Before the Film and Publication Appeal Tribunal

2/2013

In the matter between:

Spier Films SA **First Appellant**
Jamil XT Qubeka **Second Appellant**

and

The Film and Publication Board **Respondent**

Appeal against the classification of the film - *Of Good Report*

Professor K Govender
(Chairperson)

Introduction

On the 16th and 17th July 2013, a Classification Committee ('the Committee'), appointed in terms of the Films and Publications Act 65 of 1996 ('the Act'), assigned the film *Of Good Report* a 'refused classification' in terms of section 18(3)(a) of the Act, effectively banning the film. The Committee was of the view that the film contained a scene of child pornography, and stopped viewing the film after 28 minutes and 16 seconds. The film was scheduled to open at the Durban International Film Festival ('the film festival'), but as a consequence of this decision the film could not be broadcast, distributed or exhibited in public[1], and so the producers and distributors of the film could not show it as the opening film of the film festival. In addition, it is an offence for any person unlawfully to possess any film that "contains depictions, descriptions or scenes of child pornography…"[2]. An appeal was immediately lodged, and we were requested to hear this appeal as a matter of urgency. The Film and Publication Board (the Board) must be complimented for setting up the appeal as a matter of urgency, thus allowing the issues to be ventilated in an open hearing.

The appeal was heard on Saturday, 27 July 2013. The appellants were Spier Films (the producers) and Jamil XT Qubeka, the director of the film. In addition to the members of the Appeal Tribunal established in terms of the Act ('the Tribunal'), I requested Professor Ann Skelton, a recognised child rights expert, to sit with the Tribunal and consider this appeal. Prior to the commencement of the formal proceedings, the film was viewed in its entirety by members of the Tribunal together with Professor Skelton, officials of the Board, the appellants, and the various legal teams. The appellants were represented by Mr S Budlender (instructed by Webber Wentzel) and the respondent was

[1] Section 24A(2) of the FPB Act.
[2] Section 24B(1) of the FPB Act.

represented by Mr S Risiba, assisted by Mr R Mkhwanazi and Mr S Tshabalala. I am obliged to Mr Budlender and Mr Risiba for preparing written heads of argument despite severe time constraints.

After hearing arguments and reflecting fully on the issues raised, the Tribunal was of the view that the Committee had erred materially in refusing classification to this film. Given the badge of dishonour and ignominy attached to a finding that a film contains scenes of child pornography, and given the unanimous view of the Tribunal that the decision of the Committee was unsustainable in law and fact, it was decided that it was in the interests of justice to make a ruling immediately and to provide reasons later. On the day, therefore, the following ruling was made:

1. The decision of the Committee made on the 16th and 17th July 2013 that the film ***Of Good Report*** is refused classification, is set aside.
2. The film ***Of Good Report*** is assigned a classification of 16 (V) (N) (S).
3. No person under the age of sixteen is allowed to see this film.
4. Full reasons for the decisions will be given by or before the end of August 2013.

These are the reasons for our conclusions.

Description of the film

This is a sombre, grim, and menacing film shot in black and white. The film starts with the seemingly demented main male character, Parker Sithole, pulling out teeth that appear to be embedded in his head. This bizarre opening scene is only explained at the end of the film. The fleeting and brief scenes of humour in the film are barely noticeable, and are deeply buried under the intensity of the themes and by the unrelenting discomfort of witnessing a sexual predator who easily gains the confidence of decision-makers who run schools, and then preys on young girls. An accomplished Parker Sithole – he reads Shakespeare, dances, is academically bright, and plays cricket – develops an obsessive relationship with one of his pupils, the beautiful and riveting Nolitha. The striking similarity of her name to *Lolita* – the novel written by Vladimir Nabakov and published for the first time in France in 1955 – is not co-incidental. *Lolita* is a story about the well-educated Humbert Humbert who becomes obsessed with the twelve-year-old daughter of his landlady, and explores the dangers of this obsessive relationship and the impact that it has on the victim.[3] To underscore the link with *Lolita*, there is a direct reference in the closing sequence of the film to the novel when a schoolgirl, holding the book, casts what appears to be a glance of admiration at Parker Sithole.

Initially Parker Sithole is unaware that Nolitha is a pupil at the school, and after an encounter at the local tavern, he has sexual relations and intercourse with her. She initiates the contact and is a willing participant in the sexual activities that occur in his rented residence. At this point, the audience is unsure of the age of Nolitha. We then discover that she is a learner in the grade 9 class taught by Parker Sithole. Their obsessive and passionate relationship continues unabated. She falls pregnant, has what appears to be a difficult abortion, and then absents herself from school. Parker Sithole, who never speaks in the film, prevails on Nolitha's grandmother to send her back to school.

[3] http://homeworktips.about.com/od/bookreportprofiles/a/lolita.htm. The site contains a review of *Lolita*, and was accessed on 3 August 2013.

We see a devious and conniving intent on his part, and the gullibility of those who trust him because he is 'of good report'. However, Nolitha sees him for what he is, is no longer interested in him, and rebuffs Parker's desperate attempts to re-ignite their passionate liaison. She begins to enjoy the company of male companions of her own age whose material possessions appear to add an extra lure. We notice how attracted Parker Sithole is to the young pupils in gymslips – and distracted by them; and a comment by a fellow teacher, Mr September, that Parker's illness (his obsession with girls) is worse than his own alcoholism, resonates.

Parker Sithole sheds the façade of the genteel educator and attempts to kill the man whom he perceives to be Nolitha's boyfriend. In a scene in which he is portrayed as the grim reaper, he endeavours to decapitate the boyfriend, but is interrupted and does not carry out his intent. However, his obsession continues unabated, and he kidnaps and murders Nolitha; and after coldly conducting research into the technique, in a haunting scene he dismembers her body and disposes of the remains. There is a sense of relief when he is apprehended by a conscientious but over-enthusiastic police officer. However, the ending is not reassuring: we are left with a sense of foreboding that Parker Sithole, a man of good report but profoundly evil, still lurks within our midst.

I now turn to an analysis of relevant legal issues.

The constitutional imperative of protecting children, and the applicability of the reasoning in *De Reuck*

I proposed dealing with a number of legal issues that were raised during the hearing, and then applying the relevant and applicable legal principles to the classification of the film.

One of the central objectives of any society is to protect its children and allow them to enjoy their childhood without premature exposure to adult experiences, and without their having to experience damaging, harmful, and inappropriate behaviour, whether directly or indirectly. The Constitution enjoins us to protect children from maltreatment, neglect, abuse, and degradation.[4] The Act explicitly lists the protection of children as one of the important and solemn objectives that must be respected by the bodies functioning in terms of the Act.[5] Child pornography is a scourge that causes serious harm to our society; and the proliferation of this material is a matter of great concern. Legislation that criminalises child pornography is a manifestation of our commitment to protecting our children, and an affirmation of their right to human dignity. This correlation between legislation against child pornography and the dignity of children was expressly recognised by the Constitutional Court in *De Reuck v Director of Public Prosecutions*:[6]

> Children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties. This is recognised in section 28 of our Constitution. Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.

[4] Section 28(1)(d) of the Constitution.
[5] Section 2(b) of the Act.
[6] *De Reuck v Director of Public Prosecution* CCT 5/03 paras 63-65 (footnotes omitted).

> Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity, and integrity of children.
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> Little need be said about the second purpose of section 27 [of the Act] which is to protect children from being used in the production of child pornography. The expert evidence in this case confirms that abusing children in this way is severely harmful to them. The psychological harm to the child who was photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction. Thirdly, there is a reasonably apprehended risk of harm from child pornography. The state produced evidence to suggest that images of children engaged in sexual conduct may be used in one of the three ways to harm children, firstly, to "groom" children for sexual abuse by showing them acts other children have purportedly performed; secondly, to reinforce cognitive sexual distortions, i.e. the belief that sex with children is acceptable; and finally for paedophiles to fuel their fantasies prior to committing an act of sexual abuse.

In *De Reuck*, the court concluded that the state is obliged to make every effort to combat child pornography, as the harm caused by child pornography is real and ongoing.[7] It recognised the real harm that is caused directly and indirectly to children by child pornography. The challenge facing our society is to deal with this scourge in a responsible and proportionate manner that accords with the purport and objectives of our Constitution. This is precisely what the court in *De Reuck* sought to do by providing a detailed framework, outlined later in this judgment, on how to determine whether a film contains scenes of child pornography. Court decisions of this nature provide the certainty that is necessary to guide the discretion of functionaries such as classification committees. Conclusions that Constitutional Court judgments that were specifically designed to assist the exercise of discretion are no longer applicable must not be arrived at lightly.

It is common cause that the Committee did not have regard to the guidelines and framework laid down in *De Reuck*. There must be a clear and unequivocal legal justification for not doing so, and in this case there simply was no legal basis for the view put forward that the reasoning in *De Reuck* was not binding on and applicable to classifiers.

The applicability and precedent value of the reasoning in *XXY*

Subsequent to the *De Reuck* judgment, this Tribunal considered an appeal against the finding that the film *XXY* contained child pornography. The Tribunal in March 2009 found, firstly, that the *De Reuck* judgment is directly applicable despite certain amendments made to the Act since the *De Reuck* judgment was handed down, which altered the definition of child pornography and related sections dealing with the subject. The Tribunal then proceeded to provide a set of guidelines on how to determine whether an image or scene depicted in a film contains child pornography. The respondent in this matter sought to argue that the findings of the Tribunal do not create precedents

[7] *De Reuck* (above) paras 66 and 67.

that must be followed by the classification committees. In support of this far-reaching submission, reference was made to *Derby-Lewis and Another v Honourable Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission*,[8] where a full bench of the Cape High Court held:

> If other amnesty committees have given the provisions under review a different interpretation to that which we regard as correct, that is unfortunate. Amnesty committees are administrative bodies exercising a quasi-judicial function. They do not have a system of judicial precedent equivalent to *stare decisis*. Even if they did, their interpretations would not be binding on the High Court, to which aggrieved or disappointed parties may turn for relief on judicial review.[9]

The Tribunal is not in the same position as the Amnesty Committee: the Tribunal is an administrative appeal tribunal established in terms of section 3 of the Act, and is required to exercise its functions independently and without bias. Not respecting the decisions of the Tribunal would make the requirements of independence meaningless. The requirement of independence emphasises that as a second decision-maker, the Tribunal brings a different and reflective judgment to bear on the issues. Its appellate jurisdiction is akin to that of ordinary courts of appeal: Section 20(3) of the Act enables the Tribunal to make legally binding decisions and, in the case of an appeal, it may refuse the appeal, confirm the decision, give such decision as the Board may have given, and amend the classification of the film, game, or publication. Importantly, in terms of section 20(5) of the Act, a decision of the Tribunal is deemed to be a decision of the Board, and has legally binding consequences. As Professor Lawrence Baxter noted:

> [W]here the appellate tribunal is empowered to 'confirm, vary or set aside' the decision of the authority *a quo*, or where it is empowered to 'substitute its decision' for that which is on appeal, then the appellate jurisdiction is at least that of ordinary appeal (...) If, in addition, the decision of the appellate body is deemed by the legislation to be that of the authority *a quo*, then the appellate powers of the former body are almost certainly of the widest kind.[10]

Baxter further recognised that administrative tribunals specially created to hear administrative appeals (such as the Tribunal) are 'the closest analogies to a proper system of administrative courts'.[11] Similar sentiments were expressed by Professor Hoexter[12] who states:

> Appeals to an administrative tribunal specially created to hear administrative appeals, such as licencing appeal boards and town planning appeal boards. These bodies often exhibit a degree of independence and begin to resemble a proper system of administrative courts.

Professor Hoexter specifically cites the Appeal Tribunal empowered by s 20 of the Films and Publications Act as an example

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[8] *Derby-Lewis and Another v Honourable Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission* (2001) JOL 7871 (C).
[9] *Derby-Lewis* (above) 35 (references omitted).
[10] Baxter, *Administrative Law in South Africa* (1984), 262-263.
[11] Baxter (above), 267.
[12]. Hoexter *Administrative Law in South Africa* (2012), 2nd ed, 67.

The Tribunal has, since its inception, provided guidance to classification committees (which are perhaps the more appropriate comparison to amnesty committees) on how to exercise their discretion in terms of the Act. The judgments of the Tribunal are compiled and made available to classifiers and to the public.

Officials of the Board and the Committees are not permitted, in their own discretion, to decide whether decisions of the Tribunal are correct or incorrect and then just apply those decisions that they deem to be correct. This would be a direct violation of the Act, which imbues the Tribunal with special decisional powers, and it would be contrary to the principles of the rule of law, which require certainty only gained through consistency in interpretation. If any interested party – in this case, the Board – is dissatisfied with the decision of the Tribunal, its proper recourse is judicial review. If, following an application for judicial review, the decision of the Tribunal is not set aside, then it is a legally binding decision and must be upheld. It is legally untenable to suggest, as the respondent did, that the findings of the Tribunal are not binding on the Board, as this would be contrary to the enabling Act, which attempts to create a situation allowing for a legal framework to be erected in order to resolve classification disputes, provide certainty, and ultimately guide classifiers, who are the primary decision-makers under the Act.

In summary, the reasoning of the Tribunal in *XXY* will bind classification committees, and ought to have bound the Committee classifying *Of Good Report*.

Relevant factors to be considered in determining whether a film contains child pornography

The Committee assessed the first sexual scene involving Parker Sithole and Nolitha as being child pornography and stopped watching the film immediately it became apparent that Nolitha was a child and a learner at the school. The respondent supports this approach by relying on Regulation 16(1)(a) of the Films and Publications Regulations[13] (the regulations), which provides that "if a classification committee discovers child pornography during any classification process, the film, game or publication process shall be handled as follows (…) The classification process shall be stopped...".

Heavy reliance was also placed on Section 18(3) of the Act, which provides:

> The classification committee shall, in the prescribed manner, examine the film or game referred to it and shall –
> (a) Classify the film or game as a 'refused classification' if the film or game contains –
> (i) Child pornography, propaganda for war or incitement of imminent violence; or
> (ii) The advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,
> (…)
> unless, judged within context, the film or game is, except with respect to child pornography, a *bona fide* documentary or is of scientific, dramatic or artistic merit or is on a matter of public interest.

[13] . Film and Publications Regulations GN R207 in *Government Gazette* 33026 of 15 March 2010.

The proviso in this subsection permits a film or game containing propaganda for war or one containing scenes inciting imminent violence to be assigned an appropriate classification if it is a *bona fide* documentary or is of scientific, literary, or artistic merit, or on is a matter of public interest. The proviso does not, however, apply to films, games, or publications containing child pornography. This means that if the film, game, or publication contains child pornography, it is to be refused classification; and the fact that it is *bona fide* documentary or is of scientific, literary, or artistic merit, or is on a matter of public interest, does not permit the classifiers to give it anything less than a 'refused classification'. Thus, if a film contains child pornography it must be banned.

The respondent appeared to emphasise this section in order to support the contention that context must not be taken into account when dealing with films alleged to contain child pornography. However, on a proper reading of section 18(3) of the Act, together with the definition of child pornography in the Act, it becomes apparent that context *must* be taken into account in determining the initial enquiry into whether the film, game, or publication contains child pornography; and once it is determined that the film does indeed contain child pornography, the proviso (effectively a second enquiry) has no application. It is therefore imperative that the initial appraisal of whether the film, game, or publication is child pornography must be made with regard to the context. If this was not so, then – given the width of the definition of child pornography and sexual conduct under the Act – a written description in a newspaper of a paedophile stalking and then engaging in sexual conduct with his victims, even if the case were a matter of considerable public concern or interest, would constitute child pornography. The effect of this would be that freedom of expression would be unreasonably and unjustifiably infringed; and it was for this reason that the court in *De Reuck* adopted a context-sensitive analysis. Given the drastic consequences that flow from a film being labelled as 'child pornography' (namely, that once the conclusion is reached that the film is child pornography the film must be refused classification, even if the redeeming provisions in the proviso apply), the issue of whether the film contains child pornography must be decided with reference to the principles established in *De Reuck*. The appellants contended that, had the Committee followed the principles in *De Reuck*, it would have reached a very different conclusion; and they submitted that the decision of the Committee was directly at odds with the reasoning in *De Reuck*.

This brings another issue raised by the respondent to the fore: What is the applicability of *De Reuck* in the present circumstances?

In essence, the main contention advanced by the respondent in this regard is that the reasoning in *De Reuck* has not been applicable since the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act). The crux of the respondent's argument is that the new definition of child pornography contained in the Sexual Offences Act is much broader than the definition of child pornography in the Films and Publications Act and considered and interpreted by the Constitutional Court in *De Reuck*. Accordingly, as the respondent argued, if the definition of child pornography in the Sexual Offences Act is directly applicable to classifiers discharging responsibilities under the Films and Publications Act, different considerations from those canvassed in *De Reuck* may apply, rendering *De Reuck* almost obsolete.

However, the problem that the respondent encounters in its argument is that it never submitted to the Tribunal in *XXY* that the broad definition of child pornography in the Sexual Offences Act took

precedence over the narrower definition of child pornography in the Films and Publications Act. The entire matter in *XXY* was argued on the definition of child pornography as contained in the Act itself, without reference to the definition of child pornography in the Sexual Offences Act. There are material and significant differences between the Films and Publications Act definition, which was found to be constitutional in *De Reuck,* and the very broad definition that is contained in the Sexual Offences Act. (I digress to state that, given the reasoning in *De Reuck* and some of the comments in *Print Media SA and others v Minister of Home Affairs*,[14] serious questions may arise about the constitutionality of any definition of child pornography and sexual conduct, which excludes the qualification that the film must intend to stimulate erotic as opposed to aesthetic sentiments)

Section 1 of the Films and Publications Act defines child pornography as follows:

> 'child pornography' includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted, made to appear, look like, or described as being, under the age of 18 years –
>
> (i) engaged in sexual conduct;
> (ii) participating in, or assisting another person to participate in sexual conduct; or
> (iii) showing or describing the body or parts of the body of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.[15]

'Sexual conduct' in turn includes:

> (i) male genitals in a state of arousal or stimulation;
> (ii) the undue display of 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 object;
> (vii) the penetration of a vagina or anus with any object;
> (viii) oral genital contact; or
> (ix) oral anal contact.

The Sexual Offences Act defines 'child pornography' as follows:

> **"child pornography"** means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person —
> (a) engaged in an act that constitutes a sexual offence;
> (b) engaged in an act of sexual penetration;
> (c) engaged in an act of sexual violation;

[14] *Print Media SA and others v Minister of Home Affairs* [2012] ZACC 22 para 92.
[15] This is in terms of an amendment to the Act made shortly after *De Reuck*.

(d) engaged in an act of self-masturbation;
(e) displaying the genital organs of such person in a state of arousal or stimulation;
(f) unduly displaying the genital organs or anus of such person;
(g) displaying any form of stimulation of a sexual nature of such person's breasts;
(h) engaged in sexually suggestive or lewd acts;
(i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
(j) engaged in any conduct or activity characteristically associated with sexual intercourse;
(k) showing or describing such person—
(i) participating in, or assisting or facilitating another person to participate in; or
(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs *(a)* to *(j)*; or
(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

The respective definitions of child pornography in the two Acts are materially different, in that the definition in the Films and Publications Act – like all its predecessors – states that child pornography "includes any image..." (my emphasis). By contrast, the word "includes" is conspicuously omitted in the definition in the Sexual Offences Act, which provides simply that child pornography "means any image…". The significance of the word "includes" was directly considered by the court in *De Reuck,* which held as follows:[16]

> Pornography is notoriously difficult to define and child pornography no less so. For this reason alone, it is unlikely that the legislature intended merely to add meaning to the term on the assumption that its primary meaning was not in need of definition. Rather the purpose of the list would seem to be to give the word a more precise meaning. That this is in fact the legislative intention is suggested by the contrast between the definition of 'child pornography' and some of the other definitions in section 1, which provide that a term 'includes' certain things 'without derogating from the ordinary meaning of that word'. Although the legislature could have avoided ambiguity by stating that child pornography 'means' only the images listed, the use of 'includes' in the definition is consistent with an intention that the list should define, and thus be coloured by, the primary meaning of child pornography.

Thus two options presented themselves to the court in *De Reuck*: it could have found that the list of images in the definition is exhaustive of what constitutes child pornography; or, alternatively, that the use of the term "includes" in the definition of child pornography in the Act suggests that the list extends the meaning of the term being defined, and the true meaning has to be ascertained from the context in which it is used. The court chose the latter interpretation.

In *De Reuck*, the court concluded that the primary meaning related to material that involved the stimulation of erotic feelings rather than aesthetic feelings. Referring to the dictionary definition of child pornography, the court provides the following primary definition of 'child pornography'[17]:

> According to *The New Shorter Oxford English Dictionary*, 'pornography' means:

[16] Para 19 of the judgment.
[17] *De Reuck* (above) para 20.

> "The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this."
>
> This is a useful guide. I would observe, however, that erotic and aesthetic feelings are not mutually exclusive. Some form of pornography may contain an aesthetic element. Where, however, the aesthetic element is predominant, the image will not constitute pornography. With this qualification, the dictionary definition above fairly represents the primary meaning of 'pornography'. 'Child pornography' bears a corresponding primary meaning where the sexual activity described or exhibited involves children. In my view, the section 1 definition is narrower that this primary meaning of child pornography.

Thus the critical aspect of this definition is whether the film was intended to stimulate erotic as opposed to aesthetic sentiments; and if the intent was to achieve the latter, then the film could not be deemed to contain child pornography. This analysis seeks to balance the important societal necessity of combating child pornography without unjustifiably and unreasonably infringing the freedom of expression and other rights, including the freedom of expression, the right to dignity, and reputation. Stated differently: *De Reuck* came up with the most suitable means of achieving the purpose of combating child pornography in films, games, and publications without unjustifiably and unreasonably limiting freedom of expression and other rights.

The respondent contends that much of this analysis stems from the Act's definition of child pornography. It submits that the operative definition of child pornography presently is the definition contained in the Sexual Offences Act, which is much wider, does not require that context be taken into account, and appears to have been drafted in reaction to the *De Reuck* judgment.

Taken to its logical conclusion, the argument by the respondent is that the definition in the Sexual Offences Act supplanted and replaced the definition in the Act. But this conclusion is untenable in law for the reasons that follow. This Tribunal in *XXY* held that the change in wording did not materially impact on the definition of child pornography laid down in *De Reuck,* for the following reasons:

> It is instructive that the post-2004 definition follows a very similar structure. It is a recognised principle that the legislature is deemed to know the law. It was thus open for the legislature, when drafting the 2004 amendment, to define child pornography exhaustively rather than retaining the word 'includes'. This would have unequivocally indicated that it was distancing itself from the reasoning in *De Reuck*. Knowing of the Constitutional Court's reasoning and decision in *De Reuck*, the legislature retained the very word that was considered to be particularly important in the analysis of the court in concluding that the definition is not exhaustive. This is a strong indication that the post-2004 definition was not intended to depart materially from the definition given in the *De Reuck* case.

In the definition section of the Act, words like 'film' and 'publication' are defined exhaustively. The fact that the legislature chose to retain 'includes' in the definition of child pornography suggests that the list is not exhaustive. However, the respondent now argues that the *XXY* decision, which was handed down subsequent to the Sexual Offences Act, is incorrect and should not be followed.

The respondent has never previously challenged the Tribunal's reasoning in *XXY*. Thus, as at 2004, the definition of child pornography in the Act was informed by the reasoning in the *De Reuck* case. The respondent's contention, as I understand it, is that the applicable definition of child pornography changed significantly after Parliament passed the Sexual Offences Act in 2007. Their contention is that that definition became applicable to the decision in terms of the Films and Publications Act as well. Further, the respondent contends that the Tribunal's mistake in *XXY* was to apply the outdated and inapplicable reasoning of *De Reuck*, based on an extinct legislative position.

I digress for a moment to restate that, when the *XXY* case was argued, this submission was never made on behalf of the Board. It is therefore assumed that at the time *XXY* was argued, the position of the Board must have been that the definition in the Films and Publications Act regulated its classifications, as the Sexual Offences Act had been passed at the time the matter was heard. This is the first time that it has been contended that the broader definition in the Sexual Offences Act is applicable. In any event, for the reasons canvassed below, the Board is incorrect in its argument that, firstly, *XXY* is incorrect and should not be followed, and secondly, its broader argument that the correct definition of child pornography to be applied to the present matter is the one contained in the Sexual Offences Act.

Firstly, in direct contradiction to the assertion made by the Board at the hearing – that the definition in the Sexual Offences Act is applicable to classification – the Chief Classifier's report[18] in the matter makes reference to the definition of child pornography in the Act, and does not refer to the definition in the Sexual Offences Act. It is clear from the report that the classifiers applied the definition in the Act and not the definition contained in the Sexual Offences Act.

Secondly, the definition section in the Sexual Offences Act, prior to defining each concept, states '[i]n this act unless the context indicates otherwise…' Thus it appears that definitions listed in the Sexual Offences Act are operative for the purposes of that Act *unless the context indicates otherwise*. I was not referred to any section, and neither could I find any section, that indicates that the definition of child pornography in the Sexual Offences Act is to be extended to the Films and Publications Act. The objective of the Sexual Offences Act is 'to introduce measures which seek to enable the relevant organs of state to give **full effect to the provisions of this Act**.'[19] (my emphasis). Thus organs of state when seeking to achieve the objectives of the Sexual Offences Act must give full effect to the provisions of that Act. However this does not mean that the definitional provisions journey beyond the provisions of the Sexual Offences Act to the Films and Publications Act and to the classification process. Further, the schedule to the Sexual Offences Act lists the sections of other Acts that have been amended or repealed by it. No reference is made in this schedule to any section in the Act being amended. We must thus conclude that the Sexual Offences Act had no impact on the implementation of the classification process in the Act. It is apparent that the intent of the legislature, after the passing of the Sexual Offences Act, was to leave the more nuanced and closely crafted specific definition of child pornography in the Act applicable to classifications, and intended the much broader definition to be applicable for the purposes of the Sexual Offences Act.

[18] Report dated 16th and 17 of July 2013.
[19] . Section 2 of the Sexual Offences Act.

It is apparent that the definition in the Act has not been overruled, and has been retained with some changes that are inconsequential to the issue being considered. We thus have a specific definition for the purposes of the Act, and a more general definition that is used in the Sexual Offences Act. From this a third reason develops: The presumption of interpretation *generalia specialibus non derogant*, which means "that a subsequent general legislation is deemed not to derogate from a prior special act"[20], is applicable in this instance. The specific definition in the Act takes precedence over the general definition in the Sexual Offences Act. In *Sasol Synthetic Fuels v Lambert*[21], the presumption was described thus:

> A closely related principle, *generalia specialibus non derogant* (general words (rules) do not derogate from special ones), leads to the same result. The matter is put thus in *R v Gwantshu* 1931 EDL 29 at 31:
>
> When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim *per* Lord HOBHOUSE delivering the judgment of the Privy Council in *Barker v Edger* ([1898] A.C. at p. 754). 'Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication of a particular intention to do so.' In such cases it is presumed to have only general cases in view and not particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and provided for it the Legislature is reasonably presumed not to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language . . . (Maxwell, *Interpretation of Statutes*, 7th ed. 153)

Thus the specific definition of child pornography contained in the Act applies to classification decisions made in terms of that Act, while the general definition contained in the Sexual Offences Act applies more generally to matters covered in the Sexual Offences Act.

Indeed, this Tribunal in *XXY* made reference to the definition in the Sexual Offences Act, and stated:[22]

> As is apparent from this definition, there was a clear intent on the part of those who drafted it to depart from the reasoning of the court in *De Reuck*. The word 'includes' is omitted, and the requirement that the film or publication be objectively deemed to appeal to the erotic as opposed to the aesthetic – the gravamen of the *De Reuck* reasoning – is expressly excluded. In contrast, the post-2004 definition in the Films and Publications Act is materially and substantially similar to the definition that was considered in the *De Reuck* matter.

[20] http://www.duhaime.org – legal dictionary, accessed on the 5th August 2013.
[21] *Sasol Synthetic Fuels v Lambert* [2001] ZASCA 133 para 17.
[22] Para 21 of the reasons.

In 2009, aware of the comments in *De Reuck* and *XXY*,[23] Parliament passed a number of amendments to the Act. This last set of amendments to the Act obviously post-dated the Sexual Offences Act. However, in so far as the definition of child pornography was concerned, there was no material change to the earlier definitions in the Act. For ease of reference, the 2009 definition of child pornography as amended is repeated below, with the amendments appearing in bold:

> 'child pornography' includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or ***made to appear, look like, represented or*** described as being, under the age of 18 years –
>
> (i) engaged in sexual conduct;
> (ii) participating in, or assisting another person to participate in sexual conduct; or
> (iii) showing or describing the body or parts of the body of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.

What is clear from the amended definition under the Act is that, unlike the definition in the Sexual Offences Act, the word 'includes' is retained in this definition, surviving the amendment process. Considerable weight must be attached to the fact that Parliament, after the passage of the Sexual Offences Act with its own vastly different definition of child pornography, passed an amendment to the Act in which it clarified and retained important and relevant aspects the original definition of child pornography from the Act. The 2009 definition retains those aspects and features of the definition that were deemed critical in *De Reuck* and *XXY*, while expressly not following the broad definition contained in the Sexual Offences Act. Parliament, being aware of the reasoning in both *De Reuck* and *XXY*, retained the very words that resulted in the decision by the Constitutional Court: that when dealing with alleged child pornography, context and intention must be considered. Specifically, the test is whether the film, game, or publication is intended to stimulate erotic rather than aesthetic feelings. It is clear that Parliament did in fact endorse the reasoning of *De Reuck* and *XXY,* as it passed an amendment to the definition of child pornography that retained the textual aspects crucial to the decisions made in the two cases. This is the fourth reason why the Board's submission is incorrect that the definition of child pornography in the Sexual Offences Act overrides that in the Films and Publications Act. The 2009 amendment is the last word, and is the definition to be applied by the Committee.

Finally, the current guidelines[24] refer to the definition contained in the Act[25] and make no reference to the definition in the Sexual Offences Act. Further, the guidelines state that "all classification decisions must consider the context, impact and the release format of material".[26] This is in accordance with what was said in *De Reuck* and *XXY*.

In these circumstances, the argument by the respondent that the definition of child pornography in the Sexual Offences Act is applicable to the classification of films, publications, and games is without substance. The definition that is operative and applicable to the classification of films, games, and

[23] *Road Accident Fund v Monjane* 2010 (3) 641 (SCA) para 12.
[24] *Government Gazette* 8 October 2012 No. 35765.
[25] See the definition section of the 2012 Guidelines.
[26] Section 3 (1) of the 2012 Guidelines.

publications in terms of the Act is the definition contained in section 1 of the Act. There is therefore no legal basis for the contention that the reasoning in *De Reuck* and *XXY* is not applicable.

Revisiting the analysis in *De Reuck*

The court in *De Reuck* held that "it is not possible to determine whether an image as a whole amounts to child pornography without regard to the context".[27] As stated earlier, the court held that the definition of child pornography in the Act includes the primary meaning that the film, game, or publication must intend to stimulate erotic rather than aesthetic feelings. This aspect of the definition is based on the Oxford English Dictionary definition of pornography. Thus if the material cannot be classified as pornography, it will not be deemed to be child pornography. It is important in this context to note that Mr R Mkhwanazi (for the respondent) conceded that the film *Of Good Report* was not pornographic.

In *De Reuck*, the position was summarised as follows:

> The overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience. This entails considering the context of the publication or film in which the image occurs as a visual presentation or scene. The court conducts the enquiry from the perspective of the reasonable viewer. The image will not be child pornography unless one or more of the four prohibited acts listed below is explicitly depicted for this purpose. The person 'who is shown as being under the age of eighteen years' in the image may be real or imaginary. The prohibited acts are:
>
> (a) a child engaged in sexual conduct;
> (b) a child engaged in a display of genitals;
> (c) a child participating in sexual conduct; and
> (d) a child assisting another person to engage in sexual conduct.

It is clear from later definitions of child pornography that the display or descriptions of parts of the body of a child will amount to child pornography if, assessed within context, it amounts to sexual exploitation or is capable of being used for the purposes of sexual exploitation.

As stated above, the test is whether the scene or scenes are intended to stimulate sexual arousal in the target audience. In order to assist classifiers in exercising this discretion, the following guidance was given by this Tribunal in *XXY*[28]:

> The following issues must be considered cumulatively:
>
> 1. Does the film or publication stimulate erotic rather than aesthetic feelings? If the image is not reasonably capable of stimulating sexual arousal in the target audience, then it is unlikely to fall within the definition of child pornography.

[27] Paragraph 33 of the judgment.
[28] Para 35 of the judgment of *XXY*.

2. The subjective views of the filmmakers are not determinative. The issue is whether a reasonable viewer would deem the purpose of the film or publication to stimulate erotic rather than aesthetic feeling.
3. In making this determination, regard must be had to context. The more sexually explicit the image or scene, the more likely it is to be deemed to appeal to erotic as opposed to aesthetic sensibilities.
4. The image or description must be of a person, real or simulated, who is, or is described as being, under the age of eighteen. The image must be reasonably capable of being perceived as being that of a person under the age of eighteen.
5. The image will not be child pornography unless one or more of the four prohibited acts listed below is depicted for this purpose. The prohibited acts are:
   (i) a child engaged in sexual conduct;
   (ii) a child engaged in a display of genitals which amounts to sexual exploitation or in such manner that it is capable of being used for the purposes of exploitation;
   (iii) a child participating in sexual conduct; and
   (iv) a child assisting another person to engage in sexual conduct.
6. If the examiners are in doubt about the true nature of the film or publication, it must be referred to the Review Board.

For the reasons stated earlier, these guidelines are still applicable and relevant. It was common cause that neither the reasoning in *De Reuck* nor that in *XXY* was used by the classifiers. We are unsure whether, at the time, this was an oversight or whether they were advised that these cases were not applicable, as was argued on their behalf before the Tribunal in the present matter. In either instance, the failure to apply these principles resulted in material errors of law being committed. It is probable that, had these principles been applied, the classifiers would have reached a different conclusion in this case.

Reliance was placed on section 16(1) of the regulations, which states that if the Committee discovers child pornography during the classification process, the film, game, or publication process must be stopped. The meaning assigned in the Act is applicable to the regulations, unless the context indicates otherwise.[29] I was not referred to anything in the regulations, and neither was I able to find anything in the regulations, that indicates that the definition of child pornography in the Act is not applicable. Therefore the reasoning in *De Reuck* and *XXY* is equally applicable to the regulations. This means that the process is to be stopped only if the Committee makes a definitive finding, applying the Act, the regulations, and the reasoning in *De Reuck* and *XXY*, that the film contains images that are child pornography. They must conclude that the film, assessed within context, is intended to stimulate sexual arousal in the target audience. However, it must be stressed that the viewing of the film must not be stopped unless the Committee is of the view that the images seen are so explicit and of such a nature that the only inference that can be drawn is that the film is intended to stimulate sexual arousal in the target audience, and that this assessment would not change notwithstanding the content of the rest of the film. In most instances, the assessment of whether the images amount to child pornography can only be made after the film is viewed in its entirety, the scenes that cause concern are objectively evaluated within context, and a determination is made whether the film in intended to stimulate sexual arousal within the target audience. It is only if the ultimate conclusion is reached that the film contains child pornography that the Committee is

[29] Section 1 of the Regulations.

required to stop the classification process. If there is any uncertainty about whether the film contains images of child pornography, then the entire film must be viewed before this determination can be properly made.

It is vitally important that classifiers are fully informed of the jurisprudence that has developed around the various sections of the FPB Act, the regulations and the guidelines, so as to ensure that they are able to make what are sometimes difficult decisions that accords with the applicable legal principles.

Application of the relevant legal principles to the film

I now turn to an analysis of whether the film *Of Good Report*, assessed within context, contains scenes that – from an objective perspective – can be deemed to be intended to stimulate sexual arousal in the target audience. The appellants correctly conceded that the film contained scenes of a person who appears to be, looks like, or is represented as being under the age of eighteen engaged in sexual conduct. It is also common cause that what was portrayed cannot be described as explicit sexual conduct. Regrettably, the respondent in its submissions did not fully focus on this aspect in either their heads of argument or in their oral submissions.

The first scene that prompted the classifiers to conclude that the film contained scenes of child pornography portrayed intimate relations between Parker Sithole and Nolitha, was longer than the other scenes, and was much more suggestive and revealing. The protagonist share an intimate kiss, Parker runs his hand along her thigh, , and buries his face between her thighs, Nolitha's underwear is removed and we hear her sighing in pleasure. The scene cuts away to the drunken Mr September, and we then see Parker unzipping his pants. The Committee is correct in saying that cunnilingus is strongly implied, and further sexual conduct is implied between Parker and Nolitha, a minor. So in effect, sexual conduct is either implied or simulated with a minor. The scene lasts a few minutes and no nudity is portrayed. The cut-away to Mr September reduces the sexual impact of the scene. Had there been a more explicit depiction of the sexual conduct, different considerations might have applied.

The appellants correctly contend that if scenes of implied or simulated sexual conduct between an adult and a minor immediately trigger a finding that a film contains scenes of child pornography, irrespective of context, a number of celebrated films would be denied classification and effectively be banned in South Africa. This would include films such as *The Reader*, which was nominated for best picture in 2008; *American Beauty*, which won the best picture award in 1999; and *Risky Business*, a film shot in 1983 that featured Tom Cruise. It was specifically to deal with the potential overreach of the law that the Constitutional Court in *De Reuck* required the evaluation to be made in context, and a determination to be made whether scenes, appraised in the context of a film, are intended to stimulate sexual arousal in the target audience. It is this additional requirement that ensures the constitutionality of the definitions of child pornography and sexual conduct contained in the Act. For the reasons stated earlier, this approach has been endorsed by the legislature and by the drafters of the current guidelines.

Other scenes that have to be assessed include the montage depicting implied sexual conduct between Parker Sithole and Nolitha that is interspersed during the tango dance sequence, in which the latter takes the lead. One is unsure whether this is a fantasy or not. In one of the scenes, the viewers see Nolitha's breast, and it is clearly implied that they are having sexual intercourse. The scenes are almost photographic in that they are fleetingly portrayed during the dance sequence. These 'snapshot' scenes, spread across the tango dance sequence, are highly unlikely to stimulate sexual arousal in the target audience.

In the classroom there is a scene of implied sexual conduct, in which fellatio may have occurred. However, this is merely implied, no more. In the scene in the toilet, when Nolitha's fellow female learners try to get access, it is clear that the protagonists are either about to have sex or have just had sex. However, they are not depicted as having sex. We also see pictures of school girls photographing their breasts and buttocks, and relaying these electronically. There are also some nudity when Nolitha's body is strung up prior to being dismembered. These are fleeting references to a sexual relationship, and none of these scenes is likely to stimulate sexual arousal in the target audience.

The first scene, together with the scenes of lesser concern, must be assessed in the context of the film as a whole. The intent of this film is to convey serious messages, and is patently not to stimulate sexual arousal in the target audience. The film reflects on the consequences of poverty, the vulnerability of girl children (even within the school environment) to paedophiles 'of good report', the 'sugar daddy' phenomenon, the challenges facing adolescents as they make unfortunate choices even though they are able to analyse Othello "as a man who hates women", the naivety of those who make important decisions in our schools, and the fact that some men 'of good report' are anything but good in substance and reality. This is a serious film that endeavours to encourage debate about a number of important and pressing issues on which we as a society need to reflect more fully and urgently. The importance of allowing this type of speech to be expressed rather than banned was articulated by three justices of the Constitutional Court[30] in the following terms:

> The important right to freedom of expression lies at the heart of democracy. The search for the truth, the ability to take democratic decisions and self-fulfilment have been put forward as reasons why freedom of expression must be protected. It is closely linked to the right to human dignity and helps to realise several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasised the importance of freedom of expression as the lifeblood of an open and democratic society.
>
> Our history illustrates the crucial importance of free expression for democracy, even when its regulation and limitation deal with sexual conduct and related matters. Censorship was central in the legal system of the apartheid era. Not only were political activity, books, articles and even songs banned, but the apartheid state also imposed the narrow Calvinist and cultural notions of morality

[30]. Justice Van der Westhuizen in *Print Media SA and Others v Minister of Home Affairs and others* [2012] ZACC 22 para 93 and 94. Justice van der Westhuizen was writing for himself and three other justices in finding that the sections of the FPB Act were overbroad for other reasons than that it amounted to prior restraint. The majority were of the view that the sections were unconstitutional because they imposed a system of prior restraint that was unconstitutional. Footnotes have been omitted.

> and good taste of the ruling minority on all. For example, the 1974 Publications Act put in place an elaborate system of committees and a "Publications Appeal Board" to classify, prohibit and restrict. Books, magazines, articles and plays were banned or subjected to age and other restrictions. Globally celebrated films were banned, restricted to small venues, or subjected to the severe excising of language, nudity, sexual conduct and scenes depicting relations across the racial divide of that time. Apart from providing for censorship of material deemed to be "prejudicial to the safety of the State", vague criteria like "indecent", "obscene", "offensive" and "harmful to public morals" were central to that Act. The censorship system was a powerful tool to sustain political, cultural and religious dominance. And courts played along, for example, with the banning of books by well known authors on the basis that the description of sexual conduct in them was "indecent, obscene and objectionable.''

This film is also about the excesses of an obsessive relationship between an adult teacher and a minor learner, about gender violence and lays the tragic and bitter consequences uncompromisingly before the viewer. The supposed seductive appeal of a legally forbidden relationship is totally outweighed by the grim and devastating consequence of such a relationship. Given this, the complexity of the themes considered, and the fleeting scenes of sexual activity, this film cannot reasonably be deemed to be one that stimulates erotic sentiments or stimulates sexual arousal within its target viewers. In the circumstances, the finding that the film contained scenes of child pornography is factually incorrect and is set aside.

We now turn to an appropriate classification for the film. The grandmother figure being suffocated, the beating up of Mr September, the kidnapping and dismembering of Nolitha, and the arresting police officer's assault on Parker Sithole are scenes of realistic violence, but are justified within context. However, the full impact of the violence is dulled by the film being shot in black and white. As there are scenes of sexual conduct that are not explicit, nudity, and violence, we are unanimously of the view that an appropriate classification is a restrictive classification of 16 (V), (S), (N). This means that children under the age of 16 are not permitted to view this film.

Conclusion

1. The Committee erred in law in not assessing this film in context, and by not having regard to whether the intent of the filmmakers was to stimulate erotic sentiments in the target audience.
2. The Committee erred in assigning a 'refused classification' to this film on the basis that it contained child pornography.

Order:

1. **The decision of the FPB made on the 16th and 17th July 2013, that the film *Of Good Report* be refused classification, is set aside.**
2. **The film *Of Good Report* is assigned a classification of 16 (V) (S) (N).**
3. **No person under the age of sixteen is allowed to see this film.**

Dated at Durban on the 20th day of August 2013

Concurred by:

1. Adv. D Bensusan
2. Ms H Devraj
3. Ms P Marek
4. Revd M McCoy
5. Prof. K Moodaliyar
6. Prof. A Skelton