REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 14343/2010
DATE:26/10/2011
REPORTABLE

In the matter between:

PRINT MEDIA SOUTH AFRICA	**First Applicant**
SOUTH AFRICAN NATIONAL EDITORS FORUM	**Second Applicant**

and

THE MINISTER OF HOME AFFAIRS	**First Respondent**
FILM AND PUBLICATIONS BOARD	**Second Respondent**

JUDGMENT

MATHOPO J:

[1] The applicants applied on notice of motion for an order in the following terms:

[2] Declaring that:

2.1 Section 16(2) (a) of the Films and Publications Act 65 of 1996 as amended, is inconsistent with the Constitution and invalid.

[3] In the alternative to paragraph 1 above, declaring that, on a proper interpretation, section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, only applies to a publication which advocates the sexual conduct referred to in the section.

3A. In the further alternative paragraph 1 above, declaring that on a proper interpretation, section 16(2)(a) of the **Films and Publications Act 65 of 1996** as amended, only applies to a publication.

3A.1 Which contains visual images of the sexual conduct referred to in the section; and

3A.2 Where the publication describes the sexual conduct referred to in the section in a mater which violates or shows disrespect for the right to Human dignity of any person or degrades any person or constitutes incitement to cause harm.

[4] Declaring that:

4.1 Section 16(1), section 16(2) and section 24(2)(a) of the Films and Publications Act 65 of 1996, as amended, are inconsistent with Constitution and invalid to the extent that they exclude magazines from the protection afforded to newspapers.

4.2 In order to remedy the defect, section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, is to read as though the word "*contains"* is deleted and replaced with the word "*advocates".*

[5] In the alternative to paragraph 1 above, declaring that, on a proper interpretation, section 16(2)(a) of the Films ad Publications Act 65 of 1996 as amended, only applies to a publication which advocates the sexual conduct referred to in the section.

[6] Declaring that:

6.1 Section 16(1), section 16(2) and section 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, are inconsistent with the Constitution and invalid to the extent that they exclude magazines from the protection afforded to newspapers.

6.2 In order to remedy the defect, sections 16(1), 16(2) and 24A(2)(a) of the Films and Publications Act 65 of 1996 as amended are to be read as though the words "or *magazines*" appear after the word "*newspaper"* in each case.

[7] Declaring that:

7.1 Section 24A(2)(a) of the Films and Publication Act 65 of 1996 as amended, is inconsistent with the Constitution and invalid to the extent that it applies to publications other than those referred to in section 16(2) of the Act.

7.2 In order to remedy the defect, section 24A(2) of the Films and Publications Act 65 of 1996 is to be read a though:

7.2.1 The words "*referred to in section 16 (1) of the this Act* in section 24A (2) have been deleted; and

7.2.2 The phrase "*provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act"* appears in section 24A(2)(a) between the word "Board" and he semi-colon.

[8] Directing the first respondent to pay the costs of the applicants, alternatively and in the event of opposition by the second respondent, directing the first and second respondents to pay the costs of the applicants jointly and severally.

[9] In essence the prayers sought concerns the constitutionality of section 16(1), 16(2) and 24A(2)(a) as amended of the Act. In addition to the constitutional difficulties, the applicants challenged the exclusion of the protection afforded to the newspaper in terms of section 16(2) of the Act. Lastly the challenge is directed at the constitutional validity of the penal section 24A(2)(a)

[10] Section 16 of the Act as amended provides as follows:

10.1 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.

10.2 Any person, except the publisher of a newspapers contemplated in subsection (1), for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that:

(a) contains sexual conduct which:-

(b) violates or shows disrespect for the right to human dignity of any person

(c) degrades a person or

d) constitutes incitement to cause harm

(e) advocates propaganda for war

(f) incites violence, or

(g) advocates hatred based on any identifiable group

characteristics and that constitutes incitement to cause harm

Shall submit, in the prescribed matter, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

e) 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

f) The classification committee shall, in the prescribed manner, examine a publication referred to it and shall:

10.3 Classify that publication as a refused classification if the publication contains:

10.3.1 Child pornography, propaganda for war or incitement of imminent violence, or

10.3.2 The advocacy of hated 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 in on a matter of public interest,

10.4 classify the publication as “XX” if it contains:

10.4.1 explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person

10.4.2 bestiality, incest, rape or conduct or an act which is degrading of human beings

10.4.3 conduct or an act which constitutes incitement or, encourages or promotes harmful behaviour

10.4.4 explicit infliction of sexual or domestic violence, or

10.4.5 explicit visual presentations of extreme violence

Unless judged within the 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 he 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

10.5 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

10.6 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 material

10.7 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.

10.8 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.

BACKGROUND

[11] This application was triggered by recent amendments to the Films and Publication Act enacted by Films and Publications Amendment Act 3 of 2009 (the "Act") which came into force on the 14th March 2010. According to the applicants the Amendment Act introduces a system of pre-publication classification for various forms of publications which provides that whenever a publication falls within the requirements of section 16(2)

of the Act such publication has to be submitted to the Board for classification before it may be lawfully distributed in the Republic of South Africa.

[12] The applicants complaint is that the manner in which section 16(2) of the Act is drafted means that large numbers of publication dealing with matters of substantial public interest will have to be submitted to the Board for classification before they can be distributed and thus this will have severe negative consequences for the publication as well as the public. Furthermore, the applicant complaint/concern is that the Act grant exemption to newspapers that are subject to a self regulatory mechanism but fail to grant magazines the same exemption.

[13] The primary concern of the applicants is that the provisions of section 16(2)(a) dealing with a system of pre-publication classification require that numerous mainstream publications be submitted to the Films and Publications Board for classification before they are able to be made public. This accordingly seem to ignore the fact that such publication may be in the public interest. Applicants case is that the consequences of such pre-publication are severe and will impose financial and practical burdens on those publishing the publications. This is particularly so, because failure to comply with the provisions of the Act is visited with a criminal penalty section 24A(2)(a). According to the applicants the publications that appear to be subject to this pre-publications *inter alia* includes magazines such as You, Drum, acclaimed novels, academic journals law reports and international magazines such as New Yorker, Vanity Fair and even Time.

[14] In essence, the contention of the applicants is that the challenged provisions are unconstitutional mainly because the said provisions are a limitation of the entrenched constitutional right to freedom of expression.

[15] The case advanced by the applicants is that in terms of section 16(1), there is partial exemption to *bona fide* newspapers published by a member of a body recognised by the Press Ombudsman which subscribes and adheres to a code of conduct, this exemption does not apply to any magazine or other publication despite the fact that an identical system of self-regulations exists for such magazines or publication. The contention advanced by the respondents is that magazines cannot ordinarily be regarded as a newspaper.

[16] The practical effect is that section 16(2) (a) of the Act, requires any producer, publisher or advertiser of a publication that falls within the section to submit their publication for examination and classification to the Board before the publication is distributed, exhibited, offered or advertised for distribution or exhibition.

[17] Pre-publication classification is required where a publication "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"

[18] The word sexual conduct is broadly defined by the Act and it includes:

18.1 sexual intercourse, whether real or simulated, including anal sexual intercourse".

18.2 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, and

18.3 Various other activities

[19] The import of section 16(2)(a) is that it requires that whenever a publication "contains sexual conduct" which conduct is degrading or disrespectful, it must be submitted to the Board for classification before it can be published. The only exception to this is for *bona fide* newspapers as distinct from magazines and other publications.

[20] It is common cause, that if a publication contains sexual conduct, falling within the definition and section 16(2), the classification is required and the article in question need not advocate or promote any degradation or violation of the law envisaged.

[21] The classification committee derives its powers from regulation made under the Act in GN R207, GG 33026 of 15 March 2010. The relevant regulation which 4(1) outlines the powers as follows:

> "*The classification committee shall, when examining and classifying a publication-*
>
> a) examine the publication, page by page, from cover page to last page;
> b) scrutinize each page by examining the visual presentation and text in order to identify all classifiable elements; and
> c) on completion of the classification
> (i) allocate a rating for the publication; and
> (ii) compile a report."_

[22] Dealing with the provisions of section 16(2) the respondents case is that properly construed the impugned provisions is aimed at publication

including magazines which depict visual image of matters covered under 16(2) (a)(i) to (iii) of the Act and goes on to state that mere reporting of sexual conduct which does not violate or show disrespect for the right to human dignity of any person or which does not degrade or incite to cause harm to any person will not require prepublication classification. Specifically according to the respondents it is visual images depicting male genitals in a state of arousal or stimulation or visuals of masturbation which would require prepublication classification.

[23] Applicants answer to this paragraph is that the respondents contention is incorrect in law, because where a newspaper merely reports about sexual conduct which sexual conduct has violated or shown disrespect for human dignity of people, degrade them or incite the causing of harm, such conduct will not fall under the ambit of the Act. I agree with the applicants that the interpretation contended for by the respondents is not plausible given the language used in the section. The most plausible interpretation would be the one which contend that the publication should advocate or promote sexual conduct as opposed to the respondents.

[24] The practical effect of section 16(2)(a) according to the respondents would require a host of mainstream magazines and other publications to be submitted for pre-publication classification prior to being published. This is because many such publication contains descriptions or references to sexual conduct which is degrading or disrespectful. Even though all the publications concerned, condemn the sexual conduct in question the mere fact that they contain it, these fall within the ambit of section 16(2)(a) and must be submitted for prepublication.

[25] In support of their case, the applicants have submitted by way of examples numerous articles from mainstream South African Magazines such as Huisgenout, You and Drum and also widely acclaimed books and

articles from foreign magazines such as Time, Vanity Fair and New Yorker in an attempt to demonstrate the irrationality of the impugned sections.

[27] The contention of the respondent is that the protection is not for children only but also adult who because of their religious beliefs do not want to pick up a document at a convenient store only to discover that it contains material offensive to them and there was no prior warning for it, for example (XX). The purpose of the Act is to warn consumers by putting XX on the document so that when they see it they can make an informed choice whether or not they want to see it and read it.

[28] The Respondent contend that the limitation is one that is reasonable and justifiable in an open and democratic society based on the human dignity and freedom within the meaning of Section 36 of the Constitution. Further that this limitation is necessary for the protection of children from premature expose to disturbing and harmful material because children need special protection because of their acute vulnerability to violation of human rights.

[29] On whether classification *per se* is a limitation of the freedom of expression, the respondents contend that the aims of the Act is to protect children from premature exposure and submit that by law, labels or ratings such XX or X in the magazines assist the adult who access the magazines to protect the children in their care, by either not buying that document and those who choose to buy it will know what type of material that they are expecting, thus the respondent contend that the limitation is justified in an open and democratic society and meets the requirements of section 36 of the Constitution.

[30] In essence, the case advanced for the respondent is that mere reporting of sexual conduct which does not violate or show disrespect for the right to

human dignity of any person or which does not degrade a person or incite harm to any person will not require prepublication classification.

[31] The respondents further submit that the applicants case which seeks to declare the impugned provisions inconsistent to the extend that they exclude magazines from the protection afforded to *bona fide* newspapers, is fallacious because newspapers have acquired legislative protection as a direct result of a long history of self regulatory and that has worked. The non exemption of other newspapers and magazines is a rational exclusion.

[32] In support of its argument that the Act is not unconstitutional, the respondent submit that pre-publication is a necessary and permissible classification authorised by the Constitution from exposure to potentially harmful material and further submit that any financial or practical hardships caused thereby, is not offset by a much greater public interest value whose purpose is for greater social good and protection of children in general.

[33] The Respondent further contend that the classification would carry a label such as XX, which would advise adults to make an informed choice whether or not to read such a matter and argued that to do otherwise would be violation of the rights of children to dignity, cultural rights under the constitution because the magazine such as “Playboy”, “Hustler”, “You” which produces X rated material which depicts sexual conduct, if not classified would produce or publish disturbing and harmful material.

[34] Counsel for the respondents submitted that the effect of the order sought by the applicants is that “Hustler” magazine can be circulated in schools without warning those children or their parents that the material is of a

nature contemplated in section 16(2), hence the legislature intervened with section 16(2) by treating them differently from newspapers.

[35] Counsel for the respondent submitted further that pre-publication is not aimed at censorship but rather aimed at regulating the publishers and distributors of these materials to ensure that the material is appropriately described for distribution to a mature category of readership corresponding to the taste, style and age, sensitivity of the specific publication. It was further submitted that classification is intended to guide the consumers to know which content is suitable for which category of audience or viewership.

[36] The Respondent further contended that section 16(2) (a) of the Act does not prohibit publication of materials containing sexual conduct because properly interpreted, the provisions of the said section permits publication of materials described in section 16(2)(a), if such materials are properly classified. In essence, the argument is to the effect that this is not a limitation but a regulation of the right to the freedom of expression. As authority for this proposition, the respondent relied on the case of **Affordable Medicines Trust & Others v Minister of Health & Others 2006 (3) SA 247 CC,**

This case was decided under section 22 of the Constitution and there is no limitation in this case because the court held that the regulation of a profession will frequently constitute a limitation of rights depending on the effect of regulation and the court remarked as follows:

> ***"****The standard for determining whether the regulation of the practice of a profession falls within the purview of section 22 can therefore be formulated as follows: if the regulation of the practice of a profession is rationally related to a legitimate government*

purpose and does not infringe any of the rights in the Bill of Rights, it will fall within the purview of section 22. Where the regulation of a practice, viewed objectively, is likely to impact negatively on the choice of a profession, such regulation will limit the right freely to choose a profession guaranteed by section 22 and must therefore meet the test under section 36(1). Similarly, where the regulation of practice, though falling within the purview of section 22, limits any of the rights in the Bill of Rights, must meet the section 36(1) standard".

[37] As regards magazines, Counsel for the respondent submitted that because they are published randomly by persons who do not fall within the jurisdiction of the applicants nor abide by the code of conduct to which the applicants members are committed, it is imperative that they be classified because magazines are more graphic than newspapers and have a longer shelf life and better quality with an opportunity of such material being available for a long time and to a large viewership.

[38] The Respondent submitted that the impugned provisions is aimed at publication including magazines which depict visual images of matters covered under section 16(2) (a) (i) (ii) (iii) of the Act. The respondent further argument, is that the classification committee properly applying its mind and exercising its discretion under the regulations would not classify these materials. It was submitted that any material that carries the provisions in terms of section 16 has to submit for pre classification because the section is intended to deal with pictorial images as opposed to text.

[39] Finally the Respondent submitted, that purely because the impugned sections is regulatory, a proper approach in the adjudication of this matter is to strike a balance between various competing rights to determine the

context between freedom of expression and the right to equality. According to the respondents once that balance is struck with the exercising of a proper discretion, the impugned provisions would not pose any problem because the purpose of the Act, which is to protect children from exposure to disturbing and harmful material from pre-mature exposure to adult experiences, would be achieved without any hardship.

[40] Applicants submitted that the Act does not seek to regulate the publications but seek to preclude the publications concern from being published at all unless and until the Board in its wisdom and at its convenient time which is not stated in the legislation has given those publication a classification. The applicants contention is that, properly understood, the respondents interpretation is to the effect that until such time the applicants must sit and wait for the Board's approval. The applicants complain is that this unnecessary and an invasive delay and constitutes prior restraints and argued that, following the judgments of the courts in South Africa and foreign countries it should not be countenanced. On behalf of the applicants it was submitted vigorously that this is a drastic interference with freedom of speech and unconstitutional. In support of his argument against the limitation, counsel for the applicant relied on the judgment of **Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA) at para 6,** where Nugent JA said the following:

"*It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interest of the press… 'Press exceptionalism–the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine'. The constitutional promise is made rather to serve the interest that all citizens have in the free follow of information, which is possible only if there is a free press. To abridge the freedom of the press*

is to o abridge the rights of all citizens and not merely the rights of the press itself".

See also **South African National Defence Union v Minister of Defence & other 1999 SA 469 (CC) at para 7,** where the Constitutional Court unanimously said the following in relation to freedom of expression:

"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matter".

[41] Counsel further submitted quite persuasively that the significant impact of Section 16(2)(a), constitutes limitation of freedom of expression because in terms of the section, the fact that the publication must be submitted to the board and await approval prior to publication constitutes a delay which affects the public access to the said publications. This is especially so because, the respondents in the answering affidavit are silent as to the magnitude of the delay concerned. In support of this argument, reliance was placed in the judgment of Bertelsman J in **MEC for Health Mpumalanga v MNet & Another 2002 (6) SA 714 at para 29** where he said the following:

> *"It is of the very essence of news that as the word implies, current event should be brought to the attention of the public as soon as possible"*. See also judgments in the **United Kingdom & the United States** endorsing the said principle.

In **R v Sherwood, ex parte Telegraph Group 2001 WLR (1983) at para 16** where the following observation was made:

> "*It is undoubtedly the case that an important aspect of freedom of speech is that one should be able to publish not only what one wishes but also to do so when one wishes(my emphasis). For journalists especially topically can be crucial, and this is recognised by the courts".*

The Observer and The Guardian v UK (1992) 14 EHRR 153 at par 60, the court remarked as follows:

> "*News is perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".*

Professor Emmerson in his book **Emerson, "The Doctrine of Prior Restraint", 20 Law and Contempt. Probs, 648 at 655 (1955)** said the following:

> *"There is, at present, no common understanding as to what constitutes 'prior restraint'. The term is used loosely to embrace a variety of different situations…. The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official".*

[42] Again relying in **Khumalo & others v Holomisa 2005 (2) SA 401 (CC),** the applicants submitted that the limitations occasioned by section 16(2) of the Act, directly affect the media and the rights of the public in the free flow of information and argued that any limitations envisaged in the

challenged provisions is unsustainable given the fact that in a democratic society the mass media plays a role of undeniable importance in providing citizens both with the information and the platform for the exchange of ideas which are crucial to the development of a democratic culture - See also **Midi Television case** supra.

[43] Another reason contended for by the applicants against section 16(2) (a), is that the practical implications of the section will lead to self censorship by the publishers, thus affecting freedom of expression. It was again submitted, correctly in my view that where one publication contains only one article that falls within the said section 16(2) (a) then it means the entire publication must be submitted. The applicants concern is not that the relevant publication will be banned but that the requirement of submission for pre-publication approval amounts to a significant barrier to communication and therefore limits the right of freedom of expression. It was further argued on behalf of the applicants that the delay in publication caused by the classification requirements causes damages to freedom of expression and amounts to a limitation of section 16 of the constitution. This limitation according to the applicant can hardly be reasonable and justifiable.

[44] Addressing the contention on whether the limitation is justified or not, the applicants submitted that the respondents misconstrued its position on three basis:

- Firstly it was submitted that following the judgments of **Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC) at par 23** and **Van der Merwe v Road Accident Fund 2006(4) SA 230 (CC) at para 33.** It is not sufficient for limitation purposes to deal with the general objects of the Act without addressing the specific provisions which are challenged.

- Secondly to be consistent with he Constitution both the purpose and effect of the legislation must be constitutionally permissible.

- Thirdly the applicants argued that the impugned provisions are overbroad and that by imposing a prior restraint on bona fide magazines publishing a material which is in the public interest is an invasion of the right of free expression. This is clearly so because the respondents seemed to have ignored the less restrictive and cumbersome means to active the purpose of the Act. In support of this argument, the applicant submitted that much of the material required for classification under the impugned provision does not have any negative effect on the public instead it is plainly in public interest.

[45] This proposition is inconsistent with the decision of the Constitutional Court in **Islamic Unity Convention v Independent Broadcasting Authority & Others 2002 (4) SA 294 (CC),** where the court held that:

> "*where the state extends the scope of a regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the constitution". In the present matter the speech sought to be regulated does not fall within section 16(2) of the constitution. Thus it cannot be sanctioned because it amounts to a limitation of section 16(1).*

[46] In my view the respondents argument that the purpose of requiring a publication to be submitted to the classification committee is to enable the committee to determine whether it should be restricted before it can be published or distributed at all, amounts to prior restraint. The courts in

South Africa and other foreign jurisdictions have expressed strong views against because it amounts to limitation of freedom of expression. Similarly the argument that submission for classification carries no risk that permission to publish may be refused as it affords individual citizens with greater certainty because they can find out what is permitted or forbidden without incurring the damages of criminal or similar sanctions in the event their interpretation of the law is erroneous is also misplaced. From a public or social point of view, the interests of society as a whole in the free expression would be stultified because it implies that bolder individuals or publishers who may wish to express their opinions cannot do so, unless they conform to official opinion, this bodes ill for a spirited and healthy expression of opinion.

[47] I am in agreement with the applicants that by submitting publications to the classification committee, there will be a delay when the publication is before the committee and waiting for approval and thus the public will be deprived or denied an opportunity to access such publication timeously or at all. I align myself with the remarks by Nugent JA and Bertelsman J respectively in **Midi Television and MEC for Health Mpumalanga** supra.

[48] It is a constitutional imperative that society or public must receive current or fresh news as soon as possible. Any delay because of bureaucratic means amounts to a limitation of free expression. Such a delay fails to take into account the damage caused to freedom of expression and is a barrier to expression and therefore a limitation of section 16 of the constitution. News is a perishable commodity and to delay even a shorter period may well deprive it of its value and interest. The consequences of this delay affect the magazines alike.

[49] Apart from fulfilling the public needs, the media usually provide full and detailed news coverage of topical, cultural, political and economic issues

and this service the community as a whole rather than individual persons. It is for this reason that the public or citizenry should be fully aware of the advantages and disadvantages involved in free press. Free press and free media are thus a better position to provide the public with an overview of all the issues in the country and consequently the public must be made aware and have access to the developments in the country timeously. The role of the press was defined by Joffe J in **Government of the Republic of South Africa v Sunday Times Newspaper** as follows:

> "*The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft whenever it may occur and to expose the perpetrators. The press must reveal dishonest, malpractice and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed".*

[50] In the light of the above remarks, it is probably no exaggeration to say that in all probability democracy cannot survive in the absence of freedom of expression. The wide and detailed protection now accorded freedom of expression and the inclusion of the constitutional right to receive and impart information constitutes effective mechanisms for the achievement of self fulfilment and ideals of democratic government. I have no doubt that timeous communication is essential in a democratic system, for absent the right to receive, impart and give expression to information and ideas, there can be no meaningful talk or debates of liberal democracy. Consequently in a democratic society a system of prior restraint based on executive approval will operate as greater deterrent to freedom of expression and cause damage to fundamental democratic rights.

[51] I am fully aware that freedom of expression is not absolute and must be read, interpreted and understood in the light of other competing and potentially conflicting rights (which are also constitutionally protected) such as the rights to equality, dignity, privacy or potentially complementary rights such as the right to freedom of religion, belief and opinion, however, the submission by the respondents that the purpose of the limitation namely to provide consumer advice to adults and to protect children from premature exposure to inappropriate material, though attractive, falls short of addressing how subjecting publications and magazines, books and other publications which contain sexual conduct can be legitimately be said to be contrary to the purpose of the Act.

[52] Another reason militating against the acceptance of the respondents argument, is that the provisions are patently overbroad and casting its net very wide and imposing a prior restraint on the *bona fide* magazines publishing material which is in the public interest and this again amounts to an invasion of the right of free expression. Prior restraint, as the respondents now contend for, has the effect of delaying publication of material. Instead of dealing with hardcore violent pornography, it also deals with legitimate publication, this is in my view goes too far. On this basis, I am of the view that the case advanced by the respondents is unconstitutional.

[53] I have no doubt that there are less restrictive means of protecting children other than invasion of freedom of speech. If the challenged provisions target publications which advocate or promote sexual conduct rather than publications which contain a visual image of sexual conduct which violate or degrade human dignity, there would be no objection. I cannot visualise a scenario or situation where the applicants would boldly assert the contrary.

[54] Again the fallacy in the respondents submission is that they approach the limitation argument by referring the objectives of the legislation in general and ignored to focus on specific objectives of section 16(2) in relation to the requirements of prepublication classification other than newspapers or magazines. It was stated in **Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC) at para 23** that it is not sufficient for limitation purposes to deal with general objects of the Act without addressing the specific provisions which are challenged. See also **Van der Merwe v Road Accident Fund 2006(4) SA 230 (CC) at para 33,** the court said that "it does not mean that when the constitutional validity of a specific rule of matrimonial law is in issue, then the general purpose override the specific purpose of the rule of law under challenge. A court remains obliged to identify and examine the specific Government object sought to be achieved by the impugned rule of law or provision. A general justification is not sufficient and a specific one is required".

[55] Another reason why the approach adopted by the respondents is flawed is because, both the purpose and effect of the legislation must be constitutionally permissible. In this case, respondents have failed to deal with the effect of the legislation, In **Zondi v MEC for Traditional & Local Government Affairs & Others 2005(3) SA 589 (CC) at par 91** Ngcobo J eloquently remarked that a statute can be held to be invalid either because its purpose or effect is inconsistent with the constitution.

[56] In my view it is not required that there be any visual presentation in order for an article to fall within section 16(2)(a) for example, if a book details graphic acts of sexual conduct which is degrading, the book according to the respondents must be submitted for pre publication before it can be published. However if a *bona fide* newspapers publishes an extract from that book with the same graphic sexual conduct which is degrading, the newspaper could easily publish it on account of its exemption. This

example in my view illustrates how irrational, the interpretation of section 16(2) as contended for by the respondents is. This rationale applies with equal force to a book about women who suffered the degrading conduct concern designed to promote rape. In terms of this legislation this book cannot/will not see the light of day until the second respondent has said it is okay. Clearly this cannot be said to be permissible.

NEWSPAPER VIS-A-VIS MAGAZINES

[57] As regards newspapers and magazines, the respondents boldly sought to justify the distinction between newspapers and magazines on the basis that the newspapers have a long history of responsible and compliance with the code of conduct through self regulation, unlike magazines which are randomly published and sometimes by persons who do not fall within the codes of conduct that regulate members of the applicants. Again it was argued that the magazines have a longer shelf life than newspapers with the result that they will be read and seen by more people than newspapers.

[58] In my view the aforegoing distinctions are untenable especially if they are compared with publications such as the Mail & Guardian and Financial Mail. Both are weekly publications and all deal with hard and sometimes sensitive issues which are manifestly in the public interest. They are also subject to the same system of self regulation and comply with the code of conduct. The irrational distinction between these two publications is aptly illustrated by the following example, if both publications wished to publish a story containing sexual conduct envisaged in the challenged provisions. The Mail and Guardian (newspapers) would not be required to be submitted in advance to the classification committee whereas the Financial Mail which does not enjoy the benefit of newspaper exemption

would be required to be submitted to the committee for prepublication. The absurdity is illustrated by the fact that even if a piece of information has been published by the Mail and Guardian, if the Financial Mail wanted to publish a piece of that information, it will have to submit it for prepublication.

[59] I am of the view that you cannot catch legitimate magazines in the same net and maintain that the statute is constitutionally permissible. In my view freedom of expression would be impoverished if it does not embrace the right to receive and impart information or ideas without undue delay. Magazines and newspapers are the purveyors of information.

[60] I have not been referred to any single example in the world where a mainstream publication has to be submitted to a censor or a classification committee before it gets published. I also do not know of any democracy in the world that would require this to be classified first.

[61] Another illustration of how irrational this section is can be found in the example put up by the applicants in their papers of a book called the ”Key to my neighbours house” which is about Rwanda Tribunal dealing with rape, where a rape protagonist is quoted as saying to the woman “never again ask me what a Tutsi woman tastes like, “having raped her”. This internationally acclaimed book would not have seen the light of day in South Africa without the approval of the Film & Publication Board.

[62] The distinction contended for by the respondents do not have any legitimate purpose or a rational relationship to the purpose advanced to validate it. In my view it infringes the right to equal protection and benefit of the law under the constitution. It can hardly be said that the distinction is justified and reasonable on account of its unconstitutionality as it manifestly limits the right to freedom of expression.

CONSTITUTIONALITY OF SECTION 24A(2)(A) OF THE ACT

[63] At the hearing of this application, the constitutionality of this section was no longer an issue. The respondents conceded that reference to section 16(1) in section 24A(2)(a) is a patent error in that the section ought to refer to section 16(2). In my view this concession appears to have been correctly made and thus if the mistake is left uncorrected it would render the section incoherent.

[64] In the circumstances I am satisfied that the applicants are entitled to the relief sought.

I therefore make an order in the following terms:

1. It is declared that:
    1.1 Section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, is inconsistent with the Constitution and invalid.

    1.2 In order to remedy the defect, section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, is to be read as though the word “contains” is deleted and replaced with the words “advocates or promotes”.

2. It is declared that:

    2.1 Section 16(1), section 16(2) and section 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, are inconsistent with the Constitution and invalid to the extent

that they exclude magazines from the protection afforded to newspapers.

2.2 In order to remedy the defect, sections 16(1), 16(2) and 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, are to be read as though the words “or magazine” appear after the word “newspaper” in each case.

3. It is declared that:

3.1 Section 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, is inconsistent with the Constitution and invalid to the extent that it applies to publications other than those referred to in section 16(2) of the Act.

3.2 In order to remedy the defect, section 24A(2) of the Films and Publications Act 65 of 1996 is to be read as though:

3.2.1 The words “referred to in section 16 (1) of this Act” in section 24A(2) have been deleted; and

3.2.2 The phrase “provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act“ appears in section 24A(2)(a) between the words “Board” and the semi-colon.

4. The orders in paragraphs 1,2 and 3 above are hereby referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

5. The first and second respondents are directed to pay the costs of the applicants jointly and severally, such costs to include the costs of two counsel.

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R MATHOPO J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Advocate G Marcus Sc with Advocate S Budlender
Instructed by	:	Cliffe Dekker Hofmeyr Inc.
For the Respondent	:	Advocate I.A.M. Semenya Sc with Advocate N. Manaka
Instructed by	:	The State Attorney
Date of hearing	:	05 May 2011
Date of Judgment	:	26 October 2011