National Association of Broadcasters v South African Music Performance Rights Association and another [2014] 2 All SA 263 (SCA)

Division:	SUPREME COURT OF APPEAL
Date:	14 March 2014
Case No:	119/2013
Before:	MS NAVSA, JB SHONGWE JJA, MF LEGODI, RS MATHOPO and KGB SWAIN AJJA
Sourced by:	P Zachia
Summarised by:	DPC Harris

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Intellectual property - Sound recordings - Copyright - Rate of royalties payable to recording industry and performers for use of sound recordings in broadcasts - Correctness of determination by Copyright Tribunal in terms of the Copyright Act 98 of 1978 of the rate of royalties payable by commercial and public radio stations - Where Copyright Tribunal was found to have ignored relevant factors and evidence, court overturned decision and determined the rate based on available evidence.

Editor's Summary

The appellant was the National Association of Broadcasters ("NAB"), a non-profit organisation funded entirely by its 80 members who were participants in the South African Broadcasting Industry. While the members included all television broadcasters, most commercial and public radio stations, community radio stations and signal distributors, the present dispute only concerned 31 commercial and public radio stations. The first respondent, the South African Music Performance Rights Association ("SAMPRA"), was responsible for collecting royalties for sound recordings on behalf of its only member, the Recording Industry of South Africa ("RISA"), an industry body representing members of the recording industry.

Legislative amendments to the Copyright Act 98 of 1978 ("the Act") during 2002, compelled commercial and public radio stations to pay copyright royalties to the recording industry and performers for the use of sound recordings in their broadcasts. The dispute in this case concerned the rate of royalties which broadcasters are required to pay. The present appeal and the related cross-appeal concerned the correctness of a determination by the Copyright Tribunal in that regard.

Held - The Act and the Performers' Protection Act 11 of 1967 recognises three kinds of copyrights involved in the broadcast of a given piece of music, *viz* the rights of the composer in relation to the broadcasting of his work, the rights of performers, and the owners of copyright in sound recordings. The rate of royalties to be paid by radio stations to record companies is not prescribed. The Legislature chose to leave it to agreement between radio stations and owners of copyright in sound recordings, failing which, arbitration or, as in the present case, where the parties failed to agree on either a rate or referral to arbitration, determination by the Copyright Tribunal.

The dispute in this case was essentially between NAB and SAMPRA, concerning the reasonableness of the rate of royalties the former should be paying the latter. The two parties differed on the formula to be used in determining what was due.

Subsequent to the referral and the cross-referral, the parties were at odds about the extent of the Tribunal's jurisdiction, including the question whether it had the power to determine the date from which royalties were payable. NAB therefore approached the High Court and obtained a declaratory order confirming the issues which the Copyright Tribunal could determine in the dispute.

The parties adduced extensive evidence before the Tribunal. The present Court held that the Tribunal had wrongly discounted such evidence. To the extent that the Tribunal's determination occurred without reference to the very important evidence, the determination is liable to be set aside and substituted. The Court arrived at its own determination of the rate of royalties payable and upheld the appeal to the extent the applicable formula had to be amended.

The cross-appeal was dismissed.

Notes

For Intellectual property see:

. *LAWSA* Second Edition Replacement Volume (Vol 29)

. Burrell TD *Burrells South African Patent and Design Law* (3ed) Durban LexisNexis 1999

Case referred to in judgment

Oakdene Square Properties (*Pty*) *Ltd and others v Farm Bothasfontein* (*Kyalami*) (*Pty*) *Ltd and others* [2013] 3 All SA 303 (2013 (4) SA 539) (SCA) - **Referred to**	279

Judgment

NAVSA JA:

[1] Except for a period between 1916 and 1965, there was no legislative machinery compelling commercial and public radio stations to pay copyright royalties to the recording industry and performers for the use of sound recordings in their broadcasts.1 This changed with legislative amendments to the Copyright Act 98 of 1978 (the "Act") during 2002. The applicable provisions will be dealt with in due course. The present appeal and the related cross-appeal, with the leave of this Court, concerns the correctness of a determination by the Copyright Tribunal (Sapire AJ), established by section 29 of the Act,2 about the rate of royalties broadcasters are required to pay and it requires a consideration of the extent of the Tribunal's jurisdiction. This is the first case of its kind.

[2] The appellant is the National Association of Broadcasters ("NAB"), a non-profit organisation funded entirely by its members, more than 80 in number, who are all active participants in the South African Broadcasting

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Industry (the "SABI"). These members include all television broadcasters, most commercial and public radio stations, community radio stations and signal distributors. The present dispute only concerns 31 commercial and public radio stations.

[3] The first respondent, the South African Music Performance Rights Association ("SAMPRA"), in terms of the Act and the regulations promulgated thereunder, is an accredited3 collecting society of royalties for sound recordings on behalf of its only member, the Recording Industry of South Africa ("RISA"), an industry body representing members of the recording industry.

[4] The second respondent, the Southern African Music Rights Organisation ("SAMRO"), which represents the interests of composers, played the part of observers during proceedings before the Tribunal. Similarly, before us, they chose not to participate but to observe.

[5] A sound recording (embodied in a record, CD, tape, digital or other device) is usually the product of many talents, namely, the musical work of the composer, the literary work of the poet or lyricist, the performance of the artist, and the arrangements made for its making by its producer. A sound recording need not contain music, alternatively it need not contain words.4

[6] In appreciation of these talents the Act and the amendments thereto, read with the provisions of the Performers' Protection Act 11 of 1967 (the "PPA"), recognises three kinds of copyrights involved in the broadcast of a given piece of music. First, section 6(d) of the Act protects the rights of the composer5 in relation to the broadcasting of his or her work. Second, section 5(1)(a) of the PPA, which deals with the rights of performers, states:

> "(1) Subject to the provisions of this Act, no person shall -
>
> (a) without the consent of the performer -
>
> (i) broadcast or communicate to the public an unfixed performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; . . . ."

Third, section 9A(1)(a) and section 9A(2)(a) and (b) of the Act dealing with the position of the owners of copyright in sound recordings, provide as follows:

> "(1) (a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.
>
> . . .

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> (2) (a) The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No 11 of 1967).
>
> (b) The performer's share of the royalty shall be determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies."

[7] There is no statutorily prescribed rate of royalties to be paid by radio stations to record companies. The Legislature chose to leave it to agreement between radio stations and owners of copyright in sound recordings, failing which, arbitration or, as in the present case, where the parties failed to agree on either a rate or referral to arbitration, determination by the Copyright Tribunal.6

[8] This case does not involve the rights of composers. Essentially, it is a dispute between NAB and SAMPRA, concerning the reasonableness of the rate of royalties the former should be paying the latter. It is accepted by NAB that royalties should be paid to SAMPRA for the broadcast by radio stations of sound recordings. NAB and SAMPRA differ on the formula to be used in determining what is due. It is common cause that the royalties to be collected are to be shared between the recording studios and performers. During the hearing of the present appeal we were informed that recently, following negotiations between their respective representatives, an equal split had been agreed.

[9] Sound recording royalties are colloquially referred to as "needletime royalties", a throwback to the time when sound was relayed from a vinyl record via a stylus on a record player. Lobbying by musicians, performers and the recording industry saw the amendments to the Act and the PPA, referred to earlier, being effected in 2002, to protect performers and owners of copyright in sound recordings. Record companies were motivated by reduced sales of compact discs (CD's) due to piracy, facilitated by technological advancements. Musicians and performers, on the other hand, were driven by their sense of being inadequately rewarded for their services.

[10] The determination referred to in paragraph 1 was made pursuant to a referral to the Tribunal by SAMPRA in terms of section 9A7 of the Act. In making the referral, SAMPRA proposed a formula which it contended

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ought to be used to determine the royalty rate. NAB, in turn, resorted to a cross-referral in which it sought a determination based on its proposed royalty formula. In addition, NAB sought a determination from the Tribunal about the date from whence that royalty was to apply. That issue and the appropriateness of the formula proposed by NAB are the subjects of the cross-appeal. Sapire AJ did not address whether he could or should determine the date from which the royalties are to be paid, notwithstanding that it had been pertinently raised. More about that later.

[11] Predictably, the royalty formula proposed by each produces a result most favourable to the interests represented by each. Put simply, SAMPRA's formula results in a higher rate of royalty, whilst NAB's formula produces a lower rate.

[12] At this stage, it is necessary to set out the formulae proposed by NAB and SAMPRA. The following formula is the one proposed by SAMPRA:

$$\frac{\text{"A}}{\text{B}} \times \frac{\text{C}}{10}$$

Where:

A = the amount of time used by a radio station in any period to broadcast the sound recordings administered by SAMPRA;

B = the total amount of time used by a radio station in that period to broadcast editorial content,

and

C = a [radio station's] net broadcasting revenue.

Net broadcasting revenue means the amount in South African Rands equal to 85% in number of the published rate card value (before any . . . deductions) of advertisements and sponsored promotions or features broadcast by the Station, including any such broadcast by any entity which is an associate, subsidiary or agent of the Station and including advertisements published on any internet simulcast service;

'editorial content' is defined as content, including the repertoire, broadcast for entertainment, information or interest of members of the public and shall not include broadcast time allocated to programme promotions and/or advertisements or promotions on behalf of the Station or any registered or unregistered charity or in support of social action activities, including but not limited to awareness raising campaigns and initiatives, telephone helplines."

[13] In relation to C in the SAMPRA formula, the published rate card value is obtained from data published by the AC Nielsen company. Economists, analysts, the media and the advertising world all rely extensively on the AC Nielsen data. The published data includes the monthly values of advertising spots broadcast by each radio station, calculated by reference to each such station's published rate card. The rate card does not take into account discounts, and the 85% provided in SAMPRA's formula is based on its estimate of a 15% discount allowed by radio broadcasters to advertisers.

[14] NAB proposed the following:

$$\frac{\text{"A}}{\text{B}} \times \text{C} \times \text{D} \times \frac{\text{E}}{\text{F}}$$

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Where: -

A = the amount of time that a radio station broadcasts protected sound recordings per time channel;

B = the total broadcast time of the radio station per time channel;

C = a radio station's net revenue per time channel;

D = the industry average net profit percentage for the period;

E = the radio station's audience for the period;

F = the total radio audience for the period; and

The needletime royalty per station is the sum of royalties calculated per time channel for the period. 'Time channel' refers to a fixed period within the 24-hour cycle, and according to which audience is measured (and therefore advertising costed).

Net revenue is defined according to the industry accredited body the Radio Advertising Bureau ('RAB') as actual gross advertising revenue adding all net events revenue and deducting all agency commissions, discounts, public service

announcements and trade exchanges."

[15] The major differences between the respective formulas can be seen from what is set out in this and the four paragraphs that follow. SAMPRA takes into account the total amount of time used by radio stations in any period during which sound recordings are broadcast, to which SAMPRA can lay claim, against the total amount of time used by a radio station in that period to broadcast editorial content, which is defined to exclude the broadcast of specified items. SAMPRA brings those two items into the reckoning against the radio station's total revenue during the same period. The factor of ten employed in SAMPRA's formula is based on its unflinching attitude that a broadcaster that chooses to use sound recordings for 100% of its broadcast editorial content time should pay a royalty equal to 10% of the revenue that it derives from airtime. So, if sound recordings constitute 58% of the broadcaster's editorial content, the royalty is 5,8%, and so on. What this means is that, as a broadcaster's use of music as a percentage of its total broadcast editorial content declines, so the royalty percentage declines proportionally.

[16] The exclusion of certain items from editorial content has, as a result, that the proportion of music will necessarily be higher than if the editorial content were to be broadened, so as to avoid the exclusions contended for by SAMPRA. In simple mathematics, the smaller the denominator, the larger the result of the fraction. In short, it increases the royalty rate. SAMPRA's rate, as can be seen from what is set out above, can notionally be from 10% downwards.

[17] NAB, on the other hand, contends that the rate should be determined by reference to the use of copyright protected sound recordings per time channel, distinguishing between peak broadcasting times and times during which most people are asleep, and that revenue generated should be considered in relation to each time channel. That, according to NAB, should then be brought into reckoning against the total broadcast time of the radio station per time channel, without any deduction, as envisaged by SAMPRA's exclusions in its definition of editorial time.

[18] Furthermore, NAB brings profit into its formula, based on the industry average, whereas SAMPRA's proposal has regard to an individual

broadcasting station's total net revenue, without reference to profit or NAB's proposed time channels. NAB's formula also takes into consideration audience-reach, which SAMPRA's formula disregards. There is also disagreement about SAMPRA's use of the published rate card less a 15% discount to determine revenue. It was contended on behalf of NAB that discounts sometimes exceed 15% and that it would be better to have regard to the revenue reflected in a radio station's financial statements.

[19] NAB's less restrictive approach to editorial content has as a concomitant a reduced percentage use of musical content. It is the antithesis of what is set out in paragraph 16. All the factors referred to in the preceding two paragraphs have the effect of a restricted royalty rate which, it appears, equates to a little over 1% of a broadcaster's net income.

[20] The merits of the relevant constituent parts of each formula will be dealt with in due course after an assessment of the evidence and the contentions in relation thereto.

[21] It is necessary to record that subsequent to the referral and the cross-referral, the parties were at odds about the extent of the Tribunal's jurisdiction, including the question whether it had the power to determine the date from which royalties were payable. In the latter regard the following facts are relevant. Even though Parliament amended the Act and the PPA in 2002 to provide for needletime royalties, it was not until 1 June 2006 that the Minister published Regulations that provided for accreditation of collecting societies and the conclusion of framework agreements between such collecting societies on the one hand, and trade associations and representative bodies of potential users of sound recordings, on the other.[8] There was a dispute between the parties about whether the royalties became due when the amendments were effected or whether they were only due when the mechanisms for collections were put in place legislatively. In respect of the intervening period questions arise about whether performers and producers of sound recordings could otherwise sue for copyright infringement. Issues such as prescription also intrude.

[22] There was uncertainty about the procedure to be adopted by the Tribunal, in fulfilling its statutory function to determine the royalty rate. In this regard, it is important to note that there are no regulations prescribing the procedure. After the present matter was ripe for hearing before the Tribunal, and after representations in this regard, the Minister of Trade and Industry (the "Minister"), recognising various lacunae in the legislation, established the Copyright Review Commission to assess concerns and allegations about the Collecting Society's model for the distribution of royalties to musicians and composers of music. The Commission completed a report in 2011 in which it said the following concerning the procedure to be followed by the Tribunal:

> "It also became apparent to the [Copyright Review Commission] that the present statutory provisions dealing with the Copyright Tribunal requires substantial amendment to enable the Tribunal to perform effectively in the various matters that may come before it. . . .

> In a memorandum submitted to the [Copyright Review Commission] the Registrar of Copyright stated that the delays in finalising the two matters before it relating to needletime royalties were 'the result of unclear and vague regulations *which do not prescribe the procedure to be followed*.'" (My emphasis.)

These are aspects on which I will comment further later in this judgment.

[23] In light of the disputes referred to at the beginning of paragraph 21 NAB considered it necessary to apply to the North Gauteng High Court for a declaratory order concerning the Tribunal's jurisdiction. Despite opposition by SAMPRA it was successful in that endeavour. The following order was made by Claassen J:

> "1. THAT the copy-right Tribunal is to determine the following:
>
> 1.1 The royalties payable in respect of sound recordings;
>
> 1.2 The date from when royalties are applicable;
>
> 1.3 Whether any escrow payments are to be made in the interim;
>
> 1.4 Whether any other royalties such as for the so-called mechanical reproduction of sound recordings in the broadcast processes are payable, and if so, from when;
>
> 1.5 Costs relating to the application of substituted service effected in respect of this application, as authorised by the Court on 22 October 2008 following the applicant's *ex parte* application under case number 44698A/2008 be reserved for later determination;
>
> 1.6 First respondent pay the costs of this application, including the costs of two councils."

The application to the High Court and the resultant order will also be dealt with later in this judgment.

[24] Before the Tribunal, the parties followed the conventional adversarial procedure and evidence was adduced by each. Economists testified in support of each side's proposed formula referring to economic theory and relevant and practical factors to be taken into account in determining a royalty rate. Protagonists in both the broadcasting and sound recording fields and other witnesses testified. SAMPRA also led evidence and presented documents that dealt with the rate of royalties for sound recordings employed internationally by a range of countries. I consider it necessary to set out the relevant evidence in the paragraphs that follow.

[25] Mr Louric Richardt, an attorney and consultant with the International Federation of the Phonographic Industry, testified about his experience and exposure to processes and practices worldwide. It appears that not only economic realities but historical factors are taken into account in other countries. The more recent trend, however, is for economic factors to play a more prominent role. A principle that applies universally is that broadcasters pay royalties in relation to the time that music is played on their radio stations. Put simply, the principle is pay for play. Another rule is that rates are based on a correlation between time and revenue generated. In some instances, countries apply rates that increase in relation to bands of increasing revenue.

[26] According to Richardt the broadcasting industry in South Africa is amongst the most profitable in the world with profit margins reaching to between 40 and 50%. This evidence was largely supported by Mr Peter Armitage who commented on the financial results of three entities that control most of the radio stations in South Africa.

[27] In some countries the royalty rate payable to owners of copyright in sound recordings is half of those payable to composers. For many decades SAMRO has been collecting those royalties in South Africa. Richardt accepted that in the South African context and relative to the international trend, the SAMRO rate is irrelevant. He appears to base that conclusion on the fact that composers have resisted attempts to have the value of their intellectual property linked to those of others. Richardt testified that other benchmarks are preferable.

[28] Mr Richard Murgatroyd, an economist, testified in support of SAMPRA's case. His evidence on a particular pricing theory, it was agreed by the parties, can rightly be discounted. Of importance are his concessions under cross-examination. He accepted that the SABI was extensively regulated. So, for example, they are statutorily obliged to include local content of at least 25%. Also, the public broadcaster has language and specific religious broadcast obligations.

[29] Insofar as revenue is concerned, Mr Murgatroyd and other witnesses agreed that the use of actual income was better than the use of notional amounts and in this regard they accepted that the financial statements of NAB's members ought to be employed. Although not entirely forthcoming, Mr Murgatroyd appeared to accept that promotions by radio stations of the upcoming broadcasts, might impact beneficially on revenue and that they should perhaps not be excluded in SAMPRA's definition of editorial content. He seemed to agree with the proposition by Counsel on behalf of NAB that if one could link time channels to revenue generated by advertising during those particular segments, it would be preferable to have regard to revenue in relation to time channels. I will, in later paragraphs, deal with other evidence on this aspect.

[30] Mr Keith Lister, chairperson of the board of SAMPRA, testified that he was formerly Chief Executive Officer of Sony Music Entertainment Africa (Proprietary) Limited. He testified about how the Minister had unsuccessfully been lobbied to change legislation to provide for a compulsory 50/50 sharing of the royalty between performers and record companies. As stated above, this split now appears to have been agreed between their respective representatives. It appears from Lister's testimony that, historically, the recording industry considered a 10% royalty for 100% of music usage by broadcasters as fair, because it was then thought that the ten per cent should also embrace the present 3,25% royalty paid to SAMRO for composer rights. Later, the recording industry thought that 10% ought to be shared exclusively between performers and the recording industry, with composers being left to a separate 3,5% to be collected by SAMRO. It appears from Mr Lister's evidence in-chief that the 10% royalty claim is a rigid position driven by a "sense" that it would be reasonable, without there being any postulated rationale.

[31] In his evidence, Lister dealt with the 15% discount referred to in SAMPRA's formula and said that a closer examination of discounts provided in the available documentation indicates that the discounts afforded to advertisers were closer to 18,9%. In his view, discounts should not be allowed at all because they should be considered as the cost of doing business. In respect of the time channels and related revenue proposal by

NAB, Mr

Lister testified that the proposal is impractical, because advertising is sold by broadcasters to advertisers in bundles. Sometimes free spots are provided to advertisers in non-peak advertising times as part of a bundle, to induce advertisers to buy premium spots at premium prices. In addition, music usage in non-peak periods is substantially greater than at premium times.

[32] Mr Lister testified that there are other revenue streams that redound to the benefit of owners of copyright in sound recordings, including from retailers, banks, shopping malls, sport stadiums, restaurants and the like, and that the amount collected over the past three to four years from licensing is in the region of one hundred million rand. Importantly, Mr Lister accepted that international royalty rates paid to composers were in most instances higher than rates for sound recordings. He accepted that some of the largest members of RISA repatriated to America and elsewhere the greater percentage of what was received as sound recording royalties. Even though Mr Lister was loath to make any concession concerning royalty rights for performers in the United States of America (the "USA"), it does appear that at least a substantial percentage of performers have no royalty rights in respect of terrestrial broadcasting by radio stations in the USA. Mr Lister testified that there is some money that accrues to South African performers from broadcasts internationally, but that the outflow of funds to recording companies in other countries, particularly the USA, is greater.

[33] An important aspect of Mr Lister's testimony is the question of how a radio station's audience-reach is evaluated in relation to revenue. Some radio stations with a more limited audience charge a higher rate because the audience is regarded as having a higher value to the advertiser. It might relate to affluence, or products connected to the target audience. There is undoubtedly difficulty in placing a value on listenership.

[34] An issue of significance is the percentage of works administered by SAMPRA that is subject to copyright. The regulations under the Act require that a repertoire of copyright protected sound recordings be made available by a collecting society. Regulation 7(1) of the Collecting Society Regulations, promulgated under the Act,[9] provides as follows:

> "7. Licensing - (1) A collecting society shall make available, on non-discriminatory terms, for any potential user of public playing rights the complete repertoire of records in respect of which the public playing rights are owned by the South African and foreign rightholders that [are] represented by it."

It is necessary to point out that a complete repertoire has not yet been compiled or provided by SAMPRA. Mr Lister testified that a substantial playlist provided by NAB to SAMPRA could in a relatively short time be analysed to determine what percentage is not protected by copyright. This is an important issue because it appears that not all the music administered by the SAMPRA is subject to copyright.

[35] The problem flowing from what is set out in the preceding paragraph is that it would be difficult to invoice and charge broadcasters for the use of

sound recordings without a proper reconciliation. Mr Lister suggested that this problem could be met by resorting to the following procedure: A broadcaster would only be invoiced after an analysis by SAMPRA of its playlist. He suggested that provisional payments be made, which could later be adjusted when a reconciliation was completed, having regard to copyright in sound recordings. It also appears from Lister's testimony that the royalty rate collected by the SAMRO in respect of composer rights is calculated at 3,25% of revenue and that the rate is based on international comparisons. That rate is current.

[36] According to Mr Lister, since deregulation in 1995, the South African music industry peaked in 2007 and went into decline thereafter. Mr Lister agreed that revenue is not always in direct proportion to profitability, but pointed out that when revenue declines, margins tend to be lower and profitability less.

[37] Mr David du Plessis, General Manager of RISA and CEO of SAMPRA, testified that the rate proposed by SAMPRA, when compared to international rates, is not below the average. However, it appears that only Finland and France have a higher rate than the rate proposed by SAMPRA. He added a qualification, namely, that the music usage per radio station would determine the ultimate rate. As pointed out above, the rate reduces as the music used during a broadcast period lessens. He accepted that the average SAMPRA rate would be above the SAMRO rate. Mr Du Plessis cautioned against a purely mathematical international comparison, suggesting that circumstances in those countries have to be contrasted with circumstances locally. According to Mr Du Plessis, only 2% of SAMPRA's repertoire is not subject to copyright. He was adamant that if SAMPRA was provided with lists by broadcasters they could determine which qualify for copyright protection and which do not.

[38] Ms Virginia Hollis, the Managing Director of Media Shop (Pty) Ltd and the vice-chairperson of the South African Advertising Research Foundation that conducts audience research for all media, testified. She spoke of the media's reliance on the AC Nielsen data. Radio stations provide their logs of advertising broadcast to AC Nielsen, which then publishes it. That then provides a basis for an estimate of what was spent by each radio station. AC Nielsen provides the advertising rates as well. She testified that the radio stations do not provide particulars of discounts provided to any advertiser. Ms Hollis confirmed what was said in evidence by Mr Lister, namely, that it is often difficult to calculate revenue per time channel because of what she called "value add-ons", namely, providing free airtime to advertisers in some time channels instead of offering a discount, as an incentive to advertise at higher rates in prime time channels.

[39] Mr Andrew McFarlane, a director and shareholder of a company that uses technology to determine the time and duration of broadcast of sound recordings and to record the name of the artist as well, testified. The data

so collected enables the company to calculate the aggregate amount of time on any given day or over any period that is utilised by any radio broadcaster for the broadcast of music sound recordings. The information gathered is sold to interested parties.

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[40] Mr Quintin Stewart, Managing Director of a company that monitors radio and television broadcasts in South Africa testified that, by the use of technology, one can accurately determine the content of broadcasts.

[41] Mr Spiro Damaskinos, a director of Sony Music Entertainment Africa (Proprietary) Limited, testified that for a decade he was directly responsible for its marketing and promotional relationships with radio and television broadcasters. He testified about how radio stations clamoured for new releases and that recording companies were always under pressure to supply new content. He testified about what is common knowledge within the recording industry, namely that, ironically, even though consumers have increased access to music through the internet and digital technology and even though the music they sell has never been more popular, revenue through the sale of physical and digital products has continued to decline. Much of this is due to increasingly sophisticated illegal downloads. It was accepted that a benefit is derived by recording companies from airplay by radio stations, but that did not necessarily translate into sales and revenue - certainly, not as much as it used to.

[42] Dr William Bishop, an economist, testified in support of NAB's case. He, like others, accepted that placing a value on intellectual property is generally not an easy task. This proposition is not contentious. In the event of a rate that is prohibitive, radio stations would resort to using the efforts of session musicians captured on a disc or other device in their music broadcasts. There are instances of persons who use sound recordings, who have resorted to this method, particularly in the United Kingdom.

[43] Dr Bishop favoured the revenue per time channel calculation as NAB would have it. Dr Bishop could not understand the logic of SAMPRA's exclusions from editorial content. He was of the view that revenue in either formula should be based on actual figures rather than notional ones. Simply put, this means financial statements, rather than the rate card less the estimated discount. Dr Bishop took the view that either formula could be scaled up or down to get to a rate that would avoid perverse reactions and consequences. He agreed that an acceptable formula was one that reduced distortions but warned against setting the rate so low that it was considered not worthwhile. Dr Bishop was struck by the complexity of regulation in the radio industry in South Africa. In considering profit against revenue, Dr Bishop testified that one could have revenue with a bad profit-crunch and, similarly, one could have profit soaring out of proportion to revenue. Whilst he accepted that there was no direct correlation between revenue and profit, he stated that there was some correlation.

[44] It will be recalled that NAB's formula incorporated the profit average for the industry. Dr Bishop stated that it was for someone else to explain why that was adopted. He accepted that some form of sharing, either in revenue or profits, has to be factored into a formula. Viable sharing has to be appropriate and efficient. Whilst he described the symbiosis between the record industry and radio broadcasters as a joint venture of sorts, he accepted that it was not truly such.

[45] Mr Jonathan Shaw, a music business entrepreneur, testified that a large proportion of music broadcast in South Africa originates from American companies.

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[46] Mr Colm Tonges, an accountant, testified on behalf of NAB. He is a partner at Price Waterhouse Coopers ("PWC"), an auditing firm, and was instrumental in compiling NAB's formula. He rejected the 10% proposed by SAMPRA as being arbitrary. In justifying the revenue per time channel approach, he testified that one of the principles PWC tried to incorporate was that the more people were listening, the more revenue would be generated, and that the time channel proposal ought to be viewed in that light. Thus, the best way was to link revenue to time channels in order to ensure that that objective was being met, rather than simply having regard to revenue across all time channels. Like other witnesses, he too favoured actual revenue reflected in a broadcaster's financial statements. In looking at letters of demand from SAMPRA, PWC considered its formula in relation to seven radio stations that were different in size and got a range of a royalty rate of between 6,8 to 8,8%. That exercise was purely to illustrate the levels of royalty that would ensue if SAMPRA's formula was adopted.

[47] PWC factored in audience-reach in its formula to ensure that radio stations with a greater audience paid more. Mr Tonges accepted that revenue bears a relationship to listenership, but testified that it is not the only variable and that demographics impact on revenue as well. Audience income is thus not irrelevant. Audience size can be fairly accurately determined by market surveys.

[48] A concern by PWC was that if the level of royalty was too high, the viability of radio stations may be affected. Justifying the inclusion of industry average profits in the NAB formula, Mr Tonges stated that basing a formula on an individual station's profit might prove inequitable. So, for example, a well-run station would pay higher royalty than one less so. This, he stated, should be contrasted with loss making radio stations that would not pay any royalty, even though, notionally, they could have higher music usage. An industry average avoided such a result.

[49] Dr Nicola Theron, an economist who is the Managing Director of an economic consultancy, testified. Like others, she preferred revenue in the formula to be based on actual rather than notional figures. She too spoke of the difficulty of placing a value on intellectual property. In respect of exclusions from SAMPRA's definition of editorial content, she stated that the exclusions are something one needs to be certain of. She thought that in respect of international comparisons, developing countries would be more comparable to

South Africa. Dr Theron took the view that there was some value to international comparisons, but qualified it by saying one should be conscious of peculiarly South African circumstances. Although, more recently, there has been a decline in radio listenership, there has overall been a growth in the revenue of radio stations.

[50] Dr Theron agreed that, from an economist's point of view, one would be concerned about the net outflow of currency from South Africa in determining a royalty rate. She took the view that in determining the royalty rate, one should minimise the impact on all parties. Importantly, Dr Theron thought that a simple, rather than a convoluted formula would be preferable. As an economist, she testified in relation to any proposed formula that a result that is startling should make one revisit the methodology producing the result.

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[51] Johannes Koster, the Executive Director of NAB, testified. In respect of advertising discounts, he testified that a maximum of 16,5% is allowed as discounts to advertisers. In respect of a 50 000-odd play list obtained from SAMPRA, NAB had difficulty identifying the originality of all the sound recordings. In relation to editorial content, Mr Koster testified that promotional competitions have entertainment value as well as playing a role as a reward for listeners participating, and the advertiser attached to it gets exposure. It certainly could help to generate revenue.

[52] Finally, I consider it useful to reproduce a broad based table compiled by SAMPRA on sound recording royalty rates that apply in other countries. It is necessary to point out that the table does not provide motivations or qualifications. However, as appears from what is set out above, there was testimony in relation to royalty rates that apply in still other countries. The table that appears hereafter sets out the comparative rates.

0 - 1%	1 - 2%	2 - 3%	3 - 4%	4 - 5%	5 - 6%	>6%
Australia Chile Japan Malaysia Romania	Argentina Barbados Costa Rica Lithuania India Italy Jamaica Panama Paraguay Poland	Canada Dominican Republic Latvia Portugal Slovenia Spain Switzerland	Bulgaria Peru	Austria Czech Republic Denmark Greece Hong Kong Netherlands Thailand United Kingdom	France Germany Sweden Slovak Republic	Finland Ireland

[53] That then, in summary, was the totality of relevant evidence.

[54] Sapire AJ found most of the evidence referred to above unhelpful. Throughout proceedings it was evident that he required of the expert witnesses to actually provide the rate he was called upon to determine. He disregarded the evidence of royalty rates applied internationally. He described how he would go about determining the rate payable as follows:

> "I do not propose to analyse or adopt the opinions of the experts but will . . . use the SAMPRA formula with an adjustment to the denominator representing the percentage of the broadcaster's net income, to produce the desired result."

[55] Sapire AJ considered the appropriate rate to involve a value judgment on his part. It is difficult to discern the rationale for his ultimate conclusion. Towards the end of his determination he stated the following:

> "This assessment is made on the limited information available, but will result in an equitable reward to the referrer's clients, while not imposing an unaffordable burden on the broadcasters."

The following is the formula he determined should be used in calculating the needletime royalty:

$$\frac{\text{"A}}{\text{B}} \times \frac{\text{C} \times 7}{100}$$

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> Where:
>
> A = the amount of time used by a radio station in any period to broadcast the royalty protected sound recordings administered by SAMPRA;
>
> B = the total amount of time used by a radio station in that period to broadcast editorial content
>
> 'editorial content' is defined as content, including the repertoire, broadcast for entertainment, information or interest of members of the public and shall not include broadcast time allocated to programme promotions and/or advertisements or promotions on behalf of the Station or any registered or unregistered charity or in support of social action activities, including but not limited to awareness raising campaigns and initiatives, telephone helplines
>
> and
>
> C = a radio station's net broadcasting revenue.
>
> Net broadcasting revenue means the amount in South African Rands equal to 85% in number of the published rate card value (before any deduction of agency commissions or any other deductions) of advertisements and sponsored promotions or features broadcast by the Station, including any such broadcast by any entity which is an associate, subsidiary or agent of the Station and including advertisements published on any internet simulcast service; . . . ."

[56] In essence, the maximum royalty rate of 10% was reduced by Sapire AJ to a maximum of 7% with the

percentage decreasing relative to music use. Other than that change, the SAMPRA formula remained largely unaffected. It is against that determination that this appeal in terms of section 36 of the Act is directed.

[57] 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*,10 the factual matrix set out in Chapter 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 those provisions compatible with those of section 9A, more particularly those of section 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 section 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".

[58] One other preliminary issue that needs to be addressed, albeit briefly, is the failure of the Regulations under the Act to prescribe the procedure for the adjudication of a royalty rate. It is distressing that, despite a lapse of more than three years since the report by the Copyright Review Commission in which it described the regulations as vague and unclear and lamented the failure to prescribe a procedure for the adjudication of a royalty rate, no progress has been made. This is an aspect the Minister should address urgently.

[59] I now turn to deal with the manner in which the Tribunal made its determination. In my view, Sapire AJ wrongly discounted the evidence that both parties took care to adduce to assist him in reaching a decision. There are areas of commonality and divergence which ought to have been taken into account in arriving at a conclusion.

[60] First, almost all the witnesses were agreed that in considering revenue, the financial statements of the radio stations ought to be considered rather than the SAMPRA calculation of the rate card less a 15% discount.

[61] It is not irrelevant that many countries calculate a royalty rate based on the percentage of revenue with some choosing to increase rates relative to revenue thresholds. I will in due course deal with comparable rates.

[62] That the broadcasting industry is extensively regulated is a factor to be taken into account in NAB's favour.

[63] It 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. In Chile, sound recording rates are determined at half the rate of the composer royalty rate.

[64] Whilst NAB's proposal that revenue should be linked to time channels, distinguishing between peak periods and the midnight shift in which listenership is minimal, is superficially attractive, the following oddities arise: It discounts the fact that advertisers are offered free spots in the midnight shift in order to induce them to pay a premium for advertising spots during peak time, and it ignores the fact that the greater amount of music is used during off-peak periods.

[65] A concern expressed by the Advisory Committee on the Act in relation to the imposition of too high a royalty rate was the financial implications for South Africa, which translated, means excessive negative currency outflow. As pointed out, much of the money collected by SAMPRA will find its way to the USA and other countries.

[66] In addition, consideration should be given to perverse consequences for the music industry by too prohibitive a rate driving broadcasters to the alternative of using session musicians and the like.

[67] The problem with the introduction of profitability in the form of the industry average is that it does not properly or necessarily give vent to the pay-for-play principle and might be punitive on people whose profits are below the industry average. It might also lead to manipulation on an accounting basis in order to lessen the royalty burden. There appears to be no precedent internationally for including profitability in the calculation of a royalty rate. Dr Bishop, who testified on behalf of NAB, did not champion its inclusion and left it to others to justify.

[68] Although there appears to be some logic to factoring audience-reach into a formula, one has to be mindful of the difficulties of valuing an audience as became evident from the evidence set out above.

[69] There is force to the submission on behalf of NAB in relation to editorial content, namely, that the exclusions by SAMPRA are too liberal. Whereas advertisements ought rightly to be excluded, it appears to me that

programme promotions and other content such as charity drives or competitions ought not to be. They are part of the total cachet of a radio station and can all be said to be part of the revenue generating effort.

[70] As far as can be ascertained, only 6 countries, who probably all qualify to be described as developed countries, pay a rate of more than 5%. Only two developed countries pay more than 6% of total revenue. India, which is probably the more closely comparable country, charges between 1 and 2% of total revenue. In considering the international experience and practice, I am not unmindful of South African circumstances, more particularly that South African performers have been clamouring for years for their due.

[71] It is clear that the factor of 10 representing a maximum rate of 10% proposed by SAMPRA is purely arbitrary. Sapire AJ considered that, because the determination by him involved a value judgment, he was free to arrive at a conclusion by a sense of what was reasonable without any real consideration of all of the factors set out above. He appears to have considered that the SAMRO rate multiplied by two would be reasonable. In this

regard, instead of arriving at 6,5%, he determined 7% to be reasonable. It certainly was never suggested, with substantiation, by any of the witnesses that owners of copyright in sound recordings were entitled to rate their talents at twice the rate received by composers.

[72] It was submitted on behalf of SAMPRA that the discretion conferred on the Tribunal in terms of section 31(5) of the Act was the widest form of discretion in our law and that the Tribunal could legitimately adopt any one of a range of options about which there may well be a justifiable difference of opinion as to which one would be the most appropriate. Such discretion, so it was contended, is what is known as a strict discretion. In this regard the judgment of this Court in *Oakdene Square Properties* (*Pty*) *Ltd and others v Farm Bothasfontein* (*Kyalami*) (*Pty*) *Ltd and others* 2013 (4) SA 539 (SCA) [also reported at [2013] 3 All SA 303 (SCA) - Ed], is relevant.

[73] NAB, on the other hand, contended that the Tribunal did not have an unfettered discretion. Both parties, however, agreed that if we were to conclude that the Tribunal proceeded from incorrect facts and ignored relevant factors, the determination could be overturned and we could substitute a conclusion based on the available evidentiary material.[11] The parties were *ad idem* that any further delay was undesirable.

[74] In my view, Sapire AJ's determination occurred without reference to the very important evidence and factors set out above, with the consequence that the determination is liable to be set aside and substituted.

[75] For all the reasons set out above, a reasonable rate would be 3,0% of revenue as a maximum rather than the 7% determined by Sapire AJ or the 10% proposed by SAMPRA. In my view, the only justifiable exclusion from SAMPRA's definition of editorial time is the broadcast of advertising. There is no doubt in my mind that revenue should be that which is

reflected in a radio station's financial statements. In this regard the practice followed by SAMRO, about which we were advised from the Bar, appears salutary. It appears that broadcasters are invoiced two months in arrears, based on the revenue certified by its accountants, which, after the end of the financial year, is verifiable by way of audited financial statements. The time lag will enable SAMPRA to verify, pre-invoicing, that part of a radio station's play list that is rightly subject to copyright. From what is set out above, it is clear that I did not consider profitability or audience-reach to be included in a formula to arrive at the royalty rate. In my view, for the reasons already provided, I am un-persuaded that NAB's proposal that revenue should be calculated per time channel within a total broadcast period is justified. In this regard I bear in mind the concession by Ms Hollis who testified in support of NAB's case that a simple formula is to be preferred. NAB's formula is somewhat complex and more susceptible to disputes.

[76] Thus, the formula to be applied in determining the royalty rate is the following:

$$\frac{\text{"A}}{\text{B}} \times \frac{\text{C} \times 3}{100}$$

Where:

A = the amount of time used by a radio station in any period to broadcast the sound recordings administered by SAMPRA;

B = the total amount of time used by a radio station in that period to broadcast editorial content,

and

C = a radio station's net broadcasting revenue based on what is reflected in its financial statements or certified by its accountants.

'editorial content' is defined as content, including the repertoire, broadcast for entertainment, information or interest of members of the public and shall not include broadcast time allocated to advertisements."

[77] I now turn to address the remaining issue flowing from the cross-appeal by NAB. In my view, the approach to the South Gauteng High Court for the declaratory order referred to earlier in this judgment was misplaced. Counsel representing NAB rightly did not argue the contrary too strenuously. It was for the Tribunal to consider whether what it was required to determine was within its statutory powers. If it erred, that decision could be challenged on appeal. Counsel on behalf of NAB accepted that we were not bound by the decision of the High Court concerning the powers of the Tribunal to determine the date from whence the royalty is payable. In the latter regard, it is important to note that the Tribunal's power is narrowly circumscribed and does not include the power to deal with disputes concerning the time from which the royalties are due. Moreover, there are a number of issues that impact on the question of the date from which royalties become due including, but not limited to, prescription and claims for unlawful breach of copyright. Questions concerning the application and enforceability of the provisions of the Act also come into play. Sapire AJ did not address the question raised in the cross-appeal at all. In my view, there is no basis for concluding that the Tribunal was empowered to deal with the questions that arise from the cross-referral on this aspect.

[78] No costs were awarded in the court below. This was justified by Sapire AJ on the basis that both parties had contributed equally towards his determination and that he did not wholly adopt the formula of either one. In my view, the same reasoning applies in this Court. For the reasons set out above, the following order is made:

1. The appeal is upheld to the extent reflected in the formula set out below, and the cross-appeal is dismissed with no order as to costs.

2. The determination by the court below is set aside and substituted as follows:

$$\frac{\text{"A}}{\text{B}} \times \frac{\text{C} \times 3}{100}$$

Where:

A = the amount of time used by a radio station in any period to broadcast the sound recordings administered by SAMPRA;

B = the total amount of time used by a radio station in that period to broadcast editorial content,

and

C = a radio station's net broadcasting revenue based on what is certified by its accountants and confirmed in its financial statements.

'editorial content' is defined as content, including the repertoire, broadcast for entertainment, information or interest of members of the public and shall not include broadcast time allocated to advertisements."

(Shongwe JA, Swain, Legodi and Mathopo AJJA concurred in the judgment of Navsa JA.)

For the appellant:

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For the respondent:

I Miltz SC and *CL Robertson* instructed by *Edward Nathan Sonnenbergs*, Johannesburg and *Matsepes Incorporated*, Bloemfontein

Footnotes

1 See para [18] of the report of the Advisory Committee of the Copyright Act, dated 5 November 1993.

2 S 29(1) provides:

"The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, shall also be the Copyright Tribunal (in this Chapter referred to as the tribunal) for the purposes of this Act."

S 36 provides for appeals from the Tribunal to this Court.

3 SAMPRA was accredited as a representative collecting society in terms of reg 3(1)(a) of the Collecting Society Regulations published under Government Notice No 517/06 to administer the right to receive payment of royalties in terms of s 9A of the Act.

4 See discussion in para [5] of the report referred to in fn 1.

5 S 6(d) of the Act.

6 S 9A(2)(c).

7 S 9A(1) reads as follows:

"(a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.

(b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1) or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No 42 of 1965)."

8 GN 517 of 1 June 2006.

9 GN 517 of 1 June 2006.

10 OH Dean "*Handbook of South African Copyright Law*" 2012 at 1-55.

11 See para [20] of *Oakdene*.