

Music to their ears

In The South African Music Performance Rights Association ("SAMPRA") v Foschini Retail Group (Proprietary) Limited and 9 Others (50/2015) [2015] ZASCA 188 (30 November 2015), retailers took on SAMPRA about needle-time royalty fees for playing sound recordings in retail stores; and won.



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After the *National Association of Broadcasters v South African Music Performance Rights Association and Another* [2014] 2 All SA 263 (SCA) ("*NAB*") judgement, the courts, including the Copyright Tribunal and the Supreme Court of Appeal, were bound to be approached by other sectors of the music industry to determine the royalty payments to be paid by users of music-related copyright works by holders/owners of such copyright or their representatives. The current appeal judgement (*SAMPRA v Foschini*) dealt with the amount to be paid as a royalty to SAMPRA by Foschini and nine others to allow them to play background music (sound recordings) within their stores.

"SAMPRA" is a collection society that focuses on recovering needletime royalties from users of its record label members' sound recordings. "The Retailers" were Foschini Retail Group, Pepkor Retail Stores, Just Kor Fashion Group, Mr Price Group, Pick 'n Pay Retailers and Young Designers Emporium.

The parties put forward, and the court determined, some very interesting, nuanced and important issues in this case.

As to whether the Tribunal had jurisdiction, the Supreme Court of Appeal referred to ss9A, 30, 31 and 33 of the Act and the *NAB* case, and its reference to the "*tortuous statutory scheme in terms of which the Tribunal derives its power...*" and attempted to reconcile such provisions.

The court stated that the problem of reconciling the provisions of these sections in order to determine the jurisdiction of the Tribunal is immediately apparent. Whilst s9A provides for the referral of the matter by either "*the user, performer or owner*" to the Tribunal, in the absence of agreement as to "*the amount of any royalty*", s30 provides that the Tribunal has jurisdiction to "*determine disputes*" arising between "*persons from whom licenses are required and persons requiring licenses*" on "*the application of a person requiring a license*".

To resolve the apparent anomaly, Prof. Dean correctly suggests that s30 should be interpreted as that owners and performers holding performer's rights should be regarded as "*other persons from whom licenses are required*" and users should be regarded as "*persons requiring licenses*". On this basis, referral to the Tribunal in terms of s9A by a "*user*" should be interpreted as an application in terms of s30(b). In the same way as was held in terms of s33(5)(b) in *NAB* to apply *mutatis mutandis* to a referral in terms of s9A, so should the provisions of s30, with the same objective: to prevent the provisions of s9A being rendered new bakery.

A referral to the Tribunal by a user in terms of s9A is an application to the Tribunal in terms of s30, and would also

constitute an application "by any person who claims that he requires a license" in terms of s33(3)(b).

The claim advanced in terms of s33(3)(b) would be that the charges, terms or conditions subject to which a licensing body proposes that the licence should be granted are "unreasonable". Consequently, the Tribunal dealing with a referral in terms of s9A, has to be satisfied that the claim of the applicant is "well-founded", and in that case, may determine what "charges, terms or conditions" subject to which a licence should be granted, are reasonable. Accordingly, the court found that the submission of the Retailers was correct and that they do not make any claim falling strictly within s33(3), which would render the provisions of s33(5) applicable.

The court suggested that it is clear that, in terms of s9A, all that is required before the matter could be referred to the Tribunal was the absence of an agreement between "the user" (the retailers and SAMPRA) and "the owner" as to "the amount of any royalty payable". Once the absence of an agreement was established, the jurisdiction of the Tribunal to determine the dispute in terms of s30, read with s33(3) and s33(5) of the Copyright Act, 1978 was established.

With regard to the issue of onus, s33(5) provides that the Tribunal shall make an order declaring that the applicant is entitled to a licence on such terms and conditions and subject to the payment of such charges (if any), as the Tribunal may determine to be reasonable in the circumstances, "if the tribunal is satisfied that the claim of the applicant is 'well-founded'".

The court latched onto the words "well-founded" and decided that for the Tribunal to be satisfied, it must have a "foundation in fact the reason, based on good grounds or evidence". It took into account the various arguments made by the parties, and held that the primary purpose of s9A is for the parties to reach agreement on the amount of the tariff payable. As an alternative, the parties may refer the matter to arbitration. However, if the use of copyright protected music bears a formal onus of proving that the claim is "well-founded" and the tariff demanded by the owner of the copyright is "unreasonable", there would be little or no incentive for the owner to reach agreement with the user, or agree to a referral of the dispute to arbitration. This is because a referral of the dispute to the Tribunal has the considerable advantage, to the owner, of requiring the user to discharge this onus. Such an interpretation would undermine the apparent purpose of s9A. In addition, there are a number of provisions in the Act and Regulations promulgated in terms of s29(3)(a), regulating proceedings before the Tribunal, in which an informal procedure is envisaged. In this context, it would be contradictory, and inappropriate to impose a formal onus of proof upon the claimant to satisfy the tribunal that its claim is "well-founded". Consequently, all a claimant needs to do is place evidence before the tribunal on whether the claim is well-founded.

The court relied on evidence led by the experts (particularly those of the Retailers) to determine whether sufficient evidence was placed before the Tribunal for it to be satisfied that the claim of the Retailers was "well-founded" and that the tariff proposed by SAMPRA was unreasonable. It said the problem with SAMPRA's insistence upon proof of the rand value to retailers of playing music in the stores lies not only in the issue of confidentiality, but also that it would be prohibitively expensive, impractical and any conclusion reached could not be universally applied. The court's view was that it was unnecessary for the Retailers to lead evidence of the rand value to them, in order for the Tribunal to be satisfied that the claim was well-founded.

The court held that the evidence of Prof. Ross and Prof. Arini described three possible methods that could be used to determine the tariff. The first method was the determination of the rand value to retailers of playing music in their stores (dismissed by the court). The remaining two methods work the "market-based solution" proposed by Prof. Arini and the use of tariff levels in foreign jurisdictions as a benchmark, proposed by Prof. Ross. Prof. Arini proffered that market forces should be left to determine the tariff; this was rejected by the court which preferred the use of tariff levels in foreign jurisdictions as a benchmark. The NAB case was used to support this conclusion and was accepted by the court. Both parties agreed that the tariff should be based on the international approach using square meterage of individual retail stores.

The court ultimately decided, after considering the submissions of both parties, that the tariff set by SAMPRA was indeed excessive and unreasonable. In coming to this conclusion, it stated that it did not overlook the administrative benefit to users of copyrighted music, and having to deal with one entity, namely SAMPRA, and not several recording companies, to agree to the tariff. Nor did it overlook the benefit to SAMPRA of having its members' music played in the Retailers' stores and exposing it to the public. However, it did not regard either of these submissions as being of significance in determining whether there was sufficient evidence before the tribunal.

The court agreed with Prof. Ross's recommendation that the Tribunal endorse a tariff at the Australian PPCA level converted to rands, in accordance with purchasing parity. This came in the form of the Big Mac index, which estimates the extent to which a currency is relatively overvalued/ undervalued. Exchange rate prices of McDonald's Big Mac hamburgers across a range of countries, where the hamburger is a common product having the same ingredients, are

compared.

The court agreed with Prof. Ross in his criticism of the approach of Mr Lister (SAMPRA) as he positioned SAMPRA's tariffs at the 75% mark of all other countries' tariffs. He said South Africa, as a developing country, should not be placed in the top quintile of tariffs of countries; economically it was arbitrary and irrational.

It held that there was no rationally justifiable basis for SAMPRA's decision to adopt a tariff level considerably higher than that of SAMRO.

The court held that sufficient evidence had been placed before the Tribunal for it to be satisfied that the Retailers' claim that the tariff set by SAMPRA was unreasonable, was well-founded.

The court stated that in terms of s36(3)(a), it is entitled to confirm, vary or set aside an order of the Tribunal as it deems fit, and it would determine a tariff fair to both parties and reasonable in all the circumstances.

This judgement is important not only for the parties (SAMPRA and the Retailers) but also for all other players in the music industry, particularly, other retailers or communicators of sound recordings to the public. Furthermore, I believe this judgement has implications for all s9A applications.

In my view, the court, in this judgement, has provided much needed clarity and certainty.

Additionally, I wish to support the court's consideration of local music industry's (as a whole) interest in this matter. This consideration was, in my opinion, absent in the NAB case.

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