

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

Case No: 4373/05

In the matter between:

PROGRESS OFFICE MACHINES CC

Applicant

and

THE SOUTH AFRICAN REVENUE SERVICES

First Respondent

THE INTERNATIONAL TRADE ADMINISTRATION
COMMISSION OF SOUTH AFRICA

Second Respondent

THE MINISTER OF TRADE & INDUSTRY

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

J U D G M E N T

handed down on

11/10/2005

Gyanda J:

In this matter the applicant, Progress Office Machines CC brought an application as a matter of urgency on the 18th March 2005 against The South African Revenue Services as first respondent, The International Trade Administration Commission of South Africa (ITAC) as second respondent, The Minister of Trade & Industry as the third respondent and The Minister of Finance as the fourth respondent in which it sought as a matter of urgency a declarator in the following terms:-

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"It is declared that the Anti-Dumping Duties imposed by the fourth respondent (at the request of the third respondent and enforced by the fourth respondent) in terms of GN R685, Government Gazette 20125 (dated 28th May 1999) annexured hereto marked "A", in respect of paper products and in particular A4 paper imported from Singapore, had no force and effect on 27th November 2003"

It further sought an order of costs against the respondents who opposed the application jointly and severally. Only the second respondent (on behalf of all of the respondents) opposes the application. The effect of the application was to prevent the levying of an Anti-Dumping Duty of one million five hundred and sixty five thousand five hundred and sixty nine rand and sixty cents (R1 565 569,60) upon the applicant in respect of certain A4 paper it had imported from Indonesia via the port of Durban. The salient facts relevant to the application are as stated in the argument of the respondents, they are largely common cause, and are as follows:-

- (a) By Government Notice R685 published in Government Gazette No.20125 of 28th may 1999 The Minister of Finance, (that is the fourth respondent) gave Notice in terms of Section 56 of The Customs Act that "part one of Schedule No.2 to the said Act is hereby amended with retrospective effect to 27th November 1998 to the extent set out in the Schedule hereto." In terms of the Schedule to such Notice a seventy percent (70%) anti-dumping Duty was imposed on A4 paper imported from Indonesia.
- (b) On 30th May 2003 ITAC published Government Notice No.1560 of 2003 in Government Gazette No.24893 stating that unless a request was made indicating that the expiry of the definitive Anti-Dumping Duty would be likely to lead to continuation or recurrence of dumping and

injury, the definitive Anti-Dumping Duty introduced as aforesaid, would expire. The Notice reflects the "date of imposition of the Duty" in respect of A4 paper as 28th May 1999 and the "date of expiry of the Duty" as 28th May 2004.

- (c) On 2nd April 2004 ITAC published Government Notice 552 of 2004 in Government Gazette No.26180 concerning the initiation of a Sunset Review of Dumping Duties in respect of A4 paper imported from Indonesia. This Notice records that duly completed petition review questionnaires were submitted to ITAC on the 28th November 2003 by Mondi Limited and Sappi Fine Paper (Pty) Ltd. The effect of the Sunset Review is to extend the period of the Anti-Dumping Duties the second respondent has considered the submission by interested parties and decided whether to continue or discontinue the imposition of the Anti-Dumping Duties.
- (d) During the period 8th January 2004 to 20th September 2004 the plaintiff imported through the port of Durban, twenty six (26) containers of A4 paper from Indonesia consisting of four (4) consignments. When these consignments were cleared, no Anti-Dumping Duties were levied or paid.
- (e) On 26th October 2004 the first respondent addressed a letter to the applicant that the first respondent had conducted an investigation into the clearance of the consignments of A4 paper imported by the applicant and that the consignments were classifiable under tariff heading 4802.55.20 and that *prima face* the applicant was liable for Anti-Dumping Duties in the sum of one million five hundred and sixty five thousand five hundred and sixty nine rand and sixty cents (R1 565 569,60) and that the applicant had seven (7) days to make

representations to the respondent, South African Revenue Services in this regard.

- (f) The declaration procedures in The Customs Act are premised on a system of self accounting and self assessment and the Commissioner therefore verifies compliance through routine examinations and inspections through action precipitated by suspected evasion. That this is so is as testified to in the affidavit of Catharina Grove on behalf of the second respondent (paragraph 29.2 thereof) see also First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services & Anc.; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (cc) @781C-E.

The applicant denies any liability for the Anti-Dumping Duties on the consignments referred to on the basis that:-

- (i) On the 29th May 1999 the definitive Anti-Dumping Duties in respect of A4 papers imported from Indonesia were imposed with retrospective effect to the 27th November 1998; Such measures can only be imposed for a period of five (5) years (Article 11 and Regulation 53.1)
- (ii) That the five (5) year period referred to in Article 11 of the Anti-Dumping Agreement and in Regulation 53.1 having commenced on 27th November 1998 expired on the 27th November 2003 in as much as no Sunset Review was initiated prior to 27th November 2003.
- (iii) That the Sunset Review initiated by the respondents on the 2nd April 2004 has no force and effect as it was initiated after the five (5) year period elapsed.

It is common cause between the parties that:-

- (a) The Minister was entitled to impose Anti-Dumping Duties in terms of The Customs Act and in terms of The Anti-Dumping Agreement in respect of which the Republic of South Africa is a signatory.
- (b) The Minister of Finance in the exercise of his duties and in terms of the provisions of Section 56 of The Customs Act gave notice that "part 1 of Schedule No.2 of the said Act is hereby amended with retrospective effect to 27th November 1998 to the extent set out in the Schedule hereto".
- (c) That as a result importers became liable to pay a seventy percent (70%) Anti-Dumping Duty in respect of A4 paper imported from Indonesia as from the 27th November 1998.

The dispute between the parties relates to the calculation of the five (5) year period provided for in Article 11.3 of The World Trade Organisation Agreement, which, it is common cause, is equivalent to a National Act of the Republic of South Africa and which reads:-

"Notwithstanding the provisions of paragraphs 1 and 2 any definitive Anti-Dumping Duties shall be terminated on a date not later than five (5) years from its imposition (or from the date of its most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date or on their own initiative or upon a duly substantiated request made by or on behalf of domestic industry within a reasonable period of time prior to that date, that the expiry of the Duty would be likely to lead to continuation or recurrence of dumping and injury. The Duty may remain in force pending the outcome of such review."

It is contended on behalf of the applicant that the period of five (5) years must be calculated with reference to the 27th of November 1998 as being the starting point in as much as part 1 of Schedule No.2 of The Act was amended with retrospective effect to 27th November 1998 (my emphasis). It is argued by the applicant that the 27th November 1998 must be the effective date for the commencement of the five (5) year period referred to as the obligation to pay the Anti-Dumping Duty arose with effect from that date. On behalf of the respondent, on the other hand, it is contended that the date of publication of the Statute is the date the Anti-Dumping Duty was imposed and that that date being the 28th May 1999 was the date from which the calculation of a period of five years must be reckoned, their argument being that it is only the levying of the Anti-Dumping Duty that is effected with retrospective effect to the 27th November 1998 that could not by any stretch of the imagination be deemed to be the date when the obligation to do so was imposed. The dispute between the parties is therefore on a narrow issue as to whether the Duty in question was imposed the 28th May 1999 when the statute was published or the 28th November 1998 from which date the Duty first became collectable. Mr. Kemp who appeared for the applicant submitted that in the event of a statutory provision being truly retrospective (retroactive) it begins to operate from the earlier date, subject to physical limitations, it is deemed to exist from that date. The retrospective effect of the Notice is to *exposi facto* impose the Duty with effect from 27th November 1998, as if the Schedule read as in its amended form on that day. In this regard he referred to the decisions in:

MV Yu Long Shan: Dry Bulk SA v MV Yu Long Shan 1998 (1) SA 646 (SCA)

@654D

S v Mhlungu & Others 1995(3) SA 867(CC) @897F

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Shewan Tomes & Co. Ltd v Commissioner of Customs & Exercise 1955(4)
SA 305A @311G-H

Mr. Kemp has submitted further that these provisions should be interpreted in the least burdensome manner, to wit, a Duty period of five (5) years as opposed to five (5) years and six (6) months be imposed. That in effect the interpretation contended for by the respondents resulted in the Duty being imposed for a period of five (5) years and six (6) months and not five (5) years and could, therefore, not have been the intention. In this regard he referred to the decisions of:

Trust Bank of South Africa Ltd v Secretary for Inland Revenue 1978(4) SA
580(C)

Africa v Boothan 1958(2) SA 459(A) @462

Moreover, he submitted that an interpretation *contra fiscum* should prevail in the case of doubt. In this regard he referred to the decision in *Park v Geboubeleggings en Wynkelders Bpk v Staaard van Vanderbijlpark* Park 1965(1) SA 849(T).

Mr. Dunn who appeared for the respondent in support of his contention that the date of imposition must be the date of publication submitted that the Oxford English Dictionary meaning of "imposition" is the following:-

- (a) The action of putting or laying something on: spec. (a) ECCLESIASTICAL the laying on of hands in blessing, ordination, etc.
- (b) PRINTING the imposition of pages.
- (c) The action of applying, bestowing or ascribing. Imputation, accusation, *rere* (Snakes.).

- (d) The action of imposing a charge, obligation, Duty, etc; the action of imposing oneself. Formally also, tax-action.
- (e) A thing imposed or inflicted: an unfair or inconvenient demand or burden. Formally also, a command or charge laid on a person. A piece of work imposed as punishment at school.
- (f) The action or an act of deceiving or being deceived; deception."

Based on the aforesaid definitions, it is clear that the "imposition" or the "act of imposing" occurred in the date of publication, i.e., the 28th May 1999; he argued that the date of "imposition" of a definitive Anti-Dumping Duty may be different to the date on which such Duty is recoverable. Stated differently, the date of "imposition" of a definitive Anti-Dumping Duty and the date from which such Duty is to be levied may differ; there is nothing inherently improper about this. Mr. Dunn submitted that the cardinal construction of a statute is to endeavour to arrive at the intention of the legislative from the language employed in the enactment.

See: Bhyat v Commissioner for Immigration 1932 AD 125 @129

I am in full agreement with the submission and that the date of "imposition" must obviously be the date when the action of levying the duty is taken i.e. the date of publication. Subject to what is said below in regard to what the position is in other foreign jurisdictions and the stated intent of the parties to the WTO Agreement to maintain uniformity in keeping with such intent that date must be the date of publication. It must be the date intended in respect of the Republic of South Africa, if not for anything else, but the stated intention of the participants to the agreement to maintain uniformity.

A general rule of interpretation of words of a statute is that words must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a Court of Law to depart from such a literal construction for example where it leads to a manifest absurdity, inconsistency, hardship or result contrary to the legislative intent.

Adampol (Pty) Ltd v Administrator Transvaal 1989(3) SA 800AD
@804A-C

Bras v Randburg Stadsraad 1992(3) SA 371AD @377H-J

Land-en-Landboubank van Suid-Afrika v Rousseau NO 1993(1) SA
513AD @519A-C

On this basis the word "retrospective" should be accorded the meaning contended for by the respondents and not be interpreted as being "retroactive".

National Director of Public Prosecution v Carolus & Others 2000(1) SA
(SCA) 1127@1138H-1139B

In the event of the interpretation of the regulation which is capable of more than one construction, a Court will adopt a construction that will render the regulation valid rather than one that has the reverse effect.

Moodley v Minister of Education & Culture, House of Delegates
1989(3) SA 221AD @233E-F

I am in full agreement with submission by Mr. Dunn that neither Article 11.3 nor any other provision of the Anti-Dumping Agreement restricts the duration of the definitive Anti-Dumping Duty for five (5) years in the sense that it may not under any circumstances endure for a period of more than five (5) years. On the contrary, the Anti-Dumping Agreement expressly recognises the need for a longer period, and permits the period during which a definitive Anti-Dumping Duty will be payable to endure for more than five (5) years. This is permitted when a Sunset Review is instituted, in which event the definitive Anti-dumping Duty will remain in force pending the outcome of such review whereupon depending on the finding of such review, the definitive Anti-Dumping Duty will either terminate or be further extended. This position is in fact accepted by Mr. Kemp. In support of his argument that the imposition must be the date of publication Mr. Dunn has submitted the examples of the United States of America where the five (5) year period that Anti-Dumping Duties are payable is calculated with reference to the "date of publication" of an Anti-Dumping Duty order, the European Union where the five (5) year period is computed with reference to the "imposition" of the Anti-Dumping measure which is referred to as the date of publication of the definitive measures as referred to in the affidavit of Vermist (page 290-301) and in article 11 of The Council Regulation (EC) No.384-396 @p325; in terms of the Customs Tariff Act 1975 of India a clear distinction is drawn between the date of "imposition" of the Anti-Dumping Duty and the date from which the Duty is levied (Section 9A(1) and (3) of The Customs Tariff Act 1975).

April 2003 invalid.

In this regard the view contended for by the applicants as opposed to that of the respondents, if upheld will have the effect of rendering the subsequent notice of 2nd

"A retroactive statute is one that operates as of a time prior to its enactment. A retroactive statute is one that operates for the future only. It is prospective, but imposing

and "retrospectively" were addressed.

1997 (42) CRR (2d) 1(SCC) where the distinction between the terms "retroactivity" distinction and to the quotation referred to in *Berner v Canada (Secretary of State)* Carolus & Others 2000(1) SA 1127@1138H-1139B referred with approval to this unanimous judgment of the Court in *National Director of Public Prosecutions v Farham AJA* (as he then was) in delivering the is deemed to exist from that date. Provision is truly retrospective (retroactive) that it operates from the earlier date and opposed to being retrospective in the "weaker sense" in his submission that the difference between an enactment applying retrospectively in the "strong sense" as Dumping Duties. Mr. Kemp in fact recognises this in his argument that there is a between the provisional Anti-Dumping Duties payable and the definitive Anti-57(A)(5) would be unnecessary in these circumstances if there was no distinction by Mr. Dunn that these provisions in terms of Section 57(A) especially section may not be collected by the Commissioner. I am in agreement with the submission Dumping Duty collected was less than the definitive Anti-Dumping Duty the excess by the Commissioner to the importer and in the event that the provisional Anti- more than the definitive Anti-Dumping Duty the difference is required to be refunded definitive Anti-Dumping measures and, in the event of the provisional Duty being Duties. Provisional Anti-Dumping Duties are payable prior to the imposition of the distinction between provisional Anti-Dumping Duties the definitive Anti-Dumping nonsense of the provisions of 57(A)(5) of The Customs Act if there was not this 57A of The Customs Act and submits that the argument of the applicants makes Dumping Duty and definitive Anti-Dumping Duty contemplated in terms of Section Mr. Dunn submits that the provisions clearly differentiate between provisional Anti-

new results in respect of past events. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to the event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with the respect to a prior event."

There is in any event a strong presumption against a statute being retroactive.
See: S v Mhlangu & Others (supra) @p897E-H

Based on the aforesaid definition referred to I am obliged to come to the conclusion that the statute in question is a retrospective one as it indeed says it is in that it "looks backwards, that it attaches new consequences for the future to the event that took place before the statute was enacted." The date of imposition therefore must be the date of publication of the Government Notice No.R685 published in Government Gazette No.20125 of 28th May 1999. The definitive Anti-Dumping Duties, therefore, only commenced on the 28th May 1999.

That this is so and was accepted as such by the South African authorities is apparent in their subsequent conduct in:-

- (a) Publishing the Notice of 30th May 2002 inviting submissions as regards the continued existence of Anti-Dumping Levies; and
- (b) Initiating by Notice on 2nd April 2003 the "sunset Review".

These actions were taken preciously based on the state of "imposition" being the 28th May 1998.

Retrospective effect of the provision to 27th November 1998 is no more than authorising the levying and collection of the duties from the date. It is clear that these retrospective levying of duties was necessary to prevent the evil that was feared and envisaged namely that importers would, in an effort to avoid the imposition of Anti-Dumping measures, import huge quantities of the product in question before the legislation came into force. It is clearly therefore a measure designed to prevent the importers from circumventing the provisions of the law and by putting in place measures to collect or levy the duties even before the law came

time stipulated therefore.

publication on 2nd April 2004 of the Sunset Review was effected properly within the intention that these were definitively imposed on the 28th May 1999 the subsequent Anti-Dumping Duty in force as at the 8th January 2004. Based on the respondents applicants do not state what source they received the information that there was no before the applicants received the opinion of their counsel. It is clear that the when the duties were due to expire in terms of the Notice of the 30th May 2003 and Dumping Duties in place at the time as this was clearly before the 28th May 2004 by the 8th January 2004 it could not have been advised that there were no Anti- expiry of Duty" as 28th May 2004. So that when imports were made by the applicant of "imposition of Duty" in respect of A4 paper as 28th May 1999 and the "date of definitive Anti-Dumping Duty would expire. The Notice in question reflects the date would be likely to lead to continuation or recurrence of dumping and injury, the request was made indicating that the expiry of the definitive Anti-Dumping Duty Notice No.1560 of 2003 in Government Gazette No.24893 stating that unless a wrong as it is not disputed that on the 30th May 2003 TAC published Government Dumping Duties in force at the time that they imported the A4 paper must clearly be The contention by the applicants that they were advised that there were no Anti-

into force. Under these circumstances the provision in question is definitely retrospective in effect and not a retroactive statute as contemplated in the judgment of Farlam AJA (as he then was) in National Director of Public Prosecution v Carolus & Others.

As regards the question of costs it was argued by Mr. Dunn that certain wasted costs were occasioned as a result of conduct on the part of the applicants attorneys and that in these circumstances those wasted costs for 18th March 2005 ought to be paid by the applicants. Mr. Kemp who appeared for the applicants agreed that the Court should adopt the robust attitude and that in the event of either party being successful they should be awarded their full costs including those of the 18th March 2005. In the light of the decision I am about to reach it makes no difference in this case. This clearly was a matter in which the employment of two counsel, senior and junior was merited by virtue of the complexity of the issues and the volume of legislation and other material that had to be examined in support of the case of both the parties. Under the circumstances the order that I make is the following:-

1. The application is dismissed.
2. The applicant is directed to pay the respondents costs, such costs to include the costs consequent upon the employment of two counsel.

