/Mm

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
DATE 9.05.2012 SIGNATURE

Case number: 24038/10

In the matter between:

INTERNATIONAL TRADE ADMINISTRATION COMISSION	**1st Applicant**
SOUTH AFRICAN REVENUE SERVICES	**2nd Applicant**
MINISTER OF TRADE AND INDUSTRY	**3rd Applicant**
MINISTER OF FINANCE	**4th Applicant**
and	
ARANDA TEXTILES MILLS (PTY) LIMITED	**1st Respondent**
SESLI TETILES (PTY) LTD	**2nd Respondent**
SOUTHERN AFRICAN CLOTHING& TEXTILES WORKERS' UNION	**3rd Respondent**
CONGRESS OF SOUTH AFRICAN TRADE UNIONS	**4th Respondent**
NEDSCHROEF JOHANNESBURG (PTY) LIMITED	**5th Respondent**
SA BOLT MANUFACTURERS (PTY) LIMITED	**6th Respondent**
IMPALA BOLTS & NUT SA (PTY) LIMITED	**7th Respondent**
AUTOMATIC MASS PRODUCTION (PTY) LIMITED	**8th Respondent**
BEARING MAN LIMITED	**9th Respondent**
SPRINGSET (PTY) LIMITED	**10th Respondent**
NATIONAL SOCKET SCREWS (PTY) LIMITED	**11th Respondent**

PFG BUILDING GLASS (PTY) LIMITED	12th Respondent
CHANGING TIDES 140 (PTY) LIMITED t/a HENWOOD SAFETY GLASS	13th Respondent
NATGLASS DISTRIBUTORS (PTY) LIMITED	14th Respondent
GLASS EDGE TECHNOLOGY (PTY) LTD	15th Respondent
CERTOSA TRADING 128 (PTY) LIMITED	16th Respondent
SOUTH AFRCIAN GARLIC GROWERS ASSOCIATION	17th Respondent
FRESHMARK (PTY) LIMITED	18th Respondent
NATIONAL AGRICULTURA MARKETING COUNCIL	19th Respondent
ASSA ABLOY (SA) (PTY) LIMITED	20th Respondent
I B MCINTYRE & CO (PTY) LIMITED	21st Respondent
ALGORAX (PTY) LIMITED	22nd Respondent
APOLLO TYRES SOUTH AFRICA (PTY) LIMITED	23rd Respondent
FINE CHEMICALS CORPORATION (PTY) LIMITED	24th Respondent
ETHNICHEM CC	25th Respondent
PHARMA II INVESTMENTS (PTY) LIMITED t/a ADCOCK INGRAM HEALTHCARE (PTY) LIMITED	26th Respondent
PFIZER LABORATORIES (PTY) LIMITED	27th Respondent
RESMED HEALTHCARE CC	28th Respondent
ABERDARE CABLES (PTY) LIMITED	29th Respondent
ALSTOM SA (PTY) LIMITED	30th Respondent
INGUNYA POWER (PTY) LIMITED	31st Respondent
TRANSDECO GTMH (PTY) LIMITED (in Liquidation)	32nd Respondent
RAINBOW CHICKEN LIMITED	33rd Respondent
EARLYBIRD FARM	34th Respondent
COUNTRY FAIR FOODS	35th Respondent
PIONEER VOEDSEL (PTY) LIMITED t/a TYDSTROOM	36th Respondent
DAYBREAK FARMA (PTY) LIMITED	37th Respondent
FOURIE'S POULTRY FARM (PTY) LIMITED t/a CHUBBY CHICK	38th Respondent

DONKERHOEK KUIKENS CC	39th Respondent
CC CHICKENS (EDMS) BEPERK	40th Respondent
MIKE'S CHICKENS (PTY) LIMITED	41st Respondent
SPIF INVESTMENTS (PTY) LIMITED	42nd Respondent
NEWCON INVESTMENTS (PTY) LIMITED t/a SANGIRO	43rd Respondent
CROWN CHICKENS (PTY) LIMITED t/a ROCKLANDS POULTRY	44th Respondent
ARGYLE POULTRY FARMS (PTY) LIMITED	45th Respondent
KZN FARMING ENTERPRISES (PTY) LIMITED t/a SUNRISE FARMS	46th Respondent
SUNFLOWER TRADING & INVESTMENTS 2 t/a GERMISTON FRESH MEAT SUPPLY WHOLESALE (PTY0 LIMITED	47th Respondent
AVLOCK INTERNATIONAL (PTY) LIMITED	48th Respondent
TRANSVAAL PRESSED NUTS BOLTS & EXPORTERS (PTY) LIMITED	49th Respondent
ASSOCIATION OF MEAT IMPORTERS & EXPORTERS	50th Respondent
MERLOG FOODS t/a MERCANTILE LOGISTICS (PTY) LIMITED	51st Respondent
SHOPRITE CHECKERS (PTY) LIMITED	52nd Respondent
SA BIOPRODUCTS (PTY) LIMITED	53rd Respondent
MEADOW FEEDS	54th Respondent
CHEMUNIQUE INTERNATIONAL (PTY) LIMITED	55th Respondent
SOUTH AFRICAN POULTRY ASSOCIATION	56th Respondent
SOUTH AFRICAN FASTERNERS MANUFACTURERS ASSOCIATION	57th Respondent
NINGBO JIANGBEI MINJUN LOCK FACTORY	58th Respondent
RHODIA CHEMIE	59th Respondent
SRI KRISHNA PHARMACEUTICALS	60th Respondent
CHINA CHAMBER OF COMMERCE OF MEDICINES & HEALTH PRODUCTS IMPORTERS & EXPORTERS	61st Respondents
MINISTRY OF COMMERCE OF THE PEOPLES REPUBLIC OF CHINA	62nd Respondent

APAR INDUSTRIES LIMITED	63rd Respondent
USA POULTRY & EGG EXPORT COUNCIL	64th Respondent
ARCHER DANIELS MIDLANDS COMPANY	65th Respondent
TYSON FOODS INCORPORATED	66th Respondent
PILGRIM'S PRIDE CORPORATION	67th Respondent
EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA	68th Respondent
EMBASSY OF THE REPUBLIC OF TURKEY	69th Respondent
TAPEI LIASION OFFICE IN THE RSA	70th Respondent
EMBASSY OF THE REPUBLIC OF CHINA	71st Respondent
EMBASSY OF THAILAND	72nd Respondent
EMBASSY OF THE REPUBLIC OF FRANCE	73rd respondent
THE EUROPEAN COMMISSION	74th Respondent
EMABASSY OF THE UNITED STATES OF AMERICA	75th Respondent

JUDGMENT

RAULINGA J,

INTRODUCTION

[1] This application concerns the legal status of the anti-dumping duties imposed on products listed in prayers 2 to 6 of the notice of motion as from the dates listed in those prayers. The anti-dumping duties were imposed by the Minister of Finance and are listed in Schedule 2 of the Customs and Excise Act 91 of 1984 ("Act").

[2] The anti-dumping duties were invalidated after the judgment of the Supreme Court of Appeal ('SCA') in **Progress Office Machines CC v The South African Revenue Service and others 2008 (2) SA 13 (SCA)**. In the Progress Office Machines case, the SCA held that the five year period for which anti-dumping duties remain valid is

computed from the date when an amendment to Schedule 2 of the Customs Act was to have retrospective effect and not from the date when the notice of the amendment was published. At the end of the five year period calculated from the date when an amendment to Schedule 2 was to have retrospective effect, the anti-dumping duty in question lapses. Until the SCA's decision, the applicants had calculated the five year period to run from the date of publication of the notice of amendment.

[3] This is an application for review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and an application for a declarator that conduct is inconsistent with the Constitution and invalid in terms of Section 172 of the Constitution.

The applicants seek orders:

(i) declaring invalid Schedule 2 to the Customs Act;
(ii) alternatively, declaring invalid the anti-dumping duties imposed by the Minister of Finance;
(iii) alternatively, reviewing and setting aside and declaring invalid the failure by the Minister of Finance to withdraw the anti-dumping duties;
(iv) alternatively, reviewing and setting aside and declaring invalid the failure by the Minister of Trade and Industry to request the withdrawal of the anti-dumping duties;
(v) alternatively, reviewing and setting aside and declaring invalid International Trade Administration Commission "ITAC" invitation of Sunset reviews as set out in the notice of motion from the dates listed in the notice of motion.

[4] In addition the applicants ask the Court to suspend the order of invalidity both retrospectively (to the relevant dates before the anti-

dumping duties on the affected products became invalid) and prospectively, for a period of three years. Because this application was launched out of time, applicants applied for condonation thereof. The Shoprite respondents also launched a counter application.

[5] To facilitate the reading and understanding of this judgment I shall refer to the first applicant as "ITAC"; the second applicant as "SARS";the third applicant as "the Minister of Trade and Industry"; the fourth applicant as "the Minister of Finance". the fiftieth, fifty-first and sixty –fourth respondents as "the Amie respondents";the eighteenth and fifty-second respondents as "the Shoprite respondents"; and the twelfth, thirty-third to forty-sixth and Fifty-sixth respondents as "the Chicken and Glass respondents".

FACTUAL MATRIX

[6] On the 28 May 1999, the Minister of Finance gave notice in terms of Section 56 of the Act that Part 1 of Schedule 2 was amended "*with retrospective effect to 27 November 1998*" to impose certain anti-dumping duties inter alia on the paper imported by the appellant in the Progress Office Machines case as set out in the Schedule to the notice.

[7] An anti-dumping duty is imposed with retrospective effect where a provisional payment of an anti-dumping duty is imposed upon notice given by ITAC, or its predecessor the Board in terms of the Board on Tariffs and Trade Act 107 of 1986 (the BTT Act) that it is investigating anti-dumping duty on certain imported goods. It was common cause between the parties that the duration of the definitive anti-dumping duties imposed by the Minister of Finance by notice amending Schedule 2 to the Customs Act was five years. ITAC gave notice that the definitive anti-dumping duty, which is stated to have been imposed on the 28th May 1999, would expire on 28th May 2004 unless a request

was made for its continuance on the basis that expiry of the duty would likely lead to continuation or recurrence of dumping and injury. On 2 April 2004 ITAC published a notice that on 28th November 2003, Mondi Limited and Sappi Fine Paper (Pty) Limited had submitted a review which initiated a sunset review on the anti-dumping duties on the paper imported by the appellant in the Progress Office Machines case and that this had the effect of extending the period of the anti-dumping duties pending the outcome of the review.

[8] After the Minister of Finance had levied an anti-dumping duty on the appellant (in the SCA case) in respect of paper products imported by the appellant from Singapore during the period 8 January to September 2004, the appellant (as applicant) approached the High Court in Durban on an urgency basis for a declarator that the anti-dumping duties imposed by the Minister of Finance (at the request of ITAC) in respect of paper products and in particular A4 paper imported from Indonesia, had no force and effect after 27 November 2003. It is important to note that the Minister of Finance had imposed the duty in question in terms of Section 55 and 56 of the Act, by notice in the Government Gazette on 28 May 1999 without stipulating the period of the time that the duty would be operative but with retrospective effect to 27 November 1998: The appellant refused to pay the duty levied, contending that it related to a period which fell outside of the five years for which the duty endured, the five year period having commenced on 27 November 2003. The respondents, in that case, who are applicants in this case, resisted the application, contending that the five-year period for which the duty endured commenced on 28 May 1999. Gyanda J accepted that the "imposition" or the "act of imposing" occurred on the date of publication, i.e. May 1999, and held that the date of imposition must obviously be the date when the act of levying the duty is taken, i.e. the date of publication. Gyanda J dismissed the application.

[9] The SCA defined the issue as "whether the period of five years commenced on 28 May 1999 (the date of the notice) or on 27 November 1998 (the date from which the amendment was to have retrospective effect)". If the period of five years commenced on 27 November 1998, the duties would have lapsed on 27 November 2003, and the appeal would succeed as the sunset review had not been initiated within the five year period ending on 27 November 2003. If on the other hand, the period commenced on 28 May 1999 the appeal would be dismissed. The SCA held that the operative date was the date from which the amendment was to have had retrospective effect, i.e 27 November 1998. It held that the "*purpose of the imposition was to impose the anti-dumping duty as from 27 November 1998. The duty or the burden was imposed on that day just as one would conclude that where the notice provided for the duty to take effect on a future date the duty would be imposed on that future date*". The SCA found that under South African law the period of definitive imposing anti-dumping duties and the period of a provisional payment may coincide and not follow each other as appears to be the case in the USA and the EU.

[10] Consequently, the SCA declared that the relevant anti-dumping duty imposed by the Minister of Finance had no force and effect from 27 November 2008.

THE EFFECT OF THE DECISION IN THE PROGRESS OFFFICE MACHINE CASE.

[11] It will be remembered that before the Progress Office Machines case, the applicants computed the five year period from the date on which the Minister of Finance published the notice indicating that Schedule 2 of the Customs Act had been amended and not from the date from which the anti-dumping duties had retrospective effect.

[12] In respect of each of the affected products listed in the notice of motion, the Minister of Trade and Industry published notices indicating that the relevant anti-dumping duties would expire on a date not later than five years from the date of imposition (as opposed to the date of retrospective effect) of the duties unless the authorities determined in a review initiated before that date, that the expiry of the duty would likely lead to a continuation or recurrence of dumping and injury. As a result of this calculation of the five year period, sunset reviews in respect of each of the affected products were not initiated in time to keep them alive beyond five years. These duties therefore lapsed five years after their retrospective dates of imposition.

[13] The anti-dumping duties imposed on the twelve affected products, expired on the following dates:

i. Acetampinophenol from China, France and the USA - 9 April 2004.
ii. Acrylic blankets from China and Turkey - 18 December 2008;
iii. Carbon black from Thailand - 14 April 2005;
iv. Chicken meat portions USWA - 5 July 2005;
v. Door locks and door handles from China -31 August 2006;
vi. Flat glass from China and India - 27 November 2003;
vii. Float glass from China and India - 27 November 2003;
viii. Garlic from China - 24 March 2005;
ix. Bolts and nuts of iron or steel from China - 5 February 2004;
x. Nuts of iron or steel from Chinese Taipei - 5 February 2004;
xi. Paper Insulated Lead Covered Electrical Cable from India - 7 May 2004;
xii. Lysine from the USA - 30 July 2006;

ANTI-DUMPING DUTIES AND THE LEGISLATIVE FRAMEWORK

[14] The international rules regarding anti-dumping duties are contained in Article VI of the General Agreement on Tariffs and Trade ("GATT") and the World Trade Organisation Agreement on the Implementation of Article VI of GATT ("the WTO Anti-Dumping Agreement").The imposition of anti-dumping duties may only be legalised once a complex process governed by the WTO Anti-dumping Agreement, the International Trade Administration Act 71 of 2002 (the ITA Act) the Anti-Dumping Regulations, the BTT Act and the Act has been completed .

[15] The domestic regime concerning anti-dumping is governed by the ITA Act, the Act and ITAC. (The BTT Act has been repealed and replaced by the ITAC Act). The operation of some of the key provisions of the ITA Act is dependent on the conclusion and implementation of a treaty for the establishment of a new Southern African Customs Union ("SACU"). For that reason Section 64(2) of the ITA Act suspends the operation of these provisions until the new SACU Agreement has become law. In the meantime the position is regulated by the transitional provisions in item 2 of the Schedule of the ITA Act.

[16] In general, anti-dumping duties are intended to remain in force for a period of five years. This is subject to the proviso that ITAC may conduct a sunset review prior to the expiry of an anti-dumping duty. Pursuant to such a sunset review, ITAC may recommend the withdrawal, the amendment or approval of the anti-dumping duty. The recommendation of ITAC is submitted to the Minister of Trade and Industry who may approve it, reject it or send it back to ITAC for further investigation and consideration.

[17] If the Minister of Trade and Industry accepts ITAC's recommendation to terminate or amend the anti-dumping duties, the Minister will request the Finance Minister to amend the duties currently in force. If the Minister of Trade and Industry accepts ITAC's recommendation to maintain the duties in force without amendment, then the decision is published in the Government Gazette. If a sunset review is initiated prior to the termination of an anti-dumping duty, the anti-dumping duty will remain in force until the sunset review has been finalised. If the sunset review results in a confirmation of the existing anti-dumping duty, then the anti-dumping duty may be extended for a further period of up to five years from the determination of the sunset review. Any imposition, amendment, withdrawal or reduction of duties will lapse unless the Minister of Finance acts otherwise.

[18] Various statutory provisions, regulations and articles of the relevant international instruments regulate anti-dumping processes. These will be dealt with when the arguments are considered.

CONDONATION APPLICATION

[19] The applicants apply for condonation for their failure to comply with the requirements of Section 7(1) of PAJA. These proceedings were brought after the expiry of the prescribed period of180 days.

[20] It is common cause that the judgment in the Progress Office Machines case was handed down on 25 September 2007. The applicants launched this application three and half years after that. The applicants contend that the matter is brought both in terms of PAJA and in accordance with the principle of legality. To the extent that the applicants rely on the principle of legality, there is no obligation to bring such proceedings within 180 days. Failure to institute the

proceedings will not constitute an obstacle to a declaration under Section 172(1) (a) of the Constitution.

[21] As far as their failure to comply with the PAJA time limit is concerned, the applicants contend that although the delay in this case is lengthy it is not unreasonable in the circumstances. The applicants point out that after the judgment in the Progress Office Machines case they took legal advice since there were varying interpretations on the decision. This took some time. Initially they took the view that the Minister of Trade and Industry should terminate the duties on the affected products. However, on receipt of comments from interested parties the applicants decided not to adopt this approach. By then six months had passed since the judgment in the Progress Office Machines case.

[22] In March 2008, ITAC was advised by its legal representative to launch this application. After that it took more than a year for the parties to consult with Counsel and with each other before deciding to bring the application. Once they had decided to launch the application it took some time to prepare the papers. There are seventy five respondents, three of whom did not agree to service in the Republic and the applicants had to apply to institute proceedings by way of edictal citation.

[23] The respondents, particularly the Amie respondents, contend that the applicants' explanation demonstrates a blatant disregard for the PAJA time limit and the requirement that applications for review be instituted without undue delay.

[24] The respondents' objection to condonation does not spell out why the applicants' explanation should be rejected. Furthermore they recognise that in terms of Section 9(2) of PAJA, a court can grant an application to extend the 180 days period set out in Section 7(1) if it finds that it is

in the interest of justice to do so. The time limit of 180 days has to be flexible so as to allow a court, when the interests of justice demand, to extend or condone non-compliance with the period of 180 days – **Brümmer v Minister of Social Development and others 2009 (6) SA 323 (CC) paras 76-77.**

[25] This case involves important issues relating to anti-dumping policies in South Africa which affect foreign companies and other important entities. It is in the interest of all concerned that issues be resolved and I see no reason why condonation should not be granted.

Condonation will therefore be granted.

EVALUATION AND ANALYSIS

(a) Arguments by the parties

[26] As already indicated, this case arises from the judgment in the Progress Office Machines case in which the court held that anti-dumping duties imposed by the Minister of Finance are applicable with retrospective effect to 27 November 1998. The applicants and the Shoprite and Amie Respondents accept the binding force of the SCA judgment. These parties also agree that the decision in the Progress Office Machines case has the consequence that the dumping duties on the original 12 affected products lapsed. However, the Chicken and Glass respondents contend that the dumping duties on the 12 affected products did not lapse as a result of the decision in the Progress Office Machines case. The applicants contend that this case has Constitutional implications because the Progress Office Machines case dealt with the construction of the legislation pertaining to anti-dumping duties. Consequently, at the heart of this case is the principle of legality, which all organs of state are required to observe and section 172 of the Constitution is applicable. The applicants contend that, the SCA should

have declared the applicable legislation invalid in terms of 172(1) of the Constitution.

[27] The applicants argue that the mere fact that the duties on the affected products lapsed as a matter of law five years after anniversary of their retrospective enforcement dates, does not remove the need for such a declaration of invalidity because under our constitutional system, the theory of objective constitutional invalidity operates. They rely on grounds of inconsistency with the Constitution;

(i) To the extent that the case deals with administrative action, the relevant administrative acts have been performed inconsistently with the requirements of the ITA Act and its Regulations. As a result, they fall to be reviewed and set aside in terms of Section 8 of PAJA, and in terms of Section 172(1) (a) of the Constitution.

(ii) Their second ground is that not only the inclusion of the affected duties in Schedule 2 after the date on which the duties lapsed is inconsistent with the principle of legality but also the very imposition of those duties beyond the dates on which they lapsed.

[28] The Amie respondents do not dispute that these are constitutional issues, but contend that the applicants have not demonstrated that the imposition of the anti-dumping in Schedule 2 of the Act was inconsistent with the Constitution. The Shoprite respondents do not oppose the declaration sought in prayer 3.8 of the notice of motion but contend that the constitutional declarator sought in paragraph 2 of the notice of motion cannot be granted. This contention is based on the fact that the duties lapsed as a matter of law five years after the retrospective enforcement date. The declaration of invalidity issued by

the court would not invalidate the law; it simply declares it to be invalid. The Shoprite respondents contend that the case does not concern a constitutional matter.

[29] The Chicken and Glass respondents' argument goes further. They contend that the judgment of the SCA in the Progress Office Machines case has no force of law, since it is distinguishable and the facts from the present case were rendered per incuriam. Further ,the Chicken and Glass respondents contend that the judgment in the Progress Office Machines case has no force of law in that its order of constitutional invalidity was not confirmed by the Constitutional Court as required in terms of Section 172 (2)(a) of the Constitution. They contend that although the Minister of Finance imposes anti-dumping duties by publication of a notice, the process is incomplete until Parliament confirms it by an Act of Parliament. They argue that in terms of Section 48(6), read with Section 56(3) of the Act, any imposition, amendment, withdrawal or reduction of duties will lapse unless Parliament otherwise provides. This is done in terms of Section 65 of the Taxation Law Amendment Act 30 of 2000, which is principal legislation and not secondary (subordinate) legislation. As at 27 November 2003, the anti-dumping duty derived its force from the Ministerial notice. The effect of the judgment in the Progress Office Machines case was to invalidate the Act of Parliament which perpetuated the existence of the anti-dumping duties.

[30] In support of their contention that the Progress Office Machines case is distinguishable, they point out that when ITAC conceded that the duration of the definitive anti-dumping duty imposed by the Minister of Finance is a period of five years, it did not distinguish between provisional measures and definitive anti-dumping duties. They also point out that in the Progress Office Machines case the court held that the Anti-dumping Regulations did not apply to the facts of that case –

but this was not the finding of the court. They submit that the Anti-dumping Regulations are applicable in this case.

[31] With regard to the contention that the judgment in the Progress Office Machines case was rendered per incuriam, the Chicken and Glass respondents submit that this follows from the court's failure to have regard to: Regulation 38.1 of the Anti-dumping Regulations; Various provisions of the WTO Anti-dumping Agreement; Section 57 A (5) of the Act; and Section 48(6) of the Act. Therefore the SCA found that the A4 Anti-dumping Duties commenced on the retrospective date rather than the date of the publication of the notice imposing the duty.

[32] I hold the view that the argument of the applicants should be sustained. While I agree that the judgment in the Progress office Machines case might have been rendered per incuriam, it is also my considered view that precedent should prevail over the per incuriam principle. As a consequence the judgment in Progress Office Machines is binding on this court.

(b) **Does the case concern a Constitutional issue/matter?**

[33] It must be borne in mind that the issue in this matter is whether the period of five years for the anti-dumping duties to be in force commenced on 28 May 1999 (the date of the notice) or on 27 November 1998 (the date from which the amendment was to have retrospective effect).

[34] It is difficult to discern from a number of Constitutional Court judgments dealing with the courts' jurisdiction whether its decision was made purely on the merit criterion, jurisdiction or access. The Constitutional Court is a specialised court which only adjudicates in constitutional matters. **Stu Woolman et al Constitutional Law of**

SA 2nd ed chapter 3 at 3.2 of page 3-3 analyse in considerable detail the classification of constitutional matters. They conclude that generally constitutional matters include challenges to law or conduct that is inconsistent with the Constitution; issues concerning the status, powers and functions of an organ of state; the interpretation, application and upholding of the final Constitution; judicial review of an administrative action, and the question as to whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. In the Constitutional Court's jurisprudence the terms "constitutional issue", "constitutional question" and "constitutional nature" are synonymous with constitutional matter. In Constitutional Court judgments all these terms are still common and no distinct meaning is attached to any of them. The final Constitution itself avoids the linguistic confusion of its predecessor and sticks to the phrase "constitutional matters" using "issues" only in the term "issues connected with decisions on constitutional matters" and Section 167(7) of the final Constitution, where a constitutional matter is said to include any issue involving the interpretation, protection or enforcement of the Constitution. This only suggests that the term "issues" connotes something narrower than "matter" but nothing appears to turn on this.

[35] In **Pharmaceutical Manufactures Association of SA:. *In re*: Ex parte application of the President of the Republic of South Africa 2000(2) SA 674(CC)** the court said: "*The control of public power by the courts through judicial review is and always has been a constitutional matter*". Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power

have been subsumed under the Constitution, and in so far as they may continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. Therefore one of the duties of the Constitutional Court is to determine finally whether public power has been exercised lawfully. An issue concerning the validity of the exercise of public power falls within its jurisdiction. Although the court has not yet provided an all embracing definition of the term "constitutional matter", it has decided on an ad hoc basis whether particular cases have involved constitutional matter or not – **Stu Woolman supra**.

[36] In **S v Boesak 2001(1) SA 912(CC)** at page 918 para 14 the court said "*if regard is had to the provisions of Section 172(1)(a) and Section167(4)(a) of the Constitution, constitutional matters must include any dispute as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, power and functions of an organ of state. Under Section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters".* So too, under Section 39(2) the question whether the interpretation of any Legislation on the development of law promotes the spirit, purport and objects of the Bill of Rights.

[37] In **Fraser v Absa Ltd 2007(3) SA 484(CC)**, at page 500 para 38 the court held that the following are constitutional matters:

(a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, power or function of an organ of state and disputes between organs of State;

(b) the development of common law in accordance with the spirit, purport and objects of the Bill of Rights;

(c) a statute that conflicts with a requirement or restriction imposed by the Constitution;

(d) the interpretation of a statute in accordance with the spirit, purports and objects of Bill of Rights;

(e) the erroneous interpretation or application of legislation that has been enacted to give effect to a Constitutional Legislature's constitutional responsibilities;

(f) Executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.

[38] In the **Pharmaceutical Manufacturers and Fraser cases** supra the court confirmed that executive or administrative action, particularly where the status, power or function of an organ of state and the interpretation of a statute in accordance with the Bill of Rights are at issue, are constitutional matters. In my view, all the Acts and other instruments applicable to anti-dumping duties must be interpreted in accordance with the spirit, purport and object of the Bill of Rights, particularly because there is an international aspect. The Constitutional court recently resolved this issue in **International Trade Administration Commission V SCAW South Africa (Pty) Ltd and others 2010 (5) BCLR 457 (CC)** when it held at page 474 para 43 that "*.....the impugned recommendation of ITAC too has been made in terms of national legislation that regulates the administration of international trade and also seeks to give effect to the international obligations of the Republic. The construction of provisions of the operative domestic legislation, consistent with the Constitution, in itself raises a constitutional issue. In any event, we are required by the Constitution to interpret domestic legislation governing the duration of anti-dumping duties consistently with these international obligations.*" Whether or not there was an act or omission in the form of an

executive or administrative action is immaterial. The imposition of anti-dumping duties involves public power. When the Minister of Finance imposed anti-dumping duties he exercised public power. This application therefore concerns a constitutional matter.

(c) **Whether the empowering legislation is an Act of Parliament or Subordinate Legislation**.

[39] I now turn to deal with the effects of the SCA judgment in the Progress Office Machines case in the light of section 172 of the Constitution.

[40] In terms of Section 56 of the Act anti-dumping duties are imposed and withdrawn, reduced or amended by the Minister of Finance (at the request of the Minister of Trade and Industry) by means of an amendment to Schedule 2 to the Customs Act. The Section provides as follows:

"(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).*

(2) *The Minister may, in accordance with any request by the Minister of Trade and Industry, from time to time by notice in the Gazette-*

(a) withdraw or reduce with or without retrospective effect and to such extent as may be specified in the notice, or

(b) otherwise amend , from the date of such amendment or any later date to such extent as may be specified in the notice, any anti-dumping duty imposed under subsection (1)

(3) *The provisions of section 48(6) shall mutatis mutandis apply in respect of any amendment, withdrawal or reduction made under the provisions of subsection (1) or (2) of this section."*

Section 48(6) provides as follows:

"Any amendment, withdrawal or insertion made under this section in any calendar year shall, unless Parliament otherwise provides, lapse on the last day of the next year, but without detracting from the validity of such amendment, withdrawal or insertion before it has lapsed."

[41] Section 56 is the basis for the Chicken and Glass respondents' argument for the declaration of invalidity. On the other hand the applicants rely on the principle of legality. They contend that where it is established that a law or conduct is inconsistent with the Constitution, it is invalid and courts are constitutionally obliged to declare it invalid. They also contend that the relevant administrative acts have been performed inconsistently with the requirements of the ITA Act and its Regulations and they must therefore be reviewed and set aside in terms of Section 8 of PAJA and in terms of Section 172(1)(a) of the Constitution. According to its argument, the inclusion of the affected duties in Schedule 2 after the date on which the duties lapsed and the imposition of duties beyond the dates on which they lapsed is inconsistent with the principle of legality. It is important to note that in the Progress Office Machines case the court merely referred to the Minister's notice No: GNR685 GG 20125 of 28 May 1999 as subordinate legislation without elaborating on it. Section 172 (1)(a) of the Constitution requires a court, when deciding a constitutional matter within its power, to *"declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency"*. This is indeed a mandatory provision. The court has no discretion. Any law or conduct that is inconsistent with the Constitution, must be declared invalid. This was confirmed in **Doctors for Life International v Speaker of the National Assembly and others 2006(6) SA 416(CC)** para 201, where the court said:

"*The provisions of Section 172 (1)(a) are clear, and they admit of no ambiguity; when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid*". This Section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic State. It echoes the supremacy clause of the Constitution, which declares that the Constitution is supreme ..... "law or conduct inconsistent with it is invalid", If a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.

[42] Although the applicants agree with the Chicken and Glass respondents that Section 172(1) (a) should be applied they do so for different reasons. The applicants base their case on the doctrine of legality. However they do not agree that Section 172(2) (a) of the Constitution is applicable.

[43] The Chicken and Glass respondents argue that in the Progress Office Machines case the court erred when it held that "subordinate legislation" such as the May 1999 Notice must be reasonable. They are adamant that Progress Office Machines judgment has no force of law, because Section 172(2)(a) of the Constitution provides that the SCA may make an order concerning validity of an ACT of Parliament but "*an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.*" According to them, the effect of the SCA order in Progress Office Machines case was to invalidate an Act of Parliament and not subordinate legislation. If the Minister of Finance's notice is not confirmed by an Act of Parliament – it means that the process is incomplete and therefore the anti-dumping duties cannot be brought into operation.

[44] The Amie respondents contend that Section 172(2) (a) of the Constitution only applies when a declaration of constitutional invalidity is made on an Act of Parliament, or Provincial Legislature or Conduct of the President. The Shoprite respondents submit that the applicant's do not even suggest that this case involves any inconsistency between South African Legislation and its international treaty obligations nor that the State has acted inconsistently with its international obligations.

[45] It is trite that when the SCA or High Court declares an Act of Parliament invalid, it must do so in terms of section 172(1)(a) of the Constitution and refer it to the Constitutional Court for confirmation in terms of Section 172(2)(a) in order for it to have the force of law. However, those provisions do not apply to regulations and interim orders.

[46] Section 48(6) as quoted above may provide a solution to this argument. At a glance it simply means that the imposition, amendment, withdrawal or reduction of duties will lapse unless an Act of Parliament is invoked. The relevant, provision in the circumstances would be Section 65 of the Revenue Laws Amendment Act 30 of 2000. I tend to agree with the applicants, Amie and Shoprite respondents that in Progress Office Machines case the SCA did not make a declaration of constitutional invalidity in relation to an Act of Parliament or Provincial Legislation or conduct of the President. There is therefore no reason why Section 172(2) (a) should be invoked.

Section 56(1) of the Act provides as follows:

"*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)".*

Sections 53(2) (a) and (b) provide, in relevant parts:

"(a) the imposition of any anti-dumping duty in the case of dumping as defined in the International Trade Administration Act.....shall be in accordance with any request by the Minister of Trade and Industry under the provisions of the International Trade Administration Act, 2002.

(b)Any such anti-dumping duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping -----is imposed in respect of those goods under Section 57A".

[47] The Shoprite respondents are correct in saying that the Minister of Finance therefore exercises a legislative competence when he amends Schedule 2 to impose an anti-dumping duty similar to the legislative acts which Ministers perform when they issue regulations in terms of Acts of Parliament. The effect of Section 48(6) of the Act is that such amendment lapses on the last day of the next calendar year unless Parliament otherwise provides as already stated above.

[48] Parliament through an Act delegates certain legislative powers to the Ministers. The Revenue Laws Amendment Act is a good example. ***Stu Woolman*** **et al** opine that under the general law the term subordinate legislation is often used to refer to a Legislative instrument made by an entity under a power delegated to the entity by Parliament. It is Legislative to regulate in greater detail matters provided for by the original enactment in online form.

[49] Legislative powers can be delegated for any of the following:

49.1 (a)To save pressure on parliamentary time.

(a) When the legislation is too technical or detailed to be suitable for parliamentary consideration.
(b) To deal with rapidly changing or uncertain situations; and
(c) To allow for swift action in the case of an emergency.

49.2 The Constitutional imperatives for the scrutiny of delegated legislation are contained in Sections 101 and 140 of the Constitution.

Section 101(3) of the Constitution pertains to the following national delegated legislation:
Proclamation, regulations and other instruments of subordinate legislation which must be accessible to the public.
Under Section 101(4) National legislation may specify the manner in which instruments mentioned in subsection 3 must be –

(a)Tabled in Parliament; and
(b)Approved by Parliament
Parallel provisions in respect of provincial government are to be found in sections 140(3) and (4).

[50] It is clear that the Constitution requires two things with regard to subordinate legislation. Firstly, subordinate legislation should be made accessible to the public, as that provision is mandatory. Secondly, the Constitution gives Parliament discretion as to whether or not to devise a mechanism that will specify the manner and extent to which proclamations, regulations and other instruments must be tabled and approved. Not all instruments of subordinate legislation require parliamentary scrutiny.

[51] Parliament's authority has been confirmed by the Constitutional Court in the case of **Executive Council of the Western Cape Legislation and Others v President of South Africa and Others 1995 (10)**

BCLR 1289 (CC). The court found that there is nothing in the 1993 Constitution that prohibits Parliament from delegating subordinate regulatory authority to other bodies and that the power to do so is necessary for effective law-making.

[52] In the instant situation, the Minister of Finance is empowered by Parliament to legislate on its behalf. He has the power to impose, amend, withdraw or reduce anti-dumping duties. This therefore dispenses with the Chicken and Glass contention that the SCA in Progress Office Machines case invalidated an Act of Parliament and it had to act in terms of Section 172(2)(a) of the Constitution. Therefore, the SCA in Progress Office Machines case did not declare an Act of Parliament invalid. It is also clear that the SCA treated the said legislation as subordinate legislation. The contention of the Chicken and Glass must therefore be rejected. They challenge the Ministerial Notice as being invalid without adding flesh to their premise.

(d) **Is Progress Office Machine distinguishable?**

[53] I have already indicated above that the Chicken and Glass respondents intimate that Progress Office Machines judgment is distinguishable on two grounds.

53.1 The first ground is that the SCA judgment was based on the following concession: "*It is common cause between the parties and it has been conceded on behalf of the second respondent i.e [ITAC] that the duration of the definite anti-dumping duty imposed by the Minister of finance is a period of five years. This concession was properly made*"

53.2 The second ground is that when ITAC made the concession in Progress Office Machines case it failed to distinguish between provisional measures and definite anti- dumping duties. This led the SCA to

conflate provisional measures and definite anti-dumping duties. The Chicken and Glass respondents say that where a judicial decision is based on a concession made by Counsel, it does not yield a *ratio decidendi* since the court has not applied its mind to the matter and given a considered opinion to it. This principle was expressed in **R v Phillips Dowing Ltd 1955(4) SA 120(T).**

[54] It appears from the submission of the Chicken and Glass respondents that their complaint lies against the interpretation of the concession of the SCA because it is the court that pronounced the dictum not ITAC or its counsel. Surely, if Counsel makes a concession in court and the court is convinced by it then it is the decision of the court. I am of the view that although ITAC did not distinguish between provisional and definite measures, its concession was that definite anti-dumping duties are imposed for five years. It is trite that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal.....to prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing its duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong – **Alexkor Ltd v The Richtersveld Community 2004(5) 460 (CC). Also in (USA v TAO YING METAL INDUSTRIES 2009(2) SA 204 (CC)** – it was held that where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on incorrect application of the law. That would infringe the principle of legality. A court is therefore obliged of its own accord to raise any legal question independently of the attitude of the parties.

[55] On the objection that Progress Office Machines case is distinguishable because the SCA held that Anti-Dumping Regulations were not yet in force whereas in this case they are, I am with the applicants when they say that the SCA used the Regulations to aid its interpretation in Progress Office Machines case. This can be deduced from the fact that the SCA stated that the Anti-Dumping Regulations were not in force but accepted that they provided an important indication for limiting the period of time of their force.

(e) **The Per Incuriam Principle**

[56] The *per incuriam* principle means a decision which a subsequent court finds to be a mistake, therefore not binding precedent. This may occur through ignorance of a relevant authority in a case on a point of law or legislation. The principles of *per incuriam* can be applied where a court omits to consider a binding precedent of the same or the Superior court rendered on the same issue or where a court omits to consider any statute while deciding the issue. This has been canvassed extensively by the applicants and the Chicken and Glass respondents in this case. However, it has been recognised that the doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law. ***Halsberg's Law of England (4th ed Vol 126 judgment and orders: judicial decisions as Authorities*** *(pp 297 -98 – para j 78;* per incuriam principle has been elucidated as: "*a decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of other court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which*

case it must follow that decision, or when the decision is given in ignorance of the terms of a statute or rule having statutory force".
- (**Young v Bristol Aeroplane Co Ltd 1944 2 ALL ER at 300**).
Lord Godard CJ in Hudolersfield Police Authority v Watson 1947 2 ALL ER 193, observed that "*where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered per incuriam. It is trite that a decision of a higher court is binding on a lower court even if the lower court considers the decision to be clearly wrong unless the decision is one which was pronounced per incuriam".*

[57] This question has been expounded extensively by our courts and authors. The detail of the final conclusion lies in the facts on each case. There appears to be agreement that *per incuriam* applies, although with some caution. Nugent JA recently confirmed this approach in **Makambi v MEC for Education Eastern Cape 2008(5) SA 449 (SCA)**.
"*a lower court should not depart from higher court conclusions for flimsy reasons because the decision was given per incuriam".*

[58] Similar assertions were made by Asif Tufal www.lawteacher.co.uk when he writes that the House of Lords was bound by its own previous decisions until 1966 when Lord Gardiner LC announced a change of practice. **The practice statement [1996] 1 WLR *1234*** stated that although the *House of Lords* would treat its decisions as normally binding it would depart from these when it appeared right to do so. This power has been used sparingly. The Court of Appeal is bound by decisions of the House of Lords even if it considers then to be wrong.

[59] In **Young v Bristol Aeroplane CO Ltd (1994) KB 718**, the Court of Appeal held that it was bound by its previous decisions subject to the following three exceptions:

i. Where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject.
ii. The Court of Appeal must refuse to follow a decision of its own which cannot stand with a decision of the House of Lords even though its decision has not been expressly overruled by the House of Lords.
iii. The Court of Appeal need not follow a decision of its own if satisfied that it was given *per incuriam* (literally by carelessness or mistake).

[60] Regulation 53.1 of the Anti-Dumping Regulations provides as follows: "Anti-*Dumping duties shall remain in place for a period not exceeding 5 years from the imposition of the last review thereof*".

Regulation 38 provides as follows: "*38.1 Definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five year period. 38.2 Definitive anti-dumping duties may be imposed with retrospective effect as provided for in terms of the Customs Act*".

Section 57 A(5) of the Customs Act provides: "*that if the amount of any provisional payment exceeds the amount of any anti-dumping duty, the difference shall be refunded or if it is less than the amount of the anti-dumping duty, the amount of the difference shall not be collected.*"

[61] I agree with the Chicken and Glass respondents that provisional payment has an existence of its own. It does not coincide with a definitive anti-dumping duty. It is a duty that is levied in the interim as security prior to the Minister of Finance imposing an anti-dumping duty which anti-dumping duty is not imposed retrospectively in that sense. The SCA therefore conflated provisional measures and definitive anti-dumping duties. The contention of the Chicken and Glass respondents is supported by **G.F Brink – Imposition of anti-dumping duty in terms of Customs and Exercise Act 91 of 1994** – effect of retrospective imposition of duty – **interpretation of date of imposition – University of Pretoria.**

[62] Brink postulates that, although in the Progress Office Machines case the ITAC submitted evidence on the interpretation of an application of the five year period in EU, India and the USA, which constitute the three major users of anti-dumping in the world, the court ignored that. It was shown that although the legislation or regulations of these three authorities used the same terminology that is the "imposition" of anti-dumping duties, the five year period is regarded by each of these authorities as starting on the date to which the duty was imposed retrospectively. Therefore the period of the definitive anti-dumping duties and the period of a provisional payment may not coincide as it is the case in the Progress Office Machines case. This approach resonates with legal framework as reflected in the WTO instruments, the Customs Act and Anti-Dumping Regulations. This can be gleaned from the provisions of Regulation 38.1, which unfortunately was not referred to in the judgment. In addition to Regulation 38.1 quoted above, Anti-Dumping Regulation 38.2 provides: "*that definitive anti-dumping duties may be imposed with retroactive effect as provided for in terms of the Customs Act*".

[63] Brink concludes that, an identical provision (with the necessary changes to reflect counterveiling rather than anti-dumping duties) is contained in counterveiling Regulation 38. The Safeguard Regulations, however, specifically provide in regulation 17 that "*the period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force*" this is also confirmed by Article 6 of the latter Agreement of the WTO. In terms of Article 7.5 the total period of application of a safeguard measure including the period of initial application and any extension thereof, shall not exceed eight years. The duration of definitive measures are counted as part of provisional measures only in case of safeguard measures, but not in the case of anti-dumping duties or counterveiling measures. The same differentiation is incorporated into SA's trade remedy regulations.

[64] Therefore the five year period must be counted from the date ITAC's final recommendation is published. The judgment in Progress Office Machines case is flawed. I agree with Brink's opinion that unless the SCA's decision is overturned, these reviews will therefore have to be terminated and any anti-dumping duties paid since the five year period expired, will have to be refunded.

[65] It may also be true that the SCA relied on Regulation 53.1 of the Anti-Dumping Regulation and that it calculated the five year period retroactively to 28 November 1998. It is also true that in terms of Regulation 38.1 the SCA should have calculated the period over which the definitive Anti-Dumping Duty was in force with effect from the date of publication of ITAC's final recommendation. However, the fact of the matter is that the SCA found that the anti-dumping duties had retrospective application. That was the interpretation the court made in reaching its conclusion. I also agree that in SCAW the Constitutional Court considered Regulation 38.1 to be the section which determined

the five year duration of anti-dumping duties. However the decision of the SCA is binding on this court, otherwise I would agree with the judgment of Gyanda J in Progress Office Machines case.

[66] Decisions of the Supreme Court of Appeal itself are binding on the High Court and the magistrate's courts. The question that begs an answer is whether the per incuriam principle prevails over the stare decicis rule or vice-versa. One should accept that this is a principle of English law origin. The English themselves are reluctant to apply it and so should we. It is clear from the discussion above that precedent prevails over the per incuriam rule. The application of the per incuriam rule is circumscribed. It cannot be applied willy-nilly. While I agree that the High Court may not follow a decision of its own if it is rendered *per incuriam*, the decisions of the SCA and the Constitutional Court are binding on the High Courts.

[67] In **Jones v Secretary of State for Social Services [1977] AC 944** Lord Reid stated:

> "*It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think they act wrongly in so doing, they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty...*"

[68] It is my considered view that if the attitude of the Chicken and Glass respondents is to be followed it will produce serious inconvenience in the administration of justice and significant injustice to citizens. One must also recognise that the simple issue that the SCA in Progress Office Machines case had to deal with was to determine the operative date of anti-dumping duties whether it was with retrospective effect to

the 27 November 1998 when they were imposed or whether it was on the 19 May 1999 when the Gazette was published.

[69] I am not inclined to hold that the decision in Progress Office Machines case is given *per incuriam.* As **Rupent Cross and J W Harris Precedent in English Law 149 (4th ed 1991)** have described the principle: "*.....The definition is not necessarily exhaustive, but cases not strictly within it, which can properly be held to have been decided per incuriam, must in our judgement, consistently considered with the stare decisis rule which is an essential part of our law, be of the rarest occurrences*".

(f) **Justification for declaration of invalidity**

[70] The applicants seek declarations of invalidity and an order suspending those declarations of invalidity in relation to certain anti-dumping duties which are affected by the decision of the Supreme Court of Appeal in the Progress Office Machines case.

[71] South Africa as a member of the WTO sits on the WTO Committee on Anti-Dumping Practices (Anti-Dumping Committee). The Anti-Dumping Committee is established in terms of Article 16 of the Anti-Dumping Agreement. These are aided by GATT and ITA Act which are instrumental in regulating anti-dumping duties.

[72] Article 11.3 regulates the duration of anti-dumping duties as follows: "*notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition(or from the date of the 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 on their own initiative or upon a duly*

substantiated request made by or on behalf of the 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 shall remain in force pending the outcome of such review".(my emphasis)

[73] The review referred to in Article 11.3 is a sunset review which in terms of Article 11.4 shall be carried out within 12 months of the initiation of the review. My understanding of Article 11.3 is that if no review is initiated within a period of five years of the imposition of an anti-dumping duty, that duty becomes a definitive anti-dumping duty. Definitive anti-dumping duties are imposed at the end of the investigation process.

[74] Sections 55(1) and 55(2) of Customs Act provide as follows:

(1).....

(2) (a) *the imposition of any anti-dumping duty in the case of dumping as defined in the International Trade Administration Act, (Act No 71 of 2002), a counterveiling duty in the case of subsidized export as so defined or a safe guard duty or quota in the case of disruptive competition as so defined and the rate at which or the circumstances in which such duty or quota is imposed in respect of any imported goods shall be in accordance with any request by the Minister of Trade and Industry under the provisions of the International Trade Administration Act, 2000.*

(b) *Any such anti-dumping, counterveiling or safeguard duty may be imposed in respect of the goods concerned in accordance with such request with effect from the date on which any provisional payment in relation to anti-dumping counterveiling or safeguard duty is imposed in respect of those goods under Section 57A".*

[75] Section 56(1) and (2) specifically regulate the imposition of anti-dumping duties. They provide as follows:

(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).* (my emphasis)

(2) *The Minister may, in accordance with any request by the Minister of Trade and Industry, from time to time by notice in the Gazette –* (my emphasis)

(a) *withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice; or*

(b) *otherwise amend, from the date of such amendment or any later date to such extent as may be specified in the notice, any anti-dumping duty imposed under subsection (1)*".(my emphasis).

[76] Section 57A provides as follows:

(1) *Whenever the International Trade Administration Commission publishes a notice in the Gazette to the effect that it is investigating the imposition of an anti-dumping, counterveiling or safeguard duty on goods imported from a supplier or originality in a territory specified in that notice, the Commissioner shall, in accordance with any request by the said Commission, by notice in the Gazette impose a provisional payment in respect of those goods for such period and for such amount as the Commission may specify in such request.*

(2) *The Commissioner shall, in accordance with any request by the said Commission, by further notice in the Gazette extend the period for which the provisional payment mentioned in subsection(1) is imposed or withdrawn reduce it with or without retrospective effect.*

(3) *Such provisional payment shall be paid on goods subject thereto, at the time of entry for home consumption thereof, as security for any anti-dumping, counterveiling or safeguard duty which may be retrospectively imposed on such goods under Section 56,56A or 57 and may be set off against the amount of the retrospective anti-dumping, counterveiling or safeguard duty payable.*

(4) *If no anti-dumping, counterveiling or safeguard duty is imposed before the expiry of the period for which a provisional payment in relation to the goods concerned has been imposed, the amount of such payment shall be refunded.*

(5) If the amount of any such provisional payment on the said goods –

(a) exceeds the amount of any anti-dumping, counterveiling of safeguard duty retrospectively imposed on such goods under Section 56, 56A or 57, the amount of the difference shall be refunded;

or

(b) is less than the amount of the anti-dumping, counterveiling or safeguard duty so imposed, the amount of the difference shall not be collected.

[77] The power of the Minister of Trade and Industry to request the imposition, amendment or withdrawal of anti-dumping duties, is regulated by the transitional provisions in terms of Schedule 1 of the ITA Act. Under our domestic legislation, absent a sunset review, the term of an anti-dumping duty is five years. The Constitutional Court has noted in SCAW that "Regulation 38.1 is emphatic that anti-dumping duties "lapse" after a five year period:

"*Definitive anti-dumping duties will remain in place for a period of five years from the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five year period*". This is amplified by Regulations 53 and 54.

[78] When I discussed the "Constitutional matter", supra, I touched on the issue concerning the "doctrine of legality" I now wish to revert to it in relation to an administrative act or official power. The applicants contend that prior to the judgement in the Progress Office Machines case they calculated the date of imposition of anti-dumping duties from the date of publication of the notice which was a material error as contemplated in Section 6(2) (d) of PAJA. Section 6(2) of PAJA lists instances in which a court or a tribunal has the power to judicially review an administrative action. Section 33(1) of the Constitution ordains the right to administrative action that is lawful, reasonable and procedurally fair.

78.1 Some of these instances are mentioned under Sections 6(2) (c), (d) and (g). Such an action may be reviewed if: 6(2) (b)a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;.....

(d) the action concerned consists of a failure to take a decision;.....

[79] The applicants as indicated above raise a material error of the law as their ground for judicial review. After the ITAC erroneously calculated the five year period initiated by a sunset review in respect of the affected products after the fifth anniversary of the date on which they were retrospectively imposed, the Minister of Trade and Industry did not request that the Minister of finance should withdraw the anti-dumping duties in respect of the affected products. They submit that a further consequence of the material error of law is that Schedule 2 to the Act was not amended to remove the anti-dumping duties on the affected products from the date on which the relevant five year period expired. As a result of this failure, Schedule 2, as it currently stands, is invalid to the extent that it lists the affected products as products in respect of which anti-dumping duties are liable to be levied when the relevant anti-dumping duties have already lapsed.

[80] The Amie and Shoprite respondents oppose the reviewing and setting aside of the impugned decision on the basis that the anti-dumping duties lapsed by operation of law. There is also no need to review and set aside the failure by the Minister of Trade and Industry and the Minister of Finance to withdraw the anti-dumping duties. Even if the merits favour the applicants the court has the discretion to the relief sought. Since the sunset reviews were not initiated on time on the affected products the relief should be refused. Applicants do not set out a legal basis on which Schedule 2 can be declared invalid – so they argue.

[81] As can be seen from the discussion above, the Chicken and Glass respondents oppose the declaration of invalidity on the basis that Progress Office Machines judgment has no force of law, it is

distinguishable and has been rendered *per incuriam*. Since I have already ruled that Progress Office Machines case has the force of law and is binding on this court, it will be a futile exercise if I were to belabour the issue further, except to say that they concede that the case concerns a constitutional matter. The Amie and Shoprite respondents' objection is on the basis that the case does not concern a constitutional matter within the meaning of Section 172(1) (a) of the Constitution. Further that since the anti-dumping duties have already lapsed by operation of law there is nothing to declare invalid.

[82] The constitutional doctrine of legality encompasses a demand that any exercise of official power to the detriment of any person must comply with whatever terms and conditions may be set by applicable law as may happen to exist- **Fraser and Pharmaceutical Manufactures supra**. The applicable Legislation in the instant case is Access to Administration Justice Act. It is also important to note that the inconsistency which appears in Schedule 2 only became apparent after the decision of the SCA in the Progress Office Machines case. Although the material error of law existed before the judgment was delivered the decision was only confirmed through litigation. Once this error was detected, the applicants were entitled to raise it although the error was occasioned by their own mistake.

[83] In the case of **Municipal Manager: Qaukeni Local Municipality and Another v F V General Trading CC 2010(1) SA 356(SCA)** – the appeal concerned the validity of a services procurement contract concluded by the second appellant the Qaukeni Municipality without due compliance with various statutory prescribed procedures relating to municipal procuments. The respondent raised an objection in limine, based on the contention that it was an innocent party who had done nothing wrong, but had merely accepted the appellant's offer whereas the appellant had failed to follow the municipal procedure that bound

them. The court held that this argument cannot be upheld. Further that the Supreme Court of Appeal has on several occasions stated that depending on the Legislation involved and the nature and the functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act – **Pepcor Retirement Fund and Another v Financial Services Board and Another 2003(6) SA 38 (SCA).**

[84] In **Municipal Manager – Qaukeni Local Municipality** and others supra, the court also held that "*while I accept that the award of municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is necessary to reach any final conclusion in that regard. If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter application. In doing so it raised the question of the legality of the contract fairly and squarely just as it would have done in a formal review. In the circumstances substance must triumph over form. And while my observation should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellant's failure to bring formal review proceedings under PAJA is no reason to deny them relief*".

[85] This strengthens the argument that this matter may be decided on both the doctrine of legality or PAJA. If a party's submissions are convincing on both, it merely remains for the court to make an election

on the principle it wishes to apply. If the "*had it not been for*" question is brought into the equation, the conclusion on both the doctrine of constitutional legality and PAJA would be the same. If the court in Progress Office Machines case had decided that the five year period commenced to run on the date of publication of the notice in the Government Gazette in terms of which the anti-dumping duties were "imposed" pursuant to the "original investigation" (i.e 28 May 1999) the issue of the doctrine of legality and administrative act under PAJA would not have arisen. The issue of constitutional legality and administrative action under PAJA arises because in Progress Office Machines the SCA decided that the five year period commenced to run on the date from which the anti-dumping duties were to have retrospective effect as provided for in the published notice(i.e 27 November 1998).

[86] The importance of the Legislation in this case is that anti-dumping duties involve international trade and competition. The South African government considers competition rules as a necessary measure to ensure South Africa has access to the best prices and services at the best prices for its consumers. The nature and functions of the ITAC involves international instruments which give impetus to the country's foreign policy and relations with the outside world. The applicants are therefore duty bound to approach the court and challenge the anti-dumping duties so imposed in terms of Schedule 2 of the Customs Act. The applicants have the right to approach the court both in terms of the PAJA and the doctrine of legality under the Constitution. At the end of the day, the court will decide on which route to take, depending on the facts presented by the parties.

[87] In the matter of SCAW supra the Constitutional Court remarked as follows:

"The setting changing and removal of an anti-dumping duty is a policy laden executive decision that emanates from the power to formulate and implement policy and international trade. That power resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should at any level of "defence" in making orders that perpetuate anti-dumping duties beyond their normal lifespan is a constitutional issue of considerable importance".

[88] I agree with the applicants that this is a constitutional issue which resides in the national executive heartland. This power flows from the power to formulate and implement domestic and international policy. Anti-dumping duties are therefore necessary in order to protect the local industries that supply or manufacture these products. This also helps to control prices that the public can have access to reasonably priced products. It is also inevitable that anti-dumping duties provided for in Schedule 2 shall also apply to such goods entered under any item of Schedule 3 or 4 specified in Column 111 of Schedule 2. The public should not have to depend on lawyers to interpret the meaning and input of words in proclamations in order for them to know whether a particular piece of Legislation passed by Parliament has taken effect **– Kruger v President of Republic of South Africa and others 2009 (1) SA 417.**

[89] This is a fundamental right that is required by the rule of law. While it might be true that the item concerned in Schedule 2 lapsed by operation of law, there will be no harm if it is declared invalid and the Minister of Finance is given ample time to remove it. The exercise of public power must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of our law. The doctrine of legality, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution as an incident

of the rule of law- **Affordable Medicines Trust and Others v Minister of Health and Others 2006(3) SA 247 (CC)**. Section 172(1) requires courts when deciding a constitutional matter within its power to:

a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
b) to make any order that is just and equitable.....

[90] Schedule 2 of the Customs Act is inconsistent with the decision of the Supreme Court of Appeal in Progress Office Machines and stands to be declared invalid.

(g) **Justification for suspension of declaration of invalidity**

[91] The assertion that the applicants do not set out the legal basis on which this court can suspend the declaration of invalidity does not hold water because applicants have motivated their argument. This they also did by raising the doctrine of legality. An administrative action or decision, no matter how bluntly illegal it may appear to be, continues to have effect until such time as it is declared invalid by the court. Invalidity thus operates with retrospective effect. In administrative law setting aside is a logical consequence of declaring the decision to be invalid, and is simply a way of saying that the decision no longer stands or that it is void. It is one of the remedies provided for in Section 8 of PAJA – Cora Hoexter – **Administrative Law in South Africa 1st ed – pages 484 -485**.

[92] The principle of the separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the

branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, "the areas are partly interacting, not wholly disjointed". In **Ex parte Chairperson of the Constitutional Assembly**; *In re* Certification of the Constitution of the RSA 1996 (4) SA 744 at page 810 para 109 the court held:

"*The powers of the three branches of government will at times overlap. Whether a court should intervene will depend on the circumstances of each case. Moreover, the constitutional scheme does not reflect a complete separation of powers*". It has been submitted by the applicants that the period of three years suspension was selected on the basis that there were twelve affected products when the application was launched and given the size of its teams, and the average length of sunset reviews, ITAC would be in a position to complete the current reviews within a period of three years. This submission is reasonable.

[93] While the Progress Office Machines case has not created a lacuna or uncertainty, it has rendered schedule 2 of the Customs Act unlawful, which requires intervention by this court. Section 172 (1) (b) (ii) gives the court the power to make an order suspending the declaration of invalidity for any period and on any condition to allow the competent authority to correct the defect. This was confirmed by the SCA in **De Kock and Others v Van Rooyen 2005(1) SA 1(SCA)** at para 261. It follows therefore that once the court makes a declaration of invalidity it should be suspended forthwith to allow the Minister of Finance to correct the defect. The court may also lay certain conditions. All the respondents in this case do not deny that the anti-dumping duties are necessary in order to protect the local industry

from injurius dumping. Since sunset reviews have been conducted ITAC should be allowed to maintain the duties. If the duties are extended the maximum extension must be a reasonable period. The interest of government and the local industry itself should rein supreme.

[94] The appeal in the Progress Office Machines case succeeded because the sunset review had not been initiated within the five year period ending on 27 November 2003. This was the date on which the anti-dumping duties would have had retrospective effect. This was due to the fact that the ITAC had miscalculated the date to be that of the publication of the notice. (according to Progress Office Machines case). As a consequence Schedule 2 of the Customs Act was of no force and effect. This as I have already said is a constitutional issue. The election I make is that this matter should be decided on the doctrine of Constitutional legality. In the circumstances the applicant's application should succeed.

COUNTER-APPLICATION

[95] I now turn to the Shoprite respondents' counter-application.

Shoprite filed a counter application in which they inter alia seek an order:

(i) declaring that the anti-dumping duty imposed by the 4th applicant in terms of a Government Notice published in Government Gazette No 21650 of 20 October 2009 in respect of garlic imported from the PRC has been of no force and effect since 24 March 2005;

(ii) ordering the 2nd applicant to reimburse Shoprite in a certain sum plus interest thereon at the prescribed rate a *tempore morae*; and

(iii) ordering the applicants to pay Shoprite's costs of this counter-application including costs of two Counsel, jointly and severally the one paying the others to be absolved.

[96] Shoprite avers that there was no valid cause for the payment and receipt of the duties, as a consequence SARS has been unduly enriched and must refund whatever has been paid. The Shoprite respondents raise a number of grounds on which they think their application should succeed. The applicants however, vehemently oppose the counter-application and raise a number of difficulties with the submissions of Shoprite.

[97] I have read both submissions, and in the normal legal parlance I think I could have been amenable to the granting of the relief. However, the counter-application is plagued by the fact that I have already ruled that Schedule 2 of the Customs Act is declared invalid and that the said invalidity, should be suspended.

As a consequence the application cannot succeed.

CONCLUSION

[98] I have already expressed my support for the decision of Gyanda J in the court a quo in Progress Office Machines case, that the operative date of the anti-dumping duties was the 19th May 1999 when the notice was published in the Gazette. I have also decided that stare decicis rule should prevail over the *per incuriam* principle. Despite my disagreement with the decision of the SCA in Progress Office Machines case, I have ruled that the said decision is binding on this court and myself.

[100] Since the decision on this application is based on the doctrine of constitutional legality and that Schedule 2 of the Customs Act is found to be inconsistent with the Constitution, I would in the circumstances make the following order:

(a) Application for condonation is granted.

(b)The main application is granted.

(c)In terms of Section 172(1) (a) of the Constitution, Schedule 2 to the Customs Act is declared invalid to the extent that from the dates mentioned against each affected product as listed in the amended notice of motion shall be of no force and effect.

(d)The order in (c) above is to operate with retrospective effect in relation to the affected products from the date listed against each product in the amended notice of motion.

(e)The Minister of Finance is given a period of 3 years within which the defect must be rectified.

(f) The Shoprite counter – application is dismissed.

(g)The Amie and Chicken and Glass respondents are ordered to pay the costs of the condonation application.

(h)The Amie, Chicken and Glass and Shoprite respondents are ordered to pay the costs of the main application jointly and severally the one paying the others to be absolved.

(i) The Shoprite respondents are ordered to pay the costs of the counter-application.

(j) The costs include costs occasioned by the appearance of three Counsel.

TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

For the Applicants : Adv G Marcus SC,
: Adv H Maenetje
: Adv K Hoffmeyer

Instructed by : State Attorney

For 50, 51 & 64th Respondents: Adv C Puckrin SC
: Adv K Pillay

Instructed by: Shepstone Wylie Attorneys

For 12, 33 to 46 and 56 Respondents: Adv A Cockrell SC

Instructed by: Webber Wentzel

For 18th & 52nd Respondents : Adv J C Heunis SC

Instructed by : Werksmans Inc

HEARD ON: 28 & 29 April 2011
DATE OF JUDGMENT: 10 May 2012