

Progress Office Machines v South African Revenue Services Case
[2007] SCA 118 (RSA)

Imposition of anti-dumping duty in terms of Customs and Excise Act 91 of 1964 – effect of retrospective imposition of duty – interpretation of date of imposition

On 25 September 2007 the Supreme Court of Appeal (the SCA) per Malan AJA passed a judgment that will have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa (SA).

“Dumping” is defined in the International Trade Administration Act (71 of 2002 (the ITA Act)) as taking place when the export price of a product is less than the normal value of such product. The normal value is normally defined as the selling price in the exporting country (s 32(2)(b)(i) of the ITA Act). Certain adjustments need to be made to the export price and

the normal value to ensure a fair comparison. Accordingly, dumping takes place when the ex-factory export price of a product is lower than the ex-factory selling price for domestic consumption in the exporting country (s 1(2) of the ITA Act). In terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the AD Agreement) dumping is to be condemned only if it causes material injury to the industry producing the like product to the imported product in the importing country. If the International Trade Administration Commission of South Africa (ITAC) finds that a product is dumped and that such dumping causes material injury to the domestic industry, it may recommend to the Minister of Trade and Industry that an anti-dumping duty be imposed to counter the injury caused by such dumping (Brink *A theoretical framework for South African anti-dumping law* (LLD dissertation (2004) UP) 898 and fn 1295). The Minister of Trade and Industry will then request the Minister of Finance to impose an anti-dumping duty, which may not be more than the margin of dumping but should be less if such lesser duty would suffice to remove the injury caused by the dumping (s 56(2) of the Customs and Excise Act 91 of 1964, read with reg 17 of the Anti-Dumping Regulations of 2003).

In terms of section 57A of the Customs and Excise Act (91 of 1964 (the Customs Act)), ITAC may request the Commissioner for the South African Revenue Service (SARS) to impose a provisional payment to prevent further material injury to the domestic industry during the course of an investigation, which typically takes between twelve and eighteen months from initiation to complete. Such provisional payment is normally imposed for a period of six months, but may be extended to nine months under certain conditions. A definitive anti-dumping duty is normally imposed for a period of five years. The Customs Act makes provision for the retrospective imposition of anti-dumping duties to the date that provisional payments were imposed, provided such payments are still in effect at the time the definitive duty is imposed (s 57A(3) and (4) of the Customs and Excise Act). To date, in each instance an anti-dumping duty was imposed with retrospective effect, the duty remained in place for a period of five years from the date of imposition of the definitive duty, which date was regarded as the date the notice imposing the definitive duty was published in the *Government Gazette* (Brink 920). Accordingly, whenever an anti-dumping duty was imposed with retrospective effect, the total duration of such duty exceeded five years.

This position was challenged in *Progress Office Machines v SARS* ([2007] SCA 118 (RSA)). The applicant/appellant submitted that the Anti-Dumping Regulations specifically provide that an anti-dumping duty may not remain in place for a period exceeding five years, unless a sunset review has been initiated prior to the expiry of said period. It is therefore submitted that where an anti-dumping duty was imposed with retrospective effect, the duration of five years should be counted from the date it has effect, that is, the date to which it applies retrospectively, rather than the date on which the notice imposing the definitive measure was published in the *Gazette*. In this case a provisional payment was imposed on certain paper products imported from, *inter alia*, Indonesia on 27 November 1998

A definitive anti-dumping duty was imposed on 28 May 1999 with retrospective effect to 27 November 1998. Progress Office Machines imported four consignments of paper from Indonesia between 8 January and 20 September 2004. SARS did not require the payment of anti-dumping duties at the time these shipments were cleared for domestic consumption. On 26 October 2004 the appellant received a letter from SARS requiring payment of the anti-dumping duties. The appellant submitted that as the anti-dumping duty had been imposed with retrospective effect to 27 November 1998 the five-year period should have lapsed on 27 November 2003 and that no anti-dumping duties were payable on any shipments made after that date. It is common cause that the sunset review was only initiated after this date.

Regulation 53.1 of the Anti-Dumping Regulations (AD Regulations) provides that “[a]nti-dumping duties shall remain in place for a period not exceeding 5 years *from the imposition* or the last review thereof” (emphasis added). Article 11.3 of the AD Agreement provides as follows:

“[A]ny definitive anti-dumping duty shall be terminated on a date not later than five years *from its imposition* . . . unless the authorities determine, in a review initiated before 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 a review.” (Footnote deleted, emphasis added)

The issue arose as to the meaning of the word “imposition”.

SA is a founding member of the WTO and also a signatory to the General Agreement on Tariffs and Trade of 1947 (GATT) (Dugard, with contributions by Bethlehem, Du Plessis and Katz *International Law: A South African Perspective* 3ed (2005) 429 442ff). Following SA’s accession to GATT, Parliament approved the agreement in the Geneva General Agreement on Tariffs and Trade Act (29 of 1948). The WTO Agreement, to which the AD Agreement is annexed and of which the latter Agreement forms an integral part (Art II.2 of the WTO Agreement) was concluded in Marrakesh in April 1994 by, *inter alia*, SA. Section 231(4) of the Constitution (1996) provides that “[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation”. The WTO Agreement was approved by Parliament on 6 April 1995 (see 1995 *Hansard* col 642–653) and is therefore binding on SA in international law although it has not been incorporated into municipal law. In par 6 of its judgment the court held that although the AD Agreement had not been incorporated into SA municipal law, and although no rights are derived from the AD Agreement itself, “the passing of the International Trade Administration Act . . . creating ITAC and the promulgation of the Anti-Dumping Regulations made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law” (footnote omitted).

Malan AJA held that “[t]he text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution”. Section 233 of the Constitution provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international

law over any alternative interpretation that is inconsistent with international law". After referring to Dugard's submission that a court may "insist on compliance with a state's international obligations as a requisite for the validity of subordinate legislation", Malan AJA continued to find that: (par 11)

"[t]he duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic's international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid" (footnote omitted).

Malan AJA also considered that Gyanda J accepted in the court *a quo* that the "imposition" or the "act of imposing" occurred on the date of publication, that is 28 May 1999, and held that "the date of imposition must obviously be the date when the act of levying the duty is taken ie the date of publication". The date of "imposition" may thus be different from the date of levying the duty. In coming to this conclusion he was relying on the "stated intention" of the contracting parties to the WTO Agreements to maintain uniformity. He found support in the foreign legislation referred to, that is that of the United States of America (USA), the European Union (EU) and India, that the five-year period is calculated from the date of "imposition", that is the date of publication of the definitive anti-dumping measures and that the court *a quo* had relied on the *Oxford English Dictionary* meaning of the word "imposition" as "the action of imposing a charge, obligation, duty, etc".

The second respondent, ITAC, submitted evidence on the interpretation and application of the five-year period in the EU, India and the USA, which constitute the three major users of anti-dumping in the world (see www.wto.org/english/tratop_e/adp_e/stattab3_e.xls (accessed 2007-11-04)). In each instance 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 the notice imposing the definitive duty is published and not on the date to which the duty was imposed retrospectively (*Progress Office Machines v SARS* par 18). Malan AJA held that "[t]he period of definitive anti-dumping duties and the period of a provisional payment [in SA] may thus coincide and not follow each other as is apparently the case in the USA and the EU" (par 19). There is no basis for this finding, as provisional payments and definitive duties operate in exactly the same way in these jurisdictions as in SA. It is therefore not clear on what basis the SCA rejected the practices adopted by all three of the major users of the instrument, as their practices would be indicative of the international interpretation of the concept.

There are two further reasons why the SCA's judgment is flawed. The first relates to the basic interpretation of the AD Regulations itself. Reg 38.1, which is not referred to in the judgment, provides that "[d]efinitive 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". It is therefore specifically provided that the period of

five years will only start on the day the notice is published in the *Gazette*, regardless.

Second, an important concept not considered by the court, however, is the analogous provisions in other SA trade remedy regulations and WTO Agreements. In addition to reg 38.1 quoted above, AD Regulation 38.2 provides that “[d]efinitive anti-dumping duties may be imposed with retroactive effect as provided for in terms of the Customs and Excise Act, 1964 (Act No 91 of 1964)”. An identical provision (with the necessary changes to reflect countervailing rather than anti-dumping duties) is contained in Countervailing Reg 38. The Safeguard Regulations, however, specifically provide in reg 17 that “[t]he period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force”. A similar distinction is made between arts 7, 10 and 11 of the AD Agreement and arts 17, 20 and 21 of the WTO Agreement on Subsidies and Countervailing Measures on the one hand and articles 6 and 7.3 of the WTO Agreement on Safeguards on the other. Article 6 of the latter Agreement provides that “[t]he duration of any such provisional measure shall be counted as a part of the initial period and any extension . . .”, while art 7.3 provides that “[t]he total period of application of a safeguard measure *including the period of application of any provisional measure*, the period of initial application and any extension thereof, shall not exceed eight years” (emphasis added).

It is therefore clear that the drafters of the WTO Agreement envisaged that provisional measures would be counted as part of the duration of definitive measures only in the case of safeguard measures, but not in the case of anti-dumping or countervailing measures. The same differentiation is incorporated into SA’s trade remedy regulations. The SCA’s failure to take note of AD Reg 38.1, which specifically provides that the five-year period must be counted from the date ITAC’s final recommendation is published, and its failure to note the distinction drawn between the provisions of the AD and Countervailing Regulations *vis-à-vis* the Safeguard Regulations and, bearing in mind that the same distinction exists in the three WTO Agreements, indicate that the judgment is flawed.

This leaves the question as regards the impact of the judgment on anti-dumping in SA. The effect of the judgment stretches beyond the present case, as it affects all cases in which an anti-dumping duty has been imposed with retrospective effect. ITAC is currently conducting a total of ten sunset reviews, that is, reviews initiated just prior to the lapse of the five-year period. In five of these cases duties were not imposed retrospectively and these cases are not affected. However, in each of the other five cases, the sunset reviews were initiated after the five-year period had lapsed as per the SCA’s interpretation, but prior to the lapse of the five-year period as per AD Regulation 38.1. In terms of Malan AJA’s ruling, these sunset reviews were thus only initiated after the anti-dumping duties had lapsed, indicating that these reviews have to be terminated, leaving the domestic industry without the protection against unfair international trade to which they are entitled. In addition, ITAC is reconsidering whether it can initiate several new sunset reviews in cases where the five-year period as

interpreted by the SCA has lapsed, but which it would be able to initiate under AD Reg 38.1. Of greater concern is that most of the anti-dumping duties currently in place were imposed or maintained following earlier sunset reviews that were initiated more than five years after the retrospective effect of the original anti-dumping duties (Brink *Sunset reviews: How long are 5 years?* Tralac Working Paper, Nov 2007 – available at www.tralac.org). In terms of the judgment these duties would now be null and void and all duties paid since elapse of the five-year period would have to be refunded (for more details on the effect see Brink (2007) 8ff). Not only will this remove legitimate protection against proven unfair trade, but this will enrich the importers and assist them in increasing their volume of unfair imports, leaving the domestic industries concerned at risk.

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