In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

Case no: 15797/17

In the matter between:

PIONEER FOODS (PTY LTD	Applicant
and	
MINISTER OF FINANCE	First Respondent
NATIONAL TREASURY	Second Respondent
MINISTER OF ECONOMIC DEVELOPMENT	Third Respondent
MINISTER OF TRADE & INDUSTRY	Fourth Respondent
DEPARTMENT OF TRADE & INDUSTRY	Fifth Respondent
INTERNATIONAL TRADE ADMINISTRATION COMMISSION	Sixth Respondent

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REASONS (DELIVERED ON 29 SEPTEMBER 2017)

SHER, AJ:

1. The applicant is one of the principal wheat millers and suppliers of wheat-based products including flour, bread and pasta, in the country. On 31 August 2017 it launched an urgent application in Part A of which it sought a *mandamus* compelling the Minister of Finance (first respondent) and the National Treasury (second respondent) to cause updated custom tariff duties on wheat imports to be published in the Government Gazette by no later than 8 September, in terms of the Customs and Excise Act [1] (the "CEA").

2. The application was heard late on the afternoon of Friday 1 September, in the urgent lane of the motion court roll. As there were a number of other matters which still needed attention, immediately after argument had concluded I made an *ex tempore* Order in which I dismissed Part A of the application, with costs to stand over for determination together with Part B, and indicated that reasons would be provided later, in the event that these were sought. Such a request having been made, my reasons follow below.

Historical and legislative background

2. Due largely to climactic conditions the production of wheat in South Africa occurs at a higher cost than for most wheat-producing countries in the northern hemisphere. As a result, South Africa is a net importer of wheat. Between 2005 and 2015 domestic production declined by 25% while demand increased by 17%. In 2015, whilst the country was experiencing its worst drought since the early 1980's there was a shortage of 60% of what was required for domestic consumption.

3. In 1999 the Ministers of Trade and Industry and Finance decided to adopt a tariff-based policy whereby customs duties would be levied on the importation of wheat, with the aim of encouraging and protecting local farmers in such a way that they would be able to compete sustainably against low priced imports

[1] Act 91 of 1964.

without unduly raising prices 'downstream'. In order to achieve this the then Board of Tariffs and Trade proposed the use of a variable tariff formula, which would be benchmarked on a dollar-based so-called 'floor' or 'reference' price (DBRP), being the international price of wheat. This price was based on the 10year average trading price at the time for the US no. 2 Hard Red Winter Gulf wheat strain. When the DRBP was first set in 1999, it was pegged at USD 157 per ton.

4. The idea behind the use of a variable tariff formula was to impose a countercyclical system of tariffs. When the price of imported wheat over a set period of time fell below the DBRP due to lowered international prices, then import duties would be raised based on the difference between the two, and when international prices rose above the DBRP the duties would be reduced proportionately. To this end the formula envisaged that a rise or fall in the DBRP would be triggered if the 3 week moving average international price of wheat varied by more than USD 10/ton for 3 consecutive weeks. However, as will be apparent from the history which is set out below, in practice the promulgation of increased or reduced custom duties, as the case might be, was effected a number of months after the trigger event, and as a result of this time lag would often be out of sync with what was happening on international markets.

5. With the advent of the International Trade and Administration Act[2] ("ITA") in 2002 the Minister of Trade and Industry was given certain powers[3] to regulate the import and export of certain goods into the Republic, and matters pertaining to the investigation of possible amendments to customs duties on certain imports in terms of the variable tariff formula were taken over by the International Trade Administration Commission[4] ("ITAC"), which was to report to the Minister of Trade and Industry with its recommendations. If the Minister approved ITAC's

[2] Act 71 of 2002.
[3] In terms of s 6 of the Act.
[4] In terms of s 26.

recommendations he in turn would forward them on to the Minister of Finance with a request for their implementation in terms of the CEA.

6. The use of the variable tariff formula for setting customs duties on wheat imports was maintained by ITAC until 2005 when it recommended that a switch be made to *ad valorem* tariffs. However, subsequent to representations made by the National Chamber of Milling, Grain SA and the DTI in 2008, ITAC recommended a return to the variable tariff formula and the DBRP system.

7. Following recommendations by ITAC in 2010 the DBRP was increased in 2011 to USD 215/ton and in 2013 following further recommendations it was increased to USD 294/ton. In December 2015 the Minister of Trade and Industry recommended to the Minister of Finance that the import duty on wheat be raised again, as international prices had fallen, and consultations were held by the National Treasury with various stakeholders with a view to assessing the impact of a raise in the DBRP on food prices and on upstream and downstream industries. At the same time, the Minister of Trade and Industry directed ITAC[5] to conduct a full review of the variable tariff formula and the DBRP which applied in respect of wheat, maize and sugar. In a media release by National Treasury on 8 April 2016 it was announced that the Minister of Finance had approved an amendment of the DBRP for wheat (in rand terms) to R 1224.31 per ton and this tariff would continue to apply for the remainder of 2016, pending the outcome of the review.

8. In December 2016 ITAC published the report[6] of its review. It identified a number of issues as essential to the outcome, including the effects of the severe and long-lasting drought, food inflation (particularly in relation to bread prices), exchange rate fluctuations and the relationship between the cost of production and the level of protection of the local industry.

[5] In terms of S 16 (1)(d)(i) of the ITA.
[6] No. 538.

9. As far as the drought was concerned it noted that wheat production was projected to recover significantly due to expected favourable climactic conditions, which would result in a diminished dependence on imports. In a detailed analysis of the impact of inflation on downstream wheat products such as bread and cereals it came to the conclusion that there was no simple correlation between movements in the international price of wheat and the duties levied thereon, and domestic prices.

10. As far as exchange rate fluctuations were concerned it found that substantial depreciation in the value of the rand as against the dollar over the preceding two years had a dramatic effect on the value of import duties that were levied. It noted that there were complaints that, because of this, duties were too high and had resulted in unnecessary protection in Rand terms, and as a result a number of role-players had advocated a possible switch to a Rand-based reference price system. On examining the financial implications of such a model it was of the view that due to the trajectory of the local currency it either would not yield a sufficient duty, or would only trigger a duty at very low levels. In addition, it was of the view that a Rand-based pricing system would place farmers at a commercial disadvantage given local inflationary cost pressures and would be unworkable, as it would have to be revised constantly to take account of the most up to date industry figures. However, in order to address issues of over-protection when there was an extreme fall or appreciation in the value of the currency it recommended that a new variable should be introduced into the formula viz the Real Effective Exchange Rate (REER) Index, which is published monthly by the Reserve Bank. The Index accounts for currency differentials between SA and 20 of its most important trading partners. Utilising the REER to adjust an increase or decrease in duty that was triggered by a drop or a rise in the international price would ensure that local producers were only protected from cost pressures in real terms, and that they did not benefit unduly from exchange rate movements. The Commission was of the view that this would bring stability to the DBRP system.

11. In the result, the Commission was of the view that the variable tariff formula based on the DBRP system (as adjusted by the REER) still was the appropriate vehicle to utilise in order to stimulate local production and ensure stability in the trading environment with due regard for volatility in international markets. Having regard for the average level of imports over the preceding 5 years, and the significant change in the world price over recent years, as well as certain 'distortion factors' pertaining to the shifts in import sources and transportation costs the Commission recommended that the DBRP be based on the 5 year average international price and that it be adjusted downward from the then current level of USD 294/ton, to USD 279/ton.

12. The applicant avers that the adoption of ITAC's review report by the relevant authorities was delayed until the Minister of Finance formally implemented its recommendations on 23 June 2017 when he published updated customs duty tariffs in the Gazette. Effectively therefore, a period of 6 months elapsed between the time when ITAC recommended a reduction in the DBRP, and the promulgation of reduced tariffs. Applicant points out that by the time the amended tariffs were introduced they were out of sync with the then prevailing international wheat price.

13. Applicant avers that according to a schedule produced by the SA Grain Information Service an adjustment of the DBRP was again triggered on 11 July 2017, and in terms of the variable tariff formula the import duty tariff on wheat was to have been revised downward in rand value from R 947.20 per ton to R 379.34 per ton.

14. On 27 July 2017 the applicant addressed letters to the Chief Commissioner of ITAC, and the Ministers of Trade and Industry and Finance in which it expressed the hope that every possible effort would be employed to ensure that the amended wheat import duty tariff would be published 'within the shortest possible

time period'. In the absence of any response the applicant arranged a meeting between certain of its executives and the Chief Commissioner on 22 August. Applicant avers that at that meeting it was informed that updated tariffs had been forwarded to the Minister of Finance for publication.

15. Immediately after the meeting the applicant's Group Executive: Sustainability and Stakeholders approached National Treasury with a request for a meeting to be held in order to discuss the 'mechanism for the new tariff'. On 30 August the applicant's Managing Executive duly met with the Treasury's Head of Economic Policy and its Chief Director: Microeconomic Policy, and a Commissioner from ITAC. At this meeting the applicant's representatives urged National Treasury to cause publication of the amended import duty tariff to be effected as a matter of urgency, and pointed out that the applicant was expecting a large shipment of wheat on 8 September. Applicant avers that the representatives from National Treasury did not dispute that an adjustment to the DBRP had been triggered and indicated that import duty tariffs were to be amended accordingly in due course, but were not prepared to provide any commitment as to when this would occur.

16. It is apparent from the papers that immediately after the meeting on 30 August the applicant took a decision to proceed with the instant application and the founding affidavit was deposed to on the same day, and the application was launched a day later and set down for hearing on 1 September ie on one day's notice.

17. The basis for the urgent part of the relief sought was that the shipment of 50 000 tons of wheat which was expected to arrive on 8 September would, in the absence of an adjustment to the import duty tariff, be liable for import duty of R 47 360 000, based on the existing tariff of R 947.20 per ton, as opposed to import duty in the amount of R 18 967 000, were the import to be processed on a reduced tariff of R 379.34 per ton. Applicant pointed out that it could not delay offloading and processing the shipment for any length of time pending the

decision of the Minister of Finance as it would incur demurrage charges of approximately USD 14 000 per day, and the ship would lose its docking slot.

The parties' contentions: a summary

18. The applicant contended in its founding affidavit that as updated duties had already been determined by ITAC in accordance with the variable tariff formula, which duties had been endorsed by the Minister of Trade and Industry, the Minister of Finance was simply required to Gazette them in order to bring them into operation. The applicant described the Minister of Finance's function in this regard as simply being an administrative one, which did not require him to do anything other than to rubberstamp and give effect to the tariffs previously determined by ITAC. In their view the only power which the Minister of Finance had over the tariffs was to scrutinize them for the purposes of ensuring that they had been correctly calculated by ITAC.

19. However, in its supplementary founding affidavit the applicant indicated that it had wrongly conflated the role and duties of ITAC and the DTI with that of the Minister of Finance. On reconsideration it was of the view that ITAC's role was limited to making recommendations in respect of updated tariffs to the Minister of Trade and Industry who, if he approved such recommendations would in turn forward them on to the Minister of Finance with a request that such tariffs be implemented by publication in the Gazette.

20. The respondents in turn contended that the powers of the Minister of Finance were wide and discretionary executive powers which could not be compelled and when exercised were, in effect, legislative in nature.

The legislative provisions

21. According to its preamble the purpose of the CEA is to provide for the levying of customs and excise duties and certain other levies,[7] and to regulate the importation, export, manufacture and use of certain goods. As such, the CEA has been described as a so-called tax or 'money bill' in terms of the Constitution.[8] The main function of such a piece of fiscal legislation is to impose taxes on the public, which are paid into a general revenue fund.[9]

22. In *Gaertner* [10] the Constitutional Court described the primary function and purpose of custom and excise duties[11] as being to ensure a constant stream of revenue for the state and to discourage consumption of certain products.[12]

22. In terms of the CEA, a customs duty is defined as any duty leviable under Part 1 of Schedule no. 1 or Schedule no. 2 of the Act, on goods imported into the Republic. It is common cause that the import duties which are in issue in this matter constitute customs duties levied in terms of Part 1 of Schedule 1, and the Minister of Finance's powers to levy such duties are derived from s 48(1)(b) of the CEA.

23. S 48 provides that the Minister may 'from time to time' by notice in the Gazette, amend the General Notes to Schedule 1 and Part 1 of the Schedule, or substitute the said Part 1 and amend Part 2 of the Schedule in so far as it relates to imported goods, in certain instances.[13] These include instances such as in this matter where the Minister of Finance seeks to give effect to a request by the Minister of Trade and Industry in regard to the amendment of import duties listed

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[7] Such as the fuel levy (imposed in terms of s 52 rtw Part 5A of Schedule 1), the environmental levy (imposed in terms of s 54A and 54B rtw Part 3 of Schedule 1) and an air passenger tax.
[8] Which is subject to certain special requirements in the case of any legislative amendment thereto, aas opposed to legislation which simply imposes regulatory changes- *vide* s 77(1)(b) of the Constitution.
[9] See *SA Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at paras [48]-[52].
[10] *Gaertner & Ors v Minister of Finance & Ors* 2014 (1) SA 442 (CC).
[11] An excise duty is defined as any duty leviable under Part 2 of Schedule 1, on the sale of certain goods imported into or manufactured in SA. It is commonly imposed on so-called luxury goods (including high-end motor vehicles), and on tobacco and alcohol products.
[12] *Id* para [54].
[13] Set out in sub-paragraphs (a) to (e) of s 48(1).

in Schedule 1[14] as well as instances where he seeks to give effect to an international agreement amending the so-called GATT tariffs[15] or an amendment to the international Convention on Nomenclature for the Classification of Goods in Customs Tariffs,[16] or in order to remove reference in the Schedule to a country which has cancelled a preferential customs tariff it afforded SA on any goods produced by it.[17]

An evaluation

24. The applicant submitted that if one had regard for the circumstances under which the Minister of Finance may exercise his powers to amend Schedule 1 customs duties in terms of the principal empowering provision, these largely pertain to situations where he is simply required, mechanistically, and as a formality, to give effect to decisions (such as the conclusion of agreements) taken by other state actors. In effect therefore, his role was little more than to rubberstamp decisions taken elsewhere. In support of its argument in this regard the applicant sought to contrast the exercise of ministerial powers in terms of s 58 of the CEA, which provides that the Minister may at any time table a taxation proposal in the National Assembly imposing a new duty (or increasing the rate of duty already payable) upon specified goods, whereupon such duty immediately becomes payable without the need for the proposal to be deliberated upon and accepted in the Assembly by majority vote. The applicant averred that it was thus apparent that when the Minister exercised his powers under s 58 he was performing a legislative function, whereas when acting in terms of s 48 he was simply performing an administrative one.

25. I do not agree with the applicant's contentions in this regard. In the first place, whereas it does indeed appear (I make no finding in this regard) that when

[14] S 48(1)(b).
[15] Imposed in terms of the Geneva General Agreement on Tariffs Act 29 of 1948 (s 48(1)(a)).
[16] S 48(1)(c).
[17] S 48(1)(d).

exercising his powers in terms of the former provision, the Minister exercises a legislative power, this does not necessarily mean that he does not exercise a similar power when amending custom duties listed in Schedule 1, in terms of the latter provision, simply because he exercises it in a different way ie by promulgation.

26. It is trite that when considering whether or not the exercise of a power by a functionary constitutes administrative action the focus of the enquiry is directed at the nature of the power and its source, and not the functionary.[18] The court must consider whether the exercise of the power involves the exercise of a public duty and how closely it is related to policy matters.[19] When the action in question constitutes the enactment of legislation or the formulation of policy it will generally constitute either a legislative or executive act and not an administrative one.[20] As was pointed out in *Greys Marine*[21] administrative action "*is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law*".

27. In my view, when seeking to interpret the provisions of s 48(1)(b) I am required to adopt a contextual, and purposive approach. In *Endumeni* [22] the Supreme Court of Appeal explained[23] that:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances*

[18] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [141]; *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para [24].
[19] *Id SARFU* para [143].
[20] *Id SARFU* para [141], *Greys Marine* paras [24]-[25].
[21] Note 18 at para [24].
[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[23] At para [18].

> *attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed …. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document.*"

28. Therefore, when interpreting the provisions of subsection (1)(b) or any of the other subsections of s 48(1), these must be read in the context of the section as a whole, and not as isolated provisions, standing on their own. In this regard it is important to note that subsection 48(1)(e) affords a residual power to the Minister to amend Schedule 1 "*whenever he deems it expedient in the public interest otherwise to do so*". Save for the word "*otherwise*" this self-same phrase appears at numerous other places in s 48. So, for example s 48(2) provides that the Minister may similarly from time to time and by like notice amend or withdraw or insert Parts 2-5[24] of Schedule 1 or may reduce any duty specified therein with retrospective effect on such terms as he deems fit "*whenever he deems it expedient in the public interest to do so*".

29. Similarly the Minister may from time to time and by like notice, whenever he deems it expedient in the public interest to do so, authorize ITAC to withdraw[25] any duty specified in Part 2 or Part 4 of Schedule 1[26] or he may impose an export duty on certain goods intended for export[27] or he may insert, withdraw or amend Part 8 of Schedule 1.[28]

30. In my view it is thus apparent that when the Minister exercises his powers to amend Schedule 1 customs duties under s 48, including import duties of the kind

[24] Including Part 5A and 5B.
[25] With or without retrospective effect and on such conditions as the Commissioner may determine.
[26] In terms of s 48(2A)(a)(i).
[27] S 48(4).
[28] S 48(4A)(a).

that feature in this matter he is enjoined to have regard for what will be in the public interest, and the qualifying word "*otherwise*" which appears in the relevant phrase in s 48(1)(e) read contextually, does not detract from such an interpretation.[29] But, it must be pointed out, in addition, that his powers are framed in wide, discretionary and permissive (he ''*may*"), and not obligatory terms. Read contextually with reference to this matter, he may, but is not obliged to, amend customs duties on wheat imports as listed in Part 1 of Schedule 1 when and if he deems it "*expedient*" in the public interest i.e. when and if he considers it necessary in the public interest, to do so.[30] In my view, in exercising his powers the Minister thus is of necessity engaged in a policy exercise, in which he will have to have regard for a number of issues, including fiscal and economic matters. This much is further apparent if one has regard for the nature of the enquiries and inputs which are currently made by various policy, legal and research units of National Treasury and the SARS and related departments, as is detailed hereunder, before the Minister ultimately decides whether or not to promulgate the amended duties. As such, he is not merely a rubberstamp functionary.

31. This has two further consequences. Firstly, it means that when exercising powers under s 48(1)(b), the Minister is not engaged in administrative action. In the first place, when considering whether or not to accept a recommendation in this regard from ITAC and the Minister of Trade and Industry the Minister appears to be carrying out an executive function[31] and once the Minister has considered that amended import duties are necessary in the public interest and causes them to be promulgated in the Gazette, in my view he carries out a legislative function.[32] In this regard I am fortified by the provisions of s 48(6) which provide that any amendment, withdrawal or insertion made under s 48, shall unless Parliament

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[29] A similar view was expressed by Tuchten J in the matter of *SA Sugar Association v Minister of Trade and Industry & Ors* (Case no. 5494847) [2017] ZAGPPHC, which was decided on 30 August 2017, at para [35].

[30] "*Expedient*" is defined in the Pocket Oxford Dictionary (3rd ed) as "*necessary to achieve something, though not always right or fair*".

[31] In terms of ss 85(2)(b)-(e) of the Constitution.

[32] A similar view was expressed by Tuchten J in *SA Sugar Association* n 29 at para [33].

otherwise provides, lapse on the last day of the next calendar year following such action.

32. Secondly, given that the Minister exercises a policy choice which lies within his terrain it is not up to the court to second-guess him, nor should the court interfere with the process, save in the clearest of cases when irreparable harm would otherwise ensue and it is constitutionally appropriate to grant the order concerned.

33. In *ITAC v SCAW*[33] the International Trade Administration Commission had recommended to the Minister of Trade and Industry that an anti-dumping duty[34] which was in force should be terminated. The Constitutional Court set aside an interdict whereby ITAC and the Minister of Trade and Industry had been restrained from recommending the termination of such duty to the Minister of Finance and the latter had been interdicted from implementing the termination, pending the outcome of a review of ITAC's recommendation.

34. The court expressed the view that the setting, amending or removal of anti-dumping duties in order to regulate exports and imports was a patently executive function that flowed from the power to formulate and give effect to international trade policy, which was a power which resided "*in the kraal*" of the national executive authority.[35] It held that where the Constitution or legislation had entrusted specific powers and functions to a particular branch of government, courts should not usurp that power or function by making a decision of their preference as this would frustrate the balance of power implied in the doctrine of

[33] *International Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC).
[34] S 56 of the CEA provides that the Minister of Finance may from time to time and by notice in the Gazette amend Schedule no. 2 of the Act to provide for anti-dumping duties to be imposed on goods imported into the country for 'home consumption'. In terms of international trade, dumping refers to the introduction of goods into a country or its common customs area at an export price less than the normal value of such goods. Anti-dumping duties are commonly imposed to counteract or reduce harmful dumping practices.
[35] *ITAC* n 33, para [102].

separation of powers, especially where the decision at issue was "*policy-laden or polycentric*".[36]

35. In addition, it held that where the decision-making process was still incomplete and entailed considerations of national policy choices and specialist knowledge in regard to which a court was ill-suited, it should only intrude into the terrain of the executive in the clearest of cases and when irreparable harm was likely to ensue if interdictory relief was not granted.[37]

36. In like vein, in *National Treasury and Ors v OUTA*[38] the Constitutional Court warned that when a court was invited to restrain the exercise of a statutory power which fell within the exclusive terrain of the executive or legislative branches of government, by way of an interdict, it should carefully assess how and to what extent the relief sought would disrupt the executive or legislative functions by 'cutting' across or preventing the proper exercise of a power or duty, and it should only grant such an order when a "*proper and strong case*" had been made out for the relief and only in the clearest of cases, where it was constitutionally appropriate.[39]

37. In my view, the power to amend import duties listed in Schedule 1 of the CEA, in terms of s 48(1)(b) thereof, similarly constitutes a power which lies in the domain of the executive authority of the Minister of Finance, and especially where the exercise of such power is in process it should not be interfered with by way of a mandatory order, save in the clearest of cases, and only where irreparable harm might eventuate should such an order not be granted. In my view neither of these considerations were shown to be present in this matter, and to have granted an order in the terms sought by the applicant would therefore have impermissibly breached the principle of the separation of powers.

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[36] *Id* para [95].
[37] *Id* para [101].
[38] *National Treasury & Ors v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).
[39] *Id* at paras [65]-[66].

38. In an attempt to bolster its argument that a mandatory order was permissible and would not offend against the separation of powers the applicant referred me to the order granted in a similar matter between *Grain SA* and the self-same respondents in the North Gauteng High Court on 18 August 2016 (under case number 62058/2016) in terms of which National Treasury was ordered to cause an adjustment of the wheat import duty tariff which was submitted to it by ITAC a few months earlier, to be published in the Gazette by no later than 24 August 2016. It is not apparent from a copy of the record of that matter whether the order[40] was made in terms of a written judgment and the applicant's legal representatives were unable to ascertain whether one had in fact been handed down.

39. However, from a consideration of the affidavits which were filed in that matter it seemed to me as if the order was in fact one made by agreement between the parties. I say this because in the answering affidavit which was filed on behalf of the respondents by the then Director-General of National Treasury, it was pointed out that National Treasury and the Minister of Finance had carefully considered the recommendations made by ITAC for a raise in the import duty tariff, and after having regard for a range of fiscal and macroeconomic policy issues had accepted them, and had already taken a decision to give effect to them by publishing adjusted import duty tariffs in the Gazette. As such, there was no *lis* between the parties, and the only practical and logistical difficulty lay in having the adjusted tariffs published in the Gazette by 19 August 2016, being the date referred to in paragraph 2 of the notice of motion. In paragraphs 40-41 of his affidavit the Director-General indicated that all the necessary documentation for publication to occur would however be processed by the middle of the following week. In the circumstances the order granted in that matter was understandable, and given that the ITAC recommendations had already been accepted and a

[40] Per Van Der Westhuizen AJ.

decision to promulgate the amended tariffs had been taken by the Minister of Finance, the matter is clearly distinguishable from this one.

39. What is of importance is that the Director-General pointed out that the delay in finalising the decision arose in an environment in which there were competing concerns and interests which National Treasury had to give consideration to, in the public interest, and that it sought to strike a balance between policy certainty on the one hand, with respect to the variable tariff formula, and the fiscal and macro-economic objectives of government as required in terms of the Public Finance Management Act,[41] on the other. Of particular concern to National Treasury and the Minister of Finance was the impact the imposition of amended import duties would have on local economic and trading conditions, and to this end the respondents had relied on a comprehensive economic analysis which had been done. The respondents warned that ultimately it would not be appropriate for a court to make an order which would 'fetter' the ability of any of the various organs of state (which participated in the decision in relation to the amendment of import duties) to "*interrogate or raise matters*" which were pertinent to the decision which they needed to arrive at, and that were the court to make an order compelling these organs of state to arrive at a decision within a set period of time, it would not accord with the principle of separation of powers.

40. In the circumstances, the decision in *Grain SA* in fact was not contrary to the principles laid down in the Constitutional Court matters referred to above and did not provide any support for an order interfering in the process in which the first and second respondents were engaged, and the position adopted by the respondents in that matter was consistent with that adopted by them in this matter.

41. In this matter the current Acting Director-General in the National Treasury has outlined a complex regulatory and consultative process which is followed by

[41] Act 1 of 1999.

SARS and the National Treasury, before the Minister of Finance is in a position to consider whether or not to approve recommended adjustments to import duties.

42. In this regard, on receipt of a request from the Minister of Trade and Industry, the Commissioner of SARS forwards it to the Strategy, Legal and Policy unit of SARS which considers the recommendations by ITAC and the proposed amendments and obtains the necessary statistical information in order to ascertain the impact the amendments will have on the fiscus. A draft submission and draft legislative amendment is then produced and reviewed by specialists in a number of departments[42] before it is submitted to the Chief Officer: Legal Counsel for consideration and approval, whereupon the draft final SARS submission is forwarded to the Commissioner for sign-off.

43. Once the Commissioner for SARS has signed off on the submission it is delivered to the National Treasury where it is again subjected to an extensive internal review process. In this regard it proceeds through the office of the Deputy Director-General of Economic Policy for assessment, where after it is forwarded to the Microeconomic Policy section, where an economic analysis is conducted which involves an assessment of the principal economic issues which may arise from the proposals, should they be put into effect. Key considerations in this regard include the financial impact of the proposed amendment on trade and industry (including the competitiveness of the industry), as well as the effect on upstream and downstream value-added industries, and the consumer.

44. The proposal is also reviewed by the Tax and Financial Sector Policy division which considers issues relating to tax policy and the fiscal impact of the proposed amendment of the tariff as well as legal and administrative issues. Once this unit has provided input, and the proposal has been formally approved by the Deputy

[42] Including the Functional Specialist, Manager: Tariff Amendment, the Senior Specialist: Customs Policy, the Specialist: Customs Legislative Policy, the Executive: Customs Legal Policy and the Group Executive: Legislative Research and Development.

Director-General: Tax and Financial Sector Policy the complete and comprehensive final submission by National Treasury as to whether or not the amendment should be affected, and the terms thereof, is finally forwarded to the Minister of Finance.

45. After considering all the various inputs and the financial implications, including presumably the effect on the country's trade account and balance of payments the Minister makes a decision whether or not to amend the customs duties accordingly. Only when the Minister is satisfied that the competing interests of various stakeholders including farmers, millers, consumers, taxpayers and the fiscus have been taken into account and that the proposed amendment is accordingly in the financial and fiscal interests of the country will he proceed to approve it, whereupon the necessary documentation is forwarded to the office of the Commissioner of SARS in order that publication in the Gazette can be arranged.

46. In the result, it is evident that a request by the Minister of Trade and Industry for an amendment to the import duties on wheat does not result in an automatic acceptance and amendment by the Minister of Finance and it does not necessarily follow that a request by the Minister of Trade and Industry will necessarily be approved by the Minister of Finance. In the circumstances the applicant is not entitled as of right to a legislative amendment of the import duty as proposed by ITAC and recommended by the Minister of Trade and Industry, nor is the Minister of Finance obliged to promulgate the recommended amendments to the tariffs unless and until he deems it to be expedient to do so, in the public interest.

47. It is also evident from the aforegoing not only that an amendment to import duty tariffs for wheat is a complex process involving multiple issues of policy and specialist knowledge, to which a court must defer, but also that it cannot be effected in a hurry, and will of necessity take a matter of months. This has been

the case in regard to previous amendments to import duties which have been effected at least since 2013, from what I was able to see from the papers. That this may be frustrating and may cause financial harm or loss to certain role-players in the industry as well as to consumers, is an unfortunate consequence of the nature of the process that must be followed if a proper decision is to be made by the Minister of Finance, in the public's best interests, in terms of the statutory provision in question. Unlike other provisions in the CEA whereby the Minister may impose anti-dumping,[43] countervailing,[44] or safeguard duties,[45] or amendments to other Parts of Schedule 1 with retrospective or prospective effect, it appears no such powers exist in regard to the imposition of customs duties listed in Part 1 of Schedule 1, in terms of s 48(1)(b).[46] This may be a matter which needs to be addressed by way of a legislative amendment, but the long and the short of it is that the delays in this matter were occasioned by the nature of the decision-making process, and not because of any constitutional breach on the part of National Treasury or the Minister of Finance.[47]

Conclusion

48. Consequently, and for the reasons set out above, I was of the view that the applicant had failed to make out a case for an order compelling the Minister of Finance to cause a notice to be published in the Gazette by no later than 8 September 2017, adjusting the import duty tariff on wheat to R 379.34 per ton, and I accordingly dismissed the application for urgent relief in terms of Part A of the notice of motion, with costs to stand over for determination when Part B is heard.

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[43] S 56(2)(a) and (b).
[44] S 56A(2)(a) and (b).
[45] S 57(2)(a) and (b).
[46] The power to effect retrospective amendments in terms of s 48 lies in s 48(2) which allows the Minister to amend or withdraw Parts 2-5B of Schedule 1 and s 48(2A)(a)(i) which allows the Minister to authorize ITAC or the Commissioner of SARS to withdraw a duty specified in Part 2 or Part 4 of Schedule 1.
[47] See *SA Sugar Assoc* n 29, at para [40].

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SHER AJ

Appearances:

For applicant: Adv JG Dickerson (with him Adv L Kelly)

Instructed by: Edward Nathan Sonnenbergs (A Hoeben)

For respondent: Adv D Jacobs (with him Adv A Coetzee)

Instructed by: State Attorney