

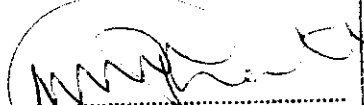
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25/10/2013
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HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 0003/2009

25/10/2013

In the matter between:

FOSCHINI RETAIL GROUP (PTY) (LTD) AND 9(NINE) OTHERS

And

THE SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION

JUDGMENT

PHATUDI J:

Introduction

[1] This is a referral to the Copyright Tribunal as provided in terms of Section 9A(1)(c) of the Copyright Act 98 of 1978 as amended. (Copyright Act). Section 9A(1)(c) provides that 'in the absence of an agreement contemplated in paragraph (B), the user, performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1)...'¹

¹ Section 9A inserted by section 3 of Copyright Amended Act 9 of 2002.

[2] Section 29(1) stipulates: 'The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978,² shall also be the Copyright Tribunal ... for the purposes of this Act.'

[3] Section 8 of the Patents Act provides that '[the] Judge President of the [Gauteng High Court]³ of the [High]⁴ Court of South Africa shall from time to time designate one or more judges or acting judges of that Division as commissioner or commissioners of patents to exercise the powers and perform the duties conferred or imposed upon the commissioner by this Act.'

[4] I am presiding as a commissioner of Copyright Tribunal (Tribunal). This is not a trial in the *stricto sensu*⁵ but an enquiry.

Section 31(5) of Copyright Act stipulates:

'Subject to the provisions of subsection (4), the tribunal shall on any reference under this section consider the matter in dispute and after giving the parties to the reference an opportunity of presenting their respective cases, make such order, ... as the tribunal may determine to be reasonable in the circumstances.'

² Patents Act 57 of 1978 as amended.

³ The wording in the Act still refers to Transvaal Provincial Division.

⁴ I substituted the word supreme as used in the Act with High.

⁵ The rules governing the trial proceedings are relaxed and yet applied for convenience and smooth running of the proceedings.

The Parties

[5] The Referrers are a group of South African retailers who play background music in their stores. Throughout the “pleadings” including these proceedings, the Referrers are referred to as “the retailers”. These retailers are: Foschini Retail Group (Pty) (Ltd), Pepkor Retail Limited Stores, Just Kor Fashion Group (Pty) (Ltd), Mr Price Group Limited, Pick ‘n Pay Retailers (Pty) (Ltd), Truworths Limited, New Clicks SA (Pty) (Ltd), Dunns Stores, Metrotoy (Pty) (Ltd) and Young Designers Emporium (Pty) (Ltd). The retailers ‘counsel’⁶ submits that ‘while these are the immediate [referrers], the outcome of the matter affects all South African retailers, from the largest to the smallest, since the tariff applies across the board to all shops and stores’⁷

[6] The defendant is the South African Music Performance Rights Association. The name is abbreviated as SAMPRA. They are, throughout the proceedings, referred to as SAMPRA. SAMPRA is accredited in terms of the regulations on the Establishment of Collecting Societies in the Music Industry to act

⁶ Adv. S.H. Sholto-Douglas SC assisted by Adv. Bloomberg

⁷ Retailers Heads of Argument, page 4 paragraph 2.1

as a Representative Collecting Society. It is 'accredited in terms of section 9A of the Copyright Act 98, of 1978 and/or in terms of section 56(1) (b) of the Performers' Protection Act 11 of 1967.'⁸ Recording Industry of South Africa (Risa) is its only member. A number of record companies are members of Risa. The so-called "big four" record companies, being, Sony BMG Music Entertainment Africa (Pty) Ltd (Sony BMG), EMI Music South Africa (Pty) Ltd(EMI), Universal Music South Africa (Pty) Ltd(Universal) and Gallo Music Company (Pty) Ltd(Gallo) are members of Risa and dominant stakeholders in SAMPRA. At the time of handing down this judgment, SAMPRA is the only accredited Collecting Society.

[7] It is important to note that the Retailers play music in their stores in the background to create an ambience for the shoppers, clients or patrons on the one hand and SAMPRA, as a Collecting Society for copyright owners, demand payment from retailers. SAMPRA is statutorily obliged to collect the royalty payable in respect of playing, as background music, sound recordings in respect of which its members hold a copyright. It represents 95 – 99 per cent of record companies.

⁸ Certificate of Accreditation – Retailers bundle of documents, page 1.

[8] At the commencement of the hearing, the parties agreed that SAMPRA has a duty to show that the tariff it set is “reasonable in the circumstances.” Mr Murphy, counsel for SAMPRA and Mr Sholton-Douglas for the Retailers, each synoptically set out in their opening statements what their contentions are in respect of the tariff set by SAMPRA.

[9] Sixteen (16) witnesses⁹, including experts in Economics, Financial Analysts, Music Therapists, Marketers, Accountants and International Music Copyright Lawyers testified. It is worth mentioning that the pleadings bundle is throughout the proceedings being referred to as the “pink” file while the retailer’s referred to as the “spotty” file. SAMPRA’s discovered documents bundle referred to the “yellow” file.

⁹ Nine (9) for SAMPRA and seven (7) for Retailers. Four of the 16 are legal practitioners.

Factual background

[10] As a point of departure, I deem it necessary to extract from the “pleadings” parties’ contentions. The retailers allege in their particulars of claim¹⁰ that ‘SAMPRA has unilaterally set a tariff (the tariff) to determine the royalty payable in respect of playing, as background music, the sound recording in respect of which its members hold copyright.’¹¹ SAMPRA admits the allegation with a rider that it ‘is under no legal obligation to negotiate a tariff with every user individually before publishing a proposed general tariff.’¹² The retailers further

- 6.1.1 contend that SAMPRA has not provided, and is unable to provide, any economic justification for the tariff it has set;
- 6.1.2 contend that the tariff is inflated, economically inefficient and an incident of the monopoly which SAMPRA and its members (particularly the multinational record companies) hold;
- 6.1.3 are accordingly unable to reach agreement with SAMPRA as to the amount of the royalty, as contemplated in s 9A(1)(b) of the Act;
- 6.1.4 have thus referred to the Tribunal the dispute as to the amount of the royalty payable to SAMPRA’s members for playing, as background music in the retail stores, the sound recordings in

¹⁰ The document is headed: Retailer’s Statement of Particulars Pleadings bundle page 1.

¹¹ Particulars of Claim page 3 – pleadings Bundle.

¹² SAMPRA’s plea headed SAMPRA’s Answering Statement – page 18 paragraph 4

respect of which SAMPRA's members own or control the copyright, as envisaged in terms of s 9A(1)(c) of the Act;

6.1.5 are, pending the outcome of this referral, playing the royalty claimed by SAMPRA (based on the tariff) into the Collecting Society Regulations.

[11] SAMPRA denies these allegations. It persists in its contention that it has discharged the responsibility to set a tariff in a responsible manner.¹³ It further contends that it is obliged, in terms of Regulation 7(1) of the Collect Society Regulations to make the entire repertoire its administration to potential users.¹⁴

[12] Further thereto, the retailers alleges that 'besides the tariff being set at a level that is economically unjustifiable, the structure thereof, as well as the manner in which SAMPRA has sought to implement it, are, ... unreasonable, unfair and discriminatory (and thus contrary to, *inter alia*, regulation 7(1) of the Collecting Society Regulations) ...'¹⁵ This is as well denied by SAMPRA.¹⁶

¹³ Answering Statement page 19 – paragraph 6.1.1

¹⁴ Ibid page 20 – paragraph 6.1.2

¹⁵ Particulars of Claim page 9 – paragraph 16

¹⁶ Answering Statement page 57 paragraph 16

How SAMPRA determined the tariff.

[13] It is necessary to consider as to how and the factors SAMPRA took into account in setting its tariff for the licence fee payable by users. Keith Leister, (Leister) an attorney by profession, though not practising as such, testifies that he, as the chairman of the board of SAMPRA, considered it to be his responsibility to lead SAMPRA in developing tariffs for different forms of public performance usage. He appointed a committee specifically for setting up the tariffs.

[14] The said committee consists of himself, David Du Plessis (Du Plessis) and Ignatius Smit (Smit). Prior to SAMPRA's accreditation, he (Leister) already had engaged Du Plessis (who at the time, was employed as Operations Director of Recording Industry of South Africa (RISA) and the CEO designate of SAMPRA) in the development of the tariffs SAMPRA intended to implement once accredited. On SAMPRA's accreditation, Smit got employed as National Sales Manager.

[15] In setting the tariff, they considered a number of factors and various structures around the world. They found setting the tariff on square metre age as simple to compound as opposed to that of South African Music Rights Organisation (SAMRO). Samro tariff is set on square meter age and a number of employees in the retail store. They found it fair to set a tariff that will accommodate the small retailers. The tariff of R500.00 per annum for a 50m² of audible area was then set as depicted hereunder¹⁷

¹⁷ Annexure A: Pleadings bundle (Pink file). Pages 12-15

Fees: Size of Premises (Audible Area in square metres)	Licence Fee per store per Annum (exclusive of VAT)
Up to 50	R500
51 to 100	R1000
101 to 200	R1500
201 to 300	R2000
301 to 500	R2500
501 to 750	R3000
751 to 1000	R3500
1001 to 1250	R4000
1251 to 1500	R4500
1501 to 1750	R5000
1751 to 2000	R5500
2001 to 2500	R6000
2501 to 3000	R6500
3001 to 3500	R7000
3501 to 4000	R7500
4001 to 4500	R8000
4501 to 5000	R8500
5001 to 6000	R9000
6001 to 7000	R9500
7001 to 8000	R10000
8001 to 9000	R10500
9001 to 10000	R11000
Every additional 1 to 1000 (Above 10000)	R500

[16] "Audible Area" is defined as the '[t]otal area, measured in square metres, in which the publicly performed sound recordings can be heard on your premises (whether indoors or outdoors). For the avoidance of doubt, this is not confined to the area to which customers have access and can include the area behind any serving counter and the back office...[T]he audible area of each storey, floor or level should be included for the purposes of measuring the total audible area of [the] premises.'¹⁸

[17] Leister testifies further that the committee analysed the tariff as being fair. He opines that the amount of the tariff as set is tantamount to R1.33 per day. In substantiating his opinion, he gives Mikes Café as an example. The Café is situated around the corner of this Court building, which occupies on the face of it, not more than 500 square metres. He says he bought a packet of crisps and a can of coke. He says out of the coke's R2.50 margin, the shop owner will be able to cover two days' worth of SAMPRA's tariff.

[18] David Du Plessis (Du Plessis), a legal practitioner by profession and a musician from his primary schooling, testifies that

¹⁸ Ibid

he is a musician and a performer with vast experience in music industry. The gist of his testimony is centred on the formation of music from an authored or written point to a composed and performed and up to the promotion or marketing of the music. He describes at length the differences of what he terms good music and sound music. He opines that the record companies invest in the marketing of a sound recording. He further opines that no company would conduct a recording business without any prospects of receiving profits from their investments.

[19] The promotion of the music is through advertising by means of, for example, posters, YouTube or print media including sampling. The promotion exercise is made in order to create awareness of art work to the public. He says all that was considered in coming to 31 tariffs as shown in paragraph [15] above and the applicants form for repertoire license. They cloned the Australian tariffs. Their tariff is per square meter.

Unilateral setting of tariff

[20] Leister, Du Plessis and Smit, being former employees of Samro, set the tariff without first consulting with the retailers. Du Plessis testified that due to the experience they have on the attitude shown by retailers at the time of setting Samro's tariff, they adopted "a take it or leave it" approach. He, under cross examination, stated that he found it to be "silly" to engage the retailers in setting the tariff, recalling the retailers' attitude at the time they were setting Samro's tariff. The retailers' attempt to engage SAMPRA in finding out the explanation as to how SAMPRA arrived at the amount it did, did not bear fruits. This was even displayed by Smit in his response to some retailers. He stated: 'SAMPRA's tariffs [were] developed by looking at the International Best Practice and the tariff scales of PPL (Sound Recording Collecting Society in the United Kingdom) and PPCA (Phonographic Performance Company of Australia) as well as Canadian model. This provided the basis of what criteria should be used i.e. Trading Square metres for Shops...I also looked at their rates per tariff, but did not do an outright Currency conversion. I used the Big Mac Index to bring the Pound Sterling, Australian Dollar and South African Rand in line with each other...'

[21] Du Plessis concedes that the retailer's primary complaint on the tariff is that the tariff is too high. He was further taken to task as to why they offer almost 60% discount to Musica (people who retail music) above other retailers. He states that a discount is not a right but a privilege. Musica or retailers, who retail in music, may be granted up to 100% discount. This, however, is not principled and thus not something everybody would be entitled to. Granting of discount to retailers is a discretion exercised during the negotiation process when concluding a license agreement. He says a "discount is a basic tool of negotiation, nothing more, nothing less." He however opines that the tariff should be set and be retrospectively ordered from 2009 when retailers started paying into escrows account.

[22] Lauri Frederick Rechardt (Rechardt) an attorney at law, a member of Finnish Bar¹⁹ and a consultant for the International Federation of the Phonographic Industry (IFPI) testifies that IFPI, as the international trade body of the recording industry that performs the same functions as SAMPRAS here in South Africa, collects the royalty fee for copyright owners from the users. He is

¹⁹ Helsinki, Finland

instructed by SAMPRA to produce a comprehensive overview of the rates around the world as he could give. He says there are two elements in determining the royalty tariff. First is the structure element. These are factors taken into account when calculating the tariff. The second element is the level of the rate²⁰. The principles followed or applied by IFPI in setting the tariff are set out by European Court of Justice (ECJ). According to ECJ, each member state is obliged to ensure that performers and producers are paid equitable remuneration when sound recordings are used in public performance or broadcasting. The ECJ says the equitable remuneration should reflect the value of the performer's rights in trade. It is, however, very hard to get evidence of the precise economic value of the right to the users. In essence, whoever, including retailers who use the music as a background in their store should pay. There are no studies of the value of music for retailers because one can conduct a retailing business without playing background music.

[23] He testifies that in structuring the tariff for retailers, it is at times taken into consideration the number of consumers coming into the retailer shop instead of the floor space. The floor space

²⁰ The amount of money fixed as tariff.

expressed in terms of square meters dominates structuring of the tariff. The popularity of the performer is not taken into account when setting the tariff. All that is considered is the floor space utilised by the retailer. He opines that SAMPRA's structure of tariff in terms of square meter age is in line with the international practice. He further opines that the amount SAMPRA is charging is within the bounds of normality comparatively speaking.

[24] He under cross-examination testifies that the retailers are very important customers of recording industry. There is a communality of interest in setting a fair rate of a tariff payable by retailers for background music used in their stores. Nothing contrary to what he says in chief was raised. He concedes that the value of music to users has not been quantified and cannot be quantified. He says the retailers must pay before they play the music. Putting it differently, he says that the music rights are a product that has a price tag which should not always be low, but should be market related. He concedes that the recording industry should agree with the users of their music on the tariff prior to setting the amount. He lastly says, for simplicity purposes, determination of the tariff should be on square meters the retailer is occupying.

[25] Peter Baron Paoliello, better known as Peter V (Peter V) has been in the music industry as a drum mist, a singer and disc cutting engineer at EMI records. He gives a background of the music industry from the writing of songs, performance and the recording on compact disc (CD). He explains the difference between cover music and original music. He says both are available in the market. The user may choose to use the cover version instead of the original. Obviously, the original is more expensive than the cover version. He further says royalty rates are based on popularity and importance of the artist.

[26] On my enquiry as to whether the royalty rates of Whitney Houston can be equated with that of Lady Gaga, he says Whitney Houston got to a royalty level she is at over a period of 10 – 15 years and probably at the maximum royalty category. Lady Gaga came in and became famous a little quicker than Houston but both, he opines, are in the same royalty category because they are superstars. He, however, cannot categorise the royalties into levels. Competition is however tight. The older the artist, the less popular the artist became, the less royalties accumulate. He accepts that other artists are great recording artist because of

them being great singers and their songs maintain their royalty level.

[27] Sean Reese James Watson(Watson) the Managing Director of Sony Music Entertainment Africa (SMEA) and previously a board member and director at EMI music (Pty)Ltd testifies that privacy and the development of technology impacted on music industry, the artist and the company's availability to monetise their work. He says some artists' work sell like "fat cakes". He illustrates by giving Brenda Fassie's record, Vuli Ndlela, as an example. He says Chiko Twala, Brenda Fassie's manager and promoter at the time, dropped them a TDK cassette with the song Vuli Ndlela. Chico demanded payment before they could play the song. After listening to the song, he predicted a "hit" and thought it was going to sell 50 000 units a year. Instead, it sold 50 000 units a day during 21 – 24 December of that year. He says that the sales of hard copied recordings declined due to technological means of accessing music. People still access music, they still use music but the performers and artists no longer enjoy royalties as they used to. He says payment of licence fee by retailers or users

before usage of music in retail stores will contribute immensely to the sustainability of the music industry.

[28] The statement he made, forming part of “pleadings” was questioned under cross-examination. Paragraph 18 of his statement states: ‘I do not agree that it is important to record companies and certainly not to Sony Music ... to promote new albums through having them played in retail stores’ Mr Blumberg²¹ demonstrates how that statement is not correct by taking him through the process of how Sony awarded Mr Price an award for its in house radio station (Red Cap Radio) for achieving sales in excess of 25 000 units. He was not aware or did not know of such an award irrespective of him being the Managing Director of Sony at the time.

[29] Mr Blumberg further demonstrates his suspicion to him that he (Watson) is not an absolute author of “his” statement.²² He further illustrated how suspicious he is that Leister, who was his employer or boss prior to drafting the statement, is in fact the author. He refers Watson to paragraph 13.9 at page 292 of the

²¹ Adv. Blumberg

²² Page 291 - 294

“Pink” file where he states that ‘... a minimum number of 500 copies of CDs are manufactured of a new album. The first 500 copies are used to sample the album to print media, to retailers...’ This too, is used to illustrate that his statement of disagreeing that it is not of importance to record companies to promote new albums through having them played in retail stores is not correct. He finally concedes that such sampling is made by record companies and that such sampling focuses on publication of new albums from which they expect consumers to respond to this exposure by making purchasing decisions.

[30] Kobie Swart (Ms Swart) obtained Bachelor of Music and Honours Cum Laude from Potchefstroom University. She obtained her Master’s degree from Southern Methodist University in Dallas, Texas, USA where she earned some “Honour”. She is registered with HPCSA²³ as Music Therapist. She has been doing music therapy for 17 years working with children and adult on various diseases, disorders and or disabilities.

²³ Health Profession Council of South Africa

[31] She testifies on how music can affect consumers' consumption in the retail store. Music affects the consumers' cognitive, emotional and behaviour specifically with regard to consumers' attitude and perception, time and money spent at the retail store with music ambience.

[32] In provisionally closing its case, SAMPRA, through, Mr Murphy applied to hand up the statement by Lubabalo Ntsonkota²⁴ as evidence. The application is unopposed but for the relevance of the contents for the purposes of determining the reasonableness of the tariff set by SAMPRA.²⁵ On my perusal of the statement, I indeed agree with retailers' counsel that the contents are irrelevant for the issues to be determined.

[33] Dr Charles Scott Areni (Prof Areni) a Professor in marketing at the University of Sydney Business School, in the state of New South Wales, Australia, is the last witness to testify in these proceedings. He testified after Prof Donald Ross (Prof Ross), who

²⁴ Summary evidence – by Lubabalo Ntsonkota – page 285 – 288 of pleadings bundle. (Pink Bundle) Page 1334 record

²⁵ Ibid

took a stand for the retailers. He testifies for SAMPRA. He says SAMPRA instructed him to comment on the use by retail business of the atmospheric music to achieve commercial objectives and not to express an opinion as to whether the present SAMPRA tariff is reasonable or not. He specialises in (i) environmental psychology, (ii) store layout and design and (iii) the effects of in store promotions. He, as a consultant, specialises in advising retailers on how to design their shops in order to create good ambient shopping space. He explains that under environmental psychology, retailers intend to attract shoppers in their commercial space for them to come and buy. The design of their commercial space affects the shoppers' behaviour.

[34] He says that lighting, as well as background music form an ambient part of the environment of the retail store. He says music is not always there to be listened to, but it creates the right mood, the right environment and atmosphere for a typical shopper. He states that most retailers in Australia play music in their stores. He gives the Big W (Woolworths as it is known in South Africa) as an example. He conducted a research on what type of music was

appropriate at Big W stores. He researched as to which music created a better ambient at what times.

[35] He states that Big W ended up creating an in-house radio station that would run advertisement at regular intervals in between music played. Advertisement, he says, is the key factor that enhances the retail stores' profit. Music tempo affects the speed at which shoppers do things. They can either spent a lot more or less time, depending on the type of background music that is been played. Music tempo may be determined by the atmospheric profile of the shopper, (age of the shopper). The younger may welcome the ambient of the high tempo music as opposed to the elderly shoppers.

[36] On the question of whether it is possible to quantify value of music played by retailers in their stores, he states that there is no research, to his knowledge, that determines the tariff value of atmospheric music played in retail stores. In fact, there is no one near any kind of estimate of the appropriate tariff. It would be impractical to pinpoint the exact maximum commercial value of

music to their retail performance. He opines it would be too hard to achieve. It would be too expensive for what it may be worth. Prof Areni agrees with Prof Ross that it will be very costly to research and find what the tariff rate should be and would, for practical purposes, be impossible for them to, with certainty say.

[37] He, on the type of music to be played in retail stores, opines that retailers are at liberty to play any music, whether international or local. Of importance to them is the type of music they think will help them to maximise their financial performance as a retail operator. He emphasises the need of music in retail stores to create an ambience. SAMPRA's duty is to maximise the royalties it collects for redistribution to the artists it represents. However, no one knows if the rates are correct, high or low. He agrees with Prof Ross that if the tariff is too high, the retailers will not pay for SAMPRA licence which will affect the royalties. He opines, on those bases, that SAMPRA should be allowed to set the tariff SAMPRA believes to be in the best interest of its clients. He further opines that the markets should determine the amount payable. If SAMPRA's tariff is too high, then, re-negotiations may be entered into to determine the amount suitable for all.

[38] He says he is not an expert to opine on what must be taken into account in setting the tariff, for example, whether the tariff should be set in accordance with the number of consumers attending the retail stores or in terms of square metre age. He cannot be of help to that effect. His emphasis is to let SAMPRA set its tariff. The retailers may engage SAMPRA for re-negotiation of the tariff if they deem the one set to be too high.

[39] He is not an expert on retailing sector in South Africa. His experience is exclusively Australian. He does not know what the environment is like in South Africa. He is reluctant to compare SAMPRA's tariff with the equivalent Collecting Society of any country especially Australia. He acknowledges that Australia's PPCA's tariff is lower than that of SAMPRA. He says no one knows that PPCA tariff could be the lowest and below optimal tariff rate.

[40] He opines that no one has the idea of what value a single retailer, like Mike's Café referred to earlier, has of the music composition. He further opines that no one has an idea of what value the entire retail industry attaches to the music composition. He sees no point in comparing South Africa with Australia in determining the tariff SAMPRA should set.

[41] On the question of the retailers' threat not to pay the licence fee for playing music in their retail stores, he says that if the retailers find it to be in their best interest to do so, no one can stop them. If their threat is simply to bluff SAMPRA, then the credibility of their threat must be questioned. If they stop paying SAMPRA's licence but establish in-house radios or organise other type of music not regulated by SAMPRA to be played, then that implies that background music in their stores is of certain value. If they stop playing the music to infinity and regards that to be of interest to their consumers, so be it. All he emphasises is that SAMPRA is there to collect royalties with responsibilities to pass them on to its clients. SAMPRA is thus tasked to maximise the amount for royalties.

[42] Esther Serena Job (Ms Job) is first to take the stand for the retailers. She is an admitted attorney (though not practising as such) employed as a legal advisor by Foschini Group. Foschini Group has various divisions. @Home, Markham's, Exact and Total Sports are among the divisions of Foschini Group that play music in their retail stores. She explains how much these divisions budget for, for the music played in stores. The consumers liked the music @Home plays in their stores. @Home requested DMX to produce CD's for sale at @Home stores. @Home sells the CD it compiles at the instance of shoppers or consumers who liked the music they heard played in @Home store. Such music compilation is updated quarterly at the costs of R50 000.00 per compilation (R200 000.00 per annum)²⁶. Foschini spends R1 million per annum. Markham's outsourced the production of CD compilation. Their compilation is done by Selwyn Shandell who charges them R75 000.00 for every new CD compiled.

[43] Ms Job testifies that retailers only knew of Samro licence fees. They knew of SAMPRA when they received a letter from Smit demanding payment for SAMPRA's licence fee. SAMPRA invoiced

²⁶ Exact budget

them. An umpteenth communiqué was exchanged between SAMPRA and the retailers. SAMPRA impressed on them a “take it or leave it” approach. They, the retailers, learned for the first time the difference between Samro and SAMPRA at that time. Foschini Head Office was responsible for payment of Samro licensing fees and each division budgeted for its day to day compilations with different play lists.

[44] Dr Donald Ross, who prefers to be called Don Ross (Prof Ross) majored in Economics, Mathematics and Science in his junior degree and obtained his Ph.D. in Economics. He is a Dean, Faculty of Commerce, School of Economics at the University of Cape Town. He is a Program Director for Methodology at the Centre for Economic Analysis of Research in Georgia State University. His statement included a report by Prof Glen Harrison – the Director of the Centre for Economic Analysis of research at Georgia State University.

[45] As an economist, he defines Economics as ‘the study of the relationship between demand and supply’. He says he is qualified

to express opinions on SAMPRA's tariff. In his research, he used the "game theory". He describes game theory as 'the study of more than one agent trying to make plans knowing that another agent is going to be responding and reacting to those plans'. The retailers briefed him to assess the level of SAMPRA's tariff from an Economist point of view. His brief was to assess SAMPRA's tariff and to give an opinion to the tribunal in determining the reasonable price. He opines that Semptra's tariff is too high. He says a price is normally set through the process of a regulated competition among independent sellers and the purchasing decisions of independent buyers. In simpler terms, he opines that the price is set by the market forces. The market forces is what he terms "demand and supply" as central to economics.

[46] He states that this tribunal should seek to set a tariff that optimises public welfare. A tariff that is neither too high nor too low, but which the service providers would realise profits whereas the consumers would purchase voluntarily. Competition in service providers must be encouraged. Monopoly on the part of service providers or suppliers should be discouraged. Competition is not met when the suppliers enjoys monopoly. Where there is

competition, the market forces normally produce a reasonable price.

[47] He opines that SAMPRA's tariff is higher than the developing countries including Australia. He sees no justification for that. SAMPRA's tariff is overpriced relative to the wealth of South African consumers. He further opines that should SAMPRA's current tariff be affirmed, some retailers would cease to play recorded music. This may result with the consequence that the ambience in South Africa's public places would change even for worse.

[48] He proceeds by comparing the tariff set by SAMPRA with its Australian counterpart, PPCA. In converting the PPCA tariff from Australian Dollar to South African Rand, one can either use the exchange rates (rates at which one can buy one currency using the other currency on international currency markets) or the purchasing power comparison (where one is trying to compare values of currency to what one can do with or put differently, to what one can purchase in the countries under comparison).

[49] Continuing to compare the Australian dollar to South African rand, he says that one can buy more goods and services in South Africa than in Australia. This means that the purchasing power

parity implies how many Rands one needs in South Africa to buy what one Australian dollar would buy in Australia. The purchasing power parity is determined and recorded quarterly by various agencies including the World Bank. He continues to say that if one compares Australia PPCA tariff with South Africa SAMPRA tariff using the purchasing power parity method, one will realise how cheap PPCA's tariff is compared to SAMPRA's.

[50] In response to a question on what he thinks considering the contents of the letter written by Smit of SAMPRA to Ms Muller of Pick & Pay, where Smit stated that 'he used the "Big Mac" Index to bring a Pound sterling, Australian dollar and South African rand in line with each other. SAMPRA used PPP rather than exchange rates. He criticises "Big Mac" Index used by SAMPRA in setting its tariff. He regards it as a very quick and dirty window into purchasing because currency is relatively under-valued or over-valued by exchange rates.

[51] He reiterates that SAMPRA's tariff is substantially greater than that of PPCA. He recommends a tariff that is at a level that will optimise overall public welfare. He recommends the following tariff.

	Actual SAMPRA rates 2009	Recommended rate using PPP comparison, 2009 rates	
Size of store			
Up to 50m ²	R500	R279.46	
Between 50 and 100m ²	R1000	R279.46	
Between 100 and 200m ²	R1500	R337.32	
Between 200 and 300m ²	R2000	R376.10	
Between 300 and 500m ²	R2500	R399.49	
Between 500 and 750m ²	R3000	R511.52	
Between 750 and 1000m ²	R3500	R549.69	
Between 1000 and 1250m ²	R4000	R646.94	
Between 1250 and 1500m ²	R4500	R646.94	
Over 1500m ²	R5000 – R11000	R646.94	

[52] He believes that the tariff level he recommends is closer to the efficient market rate than the current SAMPRA tariff. He opines that even though it is higher than the competitive market rate, the fact remains it is higher than the tariff a competitive market would produce.

[53] He confirms under cross examination that the purpose of his research as instructed by retailers was to determine if SAMPRA's tariff is reasonable and not whether there is value attributed to music in their stores. He does not think that the comparison of SAMPRA's tariff made by Armitage and Richardt is economically relevant. He opines that the retailers are interested in fine music familiar to their patrons. This results in retailers having special interest in SAMPRA's playlist. This means that SAMPRA's playlist or the music it holds the rights is of special value to the retailers given the preferences of their customers or patrons.

[54] Professor Ross did not consult SAMPRA in his research because, as he says, he avoided biasness in the report. He accepts, as a matter of fact and law that the works of performers and

music recording companies constitute their intellectual property. He states this because he lectured students on Intellectual Property Economics and Law. He concedes that the intellectual property SAMPRA is managing the licencing fee has value to the retailers.

[55] It is put to him under cross examination that the payment of money by retailers into escrow account one may infer that SAMPRA's tariff is optimal. He denies that proposition and gives Eskom *vis-à-vis* pricing of electricity in South Africa scenario as an example. He says the mere fact that the members of the communities consume electricity amid the price renders it optimal.

[56] He lastly opines that this tribunal's role is not to judge which case is superior in law but what price may be said to be reasonable in the circumstances. He says this tribunal should disapprove SAMPRA's tariff that has been set unilaterally which the retailers regret. The retailers raised their concerns over the price. It is not that they refuse to pay, but they shame SAMPRA's "take it or leave it" approach. The Copyright Act did not create a

bargaining process. The referral may to a certain degree, be construed as the bargaining process. The tribunal cannot ignore the “offers” and “counter offers” made by the parties.

Law

[57] Section 9A of the Copyright Act as inserted by section 3 of Copyright Amendment Act 9 of 2002 provides:

‘9A Royalties

- (1) (a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9 (c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.
- (b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.
- (c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may refer the matter to the Copyright Tribunal referred to in section 29 (1) or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965).’

[58] Section 9 (c), (d) and (e) of the Copyright Act stipulate that

'Copyright in sound recording vests the exclusive right to do so or to authorise the doing of any of the following acts in the Republic:

(a)...

(b)...

(c) broadcasting the sound recording;

(d) causing the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster;

(e) communicating the sound recording to the public.

Evaluation:

[59] It is common cause that SAMPRA has exclusive right to collect money from users of music recordings. It is further common cause that the Retailers, as users of music, play musical recordings as background music in their stores. SAMPRA is obliged, in terms of Regulation on the Establishment of Collecting Societies in the Music Industry ²⁷(Regulations) to 'administer public

²⁷ Promulgated on 1 June 2006 under GN 517 in GG 28894

playing rights effectively and efficiently'²⁸ and to 'enter into framework agreements with representative trade associations and user groups concerning the use of the repertoire by potential users affiliated to them.'²⁹ SAMPRA unilaterally set a tariff. It implemented it. The retailers do not accept the tariff and regards it as excessive and unreasonable in the circumstances. Some retailers opted to pay a certain sum of money in an escrow account³⁰ pending the outcome of this referral to this tribunal. The Retailers pay the money in the escrow account as provided in terms of Regulation 7(5). The Regulation stipulates that '[s]hould a tariff proposed by the collecting society not be accepted by the trade associations and representative bodies or any potential users, user groups, or individual users, such potential users and user groups shall have the option to pay the amount demanded by the collecting society into an escrow account, pending the outcome of a referral to the Copyright Tribunal or, ...'

[60] The retailers concede that there is value in music played in their retail stores. The concession is made after a number of days of evidence led by SAMPRA in their endeavour to show that music played by retailers in their stores is of value to their businesses.

²⁸ Regulation 6

²⁹ Regulation 7(2)

³⁰ Escrow account can be equated with Trust account.

The retailers submit that the said value has not been economically determined either by SAMPRA, the Retailers or any Court or Tribunal both locally and internationally. All that the Retailers seek is for this Tribunal to determine as to whether the tariff set by SAMPRA is reasonable in the circumstances and to make such order as envisaged in terms of section 31(5) of Copyright Act.

[61] I think it is important at this early stage to point out that section 9A of the Copyright Act re-established a royalty known as "needletime". It is an intellectual property owned by record companies and the performers. SAMPRA as a Collecting Society is accredited and authorised to collect and distribute royalties on behalf of its registered members.

[62] SAMPRA is obliged to set up tariffs. Du Plessis testified that they set the tariff unilaterally. They did so knowing from the experience they gained while employed by Samro, the attitude of the users of recordings. SAMPRA contravened the provisions of section 9A (1) (b) of the Copyright Act. Lister, Du Plessis and Smit knew or reasonably expected to have known the provisions of the

Copyright Act. The section, regulations and the rule of law dictates to SAMPRA to use the correct legal process. Regulation 7(3) of the Collecting Society Regulations stipulates that 'as part of a framework agreement... the collecting society may negotiate... with user groups or with individual user, a tariff that determines the amount...' This, in my view, obligates SAMPRA to enter into "negotiations" with the retailers as users before determining the amount for the royalty.

[63] Lister and or Du Plessis and or Smit, bearers of legal knowledge, knew or reasonably expected to have known what the Act required of them as the collecting society to afford the users or the retailers an opportunity to submit their inputs prior to the setting of the tariff. An agreement with the user of the sound recording, to determine the amount of the royalty contemplated in terms of section 9A(1)(b) read with regulation 7(3) is peremptory. Their knowledge of the users' attitude showed in their previous encounter is not a bar to determine the amount in agreement with the users. I am of the view that had they contacted the users prior to setting the tariff they did, this matter may not have been referred to this tribunal. Watson conceded in his testimony that the retailers'

input would have assisted SAMPRA in setting the tariff. SAMPRA's "take it or leave it" approach is not procedurally fair.

[63] It is common cause that SAMPRA is authorised to administer public playing rights effectively, efficiently and to maximise the economic exploitation of the rights entrusted by the right holders for their direct benefit. SAMPRA is further authorised to distribute the proceeds of such exploitation equitably amongst its members.³¹ In its attempt to exercise its authority, it set a tariff which the retailers as users, contends is excessive. The dispute is referred to this tribunal to determine if the said tariff is reasonable in the circumstances.

[64] A question was imposed on both Professors Areni and Ross respectively if this tribunal is empowered to set the tariff price. Prof Areni opined that the price determination in respect of the needletime royalty should simply be left to market forces, rather than it being determined by a tribunal. The answer to this question is in my view, provided in section 9A (1) (c) read with section 31(5)

³¹ Regulation 6(2) of the Collecting Society Regulations; Certificate of Accreditation

of Copyright Act. The word “scheme” as used in section 31(5) requires determination. For ease of reference, section 31(5) provides:

‘Subject to the provisions of subsection (4), the tribunal shall on any reference under this section consider the matter in dispute and after giving the parties to the reference an opportunity of presenting their respective cases, make such order, either confirming or varying the scheme in so far as it relates to cases of the class to which the reference relates, as the tribunal may determine to be reasonable in the circumstances.’(my underline)

[65] The word “scheme” is neither defined in the Copyright Act, Collecting Society Regulations nor the Performers’ Protection Act 11 of 1967. The word “scheme” is defined in Shorter Oxford English Dictionary as ‘a plan of action’ In my interpretation of the word, I am of the view that the amount payable of any royalty contemplated in section 9 and 9A of the Copyright Act is embraced in the word “scheme”. I, as a result, find that the tribunal is empowered and required to determine the amount of the tariff of the royalty to be payable, especially in the absence of the agreement between the user of the sound recording, the performer and the owner of the copyright or their representative collecting societies as envisaged in terms of section 9A(1).

[66] In determining the amount of the tariff, SAMPRA contends that this tribunal should consider the value of sound recordings played by retailers has to their businesses. SAMPRA instructed Prof Areni to research on the value of music to the retailers. Prof Areni, in preparing his report, had no sight of SAMPRA's tariff up to the time of his testimony. He had no knowledge of South Africa Copyright Act or Collecting Society Regulations. He further had no knowledge of the sources SAMPRA used in setting its tariff. He knew nothing about the process SAMPRA followed in setting the tariff. He could not even differentiate between SAMRO and SAMPRA.

[67] Prof Areni testified that he laboured under the impression that his mandate was to persuade the tribunal to enforce SAMPRA's tariff. He did not know that SAMPRA administers the needletime royalty rights of copyright owners in sound recordings. He accepted under cross examination to have been careless in his usage of the word or terminology "economic efficiency" without first finding out from Economists what it meant. He further conceded that he is not an expert in Economics but a consultant who advises retailers what type of music to play in their stores. He specialises in

“interior decoration” that enhances ambiance in the retail stores with a view to attract consumers who will ultimately enhance the retailers’ profit. He recommends that SAMPRA must set a tariff that would maximise the amount of royalties that can be collected and redistributed to the clients it represents. He opines that if retailers find the tariff to be too high, they must negotiate with SAMPRA. Put differently, he recommends confirmation of SAMPRA’s tariff which he had no knowledge of. Prof Areni’s testimony was in my view not of assistance to the tribunal in determining the reasonable tariff.

[68] Professor Ross testified that it is prohibitively expensive to determine the marginal value of music played in retail stores. As indicated earlier, both Professors Areni and Ross respectively testified that there is no research that has been made thus far in determining the value of music in the retail stores. Professor Ross recommends the tariff as set out in paragraph [51] above. Contrary thereto, Prof Areni opines that Prof Ross’s recommendation of setting tariff in comparable rate to Australia is entirely arbitrary.

[69] It is common cause that the economic analysis of setting a tariff cannot work. It is accepted that the market based approach does not work. All that is left is the benchmarking approach. Mr Lister's evidence shows that SAMPRA used the benchmarking in coming up with the tariff it set³². They used the Big Mac Index on Australian PPCA tariff. Prof Ross recommends usage of purchasing power parity as opposed to SAMPRA's Big Mac Index in coming up with a tariff that the tribunal may deem reasonable. He states that the tribunal should take the (i) absence of free competition on the supply side that (ii) creates excessive inefficient pricing that maximises the monopolist's gains but prejudices the users or consumers in the economy into account in setting the tariff.

[70] In my assessment of the evidence and the submissions made, I find the tariff set by Sampras to be invalid because it has neither been set by agreement between the users and the owners' or their representative collecting societies' copyright nor by any tribunal or arbitration as stipulated in terms of the Copyright Act. The tariff set by SAMPRA stands to be set aside. I indicated earlier

³² See paragraph [15] above

that the needletime royalty is an intellectual property of the owner. Intellectual property is deemed to be property as defined in law and the owner's right is protected by section 25(1) of the Constitution of the Republic of South Africa Act 1996. Section 25(4) (b) of the Constitution provides: 'For purposes of this section, property is not limited to land.' The setting aside of the tariff set by SAMPRA is not deprivation of the intellectual property of the owner of their right to property as SAMPRA contends. The infringement of the owners' rights by retailers in communicating the sound recording to the public must be compensated by a reasonable tariff.

Conclusion

[71] The tariff I am about to set, as SAMPRA ought to have done, is not determined on the economic value attached to background music played by the retailers in their stores but to let users to remunerate appropriately the owners of the royalties. Value has not been determined. I am not an expert in Economics or any other field to determine the value attached to music by retailers. There is no evidence before me that determines such value. The expertism in any field should be left for the experts in that field). I accept that music played in the retail stores, whether original, cover version or

live, contributes to the retailers' stores ambience that may or may not affect the consumers' mood which may or may not increase sales for the retailer.

[72] In setting the price, the owner of the retail store, for instance, Mike's Café, considers a number of factors in coming to a fixed price. There is no evidence tendered on how Mike's Café shop owner manages to make a profit of R2.50 over a can of Coke. My enquiry from Lister of factors they considered in coming up with the price they set did not bear fruit. There is no evidence quantifying either the creator, the performer or the companies' costing of a sound recording. I heard that popularity of the performer may increase the demand of the sound recording. I learned that such demand does not affect the pricing of the sound recording. It only increases the sales. Every retailer's objective is to break even and make profit. It is wrong for the owner of a property to set a price based on what the consumer makes as a profit from his/her merchandise. Put differently, the value attached to the merchandise by the consumer should not affect the pricing by the owner of the property.

[73] SAMPRA developed the tariff by looking at the international best practice and the tariff scales of their counter parts in London (PPL) and Australia (PPCA). It further used the Big Mac Index to bring the Pound Sterling, Australian Dollar and South African Rand in line with each other. It is an accepted practice to compare with the international world in developing schemes that were never made in South Africa. This must however be done taking into account the interest of justice. It will not be in the interest of justice to, in my view, "cut and paste" the international practice without engaging the market forces who are affected by the "scheme".

[74] Prof Ross opined that the currencies of Australia and South Africa attract each other. Both currencies are based on export profile on extracted industry and minerals. Both are user friendly. He further opined that Australian PPCA's tariff is a best international benchmark for a tariff that can be set for South African SAMPRA. He finds no justification for the tariff set by SAMPRA because the tariff is higher than the developing countries including the favoured Australia. He emphasised that the tariff set by SAMPRA is overpriced relative to the wealth of South African consumers. I am persuaded that should I confirm the figures SAMPRA used as the tariff pricing, some retailers may cease(if the

threat turns to reality) to play sound recordings which SAMPRA is authorised to collect and distribute royalties, then the ambience in South African public places will change for the worse. It will equally be undesirable to let the retailers to communicate the sound recording to the public for less which may result in removing the bread from the table of the owners of the royalties. Peter V Paoliello (Mr.V) opined during his testimony that the price to be set as the tariff should be counterproductive. He opined that an excessive or low price will be counterproductive.

[75] Kobie Swart (Ms Swart) the Music Therapist, impressed on the tribunal that the human body cannot ignore music in the public spaces. The consumer's mood may be changed for good or for worse by them either liking or disliking, respectively, the music they hear in stores.

[76] Most witnesses' testimonies are in line with Prof Ross's recommendation that this tribunal must set a tariff that optimises public welfare. It is recommended that a tariff to be set by the tribunal should neither be too high nor too low, but a tariff which the owners of the royalty will realise profits on the one hand and the consumers will purchase voluntarily. It is hard, in my view, to

satisfy the preferences of either party. It has already been indicated that I am not tasked to judge as to which case is superior in law but to set a tariff that may be said to be reasonable. The following tariff will, in my view, optimise public welfare. I am further of the view that it is reasonable in the circumstances. The tariff is operative from 2008 until December 2014. CPI index may be used in determining the tariff adjustment for the subsequent years or as shall have been agreed upon between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.

	Tribunal's reasonable rate from 2008- 2014
Size of store	
Up to 50m ²	R389
Between 50 and 100m ²	R389
Between 100 and 200m ²	R568
Between 200 and 300m ²	R620
Between 300 and 500m ²	R840
Between 500 and 750m ²	R930
Between 750 and 1000m ²	R1050
Between 1000 and 1250m ²	R1110
Between 1250 and 1500m ²	R1110
Over 1500m ²	R1220

Costs

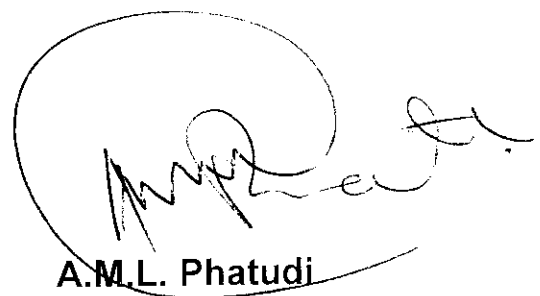
[77] Regulation 36(1) of Copyright Regulations stipulates that '[t]he costs of and incidental to any proceedings shall be in the discretion of the tribunal, which may direct that any party against whom an order for costs is made shall pay to any other party a lump sum by way of costs or such proportion of the costs as it may deem just.'

[78] Sampra's "take it or leave it" approach at the time of setting the tariff prompted the retailers to refer the matter to this tribunal. The retailers succeed. They are thus entitled to their costs.

[79] I, in the result, make the following order.

[79.1] The tariff set by SAMPRA as set out in paragraph [15] of this judgment is set aside and replaced with the one appearing at paragraph [76].

[79.2] SAMPRA is ordered to pay the retailers' costs including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'A.M.L. Phatudi', is written over a large, faint circular stamp or watermark.

A.M.L. Phatudi
Judge of the High Court

On behalf of SAMPRA: Edward Nathan Sonnenbergs

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Sandown

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Dates Heard and Representation:

30/01/2012 – 18/02/2012 Mr. M Murhpy

22/10/2012 – 09/11/2012 Adv B.C. Wanless SC

Mr. M Murphy

19/02/2013 – 21/02/2013 Mr. M Murphy

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Dates Heard and Representation:

30/01/2012 – 18/02/2012 Adv. A.R. Sholto – Douglas Sc

Adv. M Blumberg

22/10/2012 – 09/11/2012 Adv. A.R. Sholto – Douglas Sc

Adv. M Blumberg

19/02/2013 – 21/02/2013 Adv. A.R. Sholto – Douglas Sc

Adv. M Blumberg