

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 10 September 2009
CASE NO: 6326/2006

In the matter between:

MULTICHOICE AFRICA (PTY) LTD 1st APPLICANT

UEC TECHNOLOGIES (PTY) LTD 2nd APPLICANT

And

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE RESPONDENT

JUDGMENT

SERITI, J

1. This matter came to court by way of motion. In the notice of motion the applicants are seeking an order in the following terms:

- (i) The later delivery of this application by the first applicant is condoned and the period for the institution of this application is extended to the date of its delivery in terms of section 96(1)(c)(ii) of the Customs and Excise Act 91 of 1964 (“the Act”);

- (ii) The determination of the respondent dated 8 April 2002 (in respect of the first applicant) and 10 March 2005 (in respect of the second applicant) that digital satellite decoders manufactured by the second applicant for and on behalf of the first applicant be classified under Tariff Heading 85.28.12.90 of Part 1 of Schedule 1 of the Act is set aside and is substituted with a determination that the said digital satellite decoders be classified under Tariff Heading 8479.89.90 alternatively Tariff Heading 8543.89 of Part 1 of Schedule 1 of the Act or such other tariff heading as the Honourable Court may deem meet.

- (iii) In respect of the first applicant only, and in the alternative to prayers (i) and (ii) above, the respondent is directed to withdraw its determination dated 8 April 2002 and to reclassify the digital satellite decoders under Tariff Heading 8479.89.90, alternatively Tariff Heading 8543.89 of Part 1 of Schedule 1 of the Act.

- (iv) It is hereby declared that the digital satellite decoders with model number 720i and 988 manufactured by the second applicant for and on behalf of the first applicant cannot be classified under Tariff Item 124.75 of Part 2B of Schedule 1 of the Act for the period 1 July 2001 to 1 January 2007.

During his opening address, the applicant's counsel advised the court that they are not proceeding with prayer 1.

2. When the matter was initially on the roll, the court, on 30 May 2007 made an order in the following terms:

“1. The matter is referred for the hearing of oral evidence, at a time to be arranged with the Registrar, on the following question:

1.1 Whether the Model 720i ‘Digital Satellite Decoder’ manufactured by the second applicant is to be classified:

1.1.1 under tariff heading 8528.12.90 of Part 1 of Schedule 1 to the Customs and Excise Act, 91 of 1964 (as contended for by the Respondent); or

1.1.2 tariff heading 8479.89.90 alternatively tariff heading 8543.89 of the said Schedule and Act (as contended for by the Applicants);

2. The evidence shall be that of any witness whom the parties, or either of them, may elect to call, subject, however, to what is provided in paragraph 3 hereunder ...”

Founding Affidavit

3. It was attested to by Mr Jan Nicolaas Petrus Meyer the Chief Financial Officer of the first applicant. He alleges that the first applicant is a subscription television service company. The core business of first applicant involves the encrypted analogue broadcasts under the brand name DStv. This application concerns only the encrypted digital satellite

broadcasts under the brand name DStv. All of the first applicant's broadcasts for M-Net (excluding the analogue M-Net Open Time) and DStv are done on a subscription basis. This implies that a member of the public can only view DStv or M-Net if that person pays the first applicant for the service. The financial viability of the first applicant depends on the subscription fees it collects from its subscribers.

4. The decoders perform various functions, namely to receive satellite broadcasts via satellite mostly originating from the first applicant's broadcast centre in Randburg, facilitate the first applicant's control over access to those broadcasts, facilitate certain interactive services, eg electronic games, programme information as well as news, weather, e-mail and troubleshooting information.
5. The first applicant was involved in the development of the Conditional Access System at the moment, the intellectual property rights in and to the system are held by a Dutch business, Irdeto Access B.V. The Conditional Access System has a component called Conditional Access Module

which is used in every activated decoder. The first applicant is contractually obliged to pay a royalty and licence fee to Irde to Access B.V. in respect of the proprietary technology and software used in the Conditional Access Module.

6. On 8 April 2002 (for the first applicant) and on 10 March 2005 (for the second applicant) the respondent determined that a digital satellite decoder is to be classified under Tariff Heading 8528.12.90 of Part 1 of Schedule 1 of the Act, that is, as a “reception apparatus for television colour, other”. By virtue of the respondent’s aforementioned determination, an *ad valorem* excise duty of 7% is payable by the first and second applicants in terms of Tariff Item 124.75.
7. The first and second applicants do not agree with the respondent’s determination and believe that the decoders should be classified under Tariff Heading 8479.89.90 alternatively Tariff Heading 8542.89 of Part 1 of Schedule 1 of the Act.

8. He further alleges that the decoder's television reception function complements the decoder's conditional access function which in turn complements the decoder's conversion function. Without the conditional access function and the conversion function of the decoder, the broadcast signal cannot be viewed by anyone. It must first be decoded before it can be converted and transmitted to a television for viewing by the subscriber. Furthermore a decoder has other applications for which people subscribe which have nothing to do with television, e.g. audio services offered by the first applicant. These subscribers use a hi-fi or other audio distribution system to listen to the first applicant's audio services. Decoders are multi-function electronic machines with individual functions with no one function being the principal function.
9. There was a supporting affidavit attached and it was attested to by Mr Constant Fourie, employed by the first applicant as manager of product development. He is a registered engineer and a specialist in broadcasting and communication systems, and in particular, digital satellite decoders. He confirmed the correctness of Mr Meyer's

affidavit in so far as it concerns the technical aspects of the application which fall within his area of expertise.

10. He further alleged that decoders do not have any moving parts being operated electronically and therefore they are not considered to be mechanical machines. They are connected to a type of reproducing equipment such as an ordinary television, a monitor, a projector and/or a hi-fi or home theatre system. Without the external reproducing equipment, the decoder would not be useful because the first applicant's subscribers would not be able to access the satellite broadcast content. Functions and functioning of the decoder are distinct from the functions and functioning of the external reproducing equipment. The reproducing equipment is not usually reliant on the decoder as a source of content and its functionality is not affected by the absence of a decoder.
11. He further alleged that a decoder performs several individual functions, which include the following:

- 11.1 It receives satellite transmissions containing audio and/or visual and/or interactive data;
 - 11.2 It decodes these transmissions;
 - 11.3 It converts the audio and/or visual data into a format capable of being used by external reproducing equipment;
 - 11.4 It executes transmitted and embedded applications and manipulates the data for display as requested by the subscriber.
 - 11.5 When connected with a modem to a telephone line it serves as a messaging service similar to e-mail on a personal computer.
12. No single function can be considered the primary function of the decoder. The first applicant has, amongst its subscribers those who only subscribe to the first applicant's audio services eg hotels and chain stores. They cannot view any television channels but use hi-fis or audio distribution system

to convey specific audio channels. He further alleged that as it is possible to use the decoder in a viable business without any television services, television reception cannot be regarded as an essential function and therefore is also not the primary function of a decoder. All of the decoder's functions complement each other. The function of receiving a television signal is no more than a specific instance of one of the important functions of a decoder.

13. There was another supporting affidavit attached, which was attested to by Mr David Neil Siedle an Electronics Engineer, employed as a Project Architect by Irdeto Access B.V. He alleged that he is an expert in the field of electronic engineering and his area of speciality lies in the integration of Conditional Access into digital satellite decoders. He confirmed the correctness of the affidavit of Mr Meyer insofar as it concerns the technical aspects of this application which are within his area of expertise.
14. He described how the Irde Conditional Access System works and further stated that the primary purpose of the Irdeto Conditional Access System is to provide an auditable means

of ensuring that payment is received in return for the consumption of broadcasting programme rights. Access to certain protected programming is made conditional upon payment for the consumed content by the entitled end-user.

15. He further alleged that their Conditional Access System consists of three main components. The said components are the following:

- 15.1 The Irdeto Access Standalone Scrambler situated at the premises of the broadcast centre infrastructure of the first applicant;

- 15.2 The Conditional Access Control system; and

- 15.3 A network of decoders, incorporating a conditional access module, dispersed countrywide at the premises of the subscribers.

He further explained how the said three components functions.

16. The last supporting affidavit that was attached was attested to by Mr Charles Reeves, Financial Director of the second applicant. He alleged that the second applicant manufactures digital satellite decoders for and on behalf of the first applicant. The second applicant reconciles itself with the affidavits made on behalf of the first applicant, and confirms correctness thereof insofar as they refer to the second applicant.

Answering Affidavits

17. It was attested to by Mr Jean Pool a Tariff Specialist in the employ of the respondent. He alleged that in order not to cause confusion, the products, which the applicant refers to as decoders, he will refer to them as “satellite receivers”. He alleged that it is not correct that the nature and functions of all satellite receivers are as set out in the affidavits of Messrs Fourie and Siedle. Although satellite receivers may vary in the functions they perform, they all perform the following central functions:

- 17.1 They receive a satellite transmission containing visual,
audio and interactive data;

17.2 They decode the signal – this entails the converting of the data into a format capable of being read by the television set, video/cd recorder, projector or tv monitor/screen to which it is connected.

17.3 They regulate access to the data by means of the satellite receiver's conditional access function which, in practice is done by means of a smart card.

18. He further alleged that the principal function performed by the satellite receiver is the receiving, (which includes decoding) of the satellite signal and that the conditional access function is complementary and accessory thereto. The real commodity that is made available to customers by means of the satellite receiver is television programs and the games, program information, news and weather information are merely secondary and/or additional features. He accepts that the satellite receiver has additional features and can perform additional functions but that fact does not mean that it has a principal function.

19. A supporting affidavit attested to by Mr Jacques Herman Van Wyk, a qualified electronic engineer and employed as a lecturer by the Department of Electrical, Electronic and Computer Engineering of the University of Pretoria. He alleged that during August 2004 he was approached by representatives of the respondent to assist with advise on the true nature and functioning of so-called Digital Satellite television (DStv) decoder manufactured by the second applicant. He was furnished with a sample of the product in question, namely model DSD 720i. The product will be referred as a satellite receiver.

20. After examining and analysing the nature and functioning of the satellite receiver and after perusing the relevant technical data relating thereto and relevant legislative provisions he prepared a report in which he concluded that the principal function of the satellite receiver is the receiving and decoding of a satellite television signal. By and large he is in agreement with the evidence of the applicant's expert, Mr Constant Fourie as far as the functioning of the satellite receiver is concerned.

In the absence of the external reproducing equipment, ie television set or television monitor, that would not affect the functioning of the satellite receiver but would merely make it impossible for a subscriber to view the selected broadcast content. He further said “Although the functions such as the interactive and messaging services could be seen as individual functions, the main functions, ie receiving of the satellite signal, decoding and the granting of access are clearly complementary functions.”

21. He further alleged that the functions performed by the satellite receiver comprise the following three main functions:

- 21.1 The receiving of a satellite signal;

- 21.2 The decoding of the received satellite signal – this entails the processing or converting of the signal received from the satellite into a format that can be understood and read by the external reproducing equipment, ie television set;

21.3 Only in the event of the television signal being encrypted, the granting of access to the decoded signal. If the signal is encrypted, as would be the case with almost all of the Multichoice signals, the viewer would not have access thereto, unless the data has been decrypted by the conditional access function. What is clear is that central to the said functions is the reception of the satellite broadcast signal.

22. In conclusion, he stated that:

22.1 There can be no doubt that although the satellite receiver has various complementary functions, the principal function being the reception and conversion of the satellite signal;

22.2 Except for the presence of a conditional access function and the absence of a modem, the product in issue complies with the product contemplated in Explanatory Note 4 to Tariff Heading 85.28;

22.3 The presence of the conditional access system does not affect the nature and functioning of the product.

Replying Affidavit

23. It was attested to by Mr Jan Nicolaas Petrus Meyer who also deposed to the founding affidavit. He pointed out that in this application the respondent together with their expert Mr Van Wyk choose to refer to the product in question as “satellite receiver” although in a report that he made available to the respondent, Mr Van Wyk referred to the products as “digital satellite decoders”.

24. He further alleges that the only differences between the DSD 720i model decoder and the DSD 988 model are the following:

24.1 The DSD 720i model was manufactured by the second applicant in South Africa, whereas the DSD 988 model was manufactured in Thailand.

24.2 The layout of the components within each model differs slightly according to the method of manufacture

of the respective manufacturers. The two models differ only marginally.

The two models function in the same manner. The decoders which are the subject of this application are, for the purpose of this application, precisely the same. Although different manufacturers were used, both models were developed and manufactured in accordance with precisely the same technical specifications. The nature and functioning of both models are the same.

25. He further said that since the respondent does not agree with the fact that the decoders which are the subject matter of this application are, for the purpose of tariff classification, precisely the same, the respondent is invited to file a further affidavit in which he details the points of distinction (material to this application) between the DSD 720i model and the DSD 988 model. He also pointed out that it is not insignificant that the respondent issued determinations for both models and therefore had all the information at its disposal to furnish the court with substantive points of distinction between the two models of decoders should such

points of distinction have existed, but the respondent failed to do so.

26. He further stated that in addition to facilitating the collection of subscriptions and facilitating a subscriber's choices, the Conditional Access Module also assist the first applicant to comply with conditions attached to channels purchased by the first applicant. It also ensures that the first applicant does not fall foul of the industry Regulatory Body namely the Independent Communications Authority of South Africa ("ICASA"). It must be noted that a satellite broadcast has a vast geographical area which can be reached by a satellite signal. When the signal sent from the first applicant's broadcast centre in Randburg is beamed back to earth by the satellite, that signal covers the whole of Southern Africa. But for the encryption of the signal and the Conditional Access Module which again unencrypts that signal, a person in for example Botswana would be able to pick up the signal and watch or listen to whatever channel is broadcast and selected.

27. The first applicant's broadcast permission does not allow it to broadcast its services in, for example Botswana. Similarly some of the channels purchased by the first applicant are subject to certain conditions. It is only through the Conditional Access Module that the first applicant can control who can benefit from its broadcast signals and thereby ensure that it does not breach the rights bestowed on it or fall foul of ICASA.

28. In response to the affidavit of Mr Van Wyk, he denied that Mr Van Wyk is qualified to give an expert opinion on all the aspects and functions of a decoder. He pointed out that Mr Van Wyk's terminology for the decoders does not accord with the terminology used by him in a report he drew some time ago, in which report he referred to the decoders as "digital satellite decoders". He also denied that Mr Van Wyk considered technical information of the decoders relevant to this application. He further pointed out that Mr Van Wyk, in his report referred to earlier concluded that "the primary function of a Satellite Decoder is to decode a satellite signal" and he did not restrict the signal to a television signal.

According to the said report Mr Van Wyk did not find that reception is a principal function of the decoders.

29. In conclusion, he stated that the conclusions of Mr Van Wyk are factually incorrect in so far as Mr Van Wyk has analysed an antiquated system of conditional access in a different product and unreliable insofar as they do not accord with his previous conclusions.

30. A supporting affidavit of Mr Constant Fourie was attached. In the said affidavit it is stated that he has read the replying affidavit of Mr Meyer and he confirms as correct the allegations of a technical nature therein. A confirmatory affidavit from the second applicant was also attached.

Experts Agreement

31. This agreement was signed by the four experts, namely Messrs Siedle and Fourie, who testified on behalf of the applicants and Messrs Van Wyk and Von Willich who prepared experts reports on behalf of the respondent. According to the said agreement the experts agreed on

certain issues and some of the said issues are noted as follows:

31.1 For any meaningful functionality decoders are dependent on receiving a satellite signal;

31.2 The functionality of a decoder can be broken up into three functions, namely receiving the signal, applying conditional access and converting the signal to a format compatible with external reproducing equipment.

31.3 A satellite signal does not necessarily contain television services and a decoder is not dependent on the reception of a signal containing television service for it to function.

31.4 Decoders do not have any moving parts being operated electronically, and therefore are not considered to be mechanical machines.

31.5 Even if a decoder is not connected to any reproducing equipment it will still perform its functions of receiving, applying conditional access to and converting the signal. The functions and functioning of the decoder are distinct from the functions and functioning of the external reproducing equipment.

31.6 The Multichoice 720i decoder has more than one vital function and they all need to work in harmony to complement each other and provide the full potential of the originally intended purpose.

31.7 A decoder is not a reproducing apparatus for television and no single function of the decoder can be considered its principal function.

Oral Evidence

32. The applicants called Messrs Fourie and Siedle to testify. They confirmed their experts reports and also testified and gave reasons why on certain aspects the respondent's experts version is not correct. They also gave evidence relating to the functions of a decoder. After their evidence

applicants closed their case and respondent also closed its case without leading any oral evidence.

Findings

33. The evidence of the experts reveals that a decoder has three functions namely receiving the signal, applying conditional access and converting the signal to a format compatible with external reproducing equipment. A decoder is not dependent on the reception of a signal containing a television service for it to function. A satellite signal does not necessarily contain television services.

A decoder is not a reproducing apparatus for television and no single function of the decoder can be considered its principal function. The functions performed by a decoder are individual functions which are distinct from the functions and functioning of the external reproducing equipment.

34. The experts, as stated above agreed that no single function of a decoder can be considered its principal function and Mr Fourie in his statement also stated that in his opinion no

single function of the 720i decoder can be considered its principal function, and he gave reasons for the said opinion.

35. As stated earlier, the court order dated 30 May 2007 stated that the question to be determined is whether the Model 720i “Digital Satellite Decoder” manufactured by the second applicant is to be classified under tariff heading 8528.12.90 of Part 1 of Schedule 1 to the Act or tariff heading 8479.89.90 alternatively tariff heading 8543.89 of the Act as contended for by the applicants.
36. The respondent’s counsel submitted that the various functions performed by the decoder are not “individual” functions as contemplated by tariff headings 84.79 and 85.43. This submission is not supported by the evidence tendered in this case. In the statement of Mr Constant Fourie it is stated that “The functions performed by a Multichoice decoder are individual functions in the sense that it can be performed distinctly from and independently of any other machine.” I cannot find any reason not to accept the version of Mr Fourie.

37. The respondent's counsel further submitted that the various functions performed by the decoder, taken together, constitute a "reception apparatus for television". This submission is incorrect. Mr Fourie's evidence is to the effect that decoder performs various functions and television reception cannot be regarded as an essential function nor a principal function of a decoder. He also pointed out that there are certain subscribers of Multichoice who only subscribe to Multichoice audio services, eg hotels and chain stores.

It appears to me that the tariff headings contended for by the respondent are inappropriate.

38. The applicants contend that the decoders should be classified under tariff heading 8479.89.90 alternatively 8543.89.

The relevant parts of tariff heading 84.79 reads as follows:

“Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter.

8479.8 – Other machines and mechanical appliances.

8479.89 – Other.”

39. The explanatory notes to the abovementioned tariff heading provides as follows:

“This heading is restricted to machinery having individual functions, which ...

For this purpose the following are to be regarded as having ‘individual functions’ ... (B) Mechanical devices which cannot perform their functions unless they are mounted on another machine or appliance, or are incorporated in a more complex entity, provided that this function:

- (i) is distinct from that which is performed by the machine or appliance whereon they are to be

mounted, or by the entity wherein they are to be incorporated; and

- (ii) does not play an integral and inseparable part in the operation of such machine, appliance or entity.”

40. From the evidence presented, it is clear that decoders have individual functions which are distinct and independent of any other machine. During argument, I was not referred by any of the counsel to any heading which covers decoders nor any section or chapter note which excludes decoders from the chapter under consideration.

My view is that the Model 720i “Digital Satellite Decoder” manufactured by the second applicant should be classified under tariff heading 8479.89.90.

41. The next issue to be considered is the applicability or otherwise of tariff item 124.75 for the period 1 July 2001 to 1 January 2007. The relevant tariff item reads as follows:

“Reproducing apparatus for television, whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors.”

42. According to the agreement of the experts a decoder is not reproducing apparatus for television. The applicant's counsel correctly submitted that the primary product identified in tariff item 124.75 is a “reproducing apparatus for television” which is qualified by the words that follow thereafter.
43. The respondent's counsel submitted that read in context the use of the word “reproducing” instead of “reception” is a palpable and manifest error which the court on ordinary canons of interpretation should disregard and substitute with the word that was intended to be used ie “reception”.

In *Ebrahim v Minister of Interior* 1977 1 SA 665 (AD) 678A the court said that the golden or general rule of construction is that words must be given their ordinary, literal and grammatical meaning, unless if doing so would lead to

absurdity or to result contrary to the intention of Parliament. I cannot find any reason not to apply the golden or general rule of construction. The application thereof does not result to an absurdity or failure to give effect to the intention of the legislature. The respondent's counsel's submission made in this paragraph is not sustainable. The tariff item in question in my view was intended to apply to "reproducing apparatus for television" and decoders are not such apparatus.

44. The next question to be determined is the relief sought by the first application in prayer (iii) of the notice of motion. The said relief is premised on the second applicant succeeding with the relief that it seeks in prayer (ii) and on the fact that the 720i Model and 988 Model decoders are the same for purpose of this application.
45. In the founding affidavit, the applicants stated that for the purpose of this application 720i model decoder and 988 model decoder are the same and in the answering affidavit the respondent denied that they are the same. In the replying affidavit the applicants invited the respondent to file a further affidavit in which it details the points of distinction

(material to this application) between DSD 720i model and the DSD 988 model. The respondent did not file such further affidavit and consequently the court will accept that the said models are for the purpose of this application the same.

46. Section 47(9)(d)(i)(bb) of the Act states:

“The Commissioner shall –

(aa) ...

(bb) ... amend any determination or withdraw it and make a new determination if it was made in error ... or on any other good cause shown including any relevant ground for review contemplated in section 6 of the Promotion of Administrative Justice Act, 2000.”

As stated earlier in this judgment the appropriate tariff heading of the Model 720i “Digital Satellite Decoder” is tariff heading 8479.90 and not tariff heading 8528.12.90. There is also uncontested evidence to the effect that for the purpose of this application that model 720i and model 988 decoders

are the same. This, of necessity implies that the respondent made the determination issued to the first applicant in error.

47. My view is that the applicants have made out a case for the relief sought in the notice of motion.

The court therefore makes the following order:

- (i) The determination of the respondent dated 8 April 2002 (in respect of the first applicant) and 10 March 2005 (in respect of the second applicant) that digital satellite decoders manufactured by the second applicant for and on behalf of the first applicant be classified under Tariff Heading 85.28.12.90 of Part 1 of Schedule 1 of the Act is set aside and is substituted with a determination that the said digital satellite decoders be classified under Tariff Heading 8479.89.90 of Part 1 of Schedule 1 of the Act.
- (ii) In respect of the first applicant only, the respondent is directed to withdraw its

determination dated 8 April 2002 and reclassify the digital satellite decoders under Tariff Heading 8479.89.90 of Part 1 of Schedule 1 of the Act.

- (iii) It is hereby declared that the digital satellite decoders with model number 720i and 988, manufactures by the second applicant for and on behalf of the first applicant cannot be classified under Tariff Item 124.75 of Part 2B of Schedule 1 of the Act for the period of 1 July 2001 to 1 January 2007.
- (iv) The respondent is to pay the applicants' costs on a party and party scale, which costs will include costs consequent upon the employment of two counsel.

W L SERITI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 28 August 2009

For the Applicants: Adv A P Joubert SC & C J McAslin

Instructed by: Messrs Cliff Dekker Hofmeyr Inc, Pretoria

For the Respondent: Adv C E Puckring SC & J A Meyer SC

Instructed by: The State Attorney

Date of Judgment: