

# The Scope of the Powers of the Minister of Finance in Terms of Section 48(1)(b) of the Customs and Excise Act 91 of 1964: An Appraisal of Recent Developments in Case Law

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## Abstract

This paper evaluates the scope of the powers of the Minister of Finance upon a request from the Minister of Trade and Industry to amend Schedule 1 to the *Customs and Excise Act* 91 of 1964 (hereafter, CEA) in respect of imported goods as provided by section 48(1)(b) of the CEA. This assessment entails a case analysis of the High Court decisions in *South Africa Sugar Association v the Minister of Trade and Industry* 2017 4 All SA 555 (GP) and *Pioneer Foods (Pty) Ltd v Minister of Finance* 2017 ZAWCHC 110 (29 September 2017). These two cases offer for the first time, clarification on the nature of the power conferred on the Minister of Finance by section 48(1)(b) of the CEA. The High Court in these two cases rejected the argument that the role of the Minister of Finance in respect of the power conferred upon him/her by section 48(1)(b) is that of a "registrar" who merely 'rubberstamps' the decision of the Minister of Trade and Industry. Consequently, the High Court in both matters held that a veto power is conferred on the Minister of Finance which permits him/her to either accept or decline the request of the Minister of Trade and Industry to amend Schedule 1 of the CEA. To the contrary, this paper argues that if the Minister of Finance declines the request of the Minister of Trade and Industry, s/he is not 'giving effect' to the request of the Minister of Trade and Industry as required by section 48(1)(b) of the CEA and is thus acting *ultra vires* because s/he is assuming powers which never conferred on him/her by the legislature. This paper also argues that the High Court in both matters, misconstrued the relationship between section 48(1)(b) and the "public interest" provisions in section 48 and thus unjustifiably stripped the Minister of Trade and Industry of his/her power to implement an amendment to Schedule 1. In the final analysis, this paper explores the impact of the *Customs Duty Act* 30 of 2014 on the Minister of Finance's powers in this regard.

## Keywords

Custom duties; request; discretion; expedient; public interest; separation of powers.

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## 1 Introduction

The purpose of this paper is to assess the scope of the powers of the Minister of Finance upon a request from the Minister of Trade and Industry to amend Schedule 1 to the *Customs and Excise Act* 91 of 1964 (hereafter, CEA), in respect of imported goods as provided for by section 48(1)(b) of the CEA. This assessment entails a case analysis of the High Court decisions in *South Africa Sugar Association v the Minister of Trade and Industry*<sup>1</sup> and *Pioneer Foods (Pty) Ltd v Minister of Finance* (hereafter, *Pioneer Foods*).<sup>2</sup> These two cases are particularly instructive in that they offer for the first time, clarification on the nature of the power conferred on the Minister of Finance by section 48(1)(b) of the CEA. This paper concludes by exploring the impact of the *Customs Duty Act* 30 of 2014 (hereafter, CDA) on the powers of the Minister of Finance in this regard. This enquiry is necessitated by the fact that the CDA and the *Customs Control Act* 31 of 2014 will collectively replace the provisions of the CEA in respect of custom duties at a date to be determined by the President.<sup>3</sup>

## 2 The factual background

The dispute in *South Africa Sugar Association v the Minister of Trade and Industry* (hereafter, *SASA*) was precipitated by the Minister of Finance's decision to zero rate imported sugar, which meant that imported sugar was not subject to any import duty.<sup>4</sup> Unfortunately, this zero rating was based on outdated information and the result was that the sugar price used was almost US\$ 200 higher than the 20-day average on the day the zero rating was gazetted.<sup>5</sup> The South Africa Sugar Association (hereafter, the Sugar Association) notified the International Trade Administration Commission (hereafter, ITAC) of its concerns in this regard, and consequently its representatives met with ITAC on 2 August 2017.<sup>6</sup> ITAC made a

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<sup>1</sup> *South Africa Sugar Association v Minister of Trade and Industry* 2017 4 All SA 555 (GP) (hereafter *SASA*).

<sup>2</sup> *Pioneer Foods (Pty) Ltd v Minister of Finance* 2017 ZAWCHC 110 (29 September 2017) (hereafter *Pioneer Foods*).

<sup>3</sup> See s 229 of the *Customs Duty Act* 30 of 2014 (CDA) read with s 944 of the *Customs Control Act* 31 of 2014. The *Customs Control Act* focusses on the implementation of the customs control system.

<sup>4</sup> *SASA* para 20.

<sup>5</sup> *SASA* para 20.

<sup>6</sup> *SASA* para 21.

commitment that it would process the information provided to it by the Sugar Association within a day and submit a recommendation to the Minister of Trade and Industry.<sup>7</sup> On 3 August 2017 the Sugar Association sought a similar undertaking from the Minister of Finance and the Minister of Trade and Industry.<sup>8</sup> Subsequently the Minister of Trade and Industry provided the Sugar Association with the undertaking to consider and act on any recommendation relating to the import duty on sugar received from ITAC within five days of the receipt of the recommendation.<sup>9</sup> However, the Minister of Finance declined to give the Sugar Association a similar undertaking.<sup>10</sup> Consequently the Sugar Association then sought an order from the High Court directing the Minister of Finance to effect any "consequential" amendments to the Schedules to the CEA within five working days, or such other time as the court considered just, of having received the recommendation of the Minister of Trade and Industry.<sup>11</sup>

In *Pioneer Foods* the applicant sought an order from the High Court compelling the Minister of Finance and the National Treasury to cause updated custom tariff duties on wheat imports to be published in the Government Gazette by no later than 8 September 2017 in terms of the CEA.<sup>12</sup> The applicant argued that since updated duties had already been determined by ITAC, which duties had been endorsed by the Minister of Trade and Industry, the Minister of Finance was simply required to Gazette them in order to bring them into operation.<sup>13</sup>

### 3 The legal issue in *SASA* and *Pioneer Foods*

The nub of the dispute in *SASA* was the scope of the powers of the Minister of Finance upon the receipt of a request from the Minister of Trade and Industry to amend an import duty as provided by section 48(1)(b) of the CEA.<sup>14</sup> Similarly, in *Pioneer Foods* the court was called upon to decide on the nature of the power conferred upon the Minister of Finance in terms of section 48(1)(b) of the CEA.<sup>15</sup> In essence, section 48(1)(b) of the CEA provides that:

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<sup>7</sup> *SASA* para 21.

<sup>8</sup> *SASA* para 22.

<sup>9</sup> *SASA* para 22.

<sup>10</sup> *SASA* para 22.

<sup>11</sup> *SASA* para 23.

<sup>12</sup> *Pioneer Foods* para 1.

<sup>13</sup> *Pioneer Foods* para 18.

<sup>14</sup> *SASA* paras 24, 29.

<sup>15</sup> *Pioneer Foods* paras 22-23.

The Minister of Finance may, by notice in the Gazette, amend the General Notes to Schedule 1 and Part 1 of the said Schedule and Part 2 of the said Schedule, in so far as it relates to imported goods, in order, *inter alia*, to give effect to any request by the Minister of Trade and Industry and for Economic Co-ordination.

At this juncture, it must be noted that the Minister of Finance is also empowered by other provisions of the CEA to impose or vary any duty on specific goods through amendment to the Schedules of the CEA.<sup>16</sup> The focus of this paper is solely the amendment of Schedule 1 in the manner contemplated by section 48(1)(b) of the CEA.

#### **4 The arguments of the parties in SASA and Pioneer Foods**

In SASA the Sugar Association contended that the role of the Minister of Finance in terms of section 48(1)(b) of the CEA resembles that of a "registrar".<sup>17</sup> In the view of the Sugar Association, the power of the Minister of Finance is only to assess a request by the Minister of Trade and Industry for legality.<sup>18</sup> As support for this contention, the Sugar Association proffered that the approach of the Minister of Finance "duplicates the work already done by ITAC and the Minister of Trade and Industry" and this assertion was evinced by the object of the *International Trade Administration Act 71 of 2002* (ITAA) as set out in section 2.<sup>19</sup> Furthermore, the Sugar Association argued that it is within the Minister of Trade and Industry's mandate to pronounce on trade policy and directives and regulate the imports and exports of the Republic of South Africa.<sup>20</sup> It was also submitted that ITAC operates as a specialist body, and thus the court must accord some deference to its findings.<sup>21</sup> To this end, the Sugar Association cited the decision in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (hereafter SCAW), which described the powers of the

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<sup>16</sup> For instance, the *Customs and Excise Act 91 of 1964* (CEA) permits the Minister of Finance in accordance with any request from the Minister of Trade and Industry to amend Schedule 2 by notice in the Gazette: to withdraw or reduce any anti-dumping duty as provided by s 56(2); to withdraw or reduce any countervailing duty as provided by s 56(A)(2); and to withdraw or reduce any safeguard duty as per s 57(2).

<sup>17</sup> SASA para 24.

<sup>18</sup> SASA para 24.

<sup>19</sup> SASA para 30. S 2 of the *International Trade Administration Act 71 of 2002* (ITAA) provides that the object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Custom Area by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU Agreement.

<sup>20</sup> SASA para 30. See s 5 of the ITAA, which provides that the Minister of Trade and Industry may by notice in the Gazette and in accordance with the Constitution or any other applicable law make pronouncements on Trade Statements or Directives.

<sup>21</sup> SASA para 30.

Minister of Trade and Industry as being wide and involving polycentric considerations.<sup>22</sup> Consequently the Sugar Association argued that the Minister of Trade and Industry is not required to dogmatically follow the reasoning and findings of ITAC.<sup>23</sup> On the strength of these submissions, the Sugar Association submitted that it is unnecessary for the Minister of Finance to conduct an extensive analysis because the work which the Minister of Finance seeks to undertake has already been done by the Minister of Trade and Industry.<sup>24</sup>

In response, the Minister of Finance contended that he is vested with a full decision making power.<sup>25</sup> Thus, the Minister of Finance argued that he will make a decision only when he is satisfied that the competing interests of economic policies, the fiscus and sugar industry participants have been balanced.<sup>26</sup> Thus the Minister of Finance saw his/her power as constituting more than merely "rubberstamping" the decision of the Minister of Trade and Industry.

In the same vein, in *Pioneer Foods* the applicant argued that if one accorded due consideration to the circumstances under which the Minister of Finance may exercise his/her powers to amend Schedule 1 customs duties in terms of section 48(1)(b) of the CEA, these largely involve situations where s/he is merely required, "mechanistically", and "as a formality" to give effect to the decision of the Minister of Trade and Industry in this regard.<sup>27</sup> Thus it was argued that the role of the Minister of Finance is merely to "rubberstamp decisions taken elsewhere".<sup>28</sup> The applicant also described the Minister of Finance's function in respect of section 48(1)(b) as constituting an "administrative" task which obliged him/her only to "rubberstamp and give effect to the tariffs previously determined by ITAC".<sup>29</sup> Thus, the applicant argued that the Minister of Finance's role was simply to verify the accuracy of ITAC's tariff calculations.<sup>30</sup> In response, the Minister of Finance argued that section 48(1)(b) confers on him/her wide and discretionary executive powers which when exercised were in effect legislative in nature.<sup>31</sup>

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<sup>22</sup> SASA para 31; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 97.

<sup>23</sup> SASA para 31.

<sup>24</sup> SASA para 31.

<sup>25</sup> SASA para 24.

<sup>26</sup> SASA para 24.

<sup>27</sup> *Pioneer Foods* para 24.

<sup>28</sup> *Pioneer Foods* para 24.

<sup>29</sup> *Pioneer Foods* para 18.

<sup>30</sup> *Pioneer Foods* para 18.

<sup>31</sup> *Pioneer Foods* para 20.

Consequently, the principal argument of the applicants in both *SASA* and *Pioneer Foods* was that section 48(1)(b) of the CEA bestows upon the Minister of Finance only the power to "rubberstamp" the decision of the Minister of Trade and Industry, whereas the Minister of Finance, as a respondent in both matters, argued that he was conferred with the discretion to either accept or decline the request of the Minister of Trade and Industry.

## **5 Critical appraisal of the findings of the High Court in *SASA and Pioneer Foods***

### **5.1 *The language of section 48(1)(b) of the CEA***

Firstly, the court in *SASA* held that the argument that the role of the Minister of Finance is similar to that of a "registrar" does not find any support in the language of the CEA.<sup>32</sup> The court noted without deciding the issue that the wide power conferred on the Minister of Finance under section 48(1)(e) may be exercised only in instances which do not fall under sections 48(1)(a)-(d).<sup>33</sup> But the court held that use of the word "otherwise" in section 48(1)(e), supports the interpretation which the court favoured.<sup>34</sup> In the view of the court, the word "otherwise" favoured the conclusion that the power conferred on the Minister of Finance is one which s/he may generally exercise when s/he has come to the conclusion that it is in the "public interest" to do so.<sup>35</sup> The court then held that the CEA is inundated with powers conferred on the Minister of Finance in relation to duties which s/he may exercise when s/he deems it expedient in the public interest to do so.<sup>36</sup> Thus the court held that it is within the confines of the law for the legislature to require approvals by more than one decision maker for the ultimate effectiveness of the proposed action.<sup>37</sup> This is because the court was of the view that the concurrence in the decision making powers between the Minister of Finance and the Minister of Trade and Industry borne out of section 48(1)(b) of the CEA does not detract from this conclusion.<sup>38</sup> The court reasoned that this point is evinced by the provisions of Chapter VI of the CEA which deals with anti-dumping, countervailing and safeguard duties and safeguard measures.<sup>39</sup>

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<sup>32</sup> *SASA* para 35.

<sup>33</sup> *SASA* para 35.

<sup>34</sup> *SASA* para 35.

<sup>35</sup> *SASA* para 35.

<sup>36</sup> *SASA* para 35.

<sup>37</sup> *SASA* para 36.

<sup>38</sup> *SASA* para 36.

<sup>39</sup> *SASA* para 37.

In the Chapter VI, instances the Minister of Finance is endowed with powers to impose or vary anti-dumping and countervailing duties and impose or vary safeguard measures.<sup>40</sup> However, the Minister of Finance is required to act in relation to these duties and measures only in accordance with a request by the Minister of Trade and Industry.<sup>41</sup> The empowering provisions in Chapter VI clearly constrain the Minister of Finance, in the exercise of his/her power, to impose or vary duties or measures to instances where the Minister of Finance has been requested by the Minister of Trade and Industry to impose such duties or measures.<sup>42</sup> In such a case the Minister of Finance has a choice: the Minister of Finance may either impose or vary the duty or measure in accordance with the request of the Minister of Trade and Industry or the Minister of Finance may decline to act at all in accordance with the powers conferred by Chapter VI of the CEA.<sup>43</sup> In such cases, the Minister of Finance may not act unilaterally.<sup>44</sup> This is because the language (in accordance with ...) makes it clear that s/he may not.<sup>45</sup> However, section 55 does not require that the Minister of Finance must agree with or defer to the Minister of Trade and Industry and that the former Minister is not precluded by law from conducting his/her own independent investigation and analysis of the subject matter of the request received from the latter.<sup>46</sup> On the contrary, Brink<sup>47</sup> submits that even though section 56(2) is framed in the form of a request, the Minister of Finance has no discretion in this regard.

Counsel for the Sugar Association had relied on the dictum of the court in *Association of Meat Exporters v International Trade Commission*, which held that when withdrawing or reducing, with or without retrospective effect, any such duty or otherwise amending the Second Schedule through section 56(2) of the CEA, the Minister of Finance likewise acts in accordance with a request by the Minister of Trade and Industry.<sup>48</sup> Without any elaboration, the court in *SASA* held that this dictum does not advance the Sugar

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<sup>40</sup> SASA para 37.

<sup>41</sup> SASA para 37. See s 56(2)(a) of the CEA which provides that the imposition of any anti-dumping duty, a countervailing duty in the case of subsidised export as so defined or a safeguard duty in respect of any imported goods, shall be in accordance with any request by the Minister of Trade and Industry.

<sup>42</sup> SASA para 37.

<sup>43</sup> SASA para 37.

<sup>44</sup> SASA para 37.

<sup>45</sup> SASA para 37.

<sup>46</sup> SASA para 37.

<sup>47</sup> Brink 2012 <http://tinyurl.com/zk633kd> fn 212.

<sup>48</sup> SASA para 38; *Association of Meat Importers v ITAC* 2013 4 All SA 253 (SCA) para 105.

Association's case.<sup>49</sup> This finding may be correct but it is my view that this contention deserved further consideration. This is because the term "in accordance with" means that the Minister of Finance must ensure that his/her decision is in line with the request of the Minister of Trade and Industry. Thus, the term "in accordance with" denotes conforming or complying and does not imply the element of discretion. A decision by the Minister of Finance to decline the request of the Minister of Trade and Industry would be contrary to the purpose of section 56 of the CEA. Thus the duty of the Minister of Finance is simply to "implement" the Minister of Trade and Industry's request.<sup>50</sup>

Counsel for the Sugar Association also relied on certain remarks made by the Supreme Court of Appeal in *Chairman, Board of Trade v Brenco Inc (Brenco)*.<sup>51</sup> However, the court in *SASA* held that in *Brenco* the nature of the power of the Minister of Finance was not in issue.<sup>52</sup> This reading of the decision in *Brenco* appears not to be correct. This is because the court in *Brenco* held that one of the issues it had to decide on was:

The nature of the powers and the sequence of decision-making between the Minister of Trade and Industry and the Minister of Finance and hence, the relationship between the powers conferred on each of them.<sup>53</sup>

Unfortunately, the court in *Brenco* did not offer the required guidance or elucidate appropriately on this issue. Suffice it to say that the court held that the role of the Minister of Trade and Industry includes a consideration of policy.<sup>54</sup> Significantly, the court in *Brenco* held that the Minister of Trade and Industry has no power to amend the terms of the investigating authority's recommendation or to effect such changes, but s/he must refer the matter back to the investigating authority.<sup>55</sup> This means that the Minister of Trade and Industry is permitted to either accept or decline the recommendation of ITAC but s/he is barred from amending the terms of ITAC's recommendation. It follows then that the Minister of Finance has no

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<sup>49</sup> *SASA* para 38.

<sup>50</sup> *Farm Frites v International Trade Administration Commission* (unreported) case number 32263/14 of 20 May 2014 (hereafter, *Farm Frites*) para 4; *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) para 4.

<sup>51</sup> *SASA* para 32; *Chairman, Board of Trade v Brenco Inc* 2001 4 SA 511 SCA (hereafter, *Brenco*).

<sup>52</sup> *SASA* para 32.

<sup>53</sup> *Brenco* paras 19.1, 19.2.

<sup>54</sup> *Brenco* para 71.

<sup>55</sup> *Brenco* para 71. It must be noted that the decision in *Brenco* was made in the context of the *Board on Tariffs and Trade Act* 107 of 1986, whose investigating body was the Board on Tariffs and Trade, which was the body tasked with investigating dumping prior to the advent of the ITAA. Also see Brink 2013 *TSAR* 434-435.

discretion to amend ITAC's recommendation. Thus, the nature of the power of the Minister of Finance was an issue before the court in *Brenco*.

Ultimately the court in SASA held that section 48(1) provides that the Minister of Finance "may amend": which is language that is directory in nature and thus implies powers which confer an element of discretion on their holders.<sup>56</sup> The court noted that such language is by itself not always decisive, just as language which goes the other way (e.g. must or shall) does not always render a non-compliance as a nullity.<sup>57</sup> Nevertheless, the court held that if the object of the legislation had been to reduce the power of the Minister of Finance, this could easily have been done by appropriate language. The court therefore found that the choice of language evinced a wide discretion on the part of the Minister of Finance in relation to section 48(1)(b) of the CEA.<sup>58</sup> Thus the court held that the provisions of the CEA confer on the Minister of Finance the power to make the final decision, subject only to Parliament, to determine appropriate customs duties.<sup>59</sup>

However, on the basis of the court's reasoning that the word "may" is not always decisive, it can be argued that the true purpose of section 48(1)(b) is derived from the restriction later in the same provision, that the Minister of Finance "must give effect" to the request of the Minister of Trade and Industry. The term "to give effect" denotes conforming or complying with the request of the Minister of Trade and Industry. The Minister of Finance has no election or discretion in this regard. If the Minister of Finance declines the request of the Minister of Trade and Industry, s/he is *not* giving effect to the request of the Minister of Trade and Industry as required by section 48(1)(b) of the CEA. In fact, the term "give effect to" is the "appropriate language" that should have indicated to the court that the legislature had intended to "reduce the powers" of the Minister of Finance in this regard. This notion is in line with the finding of the High Court in *Farm Frites* which held that the role of the Minister of Finance is to "implement the financial aspects" of ITAC's recommendation.<sup>60</sup> Similarly, the Supreme Court of Appeal has held that the amendment of the schedules to the CEA is the "responsibility" of the Minister of Finance.<sup>61</sup> Thus, if the Minister of Finance declines the request of the Minister of Trade and Industry, s/he is acting

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<sup>56</sup> SASA para 39.

<sup>57</sup> SASA para 39.

<sup>58</sup> SASA para 39.

<sup>59</sup> SASA para 33.

<sup>60</sup> *Farm Frites* para 4.

<sup>61</sup> *Minister of Finance v Paper Manufacturers Association of South Africa* 2008 6 SA 540 (SCA) (hereafter, *Paper Manufacturers*) para 7.

*ultra vires* or unlawfully because s/he is assuming powers that were never conferred upon him/her by the legislature.

The reasoning of the court in *SASA* mirrors the *ratio* of the court in *Pioneer Foods*, which held that it is clear that when the Minister exercises his/her powers to amend Schedule 1 customs duties under section 48, including import duties of the kind that feature in this matter, s/he must consider what will be in the public interest, and the qualifying word "*otherwise*", which appears in the relevant phrase in section 48(1)(e) read contextually, does not detract from such an interpretation.<sup>62</sup> The court in *Pioneer Foods* held that this interpretation of section 48 is informed by a contextual and purposive approach.<sup>63</sup> The court then observed that these powers are postulated in wide, discretionary and permissive (s/he "may"), and not obligatory terms.<sup>64</sup> Read contextually with reference to this matter, the Minister of Finance may amend, but is not compelled to amend customs duties on wheat imports as listed in Part 1 of Schedule 1 when and if s/he deems it "*expedient*" in the public interest; i.e. when and if s/he considers it necessary in the public interest to do so.<sup>65</sup>

It is my submission that the High Court's rejection of the "duplication" argument merits further consideration. The findings of the High Court in both *SASA* and *Pioneer Foods* on the competencies of the Minister of Trade and Industry appear to be arbitrary. Prudence requires that the courts must not be too eager to accept the view that the Minister of Trade and Industry lacks the competence to conduct a holistic assessment of the recommendation of ITAC despite jurisprudence to the contrary. It has been held that the Minister of Trade and Industry is entitled to assimilate polycentric factors such as "diplomatic relationships, the country's balance of payments, the regional or global trading conditions, goods needed to foster economic growth, into his/her decision making process and so forth".<sup>66</sup> This means that both the Minister of Trade and Industry and the Minister of Finance conduct a holistic evaluation. Thus, as contended by the applicant in *SASA*, the holistic evaluation that is meant to be conducted by the Minister of Finance would be a "duplication" of the assessment conducted by the Minister of Trade and Industry.<sup>67</sup> This is particularly so in the light of the fact that ITAC and the

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<sup>62</sup> *Pioneer Foods* para 30.

<sup>63</sup> *Pioneer Foods* para 27; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter, *Endumeni Municipality*) paras 18-19.

<sup>64</sup> *Pioneer Foods* para 30.

<sup>65</sup> *Pioneer Foods* para 30.

<sup>66</sup> *SCAW* para 98; *Brenco* para 71; *Farm Frites* para 4.

<sup>67</sup> See *SASA* para 30.

Minister of Trade and Industry have a wider mandate on the basis of section 2 of ITAA rather than merely determining the duties. The Minister of Trade and Industry and ITAC are better placed to assess the need for a duty. In fact, it could be argued that it is against the "public interest" to decline a request to impose an import duty that could protect a vulnerable industry. This much is conceded by both courts in *SASA* and *Pioneer Foods*.<sup>68</sup> A sensible approach to interpretation must be preferred to one that leads to unreasonable or unbusinesslike results or that hinders the apparent purpose of legislation.<sup>69</sup> The approach to section 48(1)(b) in both *SASA* and *Pioneer Foods* caused "unbusinesslike results that undermine[d] the object of import duties", which is to protect local industries and consumers.

## 5.2 The "public interest" principle

At the outset, it is prudent to outline the relevant subsections of section 48 of the CEA, which provide for the "public interest" principle:

(1)(e) The Minister may from time to time by notice in the Gazette amend the General Notes to Schedule No. 1 and Part 1 of the said Schedule or substitute the said Part 1 and amend Part 2 of the said Schedule in so far as it relates to imported goods whenever he deems it expedient in the public interest otherwise to do so.

(2) The Minister may from time to time by like notice amend or withdraw or, if so withdrawn, insert Part 2, Part 3, Part 4, Part 5A or Part 5B of Schedule No. 1, whenever he deems it expedient in the public interest to do so: Provided that the Minister may, whenever he deems it expedient in the public interest to do so, reduce any duty specified in the said Parts with retrospective effect from such date and to such extent as may be determined by him in such notice.

(2A)(a)(i) The Minister may from time to time by like notice, whenever he deems it expedient in the public interest to do so, authorize the International Trade Administration Commission or the Commissioner to withdraw, with or without retrospective effect, and subject to such conditions as the said Commission or Commissioner may determine, any duty specified in Part 2 or Part 4 of Schedule No. 1.

(4) The Minister may, whenever he deems it expedient in the public interest to do so, by notice in the Gazette impose an export duty, on such basis as he may determine, in respect of any goods intended for export or any class or kind of such goods or any goods intended for export in circumstances specified in such notice and any export duty so imposed shall be set out in the form of a schedule which shall be deemed to be incorporated in Schedule No. 1 as Part 6 thereof and to constitute an amendment of Schedule No. 1.

(4A)(a) Notwithstanding anything to the contrary in this Act contained, the Minister may, whenever he deems it expedient in the public interest to do so,

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<sup>68</sup> *Pioneer Foods* para 47; *SASA* para 40.

<sup>69</sup> *Endumeni Municipality* para 18.

by notice in the Gazette, insert Part 8 of Schedule No. 1, and if so inserted withdraw or amend that Part for the purpose of specifying that any duty leviable under any heading or item of Part 1, 2 or 4 of Schedule No. 1 shall not be leviable under that Part, but shall be leviable under the said Part 8 at the time of entry for home consumption for use by any person, government, department, administration or body as may be specified by him in such notice.

To this end, the court in *SASA* held that the word "otherwise" in section 48(1)(e) favours the conclusion that the power conferred on the Minister of Finance is one which s/he may generally exercise when s/he has come to the conclusion that it is in the "public interest" that s/he do so.<sup>70</sup> The court then held that the CEA is "replete" with powers conferred on the Minister of Finance in respect of duties which s/he may exercise when s/he deems it "expedient in the public interest to do so".<sup>71</sup> In the same vein, the court in *Pioneer Foods* held that section 48(1)(b) must always be read in such a manner that it gives effect to the "public interest".<sup>72</sup> Thus the High Court is of the view that section 48(1)(b), when read in the context of section 48, requires that the Minister of Finance must assess whether the request of the Minister of Trade and Industry is in line with the "public interest" principle. This approach, although motivated by a cogent rule of interpretation that a section must be read as a whole, is misconceived. I am of the view that the High Court decisions in *SASA* and *Pioneer Foods* misconstrued the "public interest" principle as provided by section 48.

The "public interest" principle in section 48(1)(e) operates as an extraordinary tool through which the Minister of Finance may directly amend the Schedule 1 in exceptional circumstances. Hence the limitation that such a decision must be used when it is "expedient" or "necessary" to do so. Thus the "public interest" principle in section 48(1)(e) functions as a directly empowering provision that authorises the Minister of Finance to act on his/her own accord in the absence of a request from the Minister of Trade and Industry. This is exactly the same power conferred on the Minister of Finance by section 48(2), which empowers him/her, if it is expedient in the public interest, to reduce duties in Part 2, Part 4 or Part 5 of Schedule 1. The same could be said of the power conferred on the Minister of Finance by section 48(2A), except that in this regard, the power bestowed on the Minister of Finance is more robust. This is because under section 48(2A) the Minister of Finance, if s/he deems it to be expedient in the public interest, can authorise the Director-General: Trade and Industry or the Commissioner of the South African Revenue Service to withdraw, with or

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<sup>70</sup> *SASA* para 35.

<sup>71</sup> *SASA* para 35.

<sup>72</sup> *Pioneer Foods* paras 30, 31, 39.

without retrospective effect, and subject to such conditions as the said Director-General or Commissioner may determine, any duty specified in Part 2 or Part 4 of Schedule 1. This power in section 48(2A) clearly resides with the Minister of Finance, but what is ironic about this power is that it gives the Minister of Finance sweeping powers to delegate this power to a functionary in the department of Trade and Industry. Similarly, the CEA in section 48(4) grants the Minister of Finance, if s/he deems it expedient in the public interest to do so, the power to impose export duties on his/her own accord. In the same vein, section 48(4A) of the CEA essentially provides that the Minister of Finance is empowered to amend Schedule 1 if it is expedient in the public interest to do so. Thus, all the "public interest" provisions in section 48 are subject to the proviso that they must be used if it is "expedient" to do so.

This invariably posits the question as to the meaning of term "expedient". The term "expedient" in section 48(1)(e), denotes in the language of the court in *Pioneer Foods* that such a power must not be used in every instance but rather when it is "necessary".<sup>73</sup> This interpretation of the term "expedient" to mean "necessary" is confirmed by the corresponding provision in the CDA, which provides that the Minister of Finance may act in the public interest only if it is "necessary".<sup>74</sup> It follows, then, that the notion that the section 48 "public interest" enquiry must always be conducted every time the Minister of Finance receives a request from the Minister of Trade and Industry to amend Schedule 1 in terms of section 48(1)(b) contradicts the dictum of the court in *Pioneer Foods* that such an enquiry must be done only when it is "necessary". Thus the nature of the power conferred on the Minister of Finance in respect of section 48(1)(b) differs materially from the power conferred on the Minister of Finance in respect of the "public interest" provisions in section 48.

Furthermore, it is clear that all the "public interest" provisions in section 48 have no connection to section 48(1)(b). Section 48(1)(b) is prompted by the conduct of the Minister of Trade and Industry in requesting the Minister of Finance to give effect to ITAC's recommendation, whereas the "public interest" provisions are not triggered by any request of the Minister of Trade and Industry. This notion is endorsed by the dictum of the court in *SCAW*, which held that without a prior investigation and recommendation, the Minister of Trade and Industry may not, on his or her own, request the

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<sup>73</sup> See *Pioneer Foods* para 30.

<sup>74</sup> See s 8(2) of the CDA. The CDA will replace the provisions of the CEA relating to the imposition and collection of import and export duties, at a date to be determined by the President.

Minister of Finance to impose an anti-dumping duty.<sup>75</sup> Thus the "public interest" provisions are self-standing provisions that confer wide and discretionary powers on the Minister of Finance to directly amend the Schedule 1 of the CEA, but bear no relationship to the power conferred on the Minister of Finance in section 48(1)(b).

It seems plausible, then, that the "public interest" provisions in section 48 must not be read together with section 48(1)(b). In fact, the court in *SASA* conceded as much when it held that it was prepared to assume, without making a finding on the issue, that the wide power bestowed on the Minister of Finance under section 48(1)(e) may be exercised only in instances outside of sections 48(1)(a)-(d).<sup>76</sup> Needless to say, this does not preclude the Minister of Trade and Industry from requesting the Minister of Finance to consider amending a duty if s/he considers it to be in the "public interest" on the basis of section 48(1)(e). This is the one of the instances when the Minister of Finance can decline the request of the Minister of Trade and Industry, because in this instance the power to accept or decline this request resides solely with the Minister of Finance.

It follows then that the Minister of Finance must always accede to a request of the Minister of Trade and Industry as provided by section 48(1)(b). If the Minister of Finance has reservations about this "request", s/he must first impose the duty as requested by the Minister of Trade and Industry. Thereafter, on the basis of section 48(1)(e), which confers the widest powers in section 48, the Minister of Finance can initiate the process through Treasury of assessing if it is in the "public interest"; and if it is found to be so, s/he can then amend the Schedule without consulting the Minister of Trade and Industry. This approach may seem strange, but this is the only legal method that is provided by section 48(1) of the CEA. This is in accordance with the *ratio* of the court in *Endumeni Municipality*, which held that judges must wary of the proclivity to "substitute what they regard as reasonable, sensible or businesslike for the words actually used".<sup>77</sup> This reasoning also resonates with the approach of the CDA, which provides that in the event that an amendment to the Customs Tariff of the CDA (Schedule 1 of the CEA) results in unforeseen or unintended consequences when the amendment was made, the Minister of Finance in consultation with the Minister of Trade and Industry may adjust the amendment to address that unforeseen or unintended consequence with effect from the date on which

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<sup>75</sup> SCAW para 108.

<sup>76</sup> SASA para 35.

<sup>77</sup> *Endumeni Municipality* para 18.

the amendment took effect or any later date.<sup>78</sup> Thus, section 10 of the CDA permits the *ex post facto* amendment of the Customs Tariff to address unintended or unforeseen consequences. It follows then that the approach of the High Court in both *SASA* and *Pioneer Foods* lacks a textual basis in the CEA.

The only way that the "public interest" principle should have been a consideration in both matters should have been through the court's assessing whether the Minister of Finance complied with his/her constitutional obligation to approve the request of the Minister of Trade and Industry only if it is in the "public interest". It is trite law that the "public interest" principle is a basic principle of South African law. This is because it has been held that public functionaries, as organs of the state, have a constitutional duty to respect, protect, promote and fulfil the rights in the Bill of Rights, and as bearers of this duty they must perform their functions in the public interest.<sup>79</sup> It follows then that since the Minister of Finance is an organ of state s/he would have been compelled to act in the "public interest" as required by the *Constitution of the Republic of South Africa, 1996*, the *Public Service Act* and precedents in this regard.<sup>80</sup> Thus the High Court in both matters should have assessed the "public interest" factor not through the ambit of section 48(1) but through the *Constitution* and the *Public Service Act*.

To this end the court in *SASA* actually attempted the "public interest" enquiry through the avenue of the *Constitution*, although the court did not complete the enquiry. The court in *SASA* did not have regard to the provisions of the *Public Service Act* in line with the principle of constitutional subsidiarity.<sup>81</sup> It was held that the Minister of Finance in this regard is performing a legislative function which requires him/her to perform his/her duties in the interests of the Republic.<sup>82</sup> This is the manifestation of the "public interest" principle.

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<sup>78</sup> Section 10(1) of the CDA.

<sup>79</sup> *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 5 SA 579 (CC) para 36; s 7(2) of the *Constitution of the Republic of South Africa, 1996*. See also, *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP) para 122; *M & G Limited v 2010 FIFA World Cup Organising Committee South Africa Limited* 2011 5 SA 163 (GSJ) para 255.

<sup>80</sup> See s 195(1) of the *Constitution* read with s 5(7)(a) of the *Public Service Act* 103 of 1994.

<sup>81</sup> *My Vote Counts NPC v Speaker of the National Assembly* 2015 ZACC 31 (30 September 2015) para 53; *Mbatha v University of Zululand* 2014 2 BCLR 123 (CC) para 172; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 73; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 21-26.

<sup>82</sup> *SASA* para 33.

The court then held that the duty to act in the "public interest" arises out of the oaths of office of legislators as well as members of the executive and judicial officers, to be found in Schedule 2 to the *Constitution*, which requires the office bearer to swear or affirm to be faithful to the Republic.<sup>83</sup> In this regard the legislator acts in a fiduciary capacity which is informed by the principle of rationality in their investigations.<sup>84</sup> This rationality enquiry arises from the requirement that the exercise of a legislative power must have a cogent basis.<sup>85</sup> In essence, rationality requires that the exercise of the legislative power must not be arbitrary and thus demands that there must be a link between the instrument employed by the legislator and the goal sought to be achieved.<sup>86</sup> If there is no such link, the instrument contravenes the rule of law and is invalid.<sup>87</sup> It follows then that the legislator is entitled to conduct the necessary research that enables him/her to fulfil his/her legislative mandate.<sup>88</sup> Consequently, the court in *SASA* found that there is nothing in the language of the CEA which reduces the role of the Minister of Finance in this regard to that "akin to a registrar".<sup>89</sup> Alternatively, this reasoning of the court in *SASA* means that not only the Minister of Finance is required to act in the "public interest" but that the Minister of Trade and Industry is also required to do so. This strengthens the argument that the request of the Minister of Trade and Industry does not require the section 48(1) "public interest" enquiry of the Minister of Finance.

It bears mention that the court in *Pioneer Foods* referred to the power conferred on the Minister of Finance through section 48(1)(e) of the CEA as a "residual power".<sup>90</sup> It is not clear what the court meant by this statement but within the context of the court's reasoning, it is presumed that the court saw the power conferred upon the Minister of Finance in section 48(1)(e) as the final stage in the process of deciding whether to impose a duty after the recommendation of ITAC and the subsequent request of the Minister of Trade and Industry, as provided for by section 48(1)(b) of the CEA. As I

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<sup>83</sup> *SASA* para 33.

<sup>84</sup> *SASA* para 33.

<sup>85</sup> *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) (hereafter, *Merafong*) para 62-63.

<sup>86</sup> *Merafong* para 62; *United Democratic Movement v President of the RSA (No 2)* 2003 1 SA 495 (CC) para 68 (hereafter, *UDM 2*); *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 45; *Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 85; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 36.

<sup>87</sup> *UDM 2* para 55. See s 1(c) of the Constitution.

<sup>88</sup> *SASA* para 33.

<sup>89</sup> *SASA* para 35.

<sup>90</sup> *Pioneer Foods* para 28.

have argued above, this approach is flawed and lacks a textual basis in the CEA.

### **5.3 *The separation of powers issue***

The separation of powers issue was significant to the findings of the courts in *SASA* and *Pioneer Foods*. The court in *SASA* held that there is nothing in the language of the CEA that reduces the role of the Minister of Finance to that of a "registrar".<sup>91</sup> The resultant overlap in the decision-making powers of the two Ministers and the fact that investigations are conducted by other organs of state do not detract from its conclusion.<sup>92</sup> There is nothing illegal in the situation that arises when the legislature prescribes, in effect, that approvals by more than one decision maker are required for the efficacy of the action contemplated.<sup>93</sup> Thus, the court held that the principle of the separation of powers requires that the decision makers in the Treasury and the Minister of Finance approach their responsibilities as they deem appropriate as long as the manner in which they do so is rational.<sup>94</sup>

Similarly, in *Pioneer Foods* the court was of the view that in exercising his/her powers the Minister of Finance is invariably conducting a policy exercise, in which s/he will have to accord due consideration to a number of issues, including fiscal and economic matters.<sup>95</sup> This much is further apparent if one has regard to the nature of the assessments conducted by the various components of the National Treasury and the South African Revenue Services and associated departments, before the Minister of Finance ultimately decides whether or not to promulgate the amended duties.<sup>96</sup> As such, the Minister of Finance is not merely a "rubberstamp functionary".<sup>97</sup> Consequently the court in *Pioneer Foods* held that this means that when exercising powers under section 48(1)(b), the Minister of Finance is not engaged in administrative action.<sup>98</sup>

The court in *Pioneer Foods* further held that at first blush, when considering whether or not to accept a recommendation from ITAC and the Minister of Trade and Industry, the Minister of Finance appears to be carrying out an executive function, and when the Minister of Finance has considered that

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<sup>91</sup> *SASA* para 35.

<sup>92</sup> *SASA* para 36.

<sup>93</sup> *SASA* para 36.

<sup>94</sup> *SASA* para 40.

<sup>95</sup> *Pioneer Foods* para 30.

<sup>96</sup> *Pioneer Foods* para 30.

<sup>97</sup> *Pioneer Foods* para 30.

<sup>98</sup> *Pioneer Foods* para 31.

amended import duties are necessary in the public interest and causes them to be promulgated in the Gazette, s/he carries out a legislative function.<sup>99</sup> It was held that this is evinced by section 48(6), which provides that any amendment, withdrawal or insertion made under section 48 shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year following such action.<sup>100</sup>

Secondly, given that the Minister of Finance exercises a policy choice which lies within his/her terrain, it is not up to a court to second-guess her/him, nor should a court interfere with the process, save in obvious cases when irreversible harm would occur and it is constitutionally appropriate to grant the order concerned.<sup>101</sup> This reasoning is in line with the precedents in this regard.<sup>102</sup> Thus, the court held that the power contemplated in terms of section 48(1)(b), similarly constitutes a power which lies in the terrain of the executive authority of the Minister of Finance, and especially in instances whereby the exercise of such power is underway, it should not be interfered with by way of a mandatory order, save in the clearest of cases, and only where irreversible harm might occur should such an order not be granted.<sup>103</sup> The court was of the view that neither of these considerations were proved in this matter, and to have granted an order in the terms sought by the applicant would therefore have unjustifiably contravened the principle of the separation of powers.<sup>104</sup> Thus the court in *Pioneer Foods* held that it is evident that a request by the Minister of Trade and Industry for an amendment to the import duties on wheat does not result in an automatic acceptance and amendment by the Minister of Finance and it does not necessarily follow that a request by the Minister of Trade and Industry will necessarily be approved by the Minister of Finance.<sup>105</sup>

#### **5.4 The powers of the Minister of Finance in the CDA regime**

As noted earlier, the CEA, which is the legislation upon which the *SASA* and *Pioneer Foods* were based, will eventually be replaced by the CDA in respect of the imposition and collection of import and export duties, at a date to be determined by the President. A peek at the CDA in this regard reveals

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<sup>99</sup> *Pioneer Foods* para 31.

<sup>100</sup> *Pioneer Foods* para 31.

<sup>101</sup> *Pioneer Foods* para 32.

<sup>102</sup> *SCAW* para 101; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 68-69; *Paper Manufacturers* para 18.

<sup>103</sup> *Pioneer Foods* para 37.

<sup>104</sup> *Pioneer Foods* para 37.

<sup>105</sup> *Pioneer Foods* para 46.

some interesting observations. Firstly, section 8(1)(b) of the CDA requires that the Minister of Finance *must* amend the Customs Tariff (Schedule 1,2,3,4 and 5 of the CEA)<sup>106</sup> if the Minister of Trade and Industry or ITAC requests the amendment for implementation in accordance with the ITAA duties or other measures to foster local economic activity. Section 8(1)(b) of the CDA is the successor to section 48(1)(b) of the CEA and it makes some fundamental changes to its forerunner. The immediate implication of section 8(1)(b) of the CDA is that it brings much-needed clarity to the scope of the power of the Minister of Finance in relation to a request from the Minister of Trade and Industry or ITAC to amend the Schedule 1/Customs Tariff. This is because the Minister of Finance under section 8(1)(b) of the CDA has no "discretion" or "election" in respect of the request of the Minister of Trade and Industry or ITAC. The Minister of Finance under the section 8(1)(b) regime must "implement" without fail the amendment as requested by the Minister of Trade and Industry or ITAC. This reasoning is confirmed by the South African Revenue Services, which has explained that the Minister of Finance's power to amend the Customs Tariff is now more strictly defined because the CDA now sets out the circumstances in which the Minister of Finance "must" amend and those where the Minister of Finance "may" amend.<sup>107</sup> This means that since section 8(1)(b) employs the term "must", then the Minister of Finance does not have a right of election or discretion in respect of the request of the Minister of Trade and Industry or ITAC.

Secondly, under the CDA, the power to make a request to the Minister of Finance to effect an amendment to the Customs Tariff/Schedule 1 will no longer reside solely with the Minister of Trade and Industry. This is because section 8(1)(b) permits either ITAC or the Minister of Trade and Industry to request the Minister of Finance to implement the amendment as required by the ITAA duties or to promote local economic activity. This provision is significant because it could eliminate litigation in matters such as *SASA* and *Pioneer Foods*, as the power to accept or decline the request of ITAC would in certain instances lie solely with the Minister of Finance.

However, section 8(1)(b) of the CDA still does not resolve the debate as to whether the Minister of Finance "rubberstamps" the decision of the Minister of Trade and Industry if the latter Minister makes the request of his/her own accord, without a recommendation from ITAC, and on the ground that s/he

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<sup>106</sup> See s 7 of the CDA.

<sup>107</sup> SARS 2016 <http://www.sars.gov.za/AllDocs/Documents/customsandexcise/Customs%20Legislation%20-%20An%20Overview%20-%20May%202016.pdf>.

seeks to "foster local economic activity".<sup>108</sup> On the one hand, the ground of "fostering local economic activity" is too wide, ambiguous and problematic because it could allow the Minister of Trade and Industry to intrude on the terrain of ITAC by requesting an amendment to counteract, for instance, the "dumping" of a product or to "safeguard" local industry. Such an approach would be in conflict with the ITAA and indeed the CDA, which confer upon ITAC the exclusive power to investigate and evaluate the need for a customs duty, anti-dumping and safeguard duties.<sup>109</sup> This reasoning was endorsed by the court in *SCAW*, which held that ITAC has the power to investigate, evaluate and make recommendations to the Minister of Trade and Industry on the imposition, amendment or removal of customs, anti-dumping and countervailing duties.<sup>110</sup> On the other hand, it is unclear which grounds would justify ITAC's requesting an amendment on the basis that it is "implementing measures to foster local economic activity". ITAC is a specialist investigative body and should not be given wide and non-specific powers to implement policy measures that promote "economic activity" lest it intrude on the policy space of the Minister of Trade and Industry. Similarly, granting the Minister of Trade and Industry and ITAC such amorphous powers could be regarded as a form of disguised discrimination and protectionism which is an affront to the World Trade Organization's objectives and rules.<sup>111</sup>

Section 8(1)(b) the CDA also implies that ITAC can still make a recommendation to the Minister of Trade and Industry, who would then in turn request the Minister of Finance to effect such a request. This would still bring about the section 48(1)(b) impasse that prompted the litigation in *SASA* and *Pioneer Foods*.

Consequently, it is submitted that section 8(1)(b) should be amended to explicitly say that the Minister of Finance has the power to accept or decline the request of either the Minister of Trade and Industry or ITAC. This is necessitated by the dictum in *SASA* and *Pioneer Foods* that words such as "may" or "must" are not necessarily decisive and thus the CDA's attempt to resolve this problem in this way may suffer the same fate as section

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<sup>108</sup> The Memorandum on the Objects of the Customs Duty Bill does not shed any light on this issue apart from providing in para 3.3, that the Minister of Finance is authorised to amend the Customs Tariff by notice in the Government Gazette.

<sup>109</sup> See s 16(1) read with s 26 (1)(c)-(d) and s 30 of the ITAA; ss 15-17 of the CDA.

<sup>110</sup> *SCAW* para 6.

<sup>111</sup> See the Preamble to the *Marrakesh Agreement Establishing the World Trade Organization* (1994); see generally the *General Agreement on Tariffs and Trade* (1994).

48(1)(b).<sup>112</sup> Alternatively, section 8(1)(b) could be amended to either remove the Minister of Trade and Industry from the decision-making process or explicitly provide that both the Minister of Trade and Industry and the Minister of Finance must agree on the decision to implement the amendment to the Customs Tariff to avoid unnecessary and costly litigation. Furthermore, section 8(1)(b) could be amended to say that the Minister of Finance will only review and approve the financial aspects whereas the Minister of Trade and Industry will only review and approve the trade and industry aspects of ITAC's recommendation.

The third fundamental change in the CDA is that it explicitly differentiates between the power of the Minister of Finance to act in the "public interest" and the power to impose a duty on imported goods as requested by the Minister of Trade and Industry or ITAC. Section 8(2)(b) of the CDA provides that the Minister of Finance, acting in consultation with the Minister of Trade and Industry, may amend the Customs Tariff in relation to imported goods where section 8(1)(b) *does not apply* and the amendment is necessary in the "public interest". Section 8(2)(b) makes it clear that the "public interest" amendment is not related to the section 8(1)(b) request from the Minister of Trade and Industry or ITAC. This means that the section 48 "public interest" enquiry of the court in *Pioneer Foods* and *SASA* would not be permitted in the CDA regime except through the *Constitution* and *Public Service Act* avenues.<sup>113</sup> It is commendable that the CDA introduces a consultation requirement for the Minister of Finance to seek the views and representations of the Minister of Trade and Industry when acting in the "public interest". This novel provision aligns the role of the Minister of Finance with that of the Minister of Trade and Industry and highlights the concurrence of their mandates and interests. It goes without saying that section 8(2)(b) will negate unnecessary litigation to clarify the relationship between the two Ministers in this regard.

Lastly, section 8(3) of the CDA explains the requirements for the "request" of the Minister of Trade and Industry or ITAC, contemplated in section 8(1)(b) of the CDA. This is because section 8(3) provides that such a "request" from the Minister of Trade and Industry or ITAC must be made in writing and submitted together with a motivation giving the reasons for the request, or a report or a ministerial minute in terms of the ITAA, if the request is in terms of the ITAA. The requirement to submit written representations to the Minister of Finance introduces transparency and affords the Minister

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<sup>112</sup> See *SASA* para 39; *Pioneer Foods* para 30.

<sup>113</sup> See *SASA* para 35; *Pioneer Foods* para 30.

of Finance the opportunity to know and understand the reasons that prompted the request for a duty. It is presumed that this approach would ensure that the Minister of Finance expeditiously implements the request of the Minister of Trade and Industry or ITAC, to avoid the lengthy delays and losses suffered by the applicants in *SASA* and *Pioneer Foods*.

## 6 Concluding remarks

This paper has reflected on the nature of the powers of the Minister of Finance and the relationship between and the Minister of Trade and Industry in relation to a request from the Minister of Trade and Industry to amend Schedule 1 of the CEA as provided by section 48(1)(b) of the CEA. This assessment was conducted through an evaluation of the High Court decisions in *SASA* and *Pioneer Foods*, which hinged on the interpretation of section 48(1)(b) of the CEA. The High Court held in both cases that the role of the Minister of Finance in respect of the power conferred upon him/her by section 48(1)(b) is not merely to "rubberstamp" the decision of the Minister of Trade and Industry. Consequently, the High Court in both these matters held that section 48(1)(b) confers on the Minister of Finance a right to elect to either accept or decline the request of the Minister of Trade and Industry to amend Schedule 1 of the CEA. It is this paper's submission that if the Minister of Finance declines the request of the Minister of Trade and Industry s/he is *not* "giving effect" to the request of the Minister of Trade and Industry as required by section 48(1)(b) of the CEA, and thus s/he is acting *ultra vires*, because s/he is assuming powers that were never conferred on him/her by the legislature. This paper also argues that the High Court in both matters misconstrued the relationship between section 48(1)(b) and the "public interest" provisions in section 48, and thus unjustifiably stripped the Minister of Trade and Industry of his/her power to implement an amendment to Schedule 1. Finally, this paper has also reflected on the impact of the CDA on the powers of the Minister of Finance in this regard.

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### **List of Abbreviations**

CDA	Customs Duty Act
CEA	Customs and Excise Act
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission
SACU	Southern African Customs Union
TSAR	Tydskrif vir die Suid-Afrikaanse Reg