

**Before the Film and Publication Appeal Tribunal**

8/2012

In the matter between:

**Goodman Gallery**

**Appellant**

and

**The Film and Publication Board**

**Respondent**

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**Award**

In re: Appeal against the classification of the painting known as

***The Spear***

and the electronic versions of it.

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**Professor Karthy Govender**

**Background:**

- 1) This appeal concerns the classification of a painting, *The Spear* by Mr Brett Murray, that was part of an exhibition entitled "Hail to the Thief II". The painting was exhibited in the Goodman Art Gallery (Goodman Gallery) in Johannesburg, and an electronic version also appeared on the gallery's website. The paintings exhibited appeared to be political statements communicating disaffection with and condemnation of the conduct and behaviour of the ANC, the ruling party in South Africa. The person portrayed in the painting bore a striking resemblance to President Jacob Zuma.
- 2) Particularly controversial was the depiction of a flaccid penis on the image in the painting. The image was subsequently reproduced on a number of websites, including that of the *City Press* newspaper. Two complaints were received by the Board concerning the painting and the images of it. A complaint dated 18 May 2012 expressed concern that the image appearing on the *City Press* website was "extremely inappropriate" for children. The complainant was a parent of children aged eight and 14, and was particularly concerned about the exposure of children to inappropriate material of a sexual nature. The second complaint was received on 19 May 2012, and was directed at the painting in the Goodman Gallery. The second complainant was of the view that the painting was a "pornographic display of genitals for public viewing" and that "pornography was being legitimized under the

guise of freedom of expression...". This public display of the painting would, in the view of the complainant, result in the distribution of pornography to children and to the general public.<sup>1</sup>

### The classification process

- 3) After receiving the complaints, a five-person classification team was appointed to inspect the painting at the Goodman Gallery. They noted the context in which the painting was displayed, and that the exhibition (including the painting in question) was open for display to members of the public. They then recommended that a classification process be initiated and that the affected parties be invited to make submissions to a classification committee.
- 4) From its subsequent report, the Committee saw its responsibility as the classification of "images of the portrait as it exists in the various formats, including online content..."<sup>2</sup>. This was confirmed later in the report, when the Classification Committee concluded that "this does not exclude the Board from considering the conduct of Goodman Art Galley and any other party (other than those excluded in the Films and Publications Act) who publishes or who permits the viewing of the painting"<sup>3</sup>. It is assumed from this that the Classification Committee classified the painting and all on-line and other replications of the painting, except for those that were expressly excluded. After having heard the affected parties, the Classification Committee decided by a majority that that the 'artwork' would be assigned a '16N' classification, while a minority were of the view that a '13N' would be adequate. It is assumed that the word 'artwork' was used as a generic description of both the painting and the various electronic and other replications of it.
- 5) After a visit to the gallery by the Classification Committee, but before the hearing could be held, the painting ~~was defaced. It has subsequently been~~ was sold to an art collector abroad, and we are informed that it is no longer in South Africa. Subsequent to it being sold, it was defaced while hanging in the gallery. Goodman Gallery were aggrieved at the classification, and appealed to the Film and Publication Appeal Tribunal.
- 6) At the hearing before the Appeal Tribunal held on 17 September 2012, the applicant was represented by Mr Steven Budlender, assisted by Mr Jonathan Berger, instructed by Webber Wentzel Attorneys; the respondent was represented by Mr N.H. Maenetje SC, assisted by Mr F.J. Nalane, instructed by Motsoeneng Bill Attorneys. We are indebted to all the legal representatives both for their considered and comprehensive written submissions and for their helpful oral presentations.

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<sup>1</sup> A description of the complaints appears in paragraphs 12 and 13 of the reasons contained in the report submitted by the Classification Committee dated 31 May 2012 ("the report of the Classification Committee").

<sup>2</sup> Paragraph 35 of the Report by the Classification Committee.

<sup>3</sup> Paragraph 27 of the Report by the Classification Committee.

### Preliminary issues not in dispute

- 7) It would be useful at the outset to dispose of certain matters that were not contested by the parties. As a 'newspaper' is defined to include the on-line publication of a newspaper<sup>4</sup>, the complaint lodged against the on-line image appearing on the *City Press* website should not have been entertained in terms of the Films and Publications Act (the FPB Act).<sup>5</sup> In terms of section 16<sup>6</sup> of the FPB Act, a bona fide newspaper that is published by a member of a body recognised by the Press Ombudsman, and that subscribes and adheres to a code of conduct, is not subject to classification in terms of the section. It seems that the Classification Committee invited *City Press* to the hearing, considered their arguments, and then decided that it was "apparent that the City Press is excluded from the jurisdiction of the Board"<sup>7</sup>. Neither the newspaper nor the on-line versions of the newspaper are subject to the jurisdiction of the Board, and the complaint against *City Press* should not have been entertained in terms of the FPB Act. The Board in these circumstances ought to have conveyed the complaint to the Press Ombudsman for an investigation into the complaint. There is nothing preventing the Board, if it is of the view that a publication in any newspaper has exposed children to disturbing and harmful materials, from supporting a complaint lodged with the Press Ombudsman. It cannot itself hold a hearing into complaints against newspapers.
- 8) Second, the Board appeared to extend its ruling to all websites that contained electronic replications of the painting and to all other publications of the painting. The only respondents before the Classification Committee were Goodman Gallery and *City Press*. The ruling in this matter ought not to have been extended to persons other than Goodman Gallery. Mr Maenetje conceded that, as these persons were not joined, they are not bound by the classification of the painting. Section 19 of the FPB Act, read with section 3 of the Promotion of Administrative Justice Act 2000<sup>8</sup>, affords such persons a right to have their representations considered before a decision is made that materially and adversely affects their rights. Specifically, section 19 of the FPB Act affords a statutory right to be heard to publishers and those whose financial interests could be detrimentally affected by a decision to classify a publication.
- 9) In addition, the publishers of these websites and other publications have the right to freedom of expression; and this right was adversely affected by a restrictive classification of '16N' being assigned to the image on their websites. It was thus imperative that the various publishers be joined and heard before a decision that adversely impacted on their rights was made. It was common cause that the only persons joined and heard were Goodman Gallery and *City Press*. The Classification

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<sup>4</sup> Paragraph (x) of section 1 of the Films and Publications Act 65 of 1996 (as amended).

<sup>5</sup> Films and Publications Act 65 of 1996 (as amended).

<sup>6</sup> As section 16 is referred to throughout this Award, the full text is attached as Addendum A.

<sup>7</sup> Paragraph 26 of the reasons supplied by the Classification Committee.

<sup>8</sup> Section 3 of the Promotion of Administrative Justice Act 3 of 2000 details the requirements of procedural fairness that apply to administrative action that affects any person.

Committee erred in extending the scope of its ruling to persons who were not before it and who were not given the opportunity to make representations. The ruling of the Classification Committee, to the extent that it sought to classify electronic images of the painting appearing on websites other than the Goodman Gallery website, is set aside. The same would apply to the classification assigned to images appearing in other publications. In the light of this finding, it is not necessary to consider further the representations made by the applicant that the Classification Committee acted in a procedurally unfair manner when it classified websites other than that of Goodman Galley that exhibited the image of the painting. The focus of this appeal is thus solely on the picture as it appeared in the Goodman Gallery and on the electronic replication of the painting that appeared on the gallery's website.

#### **Other preliminary issues raised at the hearing of the appeal**

10) It was submitted by Mr Budlender that the Classification Committee did not view the image of the painting that appeared on the website of Goodman Gallery, and was therefore not in a position to classify it. It is clear that a Classification Committee must examine a publication referred to it prior to classifying it. It is obliged to do so.<sup>9</sup> In these circumstances it would be necessary to view both the painting and the electronic replication of the painting on the website. We were informed by the respondent that the Classification Committee did in fact view the image [on](#) the website. There may be a dispute of fact on this issue, but we are of the view that, given the nature of the proceedings, it would be appropriate in these circumstances to accept the version of the respondent.<sup>10</sup> As the respondent categorically indicated that the Goodman Gallery website was viewed prior to the classification, this point is dismissed.

11) It was submitted on behalf of the appellant that the Classification Committee lacked jurisdiction to classify the painting, as it had been defaced and removed from public exhibition before the classification decision was made. The defacing of the painting, and its removal from public exhibition before the classification decision was made, does not deprive the Classification Committee of jurisdiction. The Committee viewed the painting and started the process of classification before the painting was defaced. There is no suggestion that the subsequent destruction of the painting impaired or in any way adversely impacted on their ability to make a proper decision in this matter. Once they had viewed the painting and had accepted that the painting had to be classified in terms of section 16 of the FPB Act, they were properly seized with this matter. It appears that at this point the painting was still being displayed in its original form to the public in the Goodman Gallery, and that the electronic image was still displayed on its website. It would be untenable to have a process in which the Classification Committee would have jurisdiction at one point and then be denied jurisdiction because the publication had been removed from the public domain or from the country, even temporarily. The test must be whether the Classification Committee had jurisdiction over the matter when it decided to initiate a classification in terms of section 16 of the FPB Act, and not whether it had

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<sup>9</sup> Section 16(4) of the FPB Act.

<sup>10</sup> See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD).

jurisdiction at the time when it made the decision. Different considerations would apply if it were necessary for it to view the picture or painting again, and if the inability to do so adversely impacted on its ability to make a decision. We are of the view that the submission that the Classification Committee lacked jurisdiction because the painting was defaced or out of the country when the final decision was made is without merit.

- 12) An argument was also made to the effect that the complaint related solely to the painting hanging in the Goodman Gallery, and did not encompass the electronic image that appeared on its website. While we accept that both the painting and the electronic image would have to be viewed and assessed separately, we are not convinced that a narrow reading of the complaint should determine the jurisdictional scope of the Classification Committee. We accept Mr Maenetje's submission that a common sense approach must be adopted towards complaints lodged by lay persons. The test is to determine the essence of the complaint, and to deal with it in an expeditious and effective manner that is fair to all the parties. It is apparent that the essence of the complaint is that pornographic material was being exhibited by Goodman Gallery under the guise of freedom of expression. The complainant also stated that the "pornographic portrait has gone beyond viral and it is ... the largest case of pornographic distribution that the FPB have had to deal with this year". It is clear that the concern of the complainant related to the painting and to the various ways in which it had been distributed or published. Thus the essence of the complaint was about the painting and its subsequent distribution electronically. We are of the view that the complaint must be given a broad interpretation, and must be deemed to include the painting and the image of the painting that appeared on the Goodman Gallery website. We are thus of the opinion that the Classification Committee, based on the complaint, quite correctly assumed jurisdiction to classify both the painting and the electronic image of the painting on the Goodman Gallery website.

### **The merits of the appeal**

We now turn to the merits of the matter.

- 13) The Classification Committee correctly found that the image was not pornographic. The genitals were displayed in a flaccid state, and while the work explores the linkage between power and sex, there is nothing in the painting that can be described as 'sexual conduct'. The undue display of genitals becomes an issue only when it is depicted or portrayed in the context of sexual conduct. The respondents, in their argument before us, quite correctly did not contend that the image amounted either to pornography or to sexual conduct. In our award in *XXY*,<sup>11</sup> we interpreted the judgment of the Constitutional Court in *De Reuck*<sup>12</sup> as follows:<sup>13</sup>

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<sup>11</sup> Award in *XXY*, 1/2009 (Film and Publication Review Board).

<sup>12</sup> *De Reuck v Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC).

<sup>13</sup> Para 18 of the Award in *XXY*.

Both the pre-2004 and post-2004 definitions of child pornography begin with the word 'includes'. In *De Reuck*, the court had to consider the significance of the word 'includes' in the definition. It considered two options: (1) it could mean that the list of images in the definition is exhaustive of what constitutes child pornography, or alternatively (2) 'includes' 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.<sup>14</sup> The court finally held:<sup>15</sup>

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 meanings 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.

14) Similarly the FPB Act defines 'sexual conduct' to include<sup>16</sup>, inter alia, the undue display of genitals. The list that follows relates to and is defined by the primary meaning of sexual conduct. It is therefore incorrect to determine whether the image involves the undue display of genitals without having regard to the primary definition of 'sexual conduct'. The issue then is what meant by the term 'sexual conduct'. Again, in *XXY*<sup>17</sup> we interpreted the *De Reuck* judgment thus:

In *De Reuck*, the Court concludes 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'<sup>18</sup>:

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

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 forms 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

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<sup>14</sup> Para 17ff of *De Reuck* judgment.

<sup>15</sup> Para 19 of the judgment.

<sup>16</sup> Paragraph (bb) of section 1 of the FPB Act.

<sup>17</sup> Paragraph 22 of the Award in *XXY*.

<sup>18</sup> Para 20 of the *De Reuck* judgment.

where the sexual activity described or exhibited involves children. In my view, the section 1 definition is narrower than this primary meaning of child pornography.

- 15) This reasoning is instructive in determining the meaning of sexual conduct. In making the determination of whether the image amounts to sexual conduct, regard must be had to whether the publication appeals to erotic or prurient sentiments. If it does not, then it cannot be regarded as sexual conduct. It was never contended that this painting appeals to the stimulation of erotic feelings, and the image therefore cannot be described as 'sexual conduct'. It was also common cause between the parties that the painting is a provocative work of artistic merit, although the respondent was of the view that it was offensive to segments of our society. It is clear, however, that the painting is not pornographic, and nor is it a depiction of sexual conduct that includes the undue display of genitals.
- 16) The Classification Committee identified the freedom of expression, the inherent dignity of African males<sup>19</sup>, and incitement to cause harm as important constitutional issues to be considered and appropriately reconciled. It found as common cause that the painting is a mode of expression and is part of the right of artistic creativity protected in section 16(1)(c) of the Constitution.<sup>20</sup> It further found as common cause that the depiction of an African political leader with exposed genitals is offensive to African people. This was contested by the applicants, who argued that this was never common cause, and was not expressly put in issue by them. They submitted an affidavit by Ms Senzeni Marasela, an artist<sup>21</sup>, who directly disputed the assumption that the image denigrates the lives of Black men. While this issue was not common cause, it is clear to us that parts of the society found the painting offensive and distasteful.
- 17) The Classification Committee were of the view that the painting caused societal anger, outrage, and hurt; and in support of their conclusion they relied on an editorial by Ms Ferial Haffajee, the editor of *City Press*, in which she stated: "I could not have anticipated that it would snow ball into a moment of absolute rage and pain"<sup>22</sup>. The Classification Committee then identified the critical enquiries as being whether the painting is harmful, disturbing, and age-inappropriate for children; whether the public should be protected from unsolicited exposure to material that some may find offensive; whether the cultural dignity of African people is being undermined, infringed, and disrespected; and whether the freedom of expression may justifiably be limited in these circumstances. The Classification Committee was of the opinion that it was permissible to limit the freedom of artistic freedom to protect the dignity of African people, and to protect children and sensitive adults from age-inappropriate and potentially disturbing and harmful material. They then

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<sup>19</sup> Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>20</sup> Section 16(1)(c) provides that everyone has the right to freedom of expression, which includes the freedom of artistic creativity.

<sup>21</sup> From her curriculum vitae, it appears that Ms Marasela has been the recipient of a number of awards and has exhibited both locally and internationally.

<sup>22</sup> Paragraph 33 of the report of the Classification Committee.

invoked section 16(4)(d) of the FPB Act, and by a majority decided upon a classification of '16N'. Both the majority and the minority were in agreement that they were assigning restrictive age classifications of '16' and '13' respectively in terms of section 16(4)(d) of the FPB Act.

It is apparent from the reasoning of the Classification Committee that they were heavily influenced, when reaching their decision, by the need to affirm the dignity of African males and to protect sensitive persons and children.

18) The FPB Act distinguishes between the classification of films and games on the one hand and publications on the other. Any person who distributes, broadcasts, or exhibits any film or game is obliged to submit the film or game for classification prior to distributing or broadcasting or exhibiting them in the country.<sup>23</sup> By way of contrast, a publication is classified only upon receipt of a complaint, except in respect of publications as described in section 16(2) of the FPB Act. (Subsequent to the hearing of the appeal before us, the Constitutional Court held that section 16(2) was unconstitutional and severed it from the rest of the section.<sup>24</sup>) It was agreed that both the painting and the electronic image on the website fell within the definition of 'publication' in the FPB Act.<sup>25</sup>

19) Section 16(1) permits any person to request that a publication, other than a bona fide newspaper as defined in the FPB Act, be referred to the Board for classification. The FPB Act and the Classification Guidelines indicate the various categories of classification that may be assigned to a publication. In terms of section 16(4) of the FPB Act, the Classification Committee may:

- a) Classify the publication as 'refused classification' if it falls within section 16(4)(a) of the FPB Act;
- b) Classify the publication as XX if it falls within section 16(4)(b) of the Act;
- c) Classify the publication as X18 if it falls within section 16(4)(c) of the Act;
- d) Impose an age classification or other conditions, after having regard to the Guidelines, if the publication falls within section 16(4)(d).

Clause 4.5 of the Guidelines<sup>26</sup> provides further that, if the overall impact of the publication is not potentially disturbing, harmful, or inappropriate to children, the publication will not be subject to any restrictions, and no classification will be necessary.

20) No argument was made that the publications under consideration fall under categories (a), (b), or (c) above, and neither was there any basis to make such an argument. These categories deal with socially repugnant activities such as child pornography; the advocacy of hatred based on identifiable group characteristics that constitute incitement to cause harm; explicit sexual conduct that violates or shows

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<sup>23</sup> Section 18 of the FPB Act.

<sup>24</sup> *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22.

<sup>25</sup> Paragraph (aa) of Section 1 of the FPB Act.

<sup>26</sup> *Government Gazette* No: 32542 of 1 September 2009.



disrespect for human dignity; bestiality, incest, rape, or the explicit infliction of sexual or domestic violence. It also covers publications containing explicit sexual conduct, which are required to be regulated. These are activities to which Mr Budlender correctly referred as 'presumptively harmful'. This would mean that once the publication contains, for instance, images of the explicit infliction of domestic violence, such a publication will be presumed to be harmful without the necessity of any further proof to establish that.

Section 16(4)(d) of the Act is the only provision that enables a Classification Committee to assign a restrictive age classification to publications of this nature. The issue is whether there was a proper and lawful application of section 16(4)(d) in this matter. Section 16(4)(d) states:

If the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.

Both Mr Budlender and Mr Maenetje agreed that the correct approach would be for the Classification Committee to interpret and apply section 16(4)(d) of the FPB Act in a manner that promotes the spirit, purport, and objects of the Bill of Rights. The starting point for an administrative agency like the Classification Committee and the Board is the empowering section that enables it to act. In this instance, it is imperative that the Classification Committee act in accordance with the provisions of the Act, that it not act for an ulterior purpose, that it not take irrelevant factors into account, and that it not be influenced by material errors of law.<sup>27</sup> 'Ulterior purpose' in this context refers to a purpose not authorised by the enabling section.

- 21) The purpose or objective of section 16(4)(d) is to protect children from exposure to disturbing, harmful, or age-inappropriate material. Such an interpretation is irresistible: children are referred to twice in the text of the section, thus emphasising the intent of the drafters. Restrictive age classifications can serve no other purpose than to protect children. Any action taken in terms of section 16(4)(d) must have the objective and purpose of protecting children from exposure to disturbing, harmful, or age-inappropriate material. If the restriction seeks to achieve some other objective not sanctioned by the section, then the exercise of the discretion will not be lawful. Thus it would not be appropriate to use this section to impose a restrictive age classification in order to make the painting less available and less accessible to adults, even if the objective was to assuage the sense of indignity and offence felt by some segments of society. The objective of the FPB Act, as provided for in terms of section 2, is to regulate the creation, production, and distribution of certain publications by:

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<sup>27</sup> See Section 6 of the Promotion of Administrative Justice Act 3 of 2000; *Fedsure Life Assurance v Greater Jhb TMC* 1999 (1) SA 374 (CC).

- providing consumer advice to enable adults to make informed viewing and reading choices.
- Protecting children from exposure to disturbing and harmful material and from premature exposure to adult experiences; and
- Punishing the abuse of children in child pornography.

22) It is apparent from section 2 of the FPB Act that advice is given to adults about the publication, and restrictive age classifications are imposed for the purpose of protecting children. At most, adults could be advised about the contents of the publication. The spirit and purport of the FPB Act does not allow the imposition of restrictive age classification to protect adults, except in instances of publications that can be regarded as presumptively harmful. Section 2 of the FPB Act unequivocally assigns an *advisory* role to the Board and to classification committees as far as adults are concerned, and a *protective* role in relation to children. The advisory role is generally discharged by providing consumer advice to enable adults to make informed choices.

23) Human dignity, the achievement of equality, and the advancement of human rights and freedoms are among the founding values of the Constitution.<sup>28</sup> In our constitutional system, the right to dignity occupies a position of parity with that of freedom of expression.<sup>29</sup> In *S v Makwanyane*<sup>30</sup>, O'Regan J noted:

Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.

We take cognisance of the fact that segments of our society considered the painting an outrage and an insult to their dignity. The remedy provided in our law for the infringement of the right to dignity is the *actio iniuriarum*. An intricate balancing of the right to dignity and the freedom of expression will have to occur when the High Court considers an action for defamation and/or impairment of dignity instituted by those aggrieved by the painting. It will be the responsibility of the High Court to determine whether the painting unjustifiably and unreasonably infringes the right to dignity of those affected by the painting, or whether the painting is constitutionally protected expression.

24) It appears to us that the Classification Committee sought to use section 16(4)(d) of the FPB Act to vindicate the right to dignity of those who were affronted by the painting. They were not, in terms of the law, permitted to do so. The sole objective of restrictive age classifications is to protect children; and to the extent that the Classification Committee attempted to achieve the purposes of protecting sensitive viewers or assuaging the sense of indignity felt by some segments of the community, it erred. It was not legally permissible for it to impose restrictive age classifications to achieve these purposes or objectives. As stated earlier, our constitutional dispensation places high value on the affirmation of human dignity, and assigns to

<sup>28</sup> Section 1 of the Constitution of the Republic of South Africa 1996.

<sup>29</sup> *S v Mamabolo* 2001 (3) SA 409 (CC) para 41.

<sup>30</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) 328.

the courts the responsibility for balancing conflicting rights. Section 16(4)(d) gives a much narrower mandate to the Classification Committee. Given the intensity of the public furor<sup>e</sup> at the time of the decision, it is perhaps understandable that these other factors weighed so heavily when they exercised their discretion.

- 25) Mr Maenetje argued that even if the Classification Committee erred in its reasoning, the conclusion that it reached should be upheld if the conclusion could be justified on other bases. He then submitted that the image in the painting might be disturbing, harmful, or age-inappropriate for children, and in particular for children who were raised with cultural norms and values that found the public display of an African elder's genitals deeply offensive; and that therefore the '16' age classification was appropriate.
- 26) Before any publication is assigned a restrictive age classification in terms of section 16(4)(d) of the FPB Act, it is necessary that the Classification Committee form the view that the publication contains material that may be disturbing, harmful, or age-inappropriate to children. Mr Budlender described this as a jurisdictional fact that was a pre-requisite to the exercise of the power to assign a restrictive age classification.
- 27) We agree that, before a film, game, or publication can be classified, there has to be a decision that distributing it without any age classification may be disturbing, harmful, or age-inappropriate to children. Examiners are appointed with expertise in particular areas, and it may be appropriate for them in most cases to draw on their experience, expertise, and life skills to make this determination in respect of films and games without drawing on expert evidence. Given the thousands of films and games that have to be classified annually, it would be unreasonable and impractical to insist on expert testimony in each instance. However, in some cases, when the existence of this jurisdictional fact is expressly put in issue, it may be necessary to request assistance from experts before making a final determination.
- 28) Most examiners have considerable experience and expertise in classifying films; but they are rarely called upon to classify paintings. We can therefore safely assume that they have less expertise and experience in this regard. In this case, the world-renowned South African artist, Mr William Kentridge, submitted an affidavit in which he explored the value of the painting and made the argument that this is a serious work of art. This analysis and conclusion was not disputed before us; indeed, the Classification Committee accepted that the painting can be regarded as a work of artistic merit.<sup>31</sup>
- 29) Once it is concluded that the painting is a work of artistic merit, a Classification Committee is obliged, prior to assigning a restrictive age classification, to be satisfied, on a balance of probabilities, that the painting may be disturbing, harmful, or age-inappropriate to children. It was correctly argued by the applicant that works of artistic merit are afforded express protection in the FPB Act. If the work is deemed

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<sup>31</sup> Paragraph 57 of the Report of the Classification Committee.

be of artistic merit, it cannot be 'refused classification', except in the case of child pornography; nor can it be classified 'XX'. It may, depending on the content, be classified 'X18', or be assigned a lesser age classification that is appropriate. What is apparent from the provisos in section 16(4)(a), (b), and (c) is that, if a work other than child pornography is deemed to be of artistic merit, it is assigned a much less restrictive classification, even if the work portrays what may be described as presumptively harmful conduct or behaviour.<sup>32</sup>

30) Thus, if the Classification Committee is seeking to restrict a work of artistic merit, it must be satisfied that the display of the work may, if unrestricted, be disturbing, harmful, or age-inappropriate to children; and it must be satisfied on a balance of probabilities that reasonable grounds exist for such a conclusion.<sup>33</sup> It is not sufficient that there is a mere possibility of that occurring. The Review Board expressed similar sentiments in its award<sup>34</sup> in the *Cosmopolitan, GQ and FHM* publications matter:

Prior to the imposition of a restrictive classification, the committee must be satisfied that the restriction is necessary to protect children against harmful or disturbing material. This would involve the following assessments being made:

- Does the publication contain material that is reasonably likely to be harmful or disturbing to children?
- If so, what classification is appropriate to prevent this from occurring?

The concept 'harm' obviously refers to psychological, emotional and physical harm and 'disturbing' is a broader concept which is designed to protect the interests of children. In determining what amounts to harmful or disturbing material, useful guidance can be obtained from the Canadian law. It has been emphasized that the standard is one of tolerance and not taste.<sup>35</sup> The issue is whether the publication is such that it is beyond the tolerance of a particular age group and hence justifies being restricted. In *R v Butler* 1992 (1) SCR 453, the court suggested the community standard test and held:

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

31) The respondent contended that the guidelines identified nudity as an element that may be likely to be potentially disturbing, harmful, or inappropriate for children below a specified age. In the guidelines, 'nudity' is defined for the purposes of classification as the "deliberate flaunting of a person's sexuality or the undue exposure of a person's intimate parts". The respondent submitted that there is

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<sup>32</sup> As an illustration, section 16(4)(b) provides that the classification committee shall assign a publication an 'XX' classification if it contains explicit sexual conduct that violates or shows disrespect for the right of human dignity of any person unless, judged with context, the publication is, except with respect to child pornography, a *bona fide* documentary or a publication of scientific, literary, or artistic merit, in which event the publication shall be classified as X18 or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful, or age-inappropriate materials.

<sup>33</sup> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 42.

<sup>34</sup> Award in respect of *Cosmopolitan, GQ, FHM* - 05/2005 (Review Board).

<sup>35</sup> *Towne Cinema Theatres Limited v The Queen* [1985] 1 SCR 494.

nothing to contradict the identification of nudity as being potentially disturbing, harmful, or inappropriate to children. This contention cannot be correct. It would mean that every artistic work that contained nudity would be deemed presumptively harmful to children. If that were the intent, the legislature would have mentioned publications containing nudity as being presumptively harmful alongside section 16(4)(a), (b), and (c) of the FPB Act. It expressly chose not to do so because that would have meant famous paintings like Pablo Picasso's 'Nude Youth' (1906) and Michelangelo's sculpture 'David' would be deemed presumptively harmful to children who viewed them. A much more nuanced test was adopted, requiring a conclusion on reasonable grounds that it is more probable than not that the painting would be disturbing, harmful, or age-inappropriate to children. The mere fact that nudity may possibly be age-inappropriate will not suffice, and neither can it be assumed that any nudity in art will be disturbing or harmful to children. There appears to considerable empirical, scientific and conceptual psychological knowledge on the impact of harmful experiences on different emotional and cognitive developmental stages in children. In deciding whether material is harmful, regard may have to be had to this body of knowledge

32) Any contention that the painting would be harmful to children on the grounds that it seriously undermines and is insensitive to African culture would have to be supported by evidence. There was no such evidence before the Classification Committee. The evidence before it was that there was a work of artistic merit that dealt provocatively with political issues and questions by drawing on the relationship between sex and power. There was no evidence before the Classification Committee that the penis painted on the suit of the image that resembled President Zuma would in the circumstances have been disturbing, harmful, or age-inappropriate to children, and neither was such evidence led at the hearing before us.<sup>36</sup> In these circumstances there were no reasonable grounds for the Classification Committee to come to the conclusion that the unrestricted painting would disturb, harm, or be age-inappropriate to children. Similarly, there is no basis for this Tribunal to conclude that the nudity depicted in the painting would probably be disturbing, harmful, or age-inappropriate to children.

33) As the defaced painting is no longer in the country, and as the image has been removed from the website, there is no publication currently before the tribunal to inspect and classify. Mr Maenetje argued that, if there is no evidence that the painting is disturbing, harmful, or age-inappropriate to children, the Tribunal should exercise its discretion and call expert evidence on this matter. Section 20(2) of the FPB Act empowers the Chairperson of the Appeal Tribunal to call any person who, in his or her opinion, is an expert on any matter relevant to the appeal. Mr Maenetje argued that experts should be tasked to reconstruct the image, assess it, and then testify whether reasonable grounds existed for concluding that the paintings could be disturbing, harmful, or age-inappropriate to children. Having considered the request, we are of the view that this is not an appropriate case for having an expert reconstruct the painting and provide expert evidence on its impact on children. In

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<sup>36</sup> . The respondent submitted, as part of their argument, that the painting would be harmful to African children.

our previous awards, we have stressed the importance of classifying in context. For instance, in the context of films we stated in our award in *Footloose*<sup>37</sup>:

We were of the view that it would be inappropriate to assign a very entertaining film bearing positive messages for young people, a restrictive age classification of 13 because of isolated scenes that may be beyond mild, but were certainly by no means violent. In addition this particular scene may also convey important lessons and we are of the view that it and the other scenes that we considered would not be disturbing and harmful to children. We are of the view that the positive features of the film was such that it justified us assigning a less restrictive classification. The guidelines list a number of classifiable elements and it is apparent that the cumulative impact of the various scenes should be considered in determining the appropriate classification of the film. The test is whether the intensity and frequency of the classifiable element is such that it could be disturbing or harmful to children of a particular age group or prematurely expose them to adult experiences. Importantly this assessment must be a contextual one having regard to the positive or redeeming features of the film.

The individual classifiable elements must not be deemed to be in the nature of a veto. By this I mean that if one of the classifiable elements is deemed to stray beyond the 10 age classification, the film automatically cannot be classified as 10. Such an approach would be contrary to the guidelines. Obviously a single scene or a single classifiable element may be of such concern in terms of its impact and intensity that it may on its own justify a more restrictive classification. However this assessment must be made in the context of the film and with regard to all the other classifiable elements. Classifiers must be aware that some classifiable elements will point in the direction of a more restrictive classification while others may favour a less restrictive classification. These various considerations must be assessed cumulatively in the context of the film when the ultimate classification decision is made.

Classifying a painting from a reconstruction carried out by an expert will amount to assessing a publication out of the context in which it was displayed to the public. It is very likely that this would impede and mire the classification in additional controversy and dispute. Further, as pointed out earlier, the painting is no longer in South Africa, and we are informed that Goodman Gallery has removed the electronic image from its website. We are of the opinion that, as the painting and the on-line image that were the subject matter of the classification no longer exist, there would not be much value in engaging an expert to assess something that is no longer in the public domain. Thus the request to call expert evidence to reconstruct and comment on the effect of the painting on children is declined. Should Goodman Gallery reinstate the image on its website, and should a complaint be received by the respondent, then it would be open to the respondent to reclassify the image in accordance with the legal principles laid down in this award.

**Order:**

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<sup>37</sup> Award in respect of film *Footloose* 5/2011 (Appeal Tribunal).

In the circumstances the following order is made:

1. The decision of the Classification Committee to assign a restrictive age classification of '16(N)' to the painting *The Spear* that was displayed in the Goodman Gallery is set aside.
2. The decision of the Classification Committee to assign a restrictive age classification of '16N' to the electronic image of the painting of *The Spear* that was displayed on the website of the Goodman Gallery is set aside.
3. The decision of the Classification Committee to assign a restrictive age classification of '16N' to the electronic image of the painting *The Spear* that appeared on on-line websites other than that of Goodman Gallery is set aside.
4. The decision of the Classification Committee to assign a restrictive age classification of '16N' to images of the painting *The Spear* that appeared in formats other than online electronic images is set aside.

| Dated at Durban on ~~7~~ October 2012.

Concurred by

**Adv. D. Bensusan**

**Ms H. Devraj**

**Prof. A. Magwaza**

**Ms P. Marek**

**Revd M. McCoy**

**Prof. K. Moodaliyar**

**Ms D. Terblanche**

**Addendum A: Section 16 of the Films & Publications Act No. 65 of 1996 (as amended)**

*As noted in paragraph 18 of the Award, shortly after the hearing had been held the Constitutional Court found that section 16(2) was unconstitutional and severed it from the rest of the section.<sup>38</sup>*

**Classification of publications**

- 16 (1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.
- (2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—
- (a) contains sexual conduct which—
    - (i) violates or shows disrespect for the right to human dignity of any person;
    - (ii) degrades a person; or
    - (iii) constitutes incitement to cause harm;
  - (b) advocates propaganda for war;
  - (c) incites violence; or
  - (d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,
- shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.
- (3) The Board shall refer any publication submitted to the Board in terms of subsection (1) or (2) to a classification committee for examination and classification of such publication.
- (4) The classification committee shall, in the prescribed manner, examine a publication referred to it and shall—

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<sup>38</sup> *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22.



- (a) classify that publication as a “refused classification” if the publication 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 publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;
- (b) classify the publication as “XX” if it contains—
- (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
  - (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
  - (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
  - (iv) explicit infliction of sexual or domestic violence; or
  - (v) explicit visual presentations of extreme violence,
- unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified “X18” or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
- (c) classify the publication as “X18” if it contains explicit sexual conduct, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or
- (d) if the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age restrictions and such other conditions as may be

necessary to protect children in the relevant age categories from exposure to such materials.

- (5) Where a publication has been classified as a “refused classification” or has been classified “XX” or “X18”, the chief executive officer shall cause that classification decision to be published by notice in the *Gazette*, together with the reasons for the decision.
  - (6) Where a publication submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that publication to a police official of the South African Police Service for investigation and prosecution.
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