

Before the Film and Publication Review Board

In the matter between:

The Review Board

and

Desso Trading 9 (Pty) Ltd

---

Award

In re: *In the Realm of the Senses*

---

**Professor K. Govender**

*A. Introduction and description of the film*

1. *In the Realm of the Senses* is a controversial and, in cinematic terms, innovative film, made by celebrated Japanese director Oshima Nagisa in 1976. The film is based on real events that occurred before the Second World War. It tells the story of a torrid sexual relationship between a servant, Sada, and the master of the home, Kichi. The relationship deepens into obsession as they push sexual boundaries, shut themselves off from the world, and finally sacrifice their lives. The film depicts explicit sexual conduct of various sorts, and there are scenes of graphic violence.
2. The deepening intensity of the sexual activity and the graphic violence serve as a barometer of the growing obsession, the degeneration and

downward spiral of the sexual relationship between the protagonists as they defy social norms in their pursuit of hedonistic pleasure. The killing of Kichi, and the mutilation and severing of his penis, is part of Sada's desire to possess him exclusively for ever.

3. This complex and sometimes disturbing film was initially banned in a number of countries, and viewed solely in art theatres and within the confines of academia. Recently the film has been unbanned in many countries; hence the application by the distributors for classification of the film so that the DVD version can be viewed in South Africa. An internet search has indicated the extent to which commentators have reflected upon and commented on this film. There can be no doubt that this film has generated considerable discussion and debate.

*B. An assessment of the arguments of the Classification Committee, the distributors, and the Review Board.*

4. On the 31<sup>st</sup> March 2005, examiners of the Board under Chief Examiner Mr P.D.K. Makhudu and comprising Mr S. Thapedi and Mr S. Malapane, viewed the film and assigned it an 'XX' classification after discussion. The consequence of such a classification is that a film cannot be exhibited in public, nor distributed or broadcast.
5. Section 26 (1)(a) of the Films and Publications Act 1996, as amended, if read contextually, states that a person commits an offence if that person knowingly exhibits in public or distributes or broadcasts any film that has been classified 'XX' in accordance with schedule 6.
6. In the Chief Examiner's Report, the following justification is provided for the classification:

The Decision is based on the numerous sexual conduct scenes that are accompanied by sadomasochistic and violent acts. The protagonists are shown to be disrespectful of human dignity and degrading to children by masturbating their genitalia. Such implied or direct child pornography practices attracted the XX rating as envisaged in the FPAAct no 65 of 1996 and schedule 6. The scene of rape and the sexual abuse of elderly people constitutes undermining human dignity. This very adult movie and its risqué sexual practices is therefore prohibited from general and private viewing.

7. In the appeal against the classification, Mr E. Frusch (for the distributors) argued that the film is a 30-year-old classic that has been the subject of constant discussion in film literature. He argued that it has been the subject of many scholarly articles, and that it forms part of the film syllabus of many tertiary institutions. He referred us to other countries in which the film has been unbanned, and suggested that we follow the same course of action.
8. On the 29<sup>th</sup> September 2005, the Review Board viewed the film and heard representations from the distributors, the examiners, and Mr I. Chetty on behalf of the Board. Mr Chetty was of the view that the film was a *bona fide* dramatic film, and accordingly fell within schedule 9 of the Act. This has important implications, which I will consider later. Mr Makhudu also made the important and perhaps inevitable concession that the film should be regarded as a *bona fide* dramatic film, as it dealt with human relationships. From Mr Makhudu's oral presentations and the comments made by the other examiners, it appears that the following four scenes from the film were particularly pertinent in reaching the conclusion that the film be classified 'XX':
  - The playful romp between the naked woman Sada and two naked children, which culminates in her pulling the boy's penis.
  - The demeaning act of children throwing snow balls at the exposed penis of an old man.
  - The rape of an older woman.

- The severing of Kichi's penis.

*C. Discussion and analysis of the applicable legal principles*

9. As we stated in an earlier award, after hearing the appeal against the classification of the film *Hostage*:

In our previous awards, we have urged Classification Committees to start from the least restrictive classification and move progressively to more restrictive classifications. The more restrictive classification should only be adopted if a decision is made that the less restrictive ones are inappropriate. Classifiers are appointed from various segments of the South African community and bring with them their valuable life experiences. However the decision to classify is not a subjective one based on life experiences alone. The decision must be made in terms of the Films and Publications Act<sup>1</sup>, the guidelines promulgated in terms of the Act and by reference to our experiences.

10. It is vitally important to repeat that subjective disapproval of the message that the film or publication seeks to convey is not, on its own, adequate cause to classify the film or publication restrictively. We may intensely disagree, for example, with the disrespect shown in the film to the elderly man by the children, but any classification has to be made in reference to the classification guidelines and the Act. If this does not happen, then we regress from classification to censorship. The whole tenor of the Constitution, the Act, and the guidelines is designed to prevent this from happening. All classification decisions are administrative actions, and must be in accordance with the empowering legislation and the Constitution.

11. Schedule 6 provides:

A film shall be classified as XX, if judged within context, it contains a scene or scenes, simulated or real, of any of the following –

1. ...

---

<sup>1</sup>. Films and Publications Act 65 of 1996, as amended.

2. bestiality; incest or rape.
3. explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm;
4. ...
5. the explicit infliction of extreme violence or the effects of extreme violence which constitutes incitement to cause harm.

It is imperative that this Schedule be read with Schedule 9, which provides:

The XX or X18 classification shall not be applicable to a *bona fide* scientific, documentary, dramatic or artistic film or any part of a film which, judged in context, is of such a nature.

12. It is thus imperative, prior to assigning an 'XX' or 'X18' classification to a film or publication, to determine whether it falls within Schedule 9. In terms of the Act, if the film falls within the provisions of Schedule 9, then it cannot be classified as 'XX' or 'X18'. A deliberate decision, supported by reasons, must thus be made by the examiners that the film does not fall within the provisions of Schedule 9.
13. It is common cause that this is not the usual pornographic film crafted to appeal solely to prurient interests. While the Chief Examiner, during the deliberations of the Classification Committee, took the view that Schedule 9 was applicable, he subsequently changed his mind and agreed with an 'XX' rating. From the documents, no reasons were submitted as to why the film did not fall within the provisions of Schedule 9. In his oral presentations, Mr Malapane argued that the film was not a dramatic work, but appeared to base his submission on subjective sentiments about the film.
14. It is important to understand the operation of Schedule 9. If the film, judged objectively and within context, is a *bona fide* scientific, documentary, dramatic, or artistic film, then it cannot be assigned an 'XX'

or 'X18' classification. The legislature adopted this course of action in order to give effect to the provisions of the Constitution that expressly protect the freedom of artistic creativity.<sup>2</sup>

15. In effect the law permits a film to be exhibited in public, distributed, or broadcast if it falls within Schedule 9, even if the film could be classified XX under Schedule 6. This approach is not very different from that adopted in other jurisdictions.<sup>3</sup> The operation of the Canadian equivalent to this exception was described as follows in *Butler v The Queen*.<sup>4</sup>

Put another way, is undue exploitation of sex the main objective of the work or is the portrayal of sex essential to a wider artistic, literary, or other purpose? ...The Court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

16. An objective assessment must be made as to whether the film is a *bona fide* scientific, documentary, dramatic, or artistic film. The term *bona fide* means "in good faith", "honestly". The scenes of explicit sexual conduct, explicit violence, bestiality, incest, or rape must be necessary to communicate the scientific, documentary, dramatic, or artistic intent of the film in order for a film that would normally be classified 'XX' to fall within Schedule 9. The more remote the connection, the less likely it is that a finding would be made that the film falls within the provisions of Schedule 9. In making this assessment, regard must be had for the main objective,

---

<sup>2</sup>. Section 16(1) (C) of the Constitution.

<sup>3</sup>. In *Miller v California* 413 U.S. 15 (1973), the courts adopted the following test to balance freedom of expression and the need to regulate pornographic material:

- a) Whether the average person applying contemporary standards, would find the work, taken as a whole, appeals to prurient interest;
- b) Whether the work depicts or describes in a patently offensive way, sexual conduct defined by the applicable state law; and
- c) Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

<sup>4</sup>. *Butler v The Queen* 1992 (1)SCR 453.

themes, message(s), cinematographic style, and content of the film on the one hand, and the frequency, intensity, explicitness, and degrading and damaging nature of the various scenes on the other, in order to determine whether the film can be classified under any one of the exceptions listed in Schedule 9. It is particularly important that the film or publication be judged in context, and that the test of tolerance and not of taste be adhered to.

17. It is useful in this context to discuss some of the main elements of a dramatic presentation.<sup>5</sup> A peculiar characteristic of a drama is that it is created to be *performed* as opposed to being just read. A dramatic presentation is normally comprised of a number of elements. Some of these are:

- There should be a plot, which is a sequence of events or incidents of which the story is composed. Many plots deal with a clash of actions, ideas, or desires. There is often a protagonist who is the central character, and pitted against him or her are antagonistic forces that may be other persons, things, conventions of society, or the personal traits of the character. A good plot should have a reasonable measure of artistic unity, and there should not be unjustified turns and twists.
- Developed characters are important. The plot often evolves as a consequence of the development of the characters. Multi-dimensional characters are often important to sustaining a plot.
- There should be a theme that is the controlling idea or central insight of the work.
- The director or author may express his or her points of view on a variety of issues.
- Symbols that often have layers of meanings may be used.
- Irony is sometimes used to demonstrate the difference between what a character says and what the viewer knows is true.

---

<sup>5</sup>. This description has been obtained from Reuben, Paul P. "PAL: Appendix H: Elements of Drama." PAL = *Perspectives in American Literature – A Research and Reference Guide*. URL:<http://www.csustan.edu/english/reuben/pal/append>

*D. Application of the principles to the film*

18. The film relates an historical story in a graphic and explicit manner. The sexual content and scenes of violence are part of the development of the story, which plots the degeneration of the sexual relationship of the couple. Theirs is an intense love affair that spirals out of socially accepted norms of accepted behaviour. Sada's severing of Kichi's penis after suffocating him is the culmination of the path that the lovers deliberately embark upon. The various sexual and violent scenes are thus part of the plot and story of the drama. Sada is an obsessive personality who increasingly dominates, while Kichi is more accommodating and easily acquiesces. The film has a Japanese soundtrack with English subtitles, and is shot in dim lighting. The sex scenes are graphic and sometimes erotic, but not unduly accentuated solely to appeal to prurient interests.

19. The director seeks through the medium of this film to comment on various aspects of Japanese society. The following are three examples:

- The scene of the children lifting the coat of the older man with a Japanese flag and then pelting his penis with snow balls, and his subsequent subjugation to Sada, directly attacks the patriarchal nature of Japanese society.
- The exposure of pubic hair and Sada's act of eating some of Kichi's pubic hair is a response to the obsessive refusal to allow any exposure of pubic hair in Japanese publications or films.
- Kichi's marching in the opposite direction to the soldiers reflects the director's anti-war sentiments in contrast to Japanese society.



20. Both the acting and the direction appear to be of a high standard, and unequivocally convey the message that this film is a *bona fide* dramatic and artistic work. This is a serious work that has attracted considerable academic thought and reflection.

### ***E. Conclusion***

21. It is our opinion that this is a *bona fide* dramatic film that falls under Schedule 9 of the Act, and accordingly cannot be classified either 'XX' or 'X18'. In deciding on an appropriate classification, we are compelled to assess the film holistically and in context.

22. Given the explicit nature of some of the scenes in the film, it has to be assigned an '18' classification with a sex, violence, and nudity advisory. Thus no person under the age of 18 is permitted to view this film. Further, and after discussing the issue with the distributors, we are of the opinion that the film should not be permitted to be hired from video outlets. We were of the opinion that the explicit nature of the scenes of violence and sex justify such a condition. The distributors indicated that this condition was acceptable to them. The distributors will thus only be permitted to sell the DVD version of the film either directly or indirectly to the public. No version of this film is permitted to be hired out. This condition is imposed in terms of section 20(3) of the Act.

23. There are certain errors of law and fact in the reports of the examiners that have to be commented upon. Their report sought to prohibit this film from both general and private viewing. Only child pornographic publications and films can, in terms of the Act, be prohibited from being viewed privately. This was not a child pornographic film, and a reference in their report equating this film to child pornography is clearly misplaced. All of us who

exercise discretion in terms of the Act have to be familiar with legal developments and be appraised regularly of some of the thinking and developments in cinematography. This would ensure that proper and legally defensible decisions are made. It is thus imperative that regular training sessions be held for all persons involved in the classification of films and publications. We also suggest that a manual comprising the Act, the classification guidelines, decisions of the Review Board, and other relevant material be provided to each examiner. We recommend that the rule that all examiners have copies of the Act and classification guidelines before them when classifying films be strictly enforced.

***F. Finding:***

- 1. The decision of the examiners assigning the film an 'XX' classification is set aside.**
- 2. The film *In the Realm of the Senses* is assigned an '18' classification with a violence, sex, and nudity consumer advisory.**
- 3. In addition, the film is prohibited from being hired from video outlets by members of the public.**

Concurred by:

1. Adv. Ronald Lessick
2. Ms Maxi Mathabathe
3. Revd Mike McCoy
4. Ms Rene Smith

Dated at Durban on the 13<sup>th</sup> day of October 2005.