

Before the Film and Publication Appeal Tribunal

1/2014

In the matter between:

Community Development Foundation of South Africa (CODEFSA)

and

The Film and Publication Board

Award

Background and context

This is an appeal lodged by the Community Development Foundation of South Africa (CODEFSA) against the decision of a classification committee of the FPB to assign the website **www.ulwaluko.co.za** a restrictive age classification of 13N. The appellant had requested that the website be shut down with immediate effect, and that the FPB censor it. A three-person classification committee assessed the website, and in a carefully-reasoned report dated the 17th of January 2014, justified its conclusion that the website be classified 13N. The owner of Ulwaluko did not take issue with the classification, and complied with the decision. However, CODEFSA was unhappy and sought again to have the website shut down; and as a consequence it lodged an appeal against the decision of the classification committee.

On the 18th of February 2014, the Appeal Tribunal perused the website and heard arguments on behalf of CODEFSA and on behalf of the FPB. At the hearing, CODEFSA was represented by Mr N.Nxesi, and the FPB by Mr Andile Qodashe. We express our appreciation to those who made representations. After the hearing, the following decision was rendered:

- 1. The decision of the Classification Committee dated 17th of January 2014 assigning the website www.ulwaluko.co.za a restrictive age classification of 13N is confirmed with some modifications.**
- 2. The logo of the FPB indicating that a restrictive age classification of 13 N has been assigned must appear on the landing page of the website.**

3. **No person younger than 13 is permitted to view the contents of the website.**
4. **In addition the following message must be prominently displayed on the landing page:**
Some people, because of cultural or other sensitivities, may find the pictures on the website offensive or disturbing.
5. **Full reasons for the decision will be handed down within fourteen working days.**

These are the reasons for the decision.

The Films and Publications Act¹ defines publications to include “any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the internet”.²This clearly empowers the FPB to classify websites. Classifications of publications only occur when a request is made that the publication be classified. In this case, CODEFSA referred the website for classification.

CODEFSA requested both in its initial complaint to the FPB and in its appeal that the website be removed “from the public media space” and further that the FPB “sensor [sic] it with immediate effect”. The Appeal Tribunal has pointed out in a number of awards in the past that the FPB operates within the confines of a justiciable Bill of Rights in a constitutional democracy, and is a classification agency, not a censorship board. The Appeal Tribunal is an administrative appeal tribunal, and as such is obliged, in terms of the law, to act within the powers conferred upon it by the FPB Act. The objectives of the classification process³ are to:

- Provide consumer advice to enable adults to make informed viewing, reading and gaming choices both for themselves and for children in their care;
- Protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
- Punish child pornography.

The FPB does not have the power to censor as did the apartheid-era Publication Appeal Board.⁴The powers of the Appeal Tribunal are to advise adults, to protect children, and to punish the possession, distribution, and creation of child pornography. It does not have the power to proscribe any publication simply because the message communicated is distasteful and unpalatable to some segments of the community. The legislature deliberately confined the powers of the FPB in order to comply with the constitutional imperatives to protect the freedom of expression, read with other rights such as the right to human dignity.

An assessment and evaluation of the website

¹ Film and Publications Act 65 of 1996 as amended.

² Para aa of section 1 of the FPB Act.

³ Section 2 of the FPB Act

⁴ The apartheid-era Publication Appeal Board functioned under the Publications Act of 1974.

The www.ulwaluko.co.za website is maintained by Dr Dingeman J. Rijken, a medical practitioner, who has worked at the Holy Cross Hospital in the Eastern Cape. He argues that it is unacceptable that 821 boys have lost their lives at initiation schools in the hills of the Eastern Cape since 1995, and contends that during the summer of 2013 some 40 boys died. His main submission is that these deaths are totally avoidable. It is apparent that the primary concern is to protect the initiates who undergo this ritual and custom.

He is robustly critical of traditional leaders in the area, whom he alleges are quick to play the blame game and fail to address the real issues. He is of the opinion that financial considerations have overtaken cultural and traditional imperatives. He outlines the various steps he has taken, such as developing outreach programmes and writing a training manual to improve the situation. Dr Rijken writes that the winter of 2013 was catastrophic, with a total of 68 initiates being admitted to his hospital ward, of whom eight were 'amputees'. He argues that he felt compelled to speak out publicly, and consequently prepared the website.

On the website he conducts an analysis of the problem, and concludes that lack of competence on the part of traditional attendants is the main cause of mortality and morbidity. His analysis includes a reflection on wound care, fluid and dietary restrictions, sleep deprivation, and the impact of pre-existing medical conditions. The website also includes a downloadable training manual that is written for traditional practitioners, and a set of medical guidelines to deal with complications that may arise. Particularly jarring are the several pages of pictures depicting the aftermath of botched circumcisions. He states clearly and unequivocally that informed consent has been obtained for each of the 'clinical photographs' included. Dr Dingeman gives the assurance that, should the consent be withdrawn at any stage, the photographs depicting the penis of that individual will be withdrawn. All the pictures only depict deformed or diseased penises, thus preserving the anonymity of the individuals. He has chosen to display these shocking pictures to jolt those in authority into action.

It is apparent that Dr Rijken feels strongly about the consequences of botched circumcisions for the lives of young men who undergo this ritual. Indeed, Mr Nxesi (for the appellant) accepted that this is a matter of serious concern and that botched circumcisions are occurring. Dr Rijken endeavours through the website to stimulate debate by displaying multiple pictures of the penises of initiates after they had undergone circumcisions that had gone horribly wrong. This issue has rightly received national attention, and the website demands much more urgent and concerted action to address a pressing and serious issue.

We were unable to find evidence of racism or paternalism in the website, and assertions to that effect are without substance. The fact that manuals and guidelines are included is clear evidence that Dr Rijken wants to contribute positively to ending botched circumcisions and the devastating impact that they have on the lives of the initiates. The contents of the website, if assessed objectively, do not amount to destructive criticism, but seek to contribute positively to the debate on how best to protect the initiates.

An assessment of the arguments made by the appellant

The appellant contends that the pictures are “explicitly pornographic pictures”. This submission is incorrect. For material to be deemed pornographic for the purposes of the FPB Act, it must at least contain the depiction of “sexual conduct”. Sexual conduct to the extent relevant to this matter is defined in the FPB Act⁵ to include male genitals in a state of arousal or stimulation. Further, in our award⁶ in respect of the film ‘XXY’ we referred to the Constitutional Court judgment in *De Reuck*⁷, and stated:

In *De Reuck*, the Court concludes that the primary meaning related to material that involved the stimulation of erotic feelings rather than aesthetic feelings. Referring to the dictionary definition of child pornography, the court provides the following primary definition of ‘child pornography’⁸:

According to *The New Shorter Oxford English Dictionary*, ‘pornography’ means:

The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this.

This is a useful guide. I would observe, however, that erotic and aesthetic feelings are not mutually exclusive. Some form of pornography may contain an aesthetic element. Where, however, the aesthetic element is predominant, the image will not constitute pornography. With this qualification, the dictionary definition above fairly represents the primary meaning of ‘pornography’. ‘Child pornography’ bears a corresponding primary meaning where the sexual activity described or exhibited involves children. In my view, the section 1 definition is narrower than this primary meaning of child pornography.

Thus, for material to be classified as pornography, the dominant objective⁹ must be to stimulate erotic sentiments. The pictures of deformed and gangrenous penises depicted for the purpose of showing the consequences of botched circumcision cannot be described either as sexual conduct or as pornographic. This contention is therefore without substance.

⁵ Paragraph BB of Section 1 of the FPB Act.

⁶ *Out of Africa: South Africa Gay and Lesbian Film Festival v FPB* 1/2009 FPAT.

⁷ *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC)

⁸ Para 20 of the *De Reuck* judgment.

⁹ *De Reuck v Director of Public Prosecution* CCT 5/03 para 20.

It was also contended that the website is ill-disposed to traditional initiation and is disrespectful of this cultural practice. This is not borne out by a reading of the website. The website expressly indicates that the ritual is intended as a teaching institution to prepare boys for the responsibilities of manhood. It identifies some of the core principles of the ritual as respect for self (including self-control and integrity), respect for the family, and respect for the community. The website states:

It should be kept in mind that initiation is a wonderful opportunity to disseminate specific messages at such a crucial point in the life of an adolescent boy. It has an immense potential in addressing societal problems, and I look forward to the contribution it can have in building our society.

This is an endorsement of the importance of initiation, and cannot be called 'disrespectful'. The thrust of the argument is not that the ritual be stopped, but that it be performed by more competent people acting under supervision, and that this process be regulated in order to prevent the death or severe mutilation of initiates. The website, on an objective reading, cannot be deemed to be disrespectful towards this cultural practice. In addition, Mr Andile Qodashe for the FPB made the important point that cultural practices are dynamic and evolve constantly. He pointed out that some cultural practices – such as the amputation of a finger – have been completely discontinued. He correctly pointed out that the website does not seek to end the practice but rather to regulate it in a way that does not cause death or mutilation.

It was also alleged that Dr Rijken did not obtain informed consent from the patients whose penises are depicted in the website. This is directly contradicted by a note on the website that states that informed consent has been obtained, and that any person who wishes to withdraw his consent at any time can do so. The allegations that consent was not informed – or that it was obtained as a result of false promises – can be referred to the Health Professionals' Council of SA for investigation. It was further alleged that the publication of the pictures violates the relationship of confidentiality between doctor and patient. If informed consent has been obtained, then there is no violation of the important ethical rule that doctors respect the confidentiality of what is said to them by their patients.

It was also contended that the website might damage endeavours to improve relations with traditional leaders, and that this might bedevil efforts to improve conditions at initiation schools. It is imperative that government continue engaging with the traditional leaders that carry out these rituals in order to address this dire situation. However, government cannot be held responsible for the views expressed by individuals over whom it exercises no control. The fact that some segments of our community may be offended by the criticism contained in the website cannot, in a constitutional democracy such as ours, justify the suppression of expression. The criticism of an individual should not detract from the vital responsibility of government to address this problem meaningfully.

Mr Nxesi asserted that some of the pictures may have been taken immediately after the circumcision, and that there may have been subsequent improvements in the condition of

the penises. However, the website refutes this by pointing out that these pictures were taken of initiates who had been taken to various health institutions in Pondoland in 2012 and 2013. Thus these are pictures taken of persons who have sought medical attention. It is unlikely that they would have sought medical attention immediately after the circumcision. It is more probable that they would have sought medical attention because something had gone seriously wrong. A perusal of the disturbing pictures on the website bears this out.

Noble Prize laureate, Archbishop Emeritus Desmond Tutu, is reported to have called on government and traditional leadership to draw on the skills of qualified medical practitioners to enhance traditional circumcision practices.¹⁰ There has also been extensive press coverage of this issue, and other institutions have attempted to engage on this issue. Without doubt it is a problem that needs to be addressed urgently. Mr Nxesi acknowledges this, and has indicated that CODEFSA is working with the Department of Health to address this issue. If CODEFSA wishes to contest the comments made in the website then it must engage publicly with the issues. As stated earlier, neither the FPB nor any other state agency is permitted in law to close down or censor this website on the basis requested by CODEFSA. The FPB is obliged to act in accordance with the FPB Act and the Constitution of the Republic of South Africa.

Section 16(4)(d) of the FPB Act states:

If the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.

This section empowers the FPB to impose a restrictive age classification on publications that may be disturbing or harmful to or age inappropriate. Section 36(1) of the guidelines¹¹ provides:

Relevant publications are classified into categories on the basis of:

- (1) Context;
- (2) Impact of the classifiable elements.

The 2012 guideline provide¹² that 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;

¹⁰ Press statement issued on the 6th of January 2014.

¹¹ Classification Guidelines 2012, *Government Gazette* No 35765 of 8 October 2012.

¹² Section 34(6) of the 2012 Guidelines.

- (c) the manner in which an issue is presented;
- (d) the literary, artistic or scientific merit of the publication;
- (e) the apparent intention of the creator, producer or publisher of a publication as reflected in its effect.

The classification of the publication is determined by the impact of the classifiable element.

The gallery of pictures depicting deformed and gangrenous penises may be disturbing or age-inappropriate to very young children. However, this is a legitimate debate initiated by a person who is profoundly concerned about the effects and consequences of botched circumcisions. The purpose of the pictures is to shock people into action, and they contribute directly to the debate about whether more regulation, oversight, and supervision is needed. The intent of the website is to turn around what is becoming a desperate situation. In the circumstances, we are of the view that the restrictive classification of 13 would be appropriate to protect very young children, but simultaneously to allow those above that age to access the website and engage meaningfully in this debate. It is also apparent that some people may find these pictures offensive. Having regard to the above, the following order is made:

Order:

- 1. The appeal is dismissed.**
- 2. The website www.ulwaluko.co.za is assigned a restrictive age classification of 13N.**
- 3. The logo of the FPB indicating that a restrictive age classification of 13 N has been assigned must appear on the landing page of the website.**
- 4. No person younger than 13 is permitted to view the contents of the website.**
- 5. In addition, the following message must be prominently displayed on the landing page:**

Some people, because of cultural or other sensitivities, may find the pictures on the website offensive or disturbing.

Dated at Durban on the 7th of March 2014

Concurred by:

Adv. D. Bensusan

Ms P. Marek

Revd M. McCoy

Prof. K.Moodaliyar