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South Africa Judicial Review of Trade Remedies in South Africa

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1 Introduction

South Africa has a long history of trade remedies judicial reviews.[1] However, the legislative environment, both in respect of trade remedies and the basis for judicial reviews, has changed significantly after South Africa became a democracy in 1994. In 1996, South Africa's constitution[2] was adopted and this provides for specific grounds of review, which have been further amplified in the Promotion of Administrative Justice Act (PAJA).[3] Accordingly, this article will generally only consider judicial review of trade remedies since 1996.

The International Trade Administration Commission (Commission or ITAC) is responsible for all aspects of trade remedy investigations up to the point where it makes recommendation to the Minister of Trade, Industry and Competition (Minister of Trade). If he agrees with the recommendation, he requests the Minister of Finance to impose the measure. In practice, each Minister second-guesses the Commission's findings and conducts an additional investigation. Although there is no basis in law for these Ministerial investigations, the courts have agreed with this practice,[4] although Vinti correctly states that a 'sensible approach to interpretation must be preferred to one that leads to unreasonable or unbusinesslike results or that hinders the apparent purpose of legislation', when he argues that there was no basis for the courts to find that especially the Minister of Finance had any discretion in implementing the Minister of Trade's request.[5]

Although South Africa has a Competition Tribunal that may review Competition Commission determinations, a Consumer Affairs Tribunal that may review Consumer Affairs Commission determinations, and a special customs court that may review decisions by Customs, no such tribunal exists for administrative review of the Commission's or Ministers' decisions[6] and all judicial reviews must be pursued through the High Court. If leave for appeal is granted, High Court decisions can be appealed to the Supreme Court of Appeal (SCA), while constitutional issues may be appealed to the Constitutional Court. The problem is that judges do not understand the essence of trade remedies and Vinti has

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1 *See* e.g., *Minister of Finance v. Randles Bros & Hudson* 1923 NPD 199; *Union Government v. Fig Bros* 1925 CPD 280; *Watson's Shipping Co. v. Commissioner of Customs* 1927 TPD 642; *Rex v. Lakofski; Rex v. Griffiths* 1932 GWL 36.

2 Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

3 Promotion of Administrative Justice Act 3 of 2000.

4 *See* e.g., *Bosch Home Appliances (Pty) Ltd t/a Bosch v. International Trade and Administration Commission of South Africa and Others* (12160/18; 67553/18) [2021] ZAGPPHC 8 (5 Jan. 2021) (*Bosch v. ITAC*), para. 10, where the court set out the investigation procedure in detail, including that the Commission must make a recommendation to the Minister of Trade. However, there is nothing in the legislation that provides any basis for the Commission to make a recommendation to the Minister of Trade, nor for the Minister of Trade to consider the matter further. The only legal requirements are that the Commission must make a recommendation to the Southern African Customs Union (SACU) Council of Ministers (via the SACU Tariff Board), which must make a decision that the members states must implement. This decision-making function has been delegated to the Commission, which means it is the Council of Minister's decision. Since the Customs and Excise Act, 91 of 1964, provides that the Minister of Finance must impose measures in terms of a request of the Minister of Trade, it follows that the Commission must send its decision – on behalf of the Council of Ministers – to the Minister for implementation, but contrary to court decisions, neither of the Ministers has any power to 'consider' the Commission's findings. *See also International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) (*ITAC v. SCAW); Pioneer Foods (Pty) Ltd v. Minister of Finance and Others* (15797/17) [2017] ZAWCHC 110 (29 Sep. 2017) (*Pioneer Foods); South Africa Sugar Association v. the Minister of Trade and Industry* 2017 4 All SA 555 (GP) (*SASA*). *See also* the criticism expressed against these verdicts in Engela Schlemmer, *Die grondwetlike hof en die ooreenkoms ter vestiging van die wereldhandelsorganisasie* (The Constitutional Court and the Agreement Establishing the World Trade Organization) 4 (2010) *Tydskrif vir Suid-Afrikaanse Reg* (*Journal for South African Law*) (Schlemmer) 749; Clive Vinti, *The Scope of the Powers of the Minister of Finance in Terms of Section 48(1)(b) of the Customs and Excise Act 91 of 1964: An Appraisal of Recent Developments in Case Law,* 21 PER / PELJ (Vinti 'Powers of the Minister of Finance') (2018); Gustav Brink 'The roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the minister of trade and industry in the regulation of South Africa's international trade' 7 (2013) Tydskrif vir Suid-Afrikaanse Reg (Journal for South African Law) 419.

5 Vinti, *supra*, at 11.

6 *See* Gustav Brink & Corlia van Heerden, *The Need for an International Trade Tribunal,* 133 South African L. J. ('Brink and Van Heerden') 409–433 (2016) for a discussion on the need for such a tribunal.

indicated that the courts' 'approach is fraught with uncertainty and ambivalence' when it comes to anti-dumping[7] (and the same would apply to the other two remedies).

The primary trade remedies legislation is the International Trade Administration Act (ITA Act). This is supported by the Anti-Dumping Regulations (ADR), the Countervailing Regulations (CVR) and the Safeguard Regulations (SGR). Other legislation, such as the Customs and Excise Act, PAJA and the Promotion of Access to Information Act (PAIA) also play a role in trade remedy investigations.

The ITA Act provides the basis for trade remedies in South Africa. In terms of the ITA Act, interested parties may lodge trade remedy (and tariff) applications to the Commission, who has jurisdiction to consider such applications. The ITA Act also provides definitions on some substantive elements, such as normal value, export price, and the determination of the margin of dumping, and confidential information, but does not define issues such subsidies or require that injury be caused to the domestic industry before remedial action may be taken.

All other substantive and procedural provisions are included in the different regulations, while PAJA guarantees the right to fair administrative action and provides grounds for judicial review, and PAIA provides for access to all non-confidential information held by government. Over and above normal review procedures, each of the sets of regulations provides for the judicial review of the Commission's preliminary determinations under three conditions: the complaining party prove that the Commission's actions were in violation of the ITA Act or the regulations, that its action or omission led to serious prejudice and this cannot be made undone by any future final decision.[8] Under normal South African administrative law, only final decisions are reviewable, which makes these provisions special.

High Court decisions are only reported if the judge deems it of interest to other judges, which means that many trade remedies verdicts are difficult to find.[9] However, all appeals are reported, as are all cases before the Constitutional Court.[10]

The *Geneva General Agreement on Tariffs and Trade Act (GATT)*[11] was promulgated in 1948 to give domestic effect to the GATT. Thus, Articles VI and XIX of the GATT find direct application in South Africa. However, neither the WTO Agreement nor any of the covered agreements has been promulgated as part of South Africa's municipal law and courts are not bound thereby,[12] even though South Africa incurs international obligations thereunder.[13] The Constitution provides that an international agreement binds South Africa only after it both chambers of Parliament has approved it by resolution.[14] This notwithstanding, the Constitution provides that:

> *When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*[15]

Based on this, the SCA found that although South Africa was not 'obliged as a matter of law to comply with the two international agreements in question [...] international practice is of some assistance in assessing the fairness of the practices of [the Commission] in conducting anti-dumping investigations'.[16] Consequently, the High Court often makes reference to the relevant WTO agreements in judicial reviews.[17] This is in line with Dugard's statement that:

> *Whatever the jurisprudential basis for the application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal*

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[7] Clive Vinti, *A Spring Without Water: The Conundrum of Anti-dumping Duties in South African Law,* 19 Potchefstroom Electronic L.J. (Vinti 'The Conundrum of Anti-dumping Duties') 4 (2016), doi: 10.17159/1727-3781/2016/v19i0a723. He also indicates that 'South African courts do not seem to understand the issue of dumping with sufficient certainty' – *ibid.*, at 7. *See also* Gustav Brink, *South Africa: A Complicated, Unpredictable, Long and Costly Judicial Review System,* in *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* 264–267 (Müslüm Yilmaz ed., Cambridge University Press 2013) (Brink 'A complicated judicial review'); Gustav Brink, *Duration of Anti-dumping Duties Shortened following Court Order in South Africa* 3:6 (2008) *GTCJ* 217 (Brink 'Duration of Anti-Dumping Duties'); and Gustav Brink, *Progress Office Machines v. South African Revenue Services* Case [2007] SCA 118 (RSA), De Jure 643 (2008) (Gustav Brink '*Progress Office Machines*').

[8] ADR 64.1; CVR 64; SGR 22.

[9] The decisions that are available can be found at https://www.saflii.org/.

[10] All SCA and Constitutional Court decisions are available at www.https://www.saflii.org/.

[11] Act 29 of 1948.

[12] *Tata Chemicals South Africa (Pty) Ltd v. ITAC* (48248/2020) [2023] ZAGPPHC 531 (28 Apr. 2023) ('*Tata*'), para. 54.

[13] *See Progress Office Machines v. South African Revenue Services* [2007] SCA 118 (RSA) (*Progress Office Machines); ITAC v. SCAW. See also* the discussions by Lonias Ndlovu, *South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years into Democracy,* 28 South African Pub. L. 279 (2013), doi: 10.2139/ssrn.2088333 (Ndlovu); Schlemmer, *supra* n. 4, at 749; Zain Satardien, *South Africa's International Trade Laws and Its 'Guillotine' Clause*, 7 Manchester J. Int'l Econ. L. 52 (2010) (Satardien); Brink 'A complicated judicial review', *supra* n. 7; and Brink '*Progress Office Machines*', *supra* n. 7.

[14] Section 231(2) of the Constitution. *See also* G. Ferreira & A. Ferreira-Snyman, *The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism*, 17(4) PER/PELJ 1473 (2014), doi: 10.4314/pelj.v17i4.08 (Ferreira and Ferreira-Snyman).

[15] Section 233 of the Constitution.

[16] *Chairman of the Board v. Brenco* 2001 (4) SA 511 (SCA) 528G-H. *See also Progress Office Machines*, para. 6; and *SCAW v. ITAC* (Unreported Case 48829/2008 T).

[17] *See* e.g., *Degussa v. ITAC* (Unreported Case 22264/2007 T) (*Degussa*), 26; *ITAC v. SCAW*, para. 2; *Progress Office Machines*, para. 6. *See also* Ndlovu, *supra* n. 13; Brink '*Progress Office Machines*', *supra* n. 7, at 645; Satardien, *supra* n. 13, at 54; and Vinti, *supra* n. 7, at 4.

courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law.[18]

The Constitution Court has found that there is no duty on South Africa to give effect to public international law, but only to consider it,[19] although this may 'have a profound influence on the incorporation of international law principles into South African law insofar as mere interpretation, without any (constitutionally prescribed) formal incorporation might result in the adoption of international law principles into the domestic law of South Africa'.[20] Even though a ratified agreement, such as the Anti-Dumping Agreement, does not become law within South Africa after ratification by Parliament, such agreement does become binding between South Africa and other countries party to the agreement.[21] It is important to note that all lower courts (High Court and the SCA) are bound by decisions of the Constitutional Court.

Courts often cite WTO case law – and has also considered expert submissions on practice in other jurisdictions. Nevertheless, as the courts are general in nature, it is up to the parties to 'educate' the judges on the applicable principles.[22]

In *Roman v. Williams*, the Court held that the High Court's jurisdiction 'in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its *substance and merits* as well'.[23] Thus, the High Court may review the Commission's decisions based not only on investigation procedures, but also its consideration of the substantive issues, including the reasonableness and rationality of the decision, and the requirement that the Commission should have applied its mind to the matter before it.[24] Vinti also indicated that substantive issues such as the improper consideration of the facts could fall before a review court through the avenue of administrative law if the administrative action is alleged to be unreasonable or irrational, or where the authority did not apply its mind.[25]

2 Parties eligible to institute judicial review

The ITA Act provides that any 'person affected by a determination, recommendation or decision of the Commission … may apply to a High Court for a review of that determination, recommendation or decision'.[26] In addition, anyone acting in the public interest, and not only the interested parties directly affected by administrative action, have standing in terms of the Constitution.[27] Most of the early cases were lodged by the domestic industry,[28] but more recently most reviews have been lodged by either importers or exporters.[29] If exporters do not have an economic presence in South Africa, they have to provide security for any review-related

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[18] John Dugard, *International Law: A South African Perspective* 43 (4th ed., Juta Cape Town 2011).

[19] *S v. Makwanyane* 1995 3 SA 391 (CC), paras 36–37.

[20] Ferreira & Ferreira-Snyman, *supra* n. 14, at 1477.

[21] *Glenister v. President of the Republic of South Africa* [2011] ZACC 6, paras 181–182 (majority decision); Ferreira and Ferreira-Snyman, 1480. *See also Pan American World Airways Incorporated v. SA Fire and Accident Insurance Co Ltd* (1965) 3 SA 150 (A) 161C, where it was held that 'the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are *not embodied in our municipal law except by legislative process* … In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject'. (Emphasis added.)

[22] Vinti, *supra* n. 7.

[23] *Roman v. Williams NO* 1998 (1) SA 270 (CPD) 284I–285A (emphasis added). *See also Bosch v. ITAC*, paras 69–80, where the court went into the substance before the Commission in great detail.

[24] *See* e.g., *President of the Republic of South Africa v. South African Rugby Foothall Union* 2000 (1) SA 1(CC) (*SARFU*); and *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*).

[25] Clive Vinti, *The Curious Case of the 'Non-co-operating Interested Party' in Anti-dumping Investigations in South Africa: A Critical Analysis of Farm Frites International v. International Trade Administration Commission*, 33(1) South African Pub. L. 15–16 (2018), doi: 10.25159/2522-6800/2939 (Vinti 'Non-co-operating Interested Party').

[26] Section 46(1) of the ITA Act. *See* e.g., *International Trade Administration Commission and Another v. South African Tyre Manufacturers Conference (Pty) Ltd & Others* [2011] ZASCA 137 ('*ITAC v. SATMC*'), para. 40.

[27] Section 38 of the Constitution 1996 provides that: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights [which includes access to information and just administrative action] has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interests of its members'.

[28] Algorax *v. International Trade Administration Commission* Unreported Case 25233/05 (*Algorax v. ITAC); Association of Electric Cable Manufacturers of South Africa v. ITAC* (unreported Case 33807/2005 (T)) *(AECMSA v. ITAC); African Explosives Ltd v. ITAC* Unreported Case 15027/2006; *South African Tyre Manufacturers' Conference (SATMC) v. ITAC* Unreported Case 45302/2007 NG; *Degussa v. ITAC; SCAW v. ITAC.*

[29] *Progress Office Machines; Ranbaxy v. Chairman of the Board on Tariffs and Trade* (Unreported Case 659/98 TPD); *Bridon International GMBH v. International Trade Administration Commission* (538/2011) [2012] ZASCA 82 (30 May 2012); *Association of Meat Importers v. ITAC* (769, 770, 771/12) [2013] ZASCA 108 (13 Sep. 2013); *Farm Frites v. ITAC* (Unreported Case 33264/14 GN); *Mings Distributors v. ITAC* (Unreported Case 5068/2018) (*Farm Frites v. ITAC); Casar Drahtseilwerk Saar GMBH v. ITAC* (66248/2014) [2020] ZAGPPHC 141 (14 Feb. 2020).

costs, regardless of whether they lodge the review or oppose reviews lodged by the domestic industry.[30]

When a review is lodged, all interested parties must be included in the review. This means that if the domestic industry lodges a review proceeding, it would have to include as respondents not only the Commission and the Ministers, but also all cooperating importers and exporters in the investigation or review subject to judicial review. Likewise, if a review is lodged by an importer or exporter, it would have to include all domestic producers and producer associations as respondents.

3 The judicial review process[31]

Any judicial review proceedings against the Commission, the South African Revenue Services (SARS) or the Ministers must normally be filed within 180 days following the final decision or the date on which the party became, or should have become, aware of the determination.[32] SARS must be given at least thirty days' notice of any pending action,[33] while the Commission must be given similar notice for reviews of anti-dumping decisions.[34] For some reason, there is no similar provision in the CVR or the SGR. The High Court may wave this requirement in urgent cases on good cause shown.[35]

In theory, four types of review can be lodged: an interdict either forcing the Commission, SARS or a Minister to act in a certain way or to prevent that party from undertaking a certain action; a review of a preliminary or definitive determination (including a recommendation); a review of a failure to act (such as to initiate an investigation), or a claim for damages. However, following a number of judicial reviews of trade remedy decisions, in practice it appears that it is not practically possible to obtain an interdict,[36] while, despite regulations specifically providing for reviews of preliminary determinations, courts have generally rejected this.[37] This leaves only two possible reviews: of the final determination, and a claim for damages, which could also only be lodged after the final determination has been implemented.[38]

For each of these types of review, there are three possible legal bases on which to bring the review: PAJA; the constitutional principle of legality;[39] and special statutory reviews provided for in the ITA Act and the different regulations. Section 6(2) of PAJA provides inter alia the following grounds for judicial review: if the authority did not have the authority to make such decision; bias; disregard of a mandatory provision; action that was procedurally unfair, that was materially influenced by an error of law, or where 'irrelevant considerations were taken into account or relevant considerations were not considered'; where the action taken is not rationally connected to information before the administrator or the reasons given for it by the administrator; where 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'; or where the authority failed to make a decision.[40] On the principle of legality, the Constitutional Court has held that 'the entity exercising powers must act within the powers conferred upon it (otherwise it will be acting ultra vires)',[41] while the High Court has indicated that 'the holder of power must act in good faith and not misconstrue his or her powers'[42] and that 'the exercise of public power must not be arbitrary or irrational'.[43] On the principle of rationality, the Constitutional Court held that such:

> view is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link … between the means employed to achieve a particular purpose on the one hand and the purpose or itself.

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30 *ITAC v. Carte Blanche Marketing CC; In Carte Blanche Marketing CC v. ITAC* (45241/12) [2019] ZAGPPHC 33, 7–8 (22 Feb. 2019).

31 *See* Brink 'A complicated judicial review', *supra* n. 7, at, 258–260; Gustav Brink, *Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change,* 7(5) Global Trade & Cust. J. 279 (2012) (Brink 'Urgent need for change').

32 28 S7(1)(a) of PAJA. *See also Pretoria City Council v. South African Railways and Harbours* 1956(4) SA 87 (T) (*Pretoria City Council*), 89; *Van den Berg v. Suid-Afrikaanse Spoorweë en Hawens* (*South African Railways and Harbours*) 1980(1) SA 546(T) 559.

33 Section 96(1) of the Customs Act 1964.

34 ADR 64.2.

35 *Algorax, supra* n. 28*; Degussa v. ITAC*, 33; *Botha v. Suid-Afrikaanse Spoorweë en Hawens* (*South African Railways and Harbours*) 1967(3) SA 695 (GW) 700; *Pretoria City Council*, 89; *Union Government v. E Rosenberg (Pty) Ltd.* 1946 AD 120 129; *Benning v. Union Government* 1914 AD 180, 185, *Farm Frites v. ITAC.*

36 *See ITAC v. SCAW.*

37 Note that in *Degussa v. ITAC*, 33, the applicant successfully opposed the imposition of a provisional safeguard measure that was imposed on the same day the investigation was initiated, as the High Court found the Commission's action 'drastic' and indicated that it would not assist the applicant to have a subsequent opportunity to make submissions.

38 *ITAC v. SCAW.*

39 This requires that administrative action should be reasonable *see* Iain Currie & Jonathan Klaaren, *The Promotion of Administrative Justice Act Benchbook* 169–173 (Siber Ink, Claremont 2001); *Standard Bank of Bophuthatswana v. Reynolds* 1995 (3) SA 74 (BG); *Bosch v. ITAC*, paras 89–101; *SARFU*, para. 148; *Fedsure Life Assurance v. Greater Johannesburg Metropolitan Council* 1999(1) SA 374 CC (*Fedsure Life Assurance*), paras 56 & 58; *Democratic Alliance v. President of the Republic of South Africa and Others* 2013(1) SA 248 CC (*Democratic Alliance*), para. 73.

40 Section 6(2) of PAJA.

41 *Fedsure Life Assurance*, paras 56 & 58. *See also Bosch v. ITAC*, para. 96; *SARFU*, para. 148.

42 *Bosch v. ITAC*, para. 96.2.

43 *Pharmaceutical Manufacturers*, para. 85.

> 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.[44]

In *Bosch v. ITAC*, the applicant challenged the Commission's decisions on the basis that it had 'failed to consider the relevant factors and furthermore that it considered irrelevant factors'.[45] It further argued that the Minister's determination was not lawful; the basis for his decision was patently incorrect; he failed to 'rigorously evaluate' the facts before him; his decision was 'factually and substantially incorrect'; and he 'failed to consider relevant factors as he took irrelevant factors into consideration'.[46] The court indicated that in its consideration of the review, it 'will go into the evidence of the Commission to establish the merits of this ground of review'.[47] The Commission, on the other hand, argued 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'[48] and that 'the law requires the Commission to make polycentric and discretionary decisions on a case-by-case basis'.[49]

Both the Constitutional Court finding and the court's finding in *Bosch* appear to be in line with the provisions of the Anti-Dumping Agreement that where 'the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned'.[50]

In *ITAC v. SCAW*, the court addressed the principle of separation of powers and noted that courts will only set aside legislation under every limited circumstances and that 'courts are ill-suited to judge on considerations of national policy choices and specialist knowledge'.[51] The Constitutional Court has held that no interdict may be granted that would prevent the Minister from performing his constitutional duties,[52] even though the Constitutional Court has recognized that 'section 33 of the Constitution does not preclude "specialised legislative regulation of administrative action"'[53] such as that provided for in ADR 64.1.

In *Tata*, the Commission argued that the applicants could not bring a review under PAJA, but had to bring it on the basis of legality. However, the court ruled that where the process had been completed and a measure imposed, a review 'falls squarely within the ambit of PAJA'.[54]

Courts will not hear matters that are only of academic interest.[55]

Of considerable concern to any party who wishes to bring judicial review against trade remedies determinations, Langa argues that the law and politics are intertwined, and he rejects the notion of a reasonable person, indicating that beliefs, opinions and ideas play a role in judicial decisions.[56] Vinti indicates that this may be the basis of the SCA's decision in *AMIE*, as to support the earlier decision in *Progress Office Machines*, would not suit the executive. In Progress Office Machines the SCA held that the five-year duration of an anti-dumping duty starts on the date from which the duty is effective, that is, if it was imposed with retroactive effect to the date of the provisional measure, then that back-dated date starts the five year countdown,[57] and the effect would be that most anti-dumping duties in South Africa would have lapsed.

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[44] *Democratic Alliance*, para. 73.

[45] *Bosch v. ITAC*, para. 36.

[46] *Ibid.*, para. 34.

[47] *Ibid.*, para. 36.

[48] *Ibid.*, para. 36.

[49] *Ibid.*, para. 62.

[50] Article 17.6(i) of the Anti-Dumping Agreement.

[51] *ITAC v. SCAW*, para. 101. *See also Bato Star Fishing Pty Ltd v. Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC), para. 28.

[52] It is submitted that the Constitutional Court erred in its findings as the ADR specifically provide for action against interim decisions. There is no reason why an interdict cannot be brought against the Commission not to forward its recommendation to the Minister, even if it might be argued that the Minister cannot be interdicted from performing his constitutional duties once he has received a recommendation. *See* Gustav Brink (2010), Case CCT 59/09, *International Trade Administration Commission v. SCAW South Africa (Pty) Ltd.* [2010] ZACC 6 in 2010 De Jure 380 for a full discussion of the case.

[53] *Sidumo v. Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC), para. 91. *See also Coca-Cola Beverages Africa (Pty) Ltd v. Competition Commission and Another* (CCT 192/22) [2024] ZACC 3 (17 Apr. 2024), para. 26.

[54] *Tata*, para. 5. *See also ITAC v. SATMC*, para. 40; and *ITAC v. SCAW*, para. 104.

[55] S16(2)(a)(i) of the Superior Courts Act 10 of 2013; *SA Metal Group (Pty) Ltd v. ITAC* (267/2016) [2017] ZASCA 14 (17 Mar. 2017), paras 14–20; *Legal-Aid South Africa v. Magidiwana & others* [2014] 4 All SA 570 (SCA); *National Coalition for Gay and Lesbian Equality & others v. Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para. 21 footnote 18; *Coin Security Group (Pty) Ltd v. SA National Union for Security Officers & others* [2000] ZASCA 137, 2001 (2) SA 872 (SCA) para. 9; *Geldenhuys & Neethling v. Beuthin* 1918 AD 426, 441; *National Coalition for Gay and Lesbian Equality & others v. Minister of Home Affairs 2000 (2) SA 1 (CC)*, para. 21 footnote 18.

[56] Pius Langa, *Transformative Constitutionalism*, Stell LR 353 (2006).

[57] *Progress Office Machines*, para. 19.

Thus, he argues, 'the decision in *AMIE* may have been driven more by reasons of logic and efficacy rather than by pure law, as it were'.[58] However, it should be pointed out that that the ADR specifically provides that the anti-dumping duty would remain in place for a period of five years from the date of 'publication' of the final determination.[59] Thus, regardless one's view of Article 11.3 of the ADA, the SCA's decision in *AMIE* is correct as it reflects the legal position in South Africa. The court in *Tata* also confirmed that the five-year period is to be counted from the date of 'publication', as provided for in ADR 38.[60]

The Uniform Court Rules provide guidance on the duration of judicial reviews, yet in practice this is seldom adhered to and parties always receive significant extensions. Once a review has been lodged, the respondent has fifteen days to indicate whether it will oppose the motion.[61] To date, every motion has been opposed. In theory the respondent has thirty days to reply,[62] but this typically takes several months. Since the applicant normally only has access to non-confidential information and may require access to confidential information to support its case, it would have to apply for 'discovery',[63] which is typically opposed by the Commission.[64] This process can again add several months to the whole process.

On average, cases take at least two years to pursue through the High Court. If appealed, at least another year can be added, and if it goes to the Constitutional Court, it will take even longer to finalize.

Any review can be filed on the basis of specific provisions in the ITA Act or any of the regulations, yet most reviews will include provisions of PAJA, with the applicant alleging that the Commission's administrative action was procedurally unfair.[65] The applicant has the burden of proof.

The courts will typically defer to the Commission and although reviews against the Commission and the Ministers are based on the balance of probabilities, applicants face a significant burden of proof as courts typically defer to the Commission as a specialist body.[66]

The problem is that in most instances, the judges do not understand the issues argued before them. Thus, in *SATMC v. ITAC* the SCA disregarded the information submitted to the Commission and found that the Commission was not obliged to determine whether sales were made under market conditions even if information in this regard had been submitted.[67] Equally, in *ITAC v. SATMC*, the SCA confused different provisions of the legislation, confusing the provision dealing with non-market economy with that which allowed for the determination of the normal value based on the export price to a third country.[68] These cases serve to confirm the urgent need for either a specialized international trade court or at least an international trade tribunal that could review decisions of the Commission and the two Ministers.[69]

In two judicial reviews centred on the effective date of definitive duties,[70] and thus the start of the maximum of the five-year period for which anti-dumping duties could be imposed, the SCA came to conflicting findings, and Vinti indicates that in the second decision, the SCA effectively rewrote its finding in the earlier dispute.[71]

Likewise, in SCAW, the Constitutional Court found that no interdict could be granted against the Commission forwarding a recommendation to the Minister of Trade as the Minister had a constitutional duty to perform. However, this loses sight of the fact that an interdict would be granted against the Commission and not the

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[58] Vinti, *supra* n. 7, at 14.

[59] ADR 38.1.

[60] *Tata*, para. 41.

[61] Rule 53(5)(a) of the Uniform Rules of Court. In terms of Rule 19(1) of the Uniform Rules of Court, the days from 16 Dec. to 15 Jan. (both inclusive) are not counted.

[62] Rule 53(5)(b) of the Uniform Rules of Court.

[63] Rule 35(1) of the Uniform Rules of Court.

[64] In terms of Rule 35(1), such discovery must be provided within twenty days. *See* Brink 'A complicated judicial review', *supra* n. 7, at 258.

[65] *See* s. 6(2) of PAJA for the different administrative grounds of review.

[66] *See* e.g., *AECMSA v. ITAC*, 8 and 14; *SASA*, para. 31; Vinti, *supra* n. 25, at 14.

[67] *See* Brink 'No need to investigate China's market economy status in anti-dumping investigations', Tralac Trade Brief S11TB08/2011 (2011) for a discussion on the SCA's legal errors in this finding.

[68] *ITAC v. SATMC*, para. 22; *See also* Gustav Brink, *Anti-dumping and China: Three Major Chinese Victories in Dispute Resolution*, XLVII Comp. & Int'l L. J. S. Afr. 32–33 (2014); Gustav Brink, *Anti-dumpingondersoeke: International Trade Administration Commission v. South African Tyre Manufacturers Association {2011} ZASCA137*, (76) Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Modern-day Roman Dutch Law) 299–301 (2013). Note that the SCA also found that China's Protocol of Accession to the WTO did not form part of international law – *ITAC v. SATMC*, para. 18 – even though the same court had earlier held in *Progress Office Machines*, para. 5, that the WTO and all its agreements formed part of international law.

[69] *See* Brink & van Heerden, *supra* n. 6, at 409–433.

[70] *Progress Office Machines v. SARS* 2008 2 SA 13 (SCA); and *Association of Meat Importers v. ITAC* 2013 4 All SA 253 (SCA).

[71] Vinti, *supra* n 7, at 4 and 16.

Minister, and, secondly, that South Africa's legislation specifically provides for interested parties to 'challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation'.[72] Thus, the Constitutional Court made a finding based on facts that were not before it.

4 Powers of the court

Although there is no obligation on a court to refer a matter back to the investigating authority for reconsideration and it may make 'any order that is just and equitable' in the circumstances,[73] courts will seldom interfere with a decision reached by an authority and will generally defer to the investigating authority's determinations.[74] Still, the court has considered the Commission's consideration of the facts in recent cases, finding in *Algorax* that its determination was 'totally irrational',[75] in *AECMSA* that the Commission had 'applied its mind to all the relevant issues at stake and exercised its discretion properly',[76] and in *Bosch* that 'the decision of the Commission to recommend to the Minister of Trade and Industry to approve [the] application was taken in a consistent, uniform, impartial and reasonable manner'.[77]

5 Appeals

Appeals against decisions of the court *a quo* are based on the Superior Courts Act and the Uniform Rules of the High Court.[78] The Superior Courts Act sets out the grounds on which leave to appeal can be granted as follows:

> (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> *(a)* (i) the appeal would have a reasonable prospect of success; or:
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> *(b)* … ; and:
>
> *(c)* where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

If leave for appeal has not been granted, the SCA will not have jurisdiction to hear a matter.[79] In addition, until recently the rule was that the SCA could only hear an appeal if the court *a quo's* decision was 'final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.[80] However, the courts have recently indicated that this requirement is not absolute and that a matter can be appealed if 'the interests of justice require it to be regarded as an appealable decision'.[81] This applies not only to the Constitutional Court but also to the SCA. In *Government of the Republic of South Africa v. Von Abo*, the SCA indicated that:

> *It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.*[82]

An appeal must normally be lodged within fifteen court days of the order or the handing down of the reasons for the decision.[83] In deciding whether to grant leave for appeal the court will consider whether the appellant has reasonable prospects of success; 'whether grounds of appeal are not bad in law in that they are so widely expressed as to leave the appellant free to canvas every finding of fact and every ruling of law';[84] whether the

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[72] ADR 64.1.

[73] *Stadsraad Lichtenburg v. Administrateur, Transvaal* (*City Council of Lichtenburg v. Administrator of Transvaal*) 1967 (1) SA 359 (T).

[74] *AECMSA v. ITAC*, 8 and 14.

[75] *Algorax, supra* n. 28, at 13.

[76] *AECMSA v. ITAC*, 15.

[77] *Bosch v. ITAC*, para. 81.

[78] Section 17(1) of the Superior Courts Act 10 of 2013 and Rule 49(1)(b) of the Uniform Rules of the High Court.

[79] *Cyril and Another v. Commissioner for the South African Revenue Service* (186/2023) [2024] ZASCA 32 (28 Mar. 2024) (*Cyril v. SARS*), para. 5.

[80] *ITAC v. SCAW*, para. 49. *See also Zweni v. Minister of Law and Ord. {1992}* ZASCA 197; 1993 (1) SA 523 (A), 532J–533A.

[81] *Road Accident Fund v. Taylor and other matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA), para. 26. *See also United Democratic Movement and Another v. Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC), para. 45; *Cyril v. SARS*, para. 7.

[82] *Government of the Republic of South Africa v. Von Abo* [2011]ZASCA 65, 2011 (5) SA 262 (SCA) para. 17.

[83] Rule 49(1)(b) of the Uniform Rules of the High Court. Court days exclude weekends, public holidays, and the days from (and including) 16 Dec. to 15 Jan. – Rule 19(1) of the Uniform Rules of the High Court.

[84] *Himunchol v. Moharom* 1947 (4) SA 778 (W), 780.

grounds of appeal are set out in clear and unambiguous terms enabling the respondent to properly defend its interests; and whether all relevant parties have been properly notified.[85]

In *Rappa*, the court stated that in deciding whether a decision from the court *a quo* may be appealed, it 'is now well settled that whether the order is interim or final is not definitive, but whether it is in the interests of justice to grant leave to appeal'.[86] The SCA has ruled that it has discretion to hear an appeal even if the appeal has become moot.[87]

6 Court rulings

Essentially, only two outcomes are possible: the court rejects the applicant's case or, if it agrees with the applicant, the case is remanded to the Commission or the Minister(s) for reconsideration. In theory the High Court has the power to issue injunctive relief, it will seldom[88] use this discretion as it regards the Commission as a technical expert authority[89] with whose decisions it will seldom interfere. Accordingly, the Commission enjoys a considerable (and most consultants argue too big) margin of discretion in conducting its investigations. However, the High Court may remand a matter to the Commission, with or without guidelines on what ought to be done. In *Algorax*, the High Court specifically indicated that in determining the likelihood whether dumping would recur if the anti-dumping duties were to be removed the Commission had to take into consideration only those 'countries where there are positive dumping margins and establish, if dumping occurs there, whether it is likely to occur in the SACU'.[90]

7 Refunds and economic losses

In *Progress Office Machines* the Court, after finding that the anti-dumping duty had lapsed before a sunset review had been initiated, ordered that the duty be withdrawn with retrospective effect and that any duties paid had to be refunded with interest.

The ITA Act provides that the State Liability Act[91] applies to the Commission, and that a reference in that Act to the Minister must be interpreted as referring to the Chief Commissioner of the Commission.[92] The state Liability Act provides that a claim may be brought against the state arising 'out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant'.[93] In terms of this Act, damages may be claimed from government. However, to date, the courts have never heard a claim for damages and it is unclear what its requirements would be, since it generally holds that the Commission is a specialist body with wide discretion. Thus, the Commission's finding would have to be egregious before the court would award damages.

8 Conclusion

There is no international trade tribunal and all reviews have to be pursued through the generalized High Court, with appeals possible to the SCA and, for constitutional issues, to the Constitutional Court. Although the courts have in a limited number of reviews considered the facts before the Commission, courts generally only consider issues related to administrative procedures, as the judges simply do not have the technical expertise to interrogate the facts.

In addition, since the courts regard the Commission as a specialist institution, courts are unlikely to replace the Commission's findings and would rather remand a matter for reconsideration. His means that, contrary to the requirements of Article 13 of the AD Agreement, reviews are not 'prompt'. Thus, Ngobeni has indicated that 'the process of filing reviews in the normal courts is too lengthy and costly. There must be a specific Commission that will deal with anti-dumping reviews to minimise time and costs'.[94]

Notes

[85] *Associated Equipment Company CC v. ITAC* (15201/13) [2015] ZAGPPHC 658 (13 Aug. 2015), para. 11.

[86] *Commissioner of the South African Revenue Service v. Rappa Resources (Pty) Ltd* (2021/22981) [2021] ZAGPJHC 623 (8 Nov. 2021), para. 6. *See also ITAC v. SCAW South Africa*, para. 53.

[87] *City of Tshwane Metropolitan Municipality v. NUM BT Technologies (Pty) Ltd* [2016 JOL 34972] [SCA], para. 8.

[88] To date it has never issued injunctive relief in trade remedies cases.

[89] *See Algorax, supra* n. 28, at 14.

[90] *Ibid.*, at 14.

[91] State Liability Act 20 of 1957.

[92] Section 25 of the ITA Act.

[93] Section 1 of the state Liability Act.

[94] Malebo Ngobeni, *The Procedural Aspects of South Africa's Anti-dumping Legislation and Its Compatibility With the World Trade Organisation Anti-dumping Agreement* 64 (Unpublished LLM thesis, University of Pretoria 2021).