CASE NUMBER: 285/99

In the matter between:

CHAIRMAN : BOARD ON TARIFFS AND TRADE	**FIRST APPELLANT**
MINISTER OF TRADE AND INDUSTRY	**SECOND APPELLANT**
MINISTER OF FINANCE	**THIRD APPELLANT**

AND

BRENCO INCORPORATED	**FIRST RESPONDENT**
FAG SOUTH AFRICA LIMITED	**SECOND RESPONDENT**
TRANSNET LIMITED	**THIRD RESPONDENT**

CORAM : MARAIS, ZULMAN, STREICHER, NAVSA and MPATI JJA

DATE OF HEARING : 22 MARCH 2001

DATE OF JUDGMENT : 25 MAY 2001

Subject : Procedural fairness in regard to the imposition of anti-dumping duties in terms of s 56 of the Customs and Excise Act 91 of 1964 read with s 4(2) of the Board on Tariffs and Trade Act, 107 of 1986

JUDGMENT

ZULMAN JA

[1] This appeal concerns, in large measure, the application of the *audi alteram partem* principle ("the *audi* principle" for the sake of brevity) in a tiered decision making process.

[2] The respondents were the successful applicants in the court *a quo* for an order setting aside certain decisions of the three appellants (the Chairman of the Board on Tariffs and Trade, the Minister of Trade and Industry and the Minister of Finance) relating to anti-dumping duties imposed, with retrospective effect, on types of roller bearings and the refunding to the second respondent of amounts paid in respect of those duties. The appeal to this court is with the leave of the court *a quo* (MacArthur J). For the sake of convenience any reference to the second appellant will include the Deputy Minister of Finance and any reference to the third appellant will include the Deputy Minister of Finance.

[3] The first respondent (BRENCO) is a United States of America corporation producing bearings suitable for use on the axles on railway rolling stock and

locomotives. The bearings are sold in the United States of America and elsewhere. A German company (FAG GERMANY) entered into what is referred to as a "label agreement" with BRENCO in terms of which BRENCO was given the right to manufacture particular types of roller bearings under the FAG label. Amongst these bearings were class C and D roller bearings which were the subject matter of a tender awarded to the second respondent (FAG) in July 1999 by the third respondent (TRANSNET). FAG is a South African company which imported the bearings. It is a wholly owned subsidiary of FAG GERMANY.

[4] In January 1992 a complaint was lodged with the Board on Tariffs and Trade, (BTT) established in terms of s 2 of the Board on Tariffs and Trade Act No 107 of 1986 ("the BTT Act") by Timken South Africa (Pty) Ltd (TIMKEN SA). The complaint was prompted by the fact that TIMKEN SA had lost two large tenders for the supply of the bearings to TRANSNET, allegedly due to the dumping of C and D bearings manufactured by BRENCO, imported by FAG, and sold to

TRANSNET. TIMKEN SA is a wholly owned subsidiary of a United States of America corporation (TIMKEN US), a large multi-national corporation which manufactures bearings in the United States of America with operations in many countries, including South Africa. TIMKEN SA is the sole producer of the bearings in South Africa and pays royalties to TIMKEN US.

[5] On 21 August 1992, BTT gave notice[1] of its intention to institute an anti-dumping investigation into imports of roller bearings originating in the United States of America and commonly used by railway undertakings.

[6] On 4 December 1992 the Commissioner of Customs and Excise, exercising the powers vested in him in the Customs and Excise Act, No. 91 of 1964 (the CE Act), imposed a provisional dumping duty of R108,42 per product.[2] He thereafter on 2 April 1993 and 4 June 1993 extended the period for payment of the provisional duty[3].

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[1] See Government Notice No 754 of 1992 published in Government Gazette 14226 of 21 August 1992.

[2] See s 57 A and Government Notice 3281 published in Government Gazette 14438 of 4 December 1992.

[3] See Government Notice 581 published in Government Gazette 14717 of 2 April 1993 and

On 3 December 1993, the third appellant imposed a final anti-dumping duty of R81,08 per unit in respect of class C bearings and R100,69 per unit in respect of class D bearings.[4] His decision to impose the final anti-dumping duties was in accordance with a request by the second appellant.

[7] FAG paid out some money pursuant to the imposition of the provisional, and thereafter, the final anti-dumping duties. The three respondents on appeal, who were the applicants in the court *a quo,* applied to have reviewed and set aside:

[7.1] the decision of BTT (represented by its Chairman, the first appellant) recommending the imposition of anti-dumping duties.

[7.2] the decision of the second appellant to request the third appellant to impose anti-dumping duties.

[7.3] the decision of the third appellant to impose anti-dumping duties.

Consequential relief was also sought with regard to the repayment of the money paid

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Government Notice R980 published in Government Gazette 14854 of 4 June 1993 respectively.

[4] See Government Notice 2279 published in Government Gazette 15291 of 3 December 1993 p 9.

pursuant to the imposition of the provisional and final anti-dumping duties and costs.

[8] Section 4(1) of the BTT Act authorises BTT, inter alia, to investigate dumping in the Republic and to report and make recommendations to the second appellant in respect of such investigation.

At the relevant time "dumping" was defined as follows:[5]

> **" 'dumping' means the export or the proposed export of goods to the Republic or the common customs area of the Southern African Customs Union-**
>
> (a) at an export price lower than the price at which similar goods are being sold in the ordinary course of trade in the exporting country, for consumption there;
>
> (b) at an export price lower than the highest comparable price at which similar goods are being exported in the ordinary course of trade from the exporting country to any third country;
>
> (c) at an export price lower than the price which is made up as contemplated by subsection (2); or
>
> (d) at an export price lower than the comparable price at which similar goods are being exported to the Republic or the common customs area of the Southern African Customs Union from any other country;"

Essential concepts recognised in international anti-dumping law such as injury, causation and margin of dumping are not defined or referred to in the South African

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[5] By s 1(b) of Act No. 60 of 1992

legislation. In addition, there is no reference in the legislation to the procedure to be followed in the investigation of anti-dumping actions. The BTT Act provides for the promulgation of regulations, but as yet no regulations have been promulgated. BTT has, however, published a document entitled "Guide to the Policy and Procedure with Regard to Action against Unfair International Trade

Practices: Dumping, Subsidies and other forms of Disruptive Competition" ("the GUIDE"). A copy of the GUIDE, which is a detailed document, is available to interested parties. The GUIDE makes reference to South Africa's obligations in terms of the International General Agreement on Trade and Tariffs (GATT) to which South Africa is a party, and attempts to deal with some of the issues not referred to in the legislation such as injury, causation and national interest. The GUIDE also sets out the procedures to be adopted by BTT in an anti-dumping investigation.

[9] Three essential issues arise in this appeal:

[9.1] Whether the proceedings before BTT were vitiated on the basis of a

failure to comply with the principles of natural justice, in that BTT violated the *audi* principle.

[9.2] Whether the decision of the second appellant was vitiated by reason of the fact that he violated the principles of procedural fairness in that he failed to observe the *audi* principle before requesting the third appellant to impose the final anti-dumping duties and accordingly whether their imposition was null and void and of no force or effect in law.

[9.3] Similarly in the case of the third appellant whether he violated the principles of procedural fairness in that he failed to observe the *audi* principle before imposing the final anti-dumping duties and accordingly whether their imposition was null and void and of no force or effect in law.

[10] I agree with the submission made by the appellants' counsel to the effect that the entire process by which anti-dumping duties are imposed must be viewed as a whole. However, if there is merit in the respondents' contention that the proceedings

before BTT were flawed, then it becomes unnecessary to consider whether there was procedural fairness on the part of the two ministers (c/f *Turner v Jockey Club of South Africa*[6].)

[11] At the outset it would be as well to re-state some general principles of administrative or procedural fairness which are applicable to the general scheme of the BTT Act read together with the relevant provisions of the CE Act before examining the specific complaints which the respondents level against BTT and the second and third appellants.

[12] Both counsel for the appellants and counsel for the respondents invoked, in support of their respective arguments, the dicta of Hoexter JA in *Administrator, Transvaal, and Others v Zenzile and Others*[7], and of Corbett CJ in *Du Preez and Another v Truth And Reconciliation Commission*[8], the latter citing with approval the remarks of Lord Mustill in *Doody v Secretary of State for the Home Department and*

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[6] 1974(3) SA 633 (A) at 658 B-H.

[7] 1991(1) SA 21(A) at 40 B-E.

Other Appeals[9] and of Lord Denning MR and Sachs LJ in *Re Pergamon Press Ltd.*[10]

[13] Lord Mustill summarised the duty of a public official or body to act fairly in these lucid terms:

> 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'[11]

See also *Attorney-General, Eastern Cape v Blom and Others,*[12] *South African RoadsBoard v Johannesburg City Council,*[13] and *Baxter - Administrative Law*.[14]

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[8] 1997(3) SA 204 (A) at 231H-232E and at 232 G-233B.

[9] [1993] 3 All ER 92(HL) at 106 d-h.

[10] [1970] 3 All ER 535 (CA) at 539 a-f and 541 - 542 d respectively and [1971] 1 Ch 388 (CA) at 399 C-D and 403 E-F.

[11] *Doody* at 106 d-h.

The common law principle of fairness is reflected in s 33(1) of our Constitution.[15]

[14] There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. As Sachs L.J. pointed out in *In re Pergamon Press*:

> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand ...
>
> It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate ... the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.[16]

Pergamon Press, was concerned with procedures in an investigative enquiry not dissimilar in character to the investigative inquiry conducted by BTT in this case. The

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12 1988(4) SA 645 (A) at 660D-662I.

13 1991(4) SA (A) 1 at 10 G-I and 16E-17A.

14 Pages 178/8 and 543.

15 Act 108 of 1996.

16 Supra at 403 D-G, citing *Russel v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118; *Wiseman v*

inquiry there was conducted by inspectors acting in terms of the English Companies Act. The directors of the company in question claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a court of law. Lord Denning MR said of this-[17]

> "It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice ... He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply ...
>
> I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings .... They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. ...
>
> But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company and be used itself as material for the winding up.
>
> Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative ....."

Borneman [1971] A.C. 297 311, 314, 320;
See also *Du Preez and Another v Truth and Reconciliation Commission (*Supra) 232D - 233E.

[15] The whole scheme of the BTT Act which establishes BTT and the "administrative system" indicates that there is to be a detailed investigation by BTT, requiring a hearing of all interested parties, before a report concerning any alleged dumping is made for submission to the Trade Minister, before he in turn acts in terms of s 4(2) of the Act. In this regard s 4(1) of the Act is of particular significance. The section provides as follows in regard to the functions of BTT:-

> "Functions of Board
>
> (1) For the purposes of achieving its objects and subject to the provisions in any other law contained, the Board may-
>
> (a) (i) of its own accord investigate dumping, subsidised export or disruptive competition in or to the Republic and, if authorised thereto by an agreement, in or to the common customs area of the South African Customs Union;
>
> (ii) of its own accord investigate the development of industries in the Republic and, if authorised thereto by an agreement, in the common customs area of the Southern African Customs Union by the levying of customs and excise duties;
>
> (iii) by order of the Minister investigate any other matter which affects or may affect the trade and industry of the Republic and, if authorised thereto by an agreement, the common customs area of the Southern African Customs Union;
>
> (b) report and make recommendations to the Minister in respect of any investigation referred to in paragraph (a)."

[16] As to the particular powers of the second appellant, s 4(2) of the BTT Act

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[17] Supra at 399 B-F. See also *Leech and Others v Farber NO and Others* 2000(2) SA 444(W) at 451 E - 452H.

provides that:

> "(2) Upon receipt of the report and recommendations referred to in sub-section (1)(b), the Minister may -
>
> (a) accept or reject such report and recommendations, or refer them back to the Board for reconsideration; and
>
> (b) if he accepts the report and recommendations concerned, request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act..."[18]

[17] The precise wording of section 4(2) of the BTT Act is significant. It confers on the Trade Minister a particular and circumscribed discretion. He may either accept or reject the report and recommendations of the BTT in their entirety - or he may refer the matter back to BTT for reconsideration. The second appellant has no power himself to modify the report or the terms of the recommendations. Dumping investigations are by their nature highly technical. They involve a conceptual framework and an appraisal of facts that require expertise of a specialised kind. It is for this reason that a specialised agency, BTT, engages in an investigation and draws up a report and recommendations.

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[18] Section 1 defines the Minister to mean the Minister of Trade and Industry and for Economic Co-ordination.

[18] The functions of the third appellant that are here relevant are set out in s 55 and s 56 of the CE Act as follows:[19]

> "55 **General provisions regarding anti-dumping duties and countervailing safeguard duties -**
>
> (1) The goods specified in Schedule No. 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate anti-dumping ... duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods.
>
> (2) (a) The imposition of any anti-dumping duty in the case of dumping as defined in the Board on Tariffs and Trade Act, 1986 (Act No 107 of 1986)... and the rate at which or the circumstances in which such duty is imposed in respect of any imported goods shall be in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination under the provisions of the Board on Tariffs and Trade Act, 1986.
>
> (b) Any such anti-dumping... duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping,... duty is imposed in respect of those goods under section 57A...
>
> 56 **Imposition of anti-dumping duties -**
>
> (1) The Minister may from time to time by notice in the Gazette amend Schedule No. 2 to impose an anti-dumping duty in accordance with the provisions of section 55(2).
>
> (2) The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the Gazette withdraw or reduce with or without retrospective effect and to such extent as may be specified in the notice any anti-dumping duty imposed under sub-section(1)..."

It is clear from s 55(2) that the third appellant may impose an anti-dumping

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[19] Sections 55 and 56 of the CE Act as they read at the time of the institution of these

duty only in accordance with a request from the second appellant in terms of s 4(2) of the BTT Act.

[19] The duties which BTT and the second and third appellants have must be determined in this case with reference to:

[19.1] the nature of the powers conferred upon each of them;

[19.2] the sequence of decision-making among each of them, and hence the relationship between the powers conferred on each of them;

[19.3] the effect of the exercise of the powers on the respondents, upon TIMKEN, and upon the public interest in an effective administrative process;

[19.4] an appraisal of the objects of the relevant legislation and the kind of process that the legislation puts in place;

[19.5] the need to balance the public interest in decisions being arrived at fairly against what may be a competing public interest in permitting administrative powers to be effectively exercised.

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proceedings.

This is why the requirements of *audi* are contextual and relative.

[20] The respondents in argument before this court contend that BTT violated the *audi* principle and that there was no procedural fairness in the following specific respects:

[20.1] withholding of allegedly confidential information.

[20.2] non-disclosure of additional information received from TIMKEN SA.

[20.3] BTT's visit to TIMKEN SA's plant in Benoni.

[20.4] **c**onsultations and advice from the Directorate of Business Economics Investigation.

[20.5] TIMKEN SA s visit to BTT's office.

[20.6] **a**n allegation of contradictory information supplied by the legal representatives of BRENCO.

[20.7] an allegation of altering invoices coupled with an aspersion of dishonesty.

The respondents furthermore contended that there was a reasonable apprehension of

bias on the part of BTT.

[21] Before examining each of these specific matters in detail, I believe that it is important to again have proper regard to the detailed statutory framework for the investigation of dumping and the investigative function and powers of BTT. In this case it is significant that this investigation extended over a fairly lengthy period commencing on the date of the receipt of TIMKEN SA'S complaint in January 1992 and culminating in the submission of its detailed report of its findings and decision on 8 October 1993. During this period, as is clearly apparent from the useful chronology of events which was handed up by counsel for the appellants, extensive correspondence and exchanges of information and responses occurred between all interested parties including BRENCO'S legal representatives. All this bears directly upon the question of procedural fairness on the part of BTT.

[22] The procedures which BTT followed in the anti-dumping investigation which it conducted in this matter were in accordance with the GUIDE which it published and

to which I have previously referred. The respondents concede that such procedures were, in the main, followed.

[23] In terms of the GUIDE the following procedures are adopted by BTT: an anti-dumping investigation by BTT may be initiated by way of a written application in a questionnaire prescribed by BTT; such application must include evidence of dumping, material injury or the threat thereof to the industry concerned, and a causal link between the alleged dumping concerned and the alleged material injury; "Mere assertions, unsubstantiated by the relevant evidence, will not be considered sufficient reason for the initiation of an investigation" (paragraph 14 of the GUIDE); BTT considers the introduction of an anti-dumping duty whenever it encounters the existence of dumping in regard to exports, provided that:

[23.1] such exports are the cause of material injury to an industry in the Customs Union; or

[23.2] the probability exists that material injury may be caused to an industry

in the Customs Union by such export or the threat of such export; or

[23.3] such exports or the threat of such exports materially retard or prevent the establishment and development of an industry in the Customs Union; and

[23.4] such action is in the national interest.

[24 In considering material injury or the threat of material injury BTT takes into account:

[24.1] actual and potential decline in output, sales, market share, profits, return on capital, productivity, capacity utilisation, etc; and

[24.2] the actual and potential influence on cash flow, stocks, employment opportunities, wages, growth, ability to attract investment, ability to obtain capital, etc.

[25] Having established the existence of material injury or the threat of material injury BTT is obliged to determine whether and to what extent the cause is dumping and not something else. Consideration is given to:

[25.1] **t**he volume of all relevant imports from all countries, existing tariffs and rebate provisions,

[25.2] the impact of imports and their prices on the domestic market, and

[25.3] factors such as political influences; the state of the economy, labour matters; boycotts; product quality and range, delivery periods; the technology employed; the utilisation of production factors; and the policies of the industry concerning production, marketing and finance.

[26] In order to determine national interest BTT takes into consideration, among other things, the following:

[26.1] the benefits of competition to the local industry, as measured against the seriousness of the potential material injury to the industry;

[26.2] the effect that material injury to the industry will have on its supplying and consuming industry;

[26.3] the effect that any action may have on the growth and development of

any other industry;

[26.4] the ability of the industry to adjust to changing circumstances and the resulting time-span over which additional protection will have to be provided;

[26.5] the extent to which consumers benefit from the low import prices and the extent to which these benefits are passed on;

[26.6] the influence on employment and job opportunities; and

[26.7] the influence on the balance of payments.

If there is sufficient evidence of the alleged dumping and the alleged material injury or the threat thereof and that the alleged material injury or threat thereof is being caused by the alleged dumping, BTT may decide to initiate a formal investigation by publishing a general notice in the Government Gazette.

[27] The mechanics of a BTT investigation, and the work incidental to it, are performed by staff of BTT (as authorised by the BTT Act). The staff is divided into a number of directorates, including an anti-dumping directorate.

The whole investigating process is described in these terms in the first appellant's answering affidavit and is not disputed by the respondents:

> "4.8.3 The investigating process is conducted in various stages or phases.
>
> (a) In the first place the so-called merit investigating phase during which the information contained in a complaint or petition lodged is checked or verified so as to determine whether there is *prima facie* evidence of dumping and material injury, whereupon the Board, may, if satisfied that there are reasonable grounds for dumping and damage, accept the complaint for formal investigation and the Board's decision is published in the Government Gazette for general notice and interested persons are requested to fill in certain questionnaires
>
> (b) In the second place the so-called provisional investigating phase during which importers and exporters are afforded the opportunity to react by means of an oral hearing or by means of representations in writing or both to the complaint lodged, whereupon the information received in consequence of such opportunities is verified and, if reasonable grounds are found, a provisional decision is made in terms of which a provisional payment may be ordered in accordance with the provisions of the Customs and Excise Act, 1964.
>
> (c) In the third place the so-called final investigation during which all parties are afforded an opportunity to render comments on a provisional report of the Board and, if they so wish, to submit further evidence or information and to do so by means of an oral hearing or by means of re-presentations in writing or both.
>
> 4.8.4 For purposes of evaluating the information collected in this process, interested parties are afforded opportunities to react on facts and information which are relevant for purposes of a decision to be taken by the Board and which are, in so far as it is possible within the framework of the provisions of section 17 of the Board on Tariffs and Trade Act, 1986, and in accordance with international guidelines, made available to them. "

When it has concluded its investigations, BTT makes a report to the second appellant.

This report may recommend to the second appellant that he request the third

appellant to impose a particular anti-dumping duty on the product in question.[20]

[28] The detailed legislative scheme and the procedure followed by BTT described above is very relevant to the scope of the *audi* principle in the following way. The principal means by which BTT achieves its objects is by conducting investigations (s 4(1)(a) of the BTT Act). BTT has two functions: (i) to investigate and (ii) to make recommendations to the Trade Minister (s 4(1) of the BTT Act). These two functions are general to the work done by BTT, and are not specific to dumping investigations. To carry out its functions, BTT may conduct an enquiry and procure evidence for the purposes of such enquiry (section 12). Investigating officers may be appointed to procure specific information. They are equipped with extensive powers of inspection, search and even interrogation (section 14).

[29] Upon a proper interpretation of the BTT Act and the wide powers conferred upon BTT, BTT has both an investigative function and a determinative function in

[20] Section 4(1)(b) of the BTT Act.

deciding whether to request the Commissioner of Customs and Excise to impose provisional anti-dumping duties and in making its final report and recommendations to the second appellant. Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative function, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation.

[30] In the context of enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973, investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious,

oppressive or unfair manner (cf *Bernstein and Others v Bester and Others NNO*[21]).

In *Leech and Others v Farber NO*[22] a similar conclusion was reached. The court held that fairness did not require that in an enquiry there was a general right to information in the possession of the interrogator (in that case a creditor).

By analogy, on the facts of this matter, when BTT carried out its investigative functions, such as an on the spot verification exercise, the respondents had no right to be informed or to be present. Furthermore, when BTT took steps to obtain information or was approached and given information, here too there was no requirement that the respondents must be present. Nor is it required that every piece of information yielded as a result of the investigation had to be made available to the respondents. Against this background and applying the general principles that I have enunciated I now turn to consider each of the respondents' specific complaints.

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[21] 1996(2) SA 751 (CC) at 784 F-I.

[22] Supra at 451E-452H. See also *Gardener v East London Transitional Local Council and Others*

WITHHOLDING CONFIDENTIAL INFORMATION

[31] The nature of the information which the respondents claim was withheld and to which the respondents could not respond at the time relate to the following:

[31.1] TIMKEN SA's exports;

[31.2] the domestic market sales of TIMKEN US in the United States;

[31.3] the domestic market price and cost build-up of sales by TIMKEN US;

[31.4] issues relating to the alleged injury to TIMKEN SA and its causal link to the alleged dumped imports;

[31.5] details of TIMKEN SA's manufacturing process.

[32] In the court *a quo* the appellants offered two justifications for the withholding of the allegedly confidential information. First, they relied on the "international practice" as contained in Article 6.3 of the Agreement of Implementation of Article VI of GATT and Article 6.5 of the Uruguay Round Anti-Dumping Agreement. Second, they relied on s 17 of the BTT Act.

[33] The court *a quo* found that because South Africa was not a signatory to either of these two international agreements at the relevant time, they were of no assistance to BTT. I agree with the appellants' submission that this finding is incorrect. It is clear that BTT allowed international principles to guide it in conducting anti-dumping investigations. Those principles are reflected in the GUIDE published by BTT concerning its policies and procedure, *inter alia*, in dumping investigations. The point is not that BTT was obliged as a matter of law to comply with the two international agreements in question but that international practice is of some assistance in assessing the fairness of the practices of BTT in conducting anti-dumping investigations. The provisions in the international anti-dumping agreements which relate to confidential information illustrate the constraints faced by an anti-dumping authority in the fair and open conduct of anti-dumping investigations. Such constraints are inevitable in an investigation involving highly confidential technical commercial information of parties who are competitors.

[34] The papers reveal that when a particular party to an investigation claims that portions of the information it supplies are confidential, and BTT considers that the information in question is indeed confidential, BTT does not supply that information to the other party. Non-confidential summaries of the confidential information are, however, supplied to the other party, if it is at all possible to do so. This accords with international practice, which is governed by the rules contained in article VI of GATT and the principles set out in the Agreement on the Implementation of Article VI of GATT ("the GATT Anti-Dumping Code") as elaborated in the Uruguay Round Anti-Dumping Agreement ("the Anti-Dumping Agreement"). Article 6 of the Anti-Dumping Agreement deals with evidence. Paragraph 6.4 provides that the authorities must, whenever practicable, provide timely opportunities to all interested parties to see all information that is relevant to the presentation of their cases and that is used by the authorities in anti-dumping investigations, provided that it is not confidential as defined in article 6.5.paragraph 6.5 states:

> "6.5 Any information which is by nature confidential, (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it *[footnote - members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.]*
>
> 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.
>
> 6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalised summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. [footnote - *Members agree that requests for confidentiality should not be arbitrarily rejected.]*"

[35] These provisions make it plain, that confidential documents and internal documents prepared by the investigating party are not accessible to interested parties. The disclosure of information which is likely to have a significant adverse effect upon the supplier or source of such information, or which would be of significant advantage to a competitor, is treated as confidential. Non-confidential summaries of such documents are, other than in exceptional circumstances, required to be furnished.

[36] The need to respect the integrity of confidential information is accepted and enforced by the European Court of Justice (ECJ). In *Timex Corporation v Council and Commission of the European Communities*[23] the ECJ stressed the importance of making all material non-confidential information available to interested parties; that only non-confidential information should be thus accessible was treated as axiomatic. In *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council of the European Communities*[24] the court emphasised the need for the Commission to respect the rights of the parties concerned to procedural fairness in these terms:-

> "... In performing their duty to provide information under Article 7(4)(b), the Community institutions must act with all due diligence by seeking, as the Court stated in its judgment of 20 March 1985 in Case 264/82 *Timex v Council and Commission* [1985] ECR 849, to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information ..."

[37] The requirements of the *audi* principle must be viewed in the light of public policy considerations pertaining to the confidentiality of the information in question.

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[23] (Case 264/82) [1985] ECR 849 (ECJ) at para 25.

[24] Case C49/88 at I - 3181 at 3188.

The public interest in maintaining the confidentiality of documents and information provided by third parties to BTT means that the principles of fairness are not breached by the provision to the respondents of non-confidential summaries of the confidential information in question. In *Estate Dempers v Secretary for Inland Revenue*[25] Corbett JA indicated that for the purposes of administering income tax legislation

> "it is necessary …… that the fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy."

[38] The courts of England have recognised as a clear principle that the requirements of procedural fairness may be attenuated by the requirements of the administrative scheme of a statute (see for example):

> In *re Pergamon Press*[26]*; Norwich Pharmacal Co. And Others v Customs and Excise Commissioners*[27] (recognising the public interest in maintaining the confidentiality of information received in confidence); *Alfred Crompton*

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[25] 1977(3) SA 410(A) at 420 B-C.

[26] Supra at 399 H- 400 A 404D-G.

[27] [1974] AC 133 at 181H-182A; 188E-F.

Amusement Machines Ltd v Customs and Excise Commissioners (NO.2)[28] (accepting the public interest in respecting the confidentiality of confidential documents obtained from third parties).

[39] In the present case, only information which was submitted in confidence by TIMKEN SA and which BTT considered to be of a confidential nature was not supplied to the applicants. Non-confidential summaries of such information were supplied to the respondents except, in the case of invoices of sales of the products in the USA for 17 months during 1991 and 1992. BTT considered that these invoices could not be summarised in a non-confidential way, but was careful to satisfy itself that they had not been falsified and were indeed reliable.

[40] The respondents' first complaint is prefaced with a statement that the confidential information which was withheld from them was relied upon by BTT. These allegations are dealt with at length in BTT's answering affidavit. The following emerges from a consideration of the answering affidavit:

[40.1] the respondents received a copy of the complaint;

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[28] [1974] AC 405 at 433D-434H.

[40.2] the respondents were provided with non-confidential summaries in respect of the confidential information contained in a completed questionnaire supplied by TIMKEN SA;

[40.3] as to the information that was withheld, in respect of which non-confidential summaries were provided, BTT withheld this information on the basis that TIMKEN SA requested that it be treated as confidential and BTT considered that it was indeed confidential information;

[40.4] as to the specific information that is alleged to have been withheld and allegedly relied upon by BTT, BTT states that it did not in fact rely on TIMKEN US's cost build-up figures;

[40.5] as to the domestic market sales of TIMKEN US in the United States of America and the domestic market price, in a non-confidential letter of 21 January 1993, it was disclosed that there were class C and class D bearings sold by TIMKEN US in the United States of America. The invoices that were made

available to BTT contained information relating to the name and address of the purchaser and the volume and price per unit. These were considered by BTT to be of a very confidential nature. In any event, the respondents were aware that the investigation concerned whether there was a domestic market and what the price was in the United States of America and consequently the respondents could make representations in respect of whether such a market existed in the United States of America and the prices of bearings in that market.

[40.6] In a letter dated 16 February 1993 from BRENCO'S attorneys to BTT information was requested from TIMKEN SA in regard to:

"(a) Class C bearings sold in US domestic market to domestic end users (excluding export sales) as a percentage of total sales of class C bearings for both 1991 and 1992;

(b) class D bearings sold in the US domestic market (excluding export sales) as a percentage of total sales of class D bearings for both 1991 and 1992;

(c) the percentage of domestic sales of class C and D bearings respectively that are represented by:

(i) AAR sales;

(ii) sales for use in privately owned wagons;

(iii) sales of industrial bearings.

The letter further stated:

"We should like to point out that we are requesting the percentages and not the actual figures or the customers and therefore this information cannot be considered confidential. Brenco is not interested in this area of business, but this information is vital for us to properly address Timken s allegations that there is in fact a domestic market."

TIMKEN SA replied to the request in these terms in a letter it addressed to BTT dated 5 March 1993:

"In 1992 approximately 57% of the Class C and approximately 42% of the Class D bearings sold in the USA were to domestic USA customers. We do not have a breakdown of sales to AAR railroads, privately owned wagons or industrial sales.

We have obtained information that on the AAR railroads, at end 1992, there were some 2978 wagons in service on Class C bearings and 58514 wagons on Class D bearings - combined total - 61492 wagons on the bearings under discussion.

Transnet current wagon fleet is in the order of 150 000 wagons of which approximately 64000 are on plain bearings (not roller bearing equipped) and approximately 5600 wagons fitted with Class F bearings. This leaves approximately 80400 wagons on Class C and D bearings. The USA fleet on C&D bearings is therefore 76% of Transnet fleet size."

BTT passed the contents of the reply onto BRENCO'S attorneys. It is thus apparent that BTT supplied the information that was requested insofar as TIMKEN SA was able to furnish it to BTT.

[41] As to the issues relating to injury to TIMKEN SA and the causal link between such injury and the alleged dumping, and TIMKEN SA's manufacturing process:

[41.1] the essential aspects of injury were revealed;

[41.2] TIMKEN SA's manufacturing processes was not dealt with by BTT in reaching its conclusions, but the essential features of the injury to TIMKEN SA in respect of employment and the threat of closure of its plant were revealed to the respondents;

[41.3] in relation to the injury suffered by TIMKEN, disclosure was indeed made to the respondents;

[41.4] as to the causal link, BTT's decision did not turn upon matters of confidential information.

[42] In my view upon careful analysis of the issues that were relevant to BTT in making a recommendation, the information that was made available to BRENCO as also the information which was known to BRENCO about its own affairs in the United

States of America sufficed for the purpose of BRENCO knowing the substance of the case that it had to meet. Such information as was withheld was confidential. TIMKEN SA claimed protection for this confidential information. However non-confidential summaries of the information were furnished. Judged against these considerations, fairness did not demand that every shred of information provided to BTT should be made available to the respondents. Rather the general standard, as enunciated in our law and detailed above, is of application. An interested party must know the "gist" or substance of the case that it has to meet (*Du Preez*)[29]. That standard was met. It is also not without significance that Brenco has not sought to indicate what its answer is to BTT' s finding that it was indeed guilty of dumping.

NON-DISCLOSURE OF ADDITIONAL INFORMATION RECEIVED FROM TIMKEN SA

[43] When the record was filed pursuant to Rule 53, it emerged that there was certain additional information which BTT had received from TIMKEN SA which had

[29] Supra at 232 C-D.

not been disclosed to the respondents. The first item of information was a letter dated 2 March 1993 from TIMKEN SA to BTT. The opening paragraph to the letter states as follows:

> "We refer to the recent meeting at your offices during which you posed cetain questions and requested various documents from us. You also provided photo copies of certain slides from the Webber Wentzel presentation to the Board for any further comment we may wish to make."

The letter continues to make various submissions to the Board.

[44] In my opinion the letter was not one which needed to be disclosed to Brenco. It raises no new matter which Brenco had not previously dealt with and was merely in substance a reply by TIMKEN SA to BRENCO's answer. Having now seen the letter it is significant that BRENCO has given no indication of what its answer to it would have been had it been disclosed earlier (cf *S v Rudman and Another; S v Mthwana*)[30] . Furthermore, the process of allegations, answer, reply and rejoinder could well have gone on without end.

[45] The second piece of additional information which was not disclosed to Brenco

[30] 1992(1) SA 343(A) at 391 H-J.

was a letter dated 21 July 1993 from TIMKEN SA to BTT. BTT relied upon the confidential nature of the letter as excusing its disclosure. In its answering affidavit BTT states that the letter was a response by TIMKEN SA to questions asked by BTT in its process of verifying the information supplied to it by TIMKEN SA and that BTT regarded the information as being of a confidential nature. For the reasons set out above concerning BTT's obligations in regard to confidential information, I cannot find fault with this answer. In addition, what I have stated above concerning the failure of BRENCO to give any indication of what it might have said in regard to the letter of 2 March 1993, apply equally to this letter.

BTT'S VISIT TO TIMKEN SA'S PLANT

[46] It is common cause that members of BTT visited TIMKEN SA's plant in Benoni and used this opportunity to verify information submitted by TIMKEN SA.

It is also common cause that the respondents were:-

[46.1] unaware that such visit was due to take place;

[46.2] not present when such visit took place;

[46.3] never given the “information” received by the Board at this visit;

[46.4] never given an opportunity to test the correctness and accuracy of the information so submitted by TIMKEN SA to BTT.

[47] The appellants, whilst not disputing that this visit occurred, state that apart from verifying the information in question, no new or other information was obtained during the visit. As pointed out in the appellant’s heads of argument, it was necessary for BTT’s investigator to visit the premises of the petitioner (in this case TIMKEN SA) in the merit investigating stage of its task in order to check the accuracy of the information submitted by the petitioner so as to determine whether there is *prima facie* evidence of dumping. In addition, BTT’s investigator may need to visit the premises of other parties to the investigation in order to check the accuracy of the data submitted by those parties. What is involved is a technical check that the facts and figures submitted by the party in question are accurate - there is no assessment of the

meaning or significance of such facts and figures. These are not occasions during which the veracity or substance of the petitioner's claims are judged in the absence of other parties affected by such a decision. They are simply occasions on which the actual data supplied by one of the parties are checked for accuracy. It is not the kind of exercise where it is necessary or feasible to take all parties along - or where to do so would serve any purpose. This is particularly so where the visit is to a competitor's plant. The relevant information, duly verified (i.e. checked for accuracy), is in due course made available to all interested parties. Where such information is confidential, non-confidential summaries are supplied to the interested parties.

This too accords with international practice.[31]

[48] In accordance with standard practice, BTT's investigators visited Timken SA's

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[31] Significantly, Article 6.5 of the Anti-dumping Code (and Article 6.5.2 of the Uruguay Round Anti-dumpingAgreement) contemplates verification visits in other countries. Participation of all parties in such visits would be unwieldy, exorbitant and indeed, unfeasible. This illustrates that fairness, in the context of an anti-dumping investigation, does not require that all parties are physically present whenever there is contact with one particular party or any consultant in the process. In the present case, BTT did not visit the premises of BRENCO in the USA because the latter would grant access only if BTT undertook to base its investigation upon a

plant in Benoni on 9 October 1992 in order to check the accuracy of the information submitted by Timken in its petition and in the questionnaire; that information was made available to the respondents. BTT's answering affidavit reveals that the investigators obtained no new information during the visit of 9 October 1992. Visits also took place to BRENCO's premises in the absence of TIMKEN SA's representatives.

[49] In *Nakajima All Precision Co Ltd v Council of the European Communities,*[32] the applicant complained, among other things, that in its determination of injury, the Commission there relied in particular on information obtained during an investigation carried out at the premises of the producers concerned. The ECJ said of this:-

> "In this connection, it should be recalled at the outset that, according to established case-law, the rights of the defence are respected if the undertaking concerned has been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and, if necessary, on the documents used .....
>
> It would appear in this case from the minutes of the meetings between Nakajima and the Community institutions, as well as from the correspondence between the parties, that the applicant was involved at every stage of the proceedings and was therefore in a position to make its point of view known.

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particular definition of dumping, which BTT was not prepared to do.

[32] c-69/89 [1991] ECR 1- 069 at pp 2197 - 2198 paras 108-110.

> Furthermore, Nakajima had all the information which it required to defend itself effectively and in good time ....”

The same can be said of the respondents in the present matter.

[50] I agree with the appellants' submission that the finding of the court *a quo* that the visit to TIMKEN SA's plant was in breach of the principles of natural justice pays insufficient regard to the nature and purpose of the visit in the context of the investigation as a whole. MacArthur J erred when he understood BTT's explanation of the verification visit as an invocation of the "no-difference" approach rejected by this court in *Zenzile*,[33] whereas the explanation sought only to place the visit in its proper context. I also agree with the appellants' submission that the respondents' approach, accepted by MacArthur J, is an instance of inflexible formalism in the approach to natural justice, which is at odds with *Zenzile*.[34] A much "more context-sensitive and nuanced approach", in the words of counsel for the appellant, is demanded in assessing what is required by natural justice and the principles of fair

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[33] Supra at 37C-F.

play.[35]

[51] There is no requirement that BTT in the investigation of a matter must inform the parties of every step that is to be taken in the investigation and permit parties to be present when the investigation is pursued by way of the verification exercise. There is no unfairness to the respondents in permitting the officials of BTT to clarify information without notice to the respondents. To hold otherwise would not only unduly hamper the exercise of the investigative powers of BTT, but would seek to transform an investigative process into an adjudicative process that is neither envisaged by the BTT Act, nor what the *audi* principle requires. [36]

CONSULTATIONS AND ADVICE FROM THE DIRECTORATE OF BUSINESS ECONOMICS INVESTIGATION

[52] It is common cause that BTT requested the Directorate of Business Economics Investigations ("BEI") to check the available information and to advise it as regards

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[34] Supra at 40B-E.

[35] Supra at 231 H- 232E.

[36] Supra at 231 H- 232E.

what further information would be required for verification purposes. Several consultations were held with members of BEI who were supplied with certain documents and with other files of background information. The respondents-

[52.1] were not aware what consultations were held with members of BEI, nor what documents and files were supplied to BEI;

[52.2] were not invited to be present during such consultations;

[52.3] were never informed of what transpired at such consultations;

[52.4] were never given an opportunity of dealing with any information or advice furnished by BEI to the Board and were never afforded an opportunity to test the correctness and accuracy of such advice and information.

[53] BTT's request to BEI to check available information and to advise it of aspects of verification is a further instance of BTT carrying out its investigative functions. In the absence of some vexatious or oppressive behaviour by BTT, and none is alleged, I do not believe the *audi* rights claimed by the respondents apply to the steps

taken by BTT in this regard. Furthermore, for the respondents to succeed on this ground they would have to make out a case that information was yielded in consequence of the consultations held which altered in a material way the substance of the case that the respondents were required to meet. No such case has been made out.

[54] As appears from BTT's answering affidavit, what was sought from BEI was that it check information supplied by the parties. BTT never received or considered any information from BEI. Accordingly the consultations with BEI brought about no unfairness to the respondents.

[55] The court *a quo* accepted the respondents' contention that BTT's investigating team, in consulting the directorate of BEI without giving notice of such consultation to the respondents, breached the principles of natural justice. I do not agree. In my view this again is an instance of over-rigid formalism in the approach to procedural fairness. There was nothing untoward in BTT's investigating team seeking from BEI

expert assistance in relation to accounting practices in order to perform its functions properly.

[56] BTT's answering affidavit, apart from showing that a member of the BEI was actually present at a meeting with the respondents' legal representatives, places the BEI consultations in context. When this context is taken into account, it is clear that the consultations between BTT's investigating team and BEI did not compromise the fairness of the investigation.

TIMKEN SA'S VISIT TO BTT's OFFICES

[57] It is common cause that representatives of TIMKEN SA visited BTT's offices on a number of occasions to discuss certain issues with BTT. It is also common cause that the respondents-

[57.1] were unaware of the fact that such visits had occurred;

[57.2] were never invited to be present during such visits;

[57.3] have never been furnished with information arising out of such visits.

[58] I cannot agree with the court *a quo's* finding that it was irregular or unfair for TIMKEN SA's representative to have visited BTT's offices and to have had discussions with BTT's representatives in the absence of BRENCO's representatives. This finding pays insufficient regard to the fact that visits by one or more parties is a feature of any anti-dumping investigation. Indeed in the present case, the respondents' legal representatives also visited the offices of BTT in the absence of TIMKEN's representatives. In the circumstances, the respondents' representatives must have been well aware of the nature of such visits, and of the fact that any relevant information derived from such visits would be put to other interested parties.

[59] It is basic to BTT's functions that it must carry out investigations; which involve procuring information. BTT may do so in various ways, as the BTT Act indicates. Much depends upon the co-operation of the parties - both the petitioner and the respondents. That BTT's offices are visited by parties to discuss an ongoing investigation simply forms part of the investigative process. Such visits are not an

occasion upon which any form of determination or adjudication takes place which might require that all interested parties be present to make representations. The particular visit was made at the initiative of TIMKEN SA. No information was obtained, except for the confidential information referred to above, which was withheld from the respondents. In my view the visit to BTT's offices in the absence of the respondents gives rise to no valid complaint by the respondents.

CONTRADICTORY INFORMATION SUPPLIED BY BRENCO'S LEGAL REPRESENTATIVES

[60] In the BTT REPORT, the following is stated:

> "Problems were experienced with contradictory information supplied by Brenco's legal representatives. In Brenco's legal representatives submission of 15/04/93 it was stated that the Board could not use FAG's tender price to Pakistan as regards Class C bearings 'as no sales were actually made at these prices'. In a later submission Brenco's legal representatives, on request, submitted FAG's invoices to the Pakistani Railroad which clearly indicated that the bearings were sold at the tendered price."

The respondents' complaint is that:

[60.1] **t**his finding was considered by BTT to be important;

[60.2] the question of the alleged contradictory evidence was never raised with the respondents or their representative and appeared for the first time in the

REPORT;

[60.3] neither the respondents nor their representatives were given an opportunity of dealing with this allegedly "serious allegation" or of responding to what the respondents contend is "the implication of unreliability, dishonesty and lack of credibility".

[61] The deponent to BTT's answering affidavit states that BTT never accused or intended to accuse the respondents' legal representatives of unreliability or dishonesty "and any such consideration was never in the Board's contemplation or in any way affected its judgment" , I can find no good reason to reject this statement. In the context of the type of investigation being conducted by BTT, I do not believe that it was necessary for BTT, before preparing its report, to have first put what it considered to be contradictory information supplied to it to the legal representatives of BRENCO. I am accordingly of the view that there is also no substance in this complaint. Nor do I consider that there was any violation of the rules of natural

justice.

THE ALLEGATION OF ALTERING INVOICES

[62] The BTT REPORT states:

> "The Board noted that the invoice supplied by Brenco s legal representatives regarding exports to Pakistan was not an exact copy of the original invoice as certain changes had been made. The invoice originally submitted to the Board was altered as regards the addressee and the terms of the contract. The Board accepted the first invoice submitted as a true copy of the original."

The respondents complaint is that:

[62.1] the finding was considered by BTT to be important;

[62.2] the allegation that the invoice originally submitted to BTT was "altered", so the respondents' contend implicitly, suggests some act of "dishonesty" on the part of the respondents or their representatives;

[62.3] the question of the alleged alteration was never raised with the respondents or their representatives and appeared for the first time in the BTT REPORT;

[62.4] neither the respondents nor their representatives were given an

opportunity of dealing with what is contended is a serious allegation or of responding to the claimed implication of "dishonesty".

[63] The deponent to BTT's answering affidavit states that BTT did not intend to accuse BRENCO's legal representatives of any dishonesty or to imply that they had acted dishonestly. Again I have no reason to reject this statement. He further states that the respondents could obviously have dealt with the document if they so wished. I find nothing unreasonable or unfair in this contention. I accordingly believe that this complaint is equally without substance and does not support the respondents' claim of unfairness.

REASONABLE APPREHENSION OF BIAS ON THE PART OF BTT

[64] The respondents rely upon the following matters in support of their contention that there was a reasonable apprehension of bias on the part of BTT:

[64.1] BTT's visit to TIMKEN SA's plant in Benoni without informing the respondents of such visit or giving the respondents an opportunity to test the

correctness and accuracy of the information submitted by TIMKEN SA to BTT;

[64.2] BTT's request to the directorate of BEI to check the available information and to advise it as regard what further information would be required for verification purposes.

[65] I have already dealt with the visit and the request. In my view it cannot be fairly said that these matters give rise to any reasonable apprehension of bias on the part of BTT. The cases of *Katz v Peri-Urban Areas Health Board and Others*[37] and *Errington v Minister of Health*[38] to which the respondents refer, deal with instances where an official engaged in a deliberative process to determine a matter receives representations from one party when the other is not present to deal with the representations. These are not cases, such as the present one, where investigative powers are exercised. Bias arises when a deliberative process is subverted by

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[37] 1950(1) SA 306 (W) at 308-309.

[38] [1935] 1 KB 249.

receiving information and hearing one party to the deliberate exclusion of the other. This is not such a case. Here the procedure of verification and receipt of information formed no part of the deliberative process by which BTT came to make its recommendations; during that entire lengthy process which extended over many months the respondents made representations, at numerous meetings, in telephone calls, and in exchanges of correspondence, as well as at a full oral hearing which accorded the respondents full rights of representation. Throughout the process the respondents knew the substance of the case that they were required to meet.

[66] The respondents in their heads of argument also refer to two specific pieces of evidence as allegedly supporting their assertion of a reasonable apprehension of bias on the part of BTT. The first concerns a member of BTT, Mr Heyns, who said at a seminar in Durban that he knew of TIMKEN SA as a local manufacturer and that there were “accusations” of “unfair trade practices” against FAG. The second concerns remarks made by a Mr Olivier, an officer of BTT.

I did not understand counsel for the respondents to press details of these two specific matters in his oral argument before this court in support of his argument concerning bias. He, however, contended for an apprehension of bias in more general terms, based on the overall conduct of BTT in its approach to the matter. In any event, and in the light of the explanation given by both Heyns and Olivier, and viewed in the context in which the remarks were made, I do not believe that the remarks can reasonably be said to give rise to an apprehension of bias on the part of BTT. Nor do I believe that there is any substance in counsel for the respondents' argument to the effect that the overall conduct of BTT gives rise to such an apprehension.

[67] I now turn to consider the specific complaints against the second and third appellants. The functions complained of were carried out in this case not by the ministers themselves but delegated by them to their respective deputies. The attack on the validity of such delegation, previously made by the respondents, was abandoned in this court.

[68] It is common cause that the second appellant did not:

[68.1] **g**ive any advance indication to the respondents of the facts and circumstances he proposed to take into account before requesting the third appellant to amend the schedule to the CE Act so as to impose the anti-dumping duties in question;

[68.2] give the respondents an opportunity of seeing or testing the information which he had before him;

[68.3] afford the respondents a hearing before requesting the third appellant to impose a final duty;

[68.4] notify the respondents that he had received the BTT REPORT and that he was considering making a request to the third appellant arising out of the report.

[69] The second appellant admits that the respondents were not afforded a hearing.

He takes the view that it would

"appear to have been senseless, unnecessary and superfluous to either refer the matter back to the Board or to afford the applicants an opportunity to be heard".

[70] It is also common cause that the third appellant did not:

[70.1] give any advance indication to the respondents of the facts and circumstances he proposed to take into account;

[70.2] give the respondents an opportunity of seeing or testing the information which he had before him;

[70.3] afford the respondents a hearing before he imposed a final anti-dumping duty;

[70.4] notify the respondents that he had received a request from the Trade Minister and was considering imposing final anti-dumping duties pursuant to such request.

The third appellant's stance in regard to these charges is identical to that of the second appellant.

[71] Section 4(2) of the BTT Act does not contemplate and fairness does not require that the second appellant should afford to persons in the position of the respondents a further and independent hearing before acting in terms of the subsection. If the second appellant in the light of policy factors, considers that the terms of the recommendation should be amended, or that further investigation is required, he has no option but to refer the matter back to BTT. He has no power to reconsider the matter or to effect such changes himself. Any further consideration is to be undertaken by BTT, the body which conducted the investigation, and not the second appellant. This underscores the fact that it is BTT, and only BTT, which must entertain the representations of the parties affected by its report and recommendations.

I agree with the appellants submission that there would be no point in requiring the second appellant to receive from the parties affected representations in addition to those already made to BTT.

Neither s 4(2) of the BTT Act, nor s 56 read together with s 55(2) of the CE Act, nor

fairness, requires the third appellant to give to parties affected by the imposition of anti-dumping duties a further and independent hearing before acting in terms of those provisions.

[72] Even leaving aside the provisions of the two Acts, I do not believe that in the present case, where there was no procedural unfairness in the detailed investigation by the body solely entrusted to undertake such an investigation, the respondents are nevertheless entitled to a further separate and independent hearing before either of the two ministers. In this regard the following remarks in *Enichem Anic Srl v Anti-Dumping Authority*[39] are instructive. The case deals with the Australian Anti-Dumping Authority Act of 1988 in relation to the importation of forklift trucks into Australia from the United Kingdom and the question of whether procedural fairness required that the applicants were entitled to put submissions to the Minister of State for Small Business Construction and Customs who had imposed dumping duties on

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[39] (Federal Court, 9 April 1992, pp 17-18) Quoted with approval in *Hyster Australia (Pty) Ltd and Another v Anti-Dumping Authority and Others*, (1993) 112 ALR 582 at 597/8.
See also Aronson and Dyer - *Judicial Review and Administrative Action* (LBC Information Services

the forklift trucks based upon recommendations of the Anti-Dumping Authority:

> "The rules of procedural fairness did not require that every particular submission made by a party to the inquiry by the Anti-Dumping Authority should be brought to the Minister's attention. Procedural fairness was provided by the inquiry of the Anti-Dumping Authority and by the report of the Anti-Dumping Authority to the Minister. Procedural fairness is ordinarily complied with when it appears that the Anti-Dumping Authority gave a fair opportunity to interested persons to put submissions and when the Anti-Dumping Authority reported thereon. The legislative purpose in providing the inquiry is to enable the individual submissions of interested parties to be considered. Ministers of State would not have the time to give to the matter the detailed consideration which the Anti-Dumping Authority is able to do. It follows, therefore, that in the ordinary case, provided the Anti-Dumping Authority gives to interested parties the opportunity to put a case and then issues a report thereon dealing with matters of substance which were raised, procedural fairness is provided. The Minister himself, if he wishes to look at individual submissions, would be entitled to do so but there is no lack of natural justice if he fails to do so. What is procedurally fair must be determined in the light of the whole of the circumstances..."

COSTS

[73] The respondents' counsel asked for a special costs order in terms of Rule 8(6) of this court, to the effect that in the event of the appeal suceeding, the appellants should be deprived of certain costs relating to the record filed. This was because of a request made in terms of Rule 8(8)(a) by the respondents' attorneys to the appellants' attorneys in a letter dated 16 September 1999. The request was that the appellants consent to the submission of an agreed statement of the issues of unlawful delegation, breaches of natural justice on the part of the second appellant, the third

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1996) 521 - 524.

appellant and BTT, and to agree to a statement of facts. In my view the appellants were justified in refusing to accede to the request. It was necessary for this court to have the full record of the proceedings before the court *a quo* in order to properly assess the merits of the various contentions, particularly in regard to the conduct of BTT of which the respondents complained. I accordingly see no good reason to make any special costs order and why costs should not follow the result.

[74] It is ordered:

[74.1] the appeal is upheld with costs including costs attendant upon the employment of two counsel by the appellants.

[74.2] the order of the court *a quo* is set aside and the following order substituted in place thereof:

"The application is dismissed with costs including costs attendant upon the employment of two counsel by the respondents."

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R H ZULMAN JA

MARAIS JA)
STREICHER JA) CONCUR
NAVSA JA)
MPATI JA)