

Before the Film and Publication Review Board

Held in Johannesburg

1/2008

In the matter between:

United Independent Pictures

and

The Film and Publication Board

In re: Appeal in respect of the film: Iron Man

Professor K. Govender

(Chairperson)

Introduction.

- 1) This is a big-budget contemporary portrayal of the Marvel Comics character, *Iron Man*. The film features Robert Downey Jnr, Jeff Bridges, and Gwyneth Paltrow, and is directed by Jon Favreau. The Iron Man concept is given a technological face-lift and is immersed in current contemporary social issues. The film is about Tony Stark, a prodigious talent, who inherits and develops his father's armament industry into a powerful world player. They supply increasingly more powerful and more destructive weapons to satisfy the lust for power by governments and warlords, and this brings them great wealth and opulence. The wealth and opulence become the qualities that mark them out for reverence in the United States of America (USA).

- 2) The hedonistic Stark has a life-changing experience when he is kidnapped and pressed into service to design a missile for a group of Afghanistan-based warlords. The glib justification for pumping arms into conflict zones is exposed as he comes face to face with the reality that his weapons find their way into the clutches of people who they were designed to defeat. The weapons produce, sustain and nurture conflict. He escapes after receiving a life-saving electro-magnetic implant to his heart, and starts a crusade to fight for peace. Based on the prototype built in the Afghan cave, Stark builds a sleeker, smaller, more powerful and more attractive Iron Man. He turns against his previous pursuits to the chagrin of Obadiah Stane, his father's business associate. His new morality clashes directly with the old morality of profit at all costs, and we witness a titanic physical battle at the end, effectively between representatives of these forces.
- 3) The film is designed to appeal to audiences of various ages. It has spectacular effects, and sometimes ~~is~~ subliminal and, on other occasions, direct messages. It is no co-incidence that the torture technique used on Tony Stark by the warlords is based on the 'water-boarding' technique used by the USA armed forces to extract information from captives. The machinations of big business in the USA are also meant to appeal to more mature audiences. The meaningless showering of awards – and the disdain with which they are received by the recipient – ~~is are~~ clearly meant for more adult audiences.

The decision of the Classification Committee

- 4) On the 23rd April 2008, a three-person classification committee under the stewardship of Chief Examiner Ms Maggie Pillay, assigned the film a restrictive classification of 13(V). It is apparent from the reports prepared by the examiners that a considerable amount of thought and reflection preceded the decision. We are appreciative of the detailed reports submitted by the examiners. Subsequently a further set of representations/reasons was submitted to us on the day of the hearing.

These are unsigned, and we assume that these were drafted by the examiners. The second set of representations is different in a number of respects from the first set of reasons provided by the examiners. I will deal with these in more detail later.

The hearing of the Appeal

5) An appeal was lodged against the classification by the distributors, United Independent Pictures (UIP). They contended that the classification was unduly restrictive, and that a more appropriate classification would have been a 10(V) or PG 10. Members of the Review Board viewed the film at the Nu-Metro cinema at Killarney Mall on the 10th May 2008. At the hearing, UIP were represented by Mr Mark Rosin of Attorneys Rosin, Wright and Rosengarten. Regrettably, no representations were made on behalf of the Classification Committee or the Film and Publication Board (the Board) at the hearing. We were thus not able to discuss pertinent issues with them. It would be useful to us if someone were present to represent the Board or the Classification Committee at the appeals. It is recommended that the Chief Examiner be responsible either for representing the Classification Committee at the appeal hearing or for arranging for another classifier to do so. As stated earlier, further written representations were submitted on behalf of the Classification Committee. We are grateful to Mr Rosin for his detailed and comprehensive representations. On the 12th May 2008, the Review Board indicated that it had set aside the decision of the Classification Committee and assigned the film a restrictive age classification of 10(V). These are the reasons for our conclusion.

Important preliminary issues

6) It is apparent from the documents submitted by the Classification Committee that it relied on the guidelines of December 2007. My research has indicated that the December 2007 guidelines were

gazetted for public comment, but are yet to be brought into effect. The guidelines that appear on the FPB website are those dated 20th April 2007.¹ I had three telephonic conversations with Ms Yewande Lange, Head of the Classification Unit at the Film and Publication Board, who confirmed that the December 2007 guidelines have not been gazetted. In terms of section 31(2) of the Films and Publications Act 1996 (as amended) (the Act),² the Board is empowered to make regulations regarding age restriction and consumer advice in connection with films. The Board is obliged to publish in the Government Gazette the guidelines that are used to determine what is harmful and disturbing in terms of Schedules 3 and 8. Implicit in Section 31 of the Act, and in the general principles regarding the rule of law, is that law must be reasonably accessible to the public. From the information available to us, the legally applicable guidelines at the present time are those of 20 April 2007. These guidelines must be applied, not the guidelines put out for public comment in December 2007, which have not been finally gazetted. The December 2007 guidelines are different from the April 2007 guidelines. It is imperative that examiners be informed that, at present, they must apply the April 2007 guidelines until such time as the December 2007 guidelines are formally gazetted.

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6)7) Mr Rosin submitted that his clients had not had sight of the December 2007 guidelines. As the Board had no representatives at the hearing, we were not able to verify or confirm this. Suffice it to say that Section 4 of the Promotion of Administrative Justice Act 3 of 2000 requires that appropriate steps be taken to communicate administrative action to those materially and adversely affected by it in order to enable them to make representations. This may require more than simply publishing the proposed guidelines in the Government Gazette, thus assuming that all affected parties have access to it. It is strongly recommended that a database be created of interested persons, including film distributors, and that guidelines of this nature be

¹ . Government Gazette of the 20th April 2007 no. 29816

² . Act 65 of 1996.

communicated to them, thus enabling them to comment. This communication can be done electronically and thus inexpensively. Soliciting the views of all affected persons is integral to the notion of participatory democracy.

7)8) In terms of the Act, only a Classification Committee, the Review Board, or the High Court can make classification decisions. No member of staff of the Board, however senior, is empowered by the Act to make classification decisions. It is unlawful for anybody other than a Classification Committee, the Review Board, or the High Court to make classification decisions. Any person may lodge a complaint with the Board against a publication that has not already been classified by the Board.³ It is obligatory for any person who intends to distribute or exhibit any film to submit the film to the Board for classification.⁴ In terms of the Act, members of the public do not have the right to appeal against the classification of a film to the Review Board.⁵ However, the Minister of Home Affairs does have the right to appeal. In the past, the Board has motivated for a ministerial appeal against the classification of a film when it formed the opinion that the Classification Committee had erred. It is our view that members of the public should be permitted to lodge complaints against the classification of films with the Board. If the Board forms the view that the Classification Committee erred in a specific case, then it should motivate for a ministerial appeal to the Review Board.

An assessment of the film in the light of the applicable guidelines

8)9) For the reasons stated earlier, the classification of the film has to be made in accordance with the April 2007 guidelines. In his submissions before us, Mr Rosin argued that a classification of PG or 10M would be more appropriate than any other classification. An

³ . Section 16 of the Act.

⁴ . Section 18 of the Act.

⁵ . Section 19 and 20 of the Act.

analysis of the original reasons submitted by the Classification Committee clearly indicates that the scenes of violence were of particular concern to them. One of the examiners assigned the film a 13M classification in the mistaken belief that this classification would prevent children under the age of 10 from viewing the film. It is apparent that this examiner was primarily concerned about children under the age of 10. Having concluded, after discussion, that a 13M would not prevent children under the age of 10 from viewing the film, the examiner decided to settle on a 13(V) classification. No reason is given why a 10(V) classification would not have been adequate.

9)10) There was less concern about the film's theme, which was described as 'mature and complex'. The mild threat was deemed to be mitigated by an element of comedy, heroism, and entertainment value. In other instances the theme is described as 'fairly mature, mildly threatening; much of the threat is somewhat mitigated by an element of comedy, entertainment value, pro-social values espoused'. In contrast to the above, the expanded reasons (referred to in paragraph 4 above) state:

The committee considered the theme psychologically threatening to younger viewers.

Similarly, the following conclusion is reached in respect of violence in the original reasons of the Classification Committee:

There are no bloody, graphic scenes, brief mild focus on the effects or aftermath – hence impact is fairly mild. Also some fantasy violence – mild impact.

In the amplified reasons, the following conclusion is reached in respect of violence:

The violence in the film was not very brief and infrequent, or unrealistic, and was not very low impact and non-threatening. Neither is the violence in the film mild, very brief and infrequent.

The amplified reasons appear, in material respects, to be different from the original reasons submitted by the examiners. We agree much more with the assessment of the film contained in the original reasons of the Classification Committee than with those submitted subsequently.

~~40~~11) In our opinion, given the nature and impact of some of the scenes, the only appropriate choice is between a restrictive age classification of either 10 or 13. Under the April 2007 guidelines, films may be classified as 10 if the film contains mild impact classifiable elements but not of such intensity and frequency as to be disturbing or harmful to children 10 years or older. In addition, the themes may be of a mature nature. There “may be brief scenes of mild violence but not in domestic or sexual contexts or in contexts which form a part of childhood, such as schools and playgrounds. There are no scenes of graphic violence and bloodletting is extremely limited. The overall message is that violence is wrong and unacceptable and is not a way to resolve conflicts or solve problems”. Given these guidelines and the original reasons submitted by the Classification Committee, it is difficult to ascertain why the restrictive age classification of 10 was not the most appropriate.

~~44~~12) The corresponding provisions of the 13 classification in the guidelines allow for moderate- or medium-impact classifiable elements of an intensity or frequency that will be appropriate to the developmental levels of teenagers. The themes may be more complex and mature and treated in a way that may be frightening and emotionally upsetting to younger viewers. There may be scenes of realistic but mild violence without graphic or bloody detail, justified by context.

~~42)~~13) There is limited substantive difference between the two categories as far as violence as a classifiable element is concerned. The real difference is one of degree and impact. This is a long film, and the scenes involving violence or threat are separated by relatively long periods of dialogue or other kinds of action. All the scenes involving Iron Man immediately take on a fantastical nature, and the violence/action must be filtered through this prism. There are no lingering shots of the consequence or aftermath of violence, and there is no gore or blood. The scenes are brief and not graphic. Each of these scenes has redeeming or mitigating features. The water torture scene is extremely brief, and we subsequently see a bruised Stark continuing with his endeavours. The threat of laceration with a red-hot coal does not materialize. There is intense fighting in the first ambush scene, but there is a conspicuous lack of gore and blood. The real menace and threat to the refugee family by the warlords is righted by the redress meted out by Iron Man and by the absolute appreciation in the eyes of the refugee child. Similarly, the anguish on the faces of the children in the SUV when it is picked up by the evil Iron Monger is resolved when we witness the vehicle speeding off in safety.

~~43)~~14) This is a film which has the abiding message of good triumphing over evil. It would be unfair to describe this film as simplistic propaganda or as one fostering anti-Islamic sentiment. The themes are handled in an entertaining and humorous manner. Having watched the film, heard arguments, and discussed the various options, we are of the opinion that the film can be accommodated under the restrictive age classification of 10. A more restrictive classification would be unnecessary in the circumstances.

A description of the relevant constitutional and legal framework

~~44)~~15) In our awards in *Rabbit Proof Fence* and *Tomb Raider II*, we analysed the applicable constitutional and legal framework in terms of which we operate. As many new examiners have been appointed since

these awards were handed down, it may be appropriate to restate these principles in a modified form.

~~15~~16 Schedule 8 of the Act⁶ 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.

We are constrained by law to impose age restrictions for the purpose of protecting children in the relevant age group.

~~16~~17 Section 16 of the Constitution provides:

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 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

⁶. Act 65 of 1996 (as amended)

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.

~~17~~18 Section 36 of the Constitution allows for rights to be limited, and provides:

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 –

- i. the nature of the right;
- ii. the importance of the purpose of the limitation;
- iii. the nature and extent of the limitation;
- iv. the relationship between the limitation and its purpose;
- v. 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.

~~18~~19 The Films and Publications Act and the guidelines are the laws of general application that permit the freedom of expression to be limited. In addition, any classification decision restricting the freedom of expression in terms of these laws must also be reasonable and justifiable or proportionate.⁷ The proportionality enquiry requires us to balance competing interests. In this regard the Constitutional Court has held:

⁷. S v Makwanyane 1995 (3) SA 391 (CC)

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, 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.⁸

~~19)20)~~ Thus any restrictive classification imposed either by the Classification 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 interests of the children, 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.

~~20)21)~~ 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 distributors' freedom of expression as little as reasonably 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 distributors' 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

⁸. Ibid at para 108.

unnecessarily intrude into the freedom of expression. The required balance would thus not be achieved.

~~24~~22) 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.

~~22~~23) In this case, there appeared to be some ambivalence amongst the examiners about the classification category into which the film would most appropriately fit. In the light of the April 2007 guidelines, we conclude that the film can correctly be assigned a restrictive age classification of 10. Had the classification committee applied the legally binding guidelines, it may also have come to a similar conclusion.

Conclusion:

- 1. The decision of the Classification Committee assigning the film a restrictive age classification of 13(V) is set aside.**
- 2. The film, Iron Man, is classified 10(V)**

Concurred by:

Revd M. McCoy

Mrs P. Marek

Mr R. Lessick

Ms R. Smith

Mr J. Phalane