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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH PROVINCIAL DIVISION

CASE NUMBER: 48829/2008

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
5/1/09
DATE
SIGNATURE

In the matter between:

SCAW SOUTH AFRICA (PTY) LTD — Applicant

And

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION — First Respondent

MINISTER OF TRADE AND INDUSTRY — Second Respondent

MINISTER OF FINANCE — Third Respondent

BRIDON INTERNATIONAL LIMITED — Fourth Respondent

AFRICAN MARITIME SERVICES (PTY) LTD — Fifth Respondent

NU-QUIP CC — Sixth Respondent

JUDGMENT

INTRODUCTION

1. This matter came before the court by way of urgency.

2. The applicant seeks a temporary interdict to prevent the first respondent from forwarding to the second respondent a recommendation to terminate an existing anti-dumping duty imposed in respect of stranded wire, ropes and cables, of iron or steel, not electrically insulated, of a diameter exceeding 8mm, exported from the United Kingdom, particularly by the fourth respondent, pending the finalization of a review application for substantive relief in similar terms, which review application has already been launched.
3. Ancillary relief and costs are also claimed.
4. The papers run to some 600 pages.
5. Argument could not be concluded on the day set aside for the hearing thereof and a second day had to be arranged some weeks later.
6. Voluminous heads of argument and copies of relevant authorities not immediately accessible were prepared for the court's convenience and illuminating oral submissions were directed to it.
7. The sparseness of this judgment neither reflects the parties' industriousness with which the papers were prepared, nor the depth and erudition of the arguments submitted by eminent counsel, but is solely dictated by the need to finalize the court's findings as soon as possible in the light of the background facts of this matter.
8. The court is indebted to counsel for the assistance it received through their research and presentation of argument.

THE PARTIES

9. The applicant is SCAW SOUTH AFRICA (PTY) LTD, a company incorporated and registered in accordance with the company laws of the Republic of South Africa, having its principal place of business at Lower Germiston Road. Cleveland, Johannesburg, Gauteng.

10. The first respondent is the INTERNATIONAL TRADE ADMINISTRATION COMMISSION ("ITAC"), a statutory body established in terms of section 7 of the International Trade Administration Act 71 of 2002 ("the ITAC Act"), as amended. ITAC's address is The DTI Campus (Block E), 77 Meintjies Street, Sunnyside, Pretoria.

11. The second respondent is the MINISTER OF TRADE AND INDUSTRY of c/o the State Attorney, Bothongo Heights, 8th Floor, 167 Pretorius Street, Pretoria.

12. The third respondent is the MINISTER OF FINANCE of c/o the State Attorney, Bothongo Heights, 8th Floor, 167 Pretorius Street, Pretoria.

13. The fourth respondent is BRIDON INTERNATIONAL LIMITED, a company established in terms of the company laws of the United Kingdom with its principal office at Carr Hill Doncaster, South Yorkshire DN4 8DG, represented by its duly authorized agents in terms of the ITAC Act, CLS Consulting Services (Pty) Ltd of c/o Corporate Office, corner Roger Dyason Road and Voortrekker Street, Pretoria.

14. The fifth respondent is AFRICAN MARITIME SERVICES (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its registered address at The Pinnacle, 5th Floor, Corner Strand and Burg Streets, Cape Town.

15. The sixth respondent is NU-QUIP CC, a close corporation established in terms of the relevant laws of the Republic of South Africa with principal place of business at 334 Gale Street, Durban.

16. No relief is claimed against the fourth, fifth and sixth respondents, who have been joined because of the vital interest they may have in the outcome of the application.

17. The third, fifth and sixth respondents do not oppose the application, but abide the decision of the court.
18. In the judgment, the first, second and fourth respondents are referred to as "the respondents".

THE CENTRAL ISSUE

19. The applicant and the fourth respondent are significant manufacturers of stranded iron or steel wire, ropes and cables, among other products.
20. The fourth respondent exported products of this nature to South Africa, particularly shipping and mining ropes.
21. The applicant, together with other members of this industry in the SACU, alleged that the fourth respondent among other manufacturers in a variety of other countries dumped its products in the South African Customs Union (SACU) market.
22. The first respondent's predecessor, the Board on Trade and Tariffs, investigated these allegations and determined that wire ropes and cable originating from the Peoples Republic of China, Germany, India, Korea and the United Kingdom were being dumped into the SACU market. This dumping caused material injury to the SACU industry.
23. The Board recommended to the second respondent that anti-dumping duties should be imposed on products classifiable under tariff subheadings 7312.10.25 and 7312.10.40, as determined in the Schedules to the Customs and Excise Act, imposing anti-dumping duties of 42.1% on the subject products from the fourth respondent.
24. These products included fishing rope and mining rope. The bulk of the former produced by fourth respondent was imported through the fifth respondent.

25. The second respondent accepted the first respondent's advice and recommended to the third respondent that these duties be imposed, which the third respondent duly did, as he was obliged to do in terms of section 55 (2) of the Customs and Excise Act 91 of 1964.
26. Anti-dumping duties are imposed for a maximum of five years, unless a substantial request is made by the industry affected by the dumped imports to the first respondent to launch a sunset review based on the industry's allegation that the expiry of anti-dumping duties would likely lead to a recurrence of the dumping practice.
27. If a sunset review is indicated, it is conducted as a single investigation that must, in accordance with par 5.10 of Article VI of the implementation agreement, be concluded within a maximum period of 18 months.
28. The applicant has launched an application for a sunset review.
29. The first respondent has allegedly concluded in the review, which it duly performed, that the anti-dumping duties imposed upon the UK's, and therefore the fourth respondent's, products should be terminated.
30. The applicant seeks to prevent the first respondent from forwarding its recommendation to the second respondent, pending a review of the first respondent's alleged decision.

THE LEGAL AND STATUTORY BACKGROUND

31. The World Trade Organisation provides a framework for the regulation and conduct of trade between its members.
32. South Africa is a member of the WTO since 1 January 1995, together with some 158 other countries.
33. As a member of the WTO South Africa is also a signatory to the General Agreement on Tariffs and Trade ("GATT").
34. This agreement was approved by the South African Parliament through the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.

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35. The international rules relating to dumping are contained in Article VI of the GATT and the WTO Agreement on the Implementation of Article VI of GATT. The latter was approved by the South African Parliament on 6 April 1995.

36. As was held in *Progress Office Machines CC v SARS and Others* 2008 (2) SA 13 (SCA), this agreement is therefore binding on South Africa in international law. The same applies to GATT.

37. While the international agreements have not yet been incorporated into municipal law in South Africa, Parliament passed the International Trade Administration Act 71 of 2002, which established the first respondent and provides for the imposition of customs and other duties, including anti-dumping duties.

38. As not all sections of this act have come into operation, the first respondent must investigate applications for the imposition of anti-dumping duties in terms of section 32 of the Board on Tariffs and Trade Act 107 of 1986.

39. The first respondent makes recommendations based upon its findings after an anti-dumping investigation to the second respondent, who in turn considers the recommendation. If the second respondent does accept the recommendation he in turn recommends its findings to the third respondent, who is obliged to amend the relevant Schedule to the Customs and Excise Act 91 of 1964.

40. Regulations promulgated in terms of Act 71 of 2002 provide for the manner and fashion in which investigations into alleged dumping practices are to be conducted and, if required, anti-dumping duties are to be calculated and imposed.

41. "Dumping" is defined in the act in terms similar to the definition in the WTO Anti-Dumping Agreement, namely the introduction of goods at less than their normal value, if the export price of the goods is less than the comparable price in the ordinary course of trade of the goods for consumption in the exporting country.

42. As is provided in the WTO Anti-Dumping Agreement, the anti-dumping regulations determine that anti-dumping duties are to be terminated not later than five years after the date of imposition thereof unless a sunset review is initiated as aforesaid.

THE COMMON CAUSE FACTS

43. None of the facts set out above are in dispute.
44. Neither is the balance of the factual matrix against which the application must be considered in dispute.
45. After completing its investigation into the alleged dumping of stranded wire, rope and cables, the Board based its original recommendation that anti-dumping duties ought to be imposed upon UK imports upon the fact that the fourth respondent had been dumping fishing rope in the SACU market.
46. As the information supplied by the fourth respondent's representatives in respect of mining rope was unreliable, the margin of dumping duties recommended by the Board was calculated upon the dumping of fishing rope only.
47. No decision was ever taken to impose anti-dumping duty upon mining rope, but as the tariff heading for mining rope is the same as for fishing rope, the imposition of anti-dumping duties on the latter of necessity included the former.
48. These duties were imposed on the 28th August 2002 by the third respondent through a notice in the Government Gazette.
49. After the imposition of the duties, the fourth respondent exported fishing ropes to the SACU region that were held in bonded warehouses in Namibia (Walvis Bay) and South Africa for sale to foreign vessels.
50. These sales did not attract dumping duties.
51. There is no indication in the papers that the fourth respondent did not sell the fishing ropes to foreign vessels at prices that would have

attracted anti-dumping duties if the product had been sold to purchasers in the SACU market at the same prices.

52. The fourth respondent did not sell mining ropes in any significant quantities after the dumping duties were imposed.

53. The fourth respondent sold limited quantities of crane ropes into the SACU market after the imposition of the anti-dumping duties.

54. The fourth respondent requested a review of the imposition of anti-dumping duties that was initiated on the basis of allegedly changed circumstances by the first respondent on the 4th August 2006.

55. The review in terms of Regulation 45 was requested on the basis that the fourth respondent was no longer dumping product in the SACU market and that the applicant had reduced its product range of ropes in ranges that had attracted the anti-dumping duties imposed upon UK exports.

56. The request to initiate the review was launched in respect of fishing ropes and mining ropes. After it appeared *prima facie* that fishing ropes were dumped – had they been sold other than through bonded warehouses – the fourth respondent argued that fishing ropes ought to be excluded from the investigation because they were sold to foreign vessels only.

57. The review failed because the first respondent held that it could not *"..on the basis of lower volumes exported...determine....whether...(fourth respondent) would resume dumping in the future, once the current anti-dumping duties are withdrawn."*

58. The volumes of crane rope exported into the SACU market were too small to allow a conclusion to be drawn whether or not dumping by fourth respondent would resume if the duties were terminated.

59. On the 26th May 2006, the first respondent published a general notice advising that the existing anti-dumping duties would expire on 28th August 2007 unless a request for a sunset review was lodged.

60. The applicant filed such a request on the 19th February 2007.

61. A sunset review was launched.

62. In terms of Regulation 43.2 of the Anti-Dumping Regulations, reflecting a parallel provision in the WTO Anti-Dumping Agreement, the first respondent is obliged to issue an essential facts letter to all interested parties, recording the principal facts that the first respondent intends to take into consideration in coming to the final determination of the sunset review, and inviting comment on the content of the letter. Such a letter was disseminated on the 4th September 2008.

63. The first respondent opined in the letter that the fourth respondent's exports of fishing rope were to be excluded from the review as they were sold to foreign vessels, and that because there were no other ropes sold to South Africa, the review was based upon a consideration of the fourth respondent's exports of crane ropes only.

64. In its final analysis of the determination to be made, the first respondent advised that it intended to inform the second respondent that anti-dumping duties imposed upon the fourth respondent's products should be terminated.

65. Other UK exporters and those of other countries would not receive a similar benefit because of dumping that would continue and injure the SACU industry.

66. After requesting and receiving further particulars to the essential facts letter, the attorneys acting for the applicant made extensive submissions in respect of the essential facts letter. In essence, the applicant's legal representatives argued that the first respondent had failed to take the fourth respondent's past and current exports of fishing ropes into consideration; that the exclusion of exports of fishing ropes from the review was unlawful as these ropes would be dumped in the SACU market if the duties were to be lifted and that a recurrence of dumping was probable, particularly as the fourth respondent was

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clearly unable to maintain exports into the SACU market while the anti-dumping measures were in place.

67. The applicant furthermore requested an opportunity to make oral representations to the first respondent, setting out a summary of the issues to be dealt with during such oral representations.

68. The first respondent declined this request and also refused to provide the applicant with a copy of the final recommendation it intended to make to the second respondent, but confirmed that it had advised all interested parties in the essential facts letter of the recommendation it would make to the second respondent. It undertook to inform all concerned of any change in this final recommendation, if any.

69. The first respondent's Senior Manager: Trade Remedies, several of its investigators and other functionaries agreed to meet with the applicant's attorneys, however, on the 6th October 2008, to allow the latter to comment upon the essential facts letter. The former refused to answer questions relating to the exclusion of fishing ropes from the determination of the desirability of the continuation of anti-dumping duties.

70. On the 15th October 2008 applicant's attorney was informed that a decision had been made, that written confirmation thereof would be given later and that no additional essential facts letter would be issued. The applicant concluded that the first respondent had decided to recommend to the second respondent to terminate the anti-dumping duties imposed upon the fourth respondents imports.

THE DISPUTED FACTS

71. The first and second respondents deny that any decision has been taken by the first respondent at this stage. The first respondent's deponent admits that a recommendation to the second respondent has

been drafted, but states that it has neither been signed nor forwarded to the intended recipient thereof.

72. It is common cause, however, that the essential facts letter referred to above will not be amended.

73. The fourth respondent denies that it ever dumped fishing ropes prior to the original imposition of anti-dumping duties, in spite of the finding that dumping did occur by the Board in 2002.

74. All the respondents further deny that the application is urgent and suggest that the applicant would have other remedies at its disposal, such as launching another investigation into dumping if such should occur after the lifting of the present anti-dumping duties.

75. It is also suggested on fourth respondent's behalf that it could provide a price undertaking as intended in Regulation 39 of the ITAC Regulations.

FINDINGS ON DISPUTED FACTS

76. The denial that the first respondent has taken a decision appears to be based upon an excessively technical approach to the review process.

77. It must be remembered that the essential facts letter is disseminated to interested parties to inform them of the recommendation the first respondent intends to make to the second respondent.

78. The letter clearly conveys that the first respondent has made up its mind regarding the fourth respondent's exports to this country and that it does not intend to change its views in spite of the applicant's protests.

79. To suggest that no decision has been taken under those circumstances is to rely on form rather than substance.

80. I have no hesitation to hold – subject to the argument that the recommendation is no decision in law, but that the actual decision is

taken by the second respondent – that the first respondent has in fact come to a definite conclusion and has therefore made a decision.

81. The denial that the fourth respondent ever dumped fishing ropes in the SACU market is a classical example of a bare denial, devoid of any factual content.

82. On these papers there is no suggestion that the correctness of this finding by the Board was ever challenged at any stage prior to this application having been launched.

83. This bald denial by a deponent who only joined the staff of the fourth respondent some four years ago – long after the anti-dumping duty was imposed – without any documentary proof or supporting affidavit of a functionary who was involved in the previous investigation or the marketing of fourth respondent's product prior thereto cannot be accepted as creating a *bona fide* dispute and must be rejected.

84. As far as the suggestion is concerned that the application lacked urgency because the fourth respondent could give a price undertaking to the first respondent's satisfaction it must be said that this point was raised belatedly in supplementary heads of argument. It was never advanced by the fourth respondent in its opposing affidavit and cannot be taken into account at this late stage. It is in any event no undertaking that could be enforced by the applicant.

85. The further arguments raised in connection with the question of urgency will be dealt with in the discussion of the legal issues *infra*.

THE APPLICANT'S ARGUMENTS

86. The applicant seeks a temporary interdict, pending the institution and final determination of a substantive review, restraining the first respondent from forwarding its recommendation that anti-dumping duties should be lifted in respect of exports of the fourth respondent's products, to the second respondent.

87. It should be recorded at this stage that the intended review was launched during the time that argument was heard on the present application.

88. Only in the event of the recommendation having been forwarded to the second respondent already does the applicant seek a temporary interdict against the second respondent restraining him from accepting the first respondent's recommendation and forwarding the same to the third respondent until the review is finalized.

89. Should the recommendation have been sent to the third respondent already, a temporary interdict is sought against him restraining him from implementing the recommendation until the review is finalized.

90. The applicant relies for the above relief on the alleged irregularity of the decision itself and upon alleged procedural unfairness allegedly committed by the first respondent during the investigation phase of the sunset review process.

91. Applicant submits that there are three grounds of irregularity vitiating the first respondent's decision, as well as the failure to afford the applicant an oral hearing as requested.

IS THE FIRST RESPONDENT'S RECOMMENDATION REVIEWABLE?

92. Before the alleged irregularities are considered, it is necessary to decide whether the first respondent's impugned recommendation constitutes a decision that is reviewable in administrative law at all.

93. The respondents – with the exception of the third respondent – have each raised the argument that that the determination is no decision that could be reviewed by a court, as the decision whether dumping duties should be terminated is made by the second respondent. The argument therefore furthermore runs that the present application and the review are premature as the second respondent will launch his own investigation after receiving the first respondent's recommendation

before coming to a conclusion. This decision – whether to adopt the first respondent's recommendation or not – may take several months to reach.

94. The ITAC recommendation is an important jurisdictional fact for any action the second respondent might decide to take." *A fatal flaw in the process at the ITAC stage affects the whole process...*" per Harms ADP (as he then was) in *Minister of Finance and Another v Paper Manufacturers Association of South Africa* Case No 567/07 (SCA) (Not reported), *Chairman, Board on Tariffs and Trade and Others v Brenco Inc. and Others* 2001 (4) SA 511 (SCA).

95. The recommendation is certainly a decision or step that affects the rights of others and must therefore be regarded as administrative action, see *Oosthuizen's Transport and Others v MEC, Road Traffic Matters Mpumalanga, and Others* 2008 (2) SA 570 (T); *Grey's Marine Hout Bay and Others v Minister of Public Works and others,* 2005 (6) SA 313 (SCA).

96. As such, it is reviewable, see *Algorax (Pty) Ltd v ITAC and others,* Case No 18829/01 (T) (not reported).

97. The argument that the first respondent's recommendation is not reviewable cannot therefore be upheld.

THE FIRST SUGGESTED GROUND OF REVIEW: THE FIRST RESPONDENT MISDIRECTED ITSELF WHEN IT HELD THAT FOURTH RESPONDENT'S EXPORTS TO THE SACU DID NOT INCLUDE FISHING ROPES

98. In essence, this argument is based upon the fact that the bonded warehouses into which the exported fishing ropes are delivered, are physically situated in the SACU market and exported products placed in them are therefore exported into this market, regardless whether they attract import duties or not.

99. In the light of the finding on the second suggested ground of review it is not necessary to deal extensively with this point, beyond stating that such exported ropes could obviously, and subject to the payment of the relevant duties, be delivered to importers in the SACU market from the bonded warehouse.

100. It would therefore appear to strain logic to hold that exports not subject to anti-dumping duties are not exported into the SACU market by dint of the fact that they are placed into bonded warehouses.

THE SECOND SUGGESTED GROUND OF REVIEW: THE FIRST RESPONDENT MISDIRECTED ITSELF WHEN EXCLUDING FISHING ROPES FROM THE CONSIDERATION OF DUMPING MARGINS

101. It has been recorded above that the first respondent excluded fishing ropes from its considerations when determining whether anti-dumping duties should be terminated or not.

102. The dumping of fishing ropes led to the original imposition of the anti-dumping duties.

103. The fourth respondent thereafter exported fishing ropes into bonded warehouses for sale to foreign vessels, at prices that would in all probability – in the light of the common cause facts – differ little from the price that evidenced dumping when the ropes were sold into the SACU market.

104. There is no suggestion that the fourth respondent will not resume sales into the SACU market the moment the anti-dumping duties are terminated.

105. It is therefore difficult to understand the grounds upon which the first respondent was persuaded to exclude fishing ropes from the sunset review merely because no sales thereof had taken place into the SACU market since the anti-dumping duties were imposed.

106. The fourth respondent has not addressed the issue of future sales into the SACU market at all, other than to belatedly and in supplementary arguments only refer to the possibility of agreeing to price binding should it be found that it resumed dumping after termination of the existing duties.

107. The first respondent's decision to exclude fishing ropes from the sunset review of dumping margins is therefore irrational and unreasonable and must be regarded as a misdirection.

108. At the very least, the first respondent must have considered the likelihood of a recurrence of dumping in the light of the probability of a resumption of sales of fishing ropes currently being sold at prices that would attract anti-dumping duties if sold into the SACU market today.

109. The applicant, as all other producers in the SACU market, is entitled to administrative action that is fair, reasonable and rational and procedurally fair – if it is not, it fails to meet the requirement of legality. See: the Constitution 108 of 1996, section 33; Promotion of Administrative Justice Act 3 of 2000, sections 3 and 6.

110. In the light of this finding, the applicant has succeeded in establishing a case for a review of the first respondent's recommendation.

111. It must be clearly understood that the mere fact that a misdirection has occurred does not necessarily mean that the review of the recommendation will be successful, but it does mean that the applicant's right to have all relevant factors taken into consideration in preparing the recommendation has been infringed.

112. It follows that the applicant has established a clear right to review the first respondent's recommendation and, pending the finalization of this review, to an order in terms of the notice of motion, restricted to the portions of the recommendation applicable to the fourth respondent's products currently subject to the existing anti-dumping duties.

THE THIRD SUGGESTED GROUND OF REVIEW: FOURTH RESPONDENT'S SALES OF CRANE ROPES SHOULD NOT HAVE BEEN CONSIDERED IN SUPPORT OF THE RECOMMENDATION

113. In the light of the finding on the second ground it is not necessary to deal separately with this ground.
114. If it had had to be considered in detail, the applicant's argument would probably have been upheld.

THE FOURTH SUGGESTED GROUND OF REVIEW: FAILURE TO OBSERVE PROCEDURAL FAIRNESS BY NOT ALLOWING THE APPLICANT TO MAKE ORAL REPRESENTATIONS

115. As is apparent from the discussion of the common cause facts above, the first respondent meticulously engaged the interested parties in the sunset review and received a range of written submissions, including a summary of the proposed oral representations.
116. In addition, senior representatives met with the applicant's attorneys and counsel to discuss the essential facts letter.
117. There is no suggestion that the oral representations would have highlighted any facts or arguments that the first respondent did not receive in the various written submissions and during the meeting with the lawyers.
118. There is no suggestion that the information it received was not considered prior to formulating the recommendation – in spite of the misdirection that occurred.

119. This ground of review must therefore be rejected.

THE FINAL EFFECT OF THE TEMPORARY INTERDICT

120. Respondents have been at pains to point out that the interim interdict sought by the applicant is in fact final in effect.
121. This submission was disputed by the applicant, but it is clear that the relief granted will have a final effect while it is in place.
122. As the applicant has established the infringement of a clear right, however, it is entitled to its order.

THE ABSENCE OF ALTERNATIVE REMEDIES

123. The alternative remedies suggested by the respondents in the place of a temporary interdict are remedial measures that applicant could apply for if - and only after - dumping had in fact resumed.
124. These remedies could only be obtained once the proverbial horse had bolted and could only be obtained after costly and time-consuming procedures the outcome of which would be hotly contested.
125. The alternative remedies suggested are therefore no ready remedies at all.

THE BALANCE OF CONVENIENCE

126. Once it is clear that the first respondent has failed to take the likely effect of lifting the anti-dumping duties properly into account, there can be little argument that the balance of convenience must favour the applicant.

127. This is particularly the case as the recurrence of dumping could countered only by instituting new investigations, which argument has been dealt with above.

URGENCY

128. Although urgency was put in issue, it became clear during argument that the matter was at least of qualified urgency in the light of the fact that the maximum period of eighteen months for the sunset review would expire in February of this year.

129. It is consequently essential that the matter was dealt with expeditiously.

THE ORDER

1. An order is granted in terms of prayers 2 and 3 of the Notice of Motion.
2. The costs of these proceedings are ordered to be costs in the review launched by the applicant already for final relief.
3. The order is restricted to the fourth respondent's products affected by the existing anti-dumping duties.

Signed at Pretoria on the 5th day of January 2009.

E BERTELSMANN
Judge of the High Court

Heard on: 07/11/08 and 08/12/08.
For App: Adv A.P. Joubert SC and A. Cockrell inst by Webber Wentz
For 1st & 2nd Resp: Adv S. du Toit SC and SK Hassim, instructed by State Attorney Pta.
For 4th Resp: Adv ~~M~~ L.J. VD Merwe SC and L.B. van Wyk instructed by Van Der Merwe Attorneys