IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 53925/09

26/11/2010

In the matter between:

C DRAHTSEILWERK SAAR GMBH	Applicant
and	
INTERNATIONAL TRADE ADMINISTRATION	
COMMISSION	1st Respondent
THE MINISTER OF TRADE AND INDUSTRY	2nd Respondent
SCAW SOUTH AFRICA (PTY) LTD	3rd Respondent
BRIDON INTERNATIONAL GMBH	4th Respondent

Ruling on point *in limine*

MNGQIBISA-THUSI, J

[1] The applicant has launched proceedings in this court in terms of section 46(1) of the **International Trade Administration Act** 71 of 2002 ("**the Act**"), the **Promotion of Administrative Justice Act** 3 of 2000 and Rule 53 of the Uniform Rules of Court in order to have certain decisions made by the first and second respondents reviewed and set aside (**the main application**).

[2] The first respondent is a statutory body responsible for administering the country's international trade. One of its duties is to report to and make recommendations to the second respondent, after conducting an investigation, with regard to the imposition or lifting of anti-dumping duties on specified goods introduced into the country. If the second respondent agrees with the recommendation made by the first respondent, it may ask the Minister of Finance to impose or uplift such duties.

[3] The applicant and the third and fourth respondents are trade competitors involved in the manufacture of steel products.

[4] In 2002 the first respondent had imposed anti-dumping duties on the applicant. The duties imposed were set to lapse in 2007. In terms of regulation 53.1 to the Act, anti-dumping duties are normally imposed for a period of five years. Prior to the lapsing of the anti-dumping duties imposed on the applicant, the first respondent, at the request of the third respondent, conducted what is known as a sunset review. A sunset review is an investigation the first respondent would conduct to determine whether it should extend the period of duties already imposed which are about to expire. This review entailed an investigation of the applicant, the third and fourth respondent.

[5] The process of the investigation conducted by the first respondent entails the first respondent gathering information from a party whom it chooses to seek information from. During the investigation the third and fourth respondents had provided the first respondent with information deemed to be confidential nature. Furthermore, the fourth respondent has not made available an abstract of the confidential information in a non-confidential summary format.

[6] On conclusion of the investigation the first respondent recommended to the second respondent the continued and increased duties to be imposed on the applicant, which recommendation the second respondent accepted. This is the determination the applicant is seeking to be reviewed and set aside in the main application.

[7] In terms of Rule 53 the first respondent is obliged to provide the applicant with the record of the proceedings leading to the decision taken and which it is sought to be reviewed. The first respondent was supposed to have submitted to the applicant copies of the record by 28 September 2009 but has not done so. It appears that a dispute has arisen as to whether the first respondent should provide the applicant with all the documents constituting the record. The record would then include no-confidential information and information which the first respondent has determined to be confidential in its investigation.

[8] Pursuant to the refusal by the first respondent to provide the applicant with the record as it is, the applicant launched the current interlocutory proceedings in which it is seeking an order that will regulate the use in the main application of confidential information contained in the record sought.

[9] In its answering affidavit the first respondent the reason given for not yet having provided the applicant with a copy of the record of the proceedings is that because the record contains confidential information which had been provided by other entities covered by the investigation, some of which are the applicant's competitors, it could not include such information without the prior consent of the affected parties, alternatively, without an order of court directing it to give access of the confidential information to the applicant. The fourth respondent has refused to give such consent.

[10] Further, it appears from the first respondent's affidavit that it has attempted to mediate between the applicant and the third and fourth respondents. As a result of its mediation efforts, the applicant and the third respondent have reached an agreement regulating the manner in which the first respondent will allow the applicant access to the third respondent's confidential information.

[11] From the papers and from the submissions made by counsel for the first respondent, Mr Puckrin, the first respondent is not opposed to the applicant's interlocutory application save for the manner proposed by the applicant for access to be given, as contained in the applicant's draft order to the interlocutory application. It is the first respondent's contention that the terms on which access will be granted to the applicant as contained in the draft order are too wide.

[12] Before the start of the hearing on the interlocutory application, Mr Gauntlett, counsel for the fourth respondent raised a point *in limine*. It was agreed as between the parties that this court should first deal with the point *in limine* and that should I uphold the point *in limine*, this would be the end of the applicant's interlocutory application. However, should I dismiss the point raised, and then the hearing on the application would proceed.

[13] The fourth respondent submits that the applicant's founding affidavit makes no reference whatsoever to the provision in the Act which provides for the remedy sought. It is further submitted that the remedy sought by the applicant is misconceived in that it is not provided for in the Act. Rather that the applicant should have sought relief in terms of section 35 (2) of the Act. Mr Gauntlett argued that this Court does not have the power to grant the relief sought as in terms of section 35(3) of the Act, before the Court may make a determination regarding the handling of confidential material the Court must itself determine whether and to what extent the material is confidential and if it grants access, the conditions to that might be attached to such access. He

further argued that since the court did not have the record of the proceedings sought to be expunged, it would not be in a position to make a determination as to what is confidential on the one hand and non-confidential material on the other. Mr Gauntlett referred the Court to the Supreme Court of Appeal decision in *Chairman, Board of Tariffs and Trade and others v Brenco Inc and others* 2001 (4) SA 511 (SCA) (*Brenco*) which he argues sets out a particular methodology to be adopted in treating the issue of access to confidential information submitted to the first respondent during its investigations.

[14] In response the applicant submits that even if there was no specific reference to section 35(2) of the Act in its founding papers, it is quite clear from the papers filed in this application that the applicant is seeking relief in terms of section 35(2) of the Act. Further it was pointed out that looking at the heads of argument of all the parties involved in this matter it is clear that all the parties are aware that the relief the applicant is seeking is based on the provisions of sections 35(2) and (3) of the Act.

[15] The applicant argues that in view of the fact that mediation by the first respondent has failed in its mediation attempts, it is seeking is an order in terms of section 35 (2) for an appropriate order concerning access to the information in the record. It further argued that it would be up to the first respondent to determine what relevant information on which the first respondent based its decision to impose anti-dumping duties should be provided to the applicant in order for it to conduct its application for the review of the decision sought to be expunged. It was submitted that the applicant accepts that the record contains information which the first respondent has determined to be confidential and that the applicant was not asking this court to make a determination of what is confidential in the record. The applicant also submitted that there is no absolute bar in the Act to access to confidential information. Further that what appropriate information should be supplied will be determined by Rule 53.

[16] With regard to the reliance by the fourth respondent on the *Brenco* decision, I am of the view that the applicant has correctly pointed out that this case is distinguishable from Brenco in that that case the court dealt with an application for access to information supplied to the BTT by trade competitors at the stage at which the BTT was still investigating complaints made and not at the deliberative stage where the applicants would have been entitled to the information supplied in order to know the case they were facing.

[17] In terms of Rule 53(1)(b) a party who applies for the review and setting aside of a decision is entitled to be provided with the record of the proceedings which include "the documents, evidence, arguments and other information before the tribunal relating to the matter under review at the time of the making of the decision in question. *Johannesburg City Council v The Administrator, Transvaal and another* (1) 1970 (2) SA 89 (T) at 91G-H. The purpose for providing the record is to facilitate applications for review and to ensure their speedy and orderly presentation.

[18] I am of the view that the point *in limine* raised on behalf of the fourth respondent has no basis. Having read the papers filed of record and having heard the submissions made by counsel for the applicant and the first and fourth respondents, I am further of the view that, as correctly pointed out by Mr Seale, counsel for the applicant, that the applicant accepts as being common cause the fact that the information the applicant is seeking access to is confidential. The relief sought by the applicant is not a fresh determination of confidentiality as contended by the fourth respondent. What the applicant is seeking is an appropriate order which will regulate access to what has already been determined by the first respondent as being by its nature confidential information.

[19] The fourth respondent's argument that the relief sought by the applicant is not provided for in the Act is misplaced. It is clear from the papers before me that the applicant is seeking relief in particular in terms of section 35(2)(b)(i) of the Act which reads as follows:

> " (2) A person who seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise confidential may-
>
> (a) first, request that the Commission mediate between the owner of the information and that person; and
> (b) failing mediation in terms of paragraph (a), apply to a High Court for-
> (i) An order setting aside the determination of the Commission or
> (ii) Any appropriate order concerning access to that information."

The fact that the section was not expressly mentioned in its papers, does not detract from the fact that the facts alleged pertaining to section 35(2). *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (AD).

[20] Furthermore, as correctly contended by the applicant, the Act does not provide for an absolute prohibition to access to information which has been declared to be confidential by the first respondent. Section 35(2) empowers this Court to grant an appropriate order with regard to accessing such information. Further, in terms of Rule 53 if the record is not

produced, the applicant is entitled as an aggrieved party to apply to Court to compel compliance with a request for the production of the record of the proceedings leading to the decision sought to be expunged.

[21] Accordingly the point *in limine* raised by the fourth respondent is dismissed. Costs will be costs in the cause.

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MNGQIBISA-THUSI J