

Before the Film and Publication Review Board

In the matter between:

Carlton Pictures International CC

and

The Film and Publication Board

5/2008

Decision

In re: Appeal against the classification of the film – *Animal Instincts 1*

Professor K. Govender

Introduction

- 1) This simplistic and predictable storyline provides an excuse for a number of sexual encounters to be strung together and portrayed as a film. A tired and overworked police officer husband, struggling to make ends meet, works incessantly. He neglects his wife, Joanna, who seeks comfort in the arms of the cable guy. The husband, David, returns home to find her cavorting with the cable guy. He discovers that he likes to watch his wife having sex with others, and this is the catalyst for a lucrative business which sees the good and the bad of the town seeking the sexual comforts of Joanna. These sessions are recorded on video, and David decides to supply a recording of the corrupt Fletcher Ross, the would-be mayor, to the equally bad and devious William Lamberti, the owner of the local strip joint and purveyor of all things evil. The ruse fails, and the escapades of the couple are exposed.
- 2) However, all ends well when we hear closing argument from a lawyer about how this was nymphomania induced by drugs, and that the recordings were part of a therapeutic session in a controlled environment.

Happily the film ended there. (I pause here to comment that perhaps this was ultimately a parody of the American legal system, and a social comment on some of the bizarre defences that are proffered in US courts. A moment's reflection is enough to indicate that this is most decidedly not the object of this film.)

- 3) It is perhaps ironic that a film of so little merit generated so much discussion about the correct application of the applicable legal principles. Three separate classification committees considered this and other versions of the film. The appellants submitted the DVD version of the film for classification, but the committee could not reach agreement as to the appropriate classification. A second committee was appointed under the chairpersonship of Paula Louw, and an X18 classification was assigned. Mr Mohammed (of Carlton Pictures International CC) then sought assistance from the Board concerning the scenes that, in the opinion of the examiners, necessitated the more restrictive classification. This advice was provided, and according to Mr Mohammed, he edited out the identified scenes. When he presented the edited version for classification, it was once again given an X18 classification. An aggrieved Mr Mohammed then lodged the present appeal against the decision.

APPOINTING ADDITIONAL EXAMINERS

- 4) On 30th July a two-person classification committee, comprising Mr T. Couzens and Ms G. Jackson, failed to reach agreement on the appropriate classification. Mr Couzens favoured an X18 while Ms Jackson was of the view that an 18 SN classification would suffice. A second classification committee, comprising Ms P. Louw and Mr M. Ho, was appointed to resolve the impasse. It is important at this juncture to refer to the applicable provisions of the Film and Publications Act 1995 (as amended) (the Act). Section 10 of the Act permits a two-person

classification committee. In anticipation of the occasional split decision, section 10(2) provides:

Decisions of a classification committee shall be taken by a majority of votes: Provided that where a committee consists of two members only, the executive committee shall in a case where those members differ with regard to the decision ..., appoint a third member to that committee so as enable that committee to come to a decision.

- 5) The Act requires the executive committee to appoint another examiner to the existing committee, not to appoint a new committee. The logic behind this section is obvious. A further two-person committee can also fail to reach agreement, as almost happened in this case when Ms Louw and Mr Ho initially reached different conclusions. The process would then have to start again. Thus, appointing a new examiner to an existing committee produces an uneven number of examiners, making it very likely that a final decision can be reached. The Act does not permit the executive committee to appoint a new classification committee when consensus cannot be reached. Another examiner must be appointed to the two-person committee that originally viewed the film.

ESTOPPLE

- 6) It is also important to deal with the legal concept of *estoppel*, which is binding on the Board. The doctrine has been described as follows:

a person is precluded, i.e. estopped, from denying the truth of a representation previously made to him by another person if the latter, believing in the truth of the representation, acted thereon to his prejudice ... The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly ... and in general it must relate to an existing fact.¹

The doctrine does not apply if the representation would allow a functionary such as the Board to exceed its powers or to act in a manner that is not

¹. Avis Enterprises (Finance) Pty Ltd v Protea Assurance Co Ltd 1981 (3) SA 274 (A).

lawful. If a representation was made by the Board to the effect that, if certain excisions were made, the film would be given a particular classification, it may be estopped from not honouring its representation, if the person relied on the representation and acted on it.

- 7) Mr Mohammed alleges that thirteen segments were identified by the Board as being problematic, and that these were removed from the edited version. Copies of e-mails from Mr Mohammed to Ms Y. Langa, head of classifications, were submitted to us in relation to this matter. It is important that applicants realize that the Board cannot bind the Review Board. It is possible that a ministerial appeal might be lodged, and then the matter would have to be considered afresh. We suggest that in the future, if advice is given, the Board should indicate that, should such excisions be made, a particular classification *might* result. However, no guarantee should be given, and if an appeal were lodged, the Review Board would not be bound by the representations made by the examiners.
- 8) At the hearing we did not hear either Ms Louw or Ms Langa on this issue, and their account of what happened could differ materially from that of Mr Mohammed. Fortunately, given our findings, we need not decide whether the third classification committee was estopped from departing from the 'promised' classification.

ANALYSING SCHEDULE 7 OF THE ACT

- 9) The reasoning of the examiners who opted for an X18 classification proceeded along the following lines. There were scenes involving the undue display of genitalia, and of self-fondling and fondling by another of a woman's breasts. The examiners interpreted the definition of 'sexual conduct' and concluded that the scenes fell within Schedule 7, thus attracting a restrictive classification of X18. This was not a film that could be deemed a *bona fide* scientific, documentary, dramatic, or artistic work,

and hence it did not fall within Schedule 9. In terms of Section 24 of the Act, a film that has been classified as X18 may only be exhibited or distributed from adult premises. Some of the examiners correctly concluded that there were no scenes portraying explicit penetration, as would normally be found in adult films.

10) Mr Mohammed's complaint is that this film does not fall within the genre of adult films. He claims that adult premises are not interested in the film because it is not explicit enough; and because of the X18 classification, he is unable to offer it to any other outlets.

11) We viewed the edited version of the film on 18th October 2008, and heard arguments from Mr Couzens. Mr Ho was also present and assisted us. Once again, we wish to express our appreciation to the examiners, particularly to Mr Couzens, for his thoughtful and considered representations. We subsequently viewed the portions that had been deleted from the original film. We were unanimous that the edited film should receive an 18 SN classification, and handed down a finding to that effect. These are the full reasons for our conclusion.

12) Both Mr Couzens and Ms Louw² interpreted the relevant sections literally, and concluded that the scenes involving the fondling of Joanna's breasts, and the brief displays of pubic hair, were sufficient to warrant an X18 classification, as we were dealing with scenes involving the display of 'explicit sexual conduct'.

13) We agree with the examiners that this is not a film that falls within Schedule 9. However, we differ with the conclusion that this film falls within Schedule 7 of the Act. Having concluded that the film does not fall

². I refer to them specifically, as they made additional representations both orally and in writing.

within Schedule 7, it is unnecessary for us to consider the application of Schedule 9.

14) Schedule 7, which requires an X18 classification for films, provides:

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 an explicit visual presentation of genitals.

15) Some examiners erred in their interpretation of Schedule 7. An example of this is the following comment:

There are frequent scenes which show very strongly implied sexual intercourse and sex scenes. Much of this shows frequent breast fondling, which, according to the Act 1(1) XIX is defined as explicit sexual intercourse.

16) It is important to point out that Section 1 of the Act defines the term 'sexual conduct' and not '**explicit** sexual conduct'. The full text of the definition reads:

Sexual conduct includes:

- i) male genitals in a state of arousal or stimulation;
- ii) the undue display of the genitals or of the anal region;
- iii) masturbation;
- iv) bestiality;
- v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any objects;
- vii) the penetration of a vagina or anus with any object;
- viii) oral genital contact; or
- ix) oral anal contact.

17) These are instances or examples of 'sexual conduct'; but the scene of the cable guy fondling Joanne's breasts does not automatically translate to *explicit* sexual conduct, thus justifying an X18 classification. It is simply an example or instance of sexual conduct. The examples listed in the

definition have the *potential* of being of a nature that can lead to them being described as explicit. However, the mere fondling of breasts or the exposure of pubic hair in and of itself is not sufficient to justify an X18 classification. If this were not so, films like *Basic Instinct* would have to be classified X18. In addition, there is no reason in logic why the direct or indirect touching of intimate parts of the body, including the breasts, should immediately attract the restrictive classification of X18. The term 'intimate part of the body' is not restricted to genitalia, and includes the breasts. 'Indirect fondling' would include fondling breasts through clothes. Such scenes cannot conceivably justify attracting an X18 restriction.

18) **Explicit**³ is defined as:

1. precisely and clearly expressed, leaving nothing to implication: *an explicit commitment to democracy*
2. leaving little to the imagination; graphically detailed: *the film contains some sexually explicit scenes*
3. (of a person) expressing something in a precise and clear way, so as to leave no doubt about what is meant [Latin *explicitus* unfolded]

19) For the reasons stated below, we are of the view that films should be assigned an X18 classification if they contain a scene or scenes of sexually explicit conduct. Explicitness in this context refers to whether or not the sexual conduct is graphically portrayed. The sexual conduct portrayed in the film must be of such an explicit nature that it justifies only being distributed or exhibited from adult premises. It was apparent that the legislature intended this to apply only to what is colloquially known as 'adult entertainment', and not to what in common parlance is referred to as 'soft porn'. Thus the mere portrayal of pubic hair or breasts being fondled will not generally move the film into the X18 category. The ambivalence in the examiners' reports, and the differences in opinion between some of the examiners, arose from their unease at this film being classified as

³  Collins Essential English Dictionary, 2nd edition 2006 © HarperCollins Publishers 2004, 2006.

adult entertainment, meaning that it could only be distributed or exhibited from adult premises.

20) Properly construed, the Act creates a spectrum of classification categories. At one end of the spectrum there are the various sub-categories under the broad under-18 classifications, followed by the restrictive age classification of 18, followed by the X18 classification, then the XX classification, and finally, decisions refusing to classify certain films or publications. The last category is meant to deal with the scourge of child pornography.

21) An XX classification deals with material described in Schedule 1 of the Act, and distribution, exhibition, and broadcasting of this material is prohibited. However, private possession of such material is permitted. An X18 classification deals with explicit sexual conduct, and material of this nature may only be exhibited or distributed from adult premises. The restrictive age classification of 18 deals with sexual conduct that is less explicit and may be viewed, distributed, or exhibited to persons over the age of 18. The under-18 classifications are designed to protect children against harmful or disturbing material. When exercising discretion as to the appropriate classification, regard must be had to the main objects and purposes of the Act and the carefully constructed categories of classification.

22) It would make the task of classification easier and more certain if a 'tick box' method were adopted. Thus, using this approach, and applying the reasoning we examine and dismiss in paragraphs 9 to 17 above, if the film had just one scene of one individual fondling another's breast, the film could immediately be assigned an X18 classification. While having the advantages of certainty and clarity, this would not, in our opinion, be

faithful to the more nuanced approach and process of reasoning required by the Act.

23) It is apparent that Schedule 7 has the important qualification that the scenes must be 'judged within context'. This phrase has both a narrow and a broad meaning. The narrow meaning refers to contextualizing the scenes within the film as a whole. The broad meaning would require assessing the scenes in the context of the film as a whole *and* in the light of the objects and goals of the Act and regulations. I would prefer the broad meaning of this term in this instance.

TEST TO BE APPLIED

24) Thus the test is whether the film contains a scene (or scenes) of sexual conduct of such an explicit nature that it is necessary that it be only distributed or exhibited from adult premises. If it falls short of this, then it should attract an 18 classification. Scenes of actual penetration or oral sex, real or simulated, will in most instances attract an X18 classification, and Schedule 9 will then have to be considered. Scenes of breast fondling and/or exposure of pubic hair should not automatically attract an X18 classification. The restrictive age classification of 18 SN would be appropriate to cover such scenes.

25) Most jurisdictions have struggled to demarcate clearly the boundaries between those films that attract an 18 SN classification and those that attract an X18. Each film has to be assessed on its own merits in the light of what is said above. We take full cognizance of Mr Couzen's request for certainty, but this is an instance where a decision has to be made by interpreting the goals and objectives of the Act in a purposive manner. There are no scenes in this film that warrant an X18 classification.

26) We have evaluated the edited version of the film *Animal Instincts 1* submitted to us in DVD format, and are of the opinion that the appropriate classification is 18 SN.

Conclusion:

- (A) The decision of the Film and Publication Board of 5th September 2008 assigning the film, *Animal Instincts 1*, an X18 classification, is set aside.**
- (B) The film is to be classified 18 SN.**
- (C) The version that has been assigned this classification is the one that had been edited by Mr Z. Mohamed of Carlton Pictures International CC, and resubmitted to the Board.**
- (D) This appeal and this decision relates only to the resubmitted edited version.**
- (E) The original (unedited) version cannot legally be exhibited or distributed as a film classified as 18 SN.**
- (F) The Film and Publication Board is directed to keep a copy of the edited version, which must duly be annotated as being the version classified as 18 SN.**

Concurred:

Mr D. Kwindu

Adv. R. Lessick

Revd M. McCoy

Ms R. Smith

Mr Andrew Verster

6th November 2008