THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 769, 770, 771/12
REPORTABLE

In the matter between:

ASSOCIATION OF MEAT IMPORTERS AND EXPORTERS AND OTHERS **Appellants**

and

INTERNATIONAL TRADE ADMINISTRATION COMMISSION AND OTHERS **Respondents**

Neutral citation:	*Association of Meat Importers v ITAC* (769, 770, 771/12) [2013] ZASCA 108 (13 SEPTEMBER 2013)
Coram:	NUGENT, LEWIS, THERON, WALLIS and SALDULKER JJA
Heard:	**15 AUGUST 2013**
Delivered:	**13 SEPTEMBER 2013**
Summary:	**Anti-dumping duties imposed under the Customs and Excise Act 91 of 1964 – termination – effect of World Trade Organisation Agreement – effect of regulations promulgated under the International Trade Administration Act 71 of 2002.**

ORDER

On appeal from North Gauteng High Court (Raulinga J sitting as court of first instance). The order appears at page 32 of the judgment.

1. The appeals all succeed with costs to be paid by the respondents jointly and severally. All the orders of the high court, other than its order of condonation and the associated costs order, are set aside.
2. The following orders are substituted:
    (a) It is declared that the anti-dumping duties reflected in the notice of motion were extant at the time the sunset reviews were initiated in each case.
    (b) The counter-application is dismissed.
    (c) The applicants jointly and severally are to pay the costs of all the respondents who opposed the application.
3. The costs in this court and the court below are to include the costs of two counsel.

JUDGMENT

NUGENT JA (LEWIS, THERON and SALDULKER JJA CONCURRING)

[1] This appeal concerns the validity of various anti-dumping duties imposed under the Customs and Excise Act 91 of 1964. The proceedings were prompted by the decision of this court in *Progress Office Machines*

CC v The South African Revenue Service,[1] which has caused some concern to the customs and revenue authorities. They say the decision has significant and far-reaching implications for the discharge of their statutory powers and functions, and that its implications for South Africa's international obligations are considerable. Those sentiments are echoed in a critical commentary on the case by G F Brink, who describes it as having 'far-reaching implications for the administration of the law of unfair international trade'.[2] The reason for the present proceedings, say the authorities, rather euphemistically, was to 'regularise' the position. I think it is more accurate to say its purpose was to overcome the consequences of that decision.

[2] The means by which the customs and revenue authorities have sought to do so are rather complex and I think it is helpful to trace the background to the case in some detail before turning to the orders sought in and granted by the court below.

[3] 'Dumping' occurs when goods are exported from one country to another at an export price that is lower than the price of the goods when sold for consumption in the exporting country. The practice gives the imported goods an unfair advantage over those produced domestically and it is common internationally for 'anti-dumping duties' to be levied by the importing country so as to neutralise the advantage.

[4] In this country the various customs statutes over many years have allowed for the imposition of anti-dumping duties. The current provisions are contained in Chapter VI of the Customs and Excise Act. The

[1] *Progress Office Machines CC v South African Revenue Service* 2008 (2) SA 13 (SCA).
[2] 2008 (41) *De Jure* 643.

provisions have altered since the statute was enacted but at the time relevant to this appeal they existed substantially in their current form. The provisions need to be read together with the Board on Tariffs and Trade Act 107 of 1986, until its repeal with effect from 1 June 2003, and thereafter with the repealing statute, the International Trade Administration Act 71 of 2002.

[5] Goods upon which anti-dumping duties are imposed are specified in Schedule 2 to the Customs and Excise Act. Under s 55(1) goods specified in that schedule are, upon entry for home consumption, liable to the specified anti-dumping duty if they are imported from a supplier, or originate in a territory, specified in respect of the goods.

[6] The Board on Tariffs and Trade was formerly the body charged with investigating dumping.[3] Once having conducted an investigation it would report and make recommendations to the Minister of Trade and Industry and for Economic Co-ordination. If the Minister accepted the report and recommendations of the Board he could request the Minister of Finance to amend Schedule 2 appropriately, which the Minister of Finance was permitted to do by notice in the Gazette.[4]

[7] Whenever the Board on Tariffs and Trade published a notice in the Gazette to the effect that it was investigating the imposition of an anti-dumping duty, it was permitted to request the Commissioner of the South African Revenue Service to impose a provisional payment in respect of the goods in question, for such period, and in such amount, as the Board might specify. If so requested the Commissioner was obliged to impose

[3] Section 4(1)(*a*) of the Board on Tariffs and Trade Act.
[4] Section 55(2) of the Customs and Excise Act.

the provisional payment by notice in the Gazette.[5] When amending Schedule 2 so as to impose an anti-dumping duty the Minister was entitled to ante-date the duty to the date the provisional payment was imposed.[6]

[8] If a provisional payment was imposed, it was required to be paid on the goods, at the time of entry for home consumption, as security for any anti-dumping duty that might later be imposed and ante-dated, and could then be set off against liability for the duty. If no anti-dumping duty was imposed before expiry of the period for which the provisional payment was imposed then the provisional payment would be refunded. If the provisional payment exceeded the amount of the ante-dated duty the excess was to be refunded. If it was less the difference could not be collected.[7]

[9] The Customs and Excise Act places no limit on the duration of an anti-dumping duty. No doubt the Minister of Finance, in his notice amending the schedule, was entitled to limit the duration of the duty, if that was requested, but without that an anti-dumping duty would endure until it was withdrawn or revised by further amendment to the schedule.

[10] South Africa is a member of the World Trade Organisation (WTO) and party to the WTO Agreement 1994, which incorporates the General Agreement on Tariffs and Trade 1947, to which this country was also a party. Part of the WTO Agreement is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which

[5] Section 57A(1) of the Customs and Excise Act.
[6] Section 55(2)(*b*) of the Customs and Excise Act.
[7] Sections 57A(3), (4) and (5) of the Customs and Excise Act.

deals with anti-dumping measures. I will refer to it for simplicity as the WTO Agreement.

[11] The principle underlying the WTO Agreement is that anti-dumping duties are exceptional measures that are to be imposed only in an amount, and for so long as, they may be required to counter injury to the domestic industry. It contains a comprehensive regime, in considerable detail, for the imposition of anti-dumping duties, which includes the basis upon which they are to be calculated, the grounds upon which injury to the domestic industry is to be shown, the circumstances in which investigations may be initiated and the manner in which they are to be conducted, the duration and review of anti-dumping duties, and provisional measures that may be taken to counter dumping once an investigation has been commenced.

[12] The duration of anti-dumping duties, and an obligation to review them periodically, is provided for in Article 11 as follows:

'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. … 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 … that the expiry of the

duty would be likely to lead to the continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.'

[13] The regime that prevailed after 1 June 2003, when the Board on Tariffs and Trade Act was replaced by the International Trade Administration Act, remained much the same as the earlier regime I have described, but with some important changes that were clearly aimed at giving effect to the obligations assumed by this country under the WTO Agreement.

[14] From that date the International Trade Administration Commission (ITAC) succeeded the former Board on Tariffs and Trade as the body charged with responsibility for investigating dumping. A person may now apply to ITAC for the imposition of an anti-dumping duty and ITAC is then required to evaluate the merits of the application.[8] Various sections of the International Trade Administration Act are to come into effect only when the Southern African Customs Union Agreement becomes law in the Republic, which has yet to occur. Until then, s 2(1) of the transitional provisions requires ITAC to investigate applications made to it as if the Board on Tariffs and Trade Act is still in existence.

[15] Other changes were introduced in regulations promulgated under the International Trade Administration Act on 14 November 2003.[9] The regulations provide, again in considerable detail, for the investigation of

[8] Sections 26(1) and 26(2) of the International Trade Administration Act.
[9] Government Notice 3197 in GG 25684 of 14 November 2003.

allegations of injurious dumping, the procedures to be followed in investigations, the manner in which anti-dumping duties are to be determined, and their review from time to time, including what are called 'sunset' reviews, no doubt called that because they are initiated as an anti-dumping duty is reaching its end.

[16] In summary, the regulations allow for an anti-dumping investigation to be initiated, generally only upon application by or on behalf of the relevant Southern African Customs Union (SACU) industry.[10] Where an investigation is to be held it must be formally initiated by notice in the Gazette.[11] ITAC will at first make a preliminary finding, which is subject to comment by interested parties,[12] and the process will culminate in its final recommendation to the Minister of Trade and Industry.

[17] The regulations allow for interim reviews to be conducted from time to time but generally not earlier than a year after the publication of ITAC's final finding in the original investigation or a previous review. ITAC will initiate an interim review only if the party requesting the review can prove that circumstances have since changed significantly.[13]

[18] Approximately six months before the lapsing of an anti-dumping duty ITAC is enjoined by regulation 54 to forewarn known interested parties by direct communication, and the public at large through notice in the Gazette, that it will lapse unless a sunset review is initiated. The SACU industry may then apply for the anti-dumping duty to be

[10] Regulation 3.1 with an exception provided for in 3.3.
[11] Regulation 28.1.
[12] Regulations 34 and 35.
[13] Regulations 44 and 45.1.

maintained, upon information establishing prima facie that the removal of the duty is likely to lead to the continuation or recurrence of injurious dumping. Where no such request is made, or such information is not provided within the specified time, ITAC 'will recommend that the anti-dumping duty lapse on the date indicated in the notice'. I think that means, more accurately, that ITAC will recommend that the anti-dumping duty be permitted to lapse, because in truth, under regulations I come to, it terminates by operation of law in the absence of a sunset review.

[19] Two regulations deal with the duration of anti-dumping duties – regulations 38.1 and 53. I deal with regulation 38.1 presently. For the moment I need recite only regulation 53:

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

53.2 If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised'.

[20] This case concerns a number of anti-dumping duties that were imposed by amendment of Schedule 2 before the International Trade Administration Act came into effect.[14] Only three were the subject of contestation before us although the others are also relevant to the order that was made.

[14] Anti-dumping duties on acetampinophenol from China and the USA, acrylic blankets from China and Turkey, carbon black from Thailand, chicken meat portions from the USA, door locks and door handles from China, flat glass from China and India, float glass from China and India, garlic from China, lysine from the USA, bolts and nuts of iron or steel from China, paper insulated lead covered electrical cable from India.

[21] The first is an anti-dumping duty imposed on chicken meat portions emanating from the United States of America. An investigation into dumping was initiated by the former Board on Tariffs and Trade on 5 November 1999[15] and a provisional payment was imposed on 5 July 2000.[16] The anti-dumping duty was introduced into Schedule 2, with effect from that date, by notice published in the Gazette on 27 December 2000.[17] A sunset review of the anti-dumping duty was initiated by ITAC on 16 September 2005,[18] and on 27 October 2006 ITAC gave notice in the Gazette that it had recommended that the anti-dumping duty be maintained, and that the Minister of Trade and Industry had approved the recommendation.[19]

[22] The second is an anti-dumping duty imposed on garlic imported from China after an investigation by the former Board on Tariffs and Trade. A provisional payment was imposed on 24 March 2000.[20] The anti-dumping duty was introduced into Schedule 2, with effect from that date, by notice published in the Gazette on 20 October 2000.[21] A sunset review of the anti-dumping duty was initiated by ITAC on 23 September 2005,[22] ITAC gave notice in the Gazette on 10 March 2006 that it had recommended that the anti-dumping duty be maintained, and that the Minister of Trade and Industry had approved the recommendation.[23]

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[15] Notice 2445 in GG 20599 of 5 November 1999.
[16] Notice R 689 in GG 21356 of 5 July 2000.
[17] Notice R 1427 in GG 21947 of 27 December 2000
[18] Notice 1737 in GG 28011 of 16 September 2005.
[19] Notice 1504 in GG 29319 of 27 October 2006.
[20] Notice R 269 in GG 20997 of 24 March 2000, subsequently amended by Notices R 455 and R 778 in GG 21152 and 21414 of 5 May 2000 and 4 August 2000 respectively.
[21] GG 21650 of 20 October 2000.
[22] Notice 1750 in GG 28038 of 23 September 2005.
[23] Notice 378 in GG 28583 of 10 March 2006.

[23] What I have called the third is really more than one duty but because they share the same material characteristics I have treated them for convenience as one. It is an anti-dumping duty imposed on various categories of glass from China and India.[24] On 5 June 1998 the Board on Tariffs and Trade initiated an enquiry,[25] and provisional payments were imposed on 27 November 1998.[26] Anti-dumping duties were introduced into Schedule 2, with effect from that date, by notice published in the Gazette on 28 May 1999.[27] On 19 March 2004 ITAC initiated a sunset review. On 5 November 2004 ITAC gave notice in the Gazette that it had recommended that the anti-dumping duty be maintained and that the Minister of Trade and Industry had approved the recommendation.[28]

[24] A second sunset review of this duty was initiated by ITAC on 21 August 2009.[29] It recommended that some of the duties be maintained, and that others be increased. Its recommendations were approved by the Minister of Trade and Industry, and notice to that effect was given on 16 April 2010.[30] The duties that were to be increased were amended in Schedule 2 by notice given by the Minister of Finance in the Gazette on 26 March 2010.[31]

[25] All those anti-dumping duties have certain features in common. First, they were all introduced into Schedule 2 by notice in the Gazette before the International Trade Administration Act and the regulations came into effect. Secondly, they were all introduced with effect from the

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[24] One duty applied as well to glass from Israel but it was later withdrawn in relation to that country and need not concern so far as that is concerned.
[25] Notice 934 in GG 18966 of 5 June 1998.
[26] Notice 565 in GG 19547 of 27 November 1998.
[27] Notice R 686 in GG 20126 of 28 May 1999.
[28] Notice 2463 in GG 26937 of 5 November 2004.
[29] Notice 1148 in GG 32499 of 21 August 2009.
[30] Notice 310 in GG 33102 of 16 April 2010.
[31] Notice R 219 in GG 33042 of 26 March 2010.

date provisional payments had been imposed. Thirdly, in each case a sunset review was initiated more than five years after the anti-dumping duty took effect, but within five years of it being introduced into Schedule 2 by notice in the Gazette. Fourthly, a sunset review was initiated in each case, which culminated in each case with a recommendation by ITAC that the anti-dumping duty be maintained, the approval of that recommendation by the Minister of Trade and Industry, and notice to that effect in the Gazette.

[26] A further anti-dumping duty indirectly relevant to this case shares those four characteristics. It is an anti-dumping duty on paper from Indonesia, which was introduced into Schedule 2 by notice in the Gazette on 28 May 1999, with effect from 27 November 1998. A sunset review was initiated by ITAC on 28 November 2003 – more than five years after the anti-dumping duty took effect, but within five years of it being introduced into the schedule.

[27] The fate of that anti-dumping duty came under consideration in *Progress Office Machines.* In that case it was found by this court that the date of 'imposition' of the anti-dumping duty as that term is used in Article 11.3 of the WTO Agreement was the date it took effect – in that case 27 November 1998 – and it declared the anti-dumping duty to have no force or effect five years later.

[28] Until then the authorities had conducted their affairs in the belief that an anti-dumping duty terminated five years from the date it was introduced by notice in the Gazette, and not the date it took effect where it was ante-dated. Acting in that belief sunset reviews of other anti-dumping duties were initiated more than five years after the duty took

effect (but within five years of the duty being introduced by notice in the Gazette). The effect of the decision in *Progress Office Machines*, as the authorities see it, is that in consequence of their mistaken belief, those duties inadvertently lapsed, notwithstanding that injurious dumping was still occurring or threatened. The duties in issue in this case all fall within that category.

[29] In an attempt to overcome what they saw to be those consequences the authorities commenced the present proceedings in the North Gauteng High Court. The authorities concerned are ITAC, the South African Revenue Service, and the state nominally represented by the Minister of Trade and Industry and the Minister of Finance, who were the applicants in the court below, and are the respondents in the appeal. For convenience I will call them collectively the authorities.

[30] A plethora of respondents were cited in the application[32] but only some joined in the proceedings. Those who joined in the proceedings fall into two camps.

[31] In the first camp are parties with an interest in the importation of the relevant goods, to whom there is advantage if the duties have expired. Amongst them are parties who have an interest in the importation of chicken portions from the United States, led by the Association of Meat Importers and Exporters (I will call them collectively AMIE[33]), and two parties with an interest in importing garlic (I will call them Shoprite[34]). In addition to opposing the application one of the Shoprite parties also

[32] Seventy five respondents were cited, including various companies and trade associations connected with the goods in question, and the embassies of the countries from which the goods emanated.
[33] Association of Meat Importers and Exporters, Mercantile Logistics (Pty) Ltd t/a Merlog Foods, USA Poultry and Egg Export Council.
[34] Freshmark (Pty) Ltd and Shoprite Checkers (Pty) Ltd, which are associated companies.

counterclaimed for recovery of a little less than R9 million in duty it had paid.[35]

[32] In the second camp are parties connected with the local production of goods subject to the anti-dumping duties, to whom there is advantage if the duties have not expired. In this camp is a party connected with the domestic production of glass[36] and parties connected with the domestic poultry industry.[37] All these parties have joined together to present a common front and I call them collectively the glass and poultry industries.

[33] The principal relief sought by the authorities was granted by the high court (Raulinga J) and is reflected in orders that were made in the following terms:[38]

'C. In terms of Section 172(1)(a) of the Constitution, Schedule 2 to the Customs [and Excise] Act is declared invalid to the extent that from the dates mentioned against each affected product as listed in the [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.'

[35] Shoprite Checkers (Pty) Ltd.
[36] PFG Building Glass (Pty) Ltd.
[37] Rainbow Chickens Limited, Astral Operations Limited, Pioneer Voedsel (Pty) Ltd, Daybreak Farms (Pty) Ltd, Fourie's Poultry Farm (Pty) Ltd, Donkerhoek Kuikens CC, CC Chickens (Edms) Bpk, Mike's Chickens (Pty) Ltd, SPIF Investments (Pty) Ltd, Newcon Investments (Pty) Ltd, Crown Chickens (Pty) Ltd, Argyle Poultry Farms (Pty) Ltd, KZN Farming Enterprise (Pty) Ltd, South African Poultry Association.
[38] Concomitantly, the counterclaim by Shoprite for return of anti-dumping duties that had been paid was dismissed.

[34] The 'affected products' are the various products I described earlier,[39] and the date referred to in each case is five years from the date the anti-dumping duty took effect (the date upon which the anti-dumping duty was believed to have terminated on an application of *Progress Office Machines*).

[35] Various orders were also sought as an alternative to each of the orders preceding it. The first was little more than a repetition of the main order cast in different form. The second was an order 'reviewing, setting aside and declaring as invalid, the failure by the Minister of Finance to withdraw the anti-dumping duties in respect of the affected products' from the dates I have referred to, coupled with an order suspending the declaration for three years. The next was an order in the same terms, but applicable to the failure of the Minister of Trade and Industry to request the withdrawal of the anti-dumping duties. And finally, an order was sought 'reviewing, setting aside and declaring invalid [ITAC's] initiation of sunset reviews', coupled with suspension of the order.

[36] AMIE, Shoprite, and also the glass and poultry industries, appeal the orders with the leave of the court below. The terms on which leave was granted were restricted to a degree, but for the moment the restriction is not material, and I deal with it later in this judgment. At first sight it might seem curious that the glass and poultry industries, whose interests coincide with those of the authorities, have appealed the orders. The explanation is that their appeal is directed not against the objective the authorities sought to achieve, but against the remedy that was pursued to achieve it.

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[39] Listed in footnote 14.

[37] Returning to the principal relief that was sought and granted it will be seen that it was in two parts that operate together. The first part was an order declaring the relevant parts of Schedule 2 to be invalid and of no force or effect. The second part was an order suspending the declaration. By that combination, so the authorities believe, the anti-dumping duties they thought had lapsed will be resurrected. Their belief is conceptually misconceived.

[38] When a court makes a declaration it is declaring the existence of a state of affairs. The state of affairs that exists before a law is declared invalid is that it purports to have the force of law but in truth it does not. For so long as it purports to have the force of law it commands obedience, no matter that in truth it is invalid, but upon being declared invalid it no longer purports to have the force of law and may be ignored with impunity.[40] When such a declaration is made, and then suspended, naturally the state of affairs remains as it was before the declaration – the law purports to have the force of law and commands obedience.

[39] When there is nothing purporting to have the force of law in the first place, a court might declare that state of affairs, but the declaration does not bring about any change. Before the declaration there was nothing purporting to have the force of law, and after the declaration there is also nothing purporting to have the force of law. Suspending the declaration has no effect on the position because no change in the state of affairs was brought about by the declaration.

[40] A declaration of invalidity is usually accompanied by an order setting the purported law aside, which extinguishes the law altogether, but that is not essential.

[40] The fatal defect in the case for the authorities, and the orders granted, is that they equate the absence of a law with the invalidity of a law. The case advanced by the authorities is that the anti-dumping duties are invalid – but the only ground for saying so is that they are said to have lapsed.

[41] It is a singular feature of this case that the authorities have yet to identify the means by which the anti-dumping duties are said to have terminated. But if they have indeed terminated, which is the foundation for their case, the only means that has ever been suggested for having brought that about, is by operation of Article 11.3 of the WTO Agreement, whether directly or indirectly, or by operation of regulation 53.1. In either event the authorities' case ought to have failed.

[42] The language used in Article 11.3 to describe the fate of the anti-dumping duties upon expiry of the specified time is 'terminated' and 'expiry' and there is no reason not to give those words their ordinary meaning. Used in their present context they mean the duties cease to exist.[41] The language in regulation 53.1 is that the duties 'lapse', which means the same thing.[42] In *Dawood v Abdoola*[43] Selke J took the word to have a more limited meaning in s 75(1) of the Insolvency Act 24 of 1936 – he took it to be the equivalent of 'fall into abeyance' – but as pointed out by Thirion J in *Minister of Law and Order v Zondi*:[44]

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[41] **Terminate**: Oxford English Dictionary: 'To come to an end; to end, cease, conclude, close'. Webster's Third International Dictionary: 'To come to an end in time: cease to be' and 'to become nil or void after reaching a term or limit'. **Expire**: Oxford: 'To become void through lapse of time' and 'To cease, come to an end, become extinct'. Webster's: To become void through the passage of time' and 'to become extinct: die out'.

[42] Oxford English Dictionary: 'The termination of a right' and 'To become void'. Webster's: 'The termination of a right'.

[43] *Dawood v Abdoola* 1955 (2) SA 365 (N).

[44] *Minister of Law and Order v Zondi* 1992 (1) SA 468 (N) at 470J-471B.

‘This conclusion Selke J reached however as a result of the peculiar way in which the provision there in question was worded; namely that, despite the fact that it provided that on the happening of a certain event the proceedings would lapse, it nonetheless referred to such ‘lapsed’ proceedings as being still ‘pending’.

[43] Whether the anti-dumping duties came to an end by operation of Article 11.3 or by operation of regulation 53.1 – if they came to an end at all – they have ceased to exist and there is nothing that purports to command obedience. That being the state of affairs a declaration of invalidity was not competent, because that is a different state of affairs. There would also be no purpose in declaring the anti-dumping duties to have ceased to exist, and then to suspend it, because that declaration brings about no change in the former state of affairs.

[44] Counsel for the authorities submitted that because the anti-dumping duties remain reflected in Schedule 2 they still purport to exist but that is not correct. It is not the writing in the schedule that brought the anti-dumping duties into existence – they were brought into existence by the act of the Minister of Finance in publishing the amendment to the schedule. The writing then inserted in the schedule merely recorded that amendment. Once the anti-dumping duties recorded in the schedule cease to exist, the writing remains only as an historical record that they once existed. The authorities need no assistance from a court if they wish to expunge that historical record. They need only ask the government printer to do so when next the schedule is printed.

[45] The court below ought not to have declared the anti-dumping duties to be invalid, because that was not the state of affairs that existed. On the case advanced by the authorities the state of affairs was that no

anti-dumping duties existed, which is something else. The orders of the court below were not competent on any basis and they must be set aside.

[46] But that is not the end of the matter. There remains the curious appeal of the glass and poultry industries. I call it curious because their interests coincide with those of the authorities, yet they appeal the order sought by and granted to the authorities.

[47] The explanation is that when the orders are stripped of their form, to expose their reality, they were intended to have the effect of a declaration that the anti-dumping duties were extant when the sunset reviews were initiated, and would continue to exist for a further three years. That was the effect the authorities intended the orders to have, all the parties knew it was intended to have that effect, and the court below granted it believing that was its effect. The orders might just as well have had a footnote explaining that was its intended effect for the difference it would have made to the conduct of the case.

[48] The purpose for which the glass and poultry industries have appealed is to preserve the first part of that intended outcome should the orders of the authorities go awry in this court. They say the intended outcome in the high court was the proper one, but they reach that conclusion on conventional lines.

[49] There is no reason not to hear the case advanced by the glass and poultry industries, and it is appropriate to decide the matter on that basis if their submissions are correct. All the parties came to this court well aware of the case that would be advanced by the glass and poultry industries, which was comprehensively dealt with in their counsel’s heads

of argument. And lest any of the parties were minded to brush that case aside, they were forewarned by this court, well in advance, that they would be called upon to address various pertinent questions that it raised. Indeed, the parties all agreed that if the case advanced for the glass and poultry industries is found to be correct, we should make a declaration to that effect so as to avoid further uncertainty.

[50] The position taken by Mr Cockrell SC for the glass and poultry industries is straightforward. He submitted that the fate of the anti-dumping duties is governed by regulation 53 and not by Article 11.3 of the WTO Agreement. On the plain meaning of article 53.1 – so he submitted – the duties lapsed five years from the date they were introduced into Schedule 2 by notice in the Gazette. That being so – the submission continued – the duties remained extant under regulation 53.2 because the sunset reviews were initiated before that date.

[51] Before considering the submission I think it is necessary to be clear on what was decided – and what was not decided – by *Progress Office Machines*. And for that it is best to start at the beginning.

[52] The applicant in that case sought an order declaring the anti-dumping duty on paper from Indonesia to be of no force or effect from 27 November 2003.[45] It was brought upon the written advice of counsel, whose advice was founded solely upon the effect of Article 11 of the WTO agreement, which he said 'is part of our law'.[46] It is apparent from the judgment of Gyanda J in the high court[47] that the authorities shared

[45] Five years from the date it took effect.
[46] Para 12 of Counsel's opinion attached to the founding affidavit in that case.
[47] *Progress Office Machines CC v The South African Revenue Services*, Case No. 4373/05, Durban and Coast Local Division, delivered on 11 October 2005.

that view, because the learned judge recorded the dispute that called for decision as follows:

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

[53] On that basis the only question submitted for his decision was when the 'imposition' of the anti-dumping duty occurred, within the meaning of the word in Article 11.3 of the WTO Agreement. The learned judge found the anti-dumping duty had been imposed when it was introduced into Schedule 2 by notice in the Gazette and the application was dismissed.

[54] In this court the case was once again presented on the basis of agreement between the parties – or at least concession, which amounts to much the same thing – but on this occasion their agreement was stated more cryptically. The judgment records it as follows:

'It is common cause between the parties and was conceded on behalf of [ITAC] that the duration of the definitive anti-dumping duty imposed by the Minister of Finance is a period of five years'.

[55] Although not expressly stated in that sentence it is clear from the reasoning of the court, from the genesis of the dispute, from the stance that had been taken in the high court, and from the heads of argument filed in this court, that what was meant by 'a period of five years' was once again that period calculated from the date of 'imposition' of the duty within the meaning of that word in Article 11.3 of the WTO Agreement.

[56] Thus the question for decision by this court was decidedly narrow. It was confined to the meaning of 'imposition' of an anti-dumping duty as it is used in Article 11.3. The court said as much:

'[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''.

[57] If the authorities forewent anti-dumping duties upon the meaning this court gave to the word in Article 11.3 – which the order of the court demonstrates they did – that is only because they chose to do so. I do not say that as a criticism of the authorities. I say it only because this court certainly did not decide that to be the case. It decided only the narrow question what was meant by 'imposition' in Article 11.3, and made its order on that basis because that was what the parties agreed it should do.

[58] In the course of its judgment two opinions were expressed that were not necessary for its decision, and are not binding. The first was its opinion that Article 11.3 of the WTO Agreement is not domestic law, and for that reason does not operate directly to bring an anti-dumping duty to an end, and I agree with that opinion.[48] The second was its opinion that Article 11.3 governed the matter indirectly, because the duration of the anti-dumping duty, when it was first imposed, must be taken to have been limited to a 'reasonable time', which was then taken to be the period in Article 11.3. I disagree with that opinion, but need express my principal reasons for doing so only briefly, because I do not understand that proposition to have been contended for in that case, nor is it contended for in the case before us.

[48] See, in addition to the authorities cited by the court, EC Schlemmer 'Die grondwetlike hof en die ooreenkoms ter vestiging van die wêreldhandelsorganisasie' 2010 *TSAR* 749.

[59] The authority of the Minister of Finance to impose anti-dumping duties emanates from the Customs and Excise Act. There is not the slightest indication in the statute that anti-dumping duties imposed by the Minister would endure only for a reasonable time. Indeed, had that been the case, it can be expected that many anti-dumping duties expired since the statute was enacted in 1964, but that has never been suggested. That being so, there is no basis upon which a restriction on the duration of an anti-dumping duty was capable of somehow infusing itself into the statute osmotically after its enactment, whether through conclusion of the WTO Agreement or through other means. There is also no indication in any of the notices that the Minister restricted the duration of an anti-dumping duty to a reasonable time by implication. Indeed, a restriction of its duration on those terms, whether in the statute or in the notices, would leave the authorities and importers in such uncertainty as to the duration of an anti-dumping duty that it simply cannot be inferred.

[60] It is as well to repeat for clarity what was not decided by *Progress Office Machines*. It did not decide that Article 11.3 operated directly to terminate an anti-dumping duty after the specified time. On the contrary, it expressed itself against it. It also did not decide authoritatively that Article 11.3 operated indirectly to bring that about on the basis suggested, and I think that proposition can be discounted. *Progress Office Machines* also decided nothing at all concerning the effect of the regulations. Indeed, the regulations received only passing reference, and then only as ‘indicative’ of an intention on the part of government to give

effect to the WTO Agreement,[49] and an 'indication' that the period referred to in Article 11.3 was 'reasonable'.[50]

[61] That being so, it seems to me that *Progress Office Machines* has little bearing on this case, other than to explain its genesis. It becomes relevant only if the meaning of 'imposition' in regulation 53 is uncertain. Section 233 of the Constitution then requires us to prefer an interpretation that is consistent with the meaning given to it in Article 11.3 over an alternative interpretation that is inconsistent with that meaning.[51] Beyond that, *Progress Office Machines* is confined to the specific context in which it was decided.

[62] The validity of the regulations has not been challenged in this case. Even if their validity had been challenged that does not seem to me to be material. The only basis they have been suggested to be invalid is a technical one that can easily be corrected, and a court that declares a law invalid is entitled to suspend the declaration so as to enable the authorities to do so. If the validity of the regulations had been before us, and the challenge had been successful, I would have had no hesitation suspending the declaration of invalidity for that purpose, if only to ensure continuity of a regime that was designed to fulfil this country's obligations to its WTO partners.

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[49] Para 6: '[The] passing of the International Trade Administration Act 71 of 2002 (ITAA) 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'.

[50] Para 11: '[The regulations] 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'.

[51] 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'.

[63] The regulations create a regime for the imposition of anti-dumping duties from the time the regulations took effect. Included in that regime are the restrictions placed on their duration by Articles 38.1 and 53. Both must be taken to have been inserted for a purpose and neither can simply be ignored if the language allows for each to be given a meaning.

[64] Article 11 of the WTO Agreement does not contain an equivalent of regulation 38.1 and the reason is obvious. It does not purport to direct the means by which contracting countries should bring about the termination of anti-dumping duties. It merely obliges them to bring that about. This country has chosen to do so by the means provided for in the two regulations.

[65] Regulation 38.1 reads 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’.

For convenience of comparison I repeat regulation 53:

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

53.2 If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised’.

[66] What is meant by a ‘definitive’ anti-dumping duty in regulation 38.1 is not explained in the regulations but I think the term can be taken to have been borrowed from the WTO Agreement, in which it is used to describe an anti-dumping duty that is imposed finally after an investigation, in contra-distinction to a provisional duty, which is one of the permitted provisional measures that may be taken while an

investigation is in progress.[52] The word is superfluous in the regulations, because the provisional measures that have been chosen are not a provisional duty, but instead security for an ante-dated duty.[53]

[67] I think the word 'imposition' can also be taken to have been borrowed from Article 11.3. Once a word has been judicially defined it can usually be assumed that it was used with that meaning in later legislation, but that does not apply in this case, in which the draftsman was not to know, at the time the regulations were drafted, what this court said was its meaning in Article 11.3.

[68] Viewed in isolation the word 'imposition' in regulation 53 is quite capable of meaning the date upon which liability for payment of duties came into being – which is when the ante-dated liability arose by amendment to Schedule 2 – contrary to what was found to be the case in *Progress Office Machines.* The fact that the case was fought in two courts demonstrates that it is capable of that meaning. But language is always to be construed in its context and in the regulations – unlike in Article 11.3 – that includes regulation 38.1. If that is its clear meaning in regulation 53.1 then that is the meaning it must be given, albeit that it conflicts with what was said to be the meaning of the word in Article 11.3.

[69] Both regulations limit the duration of anti-dumping duties but there is a significant distinction – regulation 38.1 allows for exceptions while regulation 53.1 does not. That seems to me to point inexorably to the fact that they perform separate functions.

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[52] Article 7.2.
[53] Article 7.2 of the Agreement allows for provisional measure to 'take the form of a provisional duty or, preferably, a security [for payment of an ante-dated duty]'.

[70] I have said before that when introducing an anti-dumping duty into Schedule 2 by notice in the Gazette the Minister of Finance is entitled to limit the duration of the duty. So is the Minister of Trade and Industry entitled to limit its duration if he or she continues the anti-dumping duty after a review. The effect of doing so is to set the duration of the anti-dumping duty at the time it comes into being or continues.

[71] It seems to me that regulation 38.1 functions to impose a default period for which an anti-dumping duty comes into being, or continues, in the absence of such a period being specified at the time. If none is specified then the anti-dumping comes into existence, or continues, for five years from the time ITAC's final recommendation is published in the Gazette. Because it imposes that period when the duty is brought into existence, or made to continue, its operation must necessarily be confined to anti-dumping duties that come into existence, or continue, only after the regulations took effect.

[72] Regulation 53.1 has a different function. It functions to bring down a guillotine on an anti-dumping duty that would otherwise endure beyond the period it specifies. As such it ensures any period specified by the Minister of Finance, or the Minister of Trade and Industry, as the case may be, does not exceed that period.

[73] But the regulation does not purport to bring down the guillotine only on anti-dumping duties introduced after the regulation took effect. Article 11.3 of the WTO Agreement clearly contemplates that all anti-dumping duties must be terminated upon expiry of the relevant period, not only those that came into being after the agreement was concluded. It would be absurd if a regime introduced well after this country assumed

that obligation, and designed to fulfil that obligation, was intended to terminate only some anti-dumping duties and leave others to continue indefinitely. Indeed, it seems to me it was intended primarily to terminate anti-dumping duties that existed at the time the regulations were promulgated.

[74] That is not to give regulation 53 retrospective effect. It does not purport to impose a period upon which the anti-dumping duty came into existence. It purports only to bring down a guillotine on anti-dumping duties that would otherwise continue beyond the stipulated time.

[75] I think it is clear the two regulations function at opposite ends of the lifetime of an anti-dumping duty. Regulation 38.1 functions to introduce a default period at the start of its life – regulation 53.1 functions to bring down a guillotine to end an anti-dumping duty that purports to endure beyond that period. That is supported by the fact they appear in different parts of the regulations. Regulation 38.1 appears under the part that contemplates their creation. Regulation 53 appears in the part that contemplates their end.

[76] Those being their respective functions one might expect the duration provided for in both regulations to coincide – though that need not necessarily be so.

[77] In its terms the default period in regulation 38.1 commences on the date of publication of ITAC's final recommendation. Neither the regulations nor the statutes expressly require publication of ITAC's final

recommendation, but I think that must be implied, not only by regulation 38.1 itself, but also to be consistent with the WTO agreement.[54]

[78] Mr Cockrell submitted that ITAC's final recommendation is published, in effect, when the Minister of Finance or the Minister of Trade and Industry, introduces or continues an anti-dumping duty by their respective notices in the Gazette.[55] If that is so the periods in both regulations coincide precisely, which is what one might expect.

[79] It is not necessary to decide whether or not that is so, nor is that essential to the co-existence of the two regulations. If regulation 38.1 contemplates independent publication by ITAC, that will necessarily occur before the respective notices of the Minister of Finance and the Minister of Trade and Industry are published. The effect will be that the default period in regulation 38.1 will always expire before the guillotine comes down under regulation 53.1.

[80] It should be apparent that if the date upon which an anti-dumping duty is 'imposed' for purposes of regulation 53.1 is the ante-date from which there is liability, the regulation would be hopelessly inconsistent with regulation 38.1 – the default period under regulation 38.1 would always exceed the maximum period for its existence under regulation 53.1. That could never have been intended and would be absurd. On the other hand, if the date of 'imposition' is the date the schedule is amended by notice in the Gazette, the two regulations are consistent – the default period will never expire after the guillotine comes down. Indeed, they

[54] Article 12.2.
[55] The various notices purporting to extend the lifetime of the anti-dumping duties in this case combine notice of ITAC's final recommendation and notice of the Minister's acceptance of the recommendation.

would harmonise perfectly if the publication of ITAC's final recommendation is to be taken as the date it is given effect by the relevant Minister – as submitted by Mr Cockrell.

[81] It is a well established principle of construction (in truth an inference that might be drawn) that legislation must be construed in favour of consistency, and against inconsistency, if the language allows it. The only sensible construction that brings about consistency is if 'imposition' in regulation 53 means the date upon which Schedule 2 is amended by notice in the Gazette.

[82] To give the regulation that meaning will not mean this country is in breach of its obligations under Article 11.3 of the WTO Agreement. The meaning given to Article 11.3 in *Progress Office Machines* is authoritative only so far as that Article is applied domestically, but is immaterial so far as this country's relations with its WTO partners are concerned. Perhaps they might see things in the same way as this court did in *Progress Office Machines* – in which case the regulations no doubt call for amendment – but perhaps they might not – in which case all is well and good. It is not for us to speculate on how the WTO members understand their agreement.

[83] It is common cause that sunset reviews were initiated in the case of all the anti-dumping duties now in issue before the period stipulated in regulation 53.1 expired and thus they remained extant under regulation 53.2 until finalisation of the review. Their fate thereafter is not before us to decide.

[84] There are two further matters I need deal with only briefly.

[85] Leave to appeal was granted by the court below only so far as its orders concerned the anti-dumping duties pertinent to the various parties. This court is not confined to the terms on which leave to appeal were granted, and the parties agreed it would be undesirable to do so. It would be anomalous, and misleading, if the orders were to be set aside only so far as they relate to those duties, when the conclusion I have come to applies also to the rest. All parties who might be expected to be affected by those duties were cited in the proceedings and can be taken to have no interest in the matter.

[86] Second, there is the matter of our jurisdiction to entertain this appeal. None of the parties mounted a jurisdictional challenge, but the question was raised by the court before the hearing, and the parties were invited to submit written argument on the issue. The response from all the parties was to eschew any such challenge. But even where no challenge is mounted, a court should decline to entertain proceedings if it is clear it has no jurisdiction to do so.

[87] I will assume the orders of the court below had no force unless confirmed by the Constitutional Court but it remains nonetheless an order of the high court. Section 21(1) of the Supreme Court Act 59 of 1959 confers jurisdiction on this court to 'hear and determine an appeal from any decision of [a high court]' and I find nothing in the Constitution to override that provision. Nor do I think there are necessarily procedural incongruities, bearing in mind that an order of a high court is suspended when leave to appeal is granted. In *President of the Republic of South Africa v South African Rugby Football Union*[56] Chaskalson P voiced the

[56] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (2) SA 14 (CC) para 37.

opinion that the Constitutional Court might possibly be the only court competent to deal with appeals against orders of this kind. But s 34 of the Constitution guarantees to every person the right of access to a court, and I would be most reluctant to turn litigants away from a court to which they claim, and ostensibly have, a right of access, in the absence of clear authority from a higher court.

[88] There remains the matter of costs. The glass and poultry industries had an interest common with that of the authorities. They have succeeded in their objective of rescuing the authorities should their orders go awry and I think the authorities must pay their costs. AMIE and Shoprite have succeeded in having the orders of the court below set aside, but in one sense theirs has been a pyrrhic victory. Nonetheless, they were brought to court by the authorities, and have succeeded in opposing the orders sought, and I think they should receive their costs.

[89] All parties agreed that if we should find as I have found, a declaration reflecting that finding ought to be granted so as to avoid uncertainty. The order dismissing the counter-application was correctly made but I think it is convenient to set aside all the orders, other than the order of condonation and its associated order for costs, and express them afresh. The counter-application played little role in the proceedings and I do not think a separate costs order is warranted. The following orders are made:

1. The appeals all succeed with costs to be paid by the respondents jointly and severally. All the orders of the high court, other than its order of condonation and the associated costs order, are set aside.
2. The following orders are substituted:

(a) It is declared that the anti-dumping duties reflected in the notice of motion were extant at the time the sunset reviews were initiated in each case.

(b) The counter-application is dismissed.

(c) The applicants jointly and severally are to pay the costs of all the respondents who opposed the application.

3. The costs in this court and the court below are to include the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

WALLIS JA (concurring in part, dissenting in part)

[90] If it is permissible for this court to reach the merits of these appeals, then I agree with Nugent JA for the reasons given in paras 37 to 45 of the main judgment that the application by the authorities[57] was misconceived.[58] I also agree with the manner in which he disposes of the appeals, although the declaration I would grant would be in narrower terms and I would make a different order in respect of costs. However, I do not share his view that this court has jurisdiction to hear the appeal and I reach my view on its merits by a different route. Hence the need for this judgment.

[91] On the issue of jurisdiction s 168(3) of the Constitution provides that this court may decide appeals 'in any matter'. That is reinforced by

[57] I adopt the nomenclature in the main judgment to describe the respondents.

[58] I am unable to see on what basis the respondents can ask the court, even by way of an exercise of the wide powers in s 172(1)*(b)* of the Constitution, to impose an anti-dumping duty or any other tax on the citizens of the country. The taxing power is one for Parliament to exercise not for the courts.

the provisions of s 21(1) of the Supreme Court Act,[59] which provides that this court 'shall … have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division'. Had the matter rested there it would be beyond dispute that this court has jurisdiction to hear this appeal, the necessary leave having been given by the court below. However, in my view, the matter does not rest there, because of the nature of the relief sought and granted by the court below and other relevant provisions of the Constitution.

[92] The authorities deliberately framed their case in such a way as to be able to ask the court to grant a just and equitable remedy in terms of s 172(1)*(b)* of the Constitution. Their aim in bringing the application was to obtain an order under that section that would legitimise the charging and collecting of anti-dumping duties on a range of products in the past and would enable them in the future to continue charging and collecting such duties. To this end they sought an order declaring the Second Schedule to the Customs and Excise Act,[60] ('the Act'), constitutionally invalid and asking the court to suspend the operation of that order, both retrospectively and prospectively. The effect of the suspension, so they thought, would be to legitimise the charging and collection of the relevant duties.

[93] The court below granted an order in those terms. In relevant part it reads:

'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.

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[59] Act 59 of 1959.
[60] Act 91 of 1964.

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.'

[94] The purpose and effect of this order was to declare a portion of an Act of Parliament invalid on the grounds of its inconsistency with the Constitution. The reference to s 172(1)*(a)* makes that clear beyond question. Whether it was correct to grant that order is a separate issue. The order was one that, in terms of s 172(2)*(a)* of the Constitution, would have 'no force or effect unless … confirmed by the Constitutional Court.' Section 172(2)*(c)* of the Constitution provides that national legislation must be passed to provide for the referral of an order of constitutional invalidity. That legislation is the Constitutional Court Complementary Act,[61] s 8(1)*(a)* whereof reads:

'Whenever the Supreme Court of Appeal, a High Court or a court of similar status declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)*(a)* of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), that court shall, in accordance with the rules, refer the order of constitutional invalidity to the Court for confirmation.'

Constitutional Court rule 16(1) requires the registrar of a court that makes an order of constitutional invalidity in terms of s 172(1)*(a)* to refer the order to the registrar of the Constitutional Court within 15 days of its being made. In addition to these requirements s 172(2)*(d)* of the Constitution provides that any person having a sufficient interest may appeal or apply directly to the Constitutional Court to confirm or vary – which would include setting aside – an order of constitutional invalidity.

[61] Act 13 of 1995.

[95] All of the parties, bar the fourth and fifth appellants, accepted that these provisions were applicable in relation to the order made by the court below. However, they contended that these requirements and the need to comply therewith[62] do not oust the jurisdiction of this court to hear this appeal. The fourth and fifth appellants adopted the stance that the Second Schedule to the Act is not a law for the purposes of s 172(1)*(a)* of the Constitution and therefore they contended that the confirmation provisions of the Constitution are inapplicable. For the reasons that follow I regard this contention as incorrect.

[96] There is no definition in the Constitution of what constitutes a law for the purposes of 172(1)*(a)*. The Constitutional Court has held[63] that this gap is filled by reference to the provisions of s 2 of the Interpretation Act[64] and for present purposes a law is an Act of Parliament. The fourth and fifth appellants contend that, although the affected provision is a schedule to an Act of Parliament, it is not itself an Act of Parliament or a part of an Act of Parliament. They rely on a passage in the judgment of Chaskalson P in *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa & others*[65] that deals with conflicts between a provision in the body of an Act and a provision in a schedule and held that the provision in the body of the Act should in those circumstances prevail. However, that is not the present situation. More pertinent for present purposes is that Chaskalson P went on to cite a

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[62] The record is silent on whether there has been such compliance but, from the approach taken by the different counsel in the matter, it seems not. Such a failure was deprecated by the Constitutional Court in *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC) paras 4 and 5. There was an appeal to this court in that case but it was by the applicants who had obtained the order for constitutional invalidity against the refusal of other relief. The issue in the present case did not arise.

[63] *Zantsi v Council of State, Ciskei & others* 1995 (4) SA 615 (CC) para 36; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) para 11.

[64] Act 33 of 1957.

[65] 1995 (4) SA 877 (CC) para 33.

passage from the Seventh Edition of Craies *Statute Law* containing the following sentence:

'The schedule is as much a part of the statute, and is as much an enactment, as any other part.' [66]

I have no doubt that this is a correct statement of the legal position. Whether statutory matter appears in the body of the Act or the schedule is a matter of drafting convenience. See for example the Income Tax Act,[67] the Carriage of Goods by Sea Act[68] and the Criminal Procedure Act.[69]

[97] The Second Schedule to the Act came into existence as a result of requests by the Minister of Trade and Industry to the Minister of Finance to impose anti-dumping duties and the publication by the latter in the Government Gazette of the contents of the schedule. Within one year after any change was made to the schedule it was affirmed by Parliament, sometimes in a Revenue Laws Amendment Act and sometimes in a Taxation Laws Amendment Act. That is in compliance with s 56(3) of the Act. Accordingly the circumstances in which the schedule came into existence and was amended from time to time do not alter its fundamental character as an integral part of an Act of Parliament. I accordingly reject the contention by the fourth and fifth appellants.

[98] Reverting to the constitutional requirement that a declaration that a law is constitutionally invalid is only effective once it has been confirmed by the Constitutional Court, its effect on the jurisdiction of this court to

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[66] The passage is repeated in the current edition. Daniel Greenberg *Craies on Legislation* (9th ed, 2008) relying on the following statement by Brett LJ in *Attorney-General v Lamplough* (1877-78) L R 3 Ex D 214 (CA) at 219: 'With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting – a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part.' F A R Bennion *Statutory Interpretation* (3rd ed, 1997) 555 is to the same effect.

[67] Act 58 of 1962.

[68] Act 1 of 1986.

[69] Act 51 of 1977.

hear an appeal against such an order was considered by the Constitutional Court in *President of the Republic of South Africa & others v South African Rugby Football Union & others (SARFU)*[70] where Chaskalson P said:

'[37] This is the only Court with jurisdiction to deal with a referral of an order of invalidity. There is much to be said for the view that on a proper construction of the Constitution it is also the only Court competent to deal with appeals against such orders. It would be an unusual procedure which requires an order to be referred to this Court for confirmation and at the same time permits an appeal against the order to be made to another Court, particularly where such order has no force or effect unless confirmed by this Court. That would contemplate two Courts being seized of the same issues at the same time - one of them with authority only to reverse the order but with no power to make a binding order of confirmation, and the other with authority to confirm, vary or refuse to confirm the order.'

The court did not however find it necessary to determine finally whether the jurisdiction of this court to hear appeals in such cases is excluded on a proper construction of the Constitution.

[99] In my view the construction suggested by Chaskalson P is correct. Otherwise it results in substantial anomalies and considerable potential for procedural confusion, all of which is illustrated by this case. The point must be tested by having regard to what should have occurred, not by making allowances for non-compliance with the requirement that the order be referred to the Constitutional Court. Here an order of constitutional invalidity was granted that would only be effective if confirmed by the Constitutional Court. It should have been referred to the registrar of that court by the registrar of the North Gauteng High Court within 15 days of being granted. Assuming that it was, as it should have been, the correctness of the judgment of the court below would have been

[70] 1999 (2) SA 14 (CC).

before the Constitutional Court at the same time as the appeal to this court was before us. In those circumstances it is unclear what effect, if any, our order would have. If we upheld the order of the court below then the Constitutional Court would remain seized of the question whether to confirm the order of constitutional invalidity. If we set it aside the position is entirely unclear. Could the Constitutional Court nonetheless consider the matter as it was already properly before it and uphold the order of the court below? Would our order cause the matter before the Constitutional Court to disappear, even though that court was properly seized of it? What would happen to the appeal before us if the Constitutional Court heard the confirmation proceedings, but reserved judgment, and then the appeal in this court was set down? The possibility of conflicting judgments would necessarily be present in that situation.

[100] These issues arise pertinently in the present case because leave to appeal against the orders set out in para 93 *supra* was granted only in relation to four of the eleven items in the Second Schedule affected by the order. In regard to the other seven, confirmation of the order is still a requirement. Counsel for ITAC suggested that if we were to set aside the order of the court below, but on terms that upheld the validity of the relevant anti-dumping duties, then no steps would be taken to pursue the confirmation proceedings in respect of the remaining items. That approach would involve the disregard of obligations resting on the registrar of the North Gauteng High Court. It is not an approach that we can endorse.

[101] All of these anomalies disappear once it is accepted that the Constitutional Court is the only court that can hear an appeal against an order of constitutional invalidity made in terms of s 172(1)*(a)* of the

Constitution. In addition the purpose of requiring confirmation of such orders will be appropriately served by such a construction. That purpose is to provide finality and certainty on the question of constitutional invalidity and to do so expeditiously.[71] It is for this reason that the Constitutional Court has held that the fact that a case has been settled between the parties or that the declaration of invalidity was made without jurisdiction is not necessarily a reason for it not to deal with confirmation proceedings.[72]

[102] It was submitted that not permitting an appeal to this court where an order of constitutional invalidity has been made is anomalous, when it is clear that the refusal by the high court to make such an order is appealable and the decision of the high court can be overruled and an order of constitutional invalidity made by this court.[73] This is less of an anomaly than it may seem. It enables some claims of constitutional invalidity to be resolved without the need to engage the Constitutional Court, because finality may be achieved as a result of this court holding that there is no invalidity, possibly by way of a construction of a statutory provision in a constitutionally compliant manner in accordance with s 39(2) of the Constitution. Any attempt to take the matter further would then be considered by the Constitutional Court with the advantage of the views of this court on the matter. That would enable that court to regulate its own roll by granting or refusing leave to appeal against a refusal of an order of constitutional invalidity. Where an order of constitutional invalidity has been made in the high court the need for certainty within a

[71] *S v Manyonyo* [1999] 12 BCLR 1438 (CC) para 8.
[72] *Khosa & others v Minister of Social Development & others: Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC) para 35; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) paras 60-61.
[73] Such an order is itself subject to confirmation by the Constitutional Court.

relatively short period dictates that the matter should proceed forthwith to the Constitutional Court.

[103] The other submission advanced before us was that in the absence of a specific ouster of this court's jurisdiction such an ouster should not be inferred from the provisions relating to confirmation proceedings and appeals against orders of invalidity. An ouster of the jurisdiction possessed by our superior courts is not lightly inferred.[74] That is especially the case where that jurisdiction emerges from a provision of the Constitution itself as in this case (s 168(3)). Stress was also laid on the fact that elsewhere, where the Constitution makes the jurisdiction of the Constitutional Court exclusive, this is said expressly. (See s 167(4) and s 172(2)*(a)*.) These are powerful arguments but in my view they are outweighed by consideration of the procedural nightmare that arises from recognising an appellate jurisdiction vested in this court in these circumstances.

[104] If my colleagues had agreed with my approach to the issue of this court's jurisdiction the proper order to make would have been one striking the appeals from the roll with an appropriate order for costs. However, as they hold that this court has jurisdiction, the case must be decided on its merits and it is therefore appropriate for me to express my views in that regard. I start with a brief review of the relevant statutory provisions underpinning the impugned duties.

[105] Anti-dumping duties are imposed under s 56(1) of the Act. The Minister of Finance imposes them by publishing an amendment to the

[74] *Paper, Printing, Wood & Allied Workers' Union v Pienaar NO & others* 1993 (4) SA 621 (A) at 635A-C.

Second Schedule to the Act in the Government Gazette. The Minister of Finance acts in accordance with a request by the Minister of Trade and Industry. When withdrawing or reducing, with or without retrospective effect, any such duty or otherwise amending the Second Schedule (s 56(2)) the Minister of Finance likewise acts in accordance with such a request. Any amendment to the schedule, whatever its nature or effect, made in any calendar year will lapse on the last day of the following calendar year unless Parliament otherwise provides (s 56(3) read with s 48(6)).[75] All of the anti-dumping duties in issue in this case were imposed initially in this way. Insofar as some of them have subsequently been amended in regard either to their scope or their amount, the same procedure was followed. All of them are reflected in the Second Schedule, as it exists at present.

[106] All of the disputed anti-dumping duties were imposed prior to 1 June 2003. That means that they came into operation before ITAC was established under the International Trade Administration Act (the ITAC Act),[76] At that time these issues were dealt with by the Board on Tariffs and Trade (the Board), under the Board on Tariffs and Trade Act (the BTT Act).[77] Under s 4 of the BTT Act the Board would investigate allegations of dumping and report and make recommendations to the Minster of Trade and Industry. If the Minister accepted the Board's recommendations a request would be made to the Minister of Finance to implement those recommendations by way of an appropriate amendment to the Second Schedule.[78]

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[75] In the present case Parliament has always so provided in relation to every relevant amendment to the Second Schedule.
[76] Act 71 of 2002.
[77] Act 107 of 1986.
[78] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (SCA) 626, fn 12.

[107] When one reads the Second Schedule there is no indication that the anti-dumping duties contained therein are of limited duration. However, in terms of South Africa's international obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the Anti-Dumping Agreement') 'any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition'.[79] Accordingly when the duties in issue in this case were imposed South Africa was under a binding international obligation to limit their duration to a date not later than five years from their imposition. This court held in *Progress Office Machines CC v South African Revenue Service & others*,[80] that South Africa's obligations under the Anti-Dumping Agreement were binding and the Constitutional Court endorsed that in *Scaw Metals*.[81] Accordingly when the duties in issue in this case were imposed South Africa was under an obligation in international law to terminate them by not later than five years from their imposition. This was so even though the duties, as embodied in the Second Schedule, appeared on their face to be of indefinite duration. As this court held in *Progress Office Machines* it would have been contrary to South Africa's international obligations to continue to enforce payment of the duties after the five years from their imposition had expired. While this is not essential to my conclusion it seems to me that a person faced with a claim for payment of such duties after the elapse of five years from their imposition could resist such a claim on the footing that the attempt

[79] Article 11.3 of the Anti-Dumping Agreement. This is subject to any review of the duty, a matter to which I will return.
[80] 2008 (2) SA 13 (SCA) para 6.
[81] Para 25 'In *Progress Office Machines* the Supreme Court of Appeal correctly concluded that the Anti-Dumping Agreement is binding on the Republic in international law, even though it has not been specifically enacted in municipal law.'

at enforcement breached the principle of legality.[82] Be that as it may, however, it is not relevant because SARS, which is the agency responsible for collecting the duties, has always endeavoured to do so within the framework of South Africa's international obligations.

[108] When something expires after five years the date of expiration is determined by ascertaining the date of commencement of the five year period. In relation to anti-dumping duties that is the date of imposition of the duties in terms of the Anti-Dumping Agreement. That follows from the words 'from their imposition'. Ordinarily there would be no difficulty in determining when the five year period in the Anti-Dumping Agreement would expire, because the date of imposition would correspond with the date on which the Second Schedule was amended to incorporate a particular duty, unless some other date was specified in the relevant Government Notice. However, both the Anti-Dumping Agreement (Article 10.2) and the Act (s 55(2)*(b)* read with s 57A), permit such duties to be imposed retrospectively. Where a duty is imposed retrospectively that raises the question whether the five year limit on its duration is to be calculated from the date of its retrospective application or the date of the proclamation that brought the duty into existence. That was the simple issue that this court had to decide in *Progress Office Machines*.

[109] It is unnecessary for me to explore the arguments in relation to this question. Clearly a court called upon to answer the question would be faced with two possibilities. It could say that the date of imposition is the date from which the duty is payable or it could say that it is the date of the legislative act that brought the duty into existence. In *Progress Office Machines* this court answered it by holding that the date of imposition of

[82] This appears to be the view of Professor Dugard. See *Progress Office Machines* para 11, fn 28.

the duty is the date from which the duty became payable, that is, the date of its retrospective application. That decision binds us. It is plainly not open to us on a straightforward issue of construction, where the court was faced with two possibilities and selected one of them, to depart from that finding simply because we would now reach a different conclusion. That would fly in the face of the doctrine of *stare decisis* most recently reaffirmed in this court in *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd & another*,[83] where the position was summarised in the following terms:

'In 1937 Stratford JA said the following in *Bloemfontein Town Council v Richter*:

"The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors — such preference, if allowed, would produce endless uncertainty and confusion. The maxim *stare decisis* should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."

And in 1989 Corbett CJ in *Catholic Bishops Publishing Co v State President and Another* stated:

"The reluctance of this Court to depart from a previous decision of its own is well-known. Where the decision represents part of the *ratio decidendi* and is a considered one (as is the position in this case) then it should be followed unless, at the very least, we are satisfied that it is clearly wrong."

Today it is recognised that the principle that finds application in the maxim of *stare decisis* is a manifestation of the rule of law itself, which in turn is a founding value of the Constitution.'

[110] The only parties to challenge the correctness of the decision in *Progress Office Machines* were the 6th to 21st appellants, who were concerned to maintain the anti-dumping duties in respect of the importation of clear drawn and float glass from India and China and frozen chicken pieces from the United States of America. Alive to the obstacle posed by the doctrine of *stare decisis* they argued that the

[83] 2013 (3) SA 611 (SCA) para 14.

judgment could be distinguished because it had not taken account of regulation 38.1 of the anti-dumping regulations promulgated under the ITAC Act. Only alternatively did they contend that the decision was incorrect and should be overruled because the court did not have proper regard to regulation 38.1; various provisions of the Anti-Dumping Agreement; ss 57A(5) and 48(6) of the Act.

[111] Both arguments are dependent upon the proposition that this court in *Progress Office Machines* should have taken account of regulation 38.1 of the anti-dumping regulations in determining the date of imposition of the duty in issue in that case. The regulation provides that:

‘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.’

The argument is fallacious. As explained above, the duty under consideration in that case, as with all the duties in this case, was not imposed by virtue of a recommendation by ITAC under the ITAC Act, but by virtue of a recommendation by the Board under the BTT Act. It had been in existence, as with the other duties in this case, for several years prior to the enactment of the ITAC Act and the subsequent promulgation on 14 November 2003 of the anti-dumping regulations. Regulation 38.1 was not in existence when these duties were first implemented and therefore had nothing to do with their duration. The hypothesis that the regulations were applicable to these duties from the date of their imposition is incorrect. It appears that the fact that the regulations were not in existence when the anti-dumping duties were initially imposed and accordingly did not apply in determining the period of application of those duties was overlooked in preparing the argument

for the 6th to 21st appellants, as it was not mentioned in the heads of argument.

[112] As there appears to be some confusion about the basis for the judgment in *Progress Office Machines* it is as well to clarify this. An examination of the record in that case shows that the appellant submitted that all anti-dumping duties lapsed five years from their imposition. That submission was advanced on two bases. The primary basis was that this was what was provided by article 11.3 of the Anti-Dumping Agreement and that agreement bound South Africa. The second, which supplemented the first, was that regulation 53.1 of the anti-dumping regulations provided that duties would remain in place for a period not exceeding five years from their imposition. The heads of argument for the appellant were based on the five year period in article 11.3 determining the duration of the duty and the date of imposition of the duty being relevant in order to determine when that period would begin to run. There is only a passing reference at the end of the heads of argument to the regulations. In regard to regulation 38.1 it was submitted that it 'relates to an occurrence which did not and does not occur' and is not intelligible. As to regulation 53.1 it was said to echo the provisions of article 11.3. It was submitted that the date of imposition of the duty was the date from which it was first payable, that is, the retrospective date of its imposition.

[113] The argument on behalf of ITAC in that case was that the five year limit to the duration of anti-dumping duties flowed from the provisions of article 11.3. It said that regulation 53.1 was a necessary step under the Anti-Dumping Agreement to secure compliance with South Africa's obligations under that agreement. It submitted that the date of imposition of the duty, from which date the five year period would start to run,

would be the date of proclamation of the duty not the retrospective date from which it was first payable.

[114] Against that background it can be seen that the court in *Progress Office Machines* was asked to determine when the five year period of operation of the anti-dumping duty would commence. The concession by ITAC's counsel reflected in para 11 of the judgment was a concession consistent with his heads of argument that the duties, whilst outwardly appearing to have been imposed without any limitation as to their duration, would only be applicable for five years. That concession was held to be correct and for the reasons given above, which largely mirror those of Malan AJA in *Progress Office Machines*, it was correct. In order to calculate when that period would expire it was necessary to determine the commencing date, which was the date of imposition of the duty as emerges from article 11.3. The court was then faced with the two alternatives set out in para 109 and decided that the date of retrospective application of the duty was the correct date.

[115] Reverting to regulation 38.1, it could only be relevant if, once those regulations were promulgated, it was to be taken to determine the duration of anti-dumping duties already in force. Indeed, in the light of the contention as to its meaning, the proposition is that regulation 38.1 had the effect of altering the duration of duties already in force.[84] There is not the slightest indication in the regulations that this was its purpose. Regulation 68.1 to which we were referred provides that:

'These regulations shall apply to all investigations and reviews initiated after the promulgation of the regulations.'

[84] This was not a contention advanced in *Progress Office Machines.* There is no indication in ITAC's heads of argument in that case that regulation 38.1 was regarded as particularly relevant.

Not only is that a provision that operates prospectively, and not retrospectively to alter the status of duties already in existence, but it is confined to the conduct of investigations and reviews after the regulations come into force. It accordingly did not provide for regulation 38.1 to extend the duration of existing anti-dumping duties. Regulation 68.1 simply gives effect to para 4(1) of Schedule 2 to the BTT Act. Significantly para 4(2) provides that recommendations made by the Board under the BTT Act before the ITAC Act came into operation are to be dealt with as if the BTT Act had not been repealed. That suggests that substantive matters, already in existence when the ITAC Act came into force, such as the duration of existing duties, would not be affected by the ITAC Act or any regulations made thereunder.

[116] I accordingly reject the contention that this court in *Progress Office Machines* erroneously disregarded the provisions of regulation 38.1 and any other provisions of the anti-dumping regulations dealing with the duration of anti-dumping duties. It is accordingly unnecessary for me to address the issue raised by this argument of whether it was permissible for the Minister of Trade and Industry, in making those regulations, to fix the duration of anti-dumping duties by way of these regulations. I merely record that I am by no means satisfied that the power of the Minister to make regulations under s 59 of the ITAC Act includes a power to fix by way of regulation the duration of such duties. That does not appear to me to be a power falling within the proceedings and functions of the Commission or one to give effect to the objects of the ITAC as set out in s 2 thereof, nor is it a matter that the ITAC Act requires to be dealt with by way of regulation. However, it is unnecessary to express a final view on this point.

[117] I did not understand counsel to contend that, if regulation 38.1 was inapplicable, the other provisions to which he referred, namely the provisions of the anti-dumping agreement and ss 57A(5) and 48(6) of the Act justified a departure from the decision in *Progress Office Machines*. Any such argument fails to address s 57A(3) of the Act, which appears to have been decisive in the reasons for the decision in *Progress Office Machines*.[85] It relies on s 57A(5), which provides that if an anti-dumping duty is imposed retrospectively in an amount greater than the amount of any provisional payment under that section then the excess cannot be recovered. However, that is merely a question of fairness to the importer who will have imported the goods, made the provisional payment and then proceeded to deal with the goods, probably by way of resale,[86] on the basis that its costs of importation had been fixed. On the basis of those costs it would have determined its selling price and a claim for further duty would render commercial life intolerably uncertain. That is the reason for s 57A(5), which mirrors article 10.3 of the Anti-Dumping Agreement. As far as s 48(6) of the Act is concerned the fact that the court erroneously referred to the anti-dumping duties as derived from subordinate legislation does not affect the analysis of their duration. In regard to the terms of the Anti-Dumping Agreement not only is it clear from the affidavit of Mr Vermulst, a Belgian lawyer who deposed to an affidavit on behalf of the 6th to 21st appellants, that there is no settled international construction of the relevant provisions, but it is open to any country to adopt a regime in regard to the duration of such duties that is more stringent than that in the Anti-Dumping Agreement. That is the

[85] Para 17 of the judgment.
[86] The duties in issue in this case deal with products such as paper, glass, blankets, screws and bolts, garlic, chicken pieces, carbon black, pharmaceutical products and chemicals all of which would be sold or incorporated in manufactured products.

effect of the construction placed by this court on s 55(2)*(b)* and s 57A(3) of the Act.

[118] I am accordingly satisfied that there is no basis upon which we can hold that *Progress Office Machines* is either distinguishable from the present case or that we can properly hold it to have been incorrectly decided. That brings me back to the reason for the present application. The reasoning in *Progress Office Machines* applied not only to the anti-dumping duties imposed on the importation of paper products in issue in that case, but to all eleven products that were the subject of anti-dumping duties in this case. In each case ITAC calculated the duration of the duties initially imposed as a result of the Board's recommendations under the BTT Act on the basis that the starting point for the calculation was the date of promulgation of the duties and not the date from which they were retrospectively made payable. This created the problem that the authorities sought to resolve by the orders they sought in this litigation.

[119] That problem arises from the fact that the Anti-Dumping Agreement recognises that, while such duties are primarily directed at short term problems of dumping and should remain in force only so long as and to the extent necessary to counteract dumping which is causing injury,[87] dumping sometimes continues after the expiry of the initial period of anti-dumping duties. In order to prevent the recurrence of the harm against which they were originally imposed it may be necessary for them to be continued. Accordingly the Anti-Dumping Agreement provides for a review of whether the expiry of the duty may lead to a continuation or recurrence of the dumping. If such a review is initiated before the expiry of the original five year period then the duty will remain

[87] Article 11.1.

in force while the review is being conducted.[88] The review must normally be completed within a period of 12 months from its initiation.[89]

[120] All of the duties in issue in this case owe their present existence, if they enjoy one, to what are referred to in the anti-dumping regulations as sunset reviews, that is, reviews of whether the expiry of a duty may lead to a continuation or recurrence of dumping and therefore warrant the continued imposition of anti-dumping duties. In each case, as those reviews took place after the ITAC Act and the anti-dumping regulations came into operation, they were conducted in accordance with those regulations. In each case the review resulted in a recommendation by ITAC to the Minister of Trade and Industry either to maintain the existing proclaimed duty or to amend it in some respect, either by deleting countries to which it related or by an adjustment of the amount of the duty. In each case the Minister accepted that recommendation and, where some change was recommended, the Minister of Finance duly amended the Second Schedule. In turn those amendments were kept in force by Parliament by the mechanism described in para 97 *supra*. In two instances[90] two sunset reviews had been completed and the recommendations of ITAC acted upon before the case was argued in the high court. In three instances[91] a second sunset review was underway when the case was argued and had resulted in one instance in the partial withdrawal of the duty.[92] We have not been told the results of these reviews although they should by now have been completed. In other cases notices of the possible expiry of anti-dumping duties had been published

[88] Article 11.3.
[89] Article 11.4.
[90] In relation to acrylic blankets from China and Turkey and float and flat glass from China and India.
[91] Garlic from China, bolts and nuts of iron and steel from China and Chinese Taipei and paper insulated lead covered electric cable from India.
[92] In relation to bolts and nuts of iron and steel from Chinese Taipei.

and may for all we know have resulted in further sunset reviews. Where second sunset reviews were instituted they were commenced within five years of the previous review. In one case – garlic from China – there was also an interim review that resulted in an increase in the anti-dumping duty.

[121] I have described this in some detail because it is only if the steps taken to maintain, increase or amend the scope of these anti-dumping duties were of no force and effect that it can be said that the duties were no longer in force when this application was brought and argued. By that stage the initial period for which they had been imposed had long since expired. Accordingly the foundation for the continued imposition of the duties had to lie in the sunset reviews and the steps taken by ITAC, the two Ministers and Parliament pursuant thereto. If the following steps were effective for that purpose, namely:

(a) ITAC initiating and conducting a sunset review of the duties;
(b) ITAC making recommendations to the Minister of Trade and Industry pursuant to such review; and
(c) the Minister accepting their recommendations and either giving notice of that fact when what was recommended was the continuation of the duty or requesting the Minister of Finance to amend the duties by way of an amendment to the Second Schedule; and
(d) the Minister of Finance amending the Second Schedule where requested to do so; and
(e) Parliament providing that such amendments would remain in force;

then the fact that the initial period of operation of the duties had expired before the commencement of the first sunset review is irrelevant.

[122] The assumption underpinning the present application is that all these steps were ineffective because the sunset reviews were commenced after the expiry of the initial period for which the duties in issue in this case were in operation. In the founding affidavit the Minster of Trade and Industry said that this was due to an error of law in computing the relevant period and pointed out that on the basis of computation adopted by ITAC all the sunset reviews would have been commenced timeously. He went on to submit that the effect of the error was that the initiation of the sunset reviews was invalid and that the relevant Ministers erroneously failed to cause the Second Schedule to the Act to be amended to reflect the withdrawal of the duties. Accordingly he submitted that the initiation of the sunset reviews and the failure of the two Ministers to cause the Second Schedule to be amended fell to be set aside. He based this submission first on the proposition that both the initiation of the sunset reviews and the failures by the two Ministers constituted invalid administrative action and second on the principle of legality.

[123] In argument counsel for the authorities accepted that steps taken by these two Ministers in relation to the contents of the Second Schedule are legislative and not administrative in character. The Constitutional Court described these ministerial powers as legislative in *Scaw Metals*,[93] and in my view counsel's concession was correctly made. In any event I do not regard this as material for present purposes because the submission that the Ministers had acted contrary to the principle of legality was itself dependent upon the prior submission that the initiation of the sunset reviews was invalid. Both the 1st to 4th appellants[94] and the 5th and 6th

[93] Para 99.
[94] Those seeking to import frozen chicken pieces from the United States of America free of anti-dumping duties.

appellants[95] disputed this submission on various grounds. They contended that the initiation of the reviews was not administrative action; that it was a wasteful, but not invalid, exercise and that, in any event, given the passage of time it was inappropriate to grant an order setting aside the initiation of sunset reviews in their cases.

[124] In my view the fundamental premise of the application that the sunset reviews were invalid was erroneous. These reviews take place under South African law in terms of the anti-dumping regulations. Regulation 53.2 provides that:

'If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised.'

However, this speaks only to the continued application of the duty while the sunset review is being conducted, not to the validity of a sunset review commenced after the lapse of an anti-dumping duty. The only regulation dealing with the latter issue is regulation 54.5, which reads:

'if the Commission decides to initiate a sunset review, *it shall publish an initiation notice in the Government Gazette prior to the lapse of such duties*. Such notice shall contain the information as contemplated in section 41.'(Emphasis added.)

The initiation of the various sunset reviews in issue in this case was only invalid if invalidity followed from the admittedly bona fide failure to initiate them timeously as provided by this regulation. That depends upon a proper construction of the regulations in context, which includes the provisions of the Anti-Dumping Agreement.[96]

[125] Even where a statute or regulation is couched in imperative terms prescribing that something 'must' or 'shall' be done, it does not follow

[95] Those seeking to import garlic from China free of anti-dumping duties.
[96] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 and 19.

that non-compliance renders an act done without complying with the specified condition invalid and ineffective to give rise to legal consequences.[97] Whether the act will be invalid depends upon the proper interpretation of the provision in question and in interpreting it 'an important consideration is whether "greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law"'.[98]

[126] There is nothing in the regulations that invalidates a sunset review that was initiated out of time. It is true that the regulations are couched on the assumption that the sunset review will be initiated prior to the lapse of the duty, but the reason for that is to maintain the existing duty in operation. It has nothing to do with the nature, content or validity of the sunset review itself. In terms of Article 11.4 of the Anti-Dumping Agreement such a review (not referred to as a sunset review) is to be conducted in accordance with the same requirements in respect of evidence and procedure as an initial investigation into the possible imposition of anti-dumping duties. Its purpose is no different from an initial investigation into dumping. An initial investigation considers whether there is evidence of dumping and whether injury will be caused to local industry by that dumping.[99] In a sunset review ITAC determines by exactly the same standards whether there will be a continuation or recurrence of dumping if the duty is lifted and, in the light of the injury that it anticipates will be caused thereby, recommends either the continuation of the anti-dumping duty at its existing level or its adjustment.

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[97] *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C – 830C; *Oilwell (Pty) Ltd v Protec International Ltd & others* 2011 (4) SA 394 (SCA) para 19.
[98] *Oilwell supra* para 19 quoting Solomon JA in *Standard Bank v Estate Van Rhyn* 274.
[99] Article VI of the General Agreement on Tariffs and Trade 1994 and articles 5.2, 5.7, 5.8, 7.1(ii) of the Anti-Dumping Agreement read with paras 12, 13, 14 and 16 of the anti-dumping regulations.

[127] It was suggested in the founding affidavit, and in argument, that causality formed no part of this latter inquiry, but that cannot be correct. It is only material injury to local industry caused by dumping that can attract anti-dumping duties. One cannot investigate material injury to local industry in the absence of a causal relationship between the anticipated continuation or recurrence of dumping and its impact on local industry. The fact that the material originally considered by ITAC as establishing such causal link is again relied on by 'assuming' a causal connection does not remove this from consideration. If there is no causality the continuation of the duties is impermissible. To continue to impose anti-dumping duties in the absence of any causal connection between the dumping and the material injury would conflict with the basis on which the Anti-Dumping Agreement was concluded and its fundamental purpose. As stated in Article VI.1 of the GATT:

'The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it *causes* or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.' (Emphasis added.)

The continuation of anti-dumping duties after the initial period for which they were imposed, whether because of a continuation or recurrence of dumping, serves the same purpose and emphatically requires causality, however that may be established and whatever material is taken into account for that purpose.

[128] The result of a sunset review in terms of regulation 59 is that ITAC recommends the withdrawal, amendment or reconfirmation of 'the original anti-dumping duty'. When it recommends the reconfirmation of

the original duty all that the Minister of Trade and Industry does is publish a notice in the Government Gazette that this recommendation has been made and that the Minister accepts it. Nothing more is necessary for the duty to continue in force. No amendment to the Second Schedule needs to be made. If anyone is concerned whether the duty remains in force they will have regard to both the original proclamation by which the Minister of Finance incorporated the duty in the Second Schedule and to the later Government Notice in which the Minister of Trade and Industry states that the recommendation of ITAC pursuant to a sunset review that the existing duty be 'reconfirmed' has been accepted.

[129] In those circumstances it does not seem to me to matter whether the notice of reconfirmation of a duty relates to a duty that remains in force because the sunset review was initiated before the expiry of five years from its imposition, or to a duty that has lapsed because of a failure to initiate a sunset review timeously. The duty will remain in force or be reconfirmed and revive by precisely the same process. It will continue to appear in the Second Schedule, which is the statutory source for the imposition and collection of such duties. Nor does this undermine the provisions of s 48(6) of the Act. If the duty can remain in force by virtue of a timeous sunset review and the acceptance of a recommendation by ITAC to that effect by the Minister of Trade and Industry without the intervention of Parliament there is no reason why it should not do so by virtue of a non-timeous review.

[130] A consideration of whether 'greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law', by holding the late initiation of a sunset review to be invalid points firmly in the direction of

validity and not invalidity. Otherwise bona fide failures to commence sunset reviews timeously will not only cause the duties to lapse but will mean that they can only be reinstated by way of a fresh imposition. If the publication of the relevant notice of initiation is one day late, because of a strike at the Government Printer or an official's inadvertent miscalculation, the entire sunset review process will be rendered invalid. This may only be discovered some time later after the sunset review has run its course and the duty has been reconfirmed.

[131] The affidavits in this case on behalf of the authorities and the 6th to 21st appellants demonstrate that to invalidate these anti-dumping duties would be extremely harmful to South African industry and our economy. It might also give rise to claims against SARS for refunds of duties collected bona fide and paid without objection. That is illustrated by the claim by the fifth and sixth appellants for a refund of duties paid by them on the importation of garlic during part of the relevant period. It would also be a lengthy process to commence afresh a consideration of whether anti-dumping duties are necessary in respect of these products during which incalculable harm may be caused to our domestic industries. On the other side of the coin there is no prejudice. Importers brought goods into the country on the basis that anti-dumping duties were payable and paid such duties. Presumably it was profitable for them to do so notwithstanding the existence of the duties. To hold the duties invalid at this stage ten or so years after the problem first manifested itself and six years after the judgment in *Progress Office Machines* would at most provide a windfall to importers. There is no prejudice in not affording them that windfall.

[132] In an endeavour to contend that the duties remained in force notwithstanding the expiry of the five year period it was argued on behalf of the 6th to 21st appellants that regulation 58.1 contemplates that duties will only lapse once the Commission has made a recommendation to this effect and such recommendation has been carried into effect by the Minister of Finance by amending the Second Schedule pursuant to a request by the Minister of Trade and Industry. I do not think this is correct. For the reasons already canvassed the duties lapse after the expiry of the five year period from date of imposition and that is so even if there has been no amendment to the Second Schedule. That is the only conclusion consistent with what this court held in *Progress Office Machines*, where that was in fact the situation.

[133] Anti-dumping duties may therefore be reflected in the Second Schedule, but be of no force or effect because the five year period of validity has expired. If a fresh investigation was initiated in relation to such duties and resulted in a recommendation by ITAC that the duties be reinstated there would be no need to amend the Second Schedule. All that would be required would be the acceptance of that recommendation by the Minister of Trade and Industry. Any other approach would involve the Minister of Finance engaging in a solemn, but absurd, process of amending the Schedule by withdrawing the duty reflected there and immediately (perhaps in the same Government Notice[100]) re-imposing it. That places form over substance. There is no effective difference between the Minister of Trade and Industry reconfirming a duty that has lapsed and accepting a recommendation to re-impose the same duty. Such a decision follows from the identical review process undertaken by ITAC and would be reflected in the Second Schedule in exactly the same way.

[100] c/f *Avenue Delicatessen & others v Natal Technikon* 1986 (1) SA 853 (A) 871C-F.

[134] It may be objected that if the original anti-dumping duties lapsed they cannot be revived in this way and that once they have lapsed they can only be restored by a fresh imposition of anti-dumping duties. I do not think this objection is sound. The ordinary meaning of 'reconfirmation', which is the word used in regulation 59 is to 'confirm, ratify or establish anew'.[101] That clearly encompasses the revival of a lapsed duty. Accordingly I see nothing in the language of the regulations that precludes the conclusion I have expressed.

[135] For those reasons I do not think that the initiation of the sunset reviews in issue in this case was invalid, notwithstanding the fact that they were initiated after the duties in question had lapsed. That conclusion entirely undermines the foundation of the case as advanced by ITAC. The case was not concerned with the consequences of there having been, in relation to these duties, brief interregnum periods at different stages between 2003 and 2006, depending on the particular duties, when they had lapsed and ceased in law to be payable or recoverable. It was concerned with the validity in 2010 of the duties as embodied in the Second Schedule at that time and in the light of the entire history of those duties. In my opinion each of those duties was validly in place from the time that the Minister of Trade and Industry accepted the recommendations of ITAC for the reconfirmation of that duty as a result of a sunset review. Where that resulted in an amendment of the Second Schedule that merely reinforces this conclusion.

[101] Shorter Oxford English Dictionary (6th ed, 2007) Vol 2, p2490, s.v. 'reconfirm'. The Oxford English Dictionary (2nd ed) Vol XIII, p 355 gives the same definition.

[136] Had I not reached the conclusion that the anti-dumping duties in issue in this case were valid and in force when these proceedings were commenced, it would have been necessary to consider whether a challenge to them could validly have been brought without an application to set aside not only the initiation of the sunset reviews but also the steps taken pursuant to the recommendations of ITAC following upon such reviews. It is readily conceivable that a court asked to review and set aside the initiation of the sunset reviews would in the exercise of its discretion have held that there had been undue delay in bringing review proceedings.[102] The appropriateness of setting aside these duties in the exercise of any discretion vested in the court would have had to be considered.[103] I mention this merely to indicate that even if my view on the validity of these anti-dumping duties had been different that would not necessarily have meant that the duties would have been set aside.

[137] It is unnecessary to address the consequences of any periods when there were no duties in place during the subsistence of a sunset review, save in respect of the counter application by the fifth and sixth appellants for repayment of the anti-dumping duties paid by them during the period from 16 August 2005 to 8 March 2010. The claim was originally advanced for a longer period, but the claim was limited in the light of these appellants accepting that an increase in anti-dumping duty pursuant to an interim review and effected by an amendment to the Second Schedule effected on 26 March 2010 was valid.[104] Most of the claim relates to the period after 10 March 2006 when the Minister of Trade and Industry published a notice approving ITAC's recommendation after the

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[102] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA) paras 50, 51 and 57.
[103] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 36.
[104] The concession is inconsistent with the general argument on behalf of these appellants as an interim review can only take place in relation to existing duties.

first sunset review that the anti-dumping duty on garlic imports from China be maintained. As in my opinion the duties were lawfully in place from 10 March 2006 that portion of the claim falls away. It leaves only a claim for R378 700,19 in respect of two consignments of garlic imported by the fifth appellant on 16 and 30 August 2005 respectively.

[138] The basis for any claim to recover these amounts would be a *condictio indebiti*. Such a claim can be made if a payment is made in respect of a non-existent debt but in the bona fide but mistaken belief that the payment is due. [105] A claim for repayment can be defeated if the claimant was inexcusably slack in making the payment[106] and a defence of prescription may also be available. In order to advance the claim it is accordingly necessary for evidence to be led as to the circumstances in which the payment was made and how the error arose. As Hefer JA pointed out in *Willis Faber* much will depend on the relationship between the parties and their state of knowledge in relation to the cause of the payment as well as the reasons for making it. However, no such evidence has been placed before us in the affidavits on behalf of the fifth and sixth appellants. Instead they appear to have adopted the stance that if the duties had lapsed they were entitled as of right to reclaim them. Mr du Preez who deposed to the affidavit on their behalf simply said that the levying of duties after the expiry of the initial period 'is *ultra vires* and void and entitles Shoprite to reclaim anti-dumping duties since that date'. Whilst it may be correct that a properly formulated claim supported by appropriate evidence would have given rise to a *condictio indebiti*, the manner in which it was formulated in this application falls short of what

[105] These principles emerge from the leading case of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A).
[106] *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 635E-F.

was necessary. This is not mere technicality. Had a proper claim been formulated and supported by evidence a proper reply could have been formulated including very possibly a defence of prescription. For those reasons I think that the balance of this claim has not been properly proved in these proceedings and it was correctly dismissed. However, in the light of my reasons for rejecting this portion of the claim that dismissal amounts to no more than a judgment of absolution from the instance.

[139] For those reasons I concur with Nugent JA that the appeals be upheld and that a declaratory order be issued. I would confine that order to one declaring that at the time these proceedings were commenced the anti-dumping duties in issue in this case as incorporated in the Second Schedule to the Customs and Excise Act were valid and of full force and effect. As to costs the 6th to 21st appellants have been largely successful in securing the dismissal of the application and an order that the duties they sought to support are valid and of full force and effect. The authorities should be ordered to pay their costs including the costs of two counsel, where two counsel were employed. As regards the remaining appellants whilst they have been successful in having the application dismissed, they have failed to do so for the reasons they advanced and the declaratory order that we grant is fundamentally contrary to their submissions and their aim in participating in these proceedings. In fairness I think it appropriate that they and the authorities should each be liable for their own costs.

M J D WALLIS
JUDGE OF APPEAL

APPEARANCES:

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For 6th to 26th appellants:	A Cockrell SC Instructed by: Webber Wentzel, Johannesburg Lovius Block, Bloemfontein
For respondents:	G J Marcus SC K Hofmeyr Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein