IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 3589/18

In the matter between:

INDIGENOUS FILM DISTRIBUTION (PTY) LTD	First Applicant
URUCU MEDIA (PTY) LTD	Second Applicant

and

FILM & PUBLICATION APPEAL TRIBUNAL	First Respondent
CHAIRPERSON OF THE FILM & PUBLICATION APPEAL TRIBUNAL N.O.	Second Respondent
FILM & PUBLICATION BOARD	Third Respondent
FILM & PUBLICATION COUNCIL	Fourth Respondent
MAN & BOY FOUNDATION	Fifth Respondent
CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA	Sixth Respondent
SOUTH AFRICAN HEALERS ASSOCIATION	Seventh Respondent
IBUTHOLESISWE CULTURAL DEVELOPMENT	Eighth Respondent
IZINDUNA ZAMAKHOSI	Ninth Respondent
UBUHLE BENGCULE	Tenth Respondent

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

A. INTRODUCTION

1. The Applicants have instituted application proceedings for the review and setting aside of the decision of the First Respondent taken on 13 February 2018 overruling the classification decision of the Film and Publication Board (Third Respondent) and classified the film: **Inxeba: The Wound as X18 SLNVP**. The Second Respondent has been cited in his capacity as the Chairperson and representing the First Respondent.

2. The First Respondent and other Respondents oppose the application. The First Respondent's position is that it was established as a body tasked with duties and powers to consider appeals made to it. As a result, it does not take sides in the litigation but merely places before Court reasons for its decision and the fact that it supports its decision.

3. It is submitted that there is no reason to have the decision of the First Respondent reviewed, declared invalid and set aside.

The First Respondent had the power to entertain the appeal by the Fifth and Sixth Respondents (the "Appellants"). The undisputed facts are that Appellants approached the Third Respondent complaining about the film. The Third Respondent did not reconsider its decision but referred the matter to the First Respondent. The essence thereof is that it refused the application by the Fifth and Sixth Respondents.

4. The facts of the matter are that there was substantial compliance with procedural fairness.

5. The film qualifies for the X18 classification. The requirements of s18 of the Films and Publications Act No. 65 of 1996 ("the Act") were present.

6. In the circumstances, the application should be dismissed.

B. BACKGROUND

7. On 06 July 2017 the Third Respondent classified the film Inxeba: The Wound: 16LS.[1]

8. On or about January / February 2018 the Appellants approached the Third Respondent complaining about the film.

[1] Annexure HK8, p66.

9. On 01 February 2018 the Third Respondent assisted the Appellants to launch an appeal to the First Respondent.[2]

10. On 08 February 2018 the First Applicant was informed of the appeal that was to be heard by the First Respondent.[3] It will be noted that this notice is sent by an employee of the Third Respondent because they also act as the administrative personnel of the First Respondent.

11. On 12 February 2018 the First Applicant responds to the notice.[4]

12. On the same day the First Applicant was informed that its request had been sent to the First Respondent. The First Applicant was also sent documents meant to assist it in dealing with the appeal.[5]

13. On 13 February 2018 the First Applicant was informed that the appeal would go ahead as planned[6].

14. On the same day the First Applicant appeared before the First Respondent seeking a postponement. The record thereof is annexed as annexure HK21.[7]

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[2] Annexure HK16, p107.
[3] Annexure HK17, p113.
[4] Annexure HK18, p114.
[5] Annexure HK19, p116.
[6] Annexure HK20, p124.

15. Thereafter, the First Respondent takes a decision and the First Respondent is informed thereof.[8]

16. On 23 February 2018 the First Respondent hands down the reasons for its decision.[9]

17. The decision sought to be reviewed and set aside by the Applicants is the aforesaid decision taken by the First Respondent, on 13 February 2018 wherein it overruled an earlier decision of the Third Respondent. It then classified the Film, Inxeba: The Wound as X18.

18. The appeal to the First Respondent was instituted by the Appellants, The Man and Boy Foundation and Congress of Traditional Leaders of South Africa (CONTRALESA) respectively.

19. The Applicants in this matter seeks to have the decision of the First Respondent set aside on both procedural grounds and merits. Insofar as procedural grounds are concerned, the Applicants aver that the First Respondent had no power to consider the appeal and that the Appellants to it had no *locus standi* to bring an appeal before it. Insofar as the merits are

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[7] P124 - 136.
[8] Annexure HK9, p69.
[9] Annexure HK10, p71 – 81.

concerned, the Applicants submit that the classification does not fall within the provisions of the Act,.

20. The First Respondent avers that on application of purposive interpretation, it has the powers and the Appellants had *locus standi* to bring the appeal to it. Furthermore, it supports the decision it has taken. The Third Respondent has filed an affidavit supporting its decision but does not support the procedural unfairness attack on the decision by the Applicants.

21. On a procedural level the Third Respondent should not have been joined as a party to these proceedings. It has no direct and substantial interest therein. It classified the film and gave its reasons for its classification. Its interest, as a Third Respondent ended there.

22. The Applicants further aver that the Fifth and Sixth Respondents were out of time, as they were almost six months late in bringing their appeal before the First Respondent. The Applicants further avers that the procedure adopted by the First Respondent is unfair because it deprived them of an opportunity to have their case heard.

C. **SUBMISSIONS**

23. It is submitted that it should be borne in mind that the present proceedings are review proceedings and not appeal.[10] As a result, a decision of the First Respondent can only be set aside if it falls foul of the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") and the Constitution.[11] The import thereof is that this Honourable Court may come to a conclusion that if it was sitting in the place of the First Respondent, it would not have reached the decision reached by the First Respondent. That is however, not the test that will be applied. The test is whether the First Respondent has fallen foul of the provisions of PAJA and the Constitution. Its decision would be upheld even if this Honourable Court would not have reached the same conclusion.[12]

24. The Applicants aver that the decision of the First Respondent should be reviewed and set aside because of four grounds[13] that are covered by the following provisions of PAJA:

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[10] Hamata and Another/Chairperson, Penintsula Technikon, 200(4) SA 621© at 640[63],
Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another 2017 (6) SA 1 (CC) at 33[98].

[11] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and tourism 2004 (4) SA 490 (CC) at [25].

[12] See: s.6 of PAJA

[13] Namely: the lack of jurisdiction, the unfairness of the procedure followed, breaches of sections 18(3)(c) & (b) of the Act.

24.1 the administrator who took the administrative action was not authorised to do so by the empowering provision (s6(2)(a)(i));

24.2 a mandatory material procedure or condition prescribed by an empowering provision not complied with (s6(2)(b));[14]

24.3 the action was materially influenced by an error of law (s6(2)(d));[15]

24.4 the action was taken for a reason not authorised by the empowering provision (s6(2)(e)(i));[16]

24.5 the action was taken because irrelevant considerations were taken into account or the relevant considerations were not considered (6(2)(e)(iii));

24.6 the action was taken in bad faith (s6(2)(e)(v));

24.7 the action was taken arbitrarily or capriciously (6(2)(e)(vi));

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[14] This is raised in respect absence of jurisdiction, violation of a right to fairness, breaches of s.18 (3) (b) & (c) of the Act (FA P37).

[15] This is referred to when dealing with the absence of jurisdiction (FA P 38-39 [71-77]), procedural unlawfulness and unfairness, FA P39-42 breach of s.18 18 (3)(c) (FA 42-47, and that the decision breached s.18 (3) (b) (FA 47-52).

[16] Procedural unlawfulness and unfairness (FA 39-42) breach of s.18 (3) (b) a (c) (FA 42-52) Breach of s.18 (3) (b) & (c) (FA 42-52)

24.8 the action itself contravened the law or is not authorised by the empowering provision (s6(2)(f)(i));

24.9 the act is not rationally connected to the purpose of the empowering provision (6(2)(f)(ii));

24.10 the action itself is not rationally connected to the reasons given for it by the administrator (s6(2)(f)(ii)(dd));

24.11 the exercise of the power or the performance of the function authorised by the empowering provision in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function (s6(2)(h));

24.12 the action is otherwise unconstitutional or unlawful (s6(2)(i)).

25. We now deal with the four grounds separately.

Lack of jurisdiction[17]:

26. The Act deals with appeals in two separate sections of Chapter 5 thereof, namely, sections 19 and 20.

27. S19 as it stands affords certain rights to the following persons:

(a) the Minister;

(b) a person who has lodged a complaint with the Third Respondent that a publication (written material) be referred to a classification committee for classification in terms of s16[18];

(c) a person who has lodged a complaint with the Third Respondent that a film, game or publication be reclassified[19];

(d) a person who has applied to the Third Respondent for a permit, exemption or licence;

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[17] The applicants aver that the applicable provisions of PAJA are sections 6(2)(a)(i), 6(2)(b), 6(2)(f)(i) and 6(2)(i).
[18] This section refers to publications only and not film or games.
[19] The word "reclassification" has a technical meaning. Section 18B of the Act provides as follows:
"Any person may, after a period of two years from the date when a film, game or publication was first classified in terms of this Act, apply, in the prescribed manner, for a less restrictive classification of that film, game or publication."

(e) a person who is a publisher of a publication which is the subject of an application for classification (this would not apply in this case in any event);

(f) a person whose financial interests could be detrimentally affected by a decision of the Third Respondent on such application;

(g) a person whose financial interests could be detrimentally affected by a decision of the Third Respondent with regard to an exemption or permit, the withdrawal of which is being considered; or

(h) a person who appeals to the First Respondent against a decision with regard to such an application has certain rights. This case does not fall within the ambit of those provisions.

28. It is submitted that s19 affords certain rights to a certain category of persons but does not seem to contain a closed list of the persons who can appeal to the First Respondent.

29. It is however clear that this case falls within the ambit of Section 20 of the Act. Section 20(1) provides as follows:

"*The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for a decision and classification in terms of section 16, and any person who applied for the classification of a film or game, or the publisher or distributor of a publication which formed the subject of any complaint or application in terms of section 16, may within a period of 30 days from the date on which he or she was notified of the decision, in the prescribed manner appeal to the Appeal Tribunal."*

30. The object of the Act as set out in s2 thereof is to regulate the creation, production, possession and distribution of films, games in certain publications. The Act also aims at providing consumer advice to enable adults to make informed viewing, reading and gaming choices both for themselves and for the children in their care. The Act also seeks to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

31. On the other hand, the Constitution guarantees a person a right to have any dispute that can be resolved by application of law to be decided in a fair public hearing.

32. As stated by the First Respondent above, it will be unable to carry out its functions and implement the object of the Act unless s20(1) is given a purposive interpretation to the effect that members of the public who are aggrieved by the decision of the Third Respondent should be able to appeal to the First Respondent. It is interesting to note that the Third Respondent also must have understood the Act in that fashion because it is the one that referred the Appellants to the First Respondent.

33. In this regard the following dictum of Wallis AJA[20] (as then was) is apposite:

"Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try

[20] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para. [25] – [26].

to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical,

unbusiness-like or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

34. The narrow restrictive interpretation sought to be placed by the Applicants will lead to impractical, unbusiness-like or oppressive consequences and will stultify the broader operation of the legislation under consideration. It may even render the provisions of s20(1) unconstitutional.

35. The submissions made above apply in respect of the issue of *locus standi* as well.

Unlawfulness and Unfairness of the procedure[21]

36. Insofar as the procedure adopted by the First Respondent in respect of the Applicants, it is clear from the record that they were given an opportunity to participate in the proceedings. S3(2) of PAJA makes it clear that a fair procedure depends on the circumstances of each case.[22]

37. It is thus submitted that what should be taken into account is not the form but rather, the substance of what occurred:

[21] The applicants aver that the applicable provisions of PAJA are sections 6(2)(a)(iii), 6(2)(b), 6(2)(c), 6(2)(d) and 6(2)(f)(i).
[22] See also Bato Star supra at [45].

37.1 on 8 February 2018 at 13h43, the First Applicant was sent an email from the Third Respondent informing it that there will be a hearing scheduled for 13 February 2018;

37.2 on 12 February 2018, it responded seeking the record and simply relying on the provisions of s19 of the Act;

37.3 on 12 February 2018, it received a response informing it that their response had been sent to the First Respondent;

37.4 on 13 February 2018, it received an email informing it that the Appellant proceed as planned and was given the opportunity to make representations at the hearing; and

37.5 at the hearing on 13 February 2018, they sought an opportunity to seek legal assistance and brief counsel.

Breach of the provisions of s18(3)(c)[23]

38. The Applicants aver that the First Respondent breached the provisions of s18(3)(c) of the Act.

39. In a nutshell, the First Respondent classified the film classification X18. Its reasons thereof are to the effect that:[24]

[23] The Applicants aver that the applicable provisions of PAJA are sections 6(2)(b), 6(2)(d), 6(2)(e)(i) and (ii), 6(2)(f)(i) and (ii)(bb) and 6(2)(h).

39.1 the film contains explicit sexual conduct;

39.2 it is neither dramatic nor has artistic merit.[25]

40. In this regard the following dictum of the Constitutional Court is of assistance[26]:

"*In explaining deference, he (Schutz JA) cited with approval Professor Hoexter's account as follows:*

'(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a

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24 Annexure "HK10", pp 71 to 81
25 Annexure "HK10", pp 78 to 81
26 In Bato Star, supra.

conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

Schutz JA continues to say that '(j)udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function'.

I agree. The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."[27] Footnotes omitted.

41. The First Respondent has stated that its final decision is to the effect that the film is classified as X18 as set out in s18(3)(c) of the Act. The aforesaid section reads as follows:

"The classification committee shall in the prescribed manner, examine the film or game referred to it and shall –

….

[27] At p513 – 514[46].

classify the film or game as "X18" if it contains explicit sexual conduct, unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;…"

42. This section requires that two findings have to be made in this regard. The first is whether a film contains explicit sexual conduct. If it does not, it is the end of the classification under this subsection. If, however, it does contain explicit sexual conduct it does not automatically gets classified as X18. The enquiry moves to the next stage.

43. We need to point out here that the enquiry at this stage is both objective and subjective and is guided by the provisions of the Act itself.

44. As stated above the First Respondent found that the film contains explicit sexual conduct. In this regard it refers to *"[a]nal sex scene between Vija and Xolani who are initiation*

nurses and performs the act at the initiation school, including oral sex."[28]

45. It seems as if the Applicants aver that the scenes of anal and oral sex are not graphic and detailed visual presentations. They say that the visuals are implicit.[29]

46. Explicit sexual conduct is defined in the Act as:

"… graphic and detailed visual presentations or descriptions of any conduct contemplated in the definition of "sexual conduct" in this Act"

47 The sexual conduct is defined as including:

"(i) male genitals in a state of arousal or stimulation;

(ii) the undue display of genitals or of the anal region;

(iii) masturbation;

(iv) bestiality;

(v) sexual intercourse, whether real or simulated, including anal sexual intercourse;

(vi) 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;

(vii) the penetration of a vagina or anus with any object;

(viii) oral genital contact; or

(ix) oral anal contact …"

[28] FA, Annexure HK10 (Award) p80.
[29] FA p43.

48. It should be noted that the list of acts that amount to a sexual conduct is not closed.

49. It cannot be disputed that scenes of the film referred to by the First Respondent do contain explicit sexual conduct.

50. As submitted above that is not the end of the matter. The next enquiry is whether the film *"… judged within context ...*" is *"…a bona fide documentary, or is of scientific, dramatic or artistic merit…*" If it is then it *"… shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials …"*

51. The First Respondent held that the film is of no scientific, dramatic or artistic merit.[30]

52. The question is whether[31]:

    50.1 the First Respondent did not comply with a mandatory and material procedure or condition in this regard;[32]

    50.2 the decision of the First Respondent was materially influenced by an error of law;[33]

[30] FA, Annexure HK10, p79.
[31] These are the grounds of attack mounted by the applicants (p47[88]).
[32] S6(2)(b) of PAJA.

50.3 the decision was taken for a reason not authorised by the empowering provision;[34]

50.4 the decision was taken because irrelevant considerations were taken into account, or relevant considerations were not considered;[35]

50.5 the decision itself contravenes the law or is not authorised by the empowering provision;[36]

50.6 the decision itself is not rationally connected to the purpose of the empowering provision;[37]

50.7 the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the or performed the function;[38] or

50.8 the decision is otherwise unconstitutional or unlawful.[39]

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[33] S6(2)(d) of PAJA.
[34] S6(2)(e)(i).
[35] S6(2)(e)(iii).
[36] S6(2)(f)(i).
[37] S6(2)(f)(ii)(bb).
[38] S6(2)(h).
[39] S6(2)(i).

53. It is submitted that the decision of the First Respondent does not fall foul of none of the eight grounds levelled by the Applicant.

54. In the first place the enquiry of whether the film is a *bona fide* documentary or is of scientific, dramatic or artistic merit is subjective. The Act requires that this must be "*judged within the context …*" This obviously refers to being judged by the classification committee or the First Respondent.

55. There does not seem to be a dispute as to whether the film is a *bona fide* documentary or is of scientific merit. The Applicants seem to accept that it is not.

56. The dispute is whether it is of dramatic or artistic merit. In this regard, there is no mandatory and material procedure or condition prescribed by an empowering provision that was not complied with by the First Respondent.

57. In so far as the ground relating to a material error of law the following dictum is relevant:[40]

"With reference to some of the cases on this issue in Hira, Corbett CJ pointed out that our courts drew a distinction

[40] In Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another. Supra.

between an error of law on the merits and the mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result the power is not exercised. It was the latter error which was taken as amounting to a ground of review that justified interference. This accords with the distinction our law draws between a review and appeal. A court does not interfere merely because the decision was wrong in a review application.

[99] In Hira the test was reformulated in these words:

'Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal asked itself the wrong question, or applied the wrong test, or

based its decision on some matter not prescribed for its decision, or failed to apply its mind to the relevant issues in accordance with the behests of the statute; and that as a result its decision should be set aside on review.'

[100] This statement reveals that at common law, for an error of law to constitute a ground for review, it must have materially influenced the challenged decision in the sense that it gave rise to one of the recognised grounds of review. The erroneous interpretation of a statute would vitiate the decision taken only if on the application of the correct construction, the facts do not support the decision. In terms of this standard it is not enough to merely show that the empowering statute has been incorrectly interpreted. One must go further and apply the correct meaning to the relevant facts. If the decision is justified, interference is not permitted. But if on the application of the right interpretation, the facts do not support the impugned decision, the erroneous interpretation is taken to have materially influenced the decision.

[101] This common-law test has been codified in PAJA as one of the grounds of review. In Johannesburg Municipality this court affirmed the standard in these terms:

'However, a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the

Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is materially influenced by an error of law. An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law."[41] Footnotes omitted.

58. In this case there is no evidence that the decision of the First Respondent was materially influenced by an error of law.

59. Neither is there evidence that the decision was taken for reasons not authorised by the empowering provisions.

60. It is submitted that irrelevant considerations that are taken into will affect the outcome of the decision only if they play a significant role in the outcome.[42] In this case no irrelevant considerations can be said to have played a significant role in the decision of the First Respondent.

61. Neither can it be said that relevant considerations were not considered.

[41] At 32 – 34[98] – [101].
[42] Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd 2016 (3) SA 1 (SCA) at 14[46].

62. There is also no evidence that the decision of the First Respondent contravened a law. It was in fact authorised by the Act.

63. The decision of the First Respondent cannot be said to be not rationally connected to the purpose of the empowering provision, namely, the Act.

64. In so far as the ground laid down in in s6(2)(h), namely, that the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function the Constitutional Court[43] said the following:

"*Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.*

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.

[43] In Bato Star, supra.

Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."[44]

65. As submitted above the question of whether a film is of dramatic or artistic merit is answered subjectively. The dramatic or artistic nature thereof is in the eye, so to speak. The Act does not define it but leaves it to be judged subjectively by the classification committee or the First Respondent.

66. The dictionary meaning of "*dramatic*" is "*1 of drama or the study of drama. 2 (of an event, circumstance, etc.) sudden and exciting or unexpected. 3 vividly striking. 4 (of a gesture etc.)*

[44] At 513[44].

theatrical overdone, absurd." Artistic means "*1 having natural skill in art. 2 made or done with art.*"

67. The Applicants aver that *"[i]t is beyond question that this is a film of dramatic or artistic merit."*[45] They then refer to *"the string of local and international accolades that the film has received."*[46]

68. The problem with that is that the accolades were not given by a statutory body empowered to judge the dramatic or artistic merit of the film.

69. It is submitted that this case falls within the category of decisions where *"[a] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.*" The First Respondent is a statutory body established to carry out the objects of the Act.

[45] FA p45.
[46] FA p22 – 25.

70. In this case it cannot be said that the exercise of the power or the performance of the function authorised by s18(3)(c) of the Act, in pursuance of which the decision was reached, is so unreasonable, that no reasonable person could have exercised the power or performed the function.

71. It has not been shown that the decision of the First Respondent is otherwise unconstitutional or unlawful.

72. It is submitted even if it were to be found that the classification of the film X18 is invalid the appropriate relief would be refer the matter back to the Tribunal to consider its classification with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.

Breach of 18(3)(b)

73. If it is accepted that the Appeal Tribunal was entitled to the X18 classification then it is unnecessary to deal with the issue regarding s18(3)(b) of the Act.

D **COSTS**

74. The First Respondent is a statutory body enjoined to carry out certain functions. Where its decision has been *bona fide* but

mistaken, it should not be made to pay the costs of the litigation. Such an order would be inequitable. This will be detrimental to the execution of the provisions of the Act.

75. It is submitted that in this case no order of costs should be made.

E. CONCLUSION

76. It is finally submitted that this application should be dismissed.

V S Notshe SC

D Dube

Counsel for the First and

Second Respondents