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The power of the Minister of Finance to amend Schedules to the Customs and Excise Act to impose tariffs and trade remedies: A discussion of recent developments in case law

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ABSTRACT

The Constitutional Court of South Africa in Nu Africa Duty Free Shops v Minister of Finance decided on whether the Minister of Finance has the power to amend the Schedules to the Customs and Excise Act 91 of 1964 (CEA). The High Court had ruled that this amendment power was a violation of the principle of legality, since it unlawfully allowed the delegation of a plenary legislative power. In the confirmation proceedings, the Constitutional Court declined to confirm the High Court order on the grounds that South African law does not prevent the delegation of the power to amend schedules of a statute. The apex court based this finding on the view that this amendment was subject to parliamentary oversight, that it must be in the public interest, and that the duty would lapse after a year if Parliament did not approve it. This article discusses the implications of the decision for the imposition of tariffs and trade remedies. The discussion reviews relevant case law, legislation, literature, and domestic law

Keywords: Minister of Finance; imposition of duties; rationality; arbitrariness; amendment of schedules; Customs and Excuse Act; ITAC

1 INTRODUCTION

A "duty" is a tax on imported products that can take the form of either a tariff, or an anti-dumping, countervailing duty, and a safeguard measure, that is, trade remedies. The International Trade Administration Commission of South Africa (ITAC) is conferred with the power to conduct tariff and trade-remedy investigations by the International Trade Administration Commission Act 71 of 2002 (ITAA). Upon making a decision in this regard, ITAC makes a recommendation to the Minister of Trade, Industry and Competition (Minister of Trade), who can either accept or reject this recommendation. If the Minister of Trade accepts this recommendation, then he or she makes a "request" to the Minister of Finance to give effect to this request. This is done through an "amendment" to the Schedules to the Customs and Excise Act 91 of 1964 (CEA). This power is conferred exclusively exclusively to the Minister of Finance. However, the power of the Minister of Finance in considering this "request" has been the subject of much litigation and debate. In the unprecedented decisions of the High Court in *South Africa Sugar Association v the Minister of Trade and Industry*[1] and *Pioneer Foods (Pty) Ltd v Minister of Finance*,[2] it was found that the Minister of Finance, rather than the Minister of Trade, is the final decision-maker on whether duties can be imposed on a product.

While these decisions pertained to the imposition of tariffs, they have a bearing on the imposition of other duties in the form of anti-dumping, safeguards and countervailing duties in that they rejected the view that the Minister of Finance rubberstamps the decision of the Minister of Trade when amending the Schedules to the CEA to impose, alter or abolish duties. In my previous papers, I have explored the decision-making process in the imposition of duties in South Africa.[3] In essence, I have impugned the power of the Minister of Finance to be the final decision-maker in the imposition of a duty on a product. In my view, the Minister of Finance must defer to the decision of the Minister

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1 2017 4 All SA 555 (GP) ("*SASA*").

2 [2017] ZAWCHC 110 (29 September 2017) ("*Pioneer Foods"*).

3 Vinti C "The scope of the powers of the Minister of Finance in terms of section 48(1)(b) the Customs and Excise Act 91 of 1964: An appraisal of recent developments in case law" (2018) 21 *Potchefstroom Electronic Law Journal* 1; Vinti C "The right of 'interested parties' to be heard during the anti-dumping investigation conducted by the National Treasury on behalf of the Minister of Finance" (2020) 137(4) *South African Law Journal* 713; Vinti C "*Association of Meat Importers and Exporters v International Trade Administration Commission* (9233/2022) [2023] ZAGPPHC 1790 (12 October 2023): More clarity offered on the decision-making process of the Minister of Finance in the imposition of anti-dumping duties (and other trade remedies) in South Africa" (2025) 58(1) *De Jure Law Journal* 32 at 40–42.

of Trade. Conversely, I have argued that if the Minister of Finance has this power, then there should be a right to be heard, in line with the principles of rationality and procedural fairness.

The decision in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others; Commissioner for the South African Revenue Service v Ambassador Duty Free (Pty) Ltd and Others; Minister of Finance v Ambassador Duty Free (Pty) Ltd and Others* ("*Nu Africa CC*")[4] has significant implications for this amendment power of the Minister of Finance. This is because it was held in *Nu Africa CC* that the power of the Minister of Finance to amend the Schedules to the CEA and the Value Added Tax Act 89 of 1991 ("VAT Act") on rebates of custom duties and Value-Added Tax (VAT) is constitutional and valid even though it involves the amendment of a primary statute. This has a bearing on the imposition of duties for trade remedies for South Africa and its African trade partners under the African Continental Free Trade Area Agreement (AfCFTA) Protocol on Trade in Goods. Consequently, this article explores the implications of the decision in *Nu Africa CC* for the imposition of duties for trade remedies by the Minister of Finance through amendment of Schedule 2 to the CEA.

1.1 The course of ITAC trade investigations

ITAC is mandated by the ITAA with the duty to conduct investigations on international trade remedies, that is, anti-dumping, safeguards and countervailing measures.[5] It also conducts investigations on tariffs in the form of duty rebates, increases, reductions and withdrawals. ITAC is an independent body subject only to the Constitution, the law, and policy directives and statements of the Minister of Trade and notices in terms of sections

[4] [2022] ZACC 31. (28368/2021; 32175/2021) [2022] ZAGPPHC 7 (17 January 2022) ("*Nu Africa CC*").

[5] See sections 16 and 26 of the ITAA read with the Amended Tariff Investigations Regulations GN R 652 in GG 39035 of 31 July 2015 (ATR), Anti-Dumping Regulations, in GN 3197 GG 25684 of 14 November 2003(ADR), Amended Safeguard Regulations in GN No. R. 662 in GG 22762 of 8 July 2005 (SGR) and the Countervailing Regulations in GN No. R. 356 in GG 27475 of 15 April 2005 (CVR). In simple terms, "dumping" refers to international price discrimination whereby one sells a product in another country's market at a price lower than that imposed on the like product in its home market. "Safeguard measures", in the form of a duty or quota or both, are imposed to address an extraordinary situation where serious injury, or a threat thereof, has occurred to the domestic industry of the like product due to a sudden, significant, recent and sharp increase in imports of a product into one's domestic market that was unforeseen and incurred as a result of one's obligations to the World Trade Organization. "Countervailing measures" are, in essence, duties or a quota or both, imposed to address adverse effects such as material injury caused by a subsidy.

5 and 6 of the ITAA as provided by section 7 of the ITAA. The course of the investigation in regard to tariffs and to trade remedies is mostly the same.

ITAC conducts its trade investigations in terms of sections 16 and 26 of the ITAA on tariffs, dumping, safeguards and countervailing measures. The power to investigate these measures is substantiated by regulations, namely the Amended Tariff Investigations Regulations, the Anti-Dumping Regulations, the Amended Safeguard Regulations, and the Countervailing Regulations. The underlying approach of these regulations is based on the principle of procedural fairness, as required under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 33 of the Constitution.

Essentially, investigations commence with a duly competed application, which must be properly documented by the relevant domestic industry.[6] This means that the application has to contain information which is "reasonably available" to the applicant.[7] The domestic industry making the application must be broadly representative of the Southern African Customs Union (SACU) industry; thus, 25 per cent of the domestic industry, measured by volume, must support the application.[8] When this application is filed, ITAC must verify the accuracy and adequacy of the information provided by the applicants through a verification process that culminates in a verification report.[9] ITAC has the power to reject an incomplete application and to deem it materially deficient. This is followed by a merit assessment to evaluate whether the investigation elicits a *prima facie* case.[10] ITAC will then notify the countries of origin and export of the product in question that it has received a properly documented application after verification but before initiation.[11]

Thereafter, ITAC will publish a Notice of Initiation in the Government Gazette notifying interested parties that an investigation has commenced and requesting that they make submissions on the application within 30 days of the notice.[12] This application can be requested from the investigating team, and a public file will be prepared which

6 See for instance, regulations 21 and 22 of the ADR and regulation 11 of the SGR.
7 See for example, regulation 11.2 of the ADR and regulation 23.1 of the CVR.
8 See regulation 7.3 of the CVR; regulation 7.3 of the ADR; regulation 7.2 of the SGR.
9 See regulation 25 of the ADR; regulation 25 of the CVR.
10 See regulation 13 of the SGR; regulation 26 of the ADR.
11 See regulation 27 of the CVR; regulation 27 of the ADR.
12 See regulation 14 of the SGR; regulation 28 of the ADR; regulation 28 of the CVR.

contains all the non-confidential submissions of all the parties. Interested parties are given 30 days to comment on the application. This is called the preliminary investigation phase. At the end of the preliminary investigation, ITAC makes a preliminary finding and publishes a report to that effect.[13] At this stage a provisional measure can be imposed, one which is refundable in respect of trade remedies.[14] Thereafter, the final investigation phase begins, with the parties being given an opportunity to comment on the preliminary investigation report.[15] ITAC will then draw up an essential facts letter (for dumping and countervailing matters) which establishes the facts which will form the basis of its final determination.[16]

Interested parties are given an opportunity to comment on the essential facts letter. After this stage, ITAC will consider the comments and make its final determination. This is contained in the final investigation report.[17] ITAC will then send its recommendation to the Minister of Trade in the form of the final investigation report and Ministerial Minute or Report explaining the basis of its decision.

The Minister of Trade is empowered to either accept or reject this recommendation by section 4 of the Board on Tariffs and Trade Act 107 of 1986 (BTTA). If the Minister of Trade accepts the recommendation, then he or she makes a "request" to the Minister of Finance to give effect to this request under sections 55 to 57 of the CEA by "amending" the relevant Schedule to the CEA. Based on the decisions in *Pioneer* and *SASA*, it is now common cause that the Minister of Finance has the discretion to accede to or reject this "request" by the Minister of Trade. If the Minister of Finance accedes to the request, he or she can then proceed to amend the relevant Schedule to the CEA. If it is for the imposition or abolishment or variation of a tariff, then the Minister amends Schedule 1 as provided by section 48 of the CEA; if it is for the imposition or abolishment or variation of a dumping or safeguard or countervailing measure, then the Minister of Finance amends Schedule 2 of the CEA as provided by sections 55 to 57 of the CEA.

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13 See regulation 34 of the ADR; regulation 18 of the SGR.
14 See regulation 33 of the ADR; regulation 33 of the CVR; regulation 17 of the SGR.
15 See regulation 35 of the ADR; regulation 35 of the CVR.
16 See regulation 37 of the ADR; regulation 37 of the CVR.
17 See regulation 38 of the ADR; regulation 38 of the CVR.

Consequently, it is my view that the decision in *Nu Africa* has significant implications for the Minister of Finance's power to impose duties by amending the Schedules to the CEA. The discussion below will explain my thesis, commencing with an outline of the relevant facts of the decision in *Nu Africa*, the issues before the courts, and the findings. The article concludes with an assessment of the implications of the decision in *Nu Africa* for the imposition of duties by the Minister of Finance.

2 THE DECISIONS OF THE COURTS

2.1 The High Court decision in *Nu Africa*

Before the High Court, the applicants in the two main applications – Ambassador Duty Free (Pty) Ltd, Flemingo Duty Free Shops International SA (Pty) Ltd, and International Trade & Commodities 2055 CC t/a Assortim Duty Free – applied for an urgent order to review and set aside two decisions. The first was a decision by the Minister of Finance to promulgate certain amendments to the Schedules of the CEA and to Schedule 1 of the VAT Act; the second was a decision by the Commissioner for the South African Revenue Service (SARS) to amend the Rules to the CEA.[18] Ambassador, Flemingo, Assortim and Nu Africa are licensed duty-free retailers that supply duty-free products to foreign heads of state, diplomatic or consular missions, and their representatives and family members.[19]

Each of the duty-free retailers operates their shops in terms of a licence issued to them by SARS under section 21 of the CEA. This licence is further subject to the rules made by SARS in terms of section 120 of the CEA.[20] Duty-free retailers are required to operate their respective stores as provided by the CEA, the VAT Act, and the Diplomatic Immunities and Privileges Act 2001 ("the Diplomatic Immunities Act"), including its Schedules, which consist of the Vienna Convention on Diplomatic Relations 1961 and Vienna Convention Consular Relations 1963 (collectively "the Vienna Conventions").[21] Before 1 August 2021, diplomats could obtain a full rebate on the tariff paid for products bought by them from any of duty-free retailers, subject to the condition that such goods

[18] *Ambassador Duty Free (Pty) Ltd v Minister of Finance and Others* (28368/2021; 32175/2021) [2022] ZAGPPHC 7 (17 January 2022) ("*Nu Africa HC*") at para 1.

[19] *Nu Africa HC* (2022) at para 5.

[20] *Nu Africa HC* (2022) at para 6.

[21] *Nu Africa HC* (2022) at para 7.

are purchased for the purposes provided for in the Vienna Conventions, namely for the official use of their mission or for personal use by themselves.[22]

On 23 April 2001, the Minister of Finance published amendments in the Government Gazette to certain Schedules to the CEA and to a Schedule to the VAT Act ("the impugned regulations" or "schedule amendments'').[23] The Minister of Finance argued that, in effecting the impugned regulations, he performs a legislative function. The impugned regulations, initially announced as taking effect on 1 July 2021, sought in essence to introduce a quota system operating on a six-monthly cycle and restricting the quantity of alcohol and tobacco products that diplomats could buy free of any duty and/or VAT. Secondly, the regulations imposed new requirements in the notes to the rebate item provided for in the Schedules. These had to be complied with for purchases to be made by the diplomats from the duty-free stores and to impose, in certain circumstances, a VAT liability on the importer of alcohol and tobacco products.[24]

On 11 June 2021, the Minister of Finance explained that the reason for making the impugned regulations was to prevent diplomats from abusing their privileges in respect of duty-free purchases.[25] It was alleged, for instance, that certain diplomats were buying alcohol and tobacco products from duty-free retailers and unlawfully reselling them in the local market.[26]

The principal question the court was called on to decide was whether the impugned regulations, as subsequently amended, and the impugned rules should be set aside.[27] This entailed that three additional questions had to be decided upon:

(i) whether the decisions by the Minister of Finance and SARS constituted an administrative action that stood to be reviewed and set aside in terms of the provisions of PAJA; or

(ii) whether those decisions stood to be reviewed and set aside in terms of the principle of legality; and

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22 *Nu Africa HC* (2022) at para 8.
23 *Nu Africa HC* (2022) at para 9.
24 *Nu Africa HC* (2022) at para 10.
25 *Nu Africa HC* (2022) at para 11.
26 *Nu Africa HC* (2022) at para 11.
27 *Nu Africa HC* (2022) at paras 22 and 80.

(iii) whether the decisions were unconstitutional and the provisions purporting to give the Minister the power to make the impugned regulations should be declared unconstitutional.[28]

This article focuses on the third issue, that of the constitutionality of the Minister's power to amend the Schedules to the CEA. This issue pertained to the limitation on the quantities of alcohol and tobacco products that diplomats could purchase on a duty-free basis.[29] It was argued that the amendments were unlawful and invalid because they violated the provisions of the Diplomatic Immunities Act and Vienna Conventions.[30] The court explained that the applicants were licensed as "duty-free stores" in terms of section 21 and Schedule 8 of the CEA read with the Rules.[31] The applicants conducted their businesses in Pretoria, where diplomatic missions and representatives may buy local goods duty-free and imported goods, free of duty and VAT.[32]

Section 21 of the CEA outlines the requirements applicable to special customs and excise warehouses, such as duty-free stores. Section 21(3)(a) authorises the Commissioner to prescribe the Rules relating to the storage of goods.[33] Section 21(3)(e) also authorises the Commissioner to issue Rules concerning, among other things, the goods and activities that are allowed in such a warehouse and the requirements to be complied with by applicants and licensees.[34] Section 60(2)(b)(ii)(aa) then states that SARS may cancel any licence in the event of non-compliance with the CEA.[35] The applicants used rebate item code 406.00 to clear their imported goods.[36] The code is contained in Part 1 of Schedule 4 of the CEA. Rebate item 406.02 allows diplomatic or consular missions, representatives, and family members to claim rebates on all goods purchased for official use by a diplomatic or consular mission, for official use by a diplomatic or consular representative, or for the personal use of diplomatic or consular representatives who are accredited to a diplomatic or consular mission and members of

28 *Nu Africa HC* (2022) at paras 22 and 80.
29 *Nu Africa HC* (2022) at para 56.
30 *Nu Africa HC* (2022) at para 56.
31 *Nu Africa HC* (2022) at para 57.
32 *Nu Africa HC* (2022) at para 57.
33 *Nu Africa HC* (2022) at para 58.
34 *Nu Africa HC* (2022) at para 58.
35 *Nu Africa HC* (2022) at para 59.
36 *Nu Africa HC* (2022) at para 59.

their families, to the extent determined and approved by the Director-General at the Department of International Relations and Cooperation.[37]

Schedule 1 of the VAT Act deals with the exemption of goods imported into South Africa.[38] According to paragraph 8 of Schedule 1, for one to qualify for the VAT exemption, the goods must fall under one of the descriptions listed under paragraph 8, in addition to which any requirements or limitations contained in the particular description must be complied with, as must be the case with the notes contained in paragraph 8 of Schedule 1. Rebate item 406.00, as contained in Schedule 4 of the CEA, is among the descriptions listed in this paragraph. Goods imported for the official use of missions and the personal use of diplomats are imported under rebate of duty in terms of various rebate items in Schedules 4 and 6 of the CEA. In terms of section 75(15) of the Act, the Minister is empowered to amend those Schedules.[39]

In response to these considerations, the High Court explained that the primary issue before it was whether the Minister's decision to make the amendments to the Schedules amounted to administrative action within the meaning of PAJA and was at any event subject to the principle of legality.[40] Using the decision in *Pioneer*, the court held that PAJA is inapplicable to a decision of the Minister to amend a Schedule to the CEA to set or change a customs duty.[41] It held that when the Minister decides what customs duties to set, he or she exercises an executive function, and that when he or she amends the Schedule to give effect to that decision, he or she exercises a legislative function under the supervision of Parliament.[42] This finding is contradicted by the decision in *Bosch,* where the same court later held that this power is administrative and subject to PAJA.[43] According to the court in *Bosch*, the power of the Minister of Finance to vary, amend or

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37 *Nu Africa HC* (2022) at para 59.
38 *Nu Africa HC* (2022) at para 61.
39 *Nu Africa HC* (2022) at para 62.
40 *Nu Africa HC* (2022) at para 81.
41 *Nu Africa HC* (2022) at para 86.
42 *Nu Africa HC* (2022) at para 86.
43 *Bosch Home Appliances (Pty) Ltd t/a Bosch v International Trade and Administration Commission and Others; Bosch Home Appliances (Pty) Ltd t/a Bosch v Minister of Trade Industry and Others* (12160/18; 67553/18) [2021] ZAGPPHC 8 (5 January 2021) ("*Bosch"*) at para 182.

abolish a customs duty and the preceding "request" of the Minister of Trade both emanate from national legislation and not the Constitution.[44]

Thus, it held that these decisions constitute administrative actions reviewable under PAJA because they involve the implementation of national legislation.[45] This finding in *Bosch* obviously contradicts the binding precedent in *SCAW*, where the Constitutional Court held that it is patently clear that setting, changing or removing a duty to regulate exports and imports is an executive power that arises from the power to formulate and implement industrial and international trade policy.[46] This power sits in the "kraal of the national executive authority".[47] The same considerations apply to tariffs, as correctly held by the High Court in *Pioneer* and *SASA*.[48] Thus, it is doubtful if the decision in *Bosch* – namely that the powers of the Minister of Trade in making a request and the Minister of Finance deciding on the request constitute administrative action – is correct in law. This court in *SCAW* established the principle confirmed in *SASA* and *Pioneer* that the power to amend the Schedules to the CEA is legislative in nature.[49]

Furthermore, the court in *Nu Africa* explained that when the Commissioner makes Rules in terms of section 120 of the CEA for the control of the storage or manufacture of goods in customs and excise warehouses and the payment of duties and other charges and fees, as well as in respect of all matters which by this Act are required or permitted to be prescribed by a rule, this constitutes administrative action within the meaning of PAJA.[50] It is common cause that the decisions of the Commissioner constitute administrative action and are thus subject to review under PAJA. In any event, it was accepted by the applicants that even if the decision to amend the Schedules did not constitute administrative action, these amendments should be set aside in terms of the principle of legality.[51]

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44 *Bosch* (2021) at para 182.

45 *Bosch* (2021) at para 182.

46 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("SCAW").

47 *SCAW* (2012) at para 102.

48 *Pioneer Foods* (2017) at paras 30–31.

49 *SCAW* (2012) at para 99; *SASA* (2017) at para 33; *Pioneer Foods* (2017) at para 31.

50 *Nu Africa HC* (2022) at para 89.

51 *Nu Africa HC* (2022) at para 92.

The central issue before the High Court was that the amendments to the Schedules were unlawful and therefore constituted a violation of the principle of legality, as held in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paragraph 5.[52] It was not disputed that, as it appeared from the gazetted amendments, the Minister relied explicitly on section 75 of the CEA and section 74(3)(a) of the VAT Act in making the amendments, though the Minister argued that Nu Africa overlooked section 48(6) of the Customs Act.[53] In essence, the key argument was that the decision of the Minister to publish the amended Schedules and amendments to the Schedules was unconstitutional and thus had to be set aside and declared invalid.[54]

The rationale for this argument was that the Minister relied on section 75(15) of the CEA Act and section 74(3) of the VAT Act to amend the Schedules to the relevant statutes;[55] however, in *Smit v Minister of Justice and Correctional Services and others* 2021 (3) BCLR 219 (CC), the Constitutional Court had held that it is constitutionally impermissible for Parliament to assign original plenary legislative powers to the executive to amend an Act of Parliament or its schedules.[56] This was disputed by the Minister of Finance and SARS, who contended that the provisions were distinguishable from those declared invalid in *Smit*, making reference to section 48(6) of the Customs Act. SARS argued that the amended Schedules were subordinate legislation and thus the impugned acts were constitutionally valid.[57]

According to the court, it was incumbent to commence the analysis by referring to the provisions relevant to the constitutional attack. Section 75(15)(a) of the Customs Act provides that the Minister of Finance may amend Schedules 3, 4, 5 or 6 "whenever he deems it expedient in the public interest to do so".[58] Section 48(6) of the CEA provides that when the Minister amends Schedule 1 to the CEA, the amendment "shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year, but without detracting from the validity of such amendment, withdrawal or insertion before it has so lapsed". Section 75(16) then provides that section 48(6) applies in respect of any

52 *Nu Africa HC* (2022) at para 92.
53 *Nu Africa HC* (2022) at para 115.
54 *Nu Africa HC* (2022) at para 116.
55 *Nu Africa HC* (2022) at para 116.
56 *Nu Africa HC* (2022) at para 116.
57 *Nu Africa HC* (2022) at para 117.
58 *Nu Africa HC* (2022) at para 118.

amendment made under section 75(15). In this regard, section 74(3) of the VAT Act provides that whenever the Minister amends any Schedule to the Customs Act and, as a consequence, it is necessary to amend Schedule 1 of the VAT Act, the Minister of Finance is entitled to amend Schedule 1 to the VAT Act. Section 74(3)(b) provides that the provisions of section 48(6) of the Customs Act apply to such an amendment to Schedule 1 of the VAT Act.

The court then explained that section 43 of the Constitution, read with section 44, provides that the legislative authority of the national sphere of government is vested in Parliament.[59] The Constitution allows Parliament to delegate certain legislative functions to the executive.[60] Referring to the decision in *Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa and othe*rs 1995 (4) SA 877 (CC) in paragraph 52, the court explained that the interim Constitution allowed Parliament to delegate subordinate regulatory authority to other bodies.[61] However, it was emphasised that there is "a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body".[62] ln *Smit v Minister of Justice and Correctional Services*, the Constitutional Court held that the same principle applies to statutory provisions that empower the executive to amend the schedules to a statute by holding that this is tantamount to a "complete delegation of original legislative power to the Executive and there is no clear and binding framework for the existence of the powers. This is constitutionally impermissible."[63]

Nu Africa argued that the principle in *Smit* applies "with equal force to section 75(15) of the Customs Act and section 74(3) of the VAT Act".[64] The Minister in turn argued that the framework created by the CEA and the VAT Act, on the one hand, is distinguishable from that declared invalid in *Smit,* on the other.[65] The Minister based this on section 48(6) of the CEA, which provides that those amendments to the Schedules, if they lapse, remain

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59 *Nu Africa HC* (2022) at para 121.
60 *Nu Africa HC* (2022) at para 121.
61 *Nu Africa HC* (2022) at para 121.
62 *Nu Africa HC* (2022) at para 121.
63 *Nu Africa HC* (2022) at para 122; *Smit v Minister of Justice and Correctional Services* 2021 (3) BCLR 219 (CC) at paras 35–39.
64 *Nu Africa HC* (2022) at para 123.
65 *Nu Africa HC* (2022) at para 123.

valid during the period between their being issued by the Minister and their lapsing. Thus, so it was pointed out, the amended Schedules are law for the period and the Minister is the party that made that law.[66] The court confirmed that this finding was affirmed in M*inister of Finance and another v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA) at paragraph 13. In short, the court accepted that, during the initial period of validity, any transaction to which the various rebates, refunds and drawbacks of customs and excise duty and VAT applied would still be affected by the amended Schedule whether or not Parliament intervenes.[67] Parliamentary oversight at a later stage would not address the problem.[68]

SARS argued that the Schedules are delegated legislation and suggested that the *Smit* decision had no application because the Schedules are not part and parcel of the Acts under discussion.[69] Significantly, Nu Africa explained that when the CEA was originally promulgated in Government Gazette 866 of 31 July 1964, all the Schedules (that is, Schedule No. 1 to Schedule No. 8) were promulgated along with the Act.[70] Consequently, the High Court concluded that the CEA did not empower the Minister of Finance to create the Schedules.[71] These Schedules were made part of the Act by Parliament.[72] With this finding in mind, the court then explained that section 75(15) of the CEA empowers the Minister of Finance to amend the Schedules. By doing so, the Minister of Finance was exercising plenary legislative power to amend an original Act.[73] By "plenary", what is meant here is the power to make, amend or repeal legislation.[74] Section 74(3) of the VAT Act appears to be connected to section 75(15) of the CEA. It also gives the Minister of Finance a similar power to amend Schedule 1 to the VAT Act.[75] In doing so, the court was

66 *Nu Africa HC* (2022) at para 124.
67 *Nu Africa HC* (2022) at para 124.
68 *Nu Africa HC* (2022) at para 124.
69 *Nu Africa HC* (2022) at para 125.
70 *Nu Africa HC* (2022) at para 125.
71 *Nu Africa HC* (2022) at para 126.
72 *Nu Africa HC* (2022) at para 126.
73 *Nu Africa HC* (2022) at para 126.
74 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 ("*Executive Council*") at para 62.
75 *Nu Africa HC* (2022) at para 126.

of the view that the Minister of Finance was again exercising plenary legislative power to amend an original Act despite the import of section 48(6) of the CEA.[76]

Accordingly, for these reasons and considering the proposition established by its decision in *Smit*, the court found that section 75(15) of the CEA and section 74(3) of the VAT Act, including the amended Schedules to both Acts, should be declared unconstitutional and invalid.[77] As shown by the gazetted amendments, the Minister of Finance explicitly relied on section 75 of the CEA and section 74(3)(a) of the VAT Act in making the amendments. The Minister's decision to make and publish the amended Schedules appeared to be directly linked to and based on the plenary legislative power to make these amendments.[78] Therefore, once section 75(15) of the CEA and section 73(3) of the VAT Act were declared unconstitutional, it followed that by the same token the decision of the Minister of Finance to make these amendments must be declared unconstitutional and invalid in terms of section 6(2)(i) of PAJA in that it is otherwise unconstitutional or unlawful.[79]

The court concluded by holding that since the amendments to the Schedules were to be declared unlawful, the amendments to the Rules must also be set aside, otherwise the applicants would be required to enforce a quota system which is unlawful. In line with section 6(2)(i) of PAJA, these Rules were declared unlawful and set aside.[80]

2.2 The decision of the Constitutional Court in *Nu Africa*

The apex court was of the view that the issues above had to be viewed through the lens of the substance-over-form approach. According to the court, if one focuses on the label of a statutorily conferred power, one will be led astray, albeit this does not mean that the label is of no consequence.[81] The court saw this issue as one of separation of powers. Given this premise, it explained that South Africa does not follow a rigid separation-of-powers doctrine in light of the jurisprudence on that issue.[82] Here, one must accord due weight

[76] *Nu Africa HC* (2022) at para 126.
[77] *Nu Africa HC* (2022) at para 126.
[78] *Nu Africa CC* (2022) at para 127.
[79] *Nu Africa CC* (2022) at para 127.
[80] *Nu Africa CC* (2022) at para 140.
[81] *Nu Africa CC* (2022) at para 75.
[82] *Nu Africa CC* (2022) at para 75.

to the "practicalities of day-to-day decisions in modern governance".[83] The answer lies in the difference between whether one is conferred a plenary power (which is impermissible) or a regulatory power.[84] A closer look at section 75(15) of the CEA reveals that it empowers the Minister of Finance to amend Schedules to the Act whenever he or she deems it expedient in the public interest; the caveat is that the Minister's power must be rational, lawful and pursuant to the purpose of the legislation. *Kennasystems* supports the Commissioner's contention that when the Minster amends Schedules to the Act, he or she is not exercising primary or original legislative powers.[85]

The import of Nu Africa's argument is that it is automatically unconstitutional for any Act of Parliament to empower a member of the executive to amend a Schedule to the CEA.[86] This was found to be incorrect, since it is oblivious of the duty to assess it within its context and accord due regard to the scope of the delegation, the subject matter in question, the degree of delegation, and the sufficiency of the parameters placed on the exercise of the discretionary powers conferred by the section.[87] The argument of Nu Africa was framed as an "absolutist rule" that would compel the Minister of Finance to seek parliamentary intervention first before attending to the widespread abuse.[88] This argument was found to be flawed because, usually, fiscal policy demands that, in order to prevent abuse, fiscal measures be implemented as soon as a loophole is discovered.[89]

In this case, if Parliament were to be approached first, errant diplomats would have free rein and the mischief sought to be prevented would continue unabated.[90] To be more precise, pending Parliament's intervention – which would not be as swift as executive intervention – such diplomats could engage in bulk-buying and continue selling the ill-gotten goods long after the intervention.[91] That, of course, would gravely disadvantage the fiscus and, thus, the general populace.[92]

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83 *Nu Africa CC* (2022) at para 75.
84 *Nu Africa CC* (2022) at para 77.
85 *Nu Africa CC* (2022) at para 92; *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade* 1996 (1) SA 69 (T) ("*Kennasystems*").
86 *Nu Africa CC* (2022) at para 95.
87 *Nu Africa CC* (2022) at para 95.
88 *Nu Africa CC* (2022) at para 97.
89 *Nu Africa CC* (2022) at para 97.
90 *Nu Africa CC* (2022) at para 97.
91 *Nu Africa CC* (2022) at para 97.
92 *Nu Africa CC* (2022) at para 97.

The flexibility built into the South African conception of separation of powers allows for quick executive intervention.[93] The executive has the right to act quickly to address the abuse in question by promulgating the amendments.[94] The amendment power of the executive was accepted by the Supreme Court of Appeal in *Paper Manufacturers*.[95] This power is insulated by the parliamentary oversight mooted in section 48(6) of the CEA.[96] If Parliament disagrees with the proposed amendment, then it will be withdrawn.[97] The executive is, however, better placed to understand the day-to-day demands of administering the matters covered by the Schedules, which is why Parliament delegated this power to it. That is to say, it was a deliberate choice by Parliament to delegate authority to the executive in such circumstances, bearing in mind that the latter's expertise and proximity to the matter makes it the best suited to handle the amendment of the Schedules to the CEA.[98] This is cogent since Parliament retains its oversight power under section 48(6) of the CEA. Thus, the court held that the delegation by Parliament to the Minister of Finance to amend the Schedules to the CEA was constitutional and valid.[99] The court then provided further reasons for its conclusion.

First, the Schedules contain large amounts of information that from the outset are best left for the Minister of Finance to establish by regulation. Secondly, the Schedules by nature contain detail that requires constant amendment, such as duty rates and tariff determination. Thirdly, the duties in the Schedules typically can be administered properly only if they are amended in real-time rather than retroactively. Finally, the ministerial amendments apply for a short period, after which they can remain extant only upon parliamentary approval.[100] As such, the court saw this case as distinct from the circumstances pertaining in *Smit* and *Executive Council*. The finding has profound implications for the power of the Minister of Finance to amend Schedules of the CEA to impose tariffs in general, and anti-dumping, safeguards and countervailing duties. This

93 *Nu Africa CC* (2022) at para 98.

94 *Nu Africa CC* (2022) at para 98.

95 *Nu Africa CC* (2022) at para 98; *Minister of Finance and Another v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA) at para 2.

96 *Nu Africa CC* (2022) at para 98.

97 *Nu Africa CC* (2022) at para 99.

98 *Nu Africa CC* (2022) at para 99.

99 *Nu Africa CC* (2022) at para 100.

100 *Nu Africa CC* (2022) at para 101.

inevitably requires an analysis of the issue of the rationality of the Minister of Finance's decision, as will become apparent from the court's dictum.

3 IMPLICATIONS OF THE DECISION IN *NU AFRICA CC* FOR TRADE REMEDIES

3.1 The rationality issue

In terms of section 1(c) of the Constitution, the exercise of public power is subject to the legality requirement as an aspect of the rule of law.[101] Legality means that public functionaries may exercise no power and perform no function beyond what has been bestowed to them by law.[102] As a consequence, this exercise of power needs to be rationally connected to the purpose sought to be achieved by its exercise.[103] This is the principle of rationality. In this regard, the court held that it was irrelevant to the rationality test to assess the precise information on which the Minister of Finance relied in order to establish the maximum quota.[104] The finding is flawed, as the separate judgment explained in pointedly witty terms:

> [I]f a Minister relies on material which purports to be such data, but the data is nonsensical (or "gobbledygook"), the resultant decision cannot be rational. To borrow computer modelling's colourful acronym, this is the GIGO principle: "garbage in, garbage out". The position is even worse in the present case – we do not even know what information was before the Minister when he took his decision, because nobody has told us. The Minister has not stated what inferences he drew from what material.[105]

Rationality analysis must require that valid data is placed before the court. A refusal even to engage with the data would open the door to "gobbledygook" or "GIGO". It is not that the courts must determine whether this is the best data available; rather, the court must establish that the data before the decision-maker is rationally related to the

[101] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) ("Albutt") at para 49.

[102] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 at para 58.

[103] *Albutt* (2010) at para 49.

[104] *Nu Africa CC* (2022) at para 117.

[105] *Nu Africa CC* (2022) at para 241.

legitimate goal to be achieved.[106] This assumes, compels and, thus, imposes an obligation to consider if the data or information tendered has veracity and is adequate. It is an assessment not of whether other, better information is available[107] but of whether the information availed establishes a rational link between the legitimate goal pursued and the information before the decision-maker.[108]

The apex court's reluctance to conduct this assessment is understandable in the interests of the separation-of-powers doctrine. However, this court ought not to fall into the same trap for which it castigated the parties and the High Court – namely, adopting an absolute and inflexible version of separation of powers that does not allow necessary intrusions by one arm of government in another. The separation of powers cannot mean that we do not look at the data that led to a decision: this would open the door to invalid information being availed by the government and the courts not reviewing its veracity on account of the separation of powers. This is the import of the finding of the separate judgment penned by Justice Rodgers.[109] In the alternative, Nu Africa, to avoid this quagmire, should have framed its challenge on the basis of arbitrariness and not rationality.

The Constitutional Court has held that even though there may be an intersection between arbitrariness and rationality, these are different principles that measure the exercise of public power.[110] Arbitrariness denotes the lack of a basis or justification for a decision that has been made.[111] Rationality is concerned not with the justification of the decision action but with a different issue:[112] it seeks to establish the link between the objective and the measure used to achieve such objective.[113] Rationality is therefore a standard lower than arbitrariness.[114]

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[106] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (5 October 2012) ("*Democratic Alliance*") at para 32.

[107] *Democratic Alliance* (2013) at para 32.

[108] *Democratic Alliance* (2013) at paras 31–32.

[109] *Nu Africa CC* (2022) at paras 236–242.

[110] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) ("*SARIPA*") at para 55.

[111] *SARIPA* (2018) at para 55.

[112] *SARIPA* (2018) at para 55.

[113] *SARIPA* (2018) at para 55.

[114] *SARIPA* (2018) at para 55.

Consequently, despite my misgivings (detailed below) about this reasoning, in strategic terms, arbitrariness would have been a better ground to raise in this regard since it speaks directly to the issue raised by Nu Africa. Yet I hasten to add that rationality, as framed in *Albutt,* seems amorphous in that it is unclear how the rational link is established without looking at the evidence.[115] It would be unsound – indeed impossible – to establish rationality without assessing the veracity and sufficiency of the instrument or information tendered. There may well be a better instrument or information, though that is not the inquiry here. But the fact that this inquiry does not entail an evaluation of whether there are better instruments does not mean that any instrument or information *at all* will suffice – to make that call, one must check whether that information has veracity and is sufficient to achieve the policy goal. This means that, invariably and necessarily, rationality entails an assessment of whether the information before the decision-maker is valid: it would be *irrational* to contend otherwise. This then means that a rationality analysis incorporates an assessment of the ground of arbitrariness. Thus, the line drawn between the two seems superficial and unwarranted. One is left wondering how the separation-of-powers doctrine would allow the courts to check whether a decision has a basis under the ground of arbitrariness since this this very same inquiry is frowned upon in a rationality analysis – a twin component under the umbrella principle of legality.

3.2 The question of the Minister of Finance's amendment powers

As explained above, the contentious issue in respect of the power of the Minister of Finance to amend Schedules to the CEA was whether it was constitutional for the Minister to promulgate certain amendments to the Schedules of the CEA and to Schedule 1 of the VAT Act based on section 75(15) of the CEA and section 74(3) of the VAT Act. The High Court in *Nu Africa* explained that section 75(15)(a) of the CEA allows the Minister of Finance to amend Schedules 3, 4, 5 or 6 "whenever he deems it expedient in the public interest to do so". Where Schedules 3, 4, 5 or 6 of the CEA are amended as provided for under section 75(15)(a), the Minister of Finance then also has the power to amend Schedule 1 of the VAT Act due to section 74(3) of the VAT Act. Section 74(3)(a) of the VAT Act provides that whenever the Minister of Finance amends any Schedule to the CEA and, it is also necessary to amend Schedule 1 of the VAT Act.

[115] *Albutt* (2010) at paras 49–51.

To this end, SARS argued that the Schedules are delegated legislation, and thus the *Smit* decision has no application because the Schedules are not part and parcel of the Acts under discussion. In response, Nu Africa pointed out that when the CEA was originally promulgated in Government Gazette 866 of 31 July 1964, all the Schedules (that is, Schedule No. 1 to Schedule No. 8) were promulgated along with the Act. This proposition was accepted wholeheartedly by the High Court in *Nu Africa,* as noted earlier.[116] In response, the Constitutional Court held that South African law allows the amendment of Schedules but not the delegation of plenary legislative power.[117] The court explained that the amendment of the Schedules to the CEA does not constitute "exercising primary or original legislative powers" based on the decision in *Kennasystems*.[118] In *Kennasystems*, the central contention was that the Minister of Finance was exercising plenary legislative powers when he amended Schedule 1 to the CEA to impose a tariff.[119] The High Court dismissed this argument on the basis that the power conferred on the Minister of Finance is limited and defined by the CEA since these amendments have a limited lifespan and are subject to parliamentary oversight.[120]

It was then held that the Minister of Finance can make these amendments "simply because Parliament has authorised him to do so within the prescribed parameters".[121] The court, however, was quick to say that this was not an assignment of plenary legislative powers.[122] So, without explaining what the nature of this transfer of power is, the court in *Kennasystems* found this exercise of power valid since it is a narrow power with a limited lifespan subject to parliamentary oversight. The same ambivalent approach was endorsed by the court in *Nu Africa CC* in agreeing with the Commissioner that "when the Minster amends Schedules to the Act, he is not exercising primary or original legislative powers".[123] It is not necessary here to establish the exact nature of the transfer of power, but since the court disavows the notion that it is an assignment of power, it is sufficient to accept it as a delegation. The upshot of this finding is that the court in *Kennasystems* is

[116] *Nu Africa HC* (2022) at paras 125–126.
[117] *Nu Africa CC* (2022) at paras 91–92.
[118] *Nu Africa CC* (2022) at para 92; *Kennaystems* (1996) at para 73.
[119] *Kennaystems* (1996) at para 73.
[120] *Kennaystems* (1996) at para 73.
[121] *Kennaystems* (1996) at para 73.
[122] *Kennaystems* (1996) at para 73.
[123] *Nu Africa CC* (2022) at para 92.

clear that there can never be an assignment of a plenary legislative power, but a delegation to amend the Schedules to the CEA is allowed if it is limited and closely circumscribed with a limited lifespan. In this way, it is a sound basis for the dictum in *Nu Africa CC*.

According to the court in *Nu Africa CC*, the constitutionality of the delegation in this case depends on the substance, nature and extent of the delegation.[124] While in *Smit* there was no parliamentary oversight mechanism and the amendments to the Schedules could not lapse, the situation in *Nu Africa CC* allowed for these constitutional constraints, rendering the delegation constitutional and permissible. Thus, the court endorsed the view that amendment of the Schedules to the CEA is permissible in South African law since there is a public interest requirement, parliamentary oversight, and the duration of the measure can be reduced. Therefore, it was held that this delegation in *Nu Africa* CC was different from the one in *Executive Council* because that court had held that the Constitution does not prohibit the delegation of "subordinate regulatory authority to other bodies" and such power is necessary for effective law-making.[125] As is evident and explained in *Executive Council*, the term "subordinate regulatory authority" refers to subordinate legislation, that is, law made by the executive on account of a delegation by Parliament.[126]

Thus, the court in *Executive Council* was saying it is constitutionally permissible to delegate the power to make subordinate legislation. As explained by that court and accepted by the court in *Nu Africa CC*, there is a difference between delegating the legislative power to make subordinate legislation and assigning plenary legislative power.[127] This is the very premise upon which the decision in *Nu Africa CC* was based.[128] The apex court refers to the dictum of Justice Sachs[129] and then to Justice Mahomed on this issue, yet the latter (Justice Mahomed) left that issue "open" despite offering criteria for and against in this regard.[130] Chaskalson P also declined to decide on this issue.[131]

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[124] *Nu Africa CC* (2022) at para 93.

[125] *Nu Africa CC* (2022) at paras 94; *Executive Council* (1995) at para 51.

[126] *Executive Council* (1995) at para 51.

[127] *Executive Council* (1995) at para 51.

[128] *Nu Africa CC* (2022) at para 77.

[129] *Nu Africa CC* (2022) at paras 89–90; *Executive Council* (1995) at para 205.

[130] *Nu Africa CC* (2022) at paras 76 and 94; *Executive Council* (1995) at paras 142 and 136–137 on the criteria.

[131] *Executive Council* (1995) at para 62.

Justices Ackermann, O'Regan, Langa and Didcott rejected the idea that the plenary legislative power can be delegated, since this would arrogate Parliament's legislative powers, thereby violating the Constitution.[132] Justices Ngoepe and Madala held that this power can be assigned.[133] What remains then is what the majority in *Executive Council* actually held, that is, one may delegate power only to make subordinate or secondary legislation and not primary legislation.[134] This would overrule the High Court decision in *Kennasystems*. This is the flaw in the reasoning of the apex court in *Nu Africa CC*. It follows then, by rule, that the Schedules to the CEA cannot be amended because they are not an instance or form of subordinate or secondary legislation.

Thus, the High Court in *Nu Africa HC* was correct to equate the powers in section 75(15) of the CEA and 74(3) of the VAT Act as an impermissible assignment of a plenary legislative power. This means that the Minister of Finance should not be allowed to amend the Schedules 3,4,5 and 6 to the CEA and Schedule 1 to the VAT Act.

In addition, the court in *Nu Africa CC* held that the argument that the Minister of Finance must seek parliamentary intervention first before addressing widespread abuse is flawed.[135] This is because, usually, fiscal policy concerns require urgent attention to address a gap in the law so as to avoid impunity, serious disadvantage to the fiscus, and harm to the public interest.[136] Whilst this finding is pragmatic in that it allows Ministerial intervention without parliamentary oversight in the case of an emergency, it misses the point.

First, Chaskalson P in *Executive Council* rejected any "unrestricted power to amend" primary legislation on the grounds of "necessity", as is held by the apex court in *Nu Africa CC*,[137] unless such power is granted either expressly or by implication by the Constitution.[138] Justices Mahomed, Ackermann and O'Regan declined to decide on the

[132] *Executive Council* (1995) at paras 151 and 192.
[133] *Executive Council* (1995) at paras 224 and 228.
[134] *Executive Council* (1995) at para 214.
[135] *Nu Africa CC* (2022) at para 97.
[136] *Nu Africa CC* (2022) at para 97.
[137] *Nu Africa CC* (2022) at para 97.
[138] *Executive Council* (1995) at para 62.

constitutionality of this approach.[139] Thus, it is doubtful that this finding of the apex court in *Nu Africa CC* enjoys widespread judicial support.

Secondly, in practice the imposition of a duty on a product usually results in the affected party and product exiting the market and, thus, loss of market share and profits. It is implicitly assumed in this decision that firms can withstand paying a duty that might not have been lawfully imposed for a year pending parliamentary approval. The implicit idea that a refund mechanism in the CEA negates this loss ignores the obvious problem that market share is not reacquired that easily.

It is crucial here to take stock of the implications of the decision in *Nu Africa CC*. First, the transfer of the power to amend Schedules to the CEA is permissible as long as it is not an assignment. Secondly, this power to amend a schedule to a statute must be limited, in the public interest, subject to parliamentary oversight, and for a limited lifespan. Furthermore, the assessment of the constitutionality of such a delegation also depends on the nature, extent and substance of the delegation, as well as the context of the delegation. Against this backdrop, I assess whether the same applies to the imposition of trade remedies under Chapter VI of the CEA by the Minister of Finance through an amendment of Schedule 2 to the CEA. It is now common cause that the Minister of Finance is the final decision-maker for the imposition of dumping, safeguard and countervailing duties.[140]

In particular, sections 55 and 56 of the CEA confer on the Minister of Finance the power to amend Schedule 2 to the CEA so as to impose an anti-dumping duty. Section 55 reads in relevant part as follows:

> 55. General provisions regarding anti-dumping, countervailing and safeguard duties and measures.—(1) The goods specified in Schedule No. 2 shall, upon entry for home consumption, be liable, in addition to any other duty payable in terms of the provisions of this Act, to the appropriate anti-dumping, countervailing or safeguard duties provided for in respect of such goods in that

[139] *Executive Council* (1995) at paras 140 and 149.

[140] *Association of Meat Importers and Exporters v International Trade Administration Commission and Others* (9233/2022) [2023] ZAGPPHC 1790 (12 October 2023) at paras 12–13.

Schedule at the time of such entry, if they are imported from a supplier, or originate in a territory, specified in that Schedule in respect of those goods.

Section 56 of the CEA then reads:

56. Imposition of anti-dumping duties.—(1) *The Minister* may from time to time by notice in the Gazette *amend Schedule No. 2 to impose an anti-dumping duty* in accordance with the provisions of section 55 (2).[141]

Section 56A then states in respect of countervailing measures:

56A. Imposition of countervailing duties.—(1) *The Minister* may from time to time by notice in the Gazette *amend Schedule No. 2 to impose a countervailing duty* in accordance with the provisions of section 55(2).[142]

Section 57 provides in respect of safeguard measures:

s 57. Imposition of safeguard measures.—(1) *The Minister* may from time to time by notice in the Gazette *amend Schedule No. 2 to impose a safeguard duty or quota* in accordance with the provisions of section 55(2).[143]

It is clear from the above and in South African jurisprudence that the Minister amends Schedule 2 to impose the trade remedies of anti-dumping, safeguards and countervailing measures. By comparison, the two impugned provisions in *Nu Africa CC,* commencing with section 75(15) of the CEA, state as follows:

s 75(15) (a) The Minister may from time to time by notice in the Gazette –

(i) amend Schedule 3, 4, 5 or 6 –

(aa) in order to give effect to any request by the Minister of Trade and Industry; or

(bb) whenever he deems it expedient in the public interest to do so; or

(ii) amend Schedule No. 5 or 6 to provide for a refund of fuel levy and the Road Accident Fund levy as contemplated in subsections (1A) and (4A).

[141] Emphases added.
[142] Emphases added.
[143] Emphases added.

(iii) amend Schedule No. 4 or 5 in order to give effect to any agreement contemplated in section 49.

(aA) The Minister may, whenever he deems it expedient in the public interest to do so –

i. by like notice amend any such Schedule with retrospective effect from such date as he may specify in that notice; or
ii. by like notice declare any amendment made under paragraph (a) to apply with retrospective effect from such date as he may specify in that notice.

Then, section 74(3) of the VAT Act reads:

> Whenever the Minister amends any Schedule under any provision of the Customs and Excise Act, 1964 (Act No. 91 of 1964), by notice in the Gazette and it is necessary to amend in consequence thereof Schedule 1 of this Act, the Minister, may by like notice amend the said Schedule 1.

So, these two impugned provisions in *Nu Africa CC* allow the Minister of Finance to amend Schedule 1 of the VAT Act and Schedules 3,4, 5 and 6 of the CEA. Based on *Nu Africa CC*, what saves these two provisions from unconstitutionality is largely the existence of section 48(6), which entrenches parliamentary oversight and a sunset clause for these duties. Now, since section 48(6) of the CEA is expressly incorporated into sections 55 to 57 of the CEA, this means that the imposition of trade remedies resembles – in nature, substance and extent – the delegation conferred on the Minister by sections 75(15) of the CEA and 74(3) of the VAT Act. Therefore, on the basis of *Nu Africa CC*, it is permissible for the Minister of Finance to amend Schedule 2 to the CEA to impose the trade remedies of dumping, safeguard and countervailing measures and, thus, sections 55 to 57 must be deemed valid and constitutional.

4 CONCLUSION

The decision in *Nu Africa CC* concludes the issue in respect of whether the Minister of Finance has the power to amend Schedules to the CEA to impose any duty. The apex court has confirmed that the Minister of Finance has the power to amend the Schedules to the CEA to impose a duty. This delegation has been ruled to be valid on account of section 48(6) of the CEA, which makes the decision subject to parliamentary approval, a limited

lifespan, and serving the public interest.[144] It is also a context-specific decision that will turn on the substance, nature and extent of the delegation.

In my view, Nu Africa misconceived the case as a rationality challenge instead of an arbitrariness challenge, since the data that informed the decision to amend the Schedules was essentially "nonsensical" as put by Justice Rogers. In simple terms, Nu Africa should have couched the issue as that of arbitrariness, in that the Minister's decision lacked an empirical basis. Framing it as a rationality issue meant that the court was asked to review whether there was a link between the data used by the Minister of Finance and the decision he made. This obfuscates the real issue with the Minister's decision to impose quotas on diplomatic purchases of alcohol. There was simply a poor empirical basis for such decisions. Rather, framing the issue as one of arbitrariness (that is, there was no justification or basis for the decision) would have resolved the matter easily.

But I also contend that a rationality analysis does not denote that courts cannot assess the veracity and sufficiency of the data that underlies a decision: a rationality analysis requires an assessment of the veracity of the data behind a decision, thereby incorporating the ground of rationality. A contrary approach would countenance false judicial deference on account of the principle of separation of powers.

I contend, too, that the finding of constitutionality of the Minister of Finance's powers in *Nu Africa CC* may rest on tenuous legal ground. In the main, I argue that this finding of the court in *Nu Africa CC* means that the Minister is allowed to amend all Schedules to the CEA, thereby also validating such amendments in the name of imposing duties for trade remedies. In future, under section 8(1)(b) of the Customs Duty Act 30 of 2014 (CDA), the Minister of Finance will have no say on whether a duty must be imposed on a product, as the task will only be to amend the Schedule as instructed by ITAC or the Minister of Trade.[145] The Minister of Finance will no longer have a veto power or discretion. Thus, we need the CDA to be promulgated so as to resolve this cardinal decision-making stage in South Africa's trade-remedy framework. We owe that to our trading partners not only in SACU but the entire continent under the AfCFTA.

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[144] *Nu Africa CC* at paras 99–101.

[145] See Vinti (2018) at 19.

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