IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

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

(3) REVISED.

13-12-2002
DATE

SIGNATURE

CASE NO: 98/6589

DATE: .....

In the matter between:

RHONE-POULENC AGRICHEM SA (PTY) LTD	Applicant
and	
THE CHAIRMAN. BOARD ON TARIFFS AND TRADE	1st Respondent
THE MINISTER OF TRADE & INDUSTRY	2nd Respondent
THE MINISTER OF FINANCE	3rd Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	4th Respondent
SANACHEM (PTY) LTD	5th Respondent

JUDGMENT

COETZEE. AJ

In an amended notice of motion the applicant seeks the following relief against the respondents:

"1. Reviewing and setting aside the decision of the first respondent recommending that the second respondent request the third respondent to impose final anti-dumping duties, with retrospective effect to 6 December 1996 on the importation of insecticides containing aldicarb as the active ingredient, classifiable under tariff heading 3808.10 as contained in the first respondent's report No. 3789 entitled 'Investigation into the Alleged Dumping of an Insecticide Containing Aldicarb as the Active Ingredient Originating in and Imported from the United States of America: Final Determination';

2. Reviewing and setting aside the decision of the second respondent to request the third respondent to impose final anti-dumping duties on the importation of insecticides containing aldicarb as the active ingredient in terms of the powers vested in the second respondent under sections 55 and 56 of the Customs and Excise Act 91 of 1964 and section 4(2) of the Board on Tariffs and Trade Act 107 of 1986;

3. Reviewing and setting aside the decision of the third respondent imposing final anti-dumping duties on the importation of insecticides containing aldicarb as the active ingredient in terms of Government Notice 1188, contained in Government Gazette 18269 of 5 September 1997;

"4. (a) Declaring section 56(1) of the Customs and Excise Act 91 of 1964 to be void and of no force or effect by virtue of its inconsistency with the provisions of the Constitution of the Republic of South Africa 1996;

(b) Referring the order of this Honourable Court in terms of prayer 4(a) to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution of the Republic of South Africa 1996.

5. Declaring that the applicant is entitled to repayment of all amounts paid to the fourth respondent as provisional payments in terms of Government Notice number R.1994, contained in Government Gazette 17643 of 6 December 1996, Government Notice number R.730 contained in Government Gazette 18025 of 30 May 1997, and Government Notice number R.807 contained in Government Gazette 18064 of 6 June 1997, together with interest on the aforesaid amounts at the legally prescribed rate *a tempore morae*, alternatively with interest on the aforesaid amounts at the legally prescribed rate in terms of section 2A of the prescribed Rate of Interest Act 55 of 1975.

6. Declaring that the applicant is entitled to repayment of any further amounts paid to the fourth respondent pursuant to the imposition of final anti-dumping

"duties on the importation of insecticides containing aldicarb as the active ingredient in terms of Government Notice number R.1188 of 5 September 1997, together with interest on the aforesaid amounts at the legally prescribed rate *a tempore morae*, alternatively with interest on the aforesaid amounts at the legally prescribed rate in terms of section 2A of the Prescribed Rate of Interest Act 55 of 1975.

7. (a) Declaring that to the extent that section 76(1) of the Taxation Laws Amendment Act 30 of 1998 purports to confer validity on Government Notice R.1188 of 5 September 1997, that provision is void and of no force or effect by virtue of its inconsistency with the Constitution of the Republic of South Africa 1996;

(b) Referring the order of this honourable Court in terms of prayer 7(a) to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution of the Republic of South Africa1996.

8. Costs of this application;

9. Further or alternative relief."

The application arises from the following facts. On 1 April 1996 the fifth respondent petitioned the first respondent to initiate an investigation into the dumping of aldicarb in South Africa. The fifth respondent alleged that the applicant imported aldicarb from Rhone-Poulenc in the United States of America at dumped prices thereby causing it material injury, the fifth respondent being the only manufacturer of that product in this country. The petition alleged that the low prices at which the product was being imported into South Africa has led to the fifth respondent's prices being undercut by a substantial margin which caused its aldicarb production in South Africa material injury, the injury consisting of a loss in sales volume and reduced profitability. It foresaw further decreases in prices by the applicant and expressed the fear that a further injury to it was imminent. It stated that it had invested more than R5 million in plant and equipment in order to produce aldicarb and that the continuous price reductions initiated by Rhone-Poulenc will result in it losing its market share which it gained since producing the product.

On 29 and 30 April 1996 the first respondent's investigation team visited the premises of the fifth respondent and, so the first respondent stated in a preliminary report, verified the information provided by the fifth respondent. On 15 May 1996 the first respondent issued a notice in which the applicant was informed that the first respondent had accepted the petition for further investigation. The applicant was informed that the fifth respondent had submitted sufficient evidence to justify the initiation of an investigation. The notification

was accompanied by what is described as a "non-confidential" version of the petition on which the first respondent decided to open an investigation. That meant that the information which was placed before the first respondent on the strength whereof it took the said decision was not fully disclosed to the applicant, the fifth respondent having specifically requested that certain information upon which the petition was based be kept confidential and not be disclosed to the applicant. On 24 May 1996, by way of a notice which was published in the Government Gazette, the investigation into the matter was initiated by the first respondent.

On 12 June 1996 the applicant's attorneys wrote to the first respondent informing it that its response to the petition would not be finalised within the time period stipulated to do so namely 30 days from the date of the publication of the initiation of the investigation and that an appropriate extension of time will be sought. The letter records that the applicant did not receive any prior notification, either that there was a complaint against it concerning dumping or that the first respondent was considering the initiation of an investigation. The letter further records the fact that enmity had arisen between the applicant and the fifth respondent as long ago as 1990 and it sets out a history of the tension between the parties which, the applicant submitted, had a direct bearing upon the motive for the initiation of the investigation. It appears that the fifth respondent's chief executive officer, during March 1996, stated that he intended using anti-dumping measures to "get even with the multi-

nationals" and that it would be the most effective way of "taking the multi-nationals out". It is furthermore alleged that the first respondent's predecessor, the Board of Trade and Industry, was aware of the fact that the first and fifth respondents were at loggerheads and had been so since 1990. It is stated that the fifth respondent's petition has its roots in the acrimonious history between the two parties and that the applicant regards, with a measure of scepticism, the many far-reaching and unsubstantiated claims made by the fifth respondent in the non-confidential summary of the petition. It stated that the applicant considered itself at an unfair disadvantage in attempting meaningfully to respond to the petition. The letter contains a request in terms of sections 23 and 24 of the Interim Constitution and in terms of the applicable principles of the common law for further particulars. In particular the first respondent was called on to furnish the applicant with all the documentation and information which were taken into account by it when it made the decision to initiate the investigation and also called for, in terms of section 24(c) of the Constitution, the reasons for the initiation of the investigation.

The first respondent responded on 18 June 1996. The applicant's attorneys were informed that it was willing to consider granting a maximum extension of up to 14 days during which the applicant could furnish its response to the petition. The deadline was set on 1 July 1996 with a possible further extension of 7 days. It stated that the decision to initiate an investigation was based on the confidential version of the fifth respondent's

petition. It was also said that the first respondent has in its possession supporting documents which it used to verify the information contained in the petition such as invoices, monthly breakdowns of cost of production and selling prices to specified customers. This was the first respondent's response to para 3.2 of the applicant's attorney's letter in which it was stated that, in the absence of any supporting documentation, the applicant is unable to deal with the veracity of the fifth respondent's claims. In par 3.4 of the letter of 12 June it was alleged that crucial details of submissions made by the fifth respondent to the first respondent which have been kept from the applicant results in the applicant being unable to respond to the claims advanced by the fifth respondent. The first respondent's response thereto was a reference to article 6.5 of the WTO agreement which precludes it from furnishing confidential information submitted to it without specific permission of the party submitting it. It also relied upon section 17 of the Board on Tariff and Trade Act which provides that: "No person shall, except for the purposes of the performance of his functions in terms of this act or when required to do so by any court of law or under any law, disclose to any other person any information acquired by him in the performance of his functions in terms of this act and relating to the business or affairs of any other person."

The applicant's attorneys were reminded of the limitation clause contained in section 33 of the Constitution which limits the right contained in section 23 and the first respondent expressed the opinion that such limitation applies to confidential matters of other persons

or information which has been made available to the state in confidence. Having referred to section 6.5.1 and 6.5.2 of the WTO agreement the first respondent informed the applicant that it had requested the fifth respondent to provide it with details of the information withheld in the non-confidential version of the petition, the reasons for requiring confidentiality in respect thereof and a proper summary of the confidential information and, if it is unable of summary, the reasons therefore. It promised the applicant that this documentation will be made available as soon as it is received from the fifth respondent. The applicant was invited to, after receipt thereof, indicate to the first respondent exactly what further information it needed and to what extent the non-confidential version of the fifth respondent's petition is incomplete. The call for further particulars in par 4 of the letter of 12 June was met with a request that, should the applicant still be of the view that the first respondent is not acting in accordance with the provisions of the act and is acting in conflict with general principles of administrative law and the specific protection enshrined in the Constitution, the applicant specifically point out in exactly which respects it considers the first respondent to be so acting.

In response to that letter the applicant's attorneys wrote to the first respondent on 20 June 1996. Concern was expressed in respect of the first respondent's allegation that the finalisation of the investigation was a matter of urgency and pointed out the fact that the applicant was the victim of a secret process in terms of which the first respondent, without

hearing the applicant, initiated the investigation. It was alleged that the first respondent's reliance upon section 17 of the act is misconceived and that the purpose of section 17 is to impose an obligation of confidentiality upon officials charged with executing any function in terms of the act and not to deprive a party who is the subject of an investigation of crucial information which will enable it to know the case that it is called upon to meet. It was also pointed out that the first respondent had not offered any justification for not making available the information upon which it decided to initiate the investigation. It was pointed out that the applicant at no time requested a "revised non-confidential version of the petition" which was furnished to the applicant's attorneys on 19 June 1996. The letter reiterated the applicant's complaints about the absence of relevant information to enable it to respond to the petition and that the revised petition did not solve its problems.

On 24 June 1996 a meeting was held between representatives of the applicant and of the first respondent at which an extension was granted to the applicant until 8 July 1996 to submit its reply to the petition. The first respondent undertook to request the fifth respondent to furnish further information to be submitted to the applicant for its consideration. The first respondent also undertook, should the fifth respondent be unable to substantiate any of the allegations made in its petition, not to take unsubstantiated allegations into consideration but that it will, in the process of conducting its own investigation, attempt to determine and verify the true facts.

On 28 June 1996 the first respondent furnished the applicant with certain of the information which it had requested. It refused to let the applicant have particulars of the fifth respondent's breakdown in sales and did so owing to the alleged extremely confidential nature of that information. In that response the first respondent stated that the applicant already knows the fifth respondent's estimate of imports and that the fifth respondent is not able to provide a more detailed summary in respect of its imports than has already been provided in the non-confidential version of the petition.

On 5 July 1996 the applicant's attorneys responded by stating, amongst others, that the majority of the information requested has not been furnished notwithstanding the first respondent's acknowledgement at the aforesaid meeting that such information must be made available to the applicant. The long-standing complaint that the applicant was, in the absence of relevant information unable to know what the case is that it has to meet, was repeated. The letter recorded that the applicant's repeated requests for substantiation of allegations made in the petition have gone unheeded and that until such time as the applicant is furnished with some form of evidence in that regard it cannot deal with the allegations other than to deny them. The allegation that the applicant 'already knows' the fifth respondent's estimate of imports was denied and the letter states that the information has been requested and is required in order to furnish a considered reply to the petition. The first respondent was supplied with the applicant's response to the importers questionnaire and

it stated that the response must be read together with the contents of the correspondence that have been addressed to the first respondent.

On 9 December 1996 the applicant was furnished with the first respondent's preliminary report. The report records that the first respondent had decided to request the commissioner for Customs and Excise to impose a preliminary payment of R9,89 per kg on aldicarb exported from and originating in the Unites States of America classified under tariff subheading 3808.10.00 based on the dumping margin. A notice was duly published in the Government Gazette. The preliminary duty was subsequently extended to 6 September 1997. Payment of these provisional duties was made to the fourth respondent.

On 2 July 1997 attorneys and counsel representing the applicant were given an opportunity to address the first respondent on the difficulties that they had encountered in dealing with the fifth respondent's petition in the absence of the required information. The legal representatives suggested that the confidentiality of information contained in the fifth respondent's petition he dealt with by appointing a mutually acceptable independent third party such as an auditor or by making the information available to the lawyers acting for the applicant and not the applicant itself. The applicant states that the first respondent must have rejected the suggestion without any explanation or motivation. These allegations are not denied by the first respondent. The first respondent stated in its answering affidavit that

systems whereby parties have access to each others confidential information have proven expensive and difficult to manage. Also, that it is in the first respondent's preserve to decide which system to adopt provided the system respects the parties' rights. The first respondent expressed the view that the USA model where such information is furnished is expensive and inappropriate for South Africa imposing very great burdens and potential liability upon advocates and attorneys who may inadvertently make disclosure.

After further correspondence had passed between the applicant and the first respondent in which the applicant repeated its complaints that it was not being fairly treated by the first respondent and in which further submissions were made by the applicant to the first respondent the first respondent, on 26 August 1997, presented its final determination in which it recommended that an anti-dumping duty of R1,88 per kg be imposed on the importation of insecticides containing aldicarb as the active ingredient. On 5 September 1997 the third respondent imposed a final anti-dumping duty in accordance with the recommendation contained in the first respondent's final report. On 24 June 1998 the President assented to the Taxation Laws Amendment Act 30 of 1998. In section 76 of the act the imposition of the final anti-dumping duty which was affected by the third respondent by way of amendment to schedules to Act 91 of 1964, was purportedly elevated to an act of parliament.

In the founding affidavit the applicant sums up the nature of the relief claimed and states that the first respondent did not afford it a fair and proper hearing in so far as it refused to make available to the applicant material information upon which its investigation and ultimate decision were based. Furthermore, in reaching its conclusions the first respondent materially misdirected itself in relation to its interpretation of the market share allegedly enjoyed by the applicant, the fifth respondent in so doing failed to exercise a proper discretion and to consider the matters at hand and that its conclusions are not justifiable in relation to the reasons given. As far as the second and third respondents are concerned it is alleged that neither of them afforded the applicant any hearing whatsoever and secondly they materially misdirected themselves in relation to the interpretation of the market share allegedly enjoyed by the applicant and the fifth respondent. In so doing the respondents failed to exercise a proper discretion and to consider the matters at hand and their conclusions are therefore not justifiable.

Subsequent to the delivery of the applicant's application the record of the proceedings was made available to the applicant in terms of rule 53(1) (b). Thereafter a supplementary affidavit in terms of rule 53(4) was delivered. Because some of the documents which were made available were alleged by the state attorney who represents the respondents to be confidential, the applicant's attorney deposed to the supplementary affidavit. At the time the first respondent had lodged the non-confidential portion of the record with the registrar

brings an end to the entire application brought by the applicants; that whatever irregularities may have occurred in tne procedures adopted by the first respondent or in the decisions and actions of the second, third and fourth respondents, once the amendments in schedules 1-6 made under sections 48,56 or 75(15) of the Customs and Excise Act have been embodied in an act of parliament, any application to set aside such decision is wholly academic; this act of parliament cannot be reviewed by a court. The respondents' case is based on the cases of *Kenna Systems South Africa CC v Chairman; Board on Tariffs and Trade, and Others* 1996 (1) SA 69 (T); *Micro and Peripheral Distributors (Pty) Ltd v Minister of Finance* (unreported case no 11339/94 TPD) and *Lead Loundry Equipment (Pty) Ltd v Minister of Finance* (unreported case no 936/96 NPD).

The applicant submits that the application, having been brought at the time when the act of parliament which purportedly extended the lifespan of the anti-dumping duty was enacted, the act has no impact on the pending litigation. Second, the act of parliament merely extended the lifespan of certain anti-dumping duties; it did not purport to insulate the preceeding administrative decisions from review; nor did it purport to confer validity on an invalid administrative decision. Thirdly, the defects which vitiated the respondent's decision to impose an anti-dumping duty in the present matter also vitiated parliament's purported extension of the validity of the anti-dumping duty. The court has jurisdiction under the constitution to enquire into the validity of an act of parliament.

The respondents contend that section 76(1) of the Taxation Laws Amendment Act 30 of 1998 which became operative on 29 June 1998 and which provided for the non-lapsing of the anti-dumping duty imposed on 5 September 1997 statutorily entrenched the decision of the Minister to impose the duty and that the statute cannot be attacked by way of a review, a legislative decision not being an administrative action. They rely on the case of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 394-395 (paragraphs 41 and 42). It is submitted that once parliament has enacted an amendment act, the Minister's decision is subsumed into that legislation which cannot be assailed save under the constitution; parliament is obviously taken to be aware of pending litigation and that notwithstanding, enacted the amending act; the legislature clearly intended the amending statute to have retrospective operation namely to subsume the Minister's decision into legislation; that is the way in which fiscal legislation operates and whenever in an emending act amendments or alterations to duty of whatever kind are enacted by parliament, parliament intends them to take effect as from the date of the Minister's decision; it must be presumed that parliament had considered the rights of the applicants in this matter and the pending litigation but had, that notwithstanding, decided to enact the legislation. Furthermore it is submitted that, in respect of the claim for repayment of duties, the applicant seeks not only the repayment of duties paid prior to the enactment of the amending legislation but also of duties paid thereafter. Once parliament has enacted the amending legislation the duties are to be paid

and there can be no merit in the argument that pending litigation suspends the operation of an act of parliament prospectively.

In *Kenna Systems* application was made for the review and setting aside of decisions and proceedings relating to an amendment of part 1 of schedule 1 to the Customs and Excise Act 91 of 1964 by Government Notice dated 28 August 1992. The notice imported a protective tariff on cole cutter picks. The imposition of the protective tariff was effected in terms of section 48(1) of the act which provides that the Minister (the Minister of Finance) may from time to time by notice in the Gazette amend the general notes to the schedules to the act in order to give effect to any request by the Minister of Trade and Industry. Section 48(6) ensures that the imposition of the protective tariff remains effective pending the promulgation of an act of parliament ratifying and adopting the Minister's amendment.

In that case parliament did so by promulgating section 14 of the Customs and Excise Amendment Act 98 of 1993 which ensured that the Minister's imposition of the protective tariff remained in force. The court ruled that, parliament having endorsed the Minister's amendment by way of an act of parliament, the amendment was enhanced to the status of an act of parliament which cannot be reviewed by a court. In the result the fact that the decisions that led to the publication of the notice in the Government Gazette may be *ultra vires* or have been taken without regard to the principles of natural justice or that the

decisions were arrived at arbitrarily or for an ulterior or improper purpose and that the Minister failed to exercise his discretion in terms of the act, is of no consequence. Those decisions, having been transformed into an act of parliament, cannot be queried.

This matter is distinguishable from *Kenna Systems* in that the review proceedings in that matter were commenced after section 14 of the Customs and Excise Amendment Act 98 of 1993 became operative. In this matter the application was brought during March 1998 and Act 30 of 1998 only commenced operation on 29 June 1998. It is a time-honoured principle, as Olivier JA said in *Unitrans Passenger (Pty) Ltd T/A Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 1999 (4) SA 1 (SCA) at 7 (para 12) that statutes are not to be construed as having retrospective operation unless the legislature clearly intended the statute to have that effect. Even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of a contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation *(Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F-G.) The fact that parliament may be aware of pending litigation and notwithstanding enacted the amending act does not subvert this principle. That does not in my view indicate an intention of retrospectivity. The analogy advanced in support of the respondents' contention namely that, should the Minister

have been in favour of the applicant, parliament could have overridden the decision is not convincing. Parliament would not under any circumstances have overridden a decision in favour of the applicant. I also do not think that the respondents' further submission referred to above is sound. If the decisions which led to the imposition of the duty are reviewed and set aside there is no reason why such a finding should only effect those duties paid prior to the enactment of the legislation. If the decisions are set aside it means that no duties whatsoever were and are payable arising from those decisions. In my opinion the judgment in the *Kenna Systems* case is not applicable.

The applicant placed reliance upon the judgments of McCreath J and MacArthur J in *Brenco Incorporated and Others v Chairman: Board of Tariffs and Trade and Others* (unreported case no 10652/94) (T), a matter in which review proceedings had already been instituted at the time when the act of parliament which extended the anti-dumping duties imposed in respect of roller bearings came into operation. It was held that whilst a matter is pending the rights of the parties to an action must be decided in accordance with the statutory provision in force at the time of the institution of the action unless a contrary intention appears from the statute. In that case a point *in limine* similar to the one in question was dismissed. I am in respectful agreement with the views expressed in those judgments.

In the *Micro and Peripheral Distributors* case the application was launched during 1994 whilst the Government Notice in that matter was published on 25 August 1989 and the Amendment Act, 59 of 1990 was assented to on 14 June 1990. In the *Lead Laundry* case the application was brought during 1996. The Government Notice was published on 20 May 1994 and the Amendment Act, 45 of 1995 became operative on 21 September 1995. In both cases the actions were instituted after the relevant amending acts had become operative and both these cases are therefore also distinguishable from the present matter.

In my opinion the respondent's point *in liming* must fail on this ground and I do not consider it necessary to deal with the alternative contentions advanced by Mr Marcus for the applicant in this regard. The point *in limine* is dismissed.

THE DECISION OF THE FIRST RESPONDENT - VIOLATION OF THE RULES OF NATURAL JUSTICE

The applicant's first complaint is a general one. It submits that the first respondent failed to provide it with all the information that was before it and on which it relied when it made its recommendation to the second respondent. Secondly, its complaint is more specific. It contends that the first respondent failed to provide it with statistical data regarding the fifth respondent's market share.

The applicant was provided with a non-confidential version of the fifth respondent's petition. At a later date the first respondent supplied it with a revised non-confidential version of the petition. However, the applicant never had sight of the confidential version of the petition. It is not in issue that the first respondent withheld from the applicant some of the information that was placed before it by the fifth respondent and on which the it relied when it made its final recommendation. It appears from the deponent to the first respondent's answering affidavit, Mr Jordaan, that the applicant was not provided with the sales figures of the fifth respondent. He states that the sales figures contained in the petition are confidential and that what the first respondent had supplied the applicant was sufficient to enable it to understand the allegations made by the fifth respondent and to put up evidence to meet and to deal with those allegations. The price information of the fifth respondent was also not made available to the applicant. Once again, so the first respondent contends, the nature of the fifth respondent's complaint was clear and the applicant was able to deal with the complaint by reason of its own sales information and the knowledge it had of the overall size of the market. Neither was the applicant informed of the fifth respondent's import information. In this regard Mr Jordaan states that the applicant was in a position as one of two firms supplying the South African market to determine market size and therefore comment upon matters concerning the market share of the parties.

The applicant submits that it was entitled to see all the information in possession of the first respondent and relies upon MacArthur J's judgment in the *Brenco* matter where he said the following (at p17-18): "Even if the board says it makes the investigation into confidentiality or even if it provides the applicants with a summary of the information without the confidential details, this by itself is not sufficient. The level of investigation by the board or whoever has done the investigation, never comes out in the open, and if the correctness of the summaries are not to be tested or verified by the person being investigated, I do not believe the board is entitled to use that information in preparing a report. In short, if the information affects or may affect the rights of that person, I believe he is entitled to know what it is. He must be provided with the essential facts so that he knows what case he has to meet. I understand the difficulties confronting the complainant Timken who plainly does not want to publicise details of their business to competitors such as the applicants. It is a problem which has been encountered before, but if the confidential information is likely to be used by the board, and the hearing is to be fair to both parties, it must be made available to the applicants."

Mr Unterhalter, on behalf of the first respondent, submits that, while it is trite that an interested party is entitled to know the case it must meet, it does not follow that in consequence a party in the position of the applicant is entitled to all the information made known to the first respondent; the standard in our law is clear, the test is whether an

interested party knows the gist of the case that it must meet; it is entitled to know no more than the gist of the prejudicial allegations against it. He argues that the first respondent has a duty to be fair to both parties and must carry out that duty; it does not take sides in ensuring that the applicant is given sufficient information; rather it strikes a proper balance in the conduct of an investigation between the legitimate claims to confidentiality of a party submitting confidential information and the interests of a party affected by that information to understand the gist of what has been conveyed. The balance is truck by meeting the standard that the applicant must be given sufficient information to know the gist of the case that it has to meet. Accordingly, the requirement that the applicant would impose, that all the information be made known to the first respondent, is a requirement that goes beyond what our law requires and pays no proper regard to the different interests that must be taken into account to ensure that an investigation by the first respondent is both fair and effective. He submits that the information which was given to the applicant was sufficient and that its complaint of procedural unfairness is without substance. Furthermore, he relies on section 17 of the Board on Tariffs and Trade Act, 107 of 1986 which provides that: "No person shall, except for the purposes of the performance of his functions in terms of this Act or when required to do so by any court of law or under any law, disclose to any other person any information acquired by him in the performance of his functions in terms of this Act and relating to the business or affairs of any other person." He also submits that section 36(1)

of the Constitution justified the first respondent withholding the alleged confidential information from the applicant.

The applicant will never know whether it has in fact been supplied with the gist of the information which was put before the first respondent. It has no means of testing that allegation. I respectfully agree with what MacArthur J said in the *Brenco* case namely that unless all the information in possession of the first respondent is supplied to the entity being investigated, the level of the investigation by the first respondent never comes out into the open. The applicant had a right to be provided with all information in order to be put in a position where it would know all the ramifications of the case against it and in that way provided with the opportunity to meet the fifth respondent's case (*Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others* 1998 (3) SA 228 (C) at 235C.) The applicant's legal representative suggested to the first respondent that the confidentiality of the information contained in the fifth respondent's petition be dealt with by appointing a mutually acceptable independent third party such as an auditor or by making the information available to the lawyers acting for the applicant and not the applicant itself. The auditor or the lawyer would then, after consultation with the applicant, have been in a position to meaningfully reply to the fifth respondent's complaints. The first respondent merely stated that a system whereby parties have access to each other's confidential information have proven expensive and difficult to manage and that it is in its preserve to decide which system

to adopt provided the system respects the party's rights. This does not appear to me to be a fair approach. Confidential documents have now been lodged with the registrar and the confidentiality thereof was safeguarded by way of a written agreement which was entered into between the parties. I see no reason why that could not have been done in the first place, at the time that the applicant called on the first respondent to make available to it all the information that it had received from the fifth respondent. In my view it cannot be said that the applicant was not prejudiced by the fact that it had not been provided with all the information at the first respondent's disposal and that the requirements of the rules of natural justice have been met.

Of particular importance in this regard is the first respondent's failure to provide the applicant with particulars of the alleged fluctuations in the market share of the fifth respondent. These statistics are recorded in a document entitled "comparison of sales volumes, values and unit costs for a 24 month period" which is p13 of a submission document which was prepared by officials of the first respondent and submitted to it. It appears from pages 18 and 20 of the first respondent's final determination dated 26 August 1997 that it relied upon that document for the conclusions that it reached regarding the fifth respondent's market share. The first respondent states that the applicant was not provided with the fifth respondent's sales data in the form that it appears on p13 of the submission document because the information was regarded as confidential both by the fifth respondent

and by the first respondent itself. It states that what the applicant did know however was that the fifth respondent complained that it had suffered a decline in sales and market share over the relevant period, that its the essential complaint was thus known to the applicant and that the applicant was in a position to deal with the complaint. For that reason the applicant did not require the detailed sales data. The applicant was merely informed that the fifth respondent had suffered a reduction in sales volumes and nothing more than that. It now appears, and that it conceded by the first respondent, that the evidence which was placed before it did not in fact establish that the fifth respondent had suffered a decrease in market share over the whole of the relevant period. If the first respondent had made available the statistical data to the applicant it would have been able to point that out to the first respondent. A professor of statistics and the head of the department of statistics and actuarial science at the University of the Witwatersrand, prof L P Fatti did a statistical analysis of data relied upon by the first respondent to come to its aforesaid conclusions. He states that there is no evidence of any trend, either up or down, in the fifth respondent's sales volumes or market share over the investigation period and that there is no evidence of any correlation between the fifth respondent's sale volumes or market share and the price differentials between it and the applicant. The respondents did not dispute the correctness of prof Fatti's opinion and it must therefore be accepted. This was obviously an important ground for recommending the imposition of an import duty and the first respondent's refusal

to supply the applicant with this information is in my opinion clearly a failure to comply with the rules of natural justice and the provisions of the Constitution which vitiates its decision.

The first respondent's reliance upon section 17 of the act is in my judgment misplaced. The words in the section "except for the purposes of the performance of his functions in terms of this Act" appears to me to indicate that the members of the board and staff members must preserve the confidentiality of information received by them in the course of their work. It does not mean that they are prohibited from divulging information to a party or parties who are interested in their investigations. They are prohibited from leaking information to persons who are not involved. The section did not prohibit them from conveying information to the applicant which was essential to enable it to meet and deal with the fifth respondent's complaint.

Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the factors set out in sub-paragraphs (a) to (e). The first respondent does not say what law of general application justified the withholding of information from the applicant. There does not appear to me to be such a law in existence. The decision of the first respondent to

recommend the imposition of an import duty without having afforded the applicant an opportunity to meaningfully respond to the fifth respondent's complaints was a breach of applicant's right to procedural fairness enshrined in the Constitution and in my view no question of justification in terms of section 36(1) can arise. (*Premier, Mpumalanga, and Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at 110 (para42)). Mr Unterhalter submits that South Africa's accession to the GATT made it a party to all multilateral agreements concluded in the Uruguay Round, including the anti-dumping agreement that provides for the treatment of confidential information. He contends that the anti-dumping agreement forms part of a law of general application. I do not agree with that submission. International conventions and treaties do not become part of our law unless incorporated by legislative enactment (*Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) at 688 (para26). The agreement has not been incorporated by legislative enactment.

THE FIRST RESPONDENT'S DECISION - FAILURE TO EXERCISE A PROPER DISCRETION

Mr Marcus submits that the first respondent's decision is liable to be set aside because it failed to exercise a proper discretion in the course of reaching its decision to

recommend the imposition of an import duty. The first respondent determined that the fifth respondent had suffered material injury caused by the dumping of aldicarb and he contends that this decision was not justifiable because of the fact that the first respondent's conclusion that the fifth respondent had lost market share from May 1995 to June 1996 was not supported by the data on which it relied for this conclusion. In his report Prof Fatti states that the data contained in the submission document and the first respondent's final determination fail to provide statistical evidence of a downward or an upward trend in the fifth respondent's sales volumes or market share over the investigation period and fail to show a correlation between the fifth respondent's monthly aldicarb sales volumes or market share on the one hand and the difference between the applicant's prices and the fifth respondent's prices on the other hand. Prof Fatti's conclusions are not disputed by the first respondent. It concedes that the evidence before it did not establish that there had been a decline in the fifth respondent's market share over the relevant period. In the first respondent's final determination it concludes, in para 5.3.2 thereof, that "the undermentioned graph (a reference to the fifth respondent's market share) indicates that the petitioner experienced an increase in market share from January to April 1995. From May 1995 onwards a gradual declining trend became evident which lasted up to February 1996. From March 1996 to July 1996 the market showed volatile fluctuations where the petitioner continued to experience a loss of market share. From January 1996 to June 1996 alone the petitioner suffered a material decline in market share of almost 27%. The trend line on the

graph supports the conclusion that the petitioner was continuously losing market share from May 1995 to June 1996". The statistical evidence does not support this conclusion.

It is submitted that the first respondent's conclusion that the fifth respondent suffered a material decline in market share from January to June 1996 was not justifiable. The first respondent materially misdirected itself with regard to the evidence which was before it; the first respondent's decision was so grossly unreasonable as to give rise to the inference that it failed to apply its mind to the matter, acted with an ulterior purpose or acted in bad faith; its decision is not justifiable within the meaning of item 23(2)(b) of schedule 6 to the Constitution.

Mr Jordaan states, in paragraph 165 of the first respondent's answering affidavit that: "The conclusions that the board reached in respect of the decline in market share did not determine the conclusions of the board. As appears from the final report, the conclusion of the board on the question of material injury was reached by reference to factors that independently warranted the conclusion. Accordingly, any error made by the board in respect of market share had no impact because the board would have reached the identical conclusion by reference to other factors. Accordingly, there can be no complaint that there was a failure properly to exercise its discretion."

There is no evidence before me which shows that the first respondent would have reached the same decision had it been aware of the fact that its conclusions regarding the fifth respondent's market share were wrong. Mr Jordaan testifies with hindsight. I do not think that he can say at this stage what his attitude would have been in respect of the petition had he known, at the time that the petition was considered, that its complaint in respect of loss in market share was incorrect. Moreover, Mr Jordaan cannot speak on behalf of the other members of the first respondent. In terms of section 5 of the Board on Tariffs and Act the first respondent consists of at least four members. It does not appear from the papers how those other members would have reacted to the petition had they known that the petition contained incorrect information.

It appears from Prof Fatti's affidavit and report that one of the "other factors" on which the first respondent relied in coming to the conclusion that the fifth respondent had suffered material injury, was also incorrect. He states that there was no evidence before the first respondent of a correlation between the fifth respondent's sales volumes and the price differentials between the applicant and the fifth respondent. That conclusion is not disputed by the first respondent.

In paragraph 5.3.1 of the final determination the first respondent found that:

"The petitioner's sales volumes increased from 1995 to 1996 by 26% but related sales values increased by only 17%, indicating that sales revenues were under pressure with lower unit cost sales values. The 1996 average profit margins of the petitioner, as compared to that of 1995, decreased considerably, resulting in May to December 1996 sales below cost."

The finding that the fifth respondent's sales were below cost from May to December 1996 is not supported by the evidence which was placed before it. Page 18 of the submission document contains a table which sets out the profit/kg of the fifth respondent for the period January 1995 to December 1996. It appears from this table that the fifth respondent enjoyed a profit on its selling price for the months of May, June, July, August, October and November 1996. The fifth respondent only experienced a loss in the months of September and December 1996. It appears from that table that the first respondent misdirected itself when it stated that the fifth respondent sales were below cost for the period from May to December 1996. The first respondent contends that the applicant confuses "average profits" with the "enjoyment of a profit" and that paragraph 5.3.1 of the final determination intended to refer to the "average profits". That is not what the first respondent found. It found that the fifth respondent was trading at a loss during the whole of the period May to December 1996 which finding is incorrect.

The applicant furthermore contends that the first respondent's decision to have regard to data falling outside of the investigation period in order to determine whether the fifth

respondent suffered material injury because of the importation of aldicarb was not justifiable. Also, that it does not appear from the record that the first respondent had recourse to other factors which may have resulted in the fifth respondent suffering injury. In my view these grounds which are relied upon were satisfactory answered by the first respondent and that they do not constitute grounds for the allegations of unjustifiability.

In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) the Constitutional court confirmed an order of the full bench of the Transvaal High Court which reviewed and set aside a premature exercise of a discretion by the president in terms whereof he brought into operation, by way of a proclamation, the South African Medicines and Medical Devises Regulatory Authority Act 132 of 1998. The promulgation of the act rendered the regulatory structure relating to medicines and the control of medicines unworkable. The court found that the president's decision to bring the act into operation in such circumstances cannot be found to be objectively rational and the fact that the president mistakenly believed that it was appropriate to bring the act into force and acted in good faith in doing so did not put the matter beyond the reach of the court's powers of review; what the Constitution requires is that public power vested in the executive and other functionaries be exercises in an objectively rational manner. At p708 (para 85 and 86) Chaskalson P says the following: "It is a requirement of the rule of law that the exercise of public power by the

Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries, must, at least, comply with this requirement. If it does not it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

Mr Marcus refers to this extract from the judgment as an explanation of the meaning of "justifiability". He points out that item 23(2)(d) of schedule 6 to the Constitution was in operation when the first respondent made the decision in question. It provides that every person has the right to administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened. He referred me to the judgment of Froneman DJP in *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) where he states, at 316 (paras 36 and 37) that: "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter

in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers such as 'reasonableness', 'rationality', 'proportionality' and the like.' ... Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective bases justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?"

In reply to the applicant's allegation that the first respondent misdirected itself as to market share, Mr Jordaan states, in paragraph 15 of the answering affidavit, that: "Anti-dumping investigations and decisions appraise complex economic situations. The board is constituted as a specialised agency for the purpose of conducting investigations and making recommendations. The appraisal of economic data, including data of market share, is the exercise of a power of evaluation vested in the board. That evaluation is not open to review. What the applicant seeks to do is to appeal this aspect of the matter in the guise of a review.

That is incompetent. Furthermore, as I shall demonstrate hereunder, the position of the board on market share was but one factor that the board considered and the ultimate recommendation of the board was based upon reasons that did not require the analysis of market share as a necessary step in the reasoning of the board." In paragraph 148 of the answering affidavit he states that: "As already pointed out, in determining material injury the first respondent had to examine a number of factors none of which was decisive. As I have pointed out already, although paragraph 5.3.2 is incorrect to the extent that it states that there was a decline in the market share in the period May to June 1996, the factors that were determinative were price undercutting, price depression and declining profits and the fact that the petitioner had to lower its price in order to maintain the market share. Accordingly this error had no impact on the final conclusions of the board. An error of interpretation of the data made by the board does not give rise to reviewable irregularity."

It appears from the final determination that a number of factors were considered and taken into account in coming to the conclusion that aldicarb was being dumped on the South African market. In my view the fact that the first respondent erred in its assessment of the fifth respondent's market share and the correlation between the fifth respondent's sales volumes or market share and the price differentials between the fifth respondent and the applicant over the investigation period is of not such a serious nature, considering the fact that it had taken into account a number of matters, that it can be said, in the words of

Chaskalson P in the *Pharmaceutical* case at p709 (para 90) of the report that a fundamental error had been made and that the first respondent's decision is clearly irrational. The Oxford English Dictionary defines "irrational" as "not endowed with reason; contrary to or not in accordance with reason; unreasonable; utterly illogical, absurd". To my mind it cannot be said that the first respondent's error results in its decision being not endowed with reason or utterly illogical and absurd. In my opinion this is not a sound ground for reviewing and setting aside the first respondent's decision.

THE FIFTH RESPONDENT'S LETTER DATED 3 SEPTEMBER 1998

The fact that the fifth respondent wrote this letter can have no bearing on the question whether the first respondent's decision is reviewable and that it should be set aside. It may be an indication that the decision to impose an anti-dumping duty was not justified but it is nothing more than that.

THE SECOND RESPONDENT'S DECISION

It is common cause that the second respondent requested the third respondent to impose the final duties on the strength of the final determination that he had received from

the first respondent. It is also common cause that the second respondent did not give the applicant a hearing of any sort.

Mr Unterhalter submits that the precise wording of section 4(2) of the Board on Tariffs and Trade Act which provides that the second respondent may accept or reject the report and recommendations of the first respondent or refer them back to the board for reconsideration, is significant. It confers on the second respondent a particular and circumscribed discretion; he has no power himself to modify the report or the terms of the recommendation; his role is to consider the recommendations in the light of their potential impact on trade policy or generally and not to fulfill an appellate or review function in relation to the parties to the investigation; it is within the context of this appraisal of policy that the second respondent may refer the matter back to the first respondent. Consequently, there would simply be no point in requiring the second respondent to receive from the parties affected representations in addition to those already made to the first respondent. Mr Jordaan stated that it was not necessary for the second respondent to afford the applicant a hearing since the applicant had already enjoyed a full opportunity to make representations to the first respondent.

The second respondent obviously took a decision namely to accept or reject the report and recommendations or to refer them back to the board for reconsideration. The act does

not say that the second respondent need not comply with the rules of natural justice when he makes the decision. If the applicant had been informed that the final determination had been received and that the second respondent intended to request the third respondent to impose the duties, the applicant could have attempted to persuade the second respondent either to reject the report and recommendations or to refer the matter back to the first respondent for reconsideration. It was precluded from doing so. There may also have been other evidence that the applicant could have placed before the second respondent, for example evidence which became available after the first respondent's report was submitted to the second respondent which might have swayed the second respondent in its favour. (MacArthur J's judgment in the *Brenco* case at p24.) All decision-makers, unless the law relieves them from doing so, are obliged to afford interested parties a hearing, either verbally or by way of written representations (see *Administrator Cape and Another v Ikapa Town Council* 1990 (2) SA 882 (A) at 889G-890C.

It does not appear from the second respondent's reasons that he did not consider the technical findings of the board but that he decided whether the recommendation cohered with trade policy. He states in the ultimate paragraph of numbered paragraph 6.10 that he fully applied his mind to all the relevant issues as set out in the final report and then decided upon a consideration of these issues to request the third respondent to impose the final duties. In any event, if the second respondent's task was to decide whether the

recommendation cohered with trade policy he should have, in my view, afforded the applicant an opportunity to make representations to him regarding the application of that policy.

In my judgment the second respondent's failure to hear the applicant constituted a failure to comply with the rules of natural justice and that his decision should as a result of that failure be set aside.

In the light of this finding and in the light of the fact that I have found that the first respondent did not materially misdirect itself when it came to the conclusions that it did, it is not necessary to deal with the applicant's submissions in regard to material misdirection.

THE THIRD RESPONDENT'S DECISION

Mr Unterhalter submits that the power of the third respondent to impose an anti-dumping duty which derives from section 56 from the Customs and Excise Act, 91 of 1964, read with section 55(2) severely circumscribes the third respondent's power. He can impose an anti-dumping duty only in accordance with a request from the second respondent in terms of section 4(2) of the Board on Tariffs and Trade Act and the third respondent in reality has no choice but to comply with a request made by the second respondent. By virtue of the

legislative scheme it is the second respondent who accepts or rejects the recommendations of the first respondent in the light of relevant policy considerations. Because the second respondent does not have the power to alter a schedule to the Customs and Excise Act he or she must request the third respondent to do so. The third respondent is required to act in accordance with such a request by virtue of section 55(2) of the Customs and Excise Act. He argues that there is no need for a separate and independent enquiry into the merits of the determination by the second respondent before the request to implement that determination .s met. Accordingly, there is no requirement to give an affected party a further and independent hearing before amending schedule 2 of the Customs and Excise Act to impose an anti-dumping duty.

Mr Puckrin submits that the function performed by the third respondent is an executive function and not an administrative action; an administrative action is a unilateral act whereby, in given circumstances, an individual, legal relationship is created, fixed, varied or terminated or whereby such creation, determination, variation or termination of a legal relationship is refused; when the third respondent fixes the final anti-dumping duty, that duty is applicable not only against that particular person against whom the original complaint was lodged but against all importers of that particular product and the imposition of the duty does not create an individual relationship; the decision to impose a duty is one of general application and that is why the exercise of the third respondent's function is not an

administrative action; his decision is not comparable to the decision to impose a provisional duty which decision is only applicable to the applicant and therefore creates an individual relationship. He relies for this submission on the case of *President of the Republic of South Africa and Others v South African Ruby Football Union and Others* 2000 (1) SA 1 (CC). Alternatively, he submits that should it be found that the third respondent's decision is an administrative action, it is what may be termed a "gebonde beskikking", that is, once the second respondent has recommended, the third respondent has no discretion in the matter it has to implement that recommendation by imposing the duty.

I disagree with counsels' submissions. Spoelstra J held in the *Kenna Systems* case that the third respondent's administrative and legislative functions under the Customs and Excise act do not differ in principle from those of any other official or body and the rules of administrative law would therefore apply to him. I respectfully agree with that view.

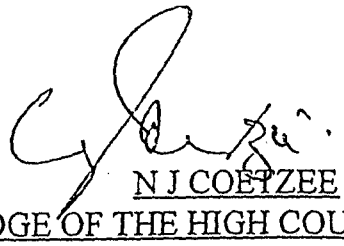
The rules of natural justice are not excluded on the basis that the third respondent's powers are legislative in character. A distinction should be drawn between statutory powers which, when exercised, affect equally members of the community at large and those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or a particular group of individuals. In the case of statutory powers which would usually be legislative in character, where a public authority is empowered to take a

decision prejudicially affecting the members of a whole community, the public authority is normally guided solely by what it believes to be best for the community as a whole and is not obliged to consider the particular interests of individual members of that community. In that case it is arguable that a failure to give individuals affected a hearing does not violate any rule of natural justice. However, when statutory powers are exercised in such a way that it could prejudicially affect an individual or a group of individuals and not the public at large, that functionary should normally, in the absence of a contrary indication in the statute, afford the particular person or group of persons a hearing before exercising the power. (See *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 12E-13A. The exercise of the third respondent's powers namely to impose the anti-dumping duties was calculated to cause prejudice to the applicant being the only importer of insecticides containing aldicarb. In my view the third respondent's failure to provide a hearing to the applicant violated the rules of natural justice and the guarantee of procedurally fair administrative action in the Constitution.

CONCLUSION

The first respondent's failure to supply to the applicant all the information that it had at his disposal before it took the decision to recommend the imposition of anti-dumping duties constituted a failure to comply with the rules of natural justice and the guarantee of

procedurally fair administrative action in the Constitution. The second and third respondents should have heard the applicant before taking the decisions to request the imposition of anti-dumping duties and to impose such duties. In the result the decisions taken by the three respondents must be reviewed and set aside. In the event prayers 1, 2, 3, 5 and 6 of the applicant's amended notice of motion are granted. The first, second, third and fourth respondents are ordered to pay the costs of the application. Costs include the costs of two counsel.



N J COETZEE
ACTING JUDGE OF THE HIGH COURT