

Before the Film and Publication Appeal Tribunal

In the matter between:

Nu Metro

and

The Film and Publication Board

12 A/2012

Award

The Hobbit – An Unexpected Journey – the 3D version

Professor Karthy Govender

The issue:

1. As stated in the companion award, this film was viewed in the normal ('2D') format, and hence the decision was restricted to that format of the film. After the decision had been communicated to the parties, the applicant submitted written correspondence to the FPB indicating that it had been advised by an official of the FPB that, even though the film was to be viewed and assessed in 2D format, the classification assigned would also be applicable to the 3D version of the film.
2. Relying on this advice, the 2D version of the film was presented for assessment by both the classification committee and the Appeal Tribunal. When these representations were brought to my attention, I asked Mr Danny Morobane to investigate whether these representations were in fact made to the applicant. Mr Morobane spoke with Ms Chan Dhanraj, an official of the FPB, who confirmed having given the advice to the applicant, and who stated that this practice was regularly adopted by the FPB. The regular practice appears to be that the films

are viewed in 2D format, and the classification that is assigned is then automatically assigned to 3D versions of the same film. Mr Morobane confirmed this in writing.

3. The issue now is whether, having viewed this film in 2D format, the Appeal Tribunal should assign the same classification to the 3D version of the film.

An assessment of the guidelines

4. There are some difficulties with the practice that appears to have been followed by the FPB. Section 3 of the 2012 guidelines¹. which deals with guiding principles, provides that:
 - (1) All classification decisions must consider the context, impact and release format of material.
 - (2) The context in which the classifiable element is present determines the acceptability thereof within the relevant category. When considering context, the following factors may be taken into account:
 - (a) The expectation of the public in general and the target market of the material.
 - (b) The theme of the material;
 - (c) The manner in which the issue is presented;
 - (d) The literary, artistic, dramatic or educational merit of the film;
 - (e) The apparent intention of the filmmaker, as reflected in its effect.

In terms of the guiding principles, the impact of the classifiable elements is used to determine the appropriate classification. It is apparent that in terms of the 2012 guidelines, regard must be had to a triad of assessments: context, impact, and the release format of the material. It is the cumulative assessment of all three categories that will result in a fair and appropriate outcome.

Section 3(4) of the guidelines provides that:

The release format of the material includes the internet and must be considered based on its impact:

- (a) the ability to replay scenes;
- (b) the likelihood to view certain scenes out of context;
- (c) the clarity of images;
- (d) interactivity with an unknown third person;
- (e) the impact of technology such as 3D.

There is thus a clear appreciation that films in 3D format can have much greater impact than 2D films; and this factor must be taken into account, together with context and impact, to determine an appropriate classification. The reason for the release of a film in 3D format is

¹ *Government Gazette* No. 35765, 8 October 2012.

to ensure a heightened impact and a more interactive viewing experience. The only way in which the full impact of a 3D film can be assessed is if the film is viewed in 3D format. If a film is only viewed in 2D format, a full and proper assessment of the release format cannot be made in respect of the 3D version of the film. The practice of viewing, assessing, and classifying the 2D version of a film and then automatically assigning that classification to 3D versions of the film appears to be contrary to the 2012 guidelines. We strongly recommend that the practice cease as soon as reasonably practicable, and that distributors be informed that classifications will be assigned to the particular format in which a film is viewed and assessed.

5. It appears to us that, as 3D format is generally likely to have greater impact than 2D format, a classification committee that views a film in 3D format should be permitted to assign the same classification to the normal 2D version of the film – what we might call a ‘backwardly-compatible’ classification – if the committee believed that such a classification would be appropriate. However, it is conceivable that a distributor might take the view that the 2D version, being of lower impact, should be assigned a less restrictive classification than the 3D version – in which case they should submit both versions for separate classification. Either way, we recommend that the FPB’s head of classification and head of the legal department consider our comments and adopt a practice that is more in accordance with the guidelines.

Law relating to estoppel

6. One of the issues to be considered is whether the FPB is estopped from not assigning the classification of ‘10-12PG (V)’ to the film after having made the representation that it did. In *Tim Pallets and Timber v Rihino Cash and Carry*², Stewart AJ restated the requirements that have to be met to found an estoppel:

It is by now trite that to found an estoppel by representation it is necessary to prove a representation by words or conduct with regard to the fact in issue, that the representation was such that the representor should reasonably have expected the representee to act on it, reasonable reliance by the representee on the representation and, on the basis of that reliance, that the representee acted to its

² *Tim Pallets and Timber v Rihino Cash and Carry* [2009] ZAKZPHC 72.

detriment. See *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* [2002 \(1\) SA 396](#) (SCA) para 26 at 412C-E.

7. It is common cause that Ms Chan Dhanraj made a representation that, even though the film was viewed in 2D format, the classification assigned would apply to both 2D and 3D formats. It was reasonable for the applicants to act on that advice, and they did in fact rely on the representation. To require now that they set up a *de novo* viewing and classification of the 3D version would result in prejudice to the applicant, as they would have to suspend the distribution and viewing of the 3D version until it had been classified by a classification committee. As the FPB was about to close until the new year at the time of the appeal hearing, this delay would cause the applicant financial prejudice – particularly as the release of the film was planned to coincide with the holiday period.

8. However, a public body cannot be estopped if to do so would result in its acting beyond its statutory powers. In *Hauptfleisch v Caledon Divisional Council*³, Corbett AJ (as he then was) said the following:

Finally, it should be observed that it is also a good affirmative answer to the case of estoppel by representation that the allowance of the estoppel must result in illegality and thus a statutory body cannot be stopped from denying an act which is ultra vires.

9. While the guidelines require that the release format be considered, there is no direct statutory prohibition against the classifiers' assigning the 3D version of the film a '10-12PG' classification. Given that the 2012 guidelines have only recently been brought into effect and that officials and classifiers are in the process of being trained; and given further the direct representation made by an official of the FPB, reliance on the representation by the applicant, and the prejudice to the applicant if the 3D version of the film had to be reclassified now, it has been decided in the circumstances of this case to assign the 3D version of the film the same classification as that assigned to the 2D version of the film. However, we repeat our earlier statement that this issue needs to be reconsidered urgently by the FPB's head of classification and the head of the legal department. It is important that a procedure be adopted that enables classifiers to be fully cognisant of the triad of issues –

³ *Hauptfleisch v Caledon Divisional Council* [1963 \(4\) SA 53](#) at 57 D-E.

the context, impact, and release format of the film – before they assign a classification to a film.

In the circumstances the following order is made:

Order:

1. The 3D version of the film *The Hobbit – the Unexpected Journey* is assigned a '10-12PG (V)' classification.

Dated at Durban on the 26th of December 2012.

Concurred by:

Adv. D. Bensusan

Prof. A. Magwaza

Ms P. Marek

Revd M. McCoy

Ms D. Terblanche