

Before the Film and Publication Review Board.

In the matter between:

Ster-Kinekor Distribution

and

The Film and Publication Board

Decision

In re: ***Appeal against the classification of the film – Casino Royale.***

Professor K Govender

Introduction and description of the film.

On the 23rd November 2006, the Review Board viewed the film and heard arguments both on behalf of Ster-Kinekor and on behalf of the examiners. On the 24th November 2006, we notified the Film and Publication Board (FPB) of our decision and indicated that a detailed award with reasons would follow. These are the reasons for the decision. The Review Board is unanimous both in its reasoning and the conclusions reached.

This film is based on the first novel of Ian Fleming. We are introduced to a novice James Bond 007, who is recruited into the world of MI-6. We witness his first killing in graphic terms as he attempts to drown his assailant. The plot revolves around attempts at eliminating support of international terror. War lords in Africa, from camps containing child soldiers, invest funds with international financiers to

increase their financial muscle and their ability to wreak havoc and destruction. Bond attempts to capture a bomb maker, and we are treated to a memorable and exaggerated acrobatic chase scene, similar in nature to other Bonds, as they race through, above and under an African construction site. The man chased is killed and a foreign embassy blown up in the process, and this causes a measure of angst within the upper echelons of the British Government.

Following potential leads, Bond ends up in the Bahamas and later in Miami where in a realistic action sequence he stops a terrorist from blowing up the world's largest airliner. An international financier, Le Chiffre, had planned to blow up the airliner, in an attempt to manipulate the stock market to benefit himself and those whose money he uses. The failed attempt results in huge financial losses for the terrorists organizations, and the scene is set for a high stakes poker game as Le Chiffre seeks to win back money and placate the not very nice organizations whose funds he has dissipated. Bond, financed by the British Government, is brought into the game. The stakes are high: a defeat for Bond would mean that the British Government would end up directly funding terrorist activities. The games begin, and the plot lurches from one dramatic twist to another.

This is a very different Bond film. There is an aura of realism, and we witness a more vulnerable and more fallible James Bond. The all-conquering, slick and unscathed Bond, always favourite to beat the odds, is replaced by someone who hurts, feels anguish, and has to recuperate from the torture inflicted on him. The scene in the Aston Martin as Bond tries and fails to use a device to resuscitate his heart properly is evidence of this fallibility.

In some respects the genre has undergone important changes. There is also a greater measure of menace in this film than in other Bond films. In this context the violence is less like choreographed action and is more believable. Many of the scenes contribute to a feeling of unease and psychological discomfort. Bond

nearly driving over Vesper Lynd at high speed while she lay trussed up the road, the threat to cut off the arm of Le Chiffre 's girlfriend with a cutlass, deliberate cutting of the seat of a chair in anticipation of the torture inflicted on Bond – these are examples of scenes which evoke a sense of psychological harm or discomfort. This is not simply a film about action sequences, high tech stunts and infallible heroes. Even the villain, despite the occasional dribble of blood from a malfunctioning tear-duct, appears to be a more believable character, as he struggles to stay alive after a sudden visit by the African war lord infuriated at the loss of their money. This is not a villain seeking to take over the world, but rather someone who has more modest, but very deadly, intentions.

Assessments of the arguments of the Classification Committee and those of Ster-Kinekor

On the 6th November 2006, a panel of examiners comprising Ms Paula Louw, Mr Nhlanhla Madlala and Ms Gracia Jackson, assigned a restrictive classification of 16(V) to this film. While the examiners referred to various other issues such as the complex themes and some strong language, it is apparent that the real issue that caused them concern was the scenes of violence. The torture scene, where a naked Bond is placed on a chair and has his testicles beaten violently with a carpet beater wielded by Le Chiffre, was identified as likely to be very disturbing to younger children. A number of other scenes of violence were identified as justifying the more restrictive classification of 16(V).

At the hearing before us on the 23rd November 2006, the FPB was represented by Ms Louw, and Ster-Kinekor was represented by Ms Jacqui Jansen van Rensburg. Ms van Rensburg submitted that the classification was unduly restrictive, as the target market for Bond films was age 13 upwards. She argued that comparable Bond films were given age classifications of 13, as were comparable films such as the *Bourne Identity*. She also submitted that

internationally the film had generally received less restrictive classifications than 16(V).

Our research has revealed a significant disparity in the classification of this film. In the UK, the film was assigned a classification of 12A, while it attracted classifications of 15 in Norway and Finland.

While Ms van Rensburg acknowledged that this film may be deemed to be different from the other Bond films, she was of the view that the scenes of violence do not justify the restrictive age classification of 16. As an example she argued that the full effect of the torture scene was mitigated to a large extent by the sense of humour demonstrated by Bond during the torture.

We wish to express our appreciation to all the parties who made representations to us, and particularly to acknowledge the efforts of the examiners in this case. It is apparent to us that Ms Louw and the other examiners made a concerted and conscientious effort to reach a classification that was appropriate in the circumstances and that was in accordance with the Film and Publication Act and guidelines issued in terms of the Act. This is apparent from the information that is contained in the reports of the examiners, and the thoughtful oral presentations that were made at the hearing.

While we have reached a different conclusion from that of the examiners, this is largely due to the additional powers at the disposal of the Review Board. The classification of this film presented some challenges, and we used the provisions of the Act to achieve an outcome that more accurately balances on the one hand the need to protect children against harmful and disturbing material, and respect for the freedom of expression of the distributors on the other.

An Assessment of the Law

The Film and Publication Act 1996¹ (the Act) empowers a classification committee to examine and classify a film referred to it by the Board.² It may, amongst other classifications, impose restrictions in accordance with Schedule 8 of the Act, which deals with age restrictions for films, and provides:

An age restriction may be imposed only if the classification committee or the Review Board is of the opinion that, judged within context, it is necessary to protect children in the relevant age group against harmful and disturbing material in the film.

The guidelines that have been promulgated to classify films and publications in terms of the Act play an important role in structuring the discretion and assisting examiners in arriving at appropriate classification decisions. The importance of these guidelines is appropriately captured in the introductory³ section of the regulations.

These guidelines set out the criteria that must be applied by the Board in making classification decisions. The guidelines are based on research on the effects of the media on the development of children and on generally accepted standards of the South African community as indicated in public comments on the draft guidelines.

In terms of the guidelines, there are seven classification categories for films. These are the all age advisory categories of “A”, “PG”, the “10M” category which permits children under the age of 10 to be admitted provided that they are accompanied by an adult, and the restrictive classifications of “10”, “13”, “16”, and “18”. The guidelines seek to assist the classification committees in deciding on the most appropriate classification. The classification committees therefore have to choose from amongst these alternative classifications.

It is important to point out in this context that the Republic of South Africa Constitution Act 1996 regards the idea of participatory democracy as being

¹ . The Film and Publication Act 1996 as amended.

² Section 18(2) of the Act.

³ Government Gazette number 28983 of the 30th June 2006.

particularly important. This requires that opportunity be afforded to members of the public to comment on and participate in the making of regulations, laws and decisions which impact on their lives. This requires that prospective regulations are published for comment, that the comments received are considered, and then a final decision made as to the regulations to be promulgated. The present set of guidelines were put out for comment and finally adopted after a consultation process. The process allows for members of the public to make an input into the process of classification, and the guidelines must therefore be interpreted with this in mind.

The Act affords the Review Board greater flexibility in the classification of films than it does the classification committees. Section 20 (3) of the Act provides:

The Review Board may refuse the appeal and confirm the decision in question, or allow the appeal, either wholly or in part, and give such decision as the Board or the executive committee should in its view have given, and amend the classification of the publication or film, specifying the clause of Schedule 1 or 6 upon which the classification is in terms of its decision based, and *may impose other conditions in respect of the distribution or exhibition of the publication or film.* (my emphasis)

It is the residual power to impose other conditions that affords the Review Board a greater degree of flexibility. In our award dated 29th April 2005 in respect of the appeal against the classification of the film, *Ring 2*, we had occasion to interpret and use section 20(3) of the Act, and stated as follows:

This section in its present form came into effect as a consequence of an amendment to the Act effected in 2004.⁴ This section allows a classification to be made and then permits the attachment of additional conditions. Having regard to the nature of the film and the arguments advanced by UIP we are of the opinion that an appropriate and balanced classification would be one that combines a restrictive classification and a condition which we are empowered to impose. This would accommodate the concerns about children between the ages of 13 and 16 viewing the

⁴ . Films and Publications Amendment Act 2004

film and appropriately deal with the commercial concerns of UIP. It is thus decided that the following classification and condition be assigned.

- The film is assigned a restrictive classification of “13”. No children under the age of 13 are permitted to view the film.
- Children between the ages of 13 and 16 are only permitted to view the film if accompanied by an adult.

The requirement of adult accompaniment would address concerns about children in this age group being distressed by certain aspects of the film and alert parents to these concerns.

The subsection once again proved useful in our deliberations.

The salient issue before us was whether the film ought appropriately to be assigned a restrictive age classification of 13 or 16.

As stated earlier, it was the scenes of violence in the film that caused the greatest concern to the classification committee. The complexity of the themes and issues of betrayal are not of such a nature to justify a restrictive classification of 16. The classification guidelines published on the 14th November 2003 provide, in respect of violence in the restrictive age classification of 13, that :

Scenes of realistic and intense violence should be brief and infrequent. Such realistic violence should be interrogated in a pro-social manner and shown as negative, hurtful, wrong and destructive. Violence based on prejudice should be mild and resolved in a way that supports human rights values. Violence should neither be glamourised nor presented in a way to solve conflicts.

The current guidelines make some material changes in respect of this category regarding the classifiable element of violence. It provides:

Scenes of realistic and mild violence, without graphic or bloody detail, may occur within a meaningful context, forming part of plot or character development. There are no scenes glamorizing, condoning or encouraging violence as a way to solve conflicts. There may be scenes of domestic or psychological violence occurring within the context of the theme, plot or character development.

Finally, the current guidelines provide, with regard to the classifiable element of violence in the restrictive age classification of 16, that:

Scenes of realistic violence may occur within a meaningful context, forming part of plot or character development. There are no scenes glamorizing, condoning or encouraging violence as a way of resolving conflicts.

It is apparent that the current guidelines in respect of the 13 age classification, by permitting “realistic and mild violence” as opposed to “realistic and intense violence” (2003 guidelines), seek to adopt a more conservative approach than was previously the case. Scenes of violence which in the past may have fallen under the 13 age classification may now attract a more restrictive classification, given the tightening of the criteria in the guidelines. Films containing scenes of intense violence are unlikely now to attract a restrictive age classification of 13. Under the old guidelines, scenes of intense violence could attract a restrictive classification of 13 if the violence was portrayed as negative, hurtful, wrong and destructive. The new guidelines do not permit intense violence, and simply require that the scenes of violence do not glamorize, condone or encourage violence as a way of resolving conflicts. Thus the new guidelines are more restrictive as far as the nature of the scenes of violence are concerned, but are broader in respect in the social role and message conveyed by the scenes of violence in the film. It is now not necessary to find that the scenes of realistic and mild violence are shown as negative, hurtful, wrong and destructive. The test in this category is now whether the scenes of realistic and mild violence glamorize, condone or encourage violence as a way of resolving conflict.

Looking at the guidelines holistically, it would appear that films with scenes of violence that are realistic and intense and which are graphic and bloody in detail will fall either in the restrictive classifications of 16 or 18. The nature, frequency

and intensity of the violence, together with the social message conveyed, will determine the exact classification category.

It is imperative to emphasize that the guidelines that now guide the discretion of the examiners are the product of public consultation, and as functionaries participating in a constitutional democracy we are obliged to have earnest regard to them. In this sense, the rules of adjudication have changed, and we must thus approach classification decisions made under the previous guidelines with caution. Ms Jansen van Rensburg (for Ster-Kinekor) argued that the classifications assigned to the Bond films in the past be used as precedents for this decision. Given the new classification guidelines, this cannot be accepted without reservation.

Application of the legal principles to the film

The torture scene is one of the most compelling and rivetting in Ian Fleming's first novel. It is this scene in the film that caused greatest concern to the examiners. Our research has indicated that the scene was edited on advice from the British Board of Film Classification in order to qualify for a 12A classification in that country. Close-up shots capturing the agony on Bond's face and lingering shots of the rope were removed and replaced by more distant shots. While there is a chilling and menacing quality inherent in the scene, the depiction of violence and gore is brief and fleeting. The cutting out of the seat of the chair and Bond's naked vulnerability heightens our sense of fear and contributes to a sense of psychological unease. There is a degree of mitigation in Bond's desperate attempts at humour. However, there is no doubt that this is a scene that can cause anxiety and concern to younger children. While there are no close-up scenes of violence, the audience is left in no doubt that the pain inflicted and the pain suffered is intended to be real.

Bond's first killing involves a graphic attempted suffocation of an assailant. The full intensity of the scene is reduced when the person resurfaces and is shot. The scene when Le Chiffre's girlfriend is threatened with having her arm amputated by a terrorist is frightening and realistic. This was the exact mode of reprisal used so cruelly and indiscriminately in Sierra Leone. The fight sequence and the killings in the hotel are also realistic. The frantic but unsuccessful attempts by a desperate Bond to rescue Vesper and her subsequently drowning leave a vivid and lasting impression. Finally the shooting of Mr White in the foot appears both graphic and clear.

It is important that all the scenes are evaluated in the context of the James Bond genre. However, this film does much more than the familiar Bond films. The scenes of violence may not justify a restrictive classification of 16, but do appear to journey outside the parameters laid down for assessing scenes of violence in the current guidelines in so far as they apply to a 13 classification. In addition to the actual scenes of violence, there is a sense of fear and anxiety evoked by scenes of threatened violence, and by scenes that depict the consequences of violence.

It was common cause that it would not be proper and appropriate for children under the age of 13 to view this film. We were thus mainly concerned with the welfare of children aged 13, 14 and 15. It would appear to us that the most appropriate classification is one that is within the penumbra of a restrictive age classification of 13, but one that provides clear guidance to parents and guardians that children aged 13, 14, and 15 should be accompanied by an adult.

As stated earlier in the award, Section 20 (3) of the Act gives the Review Board the power to impose conditions in respect of the distribution or exhibition of the publication or film. It is this provision that enables us to arrive at an adequate and appropriate classification. While the scenes of violence cannot be described as intense, with graphic and bloody detail, neither can they be described as mild. In

the circumstances, we decided that the most appropriate classification would be a restrictive classification of 13, together with a condition requiring children aged 13, 14 and 15 to be accompanied by an adult. This condition is legally binding and will be enforced as any other classification category. The condition will alert parents to the concerns of the Board, and children in the age groups of 13, 14 and 15 will be accompanied by and if necessary reassured by the presence of adults. This would also mean that children aged 13, 14 and 15 would not be denied the opportunity of seeing this film, and neither will the distributors be denied the opportunity of accessing this particularly sector of the market.

A salient question was posed to me on behalf of the Board by Mr Iyavar Chetty after the publication of our decision in his matter. He requested clarity as to whether the effect of this decision is that Classification Committees can now use the mature or adult accompaniment condition to supplement their existing classification powers. The issue is whether the decision creates a precedent for both the Review Board and for future Classification Committees.

Both the Review Board and the Classification Committees are functionaries exercising public power, and their decisions, in implementing the legislation, will be deemed administrative action. It is a fundamental principle of our law that public authorities can only do that which they are empowered to do.⁵ The Constitutional Court expressed the principle thus:⁶

It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.

It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle

⁵ .JR de Ville *Judicial Review of Administrative Action in South Africa* (2005) at 90.

⁶ . *Fedsure Life Insurance v Greater Johannesburg Transitional Council* 1998 (12) BCLR 1458 (CC) at para 58.

that they may exercise no power and perform no function beyond that conferred upon them by law.

Thus in terms of our administrative and constitutional law, functionaries like the Review Board and the classification committees can only exercise power if that power is given to them by legislation.

Section 20(3) of the Act empowers the Review Board to impose conditions in respect of the distribution or exhibition of the publication or film. As stated earlier, the Review Board has used this subsection to impose conditions in addition to a restrictive classification. We are thus interpreting a power that resides exclusively in the Review Board. This decision clearly creates a precedent which future Review Boards may follow.

However, neither the Act nor the guidelines give similar power to the classification Committees. In terms of the legal principles cited above, the Review Board cannot unilaterally increase the statutory powers of the Classification Committees. This means that the Classification Committees are not empowered to, and therefore cannot, impose conditions similar to that used in this award. If any specific Classification Committee is of the view that such a condition is preferable, then it is obliged to act within its powers and determine a classification, and then to make a recommendation that the matter be referred to the Review Board to consider whether a mature accompaniment condition is appropriate.

Conclusion and Findings:

- 1. The decision of the Board that the film, *Casino Royale*, be assigned a restrictive age classification of 16 with consumer advice for violence is set aside.**
- 2. The film is assigned the following restrictive classification:**

13 (V)

3. In addition the following obligatory and legally binding conditions are imposed:

Immediately following the classification there must be an under-strip which reads as follows:

Children under 13 not admitted.

Children aged 13 to 15 must be accompanied by an adult.

4. The logo of the FPB must be placed immediately after the under-strip to signify that it carries the authority of the board.

Dated at Durban on the 7th December 2006

Professor K Govender

Concurred by

Ms Penny Marek

Ms Rene Smith

Revd Michael McCoy

Mr Jack Phalane.