

5/2005

Before the Film and Publication Review Board.

In the matter between:

Associated Magazines (PTY) Ltd (re: Cosmopolitan.)	Appellant 1
Conde' Nast Independent Magazines. (re: GQ)	Appellant 2
UpperCase Media (PTY) Ltd (re: FHM)	Appellant..3
And	
Film and Publication Board.	Respondent.

In re:

Appeal against the classifications of the December 2004 issue of GQ,
January 2005 issue of FHM and the January 2005 issue of Cosmopolitan.

Decision.

Professor K. Govender (Chairperson)

INTRODUCTION.

- 1) On the 23rd February 2005, a classification committee of the FPB decided that all the above-mentioned magazines must be offered for

sale on condition that the magazines are displayed in a sealed wrapper with a notice that they can only be purchased by persons over the age of eighteen. The committee reacted to a complaint received from Ms RA Fudge who alleged that the contents of the magazines would be harmful to children. The committee concurred with this opinion and hence decided on the '18' classification.

- 2) At the hearing before us on the 9th April 2005, Cosmopolitan was represented by Mr. Mark Rosin of Attorneys Rosin, Wright and Rosengarten, GQ by Jacque Louw of Attorneys Lionel Murray Schwormstedt & Louw and FHM by Mr. Louis Du Preez of Attorneys Jan S De Villers. The Classification Committee was represented by Ms Kenalemang Kiba and Ms Nikiwe Mphomela. Detailed written arguments were submitted by all the attorneys and the committee relied on their reasons and oral submissions.

ISSUES RELATING TO THE DECISION OF THE CLASSIFICATION COMMITTEE

- 3) Prior to dealing with the arguments, we must indicate our concerns with the manner in which the committee arrived at its decision and the reasons submitted in support of its conclusion. Most classifiers have considerable experience in the classification of films and, given the dearth of requests for classifications of publications, few have had experience in classifying publications. This is a learning experience for us all and the comments that we make are meant to assist classifiers and are issues that have to be dealt with as they arose during the course of the hearing.
- 4) Schedule 3 of the Film and Publication Act 65 of 1996 (the Act) provides:

A classification committee or the Review Board may impose any or both of the following conditions on the distribution of a publication if, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing material in the publication.

It is clear that in assigning the classification of '18', the committee was acting in terms of this section.

5) Ms Kiba indicated to us at the hearing that the committee only had possession of photocopies of the articles and pictures from the various magazines. She stated that the committee did not see the magazines in respect of which the complaints had been laid. Had they done so, they would have realized that the pages complained of were a small part of the contents of the each of the magazines. Assessing copies of articles in isolation may convey an impression of the magazine that is very different to that conveyed if the articles are assessed in the context of the magazine. Further, the section requires that the publication be judged within context. If the magazines are not assessed holistically, then the publication is not judged within context. Accordingly the failure to consider the articles in the context of the magazine is irregular and contrary to the section.

6) Further it is apparent that all three sets of articles were considered collectively. The report identifies the various publishers as 'respondent'. The reasoning draws no distinction between the various magazines and draws a general conclusion in respect of all three magazines. This is not a permissible approach. Each of these publications is a separate and distinct one and has to be considered individually on the merits. The fact that a single complaint was lodged against all three and that some of the articles deal with sexual themes does not permit the committee to consider them as if they were a single publication. The section requires an assessment to be made as to whether the publication contains

disturbing and harmful material. This is a factual determination that has to be made in respect of each individual publication. These are not identical publications and are not part of a single publication. By considering the three separate articles as a single publication, the committee acted contrary to the requirements of the sections.

- 7) Two sets of reasons were submitted. One of which, was unsigned but in the name of the three members of the committee. Ms Kiba indicated to us that she had not seen the unsigned version and that the signed version was the one agreed to by the committee. We accepted her statement in this regard. The difficulty is that the signed version contains no reasons for the decision to require an '18' age classification for the December 2004 issue of Cosmopolitan. The unsigned version provides a brief explanation. As we were told that the signed version was the correct one, we must conclude that no adequate or proper reasons were supplied in support of the decision in respect of Cosmopolitan. In terms of section 17 (1)(b) of the Act, the classification committee is obliged to submit reasons for its decision. The failure to justify its decision regarding the Cosmopolitan issue means that the statutory duty was not complied with. It is also important to point out that supplying reasons serves the important purpose of informing the parties affected of the justification for the conclusion. It then enables them to make an informed decision as to whether to appeal against the decision or not. Not supplying adequate reasons would frustrate the purposes of the Act.

- 8) Ms Kiba also informed us that she was unaware of the fact that both GQ and FHM were sold in plastic wrappers. She stated that had they been informed of that, they may not have insisted on the 18 classification.

- 9) It is our conclusion that the decision of the committee, for the reasons stated above were incorrect and must be set aside. However the Review Board is required, in terms of section 20(3) of the Act to:

...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 ... and impose other conditions in respect of the distribution or exhibition of the publication or film.

The Review Board is thus required to make a decision on the complaint submitted by Ms Fudge.

- 10) From the heads of argument submitted, it is clear that:

the publications have an established niche in the South African market;

have attracted targeted readers;

have been acknowledged in media circles and have managed to secure advertising from a range of national and multi-national firms.

All three magazines are targeted at adults but operate within the category of an unrestricted magazine within the South African market. An '18' classification would imply that the magazines have strayed from their traditional focus and is now publishing material that warrants an '18' age restriction. This could have an adverse impact on their market, their distributors and on those that advertise in the magazines. The net result is that such a classification can have serious financial implications for each of the magazines. Given the investments made by each of the magazines, they have a right to expect that any classification would be made in accordance with the Constitution and the Act.

AN ASSESSMENT OF THE APPLICABLE LEGAL PRINCIPLES.

- 11) The following is a somewhat lengthy extract from our award in respect of the film *Tomb Raider* (<http://www.fpb.gov.za/rbreports>) where reference was made to our comments in the classification of the film *Rabbit Proof Fence*. The comments are applicable to publications.

In our award in *Rabbit Proof Fence* we described the general constitutional framework in terms of which we operate as follows:

Section 16 of the Constitution provides:

(1) Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) freedom to receive and impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

The section does not extend to propaganda for war, incitement of imminent violence or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. This internal modifier means that expression falling within these categories is unprotected and can be modified, restricted and even prohibited. Expression falling outside these categories is regarded as protected.

The freedom of expression, like all other rights in the Bill of Rights, is subject to a general limitation clause which allows rights to be limited in terms of a law of general application provided that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Film and Publication Act 65 of 1996 (as amended) is a law of general application and one of its objects is to regulate the creation, production, possession and distribution of certain publications and certain films by means of classifications, the imposition of age restrictions and the giving of consumer advice. The guidelines that have been promulgated assist in the exercise of this discretion.¹

¹ . The italicised extract is from *Rabbit Proof Fence* and the rest of the quote is from *Tomb Raider*

The decision to impose a restrictive classification to protect children against harmful and disturbing material is a limitation on the freedom of expression, but is reasonable and justifiable in an open and democratic society. In other words we use the limitation clause to justify the decision to classify films and prohibit children under a certain age from viewing them.

Section 36 of the Constitution allows for rights to be limited and provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the relationship between the limitation and its purpose;**
and
- (e) less restrictive means to achieve the purpose.**

There are two requirements that must be satisfied if the limitation clause is to be successfully relied upon. Firstly, it must be established that the limitation is in terms of a law of general application and secondly, it must be demonstrated that the limitation is reasonable and justifiable in an open and democratic society.

As indicated earlier, the Film and Publications Act and the guidelines are the laws of general application that permit the freedom of expression to be limited. However any decision that we make restricting the freedom of expression in terms of these laws must be reasonable and justifiable or proportionate.² The proportionality enquiry requires us to balance competing interests. In this regard the Constitutional Court has held:

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy,

² . S v Makwanyane 1995 (3) SA 391 (CC)

and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.³

Thus any restrictive classification imposed either by the examining committee or by the Review Board must be proportionate as defined above. In effect we are saying that as we have a duty to act in the best interest of the child, it is permissible for us to impose a restrictive classification to protect them from material that is harmful and disturbing, even if the effect is to limit the freedom of expression of the distributors of the film.

However it is vital that we only limit the expression to the extent needed to protect children from harmful and disturbing material. We justify our decision by saying that we are interfering with the distributor's freedom of expression as little as possible in order to protect the legitimate societal objective of protecting children from harmful or disturbing material. It is for this reason that the guidelines are structured on the basis of various age categorizations. If a film should legitimately be restricted to those below "10", then a classification of "13" in respect of that film, would not be proportionate in the circumstances and would be an unreasonable and unjustifiable interference with the distributor's freedom of expression. This would be so because the less restrictive classification of "10" would be able to achieve the societal objective whereas the more restrictive classification of "13", while achieving the societal objective, would unnecessarily intrude into the freedom of expression. The required balance would thus not be achieved.

Hence our suggestions in earlier awards for examiners to commence from the presumption that the film should be classified as permissible for all ages and move to more restrictive classifications if justification exists. This process of reasoning is important when dealing with the balancing of rights.

- 12) It is appropriate to distinguish between pictorial presentations and the written word. Pictures convey an immediate impression while a text requires a greater measure of intellectual engagement by the reader. It is for this reason that the act and the guidelines distinguish between

³ . Ibid at para 108.

films and publications. Films are more readily accessible in the public domain and may need to be subject to closer scrutiny than publications.

- 13) It is common cause that the publications in question do not fall either within schedule 1 or 2. In the assessment of the classification committee, the publications justified a restrictive classification under schedule 3.
- 14) Prior to the imposition of a restrictive classification, the committee must be satisfied that the restriction is necessary to protect children against harmful or disturbing material. This would involve the following assessments being made:
 - Does the publication contain material that is reasonably likely to be harmful or disturbing to children?
 - If so, what classification is appropriate to prevent this from occurring.
- 15) The concept 'harm' obviously refers to psychological, emotional and physical harm and disturbing is a broader concept which is designed to protect the interests of children. In determining what amounts to harmful or disturbing material, useful guidance can be obtained from the Canadian law. It has been emphasized that the standard is one of tolerance and not taste.⁴ The issue is whether the publication is such that it is beyond the tolerance of a particular age group and hence justifies being restricted. In *R v Butler* 1992 (1) SCR 453, the court suggested the community standard test and held:

It is the standard of the community as a whole which must be considered and not the standard of a small segment of the community.

⁴ . *Towne Cinema Theatres Limited v The Queen* [1985] 1 SCR 494.

- 16) As we pointed out in our award in the *Pink Agenda* (<http://www.fpb.gov.za/rbreports>), children in this society are exposed to issues of religion, sex and homosexuality in an educational and or discursive context. The mere fact that a publication deals with issues of a sexual nature does not mean that it should be subject to restrictions. It should only be restricted, if judged within context, it is reasonably likely to cause harm or disturb children.
- 17) The classification must then be proportionate to the harm sought to be avoided. An X18 refers to visual presentations of explicit sexual conduct or a publication that predominantly describes explicit violent conduct, bestiality, incest rape, explicit sexual conduct or the explicit infliction of violence. If a publication is classified as X18, it may only be exhibited in public in licenced adult premises.
- 18) An ordinary 18 classification restricts the distribution of publications to persons above 18 years of age. However it is a highly restrictive classification and must be resorted to only when necessary. It must also be borne in mind that the age of consent to engage in sexual activity in South Africa is 16.

APPLICATION OF THE LAW TO THE FACTS:

Cosmopolitan.

- 19) The article complained about in the January 2005 edition of *Cosmopolitan* comprises two pages with a picture in a magazine of some 160 pages. The article is a candid description of a week in the life of a prostitute. It is not a sexually explicit article and while it describes

acts of a sexual nature, it is not prurient. In the amended report the following is stated:

'The CC accepts the entire submission of Ms Fudge, in that, it is socially irresponsible and completely inappropriate to allow such an article to be read by children without the necessary contextualization and guidance from the parents.'

- 20) According to the committee, the harm anticipated by the article is that a naïve reader may form the view that prostitution is acceptable in the UK and should be emulated in South Africa and that the income earned outweighs the inconvenience.
- 21) This article is about the diary of a prostitute and reveals her ambivalence about her job, the financial reward, her sense of being trapped and her wanting to one day lead a normal life. It is extremely difficult to find any reasonable justification for the conclusion that this article will cause harm or disturb younger readers. In *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC), the Constitutional Court, by a majority of six to five upheld provisions that made it an offence for women to engage in prostitution. The divided court reflects the disagreements and divisions on this issue in the broader society. Prostitution, as an issue, is discussed openly in this society. Most persons, including children, are aware that those that engage in acts of prostitution do so for financial gain.
- 22) The finding that the article and specifically the reference to the money earned may cause "naïve readers" to want to become prostitutes is far fetched and speculative in the extreme. It is unreasonable to draw this conclusion from this article in the context of this magazine.

- 23) Having considered the article in context, we are satisfied that it is not reasonably likely to cause harm or distress to children and accordingly the 18 classification is set aside.

FHM January 2005.

- 24) The complaint lodged and upheld by the committee in respect of FHM related to pictures on page 35, pictures and brief “naughty thoughts” from pages 59 to 64, and an article entitled Bikini Blast from pages 86 to 90, together with colour pictures detailing the activities of students during their spring break at a bikini contest. These pages also reproduced pictures from the annual Agent Provocateur Lingerie Catalogue, which appears to be widely published in various parts of the world. While the articles and the pictures can be described as risqué and discuss sexual fantasies and related issues, they cannot be described as soft pornography. There is no exposure of nipples or genitalia and the articles while clearly intending to be evocative and titillating are not vulgar or degrading. There is no explicit depiction of sexual activity either visually or in writing. Nudity and the exposure of nipples may not, in and of itself, always justify a restrictive classification.

GQ December 2004.

- 25) Three articles are singled out for objection in this issue. The first article appears on page 92 entitled “ Room Servicing” and deals with sex in hotel rooms. Some strong language is used, but once again, this cannot be described as soft pornography. The article is about hedonistic sex in a hotel room and the mere fact that this topic is discussed in print does not mean that it would be harmful to children. Regard must be had to the accessibility of the publication, the true nature of the article, the proportionality of this article to the rest of the magazine, the price and

other steps taken to restrict it to a mature audience. The pictures complained of were also taken from the Agent Provocateur Catalogue and there is no explicit nudity in the pictures. These pictures are also generally available in the public domain. The final article is entitled "Paris in the Swing" and deals with sexual activities at a club in Paris called the Rock. The article is sexually titillating and descriptive of sexual conduct, but not explicit.

- 26) I digress for a moment to state that the Act effectively allows for the self-regulation of publications. The FPB becomes involved only upon receipt of a complaint by a member of the public. The various magazines have indicated the tests and standards that they utilize in order to ensure that their magazines do not step beyond the boundaries. However as the articles become more risqué, more frequent referrals can be anticipated and restrictive age categorizations may be imposed depending on the nature of the publications. Much will ultimately depend on the magazines themselves. Each publication will have to be assessed on its merits.

CONCLUSION.

- 27) Both FHM and GQ have a cover price of R29, 95 and R28. 95 respectively and both are in excess of 160 pages. Both magazines follow a format that has been successfully used in other countries. The magazines deal with a variety of issues and are not designed to appear exclusively to prurient interests. Materially, both magazines are sold in plastic wrappers. This means that people should only be able to view the magazines if they purchase the publications. We looked at the magazines and examined their wrapping.
- 28) Given the nature of the publications and the manner of distribution, there must be a reasonable likelihood that the publications will cause harm or

disturb children. We are of the opinion that, on the information before us, there is no evidence of this. However, given the nature of the publication we were concerned that the wrapping of the FHM magazines appeared to be re-sealable. This may facilitate the opening, perusing and resealing of the magazine at outlets. This, in our opinion was undesirable and it was decided that the plastic wrapping be sealed with a heat sealing mechanism. The result that we intend is that both FHM and GQ be sealed in a manner which does not allow the wrapping to be opened and then resealed. The heat sealing will mean that the wrapping will have to be torn in order to have access to the magazine. GQ had no difficulty with this and FHM agreed to abide by this condition. If there is any uncertainty about the practical application of this order, clarity may be obtained from the CEO of the Film and Publication Board.

ORDER:

- The decision of the classification committee that the January 2005 issue of Cosmopolitan be offered for sale on condition that the magazine be displayed in a sealed wrapper with a notice that it can only be purchased by a person over the age of 18 is set aside.
- The decision of the classification committee that the January 2005 issue of FHM and the December 2004 issue of GQ be offered for sale on condition that the magazines be displayed in a sealed wrapper with a notice that it can only be purchased by a person over the age of 18 is set aside and replaced with:

The January 2005 issue of FHM and the December 2004 issue of GQ and all subsequent issues of these magazines must be offered for sale in a sealed plastic wrapper.

Concurred by:

Ms. Rene Smith.

Ms. Penny Marek.

Mr. Andrew Verster.

Adv. Ronald Lessick.

24th April 2005.