

**IN THE HEARING BEFORE THE ENFORCEMENT COMMITTEE OF
THE FILM AND PUBLICATION BOARD**

In the matter between:

Film and Publication Board

Applicant

and

Fantasia

Respondent

Case No:001/2023/RD/FS

Date of Hearing: 17 January 2024

Film and Publication Board

Applicant

and

Joyland

Respondent

Case No: 002/2023/RD/KZN

Date of Hearing: 17 January 2024

The Enforcement Committee

Judge Thokozile Masipa - Chairperson

F Beukman - Member

N Maharaj - Member

G Mathebula - Member

NS Siphuma - Member

The Office of the Enforcement Committee

Kopano Mpete - Administrator/Coordinator

Legal Representation

The parties were not legally represented.

For the Applicant:

Mr. Andrew Sebapu in his capacity as the Acting Manager: Regulatory Compliance and Enforcement

For the Respondents:

Mr. S Guerreiro in his capacity as Director of both Respondents

DECISION

Judge Thokozile Masipa

INTRODUCTION

[1] There are two matters, which for convenience were heard together in one hearing as they involved the same issue. For the same reason, only one judgment has been prepared and issued for both matters.

THE PARTIES

[2] In both matters, the Applicant is the Film and Publication Board (fpb) established in terms of the Films and Publications Act No 65 of 1996 as amended ("the Act").

[3] In the first matter, the Respondent is cited as **FANTASIA**, and described as a business entity with its business address at Shop U 29 Mimosa Mall, 131 Kelineer Street, Brandwag, Bloemfontein, Free State Province.

[4] In the second matter, the Respondent is cited as **JOYLAND**, and described in the papers as an entertainment company with business premises situated at shop 26 Liberty Midlands Mall, 50 Sanctuary Road, Woodlands, Pietermaritzburg, KwaZulu-Natal.

[5] The two matters were referred to the Enforcement Committee for adjudication by the Executive of Regulatory Development and Enforcement in terms of Section 6B(1)(b)(d)(i) of the Act.

THE COMPLAINT

[6] The allegation in each case is that the Respondent failed to comply with section 18(1)(a) read with the provisions of section 24A(1) of the Act, in that it exhibited and/or distributed games without the authorization of the fpb as required by the aforementioned provisions.

RELIEF SOUGHT

[7] The Applicant sought the following relief against each of the Respondents:

7.1 That the Enforcement Committee, make a finding that the Respondent exhibited and/or distributed games without being registered with the Board in contravention of the Act;

7.2 That the Enforcement Committee impose a fine of R150 000 on the Respondent for the contravention.

FACTUAL BACKGROUND

Fantasia

[8] Fpb described Fantasia as a store in the business of entertainment, movies, and music.

[9] It stated: "According to the mall website, Fantasia is categorized as a store in the business of entertainment, movies and music."

[10] Circumstances which led to the referral of this matter to the Enforcement Committee for adjudication, are set out hereunder.

[11] According to the fpb, on 24 February 2023, and again on 8 August 2023, its Compliance Officers conducted compliance inspections on the premises of Fantasia and discovered that the entity was contravening the Act.

[12] On 24 February 2023, Ms. Nozipho Dladla, a Compliance Officer stationed at the Durban Office of the Board, conducted a routine compliance inspection on the premises of Fantasia.

[13] During the course of the inspection, the Compliance Officer sought to determine whether Fantasia was compliant with the Act. The duty manager for the day was unable to produce the certificate of registration with the fpb. She was then informed that exhibiting and/or distributing games without first being registered with the Board

is a contravention of the Act and that, on a finding of non-compliance, Fantasia would be liable for a fine of up to R150 000, among others.

[14] In addition, a non-compliance notice for contravening the Act was issued and served on the manager on duty.

[15] In terms of the notice, Fantasia was given 21 days to correct the non-compliance by submitting registration documents to the Board.

[16] On 8 August 2023, Mr. Yakeen Singh, a Compliance Officer stationed at the Durban Office of the Board, conducted a follow up investigation at the premises of Fantasia.

[17] On that occasion, Mr. Singh established that Fantasia still could not produce a registration certificate. The manager on duty confirmed that Fantasia was still not registered with the fpb in terms of the Act.

[18] At the time the matter was referred to the Enforcement Committee, for resolution, the Respondent had still not complied with the provisions of section 18(1)(a) of the Act.

Joyland

[19] Similarly, in Joyland, the trigger for the referral was a routine inspection of the premises by a Compliance Officer.

[20] On 8 September 2023, Mr. Thulani Zondi, a Compliance Officer stationed at the Durban Office of the Film and Publication Board, paid a visit to the premises of Joyland.

[21] The purpose of the visit was to conduct a routine compliance inspection on the activities of Joyland.

[22] During the course of the inspection, Mr. Zondi requested Ms. Dallen Scharneck, the manager on duty at the time, to produce a certificate showing that Joyland was registered with the fpb as a distributor or exhibitor of films or games.

[23] Ms. Scharneck failed to produce such a certificate. The Compliance Officer then informed the duty manager that distributing and/or exhibiting games without first being registered with the board is an offence and on conviction, Joyland may be liable for a fine of up to R150 000, among others.

[24] The Compliance Officer then served a notice for contravention of the Act on the duty manager. In terms of the notice Joyland was given 30 days to remedy the non-compliance by submitting registration documents to the fpb.

[25] On 8 November 2023, Mr. Zondi made a follow up inspection on Joyland and found that Joyland had still not complied with the requirement to register with the fpb. The duty manager, at the time, Ms. Candice Pillay, confirmed that Joyland was not registered with the fpb as an exhibitor or distributor of games.

[26] At the time of the hearing, Joyland was still non-compliant with section 18(1)(a) of the Act.

THE HEARING

[27] At the hearing, the fpb was represented by Mr. Andrew Sepabu. The Respondents, both Fantasia and Joyland, were represented by Mr. Guerreiro, the Director.

[28] Necessity demands that we discuss procedural issues first before dealing with the merits.

[29] Since the same procedure was followed in both cases, it shall not be necessary to discuss the details in both cases.

Procedural Fairness

[30] Proper adjudication of a case is more than just analyzing the facts and/or evidence led and then making a finding. It includes the examination of the steps that were taken to bring the Respondent before the adjudicating body. The question always is whether the Respondent was appropriately informed of the charges against him and whether he was afforded an adequate opportunity to make representations. In short, the Respondent must know what case he has to answer, in advance, so that he should be in a position to defend his case properly.

[31] The initial steps, therefore, of bringing someone before an adjudicator, are just as important as the hearing itself. This is so as there can never be justice without procedural fairness.

[32] In the present case, in the Fantasia matter, a *Notice to Appear*, dated and signed on the 28 November 2023, reads as follows:

"You are hereby notified that you must appear personally or with your legal representative before the above mentioned Enforcement Committee on 17 January, 2024 at Holiday Inn Hotel, Rosebank, Johannesburg, 177 Oxford Road, Rosebank, at 10:00am in respect of non-compliance with section 18(1)(a) of the Films and Publications Act, No. 65 of 1996 as amended."

[33] The *Notice to Appear* was signed on behalf of the Applicant on 28 November 2023. On 30 November 2023, it was signed on behalf of the Respondent by Neels, who acknowledged receipt, in his capacity as manager.

[34] In addition, the Notice was emailed to the Registrar of the Enforcement Committee and to Fantasia (Pty) Ltd at two email addresses. The Ref: was Mr. CP Perreira instead of Mr. S Guerreiro. It transpired that the person who was speaking to Mr. Guerreiro on the phone misheard him and got the spelling of the name wrong.

The Purpose of the Notice To Appear

[35] Like a *summons* in a court of law, a *Notice to Appear* plays an important role of initiating litigation. Litigation must be against the right Respondent for the right cause. Hence the importance of citing the parties correctly.

[36] Dictates of fairness and justice demand that the charges must be easy to understand. By issuing the *Notice To Appear*, the Applicant is authoritatively calling on the Respondent to be present at a hearing before an adjudicator, where the parties involved shall be given an opportunity to be heard. The purpose of the *Notice To Appear* is to inform the Respondent of the allegations against him and to afford him adequate opportunity to defend himself should he have a defence.

[37] And the Respondent can only defend himself properly if he understands the charges he is facing, and the relief sought against him. For that reason, the notice must provide as much information as possible while the language used must be simple.

[38] In the present case, the *Notice To Appear* barely explains the substance of the charge. It merely notifies the Respondent to appear personally or with a legal representative before the Enforcement Committee ...

“... in respect of non-compliance with section 18(1)(a) of the Films and Publications Act, 1996 (Act No 65 of 1996) as amended.”

[39] What is missing from the *Notice To Appear* is the basis of the allegation that led to the conclusion that there has been non-compliance with section 18(1)(a) of the Act.

[40] Also missing on the *Notice To Appear*, is the correct name of Mr. Guerriero. Instead of S Guerreira, the Notice refers to PC Perreira. (During the course of the hearing, it was explained that the Applicant made a mistake when taking the name down as communication with Mr. Guerriero was by telephone.

Return of Service

[41] A **RETURN OF SERVICE**, citing Fantasia (Pty) Ltd as the Respondent, but with no case, No reads thus:

“THIS IS TO CERTIFY that on this the 16th day of November 2023 at 10:29 at Fantasia Mimosa Mall, being the Respondent’s place of operation, I displayed the original Notice To Appear, the Applicant’s statement and annexures to the Statement, and explained the nature thereof to the Respondent and handed the Respondent personally a copy thereof.”

[42] The **RETURN OF SERVICE**, signed by Thulani Zondi, on 16 November 2023, was served on Fantasia (Pty) Ltd as the Respondent, per email.

[43] A few concerns with regard to the **RETURN OF SERVICE** need to be addressed. Firstly, it is not clear what the annexures to the Applicant’s Statement are. All we know is that, according to what appears on the face of the document, their nature was explained to the Respondent.

[44] Secondly, it is not clear who is referred to as the Respondent (who was personally handed the documents concerned). An assumption can be made, however, that the Respondent is someone by the name of Angycjolque Cumming, who signed the acknowledgment of **RETURN OF SERVICE** in his/her capacity as supervisor.

[45] Thirdly, service to Fantasia (Pty) Ltd, the Respondent, was effected by way of email. It is not clear whether these were correct email addresses as there was neither an affidavit confirming service nor oral evidence in this regard. In any event, service by email, in this case, cannot be proper service.

[46] I say this because in terms of the Rules, service by email can only be used where there is an agreement between the parties to that effect. Where no such agreement exists between the parties, service of processes per email is not proper service.

[47] It is common cause that in the present case, there was no such agreement. Service of the relevant documents on the Respondents, therefore, was invalid.

The Presence of Mr. Guerreiro

[48] It is so that Mr. Guerreiro was present at the proceedings and made an attempt to defend the Respondents. However, his presence did nothing to allay the concerns of the Enforcement Committee that the procedure followed to bring the Respondents before it was not proper.

[49] On the contrary, it served to confirm that the concerns were valid. Firstly, at the time that the Applicant was presenting its case, Mr Guerreiro had not been provided with the paginated bundles. This made it difficult for him to properly follow the proceedings.

[50] The oversight concerning the bundles only came to the attention of the Enforcement Committee when Mr. Guerreiro was given an opportunity to present his case. It was only then that Mr. Guerreiro, for the first time, had sight of the paginated bundles.

[51] Secondly, during the course of the proceedings, it transpired that Mr Guerreiro's understanding of why exactly he was there, was limited to a "simple matter" of "*complying with the fpb*" and then putting the case to rest. He genuinely had no idea how serious the matter really was.

[52] Just a week before the hearing, on the 10 January 2024, Mr Guerreiro had written a letter to Thulani Zondi, the Compliance Officer, who, incidentally, was later to assist him with information on how to register the Respondents with the fpb. [I pause to state that Mr Guerreiro eventually did make an application to register with the fpb, but the application is still pending as Mr Guerreiro was unable to submit all the documents required at the time].

[53] In part, the letter to Mr Zondi and marked Annexure "B" reads thus:

“My name is Sepriano Guerreiro and I am the director of Fantasia. I hereby address the matter of non-compliance with the fpb. I feel the process of complying and registering could be dealt with a lot better from our side and I would like to inform you that I am one hundred percent for complying and unfortunately there should have been better communication from the employees that received the relevant paperwork (who is no longer working for my Company) but unfortunately never reached me.

The procedure not happening correctly prohibited me from getting information from you to have a better understanding of the fpb and why it is necessary to be on board with you”.

[54] In the next few sentences Mr Guerreiro explained that as he was out of the country for some time, it was not possible for him to get notification of the non-compliance and to address the issue of non-compliance timeously. Then the letter proceeds:

“Not focusing on the negative but on resolving the matter and working hand in hand with the fpb, I respectfully ask you to acknowledge the fact that I have followed the correct procedures and made the relevant payments.

I hereby again apologize and would like to resolve the matter without any negativity and would like to inform you that I am all for complying.”

[55] Having set out mitigating factors, (which are not relevant for the purposes of this decision), Mr Guerreiro again pleads

“If you kindly give me a better understanding as to what exactly it means to be complying with the fpb as I do not want to miss anything and be fully complying as I mentioned.”

[56] In our view, the above is an indication that Mr Guerrerio had no clear understanding of why the two Respondents, which he was representing, were before the Enforcement Committee. In addition, he seemed confused as to the real nature of the non-compliance.

[57] Lending credence to this conclusion is the last but one paragraph of Mr Guerreiro's letter. The paragraph reads:

"Just to inform you that me being a family man understands the rights and wrongs in life and will most definitely not have any form of harm in my business as we focus on kids and people have a great time, so I assure you that we do not show anything harmful in my stores. I have never had a complaint on any aspect for showing harmful content as I simply will not allow it."

[58] The above letter was quoted in detail to demonstrate the importance of ensuring that the *Notice To Appear* has the correct details of the particulars of claim, in a language that can easily be understood.

Without such details, a Respondent is denied an opportunity to properly assess the seriousness of the matter and to prepare his defence accordingly.

[59] In the present case, the initial step in bringing the two Respondents before the Enforcement Committee, was clearly defective in more than one respect. To ignore this would be tantamount to dereliction of duty.

CONCLUSION

[60] Procedural fairness and justice are inextricably linked. This means there can be no justice without procedural fairness.

[61] In view of the facts, in these two matters, the complaint, in each, falls to be dismissed.

The Merits

[62] Having regard to the position that the Enforcement Committee has taken on this matter, it shall not be necessary to deal with the merits.

FINDING

[63] Accordingly,

63.1 the case against Fantasia is dismissed for lack of procedural fairness as detailed above.

63.2 similarly, the case against Joyland is dismissed for lack of procedural fairness.

[64] The Film and Publication Board is free to reinstitute proceedings afresh, after following the correct procedure.

ENFORCEMENT COMMITTEE

Judge Thokozile Masipa - Chairperson

Mr. Francois Beukman - Member

Ms. Nalini Maharaj - Member

Ms. Goitsewang Mathebula - Member

Dr. Nzumbululo Silas Siphuma - Member

Date: 12 February 2024