

SOUTH AFRICA / JUDGMENT

Masstores (Proprietary) Limited v South African Broadcasting Corporation Limited (A5071/2014, 3294/2012) [2015] ZAGPJHC 192 (31 August 2015) [2015] ZAGPJHC 192

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meyer, Victor, Wepener

CASE / FILE NUMBER

A5071/2014, 3294/2012

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THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

JUDGMENT

Appeal Case No: A5071/2014

Case No: 3294/2012

DATE: 31 AUGUST 2015

In the matter between:

MASSTORES (PROPRIETARY) LIMITED.....Appellant

And

SOUTH AFRICAN BROADCASTING.....Respondent

CORPORATION LIMITED

Case Summary: Interpretation – Subsection 27(4) of the Broadcasting Act 4 of 1999 – provision imposes liability to pay a penalty upon 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 one - the meaning of the word ‘sells’ cannot be limited to the mere formalities of a contract of sale but the word is employed to refer to the wider transaction completed by delivery.

MEYER J (VICTOR AND WEPENER JJ concurring)

- [1] This is an appeal against an order of the Gauteng Local Division of the High Court (Mailula J) on 22 August 2012, dismissing with costs an application for declaratory relief brought by the appellant, Masstores (Pty) Ltd (Masstores), against the respondent, the South African Broadcasting Corporation Limited (the SABC). The appeal is with the leave of the court a quo.
- [2] The objectives of the SABC, in terms of s 8 of the Broadcasting Act 4 of 1999 (the Act), include the provision of television broadcasting services and television programmes funded inter alia by licence fees. The use of any television set by any person, business, dealer or lessor is prohibited in terms of s 27(1) of the Act unless they are in possession of a television licence issued by the SABC or exempted by regulation. Section 27(4), the construction of which is presently in dispute, reads as follows:

‘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 higher 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.’

Masstores, it is common cause, is a ‘dealer’ for the purposes of s 27(4) of the Act. It sells almost 328 thousand television sets annually through the countrywide retail stores known as ‘Game’ and ‘DionWired’.

- [3] Ptytrade 73 (Pty) (Ltd) trading as EduSolutions (EduSolutions) is involved in the management and procurement of goods for schools run by the Provincial Departments of Education in various provinces. EduSolutions purchased 2 500 television sets (the television sets) and 2 500 home theatre systems from Masstores for delivery to schools in the Limpopo Province. It was a sale for credit. The date of the conclusion of the contract of sale is in issue: the SABC asserts that it was on 24 March 2011 and Masstores maintains that it was on 12 and 13 May 2011. It is common cause that EduSolutions received its dealer’s television licence from the SABC on 11 May 2011. Masstores thereafter, on 13 May 2011, delivered the television sets to EduSolutions. Payment by EduSolutions of the purchase price to Masstores was made on 26 May 2011.
- [4] The SABC asserted that the television sets, although only delivered to EduSolutions on 13 May 2011 and paid for on 26 May 2011, were sold at a time when EduSolutions was not in possession of a dealer’s television licence. The SABC accordingly, in terms of s 27(4) of the

Act, demanded the payment of penalties from Masstores in respect of each television set sold to EduSolutions, which penalties total the sum of R7,5 million. Masstores refused to comply with the SABC's demand. It maintained that it sold the television sets to EduSolutions only after the SABC had issued the required television licence and Masstores was thus not liable to pay penalties to the SABC in terms of s 27(4) of the Act. The SABC refused to reverse the penalties levied against Masstores.

- [5] Hence the application in the Gauteng Local Division in terms of which Masstores sought a declaratory order that: (a) it did not sell or alienate the television sets to EduSolutions prior to EduSolutions having first obtained the television licence as required in terms of s 27(4) of the Act; (b) the sale of the television sets was not in breach of the Act; and (c) it is not liable for any penalties arising from the sale. Masstores asserted in the court a quo that it was the common intention of EduSolutions and itself that unless EduSolutions had been in possession of a valid television licence issued by the SABC there was to be no contract of sale. That is why, so Masstores asserted, the sale was only processed through the generation of its customary till slips, recorded and delivery of the television sets effected once EduSolutions had been in possession of a valid dealer's

television licence issued to it by the SABC. The application was dismissed with costs, the court a quo having found on the facts that the sale agreement had been concluded on 24 March 2011 when both parties signed a written 'payment credit facility agreement'.

Such are the provisions of that document, the court a quo found, as constituting a contract of sale between Masstores and EduSolutions.

- [6] Two questions are raised in this appeal: the point on which the case was decided in the court a quo, and more specifically whether or not Masstores and EduSolutions had the requisite consensus - the former to sell and the latter to buy - prior to EduSolutions coming into possession of the requisite television licence and the proper interpretation of s 27(4) of the Act, and in particular the meaning to be ascribed to the word 'sells', which is a question that was raised for the first time when application for leave to appeal against the judgment and order of the court a quo was made. It is to that question of law that I now turn. Section 27(4) of the Act must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.)
- [7] The requisites or essential elements of a contract of purchase and sale (*emptio venditio*) were concisely set out by Innes CJ in *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92 (at 101). There the Chief Justice at the time stated that-

'... the requisites of a sale are well known, *merx*, *pretium*, *consensus*. There must be a merchantable article, an agreed price, and the consensus of both parties, the one to buy and the other to sell; or the one to acquire and the other to alienate.'

(See also *McAdams v Fiander's Trustee & Bell* N.O. 1919 AD 207 at 223-224; *Commissioner for Inland Revenue v Saner* 1926 AD 162 at 172; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (AD) at 574B-D; *BC Plant Hire CC t/a BC Carriers v Gresco (SA) (Pty) Ltd* 2004 (4) SA 550 (CPD) para 41.) Payment and delivery are usually incidental to the concluded contract of sale. The delivery of the merx, which is the main obligation imposed on a seller by a contract of sale (*R v Levy* 1953 (3) SA 466 (A) at 471H-472A; *Modelay v Zeeman and Others* 1968(4) SA 639 (A) at 644C; *R v Hayden* 1926 TPD 419 at 423) transfers the ownership or dominium of the thing sold provided the price was paid, security found or credit given (*R v Nel* 1921 AD 339 at 346; *Laing v South African Milling Co. Ltd* 1921 AD 387 at 394).

[8] But, as was said by Solomon JA in *Rex v Nel* 1921 AD 339 (at 342)-

‘... the word sale is an equivocal one, which may be used in more senses than one. It may mean simply the contract of sale, or, as was said by Lush, J., in *Bristow v. Piper* (1915, 1 K.B. 279) “it is frequently used as a short way of describing a sale in the ordinary sense, a sale completed by delivery.”

And in *Nimmo v Klinkenberg Estates Co. Ltd* 1904 TS 310, Wessels J said the following regarding the various meanings with which the word ‘sale’ is used:

‘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 the mere agreement. In a cash transaction it means delivery of the property and 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.’

[9] The question that arises, therefore, is in what sense the word ‘sell’ is used in ss 27(4) of the Act. Did the Legislature intend for a dealer to incur the liability to pay a penalty upon the mere conclusion of a contract of sale with a person who is not in possession of a television licence and who is not exempt from the obligation to be in possession of one or is it the intention that the word also includes the delivery of the television set to such a person? In other words, is the word used in its narrow sense of a concluded agreement of sale or in its wider sense of not merely a concluded agreement of sale but the wider transaction embracing the delivery of the television set sold?

[10] A ‘television licence’ is defined in s 1 of the Act to mean ‘a current and valid written licence issued in terms of this Act for the use of a television set’ and a “television licence fee” means a fee prescribed in terms of this Act and payable for the use of a television set’. The word ‘use’ is defined to mean ‘the use or possession of a television set or permitting any other person to use or possess a television set and the words “user” and “used” are construed accordingly’. The manner or mode of using the television sets is not defined in the Act. But s

27(1)(c) provides that '[a] user who is required to be in possession of a television licence must possess all

the categories of television licences as prescribed, which pertain to such use' and ss 40(1)(c)(iii) and (iv) empower the Minister charged with the administration of the Act by notice in the Gazette to make regulations regarding 'the purpose for which and the place where a television set may be used' and 'different categories of television licences which any user of a television set may be required to possess'. The dictionary meaning of the verb 'use' followed by the word 'of' is 'make use of or employ something.' (See: The New Shorter Oxford English Dictionary 1993 Ed Vol 2 p 3531.)

[11] Subsection 27(1)(a) prohibits the 'use' of any television set by any 'person' and ss 27(1)(b) by any 'business, dealer or lessor' unless such person, business, dealer or lessor is in possession of a television licence issued by the SABC or exempted by regulation. This is where ss 27(4) fits into the legislative scheme. It imposes liability to pay a penalty upon 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'. The purpose of s 27(4)

is clear: it assists the SABC in its collection of television licence fees from persons, businesses, dealers or lessors to whom

television sets are sold or alienated and who are obliged in terms of the Act to be in possession of the prescribed television licence. If not exempted, such a person, business, dealer or lessor is only obliged to obtain a television licence if they use the television set as prescribed or if they possess the television set or if they permit any other person to use or possess the television set purchased. Mere agreement to buy and to sell a television set at an agreed price does not amount to using or possessing or of permitting someone else to use or possess the television set.

[12] I am therefore of the view that the meaning of the word 'sells' as used in ss 27(4) cannot be limited to the mere formalities of a contract of sale. The word was employed to refer to the wider transaction completed by the delivery by the dealer of the television set pursuant to the concluded contract of sale. Limiting the meaning of that word merely to the concluded contract would not give it a commercially sensible meaning. On the contrary it would result in the absurdity that the dealer in question will be liable to pay a penalty when selling or alienating a television set to a person, business, dealer or lessor who at the time of concluding the contract of sale was not using or possessing or permitting someone else to use or permit the television set and thus not obliged in terms of the Act to be in possession of a valid television licence issued by the SABC. Such a meaning would be contrary to the clear purpose of ss 27(4).

[13] My conclusion on the proper interpretation of ss 27(4) is decisive of the appeal. It is accordingly not necessary to consider the point on which the case was decided in the court a quo. Masstores and the SABC are ad idem that the engagement by each party of the services of two counsel were warranted and prudent.

[14] In the result the following order is made:

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

‘1.It is declared that:

1.1 the applicant did not sell or alienate 2 500 television sets to Ptytrade 73 (Pty) Ltd t/a EduSolutions prior to EduSolutions having first obtained the requisite television licence as required in terms of s 27(4) of the Broadcasting Act 4 of 1999;

1.2 the sale of the abovementioned television sets by the applicant to EduSolutions is not in breach of the Broadcasting Act; and

1.3 the applicant is not liable for any penalties arising from the abovementioned transaction.

2. The respondent is directed to pay the costs of the application, including the costs of two counsel where two counsel have been employed.’

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of Hearing: 19 August 2015

Date of Judgment: 31 August 2015

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