

**APPEAL TRIBUNAL FOR THE FILM AND PUBLICATION BOARD**

**(HELD AT SANDTON, JOHANNESBURG)**

**Case No: \_\_\_/2018**

In the matter between:

**UNITED INTERNATIONAL PICTURES**

**APPELLANT**

And

**The Film and Publication Board (FPB)**

**RESPONDENT**

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**AWARD: SKYSCRAPER (APPEAL DECISION)**

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**Appeal heard on 12 July 2018**

**Decision: 13<sup>th</sup> July 2018**

**For Award Reasons Dated : 1 Aug 2018**

**Lutendo Malada : Chairperson**

**BACKGROUND AND INTRODUCTION**

Appellant Represented by: Rosin Wright Rosengarten Inc - ATTORNEYS

Mr Dan Rosengarten , Mr David Fynberg

Respondent:

FILMS AND PUBLICATION BOARD – LEGAL COUNSEL

Mr Pandelg Goriou

1.

This is an Urgent Appeal before the Films and Publications Appeal Board. Presiding officer is Appeal Tribunal Board Member Mr Lutendo Malada after he was elected as acting

Chairperson for the proceedings. The Appeal Tribunal's Chairperson Mr Chris Mamathuntsha was unavailable to seat in the proceeding of this appeal. The members formed a Quorum and the Appeal was ripe for hearing. Both parties confirmed that they had no objection with the constitution and sitting of the Appeal Tribunal as is.

It was submitted on behalf of the Appellant that the Chief Classifier's report was dated 4th July 2018 but only sent to the Appellants on the 10th July 2018. The Tribunal decided, due to the URGENT nature of the appeal, to allow late submission of heads of argument as the appellants were not opposed to same as they wanted the appeal to be disposed of.

2.

The appellants sought to introduce hearsay evidence of its expert witness who was according to the appellant's legal representative not available to attend the viewing scheduled for 10:00 pm as well as the hearing and adjudicating of the appeal which took place in the early hours of the 13<sup>th</sup> July 2018, shortly after 12:00 am. The tribunal took the view that it would allow the Appellants to lead evidence on the expert's summary available but emphasised that it would be of low evidential value as the Respondents would not be able to interrogate the expert's summary in cross examination.

### **APPELLANT'S SUBMISSIONS**

3.

The movie Skyscraper should have been rated 13 LV as the classification given is unconstitutional as it unreasonably restricts the Appellant's right to freedom of expression as protected in the Constitution. <sup>1</sup>Taking into account the Appeal Tribunal's decision in the appeal of Lara Croft<sup>2</sup> - The Appeals Tribunal was persuaded to start at a less restrictive

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<sup>1</sup> Act 108 of 1996

<sup>2</sup> Appeal Tribunal decision No. 2/2003

classification to a more restrictive classification. Argument was also made that the Appeals Tribunal should be consistent with its previous decisions.

4.

In the event that the Appeals Tribunal wants to depart from its previous decisions, it should give reasons and explain as to why it has departed therefrom in order to give certainty and guidance to the public. This would go a long way in helping even the public in understanding the Films and Publications Board's (FPB) classification guidelines and norms.

5.

It was contended on behalf of the Appellant that the movie Skyscraper should be viewed in its context which is primarily an action movie. It was submitted that the main character, Dwayne Johnson "The Rock" is liked by mainly children as well as teenagers and widely known and accepted in modern society as an action hero similar to that of Lara Craft.<sup>3</sup> It was further argued that the main character always fights the bad guys and that the overall theme is a positive theme of survival and courage with a happy ending.

6.

Further argument was made on behalf the Appellant that the theme is not complex, it's clearly not realistic and not believable. The main character represents triumph against all odds and children will expect that he will succeed at the end – which he does. The Appellant also made the point that the FPB concedes that the language in the movie is mild.

7.

Regarding the level of violence, the Appellant further argued that the FPB Classification board failed to recognize that this was a pure action movie and that the violence was mild to moderate yet acceptable to a child of the age of 13 (thirteen). The Appeal Tribunal was addressed on the fact that the standard that should be applied is that of a reasonably balanced child and not that of an imbalanced child. The incidence of violence is moderate and

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<sup>3</sup> Ibid.

not extreme. The overarching theme is that of the main character who is always doing something to ensure the protection of his family.

8.

The last argument made on behalf of the appellant was that the Appeal Tribunal must interpret its empowering provisions as well as the Constitution in a manner that considers decisions of Foreign Jurisdictions - to buttress the argument, the Appeals Tribunal was referred to classifications made by similar statutory bodies regulating classifications of films in foreign jurisdictions.

9.

The Appellants again referred to Section 16 of the Constitution, namely the right to the Appellant's freedom of expression. The Appellant conceded that the right to freedom of expression is limited and not absolute. Reference was made to the case of *S v Mamabolo*<sup>4</sup> in which it was held that the right to freedom of expression should not be held higher than the other rights in the Bill of Rights to the extent that it may cause harm to others. (E.g. the right to dignity).

10.

The Appeal Tribunal was reminded that the Films and Publications Act<sup>5</sup> is legislation of general application as envisaged by the limitation clause as contained in Section 36 of the Bill of rights. A further case was made out for the Appellant that FPB Act classifies rather than censorship. The FPB Act was also designed in a manner that children be protected from premature exposure of mature or harmful materials. The Appellant also made out a case that Guidelines are directives and therefore not peremptory but mandatory in the Appeals Tribunal execution of its mandate.

11.

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<sup>4</sup> (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC);

<sup>5</sup> Act 65 of 1996

The Appellant's legal representative also emphasised that the film Skyscraper should be classified within the context of the film, its theme and format. It was conceded on behalf of the Appellant that the film is action packed with moderate to strong language. The Appeals Tribunal was also referred to the Appeals Tribunals previous decision in the film Safe House<sup>6</sup> in which the Appeals Tribunal gave direction on how to evaluate scenes of Violence. Furthermore it was stated on behalf of the Appellant that the film Skyscraper had no scenes glamorizing violence.

12.

### **RESPONDENT'S SUBMISSIONS**

It was argued on behalf of the Respondent that the film did not have moderate scenes of violence as people are shot with bullet wounds. The Respondent's legal representative argued that the classification ought to be within in South African context. Domestic violence is serious and must be presumed to be harmful. As much as there is a positive outcome in the film with the success of the main character who becomes a hero, there seems to be no consequence as to what really happened to the family of the father who had blown himself up in the close proximity and presence of his family.

13.

Further argument was made on behalf of the respondent that Stats SA reports indicate a high prevalence of femicide which should also be taken into account when classifying the film in question. It was submitted that the Classification Board did not err in its initial classification and that a proper case had been made out for the rating given. Although a concession was made that the language was of a mild nature the guidelines provide that the classification guidelines prescribe that the letter "L" ought to be included in the initial rating of the film.

14.

The respondent's legal representative argued on the guidelines' definition of what entails extreme violence. It was further submitted that the film was rather suitable for mature audiences from the age group of 16 (sixteen). The Respondent's legal representative disputed

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<sup>6</sup> 02/2012

the Appellant's notion that cognitive assessment of a child starts from an imbalanced child but and that generally that children of the age group of 13 (Thirteen) are not cognitively developed.

15.

In closing the Respondent's legal Representative submitted that The Classification Board's report was in line with the FPB Act as well as the Classification guidelines and that the appeal ought to be dismissed.

16.

### **REASONING AND FINDING**

Both the Respondent and the Appellant agreed that there is one scene at the beginning of the film which has a high level of violence. We accept that the film has moderate violence but good moral outcomes. Although there are regular scenes of violence - the violence to some part is animated and is not graphic. The violence teenagers are exposed to on National Television is in many instances more graphic and of higher proportions.

17.

Although the movie begins with a very violent scene where a father ends up detonating a bomb, killing his family and injuring the protagonist is shocking but it is also real. People with prosthetic limbs are now widely accepted in our communities as equally able people. There are no graphic scenes of blood and the minimal blood that is present is not continuous.

18.

The positive message in this movie is clear – i.e. not to give up on life despite having lost a limb. The fact and theme that the protagonist loves his family so much and will protect them at all costs clearly overshadows the opening scene which was stated by the Respondent as perpetuating violence towards children and women. The fact that the movie has a happy ending and the message that the good will always win over evil is also

a contributory factor in finding in favour of the Applicant. The language usage is also of a level that it would require a rating higher than 13. The rating of 16 V would be too harsh in the circumstances.

As a result the appeal is successful and the following order is made:

The initial rating of the film Skyscraper 16 LV as rated by the FPB Classification board is overturned and the film Skyscraper is hereby reclassified as 13 LV.

With Consensus of the full Tribunal:

Nonkoliso Sigcau

Manko Buffel

Sizwe Snail Ka Mtuze

Nonduduzo Kheswa

Dated at Johannesburg on this 13th Day of July 2018