

[60.10] Bosch then proceeded to furnish the Commission with further information in writing on 22 December 2016. The Commission considered this information. It prepared the Final Findings in a report dated 7 February 2017 which is attached to the supplementary finding affidavits as Annexure 'DG15'. The Commission considered the further information submitted by Bosch. However, as the final findings made to it, the Commission was not influenced by the further information received;

[60.11] the Final Findings were presented at a meeting of the Commission on the same date of 7 February 2017. As recorded in the minute attached hereto marked 'AA7' the Commission resolved to recommend that the increase sought by Defy should be granted;

[60.12] on 12 February 2017 the Chief Commissioner of the Commission sent a submission to the Minister of Trade and Industry, recommending an increase in custom duty, in line with the Resolution of 7 February 2017. While Bosch admits that the Commission was required to follow a rigorous and legally valid process

in coming to its recommendations, it denies that this was done in the instant case.

[61] On 28 February 2017 the Minister of Trade and Industry agreed with and approved the Commission's recommendation. He signed it. He then submitted a request to the Minister of Finance on the same date. The request was for the Minister to amend Part 1 of Schedule 1 of the CEA to make provision for the increased duty. The request of the Minister of Trade and Industry was then independently considered by SARS. On 20 July 2017, the Minister of Finance approved the request by signing the recommendation. The requested amendment was promulgated in the Government Gazette on 25 August 2017.

[F] THE COMMISSION'S FINAL FINDINGS

[62] The centrepiece of Bosch's attack in this application is the Commission's Final Findings. As already pointed out somewhere *supra*, the law requires the Commission to make polycentric and discretionary decisions on a case-by-case basis. In the instant application Bosch contends that the recommendation of the Commission was unlawful. Counsel for the Commission submitted that this was incorrect. The starting point in this regard is the content of Defy's application. There the challenges facing the domestic industry at an operational level were described as including "high manufacturing costs, transport costs and financing costs". "In addition,", Defy explained that challenges specific to its local enterprise and the domestic industry were "increases in electricity prices as well as labour costs", both of which are self-evidently peculiar to domestic production in this country.

[63] Defy contended furthermore that the increase in duty sought would not only have benefits for the domestic industry but would also permit the Commission to protect the South African consumer. If the duty were to be increased Defy anticipated that it could avoid price increases by reducing its unit cost of production. The Commission considered all the evidence that it received. In weighing up its decision, the Commission considered the nature of the domestic industry and having done so, concluded that, *inter alia*, Chinese imports of the subject product from most of the imports under the relevant tariff heading and that they were rapidly increasing. This is what paragraph 8.1.2 of the Commission's Recommendation stated:

"Imports of the subject product originate mainly from China, Turkey and Italy, with China accountable for about 44% on average annually, despite contractions in 2013."

The Commission then concluded that the tariff subheading included other products that did not conflate part of the investigation. Based on that it concluded that it did not have any sufficient information before it to make a reliable final determination as to imports or exports of the subject product itself. In this respect the Commission could go no further than to

conclude that there were significant imports of substitute products. To assist with future analysis in this regard the Commission instead recommended the creation of a separate tariff subheading:

"the creation of a separate tariff subheading for the subject product would assist the Commission with accurate trade data in future investigations."

[64] Earlier it was pointed out that Mr Mbambo mentioned the fact that the Minister of Trade and Industry of Botswana supported the application. According to Mr Mbambo the position of the DTI, as fellow functionary required to implement the industry policy, was one of the important considerations that the Commission had to consider. The Department of Trade and Industry supported the application, among others, for the following reasons (in this regard reference is made to paragraph 10.3 of the Commission's recommendation):

[64.1] in the IPAPs of 2014/2015 and 2016/2017, the facilitation of a favourable tariff regime was one of the key milestones identified as being salutary to the local manufacturing of Whites Goods and products;

[64.2] the positive outcomes of the tariff would accord with the key milestones in the IPAPs, and it would therefore facilitate growth of the local industry; and

[64.3] the tariffs would incentivise local manufacturing over imports of the subject product, which would result in the creation of additional jobs and strengthen local manufacturing, *inter alia*, by improving the competitiveness of local manufacturers. According to Mr Mbambo on the Commission's assessment of evidence before it, it agreed with the DTI, among others, that in the circumstances where there were indeed substitutable imports that were constraining the subject product – the tariff would indeed have the positive effects listed by the DTI. In so doing the Commission rejected the objections received concerning the potential employment benefits of the requested increase:

"The respondent raises concerns regarding the lack of comparison in the application of manufacturing jobs that will be created against possible job losses on the part of importers because of the proposed customs duty increase on the subject products. However, such a simplistic comparison would not be sufficient for the purposes of tariff setting. Manufacturing jobs require certain skills that are not comparable to jobs created by importers. Manufacturing skills may result in decent jobs for employees. Such skills are also permanent and transferable to other similar production professions making the workers more marketable and employable in other sectors of the economy."

The Commission concluded that the cost benefit analysis concerning employment favoured the grant of the requested increase:

"The Commission deliberated on the possible trade-off between employment created by importers and manufacturing jobs as a result of import duties. The Commission took a view that manufacturing jobs require skills that are not comparable to the jobs created by importers. Such skills are transferable to similar processes making workers more marketable and employable in other sectors of the economy."

[65] [65.1] In the exercise of its discretion, the Commission considered several various factors that it is permitted to consider in terms of the ITA Act and the Regulations. Some of these are listed in the Final Findings. Considering all the relevant evidence, the Commission concluded that the application met the requisite requirements and that an increase in the relevant duty would be good policy:

"The Commission concluded that additional staff support would significantly improve the competitive position of the subject product, thereby ensuring economic viability and sustainability of the local industry."

[65.2] In contradistinction Bosch ignores these other factors that influenced the Commission. At the same time, it asks the Court to ignore the undisputed effect of the imposition of the tariff, despite the fact that it acknowledges that the effects of the increase in tariff on both Defy and Bosch are precisely the effects that had been intended.

[65.3] As pointed out supra, in considering several various factors other factors that it was permitted to consider by the ITAC Act and the Regulations, the Commission exercised its discretion properly in law. A discretion must be exercised reasonably. The phraseology *"exercised reasonably*" has frequently been used and is frequently used as a general description of things that should not be done. A person or body entrusted with a discretion must direct himself or itself properly in law. For instance, the Commission will be regarded as having acted properly in law if it is allowed by the ITA ACT and or the Regulations to take certain factors into account even if such factors were not mentioned in the application. When the Commission has acted properly there cannot be a complaint that the Commission has decided an application on factors which were not mentioned in the application.

[65.4] A person who has been entrusted with a discretion, such as the Commission was, must call all his or its attention to the matter which it is bound to consider. It must exclude from its consideration matters which are irrelevant to what it must consider. The factors the Commission is permitted to consider by the provisions of ITA ACT or the Regulations, even if not referred to in any application, and which matters are within its discretion, can never be irrelevant. If the Commission

fails to obey the provisions of the ITA ACT or the rules of the Regulations, it may truly be said, and is often said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it within the powers of the Commission.

[65.5] I am therefore satisfied that the Commission exercised its discretion reasonably when it considered various other factors not mentioned in Defy's application but which it was obligated by the provisions of the ITA ACT and the Regulations to consider. Investigating an application is by that nature highly technical. Such an investigation involves a conceptual and an appraisal of facts and demands expertise of a special kind. For this reason, the Commission, as a special agency, will investigate and draw up recommendations.

[66] Accordingly, the Commission was correct when it recommended that the Minister of Trade and Industry approve an increase in the rate of customs duty on a subject product from 15% to 30% *ad valorem*, by way of creating an additional "8-digit tariff subheading". The Minister of Trade and Industry and the Minister of Finance ostensibly agreed with the Commissions' proposed cause of action, *inter alia*, by SARS was the cause of action that was ultimately followed. It is these decisions of the Ministers of Finance and of Trade and Industry that are the target of Bosch's application for review and set aside. I deal separately with each Minister's case hereunder.

[G] BOSCH's PURPORTED GROUNDS OF REVIEW

[67] Bosch's challenge to the legal validity of the decision under attack is predicated to an exceptionally large extent on the analysis of Genesis Analytics (Pty) Ltd ("Genesis"). That attack is confined to the co-reasoning in the Final Findings that have been referred to. Bosch cannot legitimately contend, for example, that the Commission was wrong to reach any of the following conclusions that:

[67.1] there were significant imports of substitute products and theses products had a bearing on Defy's ability to make a profit;

[67.2] the increase of the duty sought by Defy would permit Defy to increase production and employment, resulting in potential growth in the market;

[67.3] Defy's claims that it could and its undertaking that it would indeed increase production, investment, and employment, as it promised to do, were credible;

[67.4] the increase of the duty sought by Defy would accord with the industrial policy and economic objectives which the government sought to advance.

It was submitted by counsel for the Commission that the aforegoing reasons were sufficient to dismiss the current application.

[68] I now turn to the submission by the Commission that the five main criticisms levelled by Bosch against the decision of the Commission do not meet the required standards.

[69] I proceed to deal singly, as the Commission did, with the several complaints raised by Bosch:

Complaint A: there was no basis for the Commission to conclude that Defy's profits were low;

[69.1] the Commission, based on the conflict analysis of the evidence before it, concluded that Defy's margin of profit in 2015 was 5%. Mr. Mbambo concluded that the Commission concluded that Defy was experiencing low profitability informed its final findings. Bosch, through Genesis, criticises this conclusion on three bases. These criticisms, and the reasons why the Commission submit that they are without merit, may be summarised as follows:

[69.1.1] first, Genesis attempts to demonstrate that the Commission's assessment of profitability diverges from Genesis own assessment of Defy's return on investment. The Commission did not use this calculation and Mr Mbambo advise and submits that it was not required to do so. He was also advised that there are different ways to calculate profitability with the return on investment being only one. It was advised and is submitted that the Commission was perfectly at liberty to apply the standard that it did and not the return on investments standard;

[69.1.2] second, Genesis criticises the Commission for relying on only a single year's data to form its assessment. This ignores the imperfect circumstances in which the Commission was required to make its decision. Because Defy had only recently commenced production, it was only able to furnish the Commission with one year's data to consider. If the Commission had declined to decide based on this reality, it would necessarily mean that it could only decide once Defy had been manufacturing for several years by which time Defy may have elected to pull out of the domestic industry and returned to imports;

[69.1.3] Genesis argues that the Commission's assessment of the profit as being low is "highly subjective". It does not, however, contest that the facts on which the Commission made its assessment are correct. Mr Mbambo was advised, denuded of the meritless criticism he had addressed above, the criticism is not valid;

[69.1.3.1] the assertion raised by Genesis goes no further than to suggest that Genesis disagrees with the Commission that the 5% profit margin is low;

[69.1.3.2] the question of whether a 5% profit margin is low or high is a decision which the law requires the Commission to make. It is a question for the Commission's discretion or opinion provided that the Commission exercises the discretion in a rational manner;

[69.1.3.3] the complaint does not begin to rise to the level that the Commission's assessment was irrational.

Complaint B: The Commission was wrong to conclude that low costs were increasing

[70] The assessment of the Commission that is relevant under this heading is its conclusion that local manufacturers had experienced cost increases in the period 2013 to 2015. But Genesis's does not dispute that this conclusion is correct, as a matter of fact. Instead, Genesis' sole criticism in this regard is that the increase of local costs does not lead to the conclusion that local producers were unable to compete with imports.

[71] This purported criticism of the Commission's reasoning process attracts a strawman. It criticises the Commission based on something that the Commission did not say. Furthermore, the alleged failure relates to the finding that the Commission was not required to make.

[72] All that the Commission was required to assess was whether the local producers had high costs and whether their prices were constrained by imports, resulting in low profitability. However, as had been explained, this was precisely what the Commission did.

[73] Even if this Court were to hold otherwise, Mr Mbambo still submits that there is no merit to the three complaints raised by Genesis under the subheading. He said that because of the following:

[73.1] first, Genesis suggests, because of Table 5 of the Final Findings, that Defy's profits increased by more than its costs between 2014 and 2015. This contention is factually incorrect. The Table contains an erroneous expert reselling price for Defy for 2014. The Commission made its decision based on the correct expert reselling price. Once the error is corrected it becomes clear that the complaint of Genesis has no merit;

[73.2] second, Genesis objects to the imposition of customs duty on imports because of the existence of the rebate provision. The contention ignores the fact that, pre-rebate, the existing costs would already have had an impact on Defy's costs structure. The contention is also wrong in fact, because not all the steel components used in the manufacture process were subject to the rebate;

[73.3] third, Genesis suggests that increases in costs of importers may have been higher than those of local producers. Mr Mbambo denied that this is the case. On the facts he was advised, and he submits that Genesis' contention to the contrary cannot be established.

Complaint C: The Commission was wrong to rely on SARS import data and to conclude that imports were rising

[74] Similarly to the latter complaint, Bosch's complaint under the heading also appears to attack a strawman. The Commission states that it was at all times acutely aware of difficulties presented by SARS' data. This appears quite evidently from its Final Findings:
"Tariff Subheading 7321.11 includes other products that are not part of the investigation and therefore a logical conclusion cannot be made regarding the import and export trends. The market share of the domestic industry on the subject product is also not accurate because Tariff Subheading 7321.11 includes a wide range of stoves."

[75] According to the Commission the fact that the SARS data was unreliable did not mean that it could not decide. In making the decision, it had regards to several factors, which included what could usefully be extracted from the admitted imperfect data. In investigations generally, this is what it does. It examines the environment in which the domestic industry operates. Where, as in this case, there are issues complicating the evaluation of certain data, regulation 10.2 of the Regulations, permits it to grant such data little or no weight. Regarding SARS data, the Commission did no more than to take cognisance of relevant trends.

[76] The Commission is satisfied that it had sufficient data before it to make a legally valid conclusion and it did so. Genesis refers to information that was not before the Commission to undermine this conclusion. Such extraneous information is not relevant.

Complaint D: The Commission was wrong to conclude that domestic producers were suffering from the price disadvantage when compared to imports

[77] Mr Mbambo testified that under this heading, Genesis and Bosch take issue with the conclusion that the Final Findings **made clear was not central** or critical to the Commission's reasoning. This is made clear at paragraph 11.6 of the Findings:
"An analysis of import prices can be misleading because the FOB values from SARS include other stoves that are not covered by the investigation. Further, actual invoices are also not reliable for purposes of realising the price competitiveness of the local industry because of the wide range of band names to subject products. This is also complicated by the varying in range of input materials used to manufacture similar stoves."

[78] Mr Mbambo does not admit the contention that Defy was not suffering from a price disadvantage. He submits that this contention has not been established. However, he holds the view that even if this Court were to disagree, he would submit that nothing turns on this issue. Given the peripheral importance of the assessment, he was advised, and he submits, that this does not affect the conclusion that the Commission ultimately reached. To the extent that an error was made in the Final Findings in this regard, which he did not admit, it is according to him, not material to the rationality of the decision, given that it did not inform the Commission's conclusion, insubstantial.

Complaint E: The Commission misinterpreted the implications of the fact that Total decided to localise manufacturing

[79] Under this finding Genesis argues that the Commission incorrectly ignored the import of Total's conduct. In effect Genesis argues that Total's decision to localise its manufacturing of gas stoves demonstrated that Total considered it profitable to manufacture locally at existing tariff levels. This, Genesis argues, is "further evidence" that the Commission's Recommendation for an increase in existing tariff was unnecessary.

[80] Once regard is had to the true facts, Mr Mbambo submitted that Total's conduct undermines the argument of Bosch, as opposed to the Recommendation of the Commission. He submitted that Total's conduct supports the Commission's Recommendation in that:

[80.1] Total initially strongly objected to the increase that Defy proposed;

[80.2] Total informed the Commission that it intended to localise its manufacturing during the investigation period, when it became apparent that an increase in the duty was lacking;

[80.3] the fact that Total decided to change its position based on the increased duty is evidence that the increase in the duty, giving that it has acted as an incentive for Total, is likely to have the desired effect.

It is for the aforegoing reasons that the Commission contends that Bosch's complaints are unfounded, and that this application should be dismissed.

[81] In my view, the decision of the Commission to recommend to the Minister of Trade and Industry to approve Defy's application was taken in a consistent, uniform, impartial and reasonable manner. The Commission properly applied its mind to the application. It made sure that in the execution of its duties in terms of s 16 of the ITA Act, it ensured that the purpose of its exercise satisfied the requirements of s 2 of the ITA Act; that the tariff investigation unit, as it normally did on the case-by-case basis, worked within the requirements of the law.

[82] There is no doubt that the Commission considered the regulations in its decision. The Commission was required to have regard to the Government Policy and Policy Directive in the formulation of its decision. The Commission has acted regarding all the factors that it had to consider.

[83] The principle of procedural fairness was observed by the Commission. The recommendation of the Commission was made only after a careful analysis of the issues that were relevant to the Commission in making a recommendation. Judged against these considerations, fairness did not demand that every objection should be considered from those functions.

[84] The principle means by which the Commission achieves its objects by conducting investigations: S 16(1)(c) of the ITA Act by using the word "must", the legislature imposed a duty on the Commission to perform these functions. The law required these duties to conform. The Commission has no discretion. The Commission has two fundamental functions to perform in terms of s 16(1) of the ITA Act;

(i) to investigate;

(ii) to evaluate and to make recommendations.

These two functions are general to the work performed by the Commission and not specific to Customs Duties.

[85] Upon a proper interpretation of the ITA Act and the wide powers vested on the Commission, the Commission has both an investigative function and a determinative function in deciding whether to request the Minister of Trade and Industry to request the Minister of Finance to impose custom duties and in making it file a report to the Minister of Trade and Industry.

[86] It is of paramount importance to point out that while the Commission has a duty to act fairly it does not follow that it must discharge that duty precisely in the same respect regarding the different functions performed by it. When the Commission exercises its deliberative function, interested parties, especially objectors, such as Bosch, have a right to know the substance of the application that they must meet. Objectors are entitled to representations, like in the instant case, Bosch was given an opportunity to make written and oral submissions. This was relevant to the scope of the *audi alteram partem* principle in following its investigative powers, the Commission must not act vexatiously or oppressively towards those persons or subject to its investigation. To the applicants and the objectors alike there is an administrative duty on the part of the Commission to perform its functions with an even hand. Decisions made using a statutory power must be reached fairly. All the statutory powers are given with implicit assumption that they will be wielded fairly.

[87] In **the Chairman Board of Tariffs and Trade v Bruno Inc. 2001(4) SA 511 at 527 paragraph 30** the Court, in dealing with fairness stated that:

[30] In the context of enquiries in terms of s 417 and 418 of the Companies Act 61 of 1973, investigatory, proceedings which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigations are not exercised in the exertions, oppressive or unfair manner."

[88] By analogy on the facts of this matter, when the Commission carried out its investigative functions, it listened to a variety of views or objections. It gave credence to the principle of *audi alteram partem*. In that manner it acted fairly. It will be recalled that Bosch was not the only objector. There were many of them. Bosch's participation is singled out because it was given an opportunity not only to make written submissions but, on its request, also to make oral submissions, a quintessential example of the fairness of the process.

[H] THE REASONABLENESS UNDER S 46 OF THE ITA ACT READ WITH THE GGATT ACT AND GATT 1947

[89] According to Bosch's counsel, the principles of reasonableness uniformity and impartiality were incorporated into the South African Trade Legislation by virtue of the provisions of GATT 1947 (Article X) read with the GGATT Act. He submitted that the review process envisaged under s 46 of the ITA Act, read with the aforesaid International Agreements and the GGATT Act, requires a court judicially reviewing decisions of the Commission to demonstrate the reasonableness of that decision.

[90] For the aforegoing reasons, he submitted that the decision of the Commission was unreasonable and contravened the provisions of the legislation. In this regard, it is Bosch' case that the factors recorded by the Commission in its recommendation were unsupported and unfounded. Therefore, a reasonable administrator would not have decided recommending Defy's application in the circumstances. This is one of the fundamental flaws that, according to Bosch, taint the entire process and render all three decisions subject to review.

[91] Counsel for the Commission disagrees. He contends that the purported basis for the conclusion terms upon Bosch' interpretation of the distinction between International and Municipal law. According to Bosch' version, the reason for applying the *"reasonableness*" standard is that the provisions of GATT were incorporated into South African trade legislation by virtue of the provisions of GATT 1947 (Article X) read with the GGATT Act.

[92] He argued that s 46 of the ITA Act makes no mention at all of *"reasonableness"* as a requirement. S 46 provides that:

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

Counsel for the Commission, argued, in addition, that Bosch has referred this Court to no authority in support of this contention. Furthermore, he submitted that, on a proper analysis, the requirement of "*reasonableness"* was not incorporated into the South African municipal law, for the following reasons:

[92.1] "Traditionally, there are two approaches to the incorporation of International Agreements: the monist approach (which holds that international treaties are domestically enforceable without any need for an act of domestic adoption) and the dualist approach (which requires that international treaties may apply domestically only if they have been adopted domestically, through the enactment of domestic legislation."

In this regard, counsel for the Commission relies on International Law; The South African Perspective (2000) 43 by Professor Dugard. He also relies on JG Starke Monism and Dualism in the Theory of International Law (1936) 17 BYLL 66 and C Roodt; National Law and Treaties (1987-1988) 17 SAYIL 72.

[92.2] According to Adv Maenetje SC South Africa turns towards the latter. S 231 of the Constitution provides as follows:

"231(2) An International Agreement bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred in subsection (3).

(3) An International Agreement of a technical, administrative, or executive nature, or an agreement which does not require either rectification or accession, entered into by the National Executive, bind the Republic without approval by the National Assembly and the National Council of Provinces but must be tabled in Assembly and the Council within a reasonable time.

(4) Any International Agreement becomes law in the Republic when it is enacted into law by National Legislation; by the same executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by International Agreements which were binding on the Republic when the Constitution took effect."

[92.3] S 231 is the Constitutional provisions especially concerned with International negotiations and incorporation of International Agreements. This means that the National Executive is responsible for negotiating and entering into International Agreements. International Agreements which are not of a technical administrative or executory nature, and which are referred to in s 231 (3) of the Constitution, become binding upon the Republic on the International plane once they have approved by resolution in both houses of parliament. In the ordinary course, for an International Agreement to have domestic effect, it must be specifically enacted, as legislation. He submitted that this was confirmed by the SCA in Progress Office Machines CC v South African Revenue Services and Others [2007] 4 ALL SA 1358 (SCA) where the Court had the following to say:

"South Africa is a founding member of the World Trade Organisation Agreement ("WTO") and also a signatory to the General Agreement on Tariffs and Trade of 1947 ("GATT"). The South African Government acceded to GATT and its accession was published in the Government Gazette. Parliament approved the Agreement in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948. The learned Trade Organisation Agreement was the outcome of the so-called Uruguay Round of GATT negotiations and was concluded in Marrakesh by the signing of some 27 agreements and instruments in April 1994 by the members, including South Africa. The WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) forms part of the WTO Agreement."

The effect of international treaties on municipal law is regulated by ss 231, 232 and 233 of the Constitution. S 231(4) provides that:

"Any international agreement becomes law in the Republic when it is enacted into law by national legislation."

The WTO Agreement was approved by parliament on 6 April 1995 and is thus binding on the Republic in international law, but it has not been enacted into the municipal law, nor has the Agreement on Implementation Article VI of the General Agreement on *Tariffs and Trade been made part of municipal law. "No rights are therefore derived from the International Agreements themselves. However, the passing of the International Trade Administration Act 71 of 2002 ("ITAA") creating ITAC and the promulgation of the Anti-Dumping Regulation made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law. The text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution."*

[93] Statutes must be construed consistently with South Africa's international obligations. This is, however, subject to a caveat articulated by the Constitutional Court in the following way:
"The Constitution is the supreme law of the Republic and, in entering into International Agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its international obligations. This Court cannot be precluded by an International Agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allow South Africa to comply with its international obligations will be preferred to one that is not, provided this does not strain the language of a statutory provision."
In this regard counsel relied on the case of **Minister of Justice and Constitutional Development v Prins (Clark & Others Intervening)**; **National Director Public Prosecutions v Rubin**; **National Director Public Prosecutions v Acton 2018 (10) BCLR 1220 (CC) at par. 82**.

[94] It is the Commission's counsel's submission that to impute a standard of "reasonableness" into legislation which makes no mention at all, namely s 46 of the ITA Act, would be a clear example of "straining the language of the statutory provision". Accordingly, Adv Maenetje SC submits that Bosch' complaint is therefore without any merit. I agree.

[I] <u>REVIEW UNDER THE PRINCIPLE OF LEGALITY</u>

[95] It is Bosch's case that the decisions of both the Ministers were tainted by the lack of legality of the underlying process and decision and that for this reason the decision should, on this basis alone, be set aside. The reason for making these allegations arises from Bosch's interpretations of the provisions of s 26(1)(c) of the ITA Act. I have dealt with this Bosch interpretation of s 26(1)(c) in paragraphs [29] to [34] *supra*. Counsel for Bosch contended, in my view, for a wrong interpretation of the said section. The finding that I made was that Bosch's interpretation of the said section was flawed. I must point out that in the result the safeguarding regulations did not apply in this matter. Accordingly, the Commission did not have to apply the procedure and factual investigations of factors included in the safeguard regulations.

[96] Counsel for the Commission referred the Court to the judgment of **Minister of Defence and Military Veterans v Motau and Others 2014(5) SA 69 CC paragraph [27]**, in which the Court had the following to say:
"[27] Does the Minister's decision amount to an administrative or executive action? Answering this question is important. If it amounts to administrative action, it is subject to

the higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to or the less exacting constraints imposed by the principle of legality."

In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) [SARFU]** the Court stated in paragraph 148 that the exercise of executive powers of the President of the Republic of South Africa "is also constrained by the principle of legality." The Constitutional has held that the principle of legality requires that:

[96.1] *"the entity exercising powers must act within the powers conferred upon it (otherwise it will be acting ultra vires) see* ***Fedsure Life Assurance v Greater Johannesburg Metropolitan Council 1999(1) SA 374 CC at paras [56] and [58]****. In this judgment the Constitutional Court identified the principle of legality and described it as an aspect of the rule of law. Here the principle was held to imply that a body exercising public power had to act within the powers lawfully conferred on it";*

[96.2] the holder of power must act in good faith and not misconstrue his or her powers. See in this regard paragraph 148 of SARFU Judgment or unduly fetter its discretion;

[96.3] the exercise of public power must not be arbitrary or irrational. See **Pharmaceutical Manufacturers Ass of South Africa in Re Ex Parte President of the Republic of South Africa 2000 [2] (SA) 674 CC para [85]**;

[96.4] the other sides of public power must be procedurally fair. In this regard sees **Albutt v Centre for the Study of Violence and Reconciliation and Others 2010(3) SA 293 paras [72] and [74]**.

[97] It must be recalled that this reference to the legality arises mainly from Bosch's flawed interpretation of the provisions of s 26(1)(c) of the ITA Act. Counsel for the Commission has spotted three contentions which Bosch seeks to put across under the principle of legality. All these three contentions are, in so far as it relates to Adv Maenetje SC, without merit. According to him Bosch's attack on the decision of the Commission under this ground is aimed at the factors which the Commission considered in reaching its conclusion. It is unclear, from Bosch's heads of argument, as to the factors that rendered the decision of the Commission irrational.

[98] In his heads of argument counsel for Bosch states that in the absence of any supporting evidence, the only conclusion one can reach is that the Commission manufactured the figure of 29.3%. This irrational and erroneous averment goes to the heart of the Commission's decision. It was a factor the Commission purportedly considered which motivates its ultimate decision to support Defy's application. Adv. Maenetje SC argued that in trying to

prove that the decision of the Commission was irrational, Bosch limited this challenge to the following sweeping statements:

"It is the Applicant's case that ITAC's decision overstepped the boundaries of rationality in a number of respects. ITAC purportedly took into account various factors which were unsupported by evidence and had no factual foundation."

And

"The absence of any evidence leads to the irrefutable conclusion that ITAC's decision was irrational, arbitrary and contra to the principle of legality."

[99] In my view, it is incorrect for Bosch to contend that the Commission had no evidence when it reached its conclusions. It is also incorrect for Bosch to contend that the Commission had no evidence when it reached some of its conclusions. The feet of clay in Bosch's counsel's argument are that Bosch made sweeping statements. Because of the nature of these statements the Commission was unable to deal with them.

[100] Counsel for the Commission submitted that in so far as the issue of price disadvantage is concerned, Bosch's contention that it renders the statistics irrational and thus unlawful, should be rejected for two reasons:

[100.1] it has not been established by the evidence before this Court why the Commission, on the other hand, has denied it. Accordingly applying the principle set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 A**, this dispute falls to be resolved in favour of the Commission, and;

[100.2] even if Bosch's contention that the Commission's calculation is inaccurate was correct, the Commission stated that it was of a peripheral importance to its overall assessment. The Commission made it clear that it did not mean that the factors that SARS's data was unreliable it meant that the Commission could not decide. In making its decision the Commission had regard to several factors which it regarded as useful factors. Not all the data placed before it for its decision was useful. Some of it may not be of any help to the Commission.

[101] Consequently, Adv Maenetje SC submits that based on the applicable legal principles, the standard required to render a decision irrational has not been satisfied. The judgment of **Democratic Alliance v President of the Republic of South Africa and Others 2013(1) SA 248 CC**, to which the Court was referred by Mr Maenetje, sets out a standard to be applied when the legal validity of a decision is challenged based on irrationality. In paragraph [73] the Constitutional Court had to say:

"Rationality view is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or itself.

The aim of the evaluation of the rationality is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power is conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

The Constitutional Court held, in the same case, that ignoring facts which are relevant to a decision, where the legality of that decision has been challenged will not render the decision irrational and unlawful in every instance. It had the following to say:

"I must explain that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the powers conferred, there can be no rational relationship between the means employed and the purpose."

Referring to the judgment of **MEC for Environmental Affairs and Development Planning v Clairison CC 2013 (6) SA 235 (CC)** Adv Maenetje SC submitted that it is trite that the Commission was empowered to give the factor of price advantage little weight. In this regard the said judgment states as follows:

"It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision maker. As it was stated by Baxter:

"The court will merely require the decision maker to take the relevant considerations into account; it will not prejudice the weight that must be accorded to each consideration, for to do so would constitute usurpation of the decision maker's discretion"."

The same view was expressed as follows in **Durban Rand Board and Another v Edgemount Investments (Pty) Ltd**, **1946 AD 962**, in relation to the discretion of the Rand Board to determine a reasonable rent:

"In determining what a reasonable rent it is entitled to and ought to take into consideration all matters which a reasonable man would take into consideration in order to arrive at a fair and just decision in all the circumstances of the case … How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of a discretion entrusted to it and, so long as it acts bona fide, a court of law cannot interfere."

This Court accepts accordingly the Commission's contention that the factor of price disadvantage was of peripheral importance to the recommendation by the Commission. The Court agrees with counsel for the Commission that no irrationality arises even if this Court

were to agree with Bosch's contentions on price advantage. In the circumstances the Court finds that Bosch's ground of review of the Commission's recommendation is without merit.

[101.1] Counsel for Defy states in his heads of argument that this is emblematic of Bosch's approach. It does not approach the Court to remedy any serious unlawful conduct by the Commission. It simply seeks to set aside a decision that has caused it commercial harm, based on a "point scoring" review of a single set of factors set out by the Commission in a single paragraph of a much more comprehensive document, which factors it insists must be viewed in isolation from the rest of the document, and from the contents of the other findings documents prepared by the Commission, and treated as the only relevant facts before the Commission for purposes of considering the reasonableness of the Commission's decision.

[101.2] Even in respect of this extremely limited challenge, and as discussed in detail below, Bosch has only been able to establish that two of the seven statements of fact made by the Commission are not supported by the evidence set out by the Commission (Bosch is not able to demonstrate that the statements are in fact wrong, only that the evidence relied on by the Commission does not support the statements). The Commission has explained in the answering affidavit though that it did not place significant reliance on these facts in reaching its decision because it understood at the time that the calculations it had performed were of limited usefulness. This caveat appears in the documents the Commission prepared at the time.

[101.3] He submitted that, in the circumstances, Bosch has not established any basis to set aside the Commission's decision, which was undoubtedly reasonable having regard to all the evidence before it and all the factors the Commission considered in making its decision. I conclude that the finding of the Commission was not vitiated by any disregard of the requirements of the ITA Act or Regulations or Policy directive. On this basis, both applications by Bosch fall to be dismissed. This Court can find nothing in the Commission's recommendation which is in conflict with the prescribed procedure set out in the ITA Act or Regulations or Policy directive. Accordingly, the recommendation of the Commission was not flawed.

[J] THE CASE OF THE MINISTER OF FINANCE

[102] The Minister of Finance played a crucial part in the process that led to the decisions challenged in the first application. The version of the Minister of Finance as placed on record by the Director-General, Dondo Mohajane, is that this application, as pointed out earlier,

arises because of the amendment made to Part 1 of Schedule 1 (Schedule 1 of the CEA 91 of 1961), the CEA as recorded in Government Gazette No. 41065 by the Minister of Finance on 25 August 2017. The said amendment was precipitated by Defy lodging with the Commission an application for an increase in the rate of customs duty on gas stoves for gas fuel classifiable under tariff subheading 7321.11 from 15% *ad valorem* to 30% *ad valorem* by way of creating an additional 8-digit tariff subheading.

[103] The original application by Defy was lodged with the Commission during August 2015. This application by Defy was made in accordance with the prescribed legislative provisions that govern such applications. In terms of the CEA the Minister of Finance is the public functionary who is empowered to authorise the adjustment of the tariff that Defy sought. This he does by publishing an amended Schedule 1 in the Government Gazette.

[104] This executive act which is triggered by a request from the Minister of Trade and Industry, is one that the Minister of Finance discharges personally or by way of a delegation of authorities to the Deputy Minister of Finance. It is important to emphasize that the Commission and the Minister of Trade and Industry are central to the prescribed process that leads to the adjustment of a tariff in terms of s 48 of the CEA. In addition, the South African Revenue Services (SARS) gives a view on the impact of an adjustment on their statutory functions and thereafter acts on the instructions of the Minister of Finance in implementing the adjustment by way of the publication of an amended Schedule 1 and the collection of any resultant revenue.

[105] According to law, however, the statutory powers of the Minister of Finance are triggered by a request from the Minister of Trade and Industry. The Minister of Finance only acts once he receives a request from the Minister of Trade and Industry. There is no legislative authority that empowers the Commission to approach the Minister of Finance directly for an adjustment to Schedule 1 of the CEA, which is the instrument through which the Minister of Finance makes a tariff adjustment. The Minister of Finance only acts at the instance of the Minister of Trade and Industry.

[106] In context, with respect to the Minister of Finance, the relief sought by Bosch in these proceedings and the grounds of review pleaded are elements that go to the heart of the conditional legislative and policy driven competencies that he is obligated to take into consideration once he receives a request from the Minister of Trade and Industry to amend Schedule 1 of the CEA. I deal with these matters below.

[107] Due to the fact that there are three distinct decisions that are being impugned by Bosch's under the consolidated applications, the input of the Minister of Finance will be confined to

issues raised by Bosch with respect to the adjustment of Schedule 1 to the CEA only. This is apposite given that though the Minister of Finance is aware of the processes undertaken by the Commission and the Minister of Trade and Industry, he has no personal knowledge of the steps taken by these two respondents in executing their functions with regards to the application made by Defy. Any reference herein therefore to the other decisions is for purposes of creating context to the rationality, lawfulness of instructions of SARS on Schedule 1 as recorded in Government Gazette No. 41065. Firstly, the ultimate decision to make the adjustment to the tariff was taken by the Minister of Finance and not the Deputy Minister of Finance as evidenced by the signature of the Minister of Finance on Government Gazette No. 41065. The reasons for the decision that are recorded in the Minister of Finance as evidenced by the signature of the Minister of Finance on Government Gazette No. 41065 which amended Schedule 1.

[108] In essence the order sought by Bosch is, *inter alia*:

[108.1] with respect to the first review application, reviewing and or setting aside the decisions made by the Commission and the Minister of Finance in respect of Defy's application for an increase in the general rate of customs duties on gas stoves classified under Tariff Heading 7321.11 as set out in Report 534 dated 23 February 2017;

[108.2] with respect to the second review application, reviewing and setting aside of the Minister of Trade and Industry's decision in respect of Defy's tariff increase, and;

[108.3] that Defy's tariff increase application be dismissed.

[109] With respect to the Minister of Finance Bosch complains, on the following grounds of review in its founding and thereafter in its confidential supplementary affidavit that;

[109.1] the basis for the decision was factually and substantially incorrect;

[109.2] the evidence and/or information before the Minister of Finance was not rigorously evaluated;

[109.3] irrelevant considerations were considered and/or relevant considerations were not considered, and the decision is not rationally connected to the reasons given by the administrator;

[109.4] the decision was taken arbitrarily or capriciously;

[109.5] the decision itself was not rationally connected to the purpose for which it was taken, the purpose of the empowering provisions, the information before the Minister of Finance, or the reasons given for it by the Minister of Finance.;

[109.6] the exercise of the power or the performance of the function authorised by the empowering provision in pursuance of which a decision was purportedly taken,

was so unreasonable that no reasonable person could have so exercised the power or performed the function, and;

[109.7] the decision was otherwise unconstitutional or unlawful.

In the alternative, Bosch seeks to review the impugned decision under the principle of legality in that the decision was irrational or unlawful or because the Minister of Finance failed to apply his mind to the decision.

[110] The Minister of Finance opposes this application vigorously on the basis that his decision was lawful, reasonable, and rational in the circumstances. He contends that Bosch is accordingly not entitled to the relief that it seeks.

[111] In summary, the Minister of Finance submits that the decision was reasonable and rational and taken within the legislative and policy framework of:

[111.1] the equivocal request by the Minister of Trade and Industry, which was supported, *inter alia*, by the contents of Report 534 and the Commission's letter to the Minister of Trade and Industry;

[111.2] the objective fact that any matter which relates to the imposition of tariffs, levies or duties which falls within the provisions of s 77 of the Constitution;

[111.3] the fact that tariffs, being a duty imposed by the fiscus, are an instrument of industrial policy;

[111.4] the use of tariffs must be aligned to the economic objectives of the Government;

[111.5] the fact that though an application for a tariff adjustment is lodged with, and initially processed by, the Commission, the Minister of Finance is the functionary with the statutory authority to amend the relevant Schedule to the CEA;

[111.6] the statutory requirement that the imposition of, or adjustment to, tariffs is administered by the Commissioner of the South African Revenue Services (SARS), as provided for in s 2 of the CEA;

[111.7] the provisions of the Public Finance Management Act 1 of 1999 ("PFMA") about the responsibilities of the Minister of Finance and those of National Treasury to, *inter alia*, promote Government's fiscal policy or framework and coordination of macro-economic policy and coordinate inter-governmental financial and fiscal relations;

[111.8] the analysis and consequent comments of functionaries within National Treasury who had the competencies and institutional expertise to make the necessary evaluations, including the Economic Policy Unit of National Treasury, the Deputy Director-General in the Tax and Financial Sector Policy Unit within which the Legal Tax Design and Chief Directorate is situated, and his overreaching input as the Director-General and Accounting Officer at National Treasury; (see

Annexure NN2 to the Second Respondent's Reasons for Decisions at p 49 File 8 of 25).

[111.9] the comprehensive memorandum from SARS which considered factors relevant to the mandate of SARS when assessing the impact of an adjustment in tariff; (In this regard see annexure NN1 to the second Respondent reasons for Decision page 16 File 8 of 25).

[111.10] the absence of financial implications or any breaches of the law with existing trade covenants;

[111.11] the strategy to limit the increase of customs duty to gas stoves having one or more plates with gas burners, including limitations on gross capacity;

[111.12] the scope given to review the decision after a period of three years to ensure that it is achieving the objective for which it was made; and

[111.13] the inherent discretion that the Minister of Finance must consider all factors that promote the public interest.

[112] Considering the above synopsis of applicable legislative prescripts, the level of expertise that was brought into play when the application by Defy was evaluated and the factors that were considered, demonstrate that due consideration was given to whether the tariff adjustment sought was merited. The above considerations gave due weighting to competing interests of economic policies, including those of industry players within the SACU region and the consumers. Many of the implications arise when an application for a tariff increase made are of a technical expert nature. It is for these reasons that National Treasury has, within its establishment, professional team functionaries who apply their respective minds to the task of assessing and evaluating all the relevant facts. In the result, it is the Minister of Finance's case that he was satisfied that the recommendations made by those who advised him were sound and that the tariff adjustment sought was warranted.

[113] The Minister of Finance had regard to the assessment and recommendations of those functionaries when he approved the amendment to Schedule 1 of the CEA.

[K] THE SOURCES OF POWER OF THE MINISTER OF FINANCE IN RELATION TO THE INCREASE IN TARIFFS

[114] The Minister of Finance derives his powers to increase tariffs from several statutes, namely, the Constitution; the CEA; the ITA Act; the South African Revenue Service Act 34 of 1997(SARS Act) and the PFMA. In fact, it is not in dispute that the abovementioned legislations are the sources of the Minister of Finance's powers in respect of the tariffs. I therefore do not deem it necessary to point out how each statute sets out such powers.

[115] Originally, Bosch's case against the Minister of Finance, as pointed in its founding papers, was based on the prejudice and irreparable harm it contended it had suffered because of the decisions of the Commission and the Minister of Finance. In broadening its challenge with respect to the Minister of Finance's decision, Bosch's challenge to the Minister of Finance was that the decision of the Minister of Finance was simply based on the summary provided to him of the contents of Report No. 534 and the Commission's letter to him.

[116] Bosch states that it would seem from the Minister of Finance's reasons for the decision that his decision to exercise his powers in terms of s 48(1)(b) of the CEA was based on:

[116.1] a memorandum received from SARS dated 6 June 2017, which sought to give effect to the Commissioner's recommendation as approved by the Minister of Trade and Industry; and

[116.2] a submission by the Economic Policy Unit of National Treasury.

[117] Bosch's misgivings about SARS's report that it simply summarised Report No. 534 and the Commission's letter to the Minister of Trade and Industry and contains a letter from the Minister of Trade and Industry in which it is stated that a copy of Report No. 534 had been provided, the latter Minister that he had approved the Report and the Commission's effect to the recommendation and that she requested the Minister of Finance to give effect to the recommendation is without merit.

[118] Bosch's gripe is that neither SARS nor the letter from the Minister of Trade and Industry contains any substantive interrogation or analysis of the facts contained in Report No. 534 and the Commission's letter to the Minister of Trade and Industry. According to Bosch the Minister simply accepted Report No. 534 and the Commission's letter at face value. Bosch complained furthermore that the Minister of Finance failed to apply his mind to the decision taken by him.

[119] In the heads of argument, Bosch's counsel's main attack is based on what is referred to as the fundamentally flawed recommendation of the Commission, which recommendation taints and invalidates all three decisions taken. Bosch is of the view, *inter alia*, that the Minister of Finance's decision stands to be set aside as *"the Minister accepted that summary at face value and did not conduct any separate analysis or interrogation of the facts alleged in the summary."* For that reason, so contends Bosch, it follows that the decision of the Minister of Finance was unlawful as the Commission's recommendation was unlawful.

[120] Again in his heads of argument, Bosch's counsel introduces the interpretation of s 26(1(c) of the ITA Act. I have already dealt in paragraphs [39-44] *supra* with the issue of the interpretation of s 26(1)(c) of the ITA Act and I have already made a ruling on it. Relying on

its own interpretation of s 26(1)(c) of the ITA Act, Bosch concluded by arguing that, because the Minister of Finance's reliance on the underlying decision of the Commission, coupled with the Commission's erroneous reliance on s 26(1)(c) of the ITA Act and the Minister of Finance's failure to have regard to the provisions of Article X of GATT of 1947, read with Geneva General Agreement on Tariffs and Trade Act, 29 of 1948 ("the GATT Act"), that decision was arbitrary, irrational or suffering from procedural irregularity, alternatively, inconsistent with the principle of legality.

[121] The Minister of Finance disputes all these allegations levelled against him by Bosch. According to the Minister of Finance, the means employed by him to reach the conclusion that led to the adjustment to the tariffs went beyond the facts presented by the Commission. It is not correct, according to him, that the Minister of Finance relied only on the Report No. 534 and a letter by the Commission to the Minister of Trade and Industry. In her heads of argument, Adv G Lea Gcabashe SC, counsel for the Minister of Finance, argued that Bosch conveniently glossed over this element of the interrogation of the facts by the Minister of Finance. She broadened her argument and stated that Bosch misconstrues the contents of, *inter alia*, paragraph [49] of the Minister of Finance's answering affidavit. Furthermore, she argued that Bosch misinterprets the status of the International Agreements.

[122] The starting point is s 48(1)(b) of the CEA. It provides that:

"The Minister may from time to time in the Gazette amend the general notes to Schedule 1 and Part 1 of the said Schedule or substitutes the said Part 1 and amend Part 2 of the said Schedule in so far as it relates to imported goods –

(a)…….

(b) in order to give effect to any request by the Minister of Trade and Industry and for economic co-ordination."

The CEA is central to the decision taken by the Minister of Finance to give effect to the request of the Minister of Trade and Industry by acceding to the adjustment to the customs duty as recommended by the Commission. This decision was competent within legal framework of this indictment which provides for the levying of customs and excise duties, fuel levy, Road Accident Fund levy, air passengers tax and environmental levy, the prohibition and control of the importation, export and manufacture or use of certain goods and for matters incidental hereto. The CEA deals with the principles by which the Minister of Finance exercises his authority. The CEA gives the Minister of Finance specific powers as set out in the preceding sentence.

[123] Different functionaries are involved in the process that ultimately leads to the amendment of Schedule 1 of the CEA. The Commission, the Minister of Trade and Industry, SARS, and the Minister of Finance, who is the ultimate functionary in the process, each has an

independent function to discharge in the decision-making process that leads to the making of the amendment. In this section of the judgment, I will deal only with the role played by the Minister of Finance. The statutory functions of the Minister of Finance and National Treasury compliment and conclude the extensive considerations of the application for tariff increase made by an applicant and the subsequent request by the Minister of Trade and Industry. There are several variables that the Minister of Finance considers prior to a final decision being taken to amend Schedule 1.

[124] Once he receives a request from the Minister of Trade and Industry made in terms of s 48(1)(b) of the CEA, the Minister of Finance does not act alone. After receiving a request from the Minister of Trade and Industry, an extensive process of internal evaluation is undertaken by a team of functionaries within SARS and the National Treasury. Relying on their statutory obligations and technical expertise, these functionaries assist the Minister of Finance in the assessment and valuation of the request to increase or amend Schedule 1.

[125] The Minister of Finance follows the following procedure. On receipt of the Minister of Trade and Industry's request in terms of s 48(1)(b) of the CEA, the office of the Minister of Finance refers the request to the office of the Commissioner of SARS. In terms of s 4(1)(b) of the SARS Act, SARS advises the Minister of Finance on all matters concerning revenue. Tariffs, being a duty imposed by the fiscus, are regulated in terms of a money bill. For this reason alone, SARS, as the revenue collecting organ of the State, must participate in an assessment and evaluation of a request concerning tariffs.

[126] At SARS, the Strategy, Legal Policy Unit is responsible for the implementation of adjustments to customs duties. This Unit reviews the request of the Minister of Trade and Industry, including due consideration to the recommendations of the Commission. It keeps a historical record of previous justifications of tariff subheadings for various products and that of trade statistics based on import classified under specific tariff subheadings. Essentially, the role this Unit is to ascertain whether there are any financial and administrative implications that will arise from the proposed adjustment, because the status obligation to appreciate, accommodate and administer the impact of a tariff increase on revenue collection streams is the responsibility of this Unit.

[127] Four other Units within SARS considered the request for an increase. The other Units are Functional Speciality; the Manager, Tariff Amendment; the Senior Specialist Customs Policy; the Specialist Custom Legislative Policy and the Executive Customs Legal Policy. Once SARS has discharged its statutory duties by reviewing the request for the Minister of Trade and Industry, it prepares its final recommendations and submit them to the Minister of Finance.

[128] The information placed by SARS before the Minister of Finance is finally reviewed by the Group Executive Legislative Research and Development and the Chief Officer Legal Council. Their recommendations are a crucial fact that the Minister of Finance considers.

[L] HOW WAS DEFY'S APPLICATION PROCESSED BY THE MINISTER OF FINANCE?

[129] On 6 June 2017 the Minister of Finance received from SARS a memorandum with annexures. Contained in the memorandum and annexures from SARS, was a recommendation from SARS which sought to give effect to the recommendation made by the Commission and approved by the Minister of Trade and Industry. The purpose of the recommendation was to increase the general rate of customs duty on certain gas fuel, classified under tariff subheading 7321.11 from 15% to 30% by way of creating an additional 8-digit tariff subheading 7321.11.10.

[130] On receipt of this submission from SARS, the Minister of Finance referred it to the Economic Policy Unit of National Treasury for its comments. Within that Unit, the Macro-Economic Policy Chief Directorate interrogates the request with its annexures and SARS's submission to the Minister of Finance. It is important to point out that the economic analysis undertaken by the Economic Policy Unit of National Treasury reviews the submissions within the context of the prevailing economic strategies and the challenges facing the government. It is important, furthermore, to highlight that when this economic analysis is undertaken, the specific features and variables relating to the subject matter product are considered.

[131] In conducting its analysis, the Unit has access to the following documents before it:

[131.1] the background to the matter giving rise to the Commission's recommendation recommending the increase to the general rate of custom duties;

[131.2] the reasons behind the application by Defy for the proposed increase;

[131.3] the objections received by other manufacturers to Defy's application and the comments received;

[131.4] the specific factors considered by the Commission in considering the application by Defy;

[131.5] the exclusion of certain gas stoves to prevent any negative impact on lower income earners and the poor; and

[131.6] the financial implications of the increase of the general rate customs duty.

[132] In summary, the unit analyses the following matters:

[132.1] an assessment of the impact of trade to support on the product within the SADC region;

[132.2] the implications for industrial policy priorities;

[132.3] market players and issues of competition within the specific product category;

[132.4] the impact of tariff increases on the downstream and the upstream industries; and

[132.5] whether various avenues to new entrants would be created.

[133] The third step that was followed was that the Economic Policy Unit of National Treasury returned the submissions to the Deputy Director-General of the Economic Policy Unit of National Treasury, who in his turn considered the matters that had been analysed. Thereafter, he recommended the tariff increase. This recommendation by the Deputy Director-General of the Economic Policy Unit was then forwarded to the Tax and Financial Section Policy Unit which, *inter alia*, advises on the tax policy implications that may arise from the tariff increase. The analysis done by this Unit considered institutional policy considerations that spanned all three levels of Government.

[134] The Tax and Financial Sector Policy Unit considered whether the tariff increase would impact on the current or proposed tax policy. This Unit also interrogated the submission from SARS with respect to the financial impact of the increase and whether there was a consistent application of the commodity codes used by SARS. Once this analysis was done, the Deputy Director-General: Tax and Financial Sector Policy Unit made its recommendation. The recommendation of the Deputy Director- General: Tax and Financial Sector Policy Unit, included a comment with respect to the need for more economic analysis. This comment was simply intended to emphasize National Treasury's sensitivity to the impact of tariff adjustments on consumers and employment opportunities. The prevailing thinking at the time was that the correct balance must be struck among a host of competing variables. It is the Minister's case that getting the right balance was thus a constant preference when tariff adjustment applications are under consideration.

[135] Bosch latches to the following statement in the answering affidavit of the Minister of Finance that*: "it is patently clear … that ITAC Act is integral to the entire process that leads to the amendment of Schedule 1 of the Customs and Excise Act"* and concludes, wrongly, that it is evident that both the Minister of Trade and Industry and the Minister of Finance relied extensively, if not exclusively, on the ITAC Report No. 534 when making their decision to recommend the introduction of the new 8-digit tariff code and increasing the tariff under such code.

[136] The internal processes set out above are designed to enable the Minister of Finance to comply with the statutory duty imposed upon him; that before he amends the tariffs or

performs his statutory duties, he must satisfy himself that amending the tariff would not have a detrimental effect on the country.

[137] In so acceding to the request of the Minister of Trade and Industry, which in turn is informed by the Commissions' decision, the Minister of Finance did not merely rubber stamp the decision of the Commission, as alleged by Bosch, nor did he slavishly accede to the request of the Minister of Trade and Industry. In the interest of interrogating the soundness of the request made by the Minister of Trade and Industry, the Minister of Finance, trusts specialised services of officials in the afore mentioned Units of the National Treasury and conducted his own separate and unique assessment to perform his functions under s 48(1)(b) of the CEA. About the approach to the way this Court ought to apply any enquiry into the interrogation process of the Minister of Finance, this Court was informed that it was consistent with the view taken in **Bell de Porto 2002 (3) SA 265 (CC) at paras [45]** where the Court stated that:

"[t]he fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. This making of such choices is in the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."

In the matter of **Pioneer Foods v Minister of Finance and Others 2019(1) SA 273 (CC) at paras [28 – 30]** the Court found that the Minister of Finance, in exercising his powers under s 48(1)(b), is engaged in policy exercise in which he has regard to several issues including fiscal and economic matters.

In **South Africa Sugar Association v Minister of Trade and Industry and Others 2017 [4] ALLSA 555 in paragraph [33],** the judgment to which I was again referred by Counsel for the Minister of Finance, the Court found that the Minister, acting in terms of s 48(1)(b), acts as a legislature and that as a legislature, he acts in a fiduciary capacity and must so carry out the duties imposed on him in the interest of the Republic. The Court found further that a fiduciary is obliged to carry out all such investigations as are rationally required to enable him to discharge a legislative tasks conferred on him. The Minister of Finance is obligated to observe the rule of law as and when he executes his powers in terms of the s 48(1)(a) of the CEA

[138] In the heads of argument, counsel for the Minister of Finance submitted that the power enjoyed by the Minister of Finance did not entitle him to simply implement a request by the Minister of Trade and Industry. The Minister of Finance is conferred with the power to exercise his discretion whether to effect the amendment. He must observe the absolute supremacy of the law and not be influenced by arbitrary power. About this, the Constitutional

Court has found in the case of **International Trade Administration Commission v Scaw SA (Pty) Ltd 2012(4) SA 618 (CC)** that:

"[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 them 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."

The Court continued further as follows at paragraph [100]:

"[100] ITAC accordingly urged us to decide that the order of the high court breaches the doctrine of separation of powers. It 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 and 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. 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."

[139] The aforegoing authorities relate to the irrefutable conclusion that the Minister of Finance's participation in the decision-making process was not merely to implement what has already been formulated and approved by the Minister of Trade and Industry. On the contrary, the Minister of Finance is vested with wide discretionary powers to legislate amendments to custom tariffs, which exercise must be consonant with the Constitution and in particular the principle of legality. Nothing, therefore, precludes the Minister of Finance from conducting his own investigations and analysis. He is not obliged to accede to the request of the Minister of Trade and Industry without the originality of his own decision.

[140] The Court was furthermore referred to the judgment of **Tshwane City v Afriforum and Another 2016 (6) SA 279 CC** where a similar issue was the subject of a cautionary note. In the said judgment the Court stated the following:

"[68] Sight should never be lost of the fact that courts are not meant or empowered to shoulder all the governance responsibilities of the South African state. They are co-

equal partners with two other arms of state in the discharge of that constitutional mandate. Orders that have the effect of altogether derailing policy-laden and polycentric decisions of the other arms of the State should not be easily made. Comity among branches of the government requires extra vigilance, but obviously not undue self-censorship, against constitutionally forbidden encroachments into the operational enclosure of other arms."

[141] Accordingly, the ultimate decision of the Minister of Finance to sign Government Gazette No. 41065 was in full compliance with this legislative framework and complied with the principle of legality.

[142] I now turn to individual grounds of review raised by Bosch against the decision of the Minister of Finance. I will proceed to deal with them singly:

[142.1] **The basis for the Minister of Finance's decision was factually and substantially incorrect**

According to the Minister of Finance's counsel's heads of argument, Bosch complaint that the basis for the Minister of Finance's decision was factually and substantially incorrect assumed that the Minister of Finance mechanically acceded to the request of the Minister of Trade and Industry. This basis seems to lack merit. This is so because the Minister of Finance has demonstrated in his evidence the procedure, he followed in making sure that the matter was thoroughly investigated. In his replying affidavit Bosch had not discredited the procedure set out by the Minister of Finance. In the circumstances, Bosch cannot complain, once again in the replying affidavit that this basis was factually and substantially incorrect.

[142.2] **The evidence and/or information before the Minister of Finance was not rigorously evaluated**

There is no definition of what *"proper evaluation of evidence*" is. The fact that one person evaluates the evidence or information in one way while another person evaluates it in another way is not indicative of improper evaluation of the evidence. It is a manifestation of the difference in opinion. It does not necessarily follow that the evaluation of the same information by different people or otherwise must always produce the same results.

[142.3] **The irrelevant considerations were considered**

Bosch still has not complained about the information the Minister of Finance testified about. In his testimony the Minister of Finance stated that in conducting its analysis, the Economic Policy Unit of the National Treasury had access to certain information. He then went out to set out the information. Bosch has not

contradicted this evidence. Bosch has not set out the information that this Unit did not have to enable it to properly analyse the application.

[142.4] **The irrelevant considerations were considered, or relevant considerations were not considered, and the decision is not rationally connected to the reasons given**

Again, this Court finds no merit in this ground of complaint. Bosch still has not explained the irrelevant considerations considered in the whole procedure set out in the evidence of the Minister of Finance nor did Bosch indicate the relevant considerations left out of contention.

According to the Minister of Finance's counsel, the relevance of this ground is found in the contention that the role of the Minister of Finance is mechanically designed only to give effect to the requests submitted by the Minister of Trade and Industry. The additional financial and policy perspective assessed by SARS and by the officials in National Treasury supported the fact that the Minister of Trade and Industry placed before the Minister of Finance. It was submitted on behalf of the Minister of Finance that where the Minister of Finance gives effect to the request of the Minister of Trade and Industry, without applying his mind to the issue, he acts outside the principle of legality. The Court was, in this regard, referred to the judgment of **Democratic Alliance v President of South Africa and Others 2013(1) SA 248 CC** where the Constitutional Court stated, in relation to rationality, that:

"[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power is conferred.

[39] That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the

failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."

[142.5] **The decision was taken arbitrarily or capriciously**

It is a settled principle of our law that a tribunal or a minister must not act unreasonably or capriciously or in bad faith. There are two main applications of this rule of natural justice:

[142.5.1] the adjudicator, such as the Minister of Finance, must be impartial. I have pointed out somewhere supra that the Minister of Finance must observe the absolute supremacy of the law and avoid being influenced by arbitrary powers.

[142.5.2] everyone is entitled to present his case.

The statement that the Minister of Finance's decision was taken arbitrarily or capriciously lacks merit. In my view, Bosch's case was treated fairly and impartially. The Minister of Finance took unbiased consideration to the Defy's application. It is unknown on what grounds the allegation is made that the decision was arbitrarily or capriciously made.

[142.6] **The decision itself was not rationally connected to the purpose for which it was taken, the purpose of the overpowering provisions, the information before the Minister of Finance or the reasons given it by the Minister of Finance**

This ground is flawed. The Minister of Finance acted in terms of s 48(1)(b) of the CEA. He was satisfied that the purpose of adjust the general rate of customs duties on specified gas stoves was justifiable in the circumstances. The purpose of adjusting the general rate of customs duties is consistent with the powers vested on the Minister of Finance by the provisions of s 48(1)(b) of the CEA. The means the Minister of Finance selected to scrutinise the information presented to him were rationally related to the objective sought to be achieved by the adjustment. See in this regard the **Minister of Defence and Military Veterans v Mudau and Others 2014 (5) SA 69 CC**. It is the information placed before him by the Minister of Trade and Industry and the National Treasury that persuaded him to accede to the request of the Minister of Trade and Industry. The request to adjust the customs duties was accompanied by a full explanation.

[142.7] **The exercise of the power or the performance of the function authorised by empowering provision, in pursuance to which the decision was purportedly taken, was so unreasonable that no reasonable person could have so exercised the power or performed the function**

This charge, in my view, lacks merit. It is not supported by any evidence.

[142.8] **The decision was otherwise unconstitutional or unlawful**

An act carried out in terms of the empowering legislation can never be unlawful. It will only be unlawful if such powers are exceeded.

[143] Finally, the Court was referred, on this issue of justifiability, to two judgments, one of which predates the current Constitution. The first of these two judgments is **Kotze v Minister of Health 1996 (3) BCLR 417 (T)**, in which the Court found that a justifiable decision is a correct or just decision. By this is meant that the decision maker must, *inter alia*, interpret his or her authoritative power precisely in that the correct assessment of the surrounding facts and circumstances must be made, relevant factors must be considered, and irrelevant factors must be disregarded. The Court had the following to say:

"The word 'justifiable' as used in s 24(d) of the Constitution will receive proper judicial consideration in the years to come. Its meaning will become clearer as it becomes more definite/precise/better defined by such careful deliberation. According to the Shorter English Dictionary, 'justifiable' means 'capable of being justified or shown to be just'. The Afrikaans text uses the word "regverdigbaar". These words denote something that can be defended. As I understand it, the section requires that the reasons advanced for the administrative action must show that the action is adequately just or right. In other words, it must appear from the reasons that the action is based on accurate findings of fact and a correct application of the law. In this regard the difference between a review and an appeal may have been largely eroded. If a review under this section is to succeed, a court of review must be satisfied that the reasons advanced for the action under review are not supported by the facts or the law or both."

The second one is **Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa [2003] 4 ALLSA 589 (SCA) at p 596** where the Court held that:

"In the application of a rationality test relevant court will ask: is there a rational objective basis justifying the connection made by the administrative decision maker between the material made available and the conclusion arrived at?"

[144] In conclusion, I agree with the conclusions arrived at by counsel for the Minister of Finance that the process that led to the decision taken to approve and give effect to the request of the Minister of Trade and Industry was extensively described in the Minister of Finance's answering affidavit; that extensive processes are designed to enable the Minister of Finance to comply with the statutory duty imposed upon him: that before he amended the tariffs or performed his statutory duty he satisfied himself that amending the tariff would not have detrimental consequences for the country.

[145] Furthermore, I agree with counsel for the Minister of Finance that original charge that the Minister of Finance simply based his decision on the summary provided in the Commission's Report No. 534 lacks merit. Similarly, the subsequent charge that the Minister of Finance accepted the summary slavishly and did not conduct any separate analysis or interrogation of the facts alleged in summary is flawed. In the premises it is my considered view that the Minister of Finance's decision was rational, objectively sound in law and justifiable on the facts and consistent with the purpose for which the legislation was enacted.

[M] THE CASE OF THE MINISTER OF TRADE AND INDUSTRY

[146] In the review proceedings in Case Number 12160/2018 it was contend by Bosch that the decision of the Minister of Trade and Industry to approve, recommend and request that the Minister of Finance approve the recommendation of the Commission is unlawful. The Minister of Trade and Industry's decision under review is reflected in a letter from him to the Minister of Finance dated the 28 February 2017. It states, *inter alia,* as follows:
"I have approved the Commission's report and recommendation and hereby request that you in terms of section 48 of the Customs and Excise Act, 1964, amend Schedule 1 in order to give effect to the recommendation."

[147] The said decision was taken by the Minister of Trade and Industry in terms of s 5 read with s 72 of the ITAC Act. S 5 of the ITAC Act provides that: *"The Minister may, by notice in the Government Gazette and in accordance with procedures and requirement established by the Constitution or by any other relevant law issue Trade Policy Statements or Directives."*

[148] Bosch is correct when it states that the decision of the Minister of Trade and Industry to approve and request the Minister of Finance to approve the recommendation of the Commission was taken in terms of s 5 of the ITAC Act. The said section refers to the Minister of Trade and Industry. Section 48 of the CEA provides that:
"48.1 The Minister may from time to time by notice in a Gazette and 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 laid to important goods-
(b) to give effect to any amendment by the Minister of Trade and Industry of Economic coordination." The minister referred to herein is the Minister of Finance.

[149] It was contended initially by Bosch that the decision of the Minister of Trade and Industry constitutes administrative action and falls to be reviewed and set aside on various grounds set out in s 6 of PAJA. The grounds of challenge of the decision of the Minister of Trade and Industry has since shifted to legality.

[150] Mr Lionel October, the Director General of the Department of Trade and Industry, deposed to the answering affidavit on behalf of the Minister of his Department. In his answering affidavit he responded to the affidavits of Karsten Traeger and the supplementary affidavit of Alper Sangul.

[151] In the preceding paragraphs or elsewhere in this judgment I set out the route that the implementation of tariffs in particular follows until the Commission places its recommendation and a letter before the Minister of Trade and Industry. If the Minister of Trade and Industry accepts the Commission's recommendation, he may request the Minister of Finance to amend the CEA accordingly. The role of the Minister of Finance has been explained elsewhere in this judgment.

[152] The Minister of Trade and Industry can only approve the Commission's recommendation after he has satisfied himself that the Commission has performed its duty in terms of the ITA Act to thoroughly investigate and evaluate an application. He is by law not required to have access to any document other than a report and a letter from the Commission to satisfy himself that the Commission has executed its duties properly nor does he have to interview the Commission to establish that it has carried out its duties properly. Because the Commission places a report before him, this Court can only assume that it is from the said report that the Minister is able to satisfy himself that the Commission has done its duties properly.

[153] In paragraph [98] of the judgment **of ITAC v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 (CC)** the Court described the powers of the Minister of Trade and Industry as being wide and permissibly subject to polycentric considerations. It stated as follows at paragraph 32:

"19. Furthermore, the ITA 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 statutory discretion of the Minister of Trade and Industry is indeed wide. Baring 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 the Commission. It is open to the Minister, when deciding, wherein polycentric considerations such as diplomatic decisions, the country's balance of payments, the national or global trading conditions, goods needed to foster economic growth and so forth. Thus, the recommendation of the Commission may be important, but it is not the sole determinative considerations for the Minister's decision.

[154] The Minister of Trade and Industry denies that his decision or a decision of the former Minister of Trade and Industry was unlawful. He submits that his predecessor exercised his statutory powers which fell within the exercise terrain of the executive. The Commission submitted its recommendation to his predecessor. After he was satisfied with the investigation and the findings made by the Commission, the Minister of Trade and Industry approved the recommendation. The Minister of Trade and Industry is entitled to rely on the expertise and the ability of the Commission to carry out its investigative and determinative duties efficiently, and properly. The Minister of Trade and Industry does not have the powers in law to carry out the investigation in the same way as the Commission.

[155] The Minister of Trade and Industry submits that his decision to accept the recommendation of the Commission was lawful and carried out within the confines of his powers. The decision was taken lawfully in compliance with the principle of legality after having considered the information and the report compiled by the Commission. He approved the Commission's recommendation after he was satisfied that the increase of the customs duties as requested by Defy was justified as that increase would ensure economic viability and sustainability of the local industry. This clearly shows the considerations that the Minister considered.

[N] DEFY'S CASE

[156] Bosch has not levelled any specific allegations against Defy. In expressing its displeasure at the way the other Respondents reached their decisions, Bosch asked for, *inter alia*, an order in terms of which Defy's application for the tariff increase is dismissed. In the alternative, Bosch asked that Defy's application be referred to the Commission for reconsideration.

[157] The basis for Bosch's application against Defy was not so much that there was anything wrong with Defy or anything wrong Defy did as it was the fact that Bosch had misgivings about the decisions of the other Respondents. To achieve the relief sought against Defy's application, Bosch had to attack the decisions of the other Respondents as having been wrongly taken. Bosch' grounds of review are founded (page 9 paras 30-33 herein supra).

[158] While Bosch did not seek any order directly against Defy, the relief sought by Bosch in this application is to set aside the decision conferring rights on Defy in the form of an entitlement to tariff protection in consequence of an application made by Defy, and to substitute it with the decision to refuse to gratify the tariff reduction sought by it.

[159] Mr Allison van den Berg ("Ms van den Berg") deposed to an answering affidavit on behalf of Defy. This affidavit was prepared and delivered in response to the founding affidavit by

Karsten Traeger and the supplementary founding affidavit of Diedre Elizabeth Goosen. She repeated the same sentiments expressed by Mr Mbambo of the Commission that the imposition of the customs duties on imported goods has long been recognised in international trade law as a permissible method of protecting domestic industries from imports, including protecting infant industries and facilitating import substitution industrialisation.

[160] According to Defy, the Amended Tariff Investigations Regulations, promulgated in 2015 by the Minister of Trade and Industry in terms of s 59 of the ITA Act as GNR652 in the Government Gazette 39035 dated 31 July 2015, provide further details on the process to be followed by the Commission and the factors it is required to consider in evaluating an application. Regulation 10 sets out the assessment criteria that the Commission is to use in evaluating such application.

[161] Furthermore, according to Defy, Regulation 10 makes it clear that in its assessment of applications, which must be done on a case-by-case basis, the Commission is given a broad discretion in this regard. The main criterions are that the assessment must be *"informed by the industrial policy and economic objectives of the Government"* and conditional on a commitment by the beneficiary as to how it will perform against those policies *"including plans to increase production, investments and employment."* What is of utmost importance to observe is that Regulation 10.2 sets out several other factors that the Commission may consider as applicable; the list is expressly stated not to be exhaustive. Therefore, the Commission is permitted to decide the relative weight to be given to any one factor or on a case-by-case basis. Bosch does not challenge these allegations by Defy.

[162] In terms of Regulation 22 of the Amended Tariff Investigations Regulations, once the Commission has evaluated an application, it must forward a final finding in the form of a recommendation to approve or reject the application to the Minister of Trade and Industry, who must then decide whether to approve the application or not. This is his powers in terms of Regulation 22.2A.

[O] THE BASIS ON WHICH DEFY APPLIED FOR AN INCREASE IN CUSTOMS DUTY AND THE COMMISSION'S RECOMMENDATION THAT THE APPLICATION BE GRANTED

[163] Defy contends that its application was not complicated. In July 2014 Defy commenced manufacturing a gas stove with a small gas oven it its factory in Jacobs, Durban, in replacement of a similar product then being imported from Brazil. Defy invested some R3 million in tooling and equipment and employed 24 staff directly to manufacture the product. Defy completed visibility studies for two other similar products.

[164] Defy contends that it struggled to compete effectively on price against similar imported products because its costs of production were high, which was at least in part, since it could not achieve economies of scale in production and secondly, because its costs had been rising faster than its prices. In August 2015, therefore, Defy applied for an increase in the rate of custom duties on these competing imported products.

[165] In its application Defy indicated that it anticipated that if the duty rate were increased then it could, without increasing its prices, not only sustain its existing business, and so ensure retention of the existing jobs, but in fact capture more sales from imports because they would be more expensive. The result of this would be that Defy's production would increase and that its unit costs would be reduced. In consequence, Defy would be able to employ more staff and invest further in local manufacturing and extend the range of products it was manufacturing locally, specifically to include the two additional stoves that had been the subject of its feasibility studies. According to Ms van den Berg, to assess Defy's application, the Commission needed, as a matter of principle, to consider simply whether:

[165.1] Defy's claim that there were significant imports of substitute products was correct – to confirm that there was at least credible evidence to suggest that Defy's production and pricing was currently constraint by imports, so that the imposition of an import tariff would assist Defy in increasing production and improving its profits as it alleged;

[165.2] Defy's claims as to the extent and costs of its current production were correct – the purpose hereof was to make sure that the increase in the duty would likely result in increased production and employment as claimed by Defy, and not simply in Defy making inflated profits on existing production without any further benefits;

[165.3] Defy's application, and the manufacturing it sought to protect and extend, was supported by any industrial policy or economic objective of the Government that would justify the increase in duty;

[165.4] Defy's claims that it would increase production, investment, and employment if a tariff were imposed were correct – the purpose hereof was to make sure that the tariff amendment would meet the Government objectives identified in item 10.2 of the Amended Tariff Regulations.

[166] According to her evidence, the Commission in fact did consider all these factors, as appears from the contents of the Final Findings, read together with the August 2016 report (which as she already has indicated, was attached to the Final Findings as Annexure 'A'). She was adamant that the Commission relied on the contents of these documents in its decision to

recommend that the rate of customs duty be increased as sought by Defy although, with the agreement of Defy, on a narrower class of goods than originally proposed by Defy.

[167] Ms van den Berg contends that the evidence before the Commission, as reflected in the Final Findings, and the August 2016 report, demonstrated convincingly that Defy's application satisfied the threshold criteria identified above for its grant:

[167.1] in its letter to the Commission dated 20 October 2015 and annexed to the answering affidavit as 'AV04' the Department of Trade and Industry confirmed from the outset that the production of Defy's local manufacturing would be in line with Government's economic policy. The Department of Trade and Industry indicated that the imposition of a tariff would be in line with Government Policy (namely IPAP – Industrial Policy Action Plan) to support local manufacturing of White goods. The Department of Trade and Industry also noted that the tariff would make importing no longer viable and would allow local manufacturers to compete with low priced imports. The Commission recorded this support from the Department of Trade and Industry in paragraph 10.1 of the Final Findings. The application was supported by Government Policy in s 5 of the Final Findings. The Commission also recorded in paragraph 10.2 the support of the Botswana Minister of Trade and Industry, which sent a letter to the Commission on 22 December 2015. A copy of the said letter is attached to the answering affidavit of Ms van den Berg as 'AV06'. The same letter was sent to the only other local manufacturer of the subject products, Zero Appliances;

[167.2] the evidence presented by Defy manifestly established that its claims as to its capacity and cost of production were correct. It is Ms van den Berg's case that Defy put up a detailed production cost and capacity data and the Commission conducted a verification inspection at Defy's premises to check the correctness of these figures. The Commission set out its analysis of capacity and production costs in paragraph 8.2 and tables 4 and 5 of the Final Findings;

[167.3] there was also clear evidence before the Commission that there were significant volumes of imports into this country. Defy put up evidence of such imports from China, and indicative prices of such imports – on 15 October 2015 Defy sent an email to the Commission attaching evidence of low-priced products, (a copy of which email is item 'NC5' in the non-confidential record as shown in volume 1 pages 53 to 55, although Defy pointed out that assessing the scale and prices of imports was difficult because the relevant tariff information included many products other than the subject product. The Commission also received confirmation that there were material numbers of imports though from the firms that made submissions on the application, including Bosch, Totai, and SBS Household Appliances (Pty) Ltd t/a SMEG, which all provided proof that they

were imported products that were potential substitutes for the subject products. The Commission referred to the presence of these imports in paragraph 7.2 of the Final Findings;

[167.4] finally, the Commission investigated whether Defy's claim that if the rate of customs duty increased it would increase production, investment and employment were correct. The Commission concluded that they were. The Commission's conclusions on this appear in s 9, and table 17, of the Final Findings. In particular, the Commission looked at the potential for growth in the industry and the potential for an increase in employment should the customs duty be increased. Accordingly, based on these facts, the Commission recommended that the rate of customs duty increase as sought by Defy although with the agreement of Defy and SARS, on a narrower class of goods than originally proposed by Defy. The Court accepts this evidence based on this evidence. The Court is satisfied that Defy had placed before the Commission all the relevant information required for the decision making of the Commission and that, as displayed in the Final Findings report, the Commission took them into account.

[P] THE EFFECT OF THE IMPOSITION OF THE TARIFF

[168] According to Defy, the increase in duty rate has had the impact anticipated by Defy and the Commission. For example, Defy has been able to increase production of the subject products and has invested in plant and machinery, as required under its reciprocity commitments.

[169] The increase in duty rate also appears to have had exactly its intended effect on importers such as Bosch and Totai. In this regard it was noted by Defy that Bosch alleged in paragraph [70] of the founding affidavit that in consequence of the imposition of the tariff its sales have declined by some 24%. It is Ms van den Berg's evidence that Bosch has not put up any data to support this assertion or made any attempt to demonstrate a link between any lost sales and the increased customs duty but if Bosch's statement is correct, this is precisely the result that the imposition of the tariff was intended to achieve – increased local manufacturing at the expense of the imports. Defy has noted that the increase in customs duty also seems to have stimulated further local manufacturing. In this regard, Totai, which was one of the firms that was importing gas stoves at the time that Defy made its application, indicated during the process of the Commission's investigation that it was in the process of localising its manufacturing of gas stove. Totai had initially indicated, at the start of the investigation, that it strongly objected to the increase in the customs duty. The fact

that Totai subsequently changed its position suggested that the anticipated increase in customs duty prompted Totai also to invest in local manufacturing capacity.

[170] Bosch's attack on the Commission's recommendation is in turn focussed primarily on an analysis performed by an independent firm of economists, Genesis Analytics (Pty) Ltd ("Genesis"). It is Defy's case that Genesis focusses mainly on several inconsistencies it alleges exist between statements made by the Commission's recommendation and the evidence before the Commission. Importantly, according to Defy, Genesis only takes issue with some of the Commission's reasoning. According to Defy Bosch does not criticise the Commission's conclusions that at the time Defy submitted its application and the Commission considered that application:

[170.1] Defy was operating at low capacity, a point confirmed by RBB in the RBB Report at paragraphs 64-69, which had the effect of raising its unit costs of production. RBB report states that; '

"*64 Relatively high domestic production costs can in part be attributed to the low levels of capacity utilization. Genesis Report does not appear to address this issue, even though capacity utilization is a key consideration in ITAC's assessment of an industry's ability to operate efficiently and to remain viable in the long term.*

65. As a matter of economics, low capacity utilization presents a clear opportunity for local production to expand in response to the imposition of tariffs imports. An increase in tariffs would likely have the intended effect of making imports less attractive, and, as long as there is unutilized domestic capacity, demand for domestic manufactures will increase, and domestic production will increase to meet higher demand, and increase in local capacity utilization will result in lower unit cots of production for those domestic manufacturers.

66. In regard to profitability, lower capacity utilization results in higher per unit costs, as fixed costs are spread over smaller volumes. A company is unlikely to be sustainably profitable at very low levels of capacity utilization, and accordingly improvements in capacity utilization are often imperative or a local industry to survive.

67…..

68…..

69 On the basis of these estimates……"

[170.2] there were significant levels of imports, as evidenced by the submissions of Totai, SMEG, and Bosch itself;

[170.3] there was potential for growth in the domestic market;

[170.4] Defy made several commitments in its reciprocity for the imposition of the tariff, particularly in relation to increased employment and production;

[170.5] the protection of Defy's local manufacture was in line with the Government's industrial policies and objectives.

Based on these undisputed facts together with the Commission's conclusion that Defy was making low profits, these were sufficient to justify the Commission's recommendation. Defy contends that, therefore, there was clearly sufficient evidence before the Commission to justify its recommendation. In the circumstances, Defy points out that even if there was some merit in those criticisms by Genesis, it seems those criticisms do not go to the core issues, the Commission was required to consider in making its recommendation, they do not demonstrate that the Commission's recommendation was unreasonable having regard to the information before it.

[171] Defy dealt in the following manner with the specific criticisms advanced by Genesis:

[171.1] **The complaint that there was no basis for the Commission's finding that Defy had low profitability:**

[171.1.1] the Commission concluded that the two local producers, Defy and Zero Appliances, had low profitability, based on the Commission's assessment of their costs of production compared to their prices;

[171.1.2] Genesis does not contest the correctness of the Commission's calculations of cost and price in its assessment (with the result that Genesis does not contest that, based on these figures, Defy's net profit in 2015 was only 5%). Genesis simply asserts that the Commission's conclusion that Defy's profits were low is "highly subjective" and unsubstantiated. This criticism of the Commission's conclusion as "subjective" is according to Defy, amazing. Defy states that the Commission has substantial expertise in assessing issues such as profitability, and the Commission's assessment should be treated with appropriate deference by this Court. The legislature has expressly empowered the Commission to make such assessments and the fact that a third party, such as Genesis, does not agree with the Commission's assessment does not give rise to any ground of review. It is Defy's case that Genesis has its own view on whether Defy's profits are low or not does not even come close to establish that the Commission's own view, even if not the same as Genesis, was irrational, which is the test on review;

[171.1.3] in any event, RBB has pointed out in paragraphs 33-60 of the RBB Report, that the basis on which Genesis asserts that Defy's profitability was not low, namely its own purported calculation of Defy's return on investments (ROI), is not only wrong in principle but has also not been accurately performed by Genesis;

[171.1.4] performing a ROI calculation to analyse profitability in the way that it is applied in the Genesis Report is wrong in principle because it depends on arbitrary accounting treatments and allocations and is overly focussed on short-term results and profitability. In this regard, I was referred to paragraph 60 of the RBB Report. Defy has observed that the actual calculation has been inaccurately performed in that Genesis has not considered all the relevant accounting and economic costs that would be required to perform the calculation properly (see paragraph 60 of the RBB Report);

[171.1.5] finally, Genesis criticises the Commission for relying on a single year's data to perform its conclusion that Defy was making low profits. This criticism ignores entirely the real test of Defy's application, the Commission only had one years' worth of information to consider because Defy had only recently commenced production. Genesis' report should have acknowledged the fact that there would be data for only one year. The implication of Genesis' criticism is that the Commission could never have recommended an increase in customs duty to protect Defy's local manufacturing until Defy has been manufacturing for several years, even if this mean that Defy would have ceased manufacturing locally precisely because that local manufacturing was not sustainable without the increased customs duty. It is contended by Defy that Genesis' criticism is nothing more than mere speculation. Genesis has, according to Defy, not put up any facts to show that the data relied on by the Commission was atypical and therefore unreliable. It is also important to bear in mind that once the Commission had established that there was import competition then it followed that increase in the prices of imports by raising the customs duty would assist Defy as a local manufacturer.

[171.2] **The complaint that the Commission wrongly concluded that local cost was increasing (see supplementary founding affidavit at 83-93):**

[171.2.1] Genesis' complaint is not easy to follow. Although Bosch asserts in the supplementary founding affidavit that Genesis concludes that there is "no basis for the Commission's findings on increase in costs of local manufacturers", in fact, Genesis does not dispute the Commission's finding that local manufacturers did experience cost increases in the period 2013 – 2015. In this regard reference was made to paragraphs 47 and 48 of the Genesis Report;

[171.2.2] Genesis' sole criticism of the Commission is its view that the fact that local costs increase does not mean that local producers were not able to compete with imports;

[171.2.3] as RBB has pointed out in paragraph 70 of its report, Genesis' criticism is not relevant to the Commission's decision. Once the Commission had concluded (correctly), that local producers had high costs and that their prices were constraint by imports, resulting in low profitability, this was sufficient basis to justify an increase in the customs duty. It was not necessary for the Commission to make any finding on whether those high costs had increased or not – particularly since Defy had only started manufacturing the subject products locally in 2014;

[171.2.4] nevertheless, RBB has dealt with two main criticisms advanced by Genesis in relation to the Commission's statements about costs;

[171.2.5] Genesis contends, firstly, that Defy's prices increased by more than its costs between 2014 and 2015. RBB shows in paragraphs 73 and 74 of its report and table 5 that Genesis' contention is simply factually incorrect. Genesis relies on what is set out in table 5 of the Final Findings to support its statement. This reliance is either misguided or opportunistic because that table clearly contains an erroneous ex-factory selling price for Defy for 2014. Once that error is corrected, then the table reflects that Defy's prices did not increase by more than its cost from 2014 – 2015;

[171.2.6] Genesis contends, secondly, that the Commission was wrong to say that local manufacturers faced increased costs because of the imposition of a customs duty on imports of steel, because a rebate provision was introduced in 2016. This statement by Genesis is also simply wrong in fact, because not all the steel components used in the manufacture of the subject product were subject to that rebate;

[171.2.7] finally, RBB shows in paragraph 71 of its report and table 5) that the increases in costs of local manufacturers may well have been higher than those importers, contrary to what Genesis suggests in its report.

[171.3] **The complaint that the Commission mistakenly relied on SARS import data and that the Commission wrongly concluded that imports were rising (supplementary founding affidavit at 52 to 66):**

[171.3.1] Genesis states that the Commission drew conclusions about the levels of imports of products that were substitute of the subject product by relying on the import data of SARS that itself recognised

could not be reliably used for that purpose because the data was for a broader range of products;

[171.3.2] According to Defy, this criticism ignores the fact that the Commission had before it sufficient evidence from actual importers themselves to establish that there were significant imports of competing products. The Commission referred to this evidence in paragraphs 7.2 of the Final Findings. As RBB points out in section 3.1 of the RBB Report, this was sufficient evidence to establish that imports were constraining domestic producers. The Commission also had before it information from Zero Appliances that demonstrated that it had increased imports from 2012, even though it was not producing at full capacity locally, which also indicated that imports were cheaper than, and were therefore constraining local production;

[171.3.3] Genesis also alleges that even using the SARS import data, the Commission's statement that imports were increasing is also wrong. Again, Genesis' criticisms are misplayed. RBB demonstrates in paragraphs 36-39 of the RBB Report and in table 1, that the Commission's statement is correct for the periods 2013-2015 and 2014-2015. The fact that imports dropped from 2012-2013 and 2013-2014, the sole facts on which Genesis relies for its criticism, does not alter this. It also bears repeating that Defy only commenced its local production in 2014. There was a marked increase in imports and after Defy commenced production from 2014-2015 as appears from Genesis' own table 3 in its report.

[171.3.4] RBB has shown in paragraph [39] of its Report) that from 2012-2014 imports, even by Zero Appliances, at that stage, the only local manufacturer, also increased, which is a relevant indicator that locally manufactured products were not able to compete effectively with imported products at this time.

[171.3.5] Finally, Genesis has suggested that data from a third-party source, GFK, which is a market research company, demonstrated that Defy did not experience a decline in market share over the period 2012 to 2015 and was the largest firm in the brought market for general home appliances and cookers. This information was obviously not before the Commission when it made its decision and Defy respectively submits it ought not to be considered by the Court in assessing the reasonableness of the Commission's recommendation.

[171.3.6] At any rate, the evidence is not reliable. As RBB points out in paragraph 43 of its Report, it is remarkable that Genesis, having criticised the Commission for using data that includes products other than the subject products, does the same itself in this paragraph of the analysis. Genesis' conclusion that the import data referred to by the Commission "cannot be informative" because it includes a substantial amount of non-subject gas stove products (as asserted by Bosch in paragraph [57] of the supplementary founding affidavit) holds equally true for the GFK data.

[171.3.7] Ms van den Berg states that moreover, as RBB has also explained, in paragraph 43 of the RBB Report, the GFK data is not reliable because it is based on information gathered at the retail level and only gathered from selected traders. The evidence is therefore not at an appropriate level of the market, which is the wholesale level and is also not complete. In the circumstances, Defy submits that it is not reliable evidence of the actual market share of Defy in relation to the subject products.

[171.4] **<u>The complaint that the Commission wholly concluded that domestic producers were suffering a price disadvantage as against imports (supplementary founding affidavit at 67-79)</u>:**

[171.4.1] Genesis contends that the Commission's conclusion that local manufacturers were suffering a price disadvantage against importers is not supported by its own analysis in the final findings;

[171.4.2] RBB has explained (in paragraphs 87 and 89 of the RBB report) that it is not necessary to resolve this issue because the Commission did not need to make any detailed finding on the relative price competitiveness of imports and locally manufactured products once it had determined that there were significant volumes of imports. The Commission itself recorded in paragraphs 11.6 of the Final Findings that not too much reliance could be placed on its analysis of import prices versus domestic prices. In the circumstances Genesis' criticism do not go to the substance of the Commission's decision. In the contrary they simply distract from the true issues.

[171.4.3] As for the conclusion on prices the Commission set out in its findings, RBB agrees with Genesis that the analysis contained in table 6 of the Final Findings does not demonstrate a price disadvantage as alleged by the Commission. RBB points out

though, firstly, in paragraphs 95-97 of its Report, that there is an error in the table that, once corrected, reflects that prices of imports and locally manufactured products were much closer than suggested in the table, and, secondly, (see in this regard paragraphs 99-101 of the RBB Report), that there is other more direct evidence that was before the Commission, provided that Defy itself, during the application process (and supported by relevant invoices provided by Totai), that reflects that prices of imports from China were significantly cheaper than Defy's local prices, as stated by the Commission in its final findings.

[171.4.4] Finally, RBB has examined import prices using data collected after the implementation of the tariff, see in this regard paragraphs 104 to 107 of the RBB Report. RBB has shown that import duties from dutiable regions continue to be much lower than Defy's ex-factory prices. To the extent that Genesis has raised a different conclusion in its report, RBB explained that this is because Genesis did not distinguish between imports from dutiable and non-dutiable regions (which is important because countries such as China, which are the low-price importers, are not in non-dutiable regions while products from Europe, which includes high price imports from firms such as SMEG).

[171.4.5] Lastly, in relation to the analysis performed by the Commission, RBB explains in paragraphs 108 to 115 of the Report, why the Commission was correct to state that comparisons of prices at retain level is not a useful analysis and can be materially misleading and where Genesis' analysis of retail pricing therefore is not relevant to an analysis of the reasonableness of the Commission's conclusions. RBB points out, firstly, that written prices are driven by pricing strategies over which manufacturers have no control (such as the use of "loss leaders" or "footfall drivers"), which means that written prices of products may not necessarily bear the same relationship as wholesale prices. RBB points out, secondly, that retailers and end-consumers may also associate a "brand premium" with certain brands, enabling retailers to charge prices of those brands higher than the wholesale price, which is based on the cost of manufacturing or importing products.

[171.5] **The complaint that the Commission misinterpreted the implications of the fact that Totai had decided to localise manufacture (supplementary founding affidavit at 80-82):**

[171.5.1] Genesis states that the Commission ignored an important piece of evidence before it, namely, that Totai indicated during the process of the Commission's investigation that it was in the process of localising its manufacturing of gas stoves. Genesis assessed that the issue is that Totai considered that it was profitable to manufacture locally at the existing tariff levels. As RBB points out though (in paragraph 62 of the RBB Report), in fact Totai initially indicated at the start of the investigation that it strongly objected to the increase in tariff precisely because it was exclusively an importer. The fact that it subsequently changed its position during the investigation is more likely than indicative of a changed incentive once it became apparent that the custom's duty would be increased. In other words, the proposed increase in tariff has precisely the desired effect in that it stimulated local manufacture ahead of imports.

[172] I conclude that none of Bosch's criticisms alter the fundamental facts that demonstrate that the increase in the duty rate was in line with government policy and met the requirements of amended tariff regulations. In the circumstances, I am of the view that Bosch has not demonstrated that the contents of the Commission's recommendation gave rise to any basis to set aside the decisions of the Ministers of Trade and Industry and Finance to approve the increase in custom duty.

[Q] UNCORROBORATED HEARSAY

[173] In its replying affidavit Bosch objected to the absence of any confirmatory affidavit by:

[173.1] the Minister of Trade and Industry to confirm the authority of Mr Lionel October, the Director General of the Department of Trade and Industry at the time, to depose to the answering affidavit of the Minister of Trade and Industry on his behalf;

[173.2] of the confirmatory affidavit of the Minister of Finance to confirm the authority of Dondo Mogajane, the Director General and Accounting Officer of the National Treasury to depose on behalf of the Minister of Finance the answering affidavit.

[174] Bosch states that neither affidavit contains a confirmatory affidavit of the Minister for the imposition of the tariff, namely the erstwhile Minister of Trade and Industry and the erstwhile Minister of Finance. According to Bosch, the importance here is that the decisions that are being reviewed here are the impugned decisions of the Ministers, the only functionary empowered to cause the increase of a duty in terms of s 48(1)(a) of the CEA.

[175] According to counsel for Bosch, whilst the deponents can speak about the nature of the processes, they cannot provide any direct evidence relating to the specific processes, decisions, or effect of the impugned decisions as they were not designated to make these determinations in terms of the empowering legislations. Accordingly, the evidence provided by the offices of the erstwhile Ministers, which are direct in nature, amount to inadmissible hearsay evidence, so it was argued by counsel for Bosch, which cannot be relied upon and should for all these reasons be rejected. The deponents to the answering affidavits of the Minister of Finance and the Minister of Trade and Industry cannot gainsay the allegations made by the representatives of the Commission or provide any corroborative or factual evidence as to the process adopted in this matter.

[176] Mr Lionel October made the following statement:

"I the undersigned, hereby declare under oath as follows:

1.

I am the Director General of the Department of Trade and Industry (the DTI). The Minister of Trade and Industry (the Minister) is the first respondent under case nr 67553/2018 herein, and the executive functionary charged with the powers and oversight functions relevant to this application. I am duly authorised to depose to this affidavit on the Minister's behalf.

2.

The facts stated herein are within my personal knowledge or have been obtained from the DTI records or have been furnished to me by the persons or sources identified and appropriate places in this affidavit.

3.

I verily believe all the facts set out herein to be true and correct. Where I make submissions of law, I do so in the advice of my legal advisors, which advise I verily believe to be correct."

On the other hand, Mr Dondo Mogajane made an affidavit in which he stated as follows:

"I the undersigned, Dondo Mogajane,

Do hereby make an oath and say that:

1.

I am the Director General and Accounting Officer in the National Treasury. By virtue of my office I am authorised to oppose this application and to depose to this affidavit on behalf of the Minister of Finance who is cited as a party herein.

2.

The facts deposed to in this affidavit are true and, save where the contrary appears from the context or is otherwise stated, are within my personal knowledge.

3.

Where I deal with questions of law I do so on advice given by my legal representative of the Minister of Finance. Where appropriate I rely on the information furnished by officials within National Treasury in the execution of their duties."

[177] The Ministers of Finance and of Trade and Industry are parties to the applications. This is clear from the heading of the applications that the affidavits are made in the names of the Ministers of Finance and Trade and Industry. All that was required, in addition, was an affidavit stating the facts on which the versions of the Ministers were based. In the answering affidavits by Dondo Mogajane and by Lionel October, they both claim that the facts stated in those affidavits are within their personal knowledge.

[178] In dealing with the objection raised by Bosch I would adopt the approach espoused in **Leith, N.O. and Heath, N.O. v Fraser 1952 (2) SA (33) (O**). The Court held, in that judgment *"that the fact that the Applicant had neither signed the so-called petition nor made an affidavit of his own did not render the application bad for non-joinder"*. The answering affidavits clearly indicate that the affidavits were clearly made on the Ministers' behalf. The Court stated the following at p. 36B that:

"A notice of motion could in a proper case be supported by an affidavit by one not a party to it, if he were in a position to provide the necessary material to support the claim."

By analogy, an answering affidavit could, in a proper case, be made by one not a party to the proceedings but by someone who was able to provide the necessary material to support the defence and to provide the version of the events. The Director Generals are such persons who can provide the necessary material in support of the relevant Minister's answering affidavits. The purpose of the affidavit is simply to provide evidence.

[179] Even if there is no confirmatory affidavit from the relevant Ministers, this Court can certainly assume that the Ministers knew about the fact that the Director Generals had made answering affidavits on their behalf. It is important to observe that while Bosch admits that it has no knowledge of the activities or decisions the Deputy-Director was privy to, it still disputes the truth of the statement. This denial is not based on any objective facts. This Court is accordingly disinclined to reject these answering affidavits.

[R] <u>THE LATE FILING OF THE SECOND REVIEW</u>

[180] [180.1] The Commission has commented that the second review application was filed outside the applicable 180-day period. For that reason, it is so alleged by the Commission, Bosch should have sought condonation for the delay. The other Respondent in the second review, the Minister of Trade and Industry, has not raised this point. In both the replying affidavit and its counsel's heads of

argument, Bosch has disputed this allegation by the Commission. Bosch is adamant that the second review application was brought within the time period set out in s 7(1) of PAJA. Which provides that " *Any proceedings for judicial review and not later*

in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days…….

[180.2] In his heads of argument counsel for Bosch relies on the judgment of the Constitutional Court in **City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC)** for the calculation of the 180-day period contemplated in s 7(1) of PAJA. He relies on para 41 of the said judgment where the Court had the following to say:

"On a textual level, the City's contention confuses two discrete concepts: reason and irregularities. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant."

[180.3] it is Bosch's case that it only became aware of the Minister of Trade and Industry's decision on or about 19 March 2019 upon receiving the Minister of Finance's record. Having received the Minister of Finance's record on the said date, Bosch proceeded, on 14 September 2019, to issue and serve its second review application, which was within 178 days of it becoming aware of the decision of the Minister of trade and Industry.

[180.4] the Commissioner has not placed sufficient details why it alleges that the second review application was brought out of time. To succeed on this point, the Commissioner must set out the date on which Bosch became aware of the decision of the Minister of Trade and Industry or the date on which Bosch ought reasonably to have become aware of the said decision, among others. It is not enough just to make allegations of delay without any indication of the commencement of the delay.

[180.5] Even if the Commission has raised this point it does not look like it was its strongest point. It is not one of the grounds upon which the Commission seeks a dismissal of Bosch's application. I will therefore not devote any more time to it. The Court accepts that the Commission, though having raised that point, does not desire the application to be dismissed on the basis that the second review application was not brought in time. Counsel for the Commission did not even argue this point and did not even ask for any relief based on this point. In the

premises this Court is inclined to accept Bosch's explanation. Therefore, this Court finds that the second review application was launched and served in time.

Condonation for the late filing of the answering affidavit of the Minister of Trade and Industry

[181] This application by the Minister of Trade and Industry is granted without much ado. It was not opposed. It was not even referred to during argument. The Court is satisfied that counsel for the Minister of Trade and Industry, Adv M Mokadikoa-Chauke SC, has furnished a reasonable explanation for the delay. In the absence of recklessness or wilful neglect on the part of the Minister of Trade and Industry, and in the absence furthermore of any allegation of prejudice to any of the other parties in the proceedings, the Court sees no valid reason why the application should not be granted.

Whether the conduct of the Ministers amounted to administrative or executive action

[182] Without much ado, the conduct of the Minister of Finance and the Minister of Trade and Industry or their decision are administrative actions and not executive actions. This is so because the power of the Minister of Finance to vary, amend or rescind customs duties in terms of the CEA is sourced from national legislation and not from the Constitution. Similarly, the power of the Minister of Trade and Industry to request the Minister of Finance to amend the CEA is sourced from national legislation and not from the Constitution. Accordingly, those decisions constitute administrative actions, reviewable under PAJA because they involve the implementation of national legislation.

[183] The Ministers derived their powers to act neither from the Constitution nor from any provision of the Constitution but from the statutes of parliament. In **the Minister of Defence v Modau 2014 (5) SA 69 CC at p. 82 paragraph 31 C-D** the Court stated that:

"This Court has held that the implementation of legislation by a senior member of the executive ordinarily constitutes administrative action."

In making the said statement the Court confirmed what it had stated in **Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc. 2001 (2) SA 1 CC at paragraph [18] page 12**, where it had the following to say:

"In President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC this Court held that, in order to determine whether a particular act constitutes administrative action, the focus is on the enquiry should be <u>the nature of the power exercised, not the identity of the actor</u> (my own underlining). The Court noted that senior elected members of the executive (such as the President), Cabinet Ministers, in the national sphere and members of the executive councils in the provincial sphere, exercise different functions according to the Constitution. For example, they

implement legislation, they develop and implement policy and they prepare and initiate legislation. At times, the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the Executive is engaged upon implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the Executive also have constitutional responsibilities to develop a policy and initial legislation and the performance of these tasks will generally not constitute administrative action."

The Court continued as follows at p. 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 fall. The source of the power, though 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 the 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 section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 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."

[184] In deciding whether a decision was executive rather than administrative, the Court should have regard to the following guidelines:

[184.1] a power most closely related to a formulating policy is likely to be executive, while a power most closely related to applying policy is likely to be administrative;

[184.2] pointers in deciding were:

[184.2.1] the source of the power;

[184.2.2] constraints imposed to its exercise; and

[184.2.3] whether it was appropriate to subject its exercise to the more vigorous standard of administrative law review.

[185] Accordingly, I am satisfied that the decisions of the two Ministers in this matter constitute administrative actions reviewable under PAJA.

[186] **The allegation that the amendment of custom duties is a Money Bill as contemplated in s 77 of the Constitution**.

[186.1] It is the Minister of Finance case that;

[186.1.1] his decision to confirm the Commission's recommendation and cause the publication of the increase in tariff amounts to a decision that was determined by public policy ground;

[186.1.2] the imposition of tariffs falls squarely within the purview of s 77 of the Constitution and cannot, for that reason, be reviewed as it is a money bill;

[186.1.3] thirdly and lastly, the imposition of tariffs is not an administrative action as it amounts to the execution of an executive function.

[186.2] Bosch disagrees. It denies that s 77 of the Constitution applies in this application. Section 77 of the Constitution provides as follows:

"*(1) A Bill is a money Bill if it-*

(a) appropriates money;

(b) imposes national taxes, levies, duties, or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) ……...

(3) All money Bills must be considered in accordance with the procedure established in Section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament."

[186.3] I fully agree with Adv Redman SC that the imposition of tariffs is not a Money Bill. I agree furthermore, that on a proper interpretation, of s 77, the decision of the Minister of Finance does not constitute a money Bill and that the said section 77 does not find any application in this matter.

[186.4] Finally I have already, in paras [182-185] supra, dealt with the powers of the Minister of Finance and shown, with reference to authorities, that the Minister of Finance's powers to vary or amend or abolish custom duties are sourced from national legislation, the CEA, and constitute, administrative action reviewable under PAJA. There exists no merit therefore, in the allegation that the amendment of the custom duty is a Money Bill as contemplated in s 77 of the Constitution.

[S] CONCLUSION

[187] In conclusion, I am not satisfied that Bosch has made out a good case for the relief that it seeks.

Accordingly, the application is dismissed with costs, which costs shall include the employment of two counsel, where applicable.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Bosch:	Adv NPG Redman SC
Instructed by:	C de Villiers Attorneys c/o Wiese & Wiese Attorneys
Counsel for The Commission (ITAC):	Adv H Maenetje SC Adv MD Stubbs
Instructed by:	The State Attorney
Counsel for The Minister of Finance:	Adv L Gcabashe SC Adv N Ntuli Adv N Kekana
Instructed by:	The State Attorney
Counsel for The Minister of Trade and Industry:	Adv M Mokadikoa-Chauke SC
Instructed by:	The State Attorney
Counsel for Defy:	Adv MA Wesley
Instructed by	Alison van den Berg Attorney Inc c/o Klagsbun Delstein Bosman De Vries Inc
Dates heard:	29-31 October 2019
Date of Judgment:	5 January 2021