THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case number: **532/06**

In the matter between:

PROGRESS OFFICE MACHINES CC Appellant

and

THE SOUTH AFRICAN REVENUE SERVICE 1st Respondent
THE INTERNATIONAL TRADE ADMINISTRATION
COMMISSION OF SOUTH AFRICA 2nd Respondent
THE MINISTER OF TRADE & INDUSTRY 3rd Respondent
THE MINISTER OF FINANCE 4th Respondent

CORAM: **SCOTT, LEWIS, HEHER JJA, MALAN and MHLANTLA AJJA**
HEARD: **30 AUGUST 2007**
DELIVERED: **25 SEPTEMBER 2007**

Summary: Imposition of anti-dumping duty in terms of Customs and Excise Act 91 of 1964 – Effect of retrospective imposition of duty – International law – Incorporation into municipal law

Neutral citation: *Progress Office Machines v SARS* [2007] SCA 118 (RSA)

MALAN AJA:

[1] This is an appeal with leave of the court a quo against a judgment of Gyanda J dismissing with costs an application brought by the appellant as a matter of urgency for a declarator

'that the antidumping duties imposed by the Fourth Respondent (at the request of the Third Respondent and enforced by the Fourth Respondent) in terms of GN R685, Government Gazette 20125 (dated 28th May 1999) annexed hereto marked "A", in respect of paper products and in particular A4 paper imported from [Indonesia], had no force and effect after 27th November 2003.'

[2] The appellant deals in paper products some of which it imports to sell on the domestic market. From 8 January to 20 September 2004 the appellant imported four consignments of paper from Indonesia through the port of Durban. The appellant paid the applicable duty on these imports before clearance. No anti-dumping duty was imposed on the consignments although they were examined by Customs officials. Thereafter the appellant received a letter from SARS dated 26 October 2004 concerning the importation of the said paper. It intimated that an investigation had shown prima facie that the appellant contravened certain provisions of the Customs and Excise Act 91 of 1964 (the 'Act') and that anti-dumping duty in terms of Schedule 2 and value added tax amounting to R 1 565 569-60 were payable in respect of the four consignments.

[3] In terms of ss 55 to 57 of the Act the fourth respondent (the Minister of Finance) may impose anti-dumping duty pursuant to a request from the third respondent (the Minister of Trade and Industry). The first respondent (SARS) recovers the duty so imposed. The relevant powers of the Minister of Finance are set out in s 56 of the Act. At the time of the relevant Government Notice, 28 May 1999, s 56 read:

'(1) The Minister may from time to time by notice in the *Gazette* amend Schedule 2 to impose 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 and for Economic Co-ordination, from time to time by notice in the *Gazette* withdraw or reduce,

with or without retrospective effect and to such extent as may be specified in the notice, any anti-dumping duty imposed under subsection (1).'

Section 55 (2) at that time provided:

'(a) The imposition of any anti-dumping duty as defined in the Board on Tariffs and Trade Act, 1986 (Act 107 of 1986) … shall be in accordance with any request by the Minister of Trade and Industry and for Economic Co-Operation under the provisions of the Board on Tariffs and Trade Act, 1986.'[1]

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

The then Board on Tariffs and Trade was empowered to investigate dumping and to report and make recommendations to the Minister of Trade and Industry and Economic Co-ordination.[2] The said Minister, if he accepted the report and recommendation, was entitled to 'request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act, 1964 …'.

[4] Section 57A of the Act in addition provides for the imposition of a 'provisional payment'. Provisional payments may be imposed by the Commissioner of Customs and Excise when the International Trade Administration Commission ('ITAC') or its predecessor, the Board on Tariffs and Trade, publishes a notice to the effect that it is investigating the imposition of anti-dumping duty on certain imported goods. The imposition of a provisional payment must be for the period, amount and goods specified in a request by ITAC.[3] The Commissioner may in accordance with such a request also extend the period, or withdraw or reduce the amount of the provisional payment with or

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[1] The International Trade Administration Commission ('ITAC') is the successor to the Board on Tariffs and Trade (see Item 5(1) of Schedule 2 to the International Trade Administration Act 71 of 2002 ('ITAA')).

[2] Section 4(1) of the Board on Tariffs and Trade Act 107 of 1986.

[3] Section 57A(1) of the Act. Section 57A has been amended by Act 45 of 2003 to replace the references to the 'Board on Tariffs and Trade' with references to ITAC.

without retrospective respect.[4] A provisional payment is paid in respect of the goods subject to it 'as security for any anti-dumping … duty which may be retrospectively imposed' on the goods in terms of s 56 (and 55) and may be set off against the amount of any retrospective anti-dumping duty payable.[5] If no anti-dumping duty is imposed before the expiry of the period for which an anti-dumping duty has been imposed the amount of the duty has to be refunded.[6] Where the amount of the provisional payment exceeds the amount of any anti-dumping duty retrospectively imposed the difference must be refunded but where it is less than the amount of the duty the difference may not be collected.[7] Section 55(2)(b) specifically empowers the Minister of Finance to impose an anti-dumping duty in accordance with a request of the Minister of Trade and Industry 'with effect from the date on which any provisional payment … is imposed … under section 57A.' It follows and it was common cause between the parties that it is only where a provisional payment has been imposed that the Minister of Finance may impose a definitive anti-dumping duty retrospectively. This is borne out by the absence in s 56(1) of any reference to the power to introduce anti-dumping duty *retrospectively* and by the specific inclusion in s 56(2) of the power to 'withdraw or reduce, with or without retrospective effect' any duty imposed under s 56(1).[8] It is common cause that a provisional payment had been imposed in respect of the goods in question in terms of s 57A and that the Minister of Finance had imposed the definitive anti-dumping duty on 28 May 1999[9] 'with retrospective effect to 27 November 1998'.

[5] South Africa is a founding member of the World Trade Organisation Agreement ('WTO') and also a signatory to the General Agreement on Tariffs

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[4] Section 57A(2).
[5] Section 57A(3).
[6] Section 57A(4).
[7] Section 57A(5).
[8] Cf HC Cronje *Customs and Excise Service* (March 2007) p 6-3.
[9] GN R685 *GG* 20125 of 28 May 1999.

and Trade of 1947 ('GATT').[10] The South African Government acceded to GATT and its accession was published in the *Government Gazette*.[11] Parliament approved the agreement in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.[12] The World Trade Organisation Agreement was the outcome of the so-called Uruguay Round of the GATT negotiations and was concluded in Marrakesh by the signing of some 27 agreements and instruments in April 1994 by the members including South Africa. The WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the 'Anti-Dumping Agreement') forms part of the WTO Agreement.[13] Article 11 of the former agreement provides:

'11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 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 may remain in force pending the outcome of such a review.'

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[10] John Dugard SC with contributions by Daniel Bethlehem QC, Max du Plessis and Anton Katz *International Law: A South African Perspective* 3ed (2005) pp 429, 442 ff.
[11] GN 2421 of 18 November 1947.
[12] Section 2.
[13] Dugard pp 447-8.

[6] The effect of international treaties on municipal law is regulated by ss 231, 232 and 233 of the Constitution. Section 231(4) 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 and is thus binding on the Republic in international law but it has not been enacted into municipal law.[14] Nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade been made part of municipal law.[15] No rights are therefore derived from the international agreements themselves.[16] However, the passing of the International Trade Administration Act 71 of 2002 ('ITAA') creating ITAC and the promulgation of the Anti-Dumping Regulations[17] 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.[18] The text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution.[19]

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[14] EC Schlemmer 'South Africa and the WTO Ten Years into Democracy' (2004) 29 *SAYIL* 125 at p 135 referring to the WTO Agreements remarks: 'They are thus binding on South Africa, but will form part of South African law only if parliament *expressly so* provides [s 231(4) of the Constitution]. A careful reading of the parliamentary debates indicates that this was clearly not the case. The agreements were approved and ratified, but due to incomplete actions of parliament, the WTO Agreements do not form part of South African law and as such are not directly enforceable through South African law.' At p 134 n 57 she refers to the adoption of the Report of the Portfolio Committee on Trade and Industry of 22 March 1995 by Parliament. The report that was debated and adopted reads: 'The Portfolio Committee on Trade and Industry, having considered the request to agree to the accession of the Republic … to the *Marrakesh Agreement*, which establishes the World Trade Organisation, incorporates the General Agreement on Tariffs and Trade (GATT) and was signed in terms of section 231(2) of the Constitution, agrees to the accession to the said Agreement by the Republic …' (1995 *Hansard* col 642 - 653 at col 290). See further Dugard p 434; Gary S Eisenberg 'The GATT and the WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa' (1993-4) 19 *SAYIL* 127.

[15] In fact, Article 18.4 of the Agreement on Implementation of Article VI specifically provides that 'Each member shall take all necessary steps … to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement …' (my underlining).

[16] *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (BSC) 712 H.

[17] GN 3197 *GG* 25684 of 14 November 2003.

[18] Cf NJ Botha 'International Law' in 11 *LAWSA First Reissue* paras 350 ff.

[19] Section 233: 'When 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.'

[7] The Anti-Dumping Regulations made under s 59 of ITAA which came into operation on 1 June 2003[20] seek to give effect to provisions of the Anti-Dumping Agreement cited above. The most important is regulation 53.1 which reads:[21]

Regulation 53.1: 'Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.'

[8] On 28 May 1999[22] the Minister of Finance, gave notice in terms of s 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 (in this case a 70 per cent duty) inter alia on the paper imported by the appellant as set out in the Schedule to the notice.

[9] On 30 May 2003 the second respondent, ITAC, gave notice[23] that the definitive anti-dumping duty (stated to have been imposed on 28 May 1999) would expire on 28 May 2004 unless a request was made for its continuance 'indicating that the expiry of the duty [would] be likely to lead to continuation or recurrence of dumping and injury'.

[10] On 2 April 2004 ITAC published a notice[24] that a duly completed petition review questionnaire had been submitted to it on 28 November 2003 by Mondi Limited and Sappi Fine Paper (Pty) Limited which initiated a sunset review on the anti-dumping duties on the paper imported by the appellant and had the effect of extending the period of anti-dumping duties pending the outcome of the review.

[11] It is common cause between the parties and it has been conceded on behalf of the second respondent that the duration of the definitive anti-dumping duty imposed by the Minister of Finance is a period of five years. This concession was properly made. The Act gives express powers to the Minister of Finance to

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[20] GN 3197 *GG* 25684 of 14 November 2003.
[21] See also regulations 38.1, 38.2, 53.2 and 54.1.
[22] GN R685 *GG* 20125 of 28 May 1999.
[23] GN 1560 *GG* 24893 of 30 May 2003.
[24] GN 552 *GG* 26180 of 2 April 2004.

amend Schedule 2 to impose anti-dumping duty in accordance with s 55(2)[25] and to withdraw or reduce any anti-dumping duty imposed by him.[26] In exercising his powers under s 55(2) the Minister of Finance imposed anti-dumping duty by GN R685 *GG* 20125 of 28 May 1999 without stipulating the period of time the duty would be operative. Despite the seemingly limitless operation of the anti-dumping duty imposed in this case by the Minister of Finance the period of its operation should be limited. Not only is a court bound to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'[27] but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable. Dugard[28] submits that a court may 'insist on compliance with a state's international obligations as a requisite for the validity of subordinate legislation'. The 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[29] and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid. The unreasonableness of any period exceeding that provided for by the international instrument is emphasized by regulation 53.1 of the Anti-Dumping Regulations which 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.' Although the Regulations came into force on 1 June 2003 they may be regarded as an indication that the remaining-in-force of the notice imposing the anti-dumping duty beyond five years would be unreasonable and to that extent invalid.

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[25] Section 55(1).
[26] Section 55 (2).
[27] Section 233 of the Constitution.
[28] John Dugard 'International Human-Rights Norms in Domestic Courts: Can South Africa Learn from Britain and the United States?' in Ellison Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 221 p 238 and see Dugard (n 10 above) p 66 ff.
[29] Prima facie Parliament does not intend acting contrary to international law or in breach of its treaty obligations; *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) 184I - 185C.

[12] The narrow issue for consideration in this matter is 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). The appellant imported paper from Indonesia during the period 8 January to 20 September 2004. It follows that if the period of five years commenced on 27 November 1998 the duties would have lapsed on 27 November 2003 and the appeal should succeed. If, on the other hand, the period commenced on 28 May 1999 the appeal should be dismissed.

[13] In his judgment in the court a quo Gyanda J accepted that the 'imposition' or the 'act of imposing' occurred on the date of publication, ie 28 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.' 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, ie that of the USA, the EU and India, that the five year period is calculated from the date of 'imposition' ie the date of publication of the definitive anti-dumping measures. He also relied for his conclusion on the distinction between a 'provisional payment' as described in s 57A and a 'definitive' anti-dumping duty provided for in ss 55 and 56 and concluded that there would be no reason to enact s 57A(5) if there was no such distinction. He came to the conclusion that

'the statute in question is a retrospective one as it indeed says it is in that it "looks backwards, that it attaches new consequences for the future to the event that took place before the statute was enacted."[30] The date of imposition therefore must be the date of publication of the

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[30] Gyanda J relied in this respect on *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) where Farlam AJA (para 34) cited *Benner v Secretary of State of Canada* (1997) 42 CRR (2d) 1 in which reference was made to Elmer A Driedger 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264 at 268-9 who stated: 'A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to

Government Notice No.R 685 published in Government Gazette No.20125 of 28th May 1999. … Retrospective effect of the provision to 27th November 1998 is no more than authorising the levying and collection of duties from the date. It is clear that these retrospective levying of duties was necessary to prevent the evil that was feared and envisaged namely that importers would, in an effort to avoid the imposition of Anti-Dumping measures, import huge quantities of the product in question before the legislation came into force. It is clearly therefore a measure designed to prevent the importers from circumventing the provisions of the law and by putting in place measures to collect or levy the duties even before the law came into force. Under these circumstances the provision in question is definitely retrospective in effect and not a retroactive statute …'.

[14] The judge in the court a quo was undoubtedly correct in finding that anti-dumping duty may be imposed in certain circumstances for a period longer than five years: where a sunset review has been initiated under regulation 53.2 of the Anti-Dumping Regulations the anti-dumping duty remains in force until the review has been finalised. Nothing, however, turns on the fact that anti-dumping duty may in these circumstances endure for a period longer than five years.

[15] The court a quo found that the imposition of the duty was 'retrospective' and not 'retroactive'. Whether the imposition was 'retrospective' or 'retroactive' makes no difference to the burden imposed on the importer to pay the duty as from 27 November 1998. What is clear, however, is that at 27 November 1998 an anti-dumping duty existed that did not exist before the publication allowing for its 'imposition' on 28 May 1999. The 'imposition' of the duty on 28 May 1999 with effect from 27 November 1998 meant that 'the law shall be taken to have been that which it was not'.[31] It follows that the anti-dumping duty was imposed 'retroactively'. The fact that the notice uses the word 'retrospectively' and not 'retroactively' does not offend against this conclusion since a distinction is

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an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.'

[31] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65.

frequently made between retrospectivity in the 'strong' sense (ie 'retroactivity') and retrospectivity in the 'weaker' sense.[32]

[16] In holding that the anti-dumping duty was imposed on the date of the notice the court a quo relied on the *Oxford English Dictionary* meaning[33] of the word 'imposition' as 'the action of imposing a charge, obligation, duty, etc'. It does not follow, however, that the date of 'imposition' is the date of the notice introducing the duty. 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.

[17] Perhaps the strongest indication for holding that the duty was 'imposed' on 27 November 1998 is to be found in s 57A(3) which leaves no doubt that the duty imposed is a 'definitive' anti-dumping duty for the payment of which any provisional payment already imposed serves as security. It was fully effective on that date just as if it had been 'imposed' on that very day. The definitive anti-dumping duty, it is common cause, endures for five years from its imposition.

[18] The second respondent, invoking s 233 of the Constitution, sought to find support for its construction of the word 'imposition' in the opinions of foreign trade law experts from the United States, India and the European Union. The affidavit of Ms Trossevin of the USA deals with Title VII (ss 701-782) of the Tariff Act of 1930 as amended and the implementing regulations found in Title 19 of the Code of Federal Regulations, Part 351. She was required to demonstrate 'how the period of "five years" referred to in section 751(c) is calculated and, in particular,

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[32] *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) para 35.

[33] *The Shorter Oxford English Dictionary* (1973) refers to 'imposition' as the 'action of imposing; the action of inflicting, levying or enjoining … (taxation)' and 'impose' as 'to put a tax, to levy an impost'.

whether the period during which any provisional duties may be applied prior to the imposition of the final or definitive duties is required to be taken into account in the calculation of the five year period.' She concluded that under US law the calculation of the five year period referred to in s 751(c) of the Tariff Act does not include the period during which provisional measures may have been applied. The latter measure may be applied during an investigation after preliminary findings had been made. A '5 year sunset review' is initiated five years after the date of publication of the anti-dumping duty order. Pursuant to s 351.218(c) of the Regulation notice initiating the review is published 30 days before the fifth anniversary of the anti-dumping order. Should the review lead to a revocation of the order revocation will be effective 'on the fifth anniversary of the date of publication … of the order…'(Regulation 351.222(i)(2)). An anti-dumping duty order therefore remains effective for five years from the date the order was originally published which is a period after the provisional measures were in force. The evidence of Mr Vermulst concerns the duration of the anti-dumping duty imposed in terms of Article 11(1) and (2) of the European Council Regulation 384/96. Article 11(2) provides expressly that a 'definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review'. His conclusion is that in the computation of the five year period any period during which a provisional duty (in terms of Article 7) may have been imposed is not taken into account. In India an anti-dumping duty ceases to have effect on the expiry of five years from the date of its imposition.[34]

[19] To my mind none of these foreign experts supports the submission of the second respondent: they lead to the conclusion that the five year period is calculated with reference to the period of the definitive anti-dumping duty and excluding the period any provisional anti-dumping duty had been in force. It is common cause in this case that a provisional payment had been imposed in respect of the goods in question in terms of s 57A but that the Minister of Finance

[34] Section 9A(5) of the Indian Customs Tariff Act, 1975.

had imposed the definitive anti-dumping duty by notice on 28 May 1999[35] 'with retrospective effect to 27 November 1998'. There is no suggestion that the anti-dumping duty in force for the 'retrospective' period, ie from 27 November 1998 to 28 May 1999, was anything other than a definitive anti-dumping duty. The period of definitive anti-dumping duties and the period of a provisional payment may thus coincide and not follow each other as is apparently the case in the USA and the EU. Moreover, the narrow issue for decision in this case is whether the duration of the anti-dumping duty imposed 'retrospectively' is calculated from the retrospective date or from the date of 'imposition'. This question is not addressed by any of the experts.

[20] It follows that the appeal must be upheld with costs. The following order is made:

(1) the appeal is upheld with costs including the costs occasioned by the employment of two counsel;

(2) the order of the court a quo is set aside and the following is substituted in its place:

'(a) the antidumping duty imposed by the Fourth Respondent in terms of GN R685, Government Gazette 20125 (dated 28th May 1999) in respect of paper products and in particular A4 paper imported from Indonesia, had no force and effect from 27th November 2003.

(b) the second respondent is ordered to pay the applicant's costs including the costs occasioned by the employment of two counsel.'

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[35] GN R685 *GG* 20125 of 28 May 1999.

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F R MALAN

Acting Judge of Appeal

CONCUR

SCOTT JA

LEWIS JA

HEHER JA

MHLANTLA AJA