International Trade Administration Commission v SCAW South Africa (Pty) Ltd
Case CCT 59/09 [2010] ZACC 6

Prohibition on interim orders interdicting Minister from revoking anti-dumping duties – definitive interpretation of maximum duration of duties – effectively declaring certain Anti-Dumping Regulations meaningless – removing virtually only legal remedy available to industry

1 Introduction

On 9 March 2010, the Constitutional Court per Moseneke DCJ (Ngcobo CJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring) passed a judgement that will have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa (SA) and which could lead to the significant abuse of administrative powers by the International Trade Administration Commission (ITAC). This discussion does not consider whether the rationale for the Constitutional Court's verdict is valid, but only the impact of the verdict on anti-dumping investigations in SA and will show that the Constitutional Court has effectively removed the only form of protection the domestic industry had against an abuse of power by the ITAC or any errors committed by it.

2 Enabling Legislation

The ITAC is mandated in terms of the International Trade Administration Act 71 of 2002 (the ITA Act), to conduct anti-dumping investigations and reviews (s 16(1)(a)) and in terms of the Anti-Dumping Regulations (AD Regulations promulgated per Notice 3197 in *Government Gazette* 25684 of 14 November 2003) to finalise such investigations and reviews within a period of no more than 18 months from initiation thereof (Regulation 20). The AD Regulations further provide for the judicial review of any interim decision reached by the ITAC (Regulation 64). Regulation 64.1 provides as follows:

> Without limiting a court of law's jurisdiction to review final decisions of the Commission, interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that –
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> (a) the Commission has acted contrary to the provisions of the *Main Act* or these regulations;
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> (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
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> (c) such prejudice cannot be made undone by the Commission's future final decision. (Own emphasis)

SA has also incurred international obligations in terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the AD Agreement) (see *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 [2010] ZACC 6 par 2; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) par 6).

As a result of certain provisions in the ITA Act not yet coming into operation (see s 64(2)), some provisions of the Board on Tariffs and Trade Act (107 of 1986) the BTT Act) still apply, including section 4(1)(b) thereof which requires the ITAC to make a final recommendation in any anti-dumping investigation to the Minister of Trade and Industry (the Minister). The Minister may then request the Minister of Finance to implement the decision, regardless of whether to impose, amend or terminate an anti-dumping duty (section 55(2)(a) of the Customs and Excise Act (91 of 1964 the Customs Act). Anti-dumping duties may remain in place for a period not exceeding five years from imposition thereof (see *Progress Office Machines v SARS supra* and Brink "*Progress Office Machines v SARS*" 2008 *De Jure* 643 for an interpretation of the calculation of the five year period), but the duties *shall remain in place* until a sunset review has been concluded, providing such review was initiated prior to the lapse of the five-year period (AD Regulation 53.2). In this regard AD Regulation 53.1 provides that "[a]nti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof", while AD Regulation 38.1 provides similarly.

Note that in terms of the AD Agreement the duty *may* remain in place *pending* the outcome of the sunset review (Art 11.3 of the AD Agreement). Article 11.3 of the AD Agreement provides as follows:

> [A]ny definitive anti-dumping duty shall be terminated on a date not later than five years *from its imposition*… unless the authorities determine, in a review initiated before that date… that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty *may remain in force pending* the outcome of such a review.
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> (Footnote deleted, emphasis added)

SA is a signatory to the General Agreement on Tariffs and Trade of 1947 (GATT) and a founding member of the WTO (Dugard, with contributions by Bethlehem, Du Plessis and Katz *International Law: A South African Perspective* (3ed) (2005) 429, 442ff). Following SA's accession to GATT, Parliament approved GATT through the Geneva General Agreement on Tariffs and Trade Act (29 of 1948), and also indicated an effective date (13 June 1948) for the external application of GATT (see Proclamation 119 of 1948 in *Government Gazette* 3982 of 7 June 1948). On 6 April 1995 Parliament approved the WTO Agreement (see 1995 *Hansard* col 642 – 653). Section 231(4) of the Constitution (Act 108 of 1996), provides that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation". In par 25 of its judgment the Constitutional Court, with reference to *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) held that:

> [T]he Anti-Dumping Agreement is *binding on the Republic in international law*, even though it has not been specifically enacted into municipal law. In

> order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations. (Footnote deleted, emphasis added)

In addition, section 233 of the Constitution provides that "[w]hen 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". This notwithstanding, Malan AJA correctly held in *Progress Office Machines CC v South African Revenue Services and Others* (2008 (2) SA 13 (SCA) par [6]) that "[t]he text to be interpreted, however, remains the South African legislation" and that "[t]he duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic's international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid". (Par [11], footnote omitted)

3 Facts of Matter

In the present case an anti-dumping duty was imposed on 28 August 2002 for a period of five years on wire, rope and cable imported from amongst others Bridon International Limited (Bridon) from the United Kingdom. Prior to the lapse of the duty, the ITAC on the basis of a properly documented application (see AD Reg 23) initiated a sunset review on 17 August 2007 (Notice 985 in *GG* 30164). Whilst Bridon had exported a wide range of products during the original investigation (see Board Report 4173), it indicated that it only exported one class of rope in very low quantities during the review period (*SCAW South Africa (Pty) Ltd v The International Trade Administration Commission and Others*, North Gauteng High Court, Pretoria, Case No 48829/2008, 5 Jan 2009, unreported, pars 52 and 53). On the basis of these export sales the ITAC found that there was no likelihood that dumping would resume if the anti-dumping duties were to be removed (*SCAW v ITAC supra* pars 103 to 105). Note that the Constitutional Court, it is submitted erroneously, indicated that the fact that *no dumping was taking place* was the basis for the ITAC decision to recommend to the Minister that the duties be withdrawn (par [22]), whilst the test is whether there is *a likelihood of a recurrence of dumping* (see AD Regs 54.4 and 57.2 and Art 11.3 of the AD Agreement). This constitutes a completely different test, as analysed in detail in dispute settlement in the WTO (see WTO *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* WT/DS99/R (29/01/1999) pars 6.35 to 6.51).

SCAW South Africa (Pty) Ltd (SCAW) argued that the ITAC had failed to take into consideration exports of "fishing rope" which were entered into a bonded warehouse and included in Southern African Customs Union import statistics and that ITAC would have come to a different conclusion had it taken such imports into consideration. It argued further, that in line with the ITAC's finding in an earlier interim (changed circumstance) review (see ITAC Report 236:13) the low level of one category of exports by Bridon could not be used to make a determination regarding the likelihood of a recurrence of injurious dumping. SCAW therefore

approached the High Court to request an interdict to prevent the ITAC from forwarding its recommendation to the Minister or, alternatively, to prevent the Minister from requesting the Minister of Finance to withdraw the anti-dumping duties. The High Court granted SCAW an interdict pending the finalisation of the judicial review. The effect of the interim interdict was that the anti-dumping duties remained in force. The ITAC sought leave to appeal the decision to grant an interim interdict, but this was refused by both the High Court and the Supreme Court of Appeals (*ITAC and Bridon v SCAW* Appeal Case 130/09, 15 May 2009). The ITAC finally appealed to the Constitutional Court.

4 Consideration

On 9 March 2010, the Constitutional Court, overturning two previous rulings by the High Court in similar matters (*Algorax v ITAC* North Gauteng High Court, Pretoria, Case No 25233/05, 10 Sept 2005, unreported; *African Explosives Limited v ITAC* North Gauteng High Court, Pretoria, Case No 15027/2006, 5 Aug 2008, unreported) found (in par [42]) that the High Court erred in granting an interim interdict as:

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

However, it is not clear from the Constitutional Court records that the ITAC had ever made its recommendation to the Minister (it appears from *SCAW v ITAC supra* par [71] that no such recommendation had ever been made to the Minister) and it is submitted that the Minister had no duties to perform until such a stage as the ITAC had made its recommendation. Second, the Constitutional Court has rendered the wording of AD Reg 64.1 (quoted above) futile, which is not in line with the interpretation of statutes (see Steyn *Uitleg van Wette* (1981) 119–124).

Third, the effect of the Constitutional Court's verdict is to deprive parties of the possibility of overturning the ITAC's decisions following sunset reviews and specifically affects the rights of the domestic industry. Whilst an order could still be made that an anti-dumping duty must be withdrawn with retrospective effect if it was maintained incorrectly and, that any duties collected must be refunded to the importer (see AD Reg 65, read with s 56(2) of the Customs Act), the same is not true regarding the domestic industry. The Constitutional Court's ruling has the effect that the anti-dumping duties on wire, rope and cable imported from Bridon will be withdrawn despite the challenge in the High Court on the legality of the ITAC's decision not having been heard. It is submitted that there is a

strong likelihood that SCAW will prevail in its review. This follows from the High Court's finding that SCAW had established a "clear right" on the basis that the ITAC had failed to take fishing rope into consideration in its determination of the margin of dumping (par [65] of the Constitutional Court verdict; *SCAW v ITAC supra* pars [98]–[100] & [122]).

In addition, both the High Court and the Supreme Court of Appeals have previously held that a recommendation such as that made by the ITAC to the Minister is a decision or step that affects the rights of others and that it must be regarded as an administrative action (see *Oosthuizen's Transport v MEC, Road Traffic Matters Mpumalanga* 2008 (2) SA570 (T); *Grey's Marine Hout Bay v Minister of Public Works* 2005 (6) SA 313 (SCA)) and that a fatal flaw in this process affects the whole process (see *Minister of Finance v Paper Manufacturers of South Africa* Case 567/07 (SCA), not reported; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA)). It therefore appears that the Constitutional Court has disregarded parties' rights to fair administrative action.

Furthermore, in terms of both the AD Regulations and the AD Agreement, anti-dumping duties may only be *maintained* following a sunset review (Art 11.3 of the AD Agreement; Reg 54.4) or may be withdrawn, amended or reconfirmed (Reg 59). It is submitted that this can only happen if the duties are still in place at the time. The Constitutional Court's order now removes such duties. Thus, if the High Court confirms in the ongoing review that the ITAC should have taken Bridon's imports of fishing rope into consideration and if a likelihood of a recurrence of injurious dumping is found in that regard, there will be no duties that could be maintained, reconfirmed or amended. In terms of the Customs Act (s 56(2)) any anti-dumping duty may be decreased or withdrawn with retrospective effect, but can only be imposed with retrospective effect if there is a provisional payment in place (s 57A(3)).

If a High Court finding that fishing rope imports should have been taken into consideration means that the ITAC will have to reconsider its original finding and make a recommendation to maintain duties that are no longer in place, this would significantly, negatively affect the parties: if the duties are *maintained* it means that the anti-dumping duties will have to be retroactively imposed as though they were never withdrawn in the first place. However, the importer may have already sold significant volumes of the product and will not be in a position to reclaim the additional duties from its clients. It will therefore directly adversely affect the importer's right to trade (s 22 of the Constitution), its profitability and its viability. On the other hand, if, for the above reason, it is found that the duties cannot be imposed retroactively, it would affect the domestic industry negatively, as the injury that occurred between the removal of the anti-dumping duties and the re-imposition thereof would remain, ie the withdrawal of the anti-dumping duties, as per the Constitutional Court's verdict, would cause irreparable harm to the domestic industry. This is also the case even if the anti-dumping duties are retroactively imposed, as the duties additionally collected from the importer will not undo the injury suffered by the industry in the interim, especially as these duties are not and may not be, paid over to the industry to offset such injury (in WTO *United States – Continued dumping and Subsidies Offset Act of 2000*

WT/DS217/AB/R par 238, the WTO found that the payment to industry of anti-dumping and countervailing duties collected, constituted a measure inconsistent with the provisions of the AD Agreement and the United States was required to withdraw its programme).

Fourth, the Constitutional Court's verdict leaves the domestic industry and other parties open to the vagaries of the ITAC as interim relief can no longer be obtained, indicating that a full judicial review will have to take place in each instance, which will take several years. Many domestic industries may have closed down before such reviews can be finalised.

In addition, the Constitutional Court (par [82]) indicated that:

> It is open to any interested party to seek an initiation of a fresh investigation by ITAC into Bridon UK's trading conduct in relation to the whole market and that of member states of the SACU. In effect, no horse has bolted, as the High Court suggested might happen if an interim interdict is not granted. The right to initiate an investigation into anti-dumping is virtually evergreen once an existing duty has lapsed. (Footnote omitted)

There are a number of serious concerns with this paragraph. First, it is submitted that the fact that the Constitutional Court indicates that the industry can lodge a new application implies that it has no right to review an incorrect decision, despite this being a constitutional right (s 33 of the Constitution regarding parties' right to fair administrative action; and s 34 of the Constitution regarding parties' access to judicial review). If industry lodged a new application and at the same time it finally succeeds with its judicial review of the original investigation or review, it would leave the untenable position of two decisions, which may very well differ in substance, that have to be implemented simultaneously. Second, in a previous instance where the ITAC made a negative finding following an anti-dumping investigation and terminated the proceeding, it refused to accept a new application for initiation of an anti-dumping investigation until at least one year had lapsed since the publication of its final determination in the original investigation. It appears that its decision was based on an incorrect interpretation of AD Reg 44, which provides that the ITAC "*will not normally* consider an application for *an interim review* sooner than 12 months after the publication of its final finding in the original investigation or the previous review" (Emphasis added). (These facts fall within the personal knowledge of the author who was acting as consultant for the relevant domestic industry.)

Third, the Constitutional Court failed to recognise the severe administrative and timing shortcomings in its verdict. Anti-dumping cases are lodged precisely because the domestic industry is suffering material injury (AD Reg 13; Art 3 of the AD Agreement). The Constitutional Court now holds that the domestic industry may lodge a fresh application, which can only be done once the industry can show that new imports at dumped prices are causing material injury to the industry. Even disregarding the fact that this provides the importer with an ideal opportunity to stockpile dumped goods and so prolong the industry's injury, official import statistics are not available until approximately two months after products have entered the market (author's own experience as a consultant). In addition, in terms of the AD Regulations (Reg 1) the investigation period for dumping is defined as a *minimum* of six months. Thus, even if the industry can immediately

show material injury or threat thereof, it will have to wait until at least six months have passed *and* another two months before it can obtain the necessary information to support the application. Independent analysis undertaken by the author shows that it takes the ITAC an average of between four and six months to initiate an investigation following the submission of an application. No provisional measures may be imposed within less than 60 days after initiation (AD Reg 33.1; Art 7.3 of the AD Agreement). Since its establishment in 2003 the ITAC has never imposed a provisional payment within less than 100 days from initiation and, on average, it takes 221 days before a preliminary determination is published (author's own calculation from analysis of all investigations undertaken by the ITAC). It must be further indicated that the High Court, in its consideration of whether to grant SCAW and interim interdict, found in pars [123] & [124] that:

> The alternative remedies suggested by the respondents in the place of a temporary interdict are remedial measures that the applicant could apply for if – and only if – dumping had in fact resumed.
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> These remedies could only be obtained once the proverbial horse had bolted and could only be obtained after costly and time-consuming procedures the outcome of which would be hotly contested.

It is submitted that this is a correct assessment of the situation. Furthermore, whereas the rest of the world has imposed anti-dumping duties in 74.2 per cent of all cases initiated since 2003 (http://www.wto.org/english/tratope/adpe/adpe. htm accessed 20 March 2010) the comparative statistics for SA show that only 34.8 per cent of cases resulted in the imposition of anti-dumping duties (*idem*). This also compares unfavourably to 67.5 per cent of all cases resulting in the imposition of anti-dumping duties during the period 1995 to 2002 under the Board on Tariffs and Trade (*idem*), which might show that the domestic industry is being under-protected.

5 Conclusion

It is submitted that these statistics, (ie the low number of investigations resulting in anti-dumping duties both when compared to the rest of the world and when compared to the number of SA cases resulting in anti-dumping duties prior to the establishment of the ITAC), indicates that under the ITAC the anti-dumping instrument is not effectively applied in SA. This includes that the ITAC in several instances found no dumping on the same products imported from the same countries that other jurisdictions have imposed duties on, for example, automotive tyres from China and float glass from Indonesia. Further, in several recent cases (see eg grinding balls from China – ITAC Report 60; cheddar cheese from Ireland – ITAC Report 118; steel wheels from Brazil, China, Chinese Taipei and Turkey – ITAC Report 125; toughened glass from China – ITAC Report 184; and aluminium profiles from China – ITAC Report 278) the ITAC found both dumping and material injury, but then, it is submitted incorrectly, applied the non-attribution principle (see, eg, WTO *U.S. – Wheat Gluten Appellate Body Report* par 68; WTO *U.S. – Lamb Appellate Body Report* pars 179 and 186; WTO *U.S. – Hot-Rolled Steel Appellate Body Report* par 223) and found that injury would not be fully removed if

anti-dumping duties were imposed as there were other factors also causing injury. It therefore refrained from recommending the imposition of *any* anti-dumping duties in these cases.

Furthermore, since its establishment the ITAC has, on average, taken 443 days to complete an investigation (excluding investigations withdrawn by the domestic industry; author's own calculations) and definitive duties can only be imposed at this stage (s 55(2) of the Customs Act). Thus, in addition to the Constitutional Court forcing the industry to undergo another investigation with a small chance of success, it exposes the industry to more than a year's *additional* material injury. This long period before protection can be obtained against proven unfair international trade may be sufficient to destroy all but the biggest industries in the country, while the ITAC's procedure not to accept another application within a year from the publication of its previous final determination, the time taken to compile a new application and the time the ITAC takes to initiate an investigation adds another two years to the process. The Constitutional Court's verdict therefore has the effect of condemning industry in SA to unfair international trade, which is exactly what the ITAC and the ITA Act are ordained to prevent.

Accordingly, it is submitted that the Constitutional Court's verdict, which comes despite *prima facie* evidence of incorrect procedures applied by the ITAC to the detriment of the industry (see *SCAW v ITAC supra* pars [100], [107] & [114]), seriously undermines the rights of the industry to legitimate protection against unfair trade and stands in stark contrast to the purpose of the ITA Act. It is submitted that had the ITAC conducted its investigation properly and included fishing ropes in its analysis, it would have found a likelihood of a recurrence of injurious dumping and the anti-dumping duty would have been maintained. This would have been fully in conformity with SA international obligations and the Minister would have acted constitutionally in maintaining the anti-dumping duties.

However, this was not considered by the Constitutional Court, which preferred to concentrate on aspects of the Minister's power to impose duties. The effect of the decision is compounded by the fact that the verdict was set out in such a way that it would be difficult to distinguish future cases on the basis of the facts of a matter, ie the High Court and Supreme Court of Appeals will have no option but to apply the Constitutional Court's ruling even though it may disagree with the findings. It is submitted that few industries would be prepared to argue a new case before the Constitutional Court simply in order to obtain an interim interdict. Considering the very low level of confidence in the ITAC by industry, the Constitutional Court's verdict will only serve to further decrease industry's trust in the system.

In conclusion, it is submitted that the Constitutional Court has nullified all interim remedies available to industry to review the ITAC's decisions. It is further submitted that this has effectively nullified parts of the ITA Act and the AD Regulations, leaving the industry with little protection in cases of incorrect decisions by the ITAC.

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