

**SOUTH AFRICAN MEDIA LAW UPDATE**  
**RECENT DEVELOPMENTS IN SOUTH AFRICAN MEDIA LAW**

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**[225] ‘Censorship’ — child pornography and the constitutional limitation of the rights to privacy, freedom of expression and equality**

The decision of the South African Constitutional Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*<sup>2</sup> is of great importance in the sphere of media law. The Constitutional Court first addressed the sensitive, contentious and topical issue of child pornography and submitted the issue to careful reading and interpretation. However, of greater importance to media law in particular was the second part of the Court’s judgment — its analysis of the rights to equality, privacy and freedom within the context of child pornography. The Constitutional Court was called upon to adjudicate on the question whether legislation prohibiting possession of such pornographic material (pornography depicting children) did not constitute an unjustified limitation of constitutional rights to equality, privacy and most importantly, freedom of expression. Through the Court’s extensive analysis of the question valuable guidelines were laid down both in general and for researchers and documentary film producers in particular.

***The notion of children’s rights as backdrop to the decision***

Although the Court did not deal with children’s rights in general,<sup>3</sup> it is none the less necessary, by way of introduction and as a backdrop to the decision, to refer to [226] children’s rights in brief (in so far as these rights are relevant to child pornography). The very notion of children’s rights is not without problems, so much so that it has

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<sup>2</sup> (2003) 12 BCLR 1333 (CC).

<sup>3</sup> The Constitutional Court mentioned that it had been argued that s 28(2) of the Constitution, which provides that a child’s best interests ‘are of paramount importance in every matter concerning the child’, was relevant to the enquiry. However, in light of the view the Court took of the matter, it was not necessary to decide on this: *ibid* [54]. The Court did refer to the view expressed in the High Court judgment that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution ‘trumped’ other provisions of the Bill of Rights. However, the Court did not agree since such a view would be alien to the approach adopted by the Constitutional Court that constitutional rights were mutually interrelated and interdependent and formed a single constitutional value system. The Constitutional Court had held that section 28(2), like the other rights enshrined in the Bill of Rights, was subject to limitations that are reasonable and justifiable in compliance with section 36:

even been observed that it (the notion) questions basic and traditional beliefs of society. The reason for this is that the idea of children's rights runs into the traditional paternalistic approach towards children — an approach which views children as dependent, vulnerable, existing and functioning within a family and the apparatus of the state (such as schools).<sup>4</sup> Children's rights, on the other hand, require a radical rethink about who a 'child' is and whether a child is able to be a bearer of rights. Traditionally, the ability to be the bearer of rights is linked to the competence/capacity of an individual to exercise a choice over the exercise of a right. Hence a difficulty constructing children's rights, since the majority of children lack the required capacity to make such choices.<sup>5</sup> This difficulty, notwithstanding, 'the language of rights' performs an important function for children since it acknowledges that there are certain needs 'which should be provided for children because they are recognised as human beings who assert their claims or desires independently of others'.<sup>6</sup>

One of the categories of rights children may claim, are rights of protection.<sup>7</sup> This category of rights is based on the assumption that children are not in a position to care for themselves and are 'dependent on the protection and care of adults'.<sup>8</sup> (One may add that at first blush this assumption underscores the paternalistic approach to children. However, it also illustrates the problems inherent in the notion of children's rights, particularly as to when a child is a child. However, it may also be argued that these problems are generally common to all rights in which positive action from the state is required — in short, whenever socio-economic rights are at issue.) Protective rights 'entail rights to freedom from abuse, inadequate care or neglect, and are mainly concerned with protection from negative behaviours'.<sup>9</sup> It is generally the duty of parents to fulfil these responsibilities,<sup>10</sup> but there are obviously instances when parents are replaced by other decision-makers. Sonia Human quotes Michael Wald,<sup>11</sup> for example, who claims that the state should actively protect children from harm by

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*Sonderup v Tondelli* (2001) 1 SA 1171 (CC), (2002) 2 BCLR 152 (CC) [27]–[30].

<sup>4</sup> Sonia Human, 'Children's Rights: A General Overview' in *Butterworths Bill of Rights Compendium* (1998; as updated by Issue 14, 2004) 3EA–1, 3.

<sup>5</sup> *Ibid* 3EA–7.

<sup>6</sup> *Ibid* 3EA–8.

<sup>7</sup> *Ibid* 3EA–11, referring to Freeman MDA, *The Rights and Wrongs of Children* (1983) 43–5.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* 3EA–17, quoting 'Children's Rights: A Framework for Analysis' (1979) 25 *University of California Davis Law Review* 261–5.

adults. However, he adds that these claims of children can appropriately be viewed as protections, rather than rights.<sup>12</sup>

The duty of the state to protect children (against both physical and psychological harm by adults) is acknowledged internationally as well — through the United Nations *Convention on the Rights of the Child* 1989.<sup>13</sup> In fact, the state is compelled in certain instances, to take all appropriate steps to protect children against:

... all forms of sexual exploitation and sexual abuse. For these purposes State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: ... (c) The exploitative use of children in pornographic performances and materials.<sup>14</sup>

[227] The rights of children are recognised in the Bill of Rights of the *Constitution of the Republic of South Africa 1996*, in particular the right to be protected against maltreatment, abuse and degradation.<sup>15</sup> Although there is no specific reference to sexual abuse and/or degradation, one would not be too way off the mark in concluding that sexual abuse and/or degradation form part and parcel of the kind of abuse against which a child must be protected. One form of such sexual abuse and/or degradation against which a child needs to be protected, is child pornography.

### ***Facts and issues before the Court***

The applicant, a film producer, appeared in the Randburg Regional Court, where he was charged under s 27(1) of the *Films and Publications Act* with the possession and importation of child pornography. He raised objections about the constitutional validity of certain of the provisions of the Act on which the charges were based. He argued that the provisions of s 27(1), read with the definition of child pornography in s 1 of the Act, constituted a limitation of the constitutional rights to equality,<sup>16</sup>

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<sup>12</sup> Ibid 263.

<sup>13</sup> The Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990. South Africa is a signatory to this Convention.

<sup>14</sup> Article 34 of the Convention.

<sup>15</sup> Section 28(1)(d).

<sup>16</sup> Section 9 of the Constitution. The section reads:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.  
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons,

freedom of expression,<sup>17</sup> and privacy.<sup>18</sup> The applicant averred further that the limitation was not justifiable as the relevant provisions were not only overbroad, but were vague as well.

Since the Regional Court has no jurisdiction to adjudicate matters dealing with the constitutional validity of legislation, the trial was adjourned to enable him to approach the Witwatersrand High Court for a ruling on the impugned provisions. However, the High Court dismissed the applicant's challenge.<sup>19</sup> He thereupon sought leave from the Constitutional Court to appeal direct to it against the decision of the High Court. The application was opposed by the respondents, who also opposed the appeal on the merits.

### ***The decision by the Constitutional Court***

The Constitutional Court held that the objections to the applicant's leave to appeal were not well founded. The issues raised, particularly in relation to the [228] rights to privacy and freedom of expression, were complex and the prospects of success either way could not fairly be said to be self-evident. The test was whether it was in the interests of justice for the appeal to be brought to the Constitutional Court.<sup>20</sup> The Court held (relying on its decision in *Islamic Unity Convention v Independent Broadcasting Authority and Others*<sup>21</sup>) that for such a determination, the question was whether the grounds of appeal advanced an important constitutional issue on which a decision by the Court was desirable. In the Court's view, the determination of the

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or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>17</sup> Section 16(1). The subsection reads: 'Everyone has the right to freedom of expression, which includes — (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.'

<sup>18</sup> Section 14 of the Constitution. The section reads: 'Everyone has the right to privacy, which includes the right not to have — (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed'.

<sup>19</sup> *De Reuck* (2003) 3 SA 389 (W); 2002 12 BCLR 1285 (W).

<sup>20</sup> Section 167(6)(b) of the Constitution.

<sup>21</sup> (2002) 4 SA 294 (CC), 2003 (2) BCLR 433 (CC) [15]–[16]. This decision was discussed in (2003) 8(3) *MALR* 237, 242–5.

constitutionality of the child pornography provisions in s 27(1) was such a matter.<sup>22</sup> Moreover, the legal questions involved were all constitutional issues and there was therefore a public interest in their early resolution.

In order to provide the necessary context to the issues to be decided, the Court proceeded to give a brief summary of the legislative scheme. The pre-constitutional (before 1994) *Indecent or Obscene Photographic Matter Act 37 of 1967* had been repealed by the *Films and Publications Act 65 of 1996* (the Act). The Act created a new comprehensive regulatory framework for films and publications.<sup>23</sup> Criteria for the classification of films and publications are contained in the schedules to the Act.<sup>24</sup> The Court indicated that for purposes of the decision, only the 'XX classification for publications and films' was relevant.<sup>25</sup> A film or publication will be classified XX if it satisfies either the criteria relating to sexually explicit or extremely violent materials, or those relating to promotion of religious hatred (not relevant to the case under discussion).<sup>26</sup> However, any *bona fide* scientific, documentary or literary publications are exempt from being classified XX. Artistic publications are also exempt unless they contain a visual presentation of child pornography. *Bona fide* scientific, documentary or dramatic films are exempt as well, as are artistic films, unless they

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<sup>22</sup> *De Reuck* (2003) 12 BCLR 1333 (CC) [3].

<sup>23</sup> *Ibid* [7]. The Act provides for the establishment of a Film and Publication Board (s 3), which is responsible for the classification of both films (ch 3) and publications (ch 4). No film may be distributed or exhibited in public unless it has been classified by the Board (s 26(1)(a)). The classification of publications is, however, not mandatory, but if a complaint is received concerning a particular, hitherto unclassified publication, the Board is required to make a decision whether or not it should be classified (s 17(1)).

<sup>24</sup> *De Reuck*, *ibid* [8]. A publication must be classified XX, X18, R18, or F18 if it satisfies the criteria of the schedules respectively governing those classifications (s 17(1) read with schs 1–5 and 10). Similarly, a film must be classified XX, X18 or R18 if it falls within the appropriate schedules (s 18(4) read with schs 6–8 and 10). If a publication does not fall within any of the relevant schedules, the Board must refuse to classify it, and if a film falls outside all the relevant schedules, the Board must issue a classification to that effect (ss 17 (heading) and s 18(4)(b)(i)).

<sup>25</sup> *Ibid*.

<sup>26</sup> The criteria for an XX classification in respect of a sexually explicit or extremely violent publication are set out in Schedule 1. The Schedule reads as follows:

XX Classification for publications. A publication shall be classified as XX if, judged within context — (1) it contains a visual presentation, simulated or real of — (a) child pornography; (b) explicit violent sexual conduct; (c) bestiality; (d) explicit sexual conduct which degrades a person and which constitutes incitement to cause harm; or (e) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm; (2) it or any independent part thereof, describes predominantly and explicitly the acts defined in clause (1)(a). ...

Schedule 5 provides for 'art and science exemption for publications'. It reads:

The XX or X18 classification shall not be applied in respect of a *bona fide* scientific, documentary, literary or, except in the case of Schedule 1(1)(a) [child pornography], an artistic publication, or any part of a publication which, judged within context, is of such a nature.

contain a scene or scenes of child pornography.<sup>27</sup> Section 25(a) [229] makes it an offence to distribute a publication that has been classified XX, while s 26 likewise prohibits the exhibition and the broadcasting of a film that has been so classified.<sup>28</sup>

Section 27 of the Act criminalizes the possession of a publication which contains the visual presentation of child pornography and the possession and distribution of a film which contains a Schedule or Schedules of child pornography. Section 27(1) provides:<sup>29</sup>

- (1) A person shall be guilty of an offence if he or she knowingly —
  - (a) creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or
  - (b) creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography.
- (2) A person shall not be convicted of a contravention of subsection (1), unless the State proves that the Board has not given a decision which is to the effect that the publication or film referred to in that subsection does not contain a representation or a scene or scenes referred to in subsection (1).
- (3) No prosecution shall be instituted in respect of a contravention of subsection (1), and no search warrant shall be issued in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in respect of a publication or film which may be involved in such a contravention, without the written authority of the attorney-general concerned.

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<sup>27</sup> *De Reuck* (2003) 12 BCLR 1333 (CC) [10], and Schedule 9 of the *Act* with reference to films.

<sup>28</sup> Since the classification of publications is not mandatory, section 28(1) creates a parallel offence of 'knowingly' distributing a publication 'which contains a visual presentation or a description referred to in Schedule 1, read with Schedule 5'. Similarly, section 26(4)(a) makes it an offence to broadcast knowingly 'a film which has not been classified but which falls within Schedule 6 read with Schedule 9': *ibid* [11].

<sup>29</sup> *Ibid* [13]. Subsection 1 was amended in 1999 following the report of a task team that was appointed to recommend measures to counter the spread of child pornography, particularly on the internet.

It must be noted that none of the scheduled grounds that exempt a publication from the XX classification are available as a defence if a person is charged under s 27(1)(a) in respect of a publication which contains a visual presentation of child pornography. The same position obtains where a person is charged under s 27(1)(b) in respect of a film which contains a scene or scenes of child pornography.<sup>30</sup>

This section must be read with the definition of child pornography contained in the *Act*. Section 1 reads as follows:

‘Child pornography’ includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children.

[230] The definition of child pornography provided by s 1 obviously raises the question as to precisely what child pornography is. Hence the Court’s observation that the interpretation of child pornography as employed in relation to publications and films in s 27(1)(a) and (b) respectively, was the central issue in the decision.<sup>31</sup> The Court held that in order to arrive at a proper meaning, a number of issues relating to the definition had to be determined. They were: (a) the effect of ‘includes’ (the definition states that child pornography ‘includes any image ...’ and then proceeds to list a variety of different images); (b) the primary meaning of child pornography; (c) the meaning of ‘person’ (in the context of child pornography); (d) the meaning and effect of the terms ‘sexual exploitation’ and ‘degradation’; and (e) the relevance of context.<sup>32</sup>

As to the effect of ‘includes’, the question was whether the word ‘includes’ in the

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<sup>30</sup> *Ibid* [14]. The *Act* also provides for exemptions which may be granted by the executive committee of the Board in respect of certain offences. Section 22(1), for example, provides:

The executive committee may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from sections 25, 27 and 28 if it has good reason to believe that bona fide purposes will be served by such an exemption.

Sections 25, 27 and 28 include all the offences relating to publications, save for section 29, which contains provisions concerning hate speech.

<sup>31</sup> *De Reuck*, *Ibid* [16].

<sup>32</sup> *Ibid* [16].

context of the Act had the effect that the list of images in the definition was exhaustive of what constitutes child pornography for purposes of the Act. The Court said that for the singular reason that 'pornography is notoriously difficult to define and child pornography no less so'<sup>33</sup> (apart from any other reasons) it was 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: '[R]ather, the purpose of the list would seem to be to give the word a more precise meaning.'<sup>34</sup> The Court held further that although the legislature could have avoided ambiguity by stating that child pornography 'means' only the images listed, the use of 'includes' in the definition was consistent with an intention that the list should 'refine, and thus be coloured by, the primary meaning of child pornography'.<sup>35</sup> The Court held further, with reference to the primary meaning of 'child pornography', that the meaning of 'pornography' contained in *The New Shorter Oxford English Dictionary* was both a useful guide and a fair representation of the primary meaning of 'pornography'.<sup>36</sup> The definition reads:

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.

'Child pornography' bears a corresponding primary meaning where the sexual activity described or exhibited involved children. The Court, however, added that the s 1 definition was in several respects narrower, but nevertheless more precise, than the primary meaning of child pornography since (a) it referred to 'any image', thereby excluding written descriptions; and (b) it listed various forms of conduct that may not be depicted ('prohibited acts'). It therefore followed that the prohibited acts were a closed list of what constituted child pornography for purposes of the Act.<sup>37</sup>

The Court next examined the meaning of 'person' and held that the image, which may be 'real or simulated, however created', must depict a 'person'. However, under 'person' both imaginary as well as real persons were included ('an effective interpretation of the Act requires that "person" includes at least the imaginary persons

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<sup>33</sup> Ibid [19].

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid [20].

that appear in such pseudophotographs').<sup>38</sup>

The Court held that an essential element of the definition of child pornography was the notion of stimulation of erotic rather than aesthetic feeling. Any image that predominantly stimulated [231] aesthetic feeling was not caught by the definition.<sup>39</sup> To determine whether an image constituted child pornography, what had to be examined was whether the image viewed objectively and as a whole had as its predominant purpose the stimulation of erotic feeling in its target audience.<sup>40</sup> As regards the manner of determining whether the predominant purpose of an image is to stimulate erotic rather than aesthetic feelings in the target audience, the Court held that evidence of the intention of the author was irrelevant to this determination. On the contrary, according to the Court:

The purpose must be determined from the perspective of the reasonable viewer. The image must therefore, be seen by the reasonable viewer as having as its predominant purpose the stimulation of erotic rather than aesthetic feelings in a target audience. It must be emphasised that the image need not, and in most instances will not, stimulate erotic feelings in the reasonable viewer.<sup>41</sup>

This entailed that the context of the publication or film in which the image occurred as a visual representation or scene must be considered.<sup>42</sup> However, the image would not constitute child pornography unless one or more of the four prohibited acts was explicitly depicted for the purposes of stimulating sexual arousal in the target audience. The prohibited acts were: child engaged in sexual conduct, a child engaged in a display of genitals, a child participating in, or a child assisting another person to engage in, sexual conduct.<sup>43</sup>

Having dealt with the question of the meaning of child pornography, the Court then

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<sup>37</sup> Ibid [21].

<sup>38</sup> Ibid [22]. The Court added in this regard that the terms 'film', 'publication' and 'visual presentation' which are elements of the child pornography offences in section 27(1), are defined as referring to a wide range of media, including paintings, drawings and the internet. Many of these media lend themselves to work from the imagination.

<sup>39</sup> Ibid [32].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid [34], [38].

<sup>43</sup> Ibid [38].

had to turn in the second part of the decision to the applicant's challenges to the constitutional validity of the child pornography legislation.

The applicant's equality challenge was presented as an averment of irrational differentiation, alternatively unfair discrimination, against mere possessors of child pornography. His main argument was that mere possessors of a publication charged under s 27(1)(a) were treated more harshly than distributors of an as yet unclassified publication charged under s 28(1).<sup>44</sup> Except in relation to art, the latter group may raise the Sch 5 defences even if the publication is found to be child pornography. These defences were not available under s 27(1)(a) to mere possessors of the same publication. Similarly, mere possessors of a film charged under s 27(1)(b) were treated more harshly than broadcasters of an as yet unclassified film charged under s 26(4)(a), because the Sch 9 defences (except art) were available to the latter but not the former.<sup>45</sup>

[232] The Court held that the difficulty with this submission was that it ignored the overall purpose of s 28(1). Schedule 1 contained the list of materials, the distribution of which was targeted by s 28(1). In addition to child pornography, it contained several other classes of sexually explicit or violent material. Its scope was therefore wider than the material targeted by s 27, although it was 'narrowed somewhat' by the exemptions in Sch 5:

[T]hus section 28(1) should be characterised as a measure which bans for distribution a range of publications that is broader, in most respects, than those banned for possession by section 27(1)(a).

The Court held further that the differentiation was connected with the 'legitimate government objective of combating the harm caused by pornographic and violent

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<sup>44</sup> Section 28(1) reads: 'Any person who knowingly distributes a publication which contains a visual presentation or description referred to in Schedule 1, read with Schedule 5, shall be guilty of an offence.'

<sup>45</sup> Ibid [39]. The relevant part of section 26(4)(a) reads: 'Any person ... who knowingly broadcasts a film which has not been classified but which falls within Schedule 6 read with Schedule 9 ... shall be guilty of an offence'. The relevant part of Schedule 6 reads: 'A film shall be classified as XX if, judged in context, it contains a Schedule or Schedules, simulated or real, of any of the following: child pornography. ...' Schedule 9 reads: 'The XX or X18 classification shall not be applicable to a *bona fide* scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any

materials by targeting those who distribute such materials'.<sup>46</sup> Section 9(1) of the Constitution is satisfied if that connection is rational.<sup>47</sup> The Court held further:

The differentiation thus scarcely manifests arbitrariness or a naked preference for distributors. Moreover, a publication which contains child pornography must have as its purpose, the stimulation of sexual arousal among its target viewers through explicit visual depiction of any of the four prohibited acts. It is most unlikely, then, to be of a 'bona fide scientific, documentary [or] literary' nature so as to qualify for exemption under Schedule 5.<sup>48</sup>

The Court also agreed with the respondents' submission that in most cases someone who knowingly distributed a publication also knowingly possessed it, and that he or she may therefore be charged under s 27(1)(a) instead of s 28(1).<sup>49</sup> The Court concluded that the impact on mere possessors (an unlisted ground in s 9(3) of the Constitution), as against distributors who do not possess, had not been shown to be unfair: '[W]hen mere possessors and broadcasters of films are compared, it appears that broadcasters always knowingly possess and hence are liable under both section 27(1)(b) and section 26(4)(a).'<sup>50</sup>

Accordingly the applicant's challenge based on the right to equality had to fail.

The Court then proceeded to examine the applicant's challenge that s 27(1) infringed both the right to freedom of expression (s 16(1)) and the right to privacy (s 14). The respondents disputed that child pornography, as defined by the Act, was expression. They relied on the approach of the United States Supreme Court where certain categories of expression constituted unprotected forms of speech, and argued that such materials (of a pornographic nature) did not serve any of the values traditionally considered as underlying freedom of expression — truth-seeking, free political

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part of a film which, judged within context, is of such a nature'.

<sup>46</sup> Ibid [40].

<sup>47</sup> Ibid. '[t]he only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference ...': Ibid at n 47, referring to *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* (1999) 2 SA 1 (CC), (1999) 2 BCLR 139 (CC) [1b].

<sup>48</sup> Ibid [41].

<sup>49</sup> Ibid [42]. In a footnote (n 48), the Court observed that the most effective way of combating child pornography is to target possession.

<sup>50</sup> Ibid.

activity and self-fulfilment.<sup>51</sup> The Court did not agree. The Court held that in that respect, the South African Constitution differed from that of the United States of America. It held further:

Limitations of rights are dealt with under section 36 of the Constitution and not at the threshold level. Section 16(1) expressly protects the freedom of expression in a manner that does not warrant a narrow reading. Any restriction upon artistic creativity must satisfy the rigours of the limitation analysis.<sup>52</sup>

[233] The Court concluded that the criminalisation of the creation, production, importation, distribution and possession of the material that fell within the definition of child pornography, limited the right to freedom of expression.<sup>53</sup>

As regards the right to privacy the applicant claimed the protection of this right specifically for the possession and importation of works of art created from the imagination and artistic films in which the actors are over 18 years old. In dealing with this line of argument, the Court referred to its decision in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*.<sup>54</sup> In that case the Constitutional Court had held that the crime of possessing 'indecent or obscene photographic matter' (a much wider range of materials than those at issue in the present case) violated the right to privacy under the interim Constitution. The majority of the court, however, agreed that a law prohibiting possession of a narrower category of erotic materials would limit the right to privacy, but could be upheld if it satisfied the requirements of the limitation clause. The Court held that, based on the Case decision the impugned provisions did indeed infringe the right to privacy, but their constitutionality would depend on whether the requirements of the limitation clause in s 36 of the Constitution had been met.<sup>55</sup>

Having held that s 27(1) did indeed infringe the rights to freedom of expression and privacy, the Constitutional Court had to consider, finally, whether the limitation was

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<sup>51</sup> Ibid [48]. In this regard the Court referred to *Ashcroft v The Free Speech Coalition* 122 US 1389 (2002) n 54.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid [50].

<sup>54</sup> 1996 (5) BCLR 609 (1996 (3) SA 617) (CC).

<sup>55</sup> *De Reuck* (2003) 12 BCLR 1333 (CC) [52].

justifiable in terms of s 36(1) of the Constitution.<sup>56</sup> ‘To do so, the nature of the right and the extent of the limitation, on the one hand, and the purpose of the limitation on the other need to be considered.’<sup>57</sup>

With reference to the nature and extent of the limitation to the right to freedom of expression the Court held that freedom of expression is an important right in the South African Bill of Rights since it:

... lies at the heart of a 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 the 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 matters ...<sup>58</sup>

[234] However, the Court further held that seen from that perspective, the limitation of the right caused by s 27(1) did not impinge on the ‘core values’ of the right. The expression which was restricted was expression of little value found on the periphery of the right. Moreover, it was a form of expression that was not protected as part of the freedom of expression in many democratic societies.<sup>59</sup>

As to the purpose of the legislation, the Court held that in order to determine the importance of s 27(1), it was necessary to examine the Act’s objective as a whole. The Court said:

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<sup>56</sup> This limitation clause reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The Court held that section 27(1) constituted a law of general application. As regards the applicant’s complaint concerning clarity — that the definition of ‘child pornography’ in section 1 was too vague to satisfy the requirement that ‘rules be stated in a clear and accessible manner’ — the Court was satisfied that the definition was sufficiently clear: *De Reuck*, *ibid* [56].

<sup>57</sup> *Ibid* [58].

<sup>58</sup> *Ibid* [59], quoting *South African National Defence Union v Minister of Defence* (1999) 4 SA 469 (CC), 1999 6 BCLR (CC) [7].

<sup>59</sup> *De Reuck*, *ibid*.

The purpose of the legislation is to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.<sup>60</sup>

The Court said further that '[children's] dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth'.<sup>61</sup> For this very reason, the chief purpose of the statutory prohibitions against child pornography was to protect the dignity, humanity and integrity of children.<sup>62</sup> The Court concluded that the State had established three legitimate objectives which the limitation aimed to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children.<sup>63</sup>

The question whether there are less restrictive means available to the state to achieve the identified purposes, forms part of the limitation analysis. The Court addressed this question by saying that it was persuaded that the 'relatively narrow infringement of expression' was outweighed by the important legislative purposes performed by s 27, together with the legislative safeguards provided (for example, in s 22) as well as the difficulty of legislating in the particular area at all.<sup>64</sup>

The applicant, however, pointed to two categories of overbreadth which, he argued, went beyond the legitimate purposes of the state in limiting the right to freedom of expression. The first related to the documentary film-maker who possesses child pornography for the purposes of making a documentary film on child pornography; and the second related to lawyers and others who are in possession of child pornography in order to defend a person charged under s 27(1).<sup>65</sup> These examples of

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<sup>60</sup> Ibid [61].

<sup>61</sup> Ibid [62].

<sup>62</sup> Ibid.

<sup>63</sup> Ibid [67].

<sup>64</sup> Ibid [70].

<sup>65</sup> As to the second category (persons possessing child pornography for professional purposes) the

overbreadth, the applicant argued, rendered s 27(1) an unjustifiable limitation of freedom of expression.

The Court held that in determining whether s 27(1) is overbroad, the exemption procedure set out in s 22 of the Act was relevant. Section 22 permits a person who wishes to possess or otherwise deal with child pornography in breach of s 27 to apply to do so to an executive committee of the Board. Thus 27 does not impose a blanket prohibition, but permits exemptions if an applicant is able to persuade the Board that 'it has good reason to believe that *bona fide* purposes will be served by such an exemption'.<sup>66</sup> However, the applicant claimed that researchers and documentary film producers who possessed child pornography as 'raw material' for their academic or documentary project should [235] be able to raise a defence of 'legitimate purpose' if charged with possession or importation of the material concerned. The Court countered this argument by stating that 'a blanket defence' for any film-maker or researcher who reasonably needed to possess or import child pornography is not constitutionally required and that s 22 provides a qualified defence for them.<sup>67</sup> (The s 22 procedure does permit the conducting of research into child pornography provided good cause was shown.) As to the defence of 'legitimate purpose' in the context of whether less restrictive means could not have been used, to achieve the purpose the Court held that the main problem with the suggestion put forward was that it was unlikely to be an effective less restrictive means. There is a distinct possibility that such a defence could be abused, notwithstanding the fact that courts will require evidence from the accused and scrutinize its credibility. Once a defence of 'legitimate purpose' had been raised, the prosecution would have to disprove it beyond a reasonable doubt. The result of a 'legitimate purpose' defence would then be that people 'may exploit the defence as a cover'.<sup>68</sup> Such persons posed a reasonable risk of harm. The assessment of risk does not attach to the particular person who was charged, but considers the average probability that, amongst all the people who possessed child pornography, some would use it to harm. In contrast, the proposed

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Court held that in the unlikely event of a finding that section 27(1) is inconsistent with the Constitution because it does not provide a defence to them, it would not result in the section being set aside. 'It would be possible and less intrusive of the legislative function to address the inconsistency through notional severance or reading in': *ibid* [87].

<sup>66</sup> *Ibid* [72].

<sup>67</sup> *Ibid* [75].

<sup>68</sup> *Ibid* [82].

'legitimate purpose' defence seeks to undo this form of risk assessment by requiring an individualised risk to be proved on the part of a researcher, a film-maker or someone pursuing a similar project.<sup>69</sup> The Court used an analogy drawn from other possession offences to illustrate how the 'legitimate purpose' defence would undermine the effectiveness of the general prohibition and suggested that one '[c]onsider, for example, a "legitimate purpose" defence which allowed amateur chemists to possess dangerous drugs'.<sup>70</sup> The Court concluded that the less restrictive means suggested by the applicant were not sufficiently effective to warrant their adoption. It was reasonable and justifiable for the rights of researchers and film-makers in relation to possession and importation of child pornography to be limited by s 27(1) of the *Act*, read with s 22.<sup>71</sup>

As to the question whether the limitation of the right to privacy was justifiable the Court recognized that possession and consumption of child pornography often take place in the inner sanctum of the home. However, the identified legislative purposes nevertheless remained of great importance and it should not be overlooked that many of the resultant acts of abuse against children take place in private.<sup>72</sup> In such circumstances, where the reasonable risk of harm to children is likely to materialise in private, intrusion by the law into the 'private domain' is justified. A further justification of the intrusion of the Act into the private sphere was to be found in the reality that because 'child pornography is frequently being imported via the internet and possessed on computers, the ease with which such possessors may become distributors at the touch of a button' exacerbates the risk of harm.<sup>73</sup> For these reasons, the Court found the limitation of the right to privacy was justifiable as well.<sup>74</sup>

The appeal was accordingly dismissed.

#### [236] **Miscellaneous**

##### ***Infringement of a newspaper's trademark***

The *Sunday Times*, an 'institution' in South Africa and a newspaper with a wide

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid [88].

<sup>72</sup> Ibid [90].

<sup>73</sup> Ibid.

readership, reported that it was 'fighting an attempt by Zimbabwe's President Robert Mugabe and Namibia's President Sam Nujoma to hijack its name for propaganda purposes'.<sup>75</sup> The paper has taken legal steps to 'fight plans' by the two to launch a regional newspaper called the '*New Sunday Times*', widely believed to be direct challenge to the South African newspaper. Attorneys acting for the South African newspaper have written to the publishers warning them that any use of the name '*New Sunday Times*' would constitute an infringement of South African paper's rights to the trademark.

### ***Hate speech***

In terms of s 16(1) of the Constitution, everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. However, this right does not extend to (a) propaganda for war, (b) incitement of imminent violence or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Newspaper reports<sup>76</sup> have surfaced about a website called 'Men Against Moffies' ('Moffies' is a derogatory Afrikaans term for homosexuals). Web surfers are asked to vote whether to surgically or chemically castrate such people. According to a radio report, the Gay and Lesbian Alliance (GLA) lodged a complaint with the Human Rights Commission on the ground that the statements on the website constitute 'hate speech' in terms of s 16(2). It was also reported that the website was suspended because it was of an obscene nature.

### ***First profit to only 'free-to-air' television broadcaster***

It was also reported<sup>77</sup> that South Africa's only 'free-to-air' television broadcaster, 'e-tv', has become profitable for the first time since it was established six years ago. Hosken Consolidated Investments (HCI), which owns a 66 per cent stake in the station, reported that 'e-tv' had contributed R21 million to its bottom line in the year to March 2004. The station's performance could be related to increased advertising. However, the group said that the station still faced the challenge of increasing its

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<sup>74</sup> Ibid [91].

<sup>75</sup> *Sunday Times* (South Africa) 27 June 2004.

<sup>76</sup> *Pretoria News Weekend* (South Africa) 26 June 2004, 3.

market share and revenue while maintaining an efficient cost structure.

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<sup>77</sup> *Business Report* (South Africa) 29 June 2004, 1.