Degussa Africa (Pty) Ltd and Another v International Trade Administration Commission and Others (22264/2007) [2007] ZAGPHC 112 (20 June 2007)

/ES
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DELIVERED: 20/6/2007
CASE NO: 22264/2007
NOT REPORTABLE

In the matter between:

DEGUSSA AFRICA (PTY) LTD FIRST APPLICANT
DEGUSSA CORPORATION (US) SECOND APPLICANT

AND

INTERNATIONAL TRADE ADMINISTRATION COMMISSION FIRST RESPONDENT
SOUTH AFRICAN BIOPRODUCTS (PTY) LTD SECOND RESPONDENT

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE THIRD RESPONDENT

JUDGMENT

SERITI J:

1. INTRODUCTION

This matter came to court by way of an urgent application.

In the notice of motion, the applicant is seeking an order in the following terms:

[1] condoning the applicant's omission to comply with the rules of court and entertaining this matter as one of urgency;

[2] reducing the period of notice required in terms of section 96(1) of the Customs and Excise Act, 1964 with respect to the third respondent so as to allow the applicant to bring this application as a matter of urgency;
[3] reviewing and setting aside the decision of the first respondent to request the Commissioner of the South African Revenue Service to impose provisional payment, in relation to safeguard duties amounting to 160% *ad valorem* on further imports of L-Lysine HCl classifiable under tariff subheading 2922.41 and L-Lysine sulphate classifiable under subheading 2309.90.65 ("safeguard duties") and the consequent imposition of the safeguard duties;
[4] directing the first respondent to within two days of this order, request the Commissioner of the South African Revenue Service to withdraw with retrospective effect from 11 May 2007, the safeguard duties; and
[5] costs.

1.
FOUNDING AFFIDAVIT

It was attested to by Mr Herman Claasen, business unit manager of the first applicant.

He alleges that the first applicant is a duly registered company which imports the product which forms the subject matter of this application.

The second applicant is a US corporation incorporated in accordance with the laws of Alabama and the producer of the product under consideration and exported to South Africa.

The second respondent is a company duly incorporated in South Africa and is the producer of the product, Lysine in South Africa.

Other parties in this action are also described in details.

He further alleges that section 96 of the Customs Act provides that, unless specifically agreed between the litigant and the Commissioner of the South African Revenue Service ("the Commissioner of SARS"), no process by which any legal proceedings are instituted against the Commissioner of SARS may be served before the expiry of a period of one month after the delivery of the notice prescribed in that section of the Customs Act.

On 29 May 2007 Mr Meluleki Nzimande of his attorneys of record, contacted Mr Joseph Mahape, a legal officer in the customs section of the legal department of SARS to request a reduction of the notice period.

He was advised by Mr Nzimande that he (Mr Nzimande) explained to Mr Mahape that the applicant intends to bring an urgent application and it would not be able to comply with the provisions of section 96 of the Customs Act regarding the notice period and requested for a reduction of the notice period, and the said request was declined.

In the circumstances the applicant hereby applies in terms of sections 96(1)(c)(ii) of the Customs Act for the reduction of the notice period as the applicant gave the said notice only on 31 May 2007.
He further alleges that this application concerns the urgent review of the first respondent's decision to request the Commissioner for the South African Revenue Service to impose provisional safeguard measures for a period of two hundred days and the setting aside of such decision and such duties.

The decision of the Commission to request the Commissioner of SARS to impose provisional safeguard measures was:
(a)
taken summarily and without any notice to the applicants of the nature and purpose of the imposed administrative action and without affording the applicants any opportunity to make representations and accordingly constituted procedurally unfair administrative action adversely affecting the rights of the applicants;
(b)
was contrary to the Constitution and the common law;
(c)
was contrary to the provisions of International Trade Administration Act 2002, Article XIX of the World Trade Organisation Agreement on Tariffs and Trade 1994 (GATT 1994), the World Trade 0rganisation Agreement on Safeguards promulgated pursuant to that article (the "safeguard agreement") and the safeguard regulations.

The applicant faces irreparable harm if the provisional safeguard measures remain in force for a period of two hundred days as the first applicant will lose its customers with drastic consequences for the applicant.

On 11 May 2007 the Commission formally initiated an investigation into remedial action in the form of safeguard measures against the increased imports of Lysine and simultaneously published a preliminary determination.

The investigation was initiated pursuant to an application lodged on behalf of the South African Customs Union ("SACU") industry by the second respondent, who is the only producer of L-Lysine HCl in SACU.

The Commission made a preliminary determination that there was a surge of imports of the subject product causing serious injury and threatening to cause further serious injury to the SACU industry. The Commission further said "The Commission decided that there are critical circumstances where a delay would cause damage that would be difficult to repair." It further decided that "there is clear evidence that the increased imports have caused and are threatening to cause further serious injury to the SACU industry, based on this decision, the Commissioner decided to request the Commissioner of the South African Revenue Services to impose provisional measures for a period of two hundred days".

Pursuant to the said request and contemporaneously with the notice of initiation of the safeguard investigations on the same day, the Commissioner of the South African Revenue Services imposed provisional safeguard duties in an amount of 160% *ad valorem* on all countries pursuant to section 57A of the Customs Act up to and including 21 November 2007.

The preliminary determination states that "This investigation is conducted in accordance with the International Trade Administration Act 2002 (ITA Act), the World Trade Organisations Agreement on safeguards (the Safeguard Agreement) and the International Trade Administration Commission Safeguard Regulations".

The products, which are the subject of the investigation, are described in the preliminary determination as L-Lysine HCl. The product is classifiable under the customs tariff classifications. The products are used as amino acid feed supplement for use in animal feed. He further alleges that the imposition of the provisional safeguard measure was unlawful.

The first respondent has failed, prior to requesting the Commissioner of the South African Revenue Services to impose provisional safeguard to provide the applicants with

(i)
any notice of the nature and purpose of the requested administrative action;
(ii)
a reasonable opportunity to make representations; and
(iii)
a clear statement of the administrative action.

Furthermore, on a proper interpretation of the International Trade Administration Act 2002, the Safeguard Agreement and the Safeguards Regulations, a preliminary determination and the request to the Commissioner of the South African Revenue Services to impose provisional payments can only be made after the publication of the notice initiating the investigations. In this case, the preliminary determination was made prior to the publication of the notice of initiation of the investigation.

Article 12, paragraph 4 of the Safeguard Agreement specifically provides that a member shall make notifications to the Committee on Safeguards of the World Trade Organisations before taking a provisional safeguard measure. The Commission failed to so notify the World Trade Organisation's Committee on Safeguard prior to the imposition of the provisional safeguard measures contrary to the provisions of article 12 mentioned above.

A safeguard measure can only be imposed in response to rapid and significant increase in imports. The statistics submitted to the Commission by the second respondent indicates the contrary.

As it appears from the second respondent's applications that it submitted to the Commission, the non-confidential application is dated 27 March 2007. The Commission indicated that it first received the second respondent's application for the first time on 5 April 2007.

Notwithstanding the fact that the Commission took approximately five weeks from the date of receipt of the second respondent's applications to initiate the investigation, the Commission failed to give the applicants the opportunity to make representations.

The second respondent took eight days to submit its applications to the Commission after it had finalised it.

By denying the applicants the opportunity to be heard the Commission is in breach of sections 3(2)(b) and 6(2)(c) of PAJA.

3. FIRST RESPONDENT'S ANSWERING AFFIDAVIT

It was attested to by Mr E C I Masege, the acting chief commissioner of the first respondent.

Mr Masege alleges that the provisional safeguard measures imposed by the first respondent are both necessary and justifiable to protect the relevant SACU industry.

It was both reasonable and justifiable for the first respondent to depart from the requirements of section 3(2) of PAJA.

The provisions of the International Trade Administration Act 71 of 2002 read with the Safeguard Regulations and the Safeguard Agreement empower the Commission to evaluate the merits of an application in respect of the imposition of safeguard duties and measures and to recommend that the application be approved or rejected. Regulation 17 empowers the Commission to impose a provisional payment as soon as it has made a preliminary finding that there are critical circumstances where delay would cause damage that would be difficult to repair and where there is clear evidence that increased imports have caused or are threatening serious injury.

Regulation 6.1 requires the Commission to provide for consultations in a general safeguard investigation within fourteen days of the imposition of a provisional payment.

Furthermore, article 6 of the Safeguard Agreement empowers the Commission, in circumstances as stated in Regulation 17 of the Safeguard Regulations to take a preliminary safeguard measure pursuant to a preliminary determination. The article suspends the operations of articles 2 to 7 and 12 of the said agreement, which deal with, *inter alia*, investigations, public notice to and representations by importers, exporters and other interested parties.

The obligation to notify and afford opportunity to make representations only arises after the Commission has imposed the provisional safeguard measures, and the Commission had complied with the said obligation.

Under these circumstances the Commission was empowered to request the Commissioner of SARS to impose provisional safeguard measures without notification to the applicants and providing them with an opportunity to make representations.

Any effect of the first respondent's decision is of a temporary nature and justifiable for the purpose for which it was taken. If following investigations (including obviously, the opportunity for representations and consultations) the first respondent concludes that provisional payments should not have been imposed, they are immediately suspended and all payments made will be refunded to the entity against whom they were originally imposed.

The imposition of a definitive safeguard measure requires prior notification and consultations with and representations by affected parties. This process can take a long time – unless an urgent and prompt decision is taken the continued importation would have adverse and irreparable consequences for the domestic industry.

The urgency to stem the tide of imports make it justifiable to exclude, temporarily, the need to comply with process such as contemplated in section 3(2) of PAJA.

Mr Masege denies that on any interpretation of the International Trade Administrations Act 71 of 2001, the Safeguard Regulations and the Safeguard Agreement, a preliminary determination and the request to the Commissioner of SARS to impose provisional payments can only be made after the publication of the notice initiating the investigation.

The first respondent notified the Committee on Safeguards of the investigation as well as the imposition of the provisional payment on 14 May 2007.

Mr Masege further alleges that article 6 empowers the first respondent not to comply with the requirements of *inter alia,* article 12 including paragraph 4. The empowering provision, being article 6, stipulates the following key issues to be satisfied:

(i)
a member must determine the existence of critical circumstances;

(ii)
a member must take a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury;

(iii)
a provisional safeguard measure may be imposed pursuant to such determination;

the period of the provisional measure should be limited to two hundred days.

Mr Masege denies that the preliminary determination and the imposition of provisional payments have an irreparable adverse effect upon the business of the applicants. Mr Masege further alleges that should it be found after further investigations and considerations of the representations of all interested parties that it is not necessary to impose definitive safeguard measures the amount of provisional payments shall be refunded to the applicants.

The information assessed by the first respondent indicated that the import volumes increased significantly from the year 2000, and increased by 5% between 2004 and 2005. The information made available further indicated that the imports as a percentage of the SACU industry's output increased significantly from 100 basis points in 2002 to 1637 basis points in 2006. The information indicated that the second respondent was losing market share in an expanding market.

Based on the import statistics for the period 2002 to 2006, a preliminary determination was made that there was a rapid and sharp increase in imports, both in absolute terms and relative to domestic productions. The first respondent decided that *prima facie* information was submitted to indicate that the surge in imports is causing serious injury to the SACU industry and made a preliminary determination to that effect. The first respondent therefore decided to initiate a safeguard investigation. It further decided to impose provisional measures due to the critical circumstances prevailing.

4. SECOND RESPONDENT'S ANSWERING AFFIDAVIT

It was attested to by Mr M J Perling the chief operating officer of the second respondent.

Mr Perling alleges that the second respondent is a manufacturing company operating in the global biotechnology industry. The second respondent's plant is capable of producing 20 000 tons of lysine per annum or its equivalent of other amino acids and has a carrying cost of R276 000 000.00.

The second respondent earned profits in 2001-2004. Since then it incurred significant losses.

The directors of the second respondent urgently needed to find a strategic investor and by mid November 2006, an agreement was concluded whereby Oakbreak Investments purchased 73% of the second respondent's shares subject to it providing working capital.

The sudden rapid surge in imports in the latter part of 2006 and early 2007 has resulted in the second respondent losing local market share to what it perceives to be unreasonably low priced imports. The effect of the loss of local market

share is a very real risk that the second respondent may be closed down. As a result of the above factors the second respondent made applications to the first respondent for remedial actions and the imposition of safeguard measures to protect the SACU industry.

The first applicant commenced importing Biolys into South Africa in 2002 and there has been a rapid and significant increase since the second half of 2006. Regulations 17, 18 and 19 specifically contemplate that provisional measures may be put in place to operate during the interim period and that an opportunity be provided to participating and interested parties to make representations and express their view prior to definitive measures being put in place if necessary.

There is evidence that the second respondent will be harmed if the provisional measures are not put into place for two hundred days, which provisional measures can be reversed in due course if circumstances so dictate.

The second respondent's application for remedial action set out detailed confidential information, which the first respondent scrutinised and checked. Following upon its investigation it made the preliminary determination that there are critical circumstances where a delay would cause damage that would be difficult to repair and further that there was clear evidence that the increased imports have caused and are threatening to cause further serious injury to the South African Custom Union industry.

The preliminary determination was published in the same *Government Gazette* as the notice of initiation of the investigations. He denies that there is anything irregular with that procedure.

He further alleges that on a proper construction of the regulations it is not conceivable that the publications could be made before the determination.

The first respondent had sufficient information before it and conducted its own investigations which led it to come to the conclusion as motivated in its preliminary determination, prior to requesting the third respondent to impose provisional payments.

5.
FIRST AND SECOND APPLICANT'S REPLYING AFFIDAVIT
It was attested to by Mr Herman Claasen, the business unit manager of the first respondent.

Mr Claasen alleges that it is not correct that the second respondent earned profits in 2004. He referred to the first respondent's report no 193 into the anti-dumping investigation instituted by the second respondent against the applicants earlier. In the said report the first respondent referred to certain indexed information stated in a certain table. The said information is in conflict with the nett profit margins stated by the first respondent in its preliminary determination

in the safeguard investigation.

Mr Claasen referred to certain data and denied that there was any rapid and significant increase of exports of Biolys from the United States.

He denies that the second respondent faced any risk of closure if the provisional measures were not in place.

He further alleges that the first respondent made a preliminary determination without properly investigating the matter. A proper investigation in the matter would have entailed the consideration of representations made by interested parties, including the applicants. The first respondent did not have the benefit of such representation.

Article 12.4 of the Safeguard Agreement was not complied with since no notification was given to the Committee on Safeguards before the provisional safeguard measure was imposed. Notification was given on 14 May 2007, some three days after the provisional safeguard measure was imposed.

The first respondent should have regard to the previous information furnished by the second respondent in the anti-dumping investigations in order to verify the accuracy of the information provided by the second respondent. This it clearly did not do.

There is a discrepancy in the profit information furnished by the second respondent in the investigations under consideration and that submitted by the second respondent in previous investigations.

Analysis of the previous investigations might reveal other discrepancies.

The case of the alleged injury suffered by the second respondent was as a result of factors other than imports, namely export performance, the decline in the international price of Lysine and the strengthening of the Rand.

6.
LEGAL FRAMEWORK

Section 33(1) of the Constitution Act, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Sub-section (3) thereof provides that national legislation must be enacted to give effect to these rights and must, *inter alia*, provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal.

Section 3(1) of the Promotion of Administrative Justice Act no 3 of 2000 provides that an administrative action which materially and adversely affects the right or legitimate expectations of any person must be procedurally fair.

Sub-section 2(b) stipulates that in order to give effect to the right to procedurally

fair administrative action, an administrator, subject to sub-section (4), must give a person referred to in sub-section (1) -
(i)
adequate notice of the nature and purpose of the proposed administrative action;
(ii)
reasonable opportunity to make representations; etc.

On the other hand, sub-sections (4) and (5) provides that in certain mentioned circumstances, an administrator may depart from the provisions of sub-section (2) mentioned above.

Section 26(1)(d) of the International Trade Administration Act 71 of 2002 provides that a person may, in the prescribed manner and form, apply to the Commission for the imposition of safeguard measures other than a customs duty amendment.

Sub-section (3) thereof reads as follows:
"(a) The Commission may, before considering an application, give notice of the application in the *Gazette*.
(b)
If it does so, the Commission must –
(i)
allow interested parties the prescribed time to make written representations concerning the application; and
(ii)
ensure that notice of its decision or recommendations in the matter is subsequently published in the *Gazette*."

Section 54(1)(d) provides that it is an offence to fail to comply with an interim or final order made in terms of this Act.

Article 16 of the Amended Safeguard Regulations promulgated in terms of section 59 of the International Trade Administration Act 71 of 2002 provides that in the event that parties that could have been participating interested parties do not cooperate in the investigations, the Commission may rely on the facts available.

Article 17 reads as follows:
"17 Provisional measures.
17.1
The Commission may request the Commissioner for the South African Revenue Service, in terms of section 57A of the Customs Excise Act 91 of 1964, to impose a provisional payment as soon as the Commission had made a preliminary determination that:
(a)

there are critical circumstances where a delay would cause damage that would be difficult to repair; and
(b)
there is clear evidence that increased imports have caused or are threatening serious injury.
17.4
The Commission will provide an opportunity for consultations with participating interested parties following the imposition of provisional measures."

Article 3 of the Safeguard Agreement which is binding on South Africa as South Africa is a member of the World Trade Organisation, reads as follows:
"1. A member may apply a safeguard measure only following an investigation by the competent authorities of that member pursuant to procedures previously established and made public in consonance with article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest."

Article 6, which deals with provisional safeguard measures provides as follows:
"In critical circumstances where delay would cause damage which it would be difficult to repair, a member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury."

Article 12(4) stipulates that a member shall make a notification to the Committee on safeguard before taking a provisional safeguard measure referred to in Article 6.

7. FINDINGS

It is common cause between the parties that on 27 March 2007 the second respondent made an application to the first respondent for remedial action to be taken in respect of the increased volume of imports of Lysine. The first respondent, without giving any notice to any party including the applicant, investigated in accordance with the second respondent's applications.

In notice 560 of 2007 published in the *Government Gazette* on 11 May 2007, the first respondent gave notice of initiation of an investigation and its preliminary determination in the investigation for remedial action in the form of safeguard against the increased imports of Lysine.

On the same date, namely 11 May 2007 and pursuant to the request of the first respondent, the third respondent imposed provisional payments in relation to safeguard duties on certain products containing Lysine. The provisional payment was 160% *ad valorem*.

In its answering affidavit, the first respondent said, *inter alia*, at paragraph 27.1 "The preliminary determination of the first respondent involved the imposition of a provisional safeguard measure. This is a drastic measure that can only be imposed under critical circumstances. It is imperative therefore that the first respondent satisfied itself that circumstances exist to justify its imposition. I submit that a period of five weeks to consider the second respondent's application is reasonable under the circumstances."

In his heads of argument and during oral argument, the applicant's counsel submitted, *inter alia*, that the first respondent breached the requirements of procedural fairness by failing to afford a hearing to interested parties, particularly the applicant before it imposed the provisional safeguard measures. He further submitted that the said failure to afford interested parties the opportunity to be heard prior to the decision of the first respondent to impose provisional safeguard measures vitiates the said decision entirely.

On the other hand, both the first and second respondent's counsel submitted that the legal framework is such that it was not necessary for the first respondent to hear the applicant and other interested parties prior to its preliminary determination, as they will still be afforded an opportunity to be heard in relation to the main determination.

In the papers before court, the applicant described in detail how the preliminary determination made and the imposition of a provisional payment is affecting their business. The said fact is not disputed by any of the respondents. In fact, the first respondent described the imposition of a provisional safeguard measure as a "drastic measure".

As stated above, section 3(2)(b)(i) and (ii) of the Promotion of Administrative Justice Act *supra* requires that in order to give effect to the right to procedurally fair administrative action, an administrator must, subject to certain exceptions, give an affected person notice of the proposed administrative action, reasonable opportunity to make representations, etc.

It is common cause that the first respondent has failed to comply with the legal provisions mentioned in the previous paragraph.

There is no evidence before court which suggests that it was reasonable and justifiable for the first respondent not to give the applicant notice nor an opportunity to make representations.

The first respondent took at least five weeks, after receipt of the second respondent's application to make a decision. The first respondent could have, without prejudicing its investigation, given the possible interested parties, particularly the applicant, notice and an opportunity to make representations

after receipt of the second respondent's application and prior to its decision to impose provisional safeguard measures.

The argument advanced on behalf of the first and second respondents that the giving of notice would have made the situation to deteriorate more is unsustainable. There is a need to balance the interests of those that might be negatively affected by the imposition of the provisional payment against those who the provisional payment is intended to protect.

In my view, the "drastic measure" taken by the first respondent have a much more negative impact on the applicants than the negative impact that could have been caused by the giving of notice and an opportunity to make representations as required by section 3(2)(b)(ii) of the Promotion of Administrative Justice Act *supra*.

It cannot be justifiably argued that the procedure followed by the first respondent is fair but different to the one stipulated in the section mentioned in the previous paragraph.

In fact, the first respondent's counsel submitted that neither regulations 6 or 17 of the Safeguard Regulations nor any other legal provision expressly exclude a right to be heard prior to a decision being taken, but if properly constructed, the said regulations, by implication excludes the right to be heard prior to the decision to impose provisional safeguard measures is taken.

The above submission cannot be sustained, particularly in the light of the clear provisions of section 3(2)(b) of the Promotion of Administrative Justice Act *supra.*

The only exceptions are those provided for in section 3(4) and (5).

In his heads of argument the first respondent's counsel submitted that a procedure as contained in the Safeguard Regulations which requires consultations with interested parties in a general safeguard investigation within fourteen days of the imposition of a provisional payment, is fair but different from the provisions of section 3(2)(b) of PAJA.

The above submission cannot be sustained. As mentioned earlier, the administrative action taken by the first respondent is "drastic" and it has negatively impacted on the applicant. In these circumstances a notice and an opportunity to make representations given after the taking of the administrative action, is not helpful to the applicant. If definitive safeguard measures are not put in place after the investigation, the provisional payments made will be refunded but the applicant would have suffered irreparable harm.

It is not necessary for me to deal with the other issues raised in this matter.

The urgency of this matter did not allow the applicant an opportunity to comply with the provisions of section 96(1) of the Customs and Excise Act, 1964 and the failure of the applicants to comply with the said provision is reasonable under the circumstances of the case.

In the light of the above findings, I do not believe that it is necessary for me to deal with other issues or arguments raised in this matter.

The court therefore grants an order in terms of prayers 1, 2, 3 and 4 of the notice of motion.

The court further orders that the first and second respondents are to pay, jointly and severally, the one paying the other to be absolved, the costs of the applicant, which costs will include costs consequent upon the employment of two counsel.

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W.L SERITI
JUDGE OF THE HIGH COURT

22264-2007

APPLICANTS ATTORNEYS: WEBBER WENTZEL BOWENS
COUNSEL FOR APPLICANTS: G J MARCUS SC AND A COCKRELL
FIRST RESPONDENT'S ATTORNEYS: THE STATE ATTORNEY
COUNSEL FOR THE FIRST RESPONDENT: E W DUNN SC AND M SELLO
SECOND RESPONDENT'S ATTORNEYS: STEGMANNS
COUNSEL FOR SECOND RESPONDENT: M PILEMER SC