

1/2003

Before the Film and Publication Review Board.

In re:

Appeal against the classification of 10 (V) in respect of the film "X-Men

Award.

Professor K Govender
Chairperson

Introduction and Description.

This is a fantastical science fiction high budget film that is well directed excellently acted and is entertaining. The underlying theme is one of tolerance and a recognition that those different to us are capable of compassion, love understanding, and of doing good. They are also susceptible to the vices of greed, hatred, intolerance and of doing evil. It also reminds us that, as human beings, we have a similar propensity for good and evil. It cautions against instinctive judgments and extreme options in respect of those who are different to us. The options of registering mutants harks back to the authoritarian behaviour of the past. The registration of Jews by Nazis, the internment of Japanese by the government of the USA and pass laws imposed on Africans by the Apartheid authorities are all examples of how those in authority were driven by fear and prejudice of those different to them . History has judged all these instances harshly.

Overlaying this theme are the evil machinations of Dr Stryker who seeks to destroy all mutants and Magneto who wishes to respond in kind against humans. Counterbalancing this is Professor Xavier and his merry band of X-Men and to a lesser extent the President of the USA. At the end, the forces of good prevent a conflict that would have destroyed many. It thus ends on an affirming and positive note.

The special and sound effects are memorable. There is considerable action and much choreographed violence with virtually no gore and no real accentuation of pain and suffering. The consequences of violent acts are reversed and the status quo existing prior to the acts of violence is restored almost immediately. Wolverine after being shot in the forehead is resurrected when the bullet is emitted from his forehead. The torching of the cars by Pyro, which is graphic and gripping, is reversed and property and persons subjected to the incineration are restored to their previous conditions. There are also scenes where Wolverine uses his body piercing implements. Intense fighting scenes permeate the film. There are a number of scenes that evoke a sense of threat and menace. The sense of apprehension is heightened by an evocative musical score. The attacks on the President and that on the school are examples of these scenes. However all this occurs within a context of fantasy and it is clear that the directors made attempts to reassure those than may be disturbed by some of the scenes.

The Classification.

On the 23rd April 2003, examiners of the FPB classified the film as 10(V). The Chief Examiner provided the following reasons in support of their conclusions:

Admittedly, it was agreed that the movie is targeted to all viewers because the language and other classifiable elements but for the violence were clean and acceptable. The violence though occurring in the realm of fantasy is threatening and menacing. There are scenes of scientific excursions with complex machinery displayed and at times unsettling knife fightings with blood shown.

But as has been shown above all these were clearly unrealistic, typical of this scientific children movie. It is because of this complexity and the described violence that we agreed on 10 V.

Nu-Metro, the distributors of the film appealed against this decision and the appeal was heard on the 2nd May 2003. At the hearing of the appeal, NU Metro was represented by Mr Mark Rosin of Rosin Wright Rosengarten. After referring to section 16 of the Constitution and dicta from *South African National Defence Union v Minister of Defence and Another*¹ and other Constitutional Court judgments, Mr Rosin submitted:

On that basis, it is submitted that the imposition of the age restriction in question should only be permissible where it is absolutely necessary. In other words, where liberty should be compromised, that is permissible only where there would be some harm to the reasonable child watching.

He further submitted that the previous X-men film had attracted a PG restriction. He argued that the films dealt with scenes of violence in a materially similar in the manner. Both films had a similar choreographed fight scene between Mystique and Wolverine. On this basis, Mr Rosen concluded that, for the sake of consistency, the same age restriction assigned to the first film be accorded to the second in the series.

He argued that the reasonable child watching this film would be able to determine the difference between fantasy and reality and that films of this nature provide the least level of anxiety.

In his conclusion, Mr Rosen asked for either a MA 10 classification or a PG 10 classification.

Some preliminary Issues.

¹ . 1999 (4) SA 469 (CC)

Nu Metro sought, immediately after the classification of this film, to have the appeal heard and a decision rendered. We refer to our reasoning in the *Musketeer* award and the procedure that we suggested that ought to be followed when appeals are prosecuted. Flowing from our award, the Film and Publication Board published rules regarding appeals. The applicants in this case were not familiar with the rules and required the Review Board to hear the appeal as soon as possible in order to accommodate their release date. We would urge all distributors to familiarize themselves with the rules and procedures and plan their release dates timeously, having regard to the possibility that they may wish to exercise their right of appeal. It is necessary that adequate time be allocated between the submission of the film for classification and the release date to allow for the appropriate and proper consideration of appeals. Further in order to act procedurally fairly, the rules require that parties make their submissions prior to the hearing to enable them to be served on the examiners and the Film and Publication Board. In this matter, we required that the arguments submitted by the applicants be served on the board and delayed making a decision for a few days.

On the 6th May 2003, a telephonic conference between Review Board members was held and we arrived at a final decision in this matter during this discussion.

The Legal Arguments.

The applicants based some of their legal contentions on the following:

- The “basic premises” of the current Film and Publications Act “ were informed by its predecessor, the Publications Act of 1974.”
- There is no clear jurisprudence in respect of the new Act.

These contentions are incorrect. The Censorship Board created in terms of the Publication Act was intended to censor and restrict expression under the

Apartheid order. The Review Board is intended to function as a classification tribunal operating within a justiciable Bill of Rights. Given the profound paradigm change that has occurred, jurisprudence, both academic and judicial, interpreting provisions of the previous censorship process must only be applied to the new order with great circumspection and caution.

Secondly a new jurisprudence has developed around the new act. Classification guidelines have been published which provides greater detail and structures the discretion afforded by the act to the examiners and to the Review Board. In addition, the Review Board has handed down a number of awards which seek to provide further assistance to those wishing to use the Act. All of this is available on the FPB web site.

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

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 modify means that expression falling within these categories is unprotected and can be modified, restricted and even prohibited. Expression falling outside these categories are 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.

The Act, together with the classification guidelines, attempts to balance the importance of the freedom of expression and the need to regulate expression and, in some instances to impose age restrictions in order to protect the interests of children. It is vital therefore that debate as to the appropriateness of a classification be conducted within the legal framework described above and with specific reference to the Film and Publications Act 1996, the guidelines and decisions of the Review Board. Mr Rosen submission that the "imposition of the age restriction in question should only be permissible where it is absolutely necessary" thus does not accord with the law in terms of which we operate.

Each film must be assessed on its merits and a previous classification of a similar film is, at most, a factor to be taken into account when determining an appropriate classification.

The merits.

It is clear that the only classifiable element that caused the examiners concern was the violence that appeared threatening and menacing. In arriving at its decision, the examiners are required to exercise their discretion and have regard to all the classifiable elements. As far as possible a decision must be arrived at after a cumulative assessment of all the classifiable elements. This is particularly so when no single classifiable element points unequivocally in the direction of a more restrictive classification. Where as in this film, the violence is neither graphic nor gory, there are no close-ups of victims suffering and the violence is within the context of a fantastical scenario, then the theme and other elements must be reflected upon in arriving at an appropriate classification.

The contention of Mr Rosen for a mature accompaniment classification is an acknowledgment that some measure of supervision is necessary, especially for younger children. The examiners opted for a restrictive classification of 10(v). This meant that children under the age of 10 would not be permitted to view this film.

After a careful assessment of all the scenes and the theme and underlying message of this film, the Review Board is of the view that a total prohibition on children under the age of 10 viewing this film may not be the fairest classification. However concern was expressed at the prospect of children, especially those under the age of seven watching this film either on their own or together with their peers or siblings. The choreographed scenes of violence and the heightened sense of anxiety evoked by some of the scenes may adversely impact on children watching this film without parental guidance. This dilemma may also have presented itself to the examiners.

In the classification guidelines, the dividing line between a PG classification and a prohibition on children under the age of 10 watching the film, is not particularly distinct. Our preferred option would have been to permit children under 10 to view this film, provided that they are accompanied by their parents or guardians. In terms of the guidelines, such an option was not open to the examiners who are obliged to apply the guidelines.

Section 20(3) of the Film and Publication Act 65 of 1996 lists the powers of the Review Board as follows:

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: Provided that the

classification, as so amended, and the conditions so imposed, shall not be more restrictive than the classification or condition appealed against.

In terms of this section, the Review Board is given the powers of the examiners and is empowered to give any decision which the examiners ought to have given. This means that the Review Board must apply the Act and the guidelines. However an additional power is afforded to the Review Board. While operating within the parameters of the guidelines, it is empowered to impose other conditions in respect of the distribution or exhibition of the film. This means that the Review Board can supplement the guidelines with additional conditions.

It is the view of the Review Board that a PG classification with additional conditions would be the most appropriate one in the circumstances. The Review Board is of the opinion that a PG (10) (V) classification is the correct one. This would be a novel classification and needs to be explained. In order to minimize confusion, we recommend that the following sentence be inserted beneath the classification.

No Children Under the age of 10 unless accompanied by an adult.

The expenses incurred in advertising this classification must be borne by the distributor.

Conclusion:

The film X-Men 2 be classified as PG(10)(V) – No children under the age of 10 unless accompanied by adults.

Dated at Durban on the 18th May 2003.

Concurred by

Adv R Lessick,

Ms P Marek,

Rev. M McCoy,

Mr A Verster.