THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 272/09

In the matter between:

3M SOUTH AFRICA (PTY) LTD Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE First Respondent

THE MINISTER OF FINANCE Second Respondent

Neutral citation:	*3M South Africa v CSARS* (272/09)[2010] ZASCA 20 (23 March 2010)
Coram:	NAVSA, CLOETE JJA and GRIESEL, SERITI, and SALDULKER AJJA
Heard:	18 February 2010

Delivered: 23 March 2010

Summary: Customs and Excise Act 91 of 1964 – importer's entitlement to refunds and liability for arrear import duty arising from incorrect determination by Commissioner.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Louw J sitting as court of first instance):

1. The appeal is upheld to the following extent:

1.1 Paragraph 2 of the order of the high court is set aside and replaced with the following:

> '2.1 Prayer 3.2 of the notice of motion is dismissed together with the costs incurred in respect of the relief set out in that paragraph.

2.2 It is declared that the amount of customs duty (R3 598 971,70) and interest thereon (R1 890 959,72), demanded from the applicant in the first respondent's letter of demand dated 10 August 2007 (annexure FA27 to the founding affidavit) is not payable by the applicant to the first respondent.'

1.2 Paragraph 3.4 of the order of the high court is amended to read:

> '3.4 pay the applicant's costs incurred in respect of the relief set out in paragraphs 2.2, 3.1, 3.2 and 3.3 above, such costs to include the costs consequent upon the employment of two counsel.'

2. The first respondent is ordered to pay the costs of the appeal, including the costs of two counsel.

JUDGMENT

GRIESEL AJA (NAVSA and CLOETE JJA, SERITI and SALDUKER AJJA concurring):

[1] The appellant launched an application in the North Gauteng High Court, Pretoria against the first respondent, the Commissioner for the South African Revenue Service ('the Commissioner'), for declaratory and ancillary relief based on certain provisions of the Customs and Excise Act 91 of 1964 ('the Act').[1] The application succeeded in part and, with leave of the high court, the appellant appeals to this court against those parts of the order in respect of which it was unsuccessful.[2]

[2] The appeal concerns, on the one hand, the appellant's entitlement to refunds of customs duty paid on certain imported goods and, on the other hand, its liability for unpaid customs duty allegedly owing in respect of such goods. In respect of both issues the classification system created by Schedule 1 to the Act and the determination of the appropriate classification by the Commissioner play a pivotal role. However, it is not necessary for purposes of this appeal to embark upon the intricacies of tariff classification which, according to the deponent to the Commissioner's answering affidavit, is 'notoriously difficult'.[3] In this case, the Commissioner, during April 1991, determined a tariff heading,

[1] The Minister of Finance was originally joined as the second respondent, but played no further role in the litigation after the appellant's challenge to the constitutionality of s 76B of the Act was abandoned.

[2] The judgment of the high court has been reported as *3M SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 2009 JDR 0481 (GNP).

under which the goods in question were categorised, attracting customs duty at a rate of 20%. It is common cause that this determination was incorrect. It was eventually corrected many years later, in 2006. What we are concerned with are the consequences of the new determination, made with retrospective effect.

Statutory framework

[3] In terms of s 47(1) of the Act customs duty is payable on all imported goods in accordance with the provisions of Schedule 1. In Part 1 of the Schedule all goods generally handled in international trade are systematically divided into numerous tariff headings and subheadings. The tariff subheading within which imported goods fall determines the rate at which the goods attract payment of customs duty (if any). Many of the tariff subheadings provide that the goods specified may be imported free of customs duty.

[4] In terms of s 47(9)(a)(i) the Commissioner may in writing determine the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods shall be classified. Determinations are subject to appeal to the high court having jurisdiction, which appeals must be prosecuted within a period of one year from the date of the determination.[4]

[3] As to the process of classification, see eg *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863G–864C. See also *CSARS v Fascination Wigs (Pty) Ltd* [2010] ZASCA 6 para 9 and the cases referred to therein.

[5] A determination may also be amended, withdrawn, or another determination substituted for it with retrospective effect. Where the original determination was made in bona fide error of law or of fact (as happened in this instance), a new determination may be made with effect from the date of the original determination.[5] Alternatively, the amended determination may be made with effect from the date of the amendment of the previous determination or the date of the new determination.[6]

[6] A proviso to s 47(9)(d) that is particularly relevant to the present enquiry reads as follows:

'Provided that whenever any amendment of a determination or a new determination is effective from a date resulting in the person to whom the determination was issued –

(a) being entitled to a refund of duty, such refund shall be subject to the provisions of section 76B;

(b) retrospectively incurring an increased liability for duty, such liability shall . . . be limited to goods entered for home consumption during a period of two years immediately preceding the date of such amendment or new determination.'

[7] The material portions of s 76B to which reference is made in the first proviso quoted above reads as follows:

'(1) Notwithstanding any other provision of this Act, . . . where any person becomes entitled to any refund or drawback of duty –

[4] Section 47(9)(e) and (f). For a very recent example of such an appeal, see *CSARS v Fascination Wigs* above.

[5] Section 47(9)(d)(ii)(cc).

[6] Section 47(9)(d)(ii)(dd).

(a) in the case of any determination, new determination or amendment of any such determination in terms of section 47(9) . . . , such refund shall be limited to –

(i) a refund in respect of goods entered for home consumption during a period of two years immediately preceding the date of such determination, new determination or amendment, whichever date occurs last; . . . and

(ii) any application for such refund which is received by the Controller within a period of 12 months from the date of –

(aa) such determination, new determination or amendment of a determination. . . .'

Factual background

[8] The appellant has been conducting business as an importer of Interam Brand mats ('the mats') since June 1990. These mats are made up, inter alia, of ceramic fibre mineral wool which is used, after press-cutting thereof into shapes, in the manufacture of automotive catalytic converters for exhaust emission control systems. All such converters were destined for the export market, but the appellant was not responsible for either the manufacture or the export thereof.

[9] On 11 June 1990, acting in accordance with the provisions of s 47(9)(a)(i), the Commissioner determined the mats to be classifiable under tariff subheading 6806.90.90 of Part 1 of the Schedule ('the 1990 determination'). The effect of this determination was that no customs duty was payable in respect of the imported mats.

[10]However, less than a year later, in terms of a new tariff determination, dated 9 April 1991 (‘the 1991 determination’), the Commissioner amended his earlier decision and determined the mats to fall under tariff subheading 6806.10, with the result that customs duty at a rate of 20% became payable in respect of the imported mats as from that date.

[11] On 4 July 1992 the appellant obtained registration as a rebate store for purposes of importing the mats under a full rebate of duty in terms of Rebate Item 470.03 in Part 3 of Schedule 4 to the Act. The effect thereof was that as long as the applicant complied with the rebate conditions, it paid no customs duty in respect of the mats. Two of those conditions were that the goods imported had to be used for the processing and manufacture of goods for export and the manufactured goods had to be exported within 12 months from date of entry thereof.

[12] During January 2003, after an inspection by two SARS officials of the appellant’s records, the Commissioner issued a letter of demand to the appellant for payment of an amount of some R27 million in respect of, inter alia, underpayment in customs duty and value-added tax (‘VAT’). As emerged subsequently, the demand was based on a contention that no proof that the mats had been used in compliance with the relevant rebate requirements had ever been furnished to the Commissioner, with the result that the duty and VAT payable in respect of the mats should have been paid by the appellant.

[13] On 25 March 2003, no doubt prompted by the Commissioner's letter of demand, the appellant applied to the Commissioner for a new tariff determination in respect of the mats. However, on 22 April 2003 the Commissioner again determined the imported mats to fall under tariff heading 6806.10 ('the 2003 determination'), at that stage attracting customs duty at the rate of 15%.

[14] The appellant made further representations to the Commissioner to change this determination, but on 25 September 2005 the Commissioner reaffirmed the 2003 determination.

[15] In the meantime there had been a parallel exchange of correspondence between the parties arising from the Commissioner's letter of demand issued in January 2003. Certain further information and documentation was requested on behalf of the Commissioner, some of which was furnished by the appellant. Many meetings also took place which, however, did not resolve the differences between the parties. Having considered the information furnished by the appellant, the Commissioner, on 22 November 2005, issued an amended letter of demand, claiming payment of some R16,4 million. Written reasons for the decision were requested by the appellant and furnished by the Commissioner.

[16] During January 2006 the parties agreed to refer the determination issue to the World Customs Organisation ('WCO') for a non-binding advisory 'ruling'. On 21 November 2006, after receipt of the WCO's 'ruling', the Commissioner amended the classification of the imported mats from subheading 6806.10 to 6806.90.90 ('the 2006 determination'), ie the determination contended for by the appellant. This decision reinstated the earlier position that no customs duty was payable in respect of the imported mats. With regard to the effective date of the new determination, the Commissioner stated that the determination would take effect as from 22 April 2003, ie the date of the 2003 determination. He did so, however, in ignorance of the earlier 1991 determination. Having been made aware of the true position, the Commissioner ultimately, in the answering affidavit in the present proceedings, conceded that the effective date of the 2006 determination ought to be 9 April 1991. He accordingly did not oppose the appellant's claim for a *mandamus* to that effect.

[17] In a letter dated 10 August 2007, the Commissioner informed the appellant of its rights arising from the 2006 determination, in particular, its right to claim refunds of duties paid in respect of all goods imported 'during the two years immediately preceding the 2006 determination, ie from 22 November 2004 until 21 November 2006'. At the same time, the Commissioner reiterated his earlier demand in respect of underpayment of customs duty, based on the appellant's alleged failure to furnish proof that the mats had been used in compliance with the relevant rebate conditions during the period 1 November 2000 until 1 February 2002. In the circumstances, the Commissioner was holding the appellant liable for payment of a reduced amount of some R11,9 million.

[18] The appellant took issue with the Commissioner's contentions. In launching its application in the high court, the appellant accordingly sought an order (in prayer 1 of the notice of motion) –

'. . . declaring that on a proper interpretation of s 47(9)(d)(ii)(cc) and s 76B of the Customs and Excise Act, 91 of 1964, the Applicant is entitled to refunds in respect of importations of the imported mats . . . for the period 1 March 2002 to 20 November 2004'.

The corollary to this declarator was a claim (prayer 3.2) for payment of refunds in the amount of R8,8 million in respect of the same period. (The appellant's further claim (in prayer 3.1) for a refund in the amount of R4,5 million in respect of the period 21 November 2004 to 20 November 2006, together with interest, was not contested by the Commissioner.) Finally, the appellant also sought an order (prayer 7), 'that the [Commissioner's] letter of demand dated 10 August 2007 . . . be reviewed and set aside and that it be declared that the amount demanded therein is not payable by the [appellant] to the [Commissioner]'. (By the time the matter came to be argued in the high court, the appellant had narrowed down the relief in prayer 7 by claiming an order declaring that the amount of customs duty and interest thereon, demanded from the appellant in the letter of demand of 10 August 2007, is not payable by the appellant.)

[19] The high court held that the appellant was not entitled to the declarator claimed in prayer 1 in respect of the full period, but that its claim was limited to the period 21 November 2004 to 20 November 2006, ie the two-year-period immediately preceding the 2006 determination. It accordingly dismissed the claim for refunds arising during the earlier

period (prayer 3.2) and also dismissed the claim in terms of prayer 7.

[20] What falls to be decided in this appeal are the questions (a) whether or not the appellant is entitled to a further refund of customs duty in respect of the period 1 March 2002 to 20 November 2004; and (b) whether or not the appellant is liable for payment of the additional duty and interest as claimed by the Commissioner in his letter of demand, dated 10 August 2007.

Appellant's entitlement to refunds

[21]This claim must be determined with reference to the provisions of s 76B(1)(*a*), which have been quoted above,[7] more specifically the expression 'the date of such determination'[8] as it appears in that paragraph. The appellant contended that those words refer to the *effective date* of the 2006 determination, which is 9 April 1991. In the result, so it was contended, the two year period contemplated by para (a) is to be calculated as from 9 April 1989. The Commissioner, on the other hand, took up the attitude that the words in question refer to the date when the 2006 determination was made, ie 21 November 2006.

[22] The high court upheld the Commissioner's interpretation, reasoning as follows:

'It was at the forefront of the legislature's mind that there could be effective dates going back many years, and it immediately made the right of recovery subject to section 76B, which imposes a limit of two years. Secondly, whereas the terms "with effect from" and "effective from a date" have just been used, and the concept of

[7] Para 7 above.

[8] Afrikaans: 'die datum van sodanige bepaling'.

effective date is being dealt with, it is striking to note that there is no reference to effective date or the word effective in the relevant part of section 76B to which the proviso refers.'[9]

After quoting the relevant portions of s 76B, referred to above, the learned judge proceeded as follows:[10]

'The phrase highlighted above, namely "the date of such determination" is clear and has to be given its usual meaning. The date of the relevant determination is 21 November 2006. I find it obvious that the legislature would have used the concept of effective date in section 76B(1)(a)(i) if that was intended. If the Act was intended to limit the right of refund not to the period of two years preceding the date on which the determination was made, but to a period of two years preceding the effective date thereof, it would have stated so.

The applicant protests that this construction leads to unjust, even absurd, consequences. Pointing to various letters and memos exchanged between the parties and their legal representatives during the process of having the determination amended, it is argued that the first respondent now profits by its own delay, ie by not having made the correct determination much earlier, ie at a stage when the applicant first protested that the classification was wrong. The process of arriving at the redetermination of 21 November 2006 included a detailed submission on behalf of the applicant by South African Customs & Trade Specialists CC dated 10 August 2005 and an eventual referral of the issue to the World Customs Organisation (WCO) by agreement between the parties during about January 2006. It was after the WCO's "determination" that the first respondent amended the tariff determination during November 2006.

The short answer to these arguments of the applicant is that it was at all times open to the applicant to appeal the wrong determination and so limit its loss. The proviso to

[9] Judgment para 22.

[10] Paras 24–26.

s 76B(1)(a)(i) . . . makes it clear that in the case of any appeal against a determination, the two-year period shall be calculated from the date of such appeal, ie the two years preceding the date of the appeal. The applicant did not appeal any of the wrong determinations, namely: 9 April 1991, 22 April 2003 and 22 September 2005.'

The learned judge accordingly concluded 'that the plain meaning of the relevant part of s 76B is clear and that no absurd consequences follow'.[11]

[23]Before us, counsel for the appellant assailed the reasoning of the high court and reiterated the main argument that, on the Commissioner's interpretation, he can deprive the appellant of its right to refunds by simply delaying (for whatever reason) the decision to correct the determination.

[24] I am unpersuaded by this argument. As rightly pointed out by the high court,[12] it was at all times open to the applicant to appeal the wrong determination in terms of s 47(9)(e) and so limit its loss. It is thus clear that a disgruntled importer can, at least to this extent, curtail any delay on the part of the Commissioner. Counsel has been unable to point to any absurd consequences that will flow from adopting the high court's interpretation of the expression 'the date of such determination' and I am unable to find any. I am satisfied that the interpretation of s 76B advocated by the Commissioner and adopted by the high court is indeed the correct one.

[11] Judgment para 28.

[12] In para 26 of the judgment, quoted above.

[25] I am fortified in this conclusion by the fact that the expression 'the date of such determination' is used, not only in sub-paragraph (i) of s 76B(1)(a), but also in the very next sub-paragraph (ii), where an application for a refund is required to be received within a period of 12 months from 'the date of such determination'. It is a well-established principle of statutory interpretation that ordinarily the same words and phrases in a statute bear the same meaning.[13] As it was put by Kriegler J in *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat*:[14]

'It is of course most unusual to find one and the same expression used in one and the same statute but not bearing a consistent meaning. In our law the Legislature is presumed to use language consistently and one would deviate from the presumption with great hesitation and only if driven to do so, for example, because to do otherwise would lead to manifest absurdity or would clearly frustrate the manifest intention of the lawgiver.'

[26] If the appellant's interpretation were to be applied to the expression 'date of such determination' in both sub-paragraphs, namely to refer to the 'effective date', then it would lead to the absurd result that, in the present context, the application for a refund should have been submitted within 12 months from the effective date, in other words by not later than 9 April 1992, whereas the new determination was only made in November 2006. Faced with this incongruity, counsel for the appellant was constrained to urge the court to depart from the ordinary principle referred to above and to attach a different meaning to the expression in

[13] See 25(1) Lawsa (1st reissue) para 335 and the cases cited in n 1.

[14] 1999 (4) SA 623 (CC) para 47 (footnotes omitted).

the two consecutive sub-paragraphs, namely by interpreting the expression as referring to 'the effective date' in sub-para (i), but to 'the date the determination was issued' in sub-para (ii).

[27] In my view, a departure from the general principle is not warranted, either by the clear wording of the relevant provisions or by the context in which it appears. If the Commissioner's interpretation is applied to both sub-paragraphs, no absurdity follows. Then it simply means that the appellant is entitled to a refund for a period of two years preceding the date upon which the new determination is made and that its claim for a refund must be received within a period of 12 months from such date. The appellant's interpretation, on the other hand, could potentially give rise to liability going back many years (as in this instance), which would be in conflict with the manifest purpose of s 76B, namely to limit claims for refunds.[15]

[28] It follows, in my view, that the first leg of the appeal cannot succeed.

Appellant's liability to pay customs duty

[29] I now turn to consider the question whether the appellant is liable to pay arrear customs duty plus interest, as claimed by the Commissioner in his amended letter of demand, dated 7 August 2007. With regard to this aspect of the matter, the high court held as follows:

[15] See eg the heading to s 76B, which reads: 'Limitation on the period for which refund and drawback claims will be considered and the period within which applications therefor must be received by the Controller'.

'Whether this amount [ie the additional refunds claimed] is payable to the applicant depends on an interpretation of the Act, specifically section 47(9)(d) and section 76B(1)(a)(i) thereof. *The interpretation of these sections will also determine whether the amount of R11.8 million claimed by the first respondent during August 2007 is payable*.'[16]

[30]In my opinion, the high court erred in holding that the fate of the first claim necessarily determines the fate of the second claim or that s 76B has anything to do with the second claim. It is clear that s 76B expressly deals with refunds only and *not* with liability for additional customs duty. For an answer to the latter question one has to look elsewhere.

[31] Before doing so, however, it is necessary first to deal with a preliminary objection raised on behalf of the Commissioner, based on the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). It was argued that the August 2007 letter of demand was only a further demand for payment of an amount that had become payable by virtue of the January 2003 and November 2005 letters of demand. It was those decisions of the Commissioner, so it was argued, that should have been impugned on review, as that was the action which established the appellant's liability. However, by virtue of the provisions of s 7(1)(b) of PAJA, any review of those decisions should have been instituted by the appellant within 180 days after the appellant 'was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons', with the result, according to the Commissioner, that the appellant's right to impugn those decisions had become time-barred.

[16] Judgment para 15 (my emphasis).

[32] The answer to this argument is that, in resisting the Commissioner's demand for payment of arrear import duty, the appellant is not invoking judicial review as a remedy to set aside an unlawful administrative act; instead, it is raising a 'defensive' or 'collateral' challenge to the validity of an administrative act, by which is meant 'a challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act'.[17] As it was put by Scott J in *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd & others*:[18]

'But the validity of administrative acts and subordinate legislation can be challenged not only directly in review proceedings, but also indirectly or, as is sometimes said, collaterally, ie in "proceedings which are not themselves designed to impeach the validity of some administrative act or order" (Wade *Administrative Law* 6th ed at 331). Obvious examples are enforcement proceedings and criminal prosecutions, the latter, according to *Baxter (op cit* at 706), being "one of the hardiest methods of securing review". In such proceedings, therefore, the need for judicial scrutiny of an administrative act or subordinate legislation arises not for the purpose of affording a discretionary remedy, viz review or a declaratory order, but for the purpose of determining the entitlement of the party seeking enforcement, or the guilt or innocence of an accused person. The defendant or accused in such proceedings cannot, it seems to me, be precluded from raising invalidity as a defence merely on the grounds of delay. Indeed, if the position were otherwise it would be akin to a defence to a claim becoming prescribed before the claim itself, which would be untenable (cf *McDaid v De Villiers* 1942 CPD 220 and for comment thereon, see De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 273). In practice, therefore,

[17] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 32 (footnote 22).

[18] 1993 (2) SA 245 (C) at 252J–253D, referred to with approval in *Oudekraal* para 33.

administrative acts and subordinate legislation are "reviewed" in criminal and enforcement proceedings, in some cases many years after they were performed or promulgated . . . .'

[33] In this instance, the Commissioner is seeking to coerce the appellant into compliance with its demands for payment of import duty. In an attempt to defend itself against such coercive power, the appellant is mounting a collateral challenge to the validity of the underlying administrative act on which such power is purported to be exercised.[19] In these circumstances, a defence based on delay – whether under the common law or PAJA – is simply not available.

[34] Turning now to the merits of the Commissioner's claim, he relied heavily on the presumption that a statute ordinarily does not apply with retrospective effect.[20] Reference was made in this context to the principle in *Bell v Voorsitter van die Rasklassifikasieraad & andere*[21] in support of an argument that in the absence of a clear intention to the contrary, a retrospective decision is not to be treated as affecting actions or transactions that have already been finalised, stand to be finalised in due course, or which are the subject of pending litigation. In developing this argument, reliance was also placed on the wording of s 47(9)(b) as it read at the relevant time, prior to its amendment in 2003 and 2007:

[19] Cf *Oudekraal* above, *loc cit.*

[20] 25(1) Lawsa (1st reissue) para 329.

[21] 1968 (2) SA 678 (A) at 683D–G. See also *S v Mhlungu & others* 1995 (3) SA 867 (CC) paras 65–67; *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission & others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission & others* 1999 (4) SA 1 (SCA) paras 18–19.

'Any determination so made shall, subject to appeal to the Court, be deemed to be correct for the purposes of this Act, and any amount due in terms of any such determination shall remain payable *as long as such determination remains in force*.' (My emphasis.)

According to the Commissioner, therefore, the appellant remains liable for payment of customs duty in respect of the period 1 November 2000 to 1 February 2002, during which the incorrect determination remained in force.

[35] I cannot accept this argument. It is settled law that the presumption against retrospectivity can be rebutted, inter alia, where the retrospective operation of a statute or a decision is provided for, either expressly or by necessary implication.[22] Thus, even pending legal proceedings may be affected by a retrospective amendment where such an intention is clear.[23]

[36] Here, s 47(9)(d)(ii) of the Act specifically provides that an amendment or new determination may be made 'with effect from' an earlier date; in other words, there is a clear intention that the new determination is deemed to have become operative at the earlier date. What was intended, in other words, was true 'retro-activity', or retrospectivity in the 'strong' sense.[24] Applied to the present scenario, the new determination took effect and became operative *ex tunc*, ie with effect from 9 April 1991. To hold otherwise would be to negate entirely the effect of the retrospectivity of the 2006 determination and would

[22] 25(1) Lawsa 1st reissue (2001) para 329.

[23] Compare in this regard *Bartman v Dempers* 1952 (2) SA 577 (A) at 582A–D.

[24] Cf *Unitrans* case, above, para 13; *National Director of Public Prosecutions v Carolus & others* 2000 (1) SA 1127 (SCA) paras 33–35.

render the words ‘with effect from’ meaningless. Having said that, however, it needs to be emphasised that the retrospective effect of the new determination does not affect completed transactions, but only applies in respect of uncompleted transactions, such as the Commissioner’s demand for unpaid customs duty in this instance. The dispute in that regard has been ongoing for a long period and it is truly one that is covered under the rubric of pending legal proceedings.

[37] Moreover, in seeking payment of arrear import duty from the appellant, the Commissioner is effectively relying on and seeking to enforce his own mistakes, starting with the incorrect 1991 determination, followed by the incorrect 2003 determination, followed by his subsequent incorrect fixing of the effective date as being April 2003, instead of April 1991. The fact of the matter is that none of these incorrect determinations should have been made. To allow the Commissioner now, in pursuing the demand for payment, to rely on such mistakes would not only be grossly unreasonable, but would offend against the principle of legality itself.

[38] For these reasons, I conclude that the appellant is not liable for the arrear customs duty or interest claimed by the Commissioner in the letter of demand, dated 7 August 2007. It follows that the appellant is entitled to a declaratory order to that effect.

[39]To the extent that it has succeeded in resisting payment of the amount claimed by the Commissioner, the appellant has been substantially successful on appeal and is accordingly entitled to the costs of the appeal, including the costs of two counsel.

Order

[40] The following order is issued:

1. The appeal is upheld to the following extent:

1.1 Paragraph 2 of the order of the high court is set aside and replaced with the following:

‘2.1 Prayer 3.2 of the notice of motion is dismissed together with the costs incurred in respect of the relief set out in that paragraph.

2.2 It is declared that the amount of customs duty (R3 598 971,70) and interest thereon (R1 890 959,72), demanded from the applicant in the first respondent’s letter of demand dated 10 August 2007 (annexure FA27 to the founding affidavit) is not payable by the applicant to the first respondent.’

1.2 Paragraph 3.4 of the order of the high court is amended to read:

‘3.4 pay the applicant’s costs incurred in respect of the relief set out in paragraphs 2.2, 3.1, 3.2 and 3.3 above, such costs to include the costs consequent upon the employment of two counsel.’

2. The first respondent is ordered to pay the costs of the appeal, including the costs of two counsel.

_____

B M GRIESEL

Acting Judge of Appeal

APPEARANCES

FOR APPELLANT:	J P Vorster SC
	N C Maritz
Instructed by:	Wolvaardt Inc, Pretoria
	Matsepes Attorneys, Bloemfontein
FOR RESPONDENT:	J A Meyer SC
	L G Kilmartin
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein