



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 914/2015

In the matter between:

**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

APPLICANT

and

MASSTORES (PTY) LIMITED

RESPONDENT

Neutral citation: *SABC v Masstores* (1221/15) [2015] ZASCA 174 (25 November 2016)

Coram: Lewis, Wallis and Zondi JJA and Schoeman and Schippers AJJA

Heard: 16 November 2016

Delivered: 25 November 2016

Summary: Meaning of 'sell' in s 27(4) of the Broadcasting Act 4 of 1999 – whether mere agreement of sale or sale completed by delivery contemplated – dealer selling television sets to customer where goods stored at customer's premises and delivery not made – sale not concluded pending customer obtaining requisite television licence – no breach of s 27(4) – customer not liable for penalties – application for special leave to appeal refused.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Meyer, Victor and Wepener JJ sitting as a full court):

- 1 Condonation is granted for the late filing of the application for special leave to appeal.
 - 2 The application for special leave to appeal is refused with costs, including the costs of two counsel.
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JUDGMENT

Schippers AJA (Lewis, Wallis and Zondi JJA and Schoeman AJA concurring):

[1] This is an application for special leave to appeal referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The matter concerns the proper construction of s 27(4) of the Broadcasting Act 4 of 1999 (the Act). That section provides for the applicant, the South African Broadcasting Corporation SOC Ltd (SABC), to recover a penalty if a retailer sells a television set to someone who does not have a licence in terms of the Act. The specific issue is whether the respondent, Masstores (Pty) Ltd (Masstores), is liable for penalties under s 27(4) of the Act because it entered into an agreement with Plytrade 23 (Pty) Ltd t/a EduSolutions (EduSolutions) to

give it credit on the sale of 2 500 television sets, before EduSolutions obtained the requisite television licence.

[2] The SABC also sought condonation for the late filing of the application for special leave to appeal which was some eight days late. Masstores did not oppose the condonation application.

Factual overview

[3] The basic facts are largely common ground. Masstores, through a subsidiary, owns and operates retail outlets known as ‘Game’ and ‘DionWired.’ In order to ensure that customers who buy television sets are in possession of valid television licences, in 2009 Masstores in conjunction with the SABC developed a unique verification system known as the ‘purchase order management (POM) system.’

[4] Briefly, the POM system works as follows. It is linked to the SABC’s database of television licence holders and can therefore verify whether a customer who wishes to buy a television set has a licence. The details of the customer are entered into the system. If it shows that the customer does not have a licence or is in arrears with licence payments, the customer has to purchase a licence or settle the arrears at the licence counter in the store. If the POM system finds a record of a valid licence on the SABC’s database, the system generates a document recording that fact and the licence reference number. The customer then proceeds to the checkout counter to purchase the television set. At that counter a barcode entered into the till by the cashier will alert the internal point of sale system that a television set is being purchased. Thereafter a prompt on the till requests the cashier to enter the customer’s licence reference number. Only once that number has been entered, does the system allow the sale to be concluded. The licence reference number is then

reflected on the till slip which constitutes proof of both the sale of the product and that the customer is in possession of a valid licence. At the end of each day the system matches the sale of television sets and their licence reference numbers with the licences recorded in the SABC's database. It then generates a registration file of all licence registration and payments processed in the store that day, which is automatically transferred to the database of the SABC.

[5] EduSolutions procures goods for schools run by the provincial Departments of Education. On 25 February 2011 Masstores furnished it with a quotation for the sale of television sets and home theatre systems, for delivery to schools in the Limpopo Province. EduSolutions was advised that before the sale could be concluded, it would have to produce a valid licence and that it should contact the SABC to ascertain the correct licence to be obtained given the bulk nature of the transaction. It was anticipated that the requisite licence would be procured within a few days. That, however, did not happen.

[6] On 2 March 2011 EduSolutions wrote to Masstores requesting a credit facility, as payment to it by the Department of Education in Limpopo could be made only on receipt of the goods in terms of the Public Finance Management Act 1 of 1999. That request was granted and a payment credit facility agreement was signed on 24 March 2011, in terms of which Masstores granted EduSolutions a 30-day payment credit facility in the sum of R9 995 002.50. However, Masstores could not prepare the documentation relating to the sale because EduSolutions had not yet obtained the requisite licence from the SABC.

[7] Whilst Masstores was in the process of doing a credit check on EduSolutions, on 23 March 2011, Samsung, the supplier, unexpectedly delivered the goods to Masstores' Game store in Polokwane. Game had no space to store the goods and on 24 March 2011, they were moved to a

warehouse in Polokwane belonging to EduSolutions. Masstores took out short-term insurance cover for the goods because it carried the risk in respect thereof.

[8] By letter dated 8 April 2011, the SABC informed Masstores that 2 500 television sets were released to EduSolutions on 24 March 2011 when it was not in possession of the prescribed dealer licence; that Masstores failed to follow the standard procedure in verifying EduSolutions' licence prior to completing the sale; and consequently that Masstores was liable for penalties in the sum of R 7.5 million (2 500 x R3 000). Masstores' attorneys replied in a letter dated 13 April 2011 in which they set out the facts relating to the transaction and disputed Masstores' liability for penalties.

[9] On 10 May 2011 the SABC issued EduSolutions with a dealer licence. Masstores was then in a position to conclude the sale. It was not a cash sale. Therefore Masstores had to install computer software on its POM system to generate a bulk sale on credit. On 12 and 13 May 2011 Masstores processed the order placed by EduSolutions in two batches, generating two till slips recording the sale of the goods. Both till slips reflected the conventional details in relation to a licence that would be shown on the till slip of any other customer of Masstores who purchased a television set.

[10] On 13 May 2011 Masstores sent two employees to the EduSolutions warehouse at Polokwane to check the goods. They were found to be in good order and delivery notes were then issued which show that EduSolutions received the goods on 13 May 2011. It paid Masstores on 26 May 2011.

[11] By 30 May 2011 the issue regarding penalties had not been resolved. Masstores thus applied to the Gauteng Local Division of the High Court, Johannesburg for a declaratory order that it did not sell or alienate the goods to

EduSolutions within the meaning of s 27(4) of the Act; and that it was not liable for any penalties arising from the sale of the goods. Mailula J held that the sale was concluded sometime before 12 May 2011, and dismissed the application with costs. That order was reversed on appeal by a full court (Meyer, Victor and Wepener JJ). It held that Masstores did not sell or alienate the goods as envisaged in s 27(4) of the Act and that it was not liable for penalties arising from the transaction with EduSolutions.

Is Masstores liable for penalties under s 27(4) of the Act?

[12] Section 27(1) of the Act provides that no person, business, dealer or lessor may use a television set without a television licence issued by the SABC against payment of the prescribed fee for each television set so used, unless exempted by regulation.¹ Masstores is a dealer within the meaning of the Act.²

[13] A ‘television licence’ is defined as meaning a current and valid licence issued in terms of the Act for the use of a television set. The Act defines ‘use’ as, ‘the use or possession or permitting any other person to use or possess a television set and the words “**user**” and “**used**” are construed accordingly’.

[14] Section 27(4) of the Act reads:

‘A dealer who sells or alienates a television set to a person who is not in possession of a television licence and who is not exempted from the obligation to be in possession of a television licence, is liable to pay a penalty of R3 000 or such amount as may be prescribed, but such penalty may not exceed R10 000 in respect of each television set sold or alienated to such person.’

[15] This court has said that when interpreting legislation, what must be considered is the language used; the context in which the relevant provision

¹ Section 27(1)(a) and (b) of the Act.

² The Act defines a ‘dealer’ as a person who engages in the business of selling television sets.

appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.³

[16] On its plain language, s 27(1) of the Act proscribes the use of a television set without a licence. Section 27(4) must be construed in that context. Thus a dealer who ‘alienates’ a television set by way of a donation, for example, is liable to pay the prescribed penalty if the recipient does not have a licence. This construction is reinforced by three provisions of s 27: the penalty provision contained in s 27(3) in terms of which a person who contravenes s 27(1), in addition to payment of the licence fee, is liable to pay double the licence fee; the penalty provision in s 27(4); and s 27(5) which provides that any person who fails to comply with any provision of s 27 is guilty of an offence and liable on conviction to a fine not exceeding R500 in relation to each such offence, or imprisonment, or both. The manifest purpose of s 27, as a whole, is to ensure that no person uses a television set without a licence.

[17] As to the meaning of ‘sell’ in s 27(4) of the Act, Wessels J in *Nimmo v Klinkenberg Estates Co Ltd*,⁴ noted that the word ‘sale’ has different meanings. He said (at 314):

‘Now the word “sale” is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase-price has been paid or whether there has been delivery of the article sold. But it is also clear that in ordinary parlance the word “sale” is used in a somewhat wider sense than a mere agreement. In a cash transaction it means delivery of the property on payment of the purchase-price, and a sale is said to fall through when the seller or the purchaser fails to complete his part of the contract. In the case of a sale for credit the word “sale” ordinarily means the actual transfer of the property.’

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

⁴ *Nimmo v Klinkenberg Estates Co Ltd* 1904 TH 310, which was referred to by this court in *Modelay v Zeeman & others* 1968 (4) SA 639 (A) at 643A; and also *Street v Evans* 1977 (3) SA 950 (RA) at 951H-952A.

[18] The term ‘sale’ in a statutory provision has been interpreted to mean a sale in the wider sense rather than a mere agreement. In *R v Nel*,⁵ Solomon JA held that the word ‘sale’ in the Transvaal Liquor Licensing Ordinance of 1902 meant a sale in the ordinary sense, namely a sale completed by delivery,⁶ in defining a general retail liquor licence, an hotel liquor licence and other licences where liquor sold is to be consumed on the premises.

[19] Likewise in *R v Levy & another*,⁷ a case in which the accused was charged with selling bread below the prescribed weight, it was held that the word ‘sale’ as used in a regulation made under s 48 of the Weights and Measures Act 32 of 1922, was not limited to the mere formation of a contract of sale but included delivery of the thing sold: the main obligation of a seller in a contract of sale.⁸

[20] The word ‘sell’ in s 27(4) must bear the meaning assigned to it in the scheme of s 27 of the Act, unless another or narrower meaning is specifically assigned. In my view the full court correctly held that it means a sale in the ordinary sense: not only the making of the agreement, but its fulfilment by delivery. Two basic reasons underlie this conclusion. First, if the purpose of s 27 is to prohibit the use of a television set without a licence, and ‘use’ means the actual use or possession of a television set, then delivery to the user is an indispensable requirement before the penalty provision contained in s 27(4) may be invoked. Second, this is a sensible and businesslike construction, which gives effect to the purpose of s 27.⁹ Any other construction would produce a manifest absurdity: it would mean that where there is a mere agreement to buy and sell a television set and the customer has not taken delivery of it, a dealer

⁵ *R v Nel* 1921 AD 341.

⁶ At 342.

⁷ *R v Levy & another* 1953 (3) SA 466 (A).

⁸ At 471G-472A.

⁹ *Natal Joint Municipal Pension Fund* (n 2 above) para 18.

would immediately be liable to pay the penalty prescribed in s 27(4). And this even in circumstances where the dealer seeks to verify whether or not the customer has a licence. It would also mean that, contrary to authority in this court, a sale subject to a suspensive condition that the purchaser obtain a licence would fall foul of the section and attract a penalty, despite the fact that no delivery had been effected.¹⁰ Such a construction is at odds with the plain language of s 27(1), the immediate context of s 27(4) and the overall purpose of s 27 of the Act.

[21] Applying the meaning of a sale as envisaged in s 27(4) of the Act to the facts of this case, in my opinion, and contrary to the SABC's assertion, there was no agreement of purchase and sale between Masstores and EduSolutions on 24 March 2011, let alone the physical delivery of the television sets.

[22] The POM system was put in place precisely to ensure that Masstores complies with its obligations under s 27(4) of the Act, and that the SABC receives revenue from licences. They had agreed the method by which television sets would be sold. There can be no suggestion that the transaction with EduSolutions was going to take place other than in accordance with the POM system, the only difference being that it was a bulk sale on credit. From the outset EduSolutions was informed that the sale would not be concluded unless and until it was in possession of the requisite licence. That is indeed what happened. And it is confirmed by the conduct of the parties and contemporaneous documentation.

[23] Thus, on 6 April 2011, Masstores sent an email to the SABC advising it that EduSolutions had already contacted the SABC regarding the licence

¹⁰ *Corondimas v Badat* 1946 AD 548 at 551 and the cases collected and discussed in *Geue & another v Van der Lith & another* 2004 (3) SA 333 (SCA) paras 7-12.

requirements; that Masstores was unable to record the sale on its system because it did not have a licence reference number from the SABC; and that the latter had requested the relevant documents from EduSolutions after which the SABC would furnish Masstores with the dealer reference number to enable it to conclude the sale.

[24] Similarly, on 7 April 2011 EduSolutions sought clarity on the requisite licence and informed the SABC that the sale had not yet been concluded and that it was storing the goods on behalf of Masstores. Now there was no reason for EduSolutions to fabricate this evidence: it was not in the circumstances liable for any penalty under the Act. The letter of 7 April 2011 was sent to the SABC precisely because Masstores had from the outset made it clear that the sale would not be concluded without the requisite licence. And this is supported by documentation showing the attempts by EduSolutions to obtain the licence, until it eventually received a dealer licence pursuant to a meeting with representatives of the SABC on 10 May 2011.

[25] Then there is the insurance cover taken out by Masstores in respect of the goods, before the sale could be concluded. It insured the goods on 24 March 2011 as it retained ownership and the risk. These facts are confirmed by the manager of the insurance company who stated that on 13 May 2011 she was informed that the sale had been concluded and that the risk had passed to EduSolutions. Further, absent ownership, Masstores would not have had an insurable interest in the goods.¹¹

[26] Apart from all of this, Masstores could not process a bulk sale of television sets on credit to EduSolutions on its POM system; it had to install

¹¹ As to which, see M F B Reinecke, J P van Niekerk & P M Nienaber 'Insurance' in 12(1) *Lawsa* 2 ed (2012) para 50.

special software to do so. The sale was concluded only after EduSolutions obtained a valid licence on 10 May 2011. The reference number of that licence was recorded on the relevant till slips when Masstores processed the sale in two batches on 12 and 13 May 2011. That is when delivery of the television sets took place. The facts show that Game in Polokwane did not have any storage space pending conclusion of the sale and for this reason the goods were stored in EduSolutions' warehouse. So, the transaction was concluded in accordance with the POM system and the intention of the parties.

[27] It follows that the SABC's contention that the payment credit facility agreement entered into between Masstores and EduSolutions on 24 March 2011 constitutes a sale as contemplated in s 27(4) of the Act, is quite wrong and insupportable on the evidence. That agreement did no more than provide EduSolutions with a 30-day payment credit facility.

[28] The evidence also discloses that throughout the SABC was apprised of the status of the transaction with EduSolutions. More particularly, the SABC was aware of the ongoing attempts to ensure that the requisite licence was in place before the sale could be concluded. In the circumstances, the SABC's claim for penalties of R7.5 million was opportunistic and contrived.

[29] Masstores is accordingly not liable for penalties under s 27(4) of the Act.

[30] What remains are the SABC's claims that the judgment of the court below makes its regulatory and revenue collection processes cumbersome and expensive; and that the POM system would be undermined at the point of sale if delivery happens at a different date. These claims, as the POM system demonstrates, are simply unfounded. The sale of a television set cannot be processed until a valid television licence number has been entered and accepted

at the till in a store. Indeed, it is common ground that from July 2010 to June 2011 only one out of 327 900 television sets sold by Masstores had an unresolved television licence query.

[31] The SABC has not shown any special circumstances that warrant the grant of special leave to appeal, and in particular has shown no reasonable prospect of success on appeal. In the result, the application for special leave to appeal must be refused.

[32] The following order is issued:

- 1 Condonation is granted for the late filing of the application for special leave to appeal.
- 2 The application for special leave to appeal is refused with costs, including those of two counsel.

A Schippers
Acting Judge of Appeal

Appearances:

For the Applicant: V Maleka SC (with N Mayet-Beukes; heads of argument prepared by I Semanya SC and N Mayet-Beukes)

Instructed by: Ningaza Horner Inc, Sandton
Symington & De Kok, Bloemfontein

For the Respondent: I Miltz SC (with JF Nicholson)

Instructed by: Shepstone & Wylie, Johannesburg
Matsepes Inc, Bloemfontein