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[2] THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

[3] **JUDGMENT**

[4] **Reportable**

[5]

[6] Case No: 50/2015

[7]

[8] **In the matter between:**

[9]

[10] **THE SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS**

[11] **ASSOCIATION** **APPELLANT**

[12]

[13] **and**

[14]

[15] **FOSCHINI RETAIL GROUP (PTY) LIMITED**

[16] **AND 9 OTHERS** **RESPONDENT**

[17]

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[19] **Neutral citation:*SAMPRA v Foschini Retail Group (Pty) Ltd* (50/2015) [2015] ZASCA 188 (30 November 2015)**

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[21] **Coram:** **Mpati P and Mhlantla, Pillay, Swain and Zondi JJA**

[22]

[23] **Heard:** **17 November 2015**

[24]

[25] **Delivered:** **30 November 2015**

[26]

7] **Summary:** Determination by Copyright Tribunal of royalty payable in terms of s 9A read with s 30*(b)*, 33(3) and 33(5) of the Copyright Act 98 of 1978 – jurisdiction of tribunal – established by absence of agreement between user and owner of copyright protected music as to amount of royalty – tribunal to be satisfied on all of evidence that claim of user to a reduced royalty well-founded in terms of s 33(5) – no onus upon user to prove this – determination of reasonable royalty – reference to comparable royalties payable in foreign jurisdictions.

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[32] **ORDER**

[33] ___

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[35] **On appeal from:** The Copyright Tribunal (Phatudi J, sitting as the Tribunal).

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[37] 1. The appeal is upheld to the extent of the order contained in para 2 below.

[38] 2.

The order of the Copyright Tribunal contained in para 79.1, read with para 76 of the judgment of the Copyright Tribunal, is set aside and substituted with the following order:

[39] a)

The following tariff is declared to have been the reasonable rate of royalties in terms of s 9A of the Copyright Act 98 of 1978 with effect from 1 January 2008:

[40]

[41] **Fees: Size of Premises (Audible Area in square metres)**	[42] **Licence Fee per store per Annum (exclusive of VAT)**
[43] Up to 50	[44] R150
[45] 51 to 100	[46] R300
[47] 101 to 200	[48] R450
[49] 201 to 300	[50] R600
[51] 301 to 500	[52] R750
[53] 501 to 750	[54] R900
[55] 751 to 1000	[56] R1050
[57] 1001 to 1250	[58] R1200
[59] 1251 to 1500	[60] R1350
[61] 1501 to 1750	[62] R1500
[63] 1751 to 2000	[64] R1650
[65] 2001 to 2500	[66] R1800
[67] 2501 to 3000	[68] R1950
[69] 3001 to 3500	[70] R2100
[71] 3501 to 4000	[72] R2250
[73] 4001 to 4500	[74] R2400
[75] 4501 to 5000	[76] R2550
[77] 5001 to 6000	[78] R2700
[79] 6001 to 7000	[80] R2850
[81] 7001 to 8000	[82] R3000
[83] 8001 to 9000	[84] R3150

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[85] 9001 to 10000	[86] R3300
[87] Every additional 1 to 1000	[88] R150

[89]

[90] b)

The tariff is subject to revision with effect from 1 January every year in accordance with the Consumer Price Index for the previous year.

[91] 3.

The respondents are ordered to pay 50 per cent of the appellant's costs of the appeal, such costs to include the costs of two counsel.

[92] ____

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[94] **JUDGMENT**

[95] ____

[96] **Swain JA** (Mpati P and Mhlantla, Pillay and Zondi JJA concurring):

[97] In issue in this appeal is the amount to be paid as a royalty by the respondents, a group of 10 retailers, formally cited as Foschini Retail Group and 9 others (the retailers), to the appellant, the South African Music Performance Rights Association (SAMPRA), to entitle the retailers to play background music in their stores. The retailers' legal obligation to pay a royalty is located in s 9A(1)*(a)* of the Copyright Act 98 of 1978 (the Act). This section provides that in the absence of an agreement to the contrary no person may broadcast, cause the transmission of, or play a sound recording without the payment of a royalty to the owner of the relevant copyright.[1]

[1]The playing of a sound recording includes 'communicating the sound recording to the public' in terms of s 9*(e)* of the Act.

[98] The obligation to make payment of the royalty to SAMPRA arises from its legal status as an accredited representative collecting society to administer its members' rights to receive payment of these royalties.[2]The sole member of SAMPRA is the Recording Industry of South Africa (RISA), which represents members of the recording industry, in the form of the record companies which produce sound recordings and own the copyright in these sound recordings.

[99] The amount of the royalty payable (the tariff) is in terms of s 9A(1)*(b)* of the Act, to be determined by agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies. In the absence of an agreement s 9A(1)*(c)* of the Act provides that the user, performer, or owner may refer the matter to the Copyright Tribunal (the tribunal), or they may agree to refer the matter for arbitration, in terms of the Arbitration Act 42 of 1965 to resolve the dispute.

[100] The retailers and SAMPRA were unable to reach an agreement on the amount of the tariff set by SAMPRA and payable by the retailers to SAMPRA. The retailers accordingly referred the matter to the tribunal for determination. As will be seen, a referral of the dispute to the tribunal reveals difficulties in the interpretation of the powers of the tribunal as set out in chapter 3, and more specifically, ss 30 and 33 of the Act. This has given rise to competing submissions by the parties on the tribunal's jurisdiction and powers, fundamental to the outcome of this appeal. Consequently, although the parties are *ad idem* that the essential inquiry before the tribunal in terms of s 33(5)*(b)* of the Act was to determine a tariff which was 'reasonable in the circumstances', they are however not in agreement as to whether the retailers bear the onus of proving this issue. A further area of disagreement is whether the tribunal only acquired jurisdiction to determine the dispute, once it was satisfied that the tariff was unreasonable.

[2]Regulation 3(1)*(a)* of the Collecting Society Regulations, GN R517 *GG* 28894, 1 June 2006.

[101] The retailers and SAMPRA, with the objective of showing that the tariff which they respectively espoused, was reasonable in the circumstances, placed a great deal of evidence before the tribunal. In the result, Phatudi J in his capacity as a commissioner of patents,[3] sitting as the tribunal,[4] determined that in the circumstances a reasonable tariff lay somewhere between the respective amounts proposed by the retailers and set by SAMPRA. The tariff awarded exceeded that proposed by the retailers, but was less than that set by SAMPRA. SAMPRA accordingly applied for and was granted leave by the tribunal, to appeal to this court against the tariff awarded, as well as the costs order granted in favour of the retailers. The retailers did not challenge the tariff awarded by way of a cross-appeal.

[102] Before dealing with the central submissions of SAMPRA as contained in its heads of argument before this court, it is necessary to briefly deal with entirely new submissions advanced by counsel for SAMPRA at the hearing of the appeal which had their origin in competition law. Counsel for the retailers correctly pointed out that the hearing before the tribunal was not conducted on the basis of competition law principles. In addition, the criticism levelled at the evidence of the retailers' main expert witness Prof Ross, which was that he failed to have regard to competition law principles, it was submitted, was unfair. This was because Prof Ross, who was called as an economist, never had an opportunity to deal with any of these criticisms. Counsel for SAMPRA contended, however, that the submissions were made in law and related to the application of the Act. It is quite clear, however, that at no stage during the lengthy proceedings before the tribunal were principles of competition law referred to, or applied. The evidence led by the parties did not have as its objective the proof of any principles of competition law. If from the outset the dispute between the parties had been framed in the context of competition law principles, there is ground for thinking that further, or other, evidence, would have been produced by the parties. The issue was not investigated or canvassed before the tribunal.[5] To apply

[3] In terms of s 8 of the Patents Act 57 of 1978.

[4] In terms of s 29(1) of the Act.

these principles now would alter the whole basis upon which the parties approached and dealt with the central dispute between them. It would be unfair to allow this now.

[103] Central to SAMPRA's case on appeal are two propositions:

[104] (a)The retailers as applicants before the tribunal bore a duty, in terms of the legislative framework, to satisfy the tribunal that their claims regarding the unreasonableness of the tariff set by SAMPRA were well-founded. The tribunal's jurisdiction to determine a reasonable tariff would only be activated once the retailers had satisfied the tribunal that their claim of unreasonableness was well-founded.

[105] (b)Only then would the tribunal be empowered to determine a reasonable tariff after the retailers had adduced sufficient evidence of 'circumstances' applicable to them, which would enable the tribunal to determine a tariff which was 'reasonable in the circumstances'.

[106] SAMPRA then submits that the retailers did not adduce sufficient evidence in support of their claims regarding the unreasonableness of the tariff and of the 'circumstances' to enable the tribunal to determine a reasonable tariff. In particular, the retailers were obliged to lead evidence of the rand value they derived from the use of sound recordings in their businesses, which was essential to a determination by the tribunal of the reasonableness of the tariff in the particular circumstances of the retailers. SAMPRA submits that the significance of this evidence lies in the essential inquiry of whether the rand value the retailers derived from the use of sound recordings, is disproportionately lower than the tariff set by SAMPRA.

[107] In the result, SAMPRA submits that the appeal should be upheld, the tariff determined by the tribunal be set aside and replaced by the tariff set by SAMPRA, due to the retailers' failure to satisfy the tribunal that their claims regarding the tariff's

[5] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23C-F; *Bank of Lisbon and South Africa Ltd v The Master & others* [1986] ZASCA 121; 1987 (1) SA 276 (A) at 290D-F; *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) para 30 and 33.

unreasonableness were well-founded. In the alternative, SAMPRA submits that the matter ought to be remitted to the tribunal in terms of s 36(3)*(b)* of the Act, with specific instructions for the conduct of a proper inquiry with particular emphasis on evidence being placed before the tribunal by the retailers, to show that the value derived by each of the retailers from the use of sound recordings is disproportionately low when compared with the tariff. This procedure is advanced on the basis that in the absence of this evidence, there is insufficient evidential material available to this court on appeal to make its own determination of what a reasonable tariff would be. SAMPRA adds that it is accordingly unwilling to consent to this court substituting its own determination in place of the tribunal's tariff, in the name of expediency.

[108] The retailers' responses to these submissions are that:

[109] (a)All that is necessary to activate the tribunal's jurisdiction is the absence of agreement on the amount of the tariff between the retailers and SAMPRA. There is no additional onus on the retailers to satisfy the tribunal that the tariff is unreasonable, in order to activate the tribunal's jurisdiction to determine a reasonable tariff.

[110] (b)The requirement in s 33(5) of the Act that the tribunal may make an order declaring that an 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' does not place an onus upon the retailers to satisfy the tribunal on this issue.

[111] (c)The retailers placed sufficient evidence before the tribunal to satisfy it that the tariff set by SAMPRA was unreasonable and to enable the tribunal to set a tariff that was reasonable in the circumstances. The retailers denied that they were obliged to lead evidence to establish the rand value they derived from the use of

sound recordings in their businesses. They accordingly denied that there are any grounds for a remission of the matter to the tribunal in terms of s 36(3)*(b)* of the Act, with an order compelling them to obtain and lead evidence on this issue.

[112] The following issues accordingly arise for decision:

[113] (a)Does the jurisdiction of the tribunal only arise once the party referring the matter to the tribunal has discharged an onus of satisfying the tribunal that the tariff is unreasonable, or does this arise when agreement cannot be reached between the user (the retailers) and the owners of the relevant copyrights (represented by SAMPRA) on the amount of the tariff?

[114] (b) If the jurisdiction of the tribunal is established by an absence of agreement between the parties on the tariff, is the party referring the matter to the tribunal required to satisfy the tribunal that their 'claim' that the tariff is unreasonable is 'well-founded' by the discharge of a formal onus, or is the tribunal simply required to be satisfied on this issue, on all of the evidence placed before it?

[115] (c)Was sufficient evidence placed before the tribunal for it to be satisfied that the claim of the retailers was well-founded either on the basis that the retailers discharged any onus resting upon them, or alternatively, on the basis that sufficient evidence was placed before the tribunal, for it to be satisfied on this issue? If not, should this matter be referred back to the tribunal with directions that the retailers obtain and place before the tribunal evidence of the rand value derived by them from the use of sound recordings on their premises?

[116] (d) If sufficient evidence was placed before the tribunal was, the tariff determined by the tribunal reasonable in the circumstances? If not, what is a reasonable tariff in the circumstances?

[117] **The jurisdiction of the Tribunal**

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[118] A consideration of the contentions of the parties as to the jurisdiction of the tribunal requires a consideration of the provisions of ss 9A, 30, 31 and 33 of the Act. At the outset, it should be noted that this court in *National Association of Broadcasters v South African Music Performance Rights Association & another* [2014] ZASCA 10; 2014 (3) SA 525 (SCA) para 57 stated the following:

[119] 'It is necessary at the outset to say something concerning the rather tortuous statutory scheme in terms of which the tribunal derives its power. As pointed out by Dean in *Handbook of South African Copyright Law*,[6] the factual matrix set out in ch 3 of the Act has to be read "*mutatis mutandis* to accommodate the adjudication of disputes arising out of s 9A". This means that one has to strain to make these provisions compatible with those of s 9A more particularly those of s 9A(1)*(b)* and (2)*(c)*. Put simply, the licensing-scheme provisions are applied to the determination of the royalty rate. That notwithstanding, the learned author rightly points out that to adopt a different view would render the provisions of s 9A nugatory – a consequence that should be avoided. Section 33(5)*(b)* therefore applies mutatis mutandis and requires the tribunal, when it is determining a royalty rate, to make such order as it may "determine to be reasonable in the circumstances".'

[120] In *National Association of Broadcasters* only the calculation of the 'needletime' tariff was in issue. However, the 'tortuous statutory scheme in terms of which the tribunal derives its power' is equally apparent when the jurisdiction of the tribunal is considered.

[121] The relevant portion of s 9A of the Act provides as follows:

[122] '**9A. Royalties** –

[123] (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 s 9*(c)*, *(d)* or *(e)* without payment of a royalty to the owner of the relevant copyright.

[6] O H Dean *Handbook of South African Copyright Law* (Revision Service 14, 2012) at 1-55.

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[124] *(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.

[125] *(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 No 42 of 1965).'

[126] The relevant portions of s 30 of the Act provide as follows:

[127] '30. **General provisions as to jurisdiction of tribunal** –

[128] Subject to the provisions of this Chapter, the function of the tribunal shall be to determine disputes arising between licensing bodies, or other persons from whom licences are required and persons requiring licences, or organisations claiming to be representatives of such persons, either –

[129] *(a)* on the reference of a licence scheme to the tribunal; or

[130] *(b)*on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme.'

[131] The relevant portions of s 33 provide as follows:

[132] '33. **Applications to tribunal** –

[133] (1) . . . .

[134] (2)Any person who claims that in a case covered by a licence scheme the licensing body operating the scheme has refused or failed to grant him a licence in accordance with

the provisions of the scheme or to procure the grant to him of such a licence, may apply to the tribunal for an order under this section.

[135] (3)An application for such an order may also be made by any person who claims that he requires a licence in a case not covered by a licence scheme, and either –

[136] *(a)*that a licensing body or person has refused or failed to grant the licence or to procure the grant thereof, and that in the circumstances it is unreasonable that the licence should not be granted; or

[137] *(b)*that any charges, terms or conditions subject to which a licensing body proposes that the licence should be granted are unreasonable.

[138] (4) . . . .

[139] (5) On any application under subsection (2) or (3) the tribunal shall give the applicant and the licensing body in question and every other party to the application an opportunity of presenting his case, and if the tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, 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 –

[140] *(a)*in the case of an application under subsection (2), determine to be applicable in accordance with the licence scheme; or

[141] *(b)*in the case of an application under subsection (3), determine to be reasonable in the circumstances.'

[142] In the present case the parties are *ad idem* that the disputed tariff does not form part of a 'licence scheme' in terms of the Act. Consequently, only the provisions of s 30*(b)* and s 33(3) read with s 33(5)*(b)* of the Act are relevant in assessing the

jurisdiction of the tribunal in connection with a referral to it, in terms of s 9A of the Act.

[143] The problem of reconciling the provisions of these sections in order to determine the jurisdiction of the tribunal is immediately apparent. Whilst s 9A 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', s 30 provides that the tribunal has jurisdiction to 'determine disputes' arising between 'persons from whom licences are required and persons requiring licences' on 'the application of a person requiring a licence'. To resolve the apparent anomaly Prof Dean suggests that s 30 should be interpreted as though owners and performers holding performers' rights should be regarded as 'other persons from whom licences are required' and users should be regarded as 'persons requiring licences'.[7] I agree with this solution. On this basis a referral to the tribunal in terms of s 9A by a 'user' being a person 'requiring a licence' and who has not reached agreement with the 'owner' being the 'person from whom a licence is required' should be interpreted as an application in terms of s 30*(b)* of the Act. In the same way as the provisions of s 33(5)*(b)* were held in *National Association of Broadcasters* to apply *mutatis mutandis* to a referral in terms of s 9A, so should the provisions of s 30, with the same objective, namely to prevent the provisions of s 9A being rendered nugatory.

[144] If a referral to the tribunal by a user in terms of s 9A, is an application to the tribunal in terms of s 30*(b)* of the Act, this would also constitute an application 'by any person who claims that he requires a licence' in terms of s 33(3). The claim advanced in terms of s 33(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'. Because the provisions of s 33(5) are expressly made applicable in terms of the Act to an application under s 33(3), this reasoning also accords with the decision in *National Association of Broadcasters*. Consequently, the tribunal dealing with a referral in terms of s 9A, has to be satisfied that the claim of the applicant

[7] O H Dean op cir at 1-55.

(being the user or person requiring a licence) is 'well-founded' and if satisfied may determine what 'charges, terms or conditions' subject to which a licence should be granted, are reasonable. Accordingly, I do not agree with the submission of the retailers, that they do not make any 'claim' falling strictly within s 33(3), which would render the provisions of s 33(5) applicable.

[145] It is against this analysis of the relevant sections of the Act that the submissions of the retailers and SAMPRA as to the jurisdiction of the tribunal must be considered. As noted, the retailers submit that the jurisdiction of the tribunal is located in s 9A, whereas SAMPRA submits it is located in s 33(5) of the Act. The retailers submit that once they, as 'the user' and SAMPRA, as 'the owner', were unable to reach agreement on the tariff payable, the retailers were entitled to refer the dispute to the tribunal for determination. In other words, all that is necessary for the jurisdiction of the tribunal to be established is a failure to reach agreement on the amount of the tariff.

[146] As noted, SAMPRA submits, however, that the tribunal's jurisdiction to determine a reasonable tariff is only activated in terms of s 33(5) once the retailers satisfy the tribunal that their claim is well-founded, that the charges subject to which a licence will be granted are unreasonable and thereafter present evidence of 'circumstances' applicable to them which will enable the tribunal to determine a tariff that is 'reasonable in the circumstances'.

[147] For reasons which will become apparent later in this judgment, when the issue of the onus is addressed, it is clear that the submission by SAMPRA conflates the discrete issues of the tribunal's jurisdiction and the issue of whether there is an onus resting upon a party to the dispute. It is clear that in terms of s 9A all that was required before 'the matter' could be referred to the tribunal was the absence of an agreement between 'the user' being the retailers and SAMPRA, as 'the owner', as to 'the amount of any royalty' payable 'to the owner of the relevant copyright'. Once the

absence of an agreement was established the jurisdiction of the tribunal to determine the dispute in terms of s 30, read with s 33(3) and 33(5), of the Act was established.

[148] **The issue of the onus**

[149] Section 33(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'.

[150] As we have seen the 'claim of the applicant' to a licence is advanced by way of an application in terms of s 30*(b),* read with ss 33(3) and 33(5), as a result of the referral in terms of s 9A. This referral has as its foundation an allegation that the charges, terms or conditions, subject to which the licensing body will grant the licence, are unreasonable. It is clear that before the tribunal will direct the licensing body to issue a licence to the applicant, on terms and conditions and subject to charges which it determines 'to be reasonable in the circumstances', it must be 'satisfied that the claim of the applicant is well-founded'.

[151] For the tribunal to be satisfied that the claim of the applicant is 'well-founded' it must have a foundation in fact or reason, based on good grounds or evidence.[8] There are, however, two possible interpretations of the statutory requirement that the tribunal must be 'satisfied'. Either the onus is on the claimant to satisfy the tribunal, or there is simply a requirement that the tribunal be satisfied on this issue on all of the evidence. In the latter instance there can be no suggestion that the claimant must satisfy the tribunal by the discharge of a legal onus of proof. In the former instance, however, the claim must be proved by the claimant by the discharge of the requisite onus of proof, to the satisfaction of the tribunal.

[8] See the definition of 'well-founded' in *The Shorter Oxford English Dictionary* 6 ed (2007) Vol 2.

[152] The retailers submit that the strict application of an onus is 'simply inapposite' to a referral in terms of s 9A of the Act where the proceedings come before the tribunal by virtue of an 'absence of an agreement', and not by virtue of any 'claim' made by the retailers in terms of s 33(3). However, in the light of the construction placed upon the relationship of ss 9A, 30, 33(3) and 33(5) in the Act, as set out above, there can be no valid distinction drawn, for purposes of the presence or absence of an onus.

[153] The retailers also submit that the imposition of such an onus upon referrers such as the retailers, would confer undue protection in respect of the monopolistic price demanded by SAMPRA and would unduly limit the role and function of the tribunal. SAMPRA, in turn, submits that the imposition of an onus is supported by the purpose of the legislation, as well as the nature of the rights possessed by the copyright owners. It argues that the Act creates exclusive rights in sound recordings for specific usage categories and thereby establishes a monopoly in respect of each sound recording, in the hands of the copyright owner. This was aimed at the promotion, proliferation and just remuneration of the creative endeavours of the copyright owners, as well as the stimulation of the local music industry. It submits that this has been done against a backdrop of deprivation and injustice and in order to transform the economic conditions of South African musicians.

[154] As regards the nature of the rights, SAMPRA submits that the copyright granted to owners in respect of sound recordings is property that enjoys protection under the Constitution. The power accorded to the tribunal to compel a copyright owner to grant a licence to a user, it is submitted, is akin to a deprivation of property and comparable to expropriation. The retailers contend, however, that the Act as amended conferred protection upon copyright owners which they did not possess before, to prevent the playing of their sound recordings in public without their consent. Consequently, the compulsion to grant a licence subject to the payment of a tariff does not constitute a deprivation of property. In the light of the conclusion

reached below on the interpretation of the Act, it is not necessary to decide the validity of these submissions.

[155] It is clear that the primary purpose in the Act, as provided for in s 9A, is for the parties to reach agreement on the amount of the tariff payable. As an alternative to a referral to the tribunal when agreement cannot be reached, the parties may refer the matter to arbitration in terms of the Arbitration Act 42 of 1965. The object is to facilitate the resolution of disputes without resort to formal legal procedures. However, if the user of copyright protected music bears a formal onus of proving that the claim is well-founded, that 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 would hold the considerable advantage to the owner of requiring the user to discharge this onus. Such an interpretation would undermine the apparent purpose of s 9A, which is for the amount of the tariff to be resolved by agreement.[9] That this is not a hypothetical danger is illustrated by the facts of this case. Mr Lister, on behalf of SAMPRA, stated that –

[156] '. . . the phrase "take it or leave it", is one that does not embarrass me in the least, having been the primary negotiator. We have said take it or leave it many many times, in exactly the same way as yesterday Mr Rechardt said the Australian court I think said tough, because it is take it or leave it, meaning if you do not want it, then do not play it. If you are objecting to the tariff, let us get to the copyright tribunal.'

[157] On the take it or leave it approach he stated:

[158] '. . . if any retailer felt that they did not want to pay it, there is no way that we would reduce it or discount it. Obviously if we had found a wide scale rejection, we might have changed that stance. But we did not. We did not find that wide scale rejection'.

[159] Mr Du Plessis also said 'there is the very clear provisions of the Copyright Act which says that once we have proposed a tariff that can be referred to the

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[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

copyright tribunal'. This was said in the context of his view that SAMPRA could speak to the retailers for 20 years 'only to reach the conclusion then after 20 years that we still cannot see eye to eye'. He said it would be silly to gauge market response to the proposed tariff before setting it. Mr Lister also added that their case had always been that the onus was on the retailers to show what they do with the music, and why they do it, and to prove the value to them of doing so. His attitude to the dispute is encapsulated in the following statement: 'Let us not waste time, money and energy, emotion and relationships on trying to resolve a dispute that we are not going to resolve. Let us get it to the copyright tribunal.'

[160] In addition, there are a number of provisions in the Act, as well as the regulations promulgated in terms of s 29(3)*(a)* of the Act, regulating proceedings before the tribunal, in which an informal procedure is envisaged. For example section 33(5) provides that 'the tribunal shall give the applicant and the licensing body in question and every other party to the application an opportunity of presenting his case', which suggests a more informal procedure aimed at gathering evidence, rather than the strict imposition of an onus on one of the parties. This is also reflected in reg 27 of the Copyright Regulations[10] which deals with the procedure at a hearing before the tribunal. This regulation provides that '. . . every party to the reference or application shall be entitled to attend the hearing and to address the tribunal and call oral evidence'. Regulation 31 of the Copyright Regulations, which deals with the furnishing of evidence to the tribunal, provides that evidence 'shall be given orally or, if the parties agree or the tribunal so orders, by affidavit, but the tribunal may at any stage of the proceedings require the personal attendance of any deponent for examination and cross-examination'. In the context of the informal procedure envisaged by the Act, as well as the regulations, it would be incongruous to impose a formal onus of proof upon a claimant to satisfy the tribunal that its claim is well-founded.

[10] Copyright Regulations, GN R2530, *GG* 6252, 22 December 1978.

[161] Consequently, all that is required of a claimant is to place evidence before the tribunal on the issue of whether the claim is well-founded. In other words, an evidentiary burden rather than a legal burden of proof. At the end of the day for the claimant to succeed the tribunal is required to be satisfied, on all of the evidence placed before it, that the claim is well-founded.

[162] **Was sufficient evidence 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?**

[163] It is necessary at the outset to deal with the contention by SAMPRA that the retailers were obliged to lead evidence of the rand value they derived from the use of sound recordings in their stores. SAMPRA submits that the tribunal could only determine what is a reasonable tariff 'in the circumstances' in terms of s 33(5)*(b)* of the Act, once it was established that this value was disproportionately lower than the proposed tariff. The discrepancy in value must be such as would cause economic harm to the retailer. In addition, the argument went, it would have to be established that the retailers need to use the recordings offered by SAMPRA under a blanket licence in order to sustain the viability of their businesses. Further, the argument continued, it would have to be established that no available substitute would serve the retailers economic interests, even if such available substitutes are recordings of the same musical works as those offered under a blanket licence by SAMPRA.

[164] The issue of whether the rand value to the retailers of playing music in their stores had been researched by them, but not disclosed, played a significant role in the evidence led by SAMPRA. Mr Keith Lister, the chairman of the board of SAMPRA, stated that the retailers knew the value of playing music in their stores and that the report prepared by their experts that they do not, was 'a work of fiction'. He was of the view that the evidence of the economist of the retailers, that no one knows the economic value of music and no one can presently calculate it, is

'complete nonsense'. However, Mr Lauri Rechardt, an attorney in Finland and a consultant to the International Federation of the Phonographic Industry, called by SAMPRA, stated that he had not seen this type of evidence used in any court case. He said he had not seen any studies that established that for a retailer to play original recorded music 'the value is X amount of Euros or Dollars or Rand. . . ' although he would prefer it if there was such evidence. He assumed that this was because the retailers would be unwilling to assist in collecting such information, which they would not wish to disclose.

[165] These views were echoed by another expert called by SAMPRA namely, Prof Charles Areni, to comment on the use by retail businesses of atmospheric music to achieve commercial objectives. He was not, however, asked to express an opinion on whether the SAMPRA tariff was reasonable. He agreed that no research had been done anywhere to assess the global relationship between playing music in a retail environment and profits. He also agreed that any such study would be prohibitively expensive and impractical, because it would take too long. He said he would accordingly not criticise the retailers for not conducting this type of research. He added that it was not just that the research was not available, but the magnitude of the study would need so many retailers, so many different formats of music would have to be tested, so many variables would have to be kept track of and even then one could not be sure that the simple result would generalise to all retailers. He added that anybody considering this type of research would consider that it was going to cost a lot of money, take a lot of time and whatever conclusion was attained may not apply to all retailers. Accordingly in his view, one could not expect the retailers in this case to carry out this type of research.

[166] Mr David du Plessis, a member of the board of SAMPRA, stated that any attempt by the retailers to measure the economic value of playing music in their stores, would produce a result that would be speculative and subject to a wide range of variables. He explained that different users may extract different value from the use of the same repertoire of music. Even within one retailer, one might find a

different usage of the same music. He had no expectation that the retailers would be able to say what the actual monetary value was to them, of playing music in their stores.

[167] Prof Donald Ross, a professor in the school of economics at the University of Cape Town, was called by the retailers to comment on the tariff set by SAMPRA, how it would compare with one that a free market would be expected to set and how it compared with a tariff that would optimise overall social welfare. He stated that no research had been done by any party that would quantitatively estimate the value range to retailers of broadcasting copyright protected music. It would not be impossible to investigate this but would require time consuming, carefully designed and relatively expensive experiments. The outcome of such research at a particular retailer's store would not, however, be sufficient to set a tariff for all stores. In addition, the sample of retailers studied would have to be random with respect to all the variables in the structural model, and would involve the sharing of information between the retailers studied. The researchers would have to have access to the cash register outputs over a period of time of all the stores in the study. They would have to share this confidential information. The reluctance of businesses to reveal their cost structures to their competitors was a very sound principle of business, and a reason why this research had not been done. He agreed that such a study would be prohibitively expensive and that it had not been done anywhere to his knowledge. It would cost millions of rands and take a couple of years to complete. Although this research would have been the first choice for a systematic analysis of optimal tariffs, it would require a retailer to release private information and no retailer anywhere in the world would be prepared to do that.

[168] It is against this evidence that SAMPRA's submission that the retailers were obliged to lead evidence to prove the rand value they derive from the use of sound recordings, and that this is disproportionately lower than the proposed tariff of SAMPRA, has to be assessed. It will be recalled that a further submission by SAMPRA in this regard is that in the absence of this evidence, there is insufficient

evidence available to this court to make its own determination of the reasonableness of the tariff. The consequence, according to SAMPRA, is that unless this court upholds the tariff set by SAMPRA the only option is to remit the matter to the tribunal. As pointed out, it is in this context that SAMPRA adds that it is unwilling to lend its consent to this court substituting its own determination in the place of the tribunal's tariff, in the name of expediency.

[169] SAMPRA submits that the unwillingness of the retailers to make confidential information available could be addressed by appropriate orders of confidentiality. The problem, however, with SAMPRA's insistence upon proof of the rand value to retailers of playing music in their stores, lies not only in the issue of confidentiality. The evidence is that this study would be prohibitively expensive and impractical as it would take too long to complete. In addition, it cannot be said that any conclusion reached could be applied to all of the retailers. In my view, it was accordingly not necessary for the retailers to lead evidence of the rand value to them of playing music in their stores, in order for the tribunal to be satisfied that their claim was well-founded. There is accordingly no justification for a referral to the tribunal for this purpose.

[170] I turn to consider whether sufficient evidence was placed before the tribunal for it to be satisfied that the claim by the retailers was well-founded in that the tariff proposed by SAMPRA was unreasonable. The evidence of Prof Ross and Prof Areni described three possible methods which could be utilised to determine the tariff. The first method dealt with above was the determination of the rand value to the retailers of playing music in their stores. The remaining two methods were the 'market-based solution' proposed by Prof Areni and the use of tariff levels in foreign jurisdictions as a benchmark, proposed by Prof Ross.

[171] Prof Areni stated that in the absence of agreement between the user and copyright owner, the operation of market forces should be left to determine the tariff. The appropriate criterion was that the tariff should maximise SAMPRA's revenue and

market forces would constantly move towards where the optimum tariff rate should be. This would mean that there would be no need for intervention by the tribunal. However, he accepted that the tribunal must act in the public welfare and set a tariff that accords with public welfare. He conceded in cross-examination that he was not aware of the legal framework in which the tribunal operated, which directed the tribunal to determine the tariff. This accordingly precluded market forces being left to decide whether the tariff was too high or too low. In the result, there is no basis for Prof Areni's view that market forces should be left to determine the tariff.

[172] I turn to the issue of the use of tariff levels in foreign jurisdictions as a benchmark to establish the tariff. Mr Lister disagreed that tariff levels in foreign jurisdictions could serve as a basis for determining a reasonable tariff. The role of foreign tariffs was simply a point of reference, once it had been decided what a reasonable tariff would approximately be. Mr Smit, the national sales manager for SAMPRA, stated that his first role when he joined SAMPRA was to gather information in order to establish tariffs for SAMPRA. He looked at the tariffs of collecting societies in other countries, which he used as a guide to establish the tariffs in 32 different categories for SAMPRA. When cross-examined he said that in setting the tariff for retailers he looked at the tariff set in the United Kingdom by Phonographic Performance Ltd (PPL) and the tariff of the Phonographic Performance Company of Australia (PPCA) in Australia, as well as the tariff of the South African Music Rights Organisation (SAMRO), which administers the performance rights of composers and lyricists. Consequently, the two currencies he looked at were the UK pound sterling and the Australian dollar. He was told by Mr David du Plessis to examine these two tariffs because PPL was the oldest society and the trading conditions in the United Kingdom and Australia were similar to South Africa. Mr Du Plessis confirmed that what was presented to Mr Lister to determine the tariff was the Australian and UK tariff levels together with the SAMRO tariff levels. The evidence of how SAMPRA went about determining the tariff accordingly does not support the assertion made by SAMPRA, that to use any form of benchmarking to determine the tariff would be both unreasonable and arbitrary.

[2]

[173] Prof Ross stated that in the absence of research to establish the rand value to retailers of playing copyright protected music in their stores, the only practical recourse in order to avoid economic arbitrariness was for the tribunal to have regard to comparable tariffs in other countries. Prof Areni stated that although he was not qualified to comment on Prof Ross' testimony that it was standard practice, when regulating the price in regulated markets around the world to do benchmarking exercises, he agreed that this was fair. He conceded that reference to international benchmarks was a relevant input in setting tariffs, but should not solely be relied upon.

[174] In the light of the evidence that SAMPRA paid regard to international benchmarks in setting the tariff, as well as the above concession by Prof Areni, the view of Prof Ross that international benchmarking is a method of preventing economic arbitrariness in setting the tariff, must be accepted. This court in *National Association of Broadcasters* (para 70) referred to international benchmarks in determining the 'needletime' royalties payable by commercial and public radio stations for the broadcasting of sound recordings.

[175] Prof Ross stated that he focused on the United Kingdom and Australia when carrying out his benchmarking exercise. He did not do this because these two jurisdictions had been relied upon by SAMPRA, but for a number of independent reasons. These countries had Copyright Tribunals in which there had been fairly recent reviews of needletime tariffs and the legislative and regulatory framework governing music rights and collecting societies closely resembled South Africa's. He concluded that Australia, however, was the best reference point for a qualitative evaluation of South African tariffs for a number of additional reasons.

[176] In South Africa and Australia there are two principal collecting societies. The PPCA is the counterpart to SAMPRA in Australia, which collects licence fees for copyright and recorded versions of musical words. The Australian Performing Rights

Association Ltd (APRA) is the counterpart to SAMRO, which collects licence fees for copyright in the musical works themselves. The South African rand and the Australian dollar are both currencies based to a large extent on extracted industry being minerals and are small, quite heavily traded, currencies. As a result historically they have tended to track each other very closely and accordingly the economic analysis was much less likely to invoke arbitrariness or error. In addition, both markets are not integrated into a large free trade area. In both countries the markets are relatively far from other large markets that produce a lot of recorded music and have relatively vulnerable indigenous music, which does not have a presence in other international markets and which is accordingly dependent on the domestic market. Both countries, therefore, have similar concerns to ensure their domestic niches are protected. In addition, the retailers of domestic music sales in both countries are similar and, as both countries use English as the main language of business and trade, the appeal of the dominant US and UK music catalogues was comparable. In his view there was no factor unique to Australia which would have the result of drawing down tariff levels in that country, relative to the rest of the world.

[177] Mr Lister, on behalf of SAMPRA, was of the view, however, that Australia was the country which was the least comparable to South Africa. His reason was that the indigenous music scene in South Africa consisted of several language groups, whereas domestic music in Australia consisted of ‘imitation American music’. The South African industry was about making music that reflected the diversity of the country’s culture, whereas Australia was a mono-cultural society. However, it seems that the similarity is simply that both markets have relatively vulnerable indigenous music.

[178] In the face of this evidence the allegation by Prof Areni that Prof Ross had selected Australia as a suitable comparator, simply because it had the lowest tariffs, which suited his clients’ interests and the selection of which Prof Ross did not genuinely believe in, is quite clearly without foundation. From the detailed reasons

Prof Ross furnished as to his selection of Australia as a suitable comparator as well as the fact that SAMPRA utilised the Australian tariffs in setting the tariff, it is clear that Prof Ross' selection of Australia was justified.

[179] Prof Ross accordingly ascertained the tariff of the PPCA for each of the categories specified in the tariff, determined by the floor area of retail stores in square metres. The retailers did not dispute that the tariff should be based upon the square meterage of individual retail stores, which was the accepted approach internationally. The PPCA tariff sounding in Australian dollars was converted into rands, using two alternative conversion factors being purchasing power parity (PPP) and the exchange rate. He explained that PPP indicates how many rands you would need in South Africa, to buy what you could for one Australian dollar, in Australia. In this way the foreign price is placed within the local context. A conversion utilising the exchange rate does not do that, because a conversion using the exchange rate means that South African consumers would be paying more in real terms, than their Australian counterparts. South African consumers would then be charged for recorded music as if they were in Australia, operating in the general Australian price and income context. This would, however, be unfair, because South African incomes are much lower than Australian incomes and South African prices are lower than Australian prices in real terms. He stated that where a regulator, such as the tribunal, is primarily concerned with maximising the welfare of domestic people, purchasing power parity is the more appropriate comparison. Prof Ross accordingly recommended that the tribunal endorse a tariff at the PPCA level converted to rands, in accordance with purchasing power parity. In this context it is clear from the evidence of Mr Smit that SAMPRA's provisional tariffs were set by converting the Australian tariff to rands, using purchasing power parity, in the form of the Big Mac index. This index was developed by economists as a simple way to estimate the extent to which a currency is relatively over-valued, or undervalued by exchange rates. The exchange rate prices of McDonald's Big Mac hamburgers across a range of countries are compared. The basis for this comparison is that the hamburger is a

common product having the same ingredients and therefore draws from a range of inputs across the economies.

[180] Prof Ross stated that a comparison of the SAMPRA tariff with the PPCA tariff indicated that the SAMPRA tariff was substantially higher than the PPCA tariff which became more marked, the larger the store. This was the case regardless of whether PPP, or the exchange rate, was used as a conversion. He was of the view that the tariffs he recommended were closer to an efficient market rate than the current monopolistic rate of SAMPRA's tariffs. The tariff he recommended was, however, higher than the rate which a competitive market would produce. The tariff categories produced by Prof Ross were based upon the SAMPRA tariff categories determined by the square meterage of each distinct category.

[181] Apart from the evidence of Prof Ross that the tariff established by SAMPRA was excessive, there are a number of other factors which indicate that this is so. Mr Lister stated that in determining the tariff he identified in ascending order, the tariffs in other countries. This was because the record companies felt they had 'been sold short', and SAMPRA was going into the market for the first time and did not want to be locked into the bottom half of the table of comparative rates in other countries. He therefore positioned the tariff at the 75 per cent mark of these tariffs to see whether anybody was able to say they were 'way out of line'. He conceded that although some people may think the tariff was out of line, he did not. Prof Ross criticised this approach as he did not understand why the tariff in a developing country such as South Africa should be placed in the top quartile of the tariffs of countries in general, as economically it was arbitrary and not rational. He stated that SAMPRA's tariffs ranged between the 14th and 17th most expensive, and were higher than almost all of the developing countries and higher than a few of the wealthier countries, including Australia. In general, SAMPRA's rates were approximately equivalent to the average counterpart rates in countries with per capita gross domestic products about one third higher than South Africa. In other words, SAMPRA's tariffs were on a par with countries that on average were one third richer than South Africa, for which there

was no economic justification. Consequently, the SAMPRA tariff, in comparison with other tariffs, was unreasonable.

[182] SAMPRA also submitted as justification for the amount of the tariff that its tariff should be higher than that of SAMRO. This was based upon the view of Mr Du Plessis that the value in the sound recordings was worth more than the value in the underlying composition, at least in the bulk of the music used by the retailers. According to Mr Du Plessis this had nothing to do with the fact that the SAMRO rate was unreasonably low. This court, however, in *National Association of Broadcasters* (para 63) expressed the view that '[i]t does not appear that royalty rates for sound recordings internationally exceed composer royalty rates. It is arguable, though not definitive, that composers are the key component in relation to the production of music.' Prof Areni stated that he was not aware of any research on this issue and accordingly there was no scientific basis for the proposition. Ms Kobie Swart, an expert in music therapy, agreed that one could not make a general statement in this regard, as it would depend upon the individual piece of music as well as the type of music. I accordingly agree with the submission by the retailers that there was no rationally justifiable basis for SAMPRA's decision to adopt a tariff level considerably higher than that of SAMRO.

[183] SAMPRA led no expert evidence to rebut the evidence of Prof Ross that the tariff set by SAMPRA was excessive and therefore unreasonable. Prof Areni, as pointed out above, stated that he had not been asked to express an opinion on whether the rate set by SAMPRA was reasonable. There was accordingly sufficient evidence before the tribunal for it to be satisfied that the retailers' claim was well-founded, ie, that the tariff set by SAMPRA was unreasonable. In coming to this conclusion I do not overlook the contentions of SAMPRA that a relevant factor in setting the tariff was the administrative benefit to users of copyright music, in having to deal with one entity, namely SAMPRA, and not several record companies to agree a tariff. I also do not overlook the contention of the retailers that a further relevant factor to setting the tariff is the benefit to SAMPRA of having its music played in the

retailers' stores and exposing it to the public. In the context of all of the evidence I do not regard either of these contentions as being of significance in determining whether there was sufficient evidence before the tribunal.

[184] The remaining issue is whether the tariff determined by the tribunal was reasonable in the circumstances. The table below sets out the discrete categories based upon the floor area of a store in square metres. The first column is the SAMPRA tariff for each category and the second column is the equivalent PPCA (Australian) tariff converted to rands, using PPP by Prof Ross. The third column sets out the tariff awarded by the tribunal for each category. The final column sets out the tariff which counsel for the retailers submitted was a reasonable tariff in each category.

[185] Size of store	[186] SAMPRA tariff 2008/2009	[187] Retailers/Prof Ross recommended tariff	[188] Copyright Tribunal tariff	[189] Copyright Tribunal tariff set at 30% of Sampra tariff
[190] Up to 50 m²	[191] R500	[192] R279.46	[193] R389	[194] R150
[195] Between 50 and 100	[196] R1000	[197] R279.46	[198] R389	[199] R300
[200] Between 100 and	[201] R1500	[202] R337.32	[203] R568	[204] R450
[205] Between 200 and	[206] R2000	[207] R376.10	[208] R620	[209] R600
[210] Between 300 and	[211] R2500	[212] R399.49	[213] R840	[214] R750
[215] Between 500 and	[216] R3000	[217] R511.52	[218] R930	[219] R900
[220] Between 750 and	[221] R3500	[222] R549.69	[223] R1050	[224] R1050
[225] Between 1000 and	[226] R4000	[227] R646.94	[228] R1110	[229] R1200

[2]

[230] Between 1250 and	[231] R4500	[232] R676.49	[233] R1110	[234] R1350
[235] Between 1500 and	[236] R5000	[237] R709.73	[238] R1220	[239] R1500
[240] Between 1750 and	[241] R5500	[242] R739.89	[243] R1220	[244] R1650
[245] Between 2000 and	[246] R6000	[247] R792.83	[248] R1220	[249] R1800
[250] Between 2500 and	[251] R6500	[252] R839.00	[253] R1220	[254] R1950
[255] Between 3000 and	[256] R7000	[257] R880.24	[258] R1220	[259] R2100
[260] Between 3500 and	[261] R7500	[262] R917.17	[263] R1220	[264] R2250
[265] Between 4000 and	[266] R8000	[267] R951.03	[268] R1220	[269] R2400
[270] Between 4500 and	[271] R8500	[272] R983.03	[273] R1220	[274] R2550
[275] Between 5000 and	[276] R9000	[277] R1039.67	[278] R1220	[279] R2700
[280] Between 6000 and	[281] R9500	[282] R1090.76	[283] R1220	[284] R2850
[285] Between 7000 and	[286] R10000	[287] R1136.92	[288] R1220	[289] R3000
[290] Between 8000 and	[291] R10500	[292] R1179.40	[293] R1220	[294] R3150
[295] Between 9000 and	[296] R11000	[297] R1218.17	[298] R1220	[299] R3300
[300] Every additional 1 to 1000 (above	[301] R500	[302]	[303]	[304]

[305]

[306] From the table it is apparent that the tribunal placed a limit on the tariff in stores with a floor area of 1750 square metres. Thereafter the rate was fixed without regard to the increasing size of the store. No reasons were given in the judgment for

this radical departure from the approach of SAMPRA and the retailers that there should be a progressive increase in the rate, based upon the increased size of a store. In addition, no reasons were furnished in the judgment why a particular tariff was determined for each category. The tariff set by the tribunal is considerably less than the tariff set by SAMPRA. Other than the statement in the judgment that the tariff should 'optimise public welfare' and that it 'is reasonable in the circumstances' no other reasons are furnished for its award. An examination of the tariffs determined by the tribunal reveals no rational or consistent basis for their computation, save that it appears the tribunal arrived at the initial rate of R389 up to 50 square metres, by averaging the initial rates for this category of SAMPRA and the retailers.

[307] The determination of the tariffs by the tribunal, in terms of s 33(5)*(b)* of the Act, accordingly is not 'reasonable in the circumstances'. In terms of s 36(3)*(a)* of the Act, this court is entitled to confirm, vary or set aside the order of the tribunal as this court 'may deem fair'. It is in the context of determining a tariff that is fair to both parties and which is reasonable in all of the circumstances that I find merit in the submission by counsel for the retailers. The submission was that SAMPRA should be awarded 30 per cent of the tariff set by it. The resultant tariff set out in the fourth column of the table is higher than the tariff awarded by the tribunal in stores with an area exceeding 1000 square metres. In addition, except for stores up to 50 square metres, it is higher than the tariff recommended by Prof Ross in each category. This disparity becomes more apparent in stores over 1250 square metres in size, where it is approximately double the tariff recommended by Prof Ross. This progressive increase becomes more marked in larger stores where it increases to two and a half times the rate recommended by Prof Ross. The rate proposed is accordingly considerably higher than the PPCA (Australian) tariff for all floor sizes, except for stores less than 50 square metres in size. When regard is had to Prof Ross' recommendation that the tariff should be set at the Australian tariff level and this is the only expert evidence that attempts to determine what a reasonable tariff is in the circumstances, in my view the tariff proposed by the retailers is fair to SAMPRA and the retailers and reasonable in the circumstances of this case.

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[308] As regards costs SAMPRA submits that the view of the tribunal that SAMPRA's 'take it or leave it' approach at the time of setting the tariff, justified an award of costs in favour of the retailers was unjustified. This was because the legislative framework did not impose a duty on either of the parties to reach an agreement. However, the tribunal followed this statement by adding that the retailers succeeded in having the tariff set by SAMPRA reduced, as justification for the award of costs. In terms of reg 36 of the Copyright Regulations the tribunal has a discretion to award 'the costs of and incidental to any proceedings' to any party. In all of the circumstances, I can see no reason to alter the costs order of the tribunal. As regards the costs of the appeal, although SAMPRA has succeeded in achieving an increase in the tariff awarded by the tribunal in respect of floor areas greater than 1000 square metres, this is still considerably less than that determined by SAMPRA. In addition, the increase in the tariff in this appeal was not as a result of any of the legal submissions advanced by SAMPRA being upheld. In all of the circumstances, the extent of SAMPRA's success should be acknowledged by awarding it 50 per cent of its costs of the appeal.

[309] I make the following order:

[310]

[311] 1. The appeal is upheld to the extent of the order contained in para 2 below.

[312] 2.

The order of the Copyright Tribunal contained in para 79.1, read with para 76 of the judgment of the Copyright Tribunal, is set aside and substituted with the following order:

[313] a)

The following tariff is declared to have been the reasonable rate of royalties in terms of s 9A of the Copyright Act 98 of 1978 with effect from 1 January 2008:

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[315] **Fees: Size of Premises (Audible Area in square metres)**	[316] **Licence Fee per store per Annum (exclusive of VAT)**
[317] Up to 50	[318] R150
[319] 51 to 100	[320] R300
[321] 101 to 200	[322] R450
[323] 201 to 300	[324] R600
[325] 301 to 500	[326] R750
[327] 501 to 750	[328] R900
[329] 751 to 1000	[330] R1050
[331] 1001 to 1250	[332] R1200
[333] 1251 to 1500	[334] R1350
[335] 1501 to 1750	[336] R1500
[337] 1751 to 2000	[338] R1650
[339] 2001 to 2500	[340] R1800
[341] 2501 to 3000	[342] R1950
[343] 3001 to 3500	[344] R2100
[345] 3501 to 4000	[346] R2250
[347] 4001 to 4500	[348] R2400
[349] 4501 to 5000	[350] R2550
[351] 5001 to 6000	[352] R2700
[353] 6001 to 7000	[354] R2850
[355] 7001 to 8000	[356] R3000
[357] 8001 to 9000	[358] R3150
[359] 9001 to 10000	[360] R3300
[361] Every additional 1 to 1000	[362] R150

[363]

[364] b)

The tariff is subject to revision with effect from 1 January every year in accordance with the Consumer Price Index for the previous year.

[365] 3.

The respondents are ordered to pay 50 per cent of the appellant's costs of the appeal, such costs to include the costs of two counsel.

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[368] **K G B Swain**

[369] **Judge of Appeal**

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[377] Appearances:

[378]

[379] For the Appellant: M Brassey SC (with D Ehrlich) (heads of argument prepared by G Marcus SC and D Ehrlich)

[380] Instructed by:

[381] Edward Nathan Sonnenbergs Inc, Sandton

[382] Matsepes Inc, Bloemfontein

[383]

[384]

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[385] For the Respondents: A R Sholto-Douglas SC (with M Blumberg)

[386] Instructed by:

[387] Bernadt Vukic Potash & Getz, Cape Town

[388] Lovius Block, Bloemfontein

[389]