

In re: appeal against the classification of *Ken Park*.

Before the Film and Publications Review Board.

1/2004

In the Matter before:

Videovision Entertainment Pty (LTD)

And

The Film and Publication Board (FPB)

Appeal against the classifications of the film and video version of Ken Park.

Professor K Govender (Chairperson):

Introduction and points in Limine.

In May 2003, a classification committee of the FPB assigned a classification of 18 SNVL to the film version of Ken Park. The Committee also attached the following condition:

Release on art circuit only with special advisory warning to public that the film contains explicit sexual scenes.

In heads of argument dated 1 March 2004, the applicants, represented by Mr Mark Rosen of Rosin Wright and Rosengarten, sought to challenge the condition on the basis that it is ultra vires the powers of the classification

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committee. This classification, together with the condition, was assigned to the film almost ten months ago and accepted as such by the distributors. For ten months, this film has been distributed in accordance with the condition that the distributors are now seeking to impugn.

On the 5th December 2003, a different classification committee classified the video version of the Ken Park as X 18. In February 2004, an appeal against the classification was lodged by Nu Metro Home Entertainment.

Section 20 of the Films and Publication Act 65 of 1996 (as amended) provides that the distributor of a publication may within a period of 30 days from the date on which he or she was notified of the decision, appeal to the Review Board. It is important to point out that the statute does not expressly afforded a discretion to the Review Board to depart from the requirement that the appeal be noted within 30 days. In the absence of arguments to the contrary, I will assume that the appeal against the classification of the video is still in time, given the holidays in December. However the appeal against the condition imposed by the classification committee in respect of the film is clearly out of time and Mr Rosen correctly conceded that the issues surrounding the film must now be moot as the decision was accepted and respected. Finally no argument was presented as to the reasons for the inordinate delay in appealing against the conditions that accompanied the film. Thus, without commenting on the merits of the argument that the condition was ultra vires, we conclude that the appeal was totally out of time without justification and cannot be considered.

The second argument made in the heads of argument refers to section 1 of the Act and concludes that the definition does not distinguish between the format of the film. The argument then concluded that the certificate issued in May 2003 was issued for any film, whatever the format, which contained a copy of Ken

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Park. However this argument is inconsistent with amendments to the regulations¹ promulgated in terms of Act. The regulations provide:

Regulation 4 of the Films and Publications Regulations, 1998, is hereby amended by the substitution for paragraphs (a),(b),(c) and (d) of the following paragraphs:

(a) ...

(b) Films shall be classified separately in the following formats: 35MM, video, laser disc, compact disc and digital video disc (DVD). A separate classification shall be applied for in each of the said formats and a classification in one format shall not apply to a different format.

These regulations are explicit and disposes of the contention advanced in the heads that the same classification must apply to both the film and video formats. Mr Rosen questioned the legality of the regulations, but accepted that the review Board is bound by the regulations and that this argument could not be pursued any further. The submission that the classification assigned to the film should also apply to the video format is rejected.

Merits of the matter.

The classification committee debated whether the video ought to be classified as X18 or as 18 with a sex, language, nudity and violence advisory. After discussion, the committee decided on an X18 classification because:

“ of extreme and graphic violence – graphic, explicit sex group sex among teens and frontal nudity, glamourized drug use by children some of whom look under 18 and in the end there is no positive outcome.”²

¹ Regulation gazette no. 6332 of 23 October 1998.

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The classification committee elaborated on the original reasons in a letter sent to us which bears the faxed date of the 1st March 2004. In the letter the Committee added:

According to the guidelines, a movie classified as "18" should not, among other things, contain child pornography, explicit violent sexual conduct and explicit infliction of extreme violence... The movie in question was found to be too realistic and graphic to be considered as entertainment. Also there is neither a lesson to be learnt nor a positive outcome from all the activity in the movie.

The Committee then listed a number of scenes which they submitted in support of their contentions.

At the hearing before us on the 4th March 2004, Mr Rosen represented the appellants and no further representations on the merits were made on behalf of the committee.

The classification of this video presents certain difficulty. The reports of the Committee reveal that they grappled with these before arriving at a decision. The video and film are the third in a series of projects by artist and director, Larry Clark. The other two films, *Kids* and *Bully*, were contentious and controversial but clearly less so than *Ken Park*.

There is no doubt that the director seeks, in *Ken Park*, to push the boundaries in his uncompromising indictment of certain aspects of the American society. In the film, the director, tells the story of five teenagers as they grapple with the pressures of their existence in a small town in California. *Ken Park*, whose brief appearances provides the frame and context in terms of which the other stories

² . Reasons from the report of the Chief Examiner dated 12 -12-03

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are told, commits suicide in the first scene. At the end of the film, the reasons for his suicide emerge. He made his girl friend pregnant. In a flash back to a scene with his girlfriend, the topic of abortion is discussed and the girlfriend asks him " Are you not glad you were not aborted?" Ken Park is clearly far from glad and commits suicide.

One of the protagonists, kills his grandparents for the ostensible reason that the grandfather cheated at scrabble. One of the stories centres around an all American family, a blonde wife married to a former sport star who have two attractive children. We learn that the wife is having a sexual relationship with her daughter's boyfriend and keeping her younger daughter entertained during these dalliances, by showing her adult videos. In a sense we are invited into the world of Gerry Springer, but it is much more explicitly portrayed. Scenes from a Gerry Springer show is actually used in telling the story of Claude who has a warm relationship with his mother, but a difficult and violent relationship with his father. The father's aggression stems from his apparent homophobia and a feeling that Claude is less than masculine. The father is a latent homosexual and in a drunken stupor, seeks to sexually assault Claude. The final story is about Peaches, an attractive academic achiever, who lives with her father. The father is devoutly religious and obsessed with his dead wife. He finds Peaches having sex with a friend and severely assaults the friend. He then subjects Peaches to emotional and psychological abuse by mis-using tracts of the bible to condemn her. He finally goes through a bizarre marriage ritual with Peaches in an effort to maintain her purity.

We thus have teenagers living in a sometimes dysfunctional world, not being able to cope with difficulties and reacting disproportionately to the challenges that they face. The adults in their world contribute to their problems and the teenagers react by killing, either others or themselves. They seek solace from within their own ranks and engage in drug taking and sexual activity. The director uncompromisingly throws the spotlight on parts of life which are neither

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glamorous nor pleasant. This is a film about teenage alienation and the breakdown of family relationships.

The dilemma in classifying this video is that the director uses explicit sexual activity and conduct as a means of conveying this message. The sexual activity with the older women, the masturbation scene, the scene with Peaches and the threesome sex scene all convey the message of the director as opposed to being primarily designed to titillate and appeal to prurient interests.

Reference was made in the heads of argument, submitted by the appellants, to the possibility of incisions and the cutting of certain scenes. We are of the view that our function is that of a classification review board and not a censorship body. We are very reluctant to create the precedent of incising certain scenes and thus interfering with the content of the work.

The consequence of the X18 classification of the film *Ken Park* is that it can only be distributed from adult premises. Mr Rosen submitted that the effect of consigning the video to an adult store is that it will not be watched. It will not be available to the general public and does not appeal to prurient interests unlike the videos that are found in adult stores. People visiting adult stores are unlikely to be attracted by this video. This is considerable veracity in this submission.

In terms of the act, a film or video that is classified as XX under schedule 6 or X18 under schedule 7 read with schedule 9 cannot be distributed publicly. Section 24 of the Act allows for an X18 publication or film to be exhibited or distributed by a holder of a licence to conduct the business of adult premises in a building demarcated as adult premises.

In deciding whether a film or video falls with schedule 7, we must have regard to the provisions of schedule 9. Schedule 7 provides:

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A film shall be classified as X18 if it contains a scene or scenes, simulated or real, judged within context, of explicit sexual conduct which, in the case of sexual intercourse, includes explicit visual presentation of genitals.

Schedule 9 provides:

The XX or X 18 classification shall not be applicable to a bona fide scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any part of a film which, judged within context, is of such a nature.

The film *Ken Park* cannot be classified as child pornography. The sexual scenes are explicit and depict sexual contact and genitalia, but the sexual activity is not as graphic or accentuated as would occur in a pornographic film. Schedule 7 read with schedule 9 require a determination to be made as to whether the film contains a scene or scenes of sexual conduct and if it is not a bona fide scientific, documentary, dramatic or artistic film. *Ken Park* is not an excuse for pornography. The director is clearly conveying a message and telling a story and using scenes of violence, sex, and drug abuse to more effectively communicate his message. This is an artistic film of a documentary nature and falls within schedule 9.

There is unanimity that this film should not be viewed by persons under the age of 18. The question is how best to enforce this restriction and limit the freedom of expression of the director and distributors of the film as little as reasonably possible. Our view is that it is inappropriate to classify this video as X18 for the reasons given above.

We are unanimously of the view that the most appropriate classification is that of 18 with an advisory of SNVL. In addition we think it appropriate to use the power

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as contained in section 20(3) of the Act to impose further conditions. These conditions are detailed below. The following additional conditions are imposed:

Order:

1. The classification of 18 (SNVL) assigned on the 25th May 2003 to the film version of *Ken Park* with the restriction that it only be released on the art circuit is upheld.
2. The classification of X18 assigned to video format of *Ken Park* is reversed and replaced with a classification of 18 with an advisory of SNVL.
3. In addition the following conditions are imposed:
 - The video casing and cover should not contain any picture or representation depicting any of the sexual scenes from the film.
 - Videos of the film must be stored and displayed on shelves and or display cabinets that are separated from the displays and shelving containing videos to which the general public of all ages have access.
 - The following consumer advice must be printed on all videos distributed.

The film contains several scenes of graphic violence and of explicit sexual behaviour. They occur in the dramatic context of the film's social commentary on teenage alienation and the breakdown of family relationships. This is not a film for sensitive viewers or for those seeking light entertainment. It is strictly not to be shown to persons under the age of 18.

Concurred by:

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Mrs Penny Marek

Mr Andrew Verster

Mr Ronald Lessick

Rev: Mike McCoy.

Dated: 7th March 2004