



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**LEGAL SERVICES**

PO Box 15 Cape Town 8000 Republic of South Africa  
Tel: 27 (21) 403 2911  
www.parliament.gov.za

Tel: (021) 403-2809  
Fax: (021) 403-3888  
E-mail: mruda@parliament.gov.za

**MEMORANDUM**  
**[Confidential]**

**TO:** Ms JL Fubbs, MP  
Chairperson: Portfolio Committee Trade and Industry

**COPY:** Ms PN Tyawa  
Acting Secretary to Parliament

**FROM:** Adv Z Adhikarie  
Chief Legal Adviser: Constitutional and Legal Services Office

**DATE:** 2 August 2018

**REF:** 52/2018

**SUBJECT:** Opinion on closed session for consideration of statutory protected confidential information and disclosure of investigation outcomes

---

**MESSAGE:** Please find attached the above memorandum for your attention.

---

  
Adv Z Adhikarie  
Chief Legal Adviser

Enquiries: Mbulelo Ruda (X2809)



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**TO:** Ms JL Fubbs, MP  
Chairperson: Portfolio Committee Trade and Industry

**COPY:** Ms. PN Tyawa  
Acting Secretary to Parliament

**FROM:** Adv. Z Adhikarie  
Chief Legal Adviser: Constitutional and Legal Services Office

**DATE:** 2 August 2018

**REF:** 52/2018

---

**SUBJECT:** Opinion on closed session for consideration of statutory protected confidential information and disclosure of investigation outcomes

---

**INTRODUCTION**

1. Our Office was requested by the Chairperson of the Portfolio Committee on Trade and Industry ("the Committee"), Ms JL Fubbs, MP to provide a legal opinion on the request from the International Trade Administration Commission (ITAC) for the Committee to hold a closed session when considering certain information, the Committee had requested. Specifically, we were requested to advise on the following:

- 1.1. Whether, given the statutory protection of confidential information and disclosure of investigative outcome contained in the International Trade Administration Act (No. 71 of 2002) ("the Act"), the Committee could proceed with a closed session; and
  - 1.2. If the Committee can proceed, whether there would be any limitations on the information requested in a closed session.
2. Our Office was provided and considered the following information:
  - 2.1. Two letters dated 13 and 25 July 2018 from Mr. Meluleki Nzimande, Chief Commissioner of ITAC to Ms JL Fubbs.
  - 2.2. The International Trade Administration Act (No. 71 of 2002).
  - 2.3. The International Trade Administration Act's regulations, the relevant regulation being Amended Tariff Investigations Regulations, issued under Government Notice R652 of 31 July 2005, and published in Government Gazette No. 39035.

## **BACKGROUND**

3. The brief indicates that during the meeting of the Committee on 12 June 2018, ITAC indicated to the Committee that they were not able to disclose certain information, that was requested by the Committee, in a public setting. After considering the matter, the Committee, through a letter dated 27 June 2018 requested ITAC to provide reasons why the matter should be heard in a closed session.
4. ITAC responded through the correspondence referred to above, as follows:
  - 4.1 As an investigative body, through enabling legislation, it gains access to confidential information and is compelled by the Act to protect the information provided to it in confidence.
  - 4.2 Confidential information may only be disclosed if ordered to do so by a Court of Law.
  - 4.3 The information pertaining to ArcelloMittal South Africa Ltd investment breakdown is deemed confidential company information.

- 4.4 ITAC can only publish the outcome of its investigations after relevant action by the Minister of Trade and Industry and/or the South African Revenue Services.
- 4.5 ITAC's recommendation with regard to the Dollar-Based Reference Price level for sugar may be made public after the Minister of Trade and Industry has made a decision and Minister of Finance has implemented such a decision by publishing a Notice in the Government Gazette.

## **LEGAL FRAMEWORK AND DISCUSSION**

***The request of the International Trade Administration Commission that the Committee hold a closed session.***

- 5. The Constitution of the Republic of South Africa, 1996 ("the Constitution") sets out the requirement for public access to and involvement in the National Assembly. Section 59 of the Constitution, provides that:

*"(1) The National Assembly must*

*(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and*

*(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken*

*(i) to regulate public access, including access of the media, to the Assembly and its committees; and*

*(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.*

*(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."*

6. Rule 170 of the Rules of the National Assembly (9<sup>th</sup> ed) (“the Rules”) confirms the constitutional principles of public participation, openness and transparency in that it provides;

*“Committees must ensure public involvement in accordance with the provisions of the Constitution and these rules.”*

7. Rule 184 in Part 4, of Chapter 2 of the Rules provides the following

*“184. Admission of public*

*(1) Meetings of committees and subcommittees are open to the public, including the media, and the chairperson of the committee or subcommittee may not exclude the public, including the media, from the meeting, except when —*

- (a) legislation, these rules or resolutions of the Assembly provide for the committee or subcommittee to meet in closed session; or*
- (b) the committee or subcommittee is considering a matter which is —*
  - (i) of a private nature that is prejudicial to a particular person,*
  - (ii) protected under parliamentary privilege, or for any other reason privileged in terms of the law, or*
  - (iii) confidential in terms of legislation, the nature of which is such that its confidential treatment is reasonable and justifiable in an open and democratic society.*

*(2) A decision in terms of Subrule (1) to exclude the public must be taken, after due consideration, by the committee or subcommittee concerned, provided that the chairperson of the committee or subcommittee may at any time —*

- (a) before the start of the meeting rule that the meeting must take place in closed session, but the committee or subcommittee may at any time after the start of the meeting open the meeting; or*
- (b) close the meeting for a decision by the committee or subcommittee whether the matter should be considered in closed session.”*

8. The 'default' position of the Constitution, is that all meetings of any committee of the National Assembly must be held in an open manner. However, a committee may hold a close meeting only if it reasonable and justifiable to do so in an open and democratic society. (emphasis added).

9. In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masethla v President of the Republic of South Africa & another* [2008] ZACC 6; 2008 (5) SA 31 (CC) (para 40), the Constitutional Court provided that:

*"This systematic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts all organs of state function."*

10. The question that arises, is whether the request by ITAC for a closed session by the Committee meets the requirements as set out in Section 59 of the Constitution and Rule 170 of the Rules.

***Whether, given the statutory protection of confidential information and disclosure of investigative outcome contained in the International Trade Administration Act (No.71 of 2002) ("the Act"), the committee could proceed with a closed session.***

*Confidential information*

11. Whether acceding to the request for a closed session is justifiable and lawful, is regulated and governed by the Constitution (Section 56 and 59) and the Rules of the National Assembly (Rules 167, 170 and 184), read with the provisions of the International Trade Administration Act (No.71 of 2002) and Amended Tariff Investigations Regulations, issued under Government Notice R652 of 31 July 2005, and published in Government Gazette No. 39035.

12. ITAC requested a closed session and/or is reluctant to disclose information on the basis that information pertaining to ArcelloMittal South Africa Ltd ("AMSA") investment breakdown is deemed confidential company information.
13. In terms of the Act, section 1, confidential information is:
- information that is deemed as confidential, that is, by nature, confidential; and
  - information that is, recognised by ITAC in terms of the Act as confidential upon application by an applicant.
14. The information pertaining to *"a breakdown of the specific investments made by ArcelloMittal South Africa ("AMSA") in terms of reciprocal commitments"* is deemed by nature as confidential. That is, it is per section 1 of the Act:
- "... trade, business or industrial information that-*
- (a) belongs to a person or the State;*
  - (b) has a particular economic value; and*
  - (c) is not generally available to or known by others, and the disclosure of which could-*
- (i) result in a significant adverse effect on the owner, or on the person that provided the information; or*
  - (ii) give a significant competitive advantage to a competitor of the owner;*
15. The Act in terms of section 50(1) makes the disclosure of confidential information an offence. In terms of the Act, confidential information may only be disclosed in the following circumstances:
- In terms of section 35(2)(a) - disclose confidential information to third party upon consent of the owner of the confidential information.
  - In terms of section 35(2)(b) – per a High Court order setting aside determination of the Commission or an order concerning access to that information.
  - In terms of section 50(2) – that is, the prohibition on disclosing confidential information does not apply to information disclosed –
    - for the purpose of the proper administration or enforcement of this Act;

- for the purpose of the administration of justice;
- at the request of an investigating officer or member of the Commission entitled to receive the information; or
- within the terms of appropriate order of access made in terms of section 35(2).

16. The tension between the Act, which prohibits disclosure of confidential information, (unless there is consent or court order) and the provisions which support oversight (for example, section 56 and 59 of the Constitution, Rules of National Assembly, Rule 167, 170 and 184 and to an extent the relevant provisions of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures, Act 4 of 2004), must be managed through a purposive interpretation of the Act.
17. Although the Act bars disclosure of confidential information obtained by the Commission, section 50(2) allows the disclosure of such information for purposes of the proper administration or enforcement of the Act. My view is that the parliamentary oversight and accountability function is a purpose related to the proper administration or enforcement of the Act. As the National Assembly must maintain oversight of the exercise of national executive authority, including the implementation of legislation, the Committee may require the disclosure of the confidential information to oversee the administration of the Act.
18. Given the statutory protection of confidential information and prohibition of its disclosure, I advise that the Commission may disclose the confidential information insofar as it relates to the proper administration and enforcement of the Act. However, the confidential information may only be disclosed in a closed session of the meeting. Furthermore, the confidential information must be rationally connected to the purpose of parliamentary oversight of the executive authority and implementation of legislation.



*Outcomes of investigations*

19. The other requested information that ITAC is reluctant to disclose pertains to *“the level of Dollar-Based Reference Price (“DBRP”) for sugar that was recommended by ITAC as well as (sic) information that substantiates this recommended DBRP level.”*
20. The Regulations provide a regulatory framework for investigations for the reduction or increase in the rate of customs duty; and creation, amendment or removal of rebate or drawback provisions with regard to a customs duty.
21. The Regulations provide that the final outcomes of investigations can only be made public after certain actions are taken by the Minister and South African Revenue Services and the affected person has been informed accordingly. This includes the following:
  - Information submitted to ITAC that may be identified as confidential by nature, or the person submitting information may apply for the information to be recognised as confidential.
  - The commission shall investigate and shall evaluate the information obtained in connection with an investigation.
  - The commission shall make a final finding, forward the final finding, in the form of a recommendation to the Minister to approve or reject an application.
  - The commission must inform the applicant in writing of the decision and reasons of the Minister to reject or approve an application.
22. From the above, it is my view that, a recommendation of the Commission to the Minister cannot be disclosed to the public since it does not constitute a decision by the Minister. Furthermore, the affected party (who may review the decision) has not been informed of the decision. In order to preserve the integrity of the legislative and investigative process the outcomes of the investigations can only be made available to the Committee once the Minister has taken a decision.

23. However, the above does not preclude the Committee from asking questions relating to the number of investigations, pace of investigations, and implementation of decisions of the Minister and their impact.

**If the Committee can proceed, whether there would be any limitations on the information requested in a closed session**

24. Even if the Committee proceeds in a closed session, it is my view that, there will be a limitation on the information requested. For example, as illustrated above, the Committee is not entitled to information of recommendations of the Commission to the Minister prior to the Minister making a decision. A further limitation to the information requested is the proviso that it is lawful for the Committee to request the information. In other words, that the information is rationally connected to the purpose of parliamentary oversight of the executive function as set out in section 56 of the Constitution.

**CONCLUSION**

25. The Committee may, in a closed session, consider confidential information for purpose of parliamentary oversight and accountability insofar as the disclosure relates to the proper administration and enforcement of the Act and is necessary for maintaining oversight by the Committee.
26. In respect of investigations where the Minister has not made a decision in terms of the Act, it is my view that, the Committee cannot consider the recommendation of the Commission to the Minister even if such is considered in a closed session.

A handwritten signature in black ink, consisting of a large, stylized 'Z' followed by a horizontal line and a small upward stroke.

**Adv Z Adhikarie**

**Chief Legal Adviser**