IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

Case Number: 3589/2018

In the matter between**:**

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

and

FILM AND PUBLICATION APPEAL TRIBUNAL	First Respondent
CHAIRPERSON OF THE FILM AND PUBLICATION APPEAL TRIBUNAL N.O	Second Respondent
FILM AND PUBLICATION BOARD	Third Respondent
FILM AND PUBLICATION COUNCIL	Fourth Respondent
MAN AND BODY FOUNDATION	Fifth Respondent
CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA	Sixth Respondent
SOUTH AFRICAN HEALERS ASSOCIATION	Seventh Respondent

IBUTHOLESIZWE CULTURAL DEVELOPMENT Eighth Respondent

IZINDUNA ZAMAKHOSI Ninth Respondent

UBUHLE BENGCULE Tenth Respondent

FIFTH AND SIXTH RESPONDENTS HEADS OF ARGUMENT

INTRODUCTION

1. This is an urgent application to review and set aside the decision of the Film and Publication Appel Tribunal taken on 13 February 2018 and in respect of which reasons were provided on 23 February 2018. The gist of the said decision was to overrule on appeal the classification decision of the Film and Publication Board ("the **Board**") and to clarify the film Inxeba: The Wound ("**Inxeba**") as X18 SLNVP. The Board had previously classified Inxeba as 16 LS.

2. The applicants rely on three principal grounds for the review application, namely:

   2.1 The Appeal Tribunal lacked the jurisdiction to hear the appeal;

   2.2 In respect of the appeal proceedings, the applicants herein were denied their procedural rights to fairness as encapsulated in the *audi alteram partem* rule, and

2.3 The impugned decision was in breach of section 18 (3)(b)(iii) and/or 18 (3)(c) of the Film and Publications Act 65 of 1996 ("the **Act**").

3. On the basis of what is stated in the preceding paragraph the appellants allege that the impugned decision falls foul of PAJA and the principle of legality.

4. The review application is opposed by, *inter alia*, the 5th and 6th respondents, both non-governmental organisations with an interest in the preservation of cultural rights and values in general and more specifically in the cultural practice or custom of **ulwaluko** which is mainly practiced by amaXhosa, a South African language and cultural group consisting of approximately 8 million people. This matter is of indirect interest to all those whose cultures were degraded in order for the ascendancy and dominance of Western cultures and language to take root over centuries of colonialism and apartheid. It is trite that it is impossible to dominate a people without taking away their language, culture and identity. Our constitution seeks to heal the divisions of the past as stated in its preamble.

5. The first two grounds mentioned in paragraph 2 above are of a technical and procedural nature and are opposed on the grounds set out hereinbelow. The third ground related to section 18 of the Act raises the key substantive issues raised by this application namely: whether or not, in the circumstances, the decision of the Appeal Tribunal ought to be set aside on the basis that it was taken in breach of section 18 (3)(c) and section 18 (3)(b) of the Act.

6. This application involves a number of resultant specific topics which will be addressed herein and which arise from the issues outlined above. Principally the following topics will be broadly canvassed in the course of these submissions and also discussed during oral argument:-

   6.1 The extent to which the impugned decision is reviewable in the light of the distinction between appeal and review;

   6.2 The procedural grounds of review (see 2.1 and 2.2 above).

   6.3 The substantive ground of review (see 2.3 above);

   6.4 Whether there is an error of law or misinterpretation of the Act;

   6.5 Materiality; and

   6.6 Balancing of competing constitutional rights (section 36 of the Constitution).

7. Before dealing with the legal issues outlined above it will be appropriate to outline the factual matrix upon which the legal principles will be discussed.

8. The facts dealt with hereunder are common cause or facts which are not seriously disputed. In the context of this case the significance of this point lies in the fact that reliance is going to be placed on the well-known Plascon-Evans rule.

9. It is clear from the contents of paragraphs 88, 25, 92 and 97 of the applicants' replying affidavit that they have adopted the attitude that the application may be decided on the basis that the main factual averments pleaded by the 5th and 6th respondents be accepted as true. In addition large sections of the answering affidavit are either directly admitted, simply left unanswered or dealt with by way of bare denials. The applicants have taken the dangerous route of ignoring all the specialist evidence of Nkosi Holomisa who is one of the custodians of the culture in question, and Dr Bungane who has been involved with the medical and mass educational side of it for decades as "*irrelevant*".

10. Apart from the Plascon-Evans rule, the other implications of the above are that the policies and norms outlined in the answering affidavit must be accepted as the established, and uncontested legal principles of customary law and practice to be applied in the process of adjudicating the relevant disputes in this application, in line with section 39 (3) and 211 of the Constitution.

MATERIAL FACTS

11. Unless otherwise indicated the facts outlined in this section are common cause and arise from the film itself which has been viewed, for the purposes of this application, by all parties and by the court.

12. The subject matter of this application is Inxeba, a film set in rural Eastern Cape and more particularly in the Queenstown area. The action is almost exclusively based on a Xhosa initiation school and the goings on amongst the

key inhabitants of the school namely the initiates themselves (**abakhwetha**) and their traditional nurses or caregivers (**amakhankatha**). *Inter alia*, the film involves **amakhankatha**:

12.1 A great detail of how the ritual of **ulwaluko** is purportedly practiced.

12.2 A romantic homosexual relationship between two caregivers.

12.3 Repeated and different scenes of sexual conduct between the two lovers.

12.4 Physical violence between initiates and caregivers.

12.5 The murder of an initiate by a caregiver in order to prevent the public revelation of the sexual nature of the relationship between the caregivers.

13. By the description of the appellants themselves, the homosexual or gay relationship referred to in the preceding paragraph is "*set in the <u>context</u> of (the) <u>secretive world</u> of a traditional initiation school of Xhosa boys*". (Emphasis added)

14. The film has collected a number of local and international awards and was submitted for an Oscar nomination. It has also received a number of positive reviews from critics.

15. On 14 June 2017 the first applicant submitted the film to the Board for examination and classification in terms of section 18 (1)(b) of the Act.

16. On 6 July 2017 the Board classified the film as 16 LS.

17. Thereafter the film was screened on limited terms, designed to ensure that the film could qualify for the deadline for nominations for the Oscar Awards of 2018. The main launch of the film was scheduled for 2 February 2018.

18. In January 2018 the 5th and 6th respondents and other interested parties lodged complaints with the Board (in terms of section 19 of the Act).

19. The Board's Management wrote a letter to the Appeal Tribunal Chairperson highlighting the concerns raised in the complaints and requesting the Tribunal to consider the matter. The Tribunal subsequently agreed to hear the appeal.

20. On 6 February 2018 the Tribunal invited the applicants to participate in the appeal.

21. The Appeal Tribunal granted the complainants condonation for their late submission of the appeal.

22. On 13 February the hearing took place. The applicants sought a postponement which was declined.

23. Insofar as the majority of the important facts and contextual issues are not contested, the Plascon-Evans rule must apply and the matter must be determined on the version of the respondents.

24. Among the factors to be considered in that vein are the following:

24.1 It is impossible to imagine the continued existence of amaXhosa as a nation without **ulwaluko** which is central to their very existence and identity.

24.2 The practice of **ulwaluko** is a rite of passage to manhood and fatherhood.

24.3 Measures such as the promulgation of the Traditional Circumcision Act 6 of 2001 which prescribed the minimum age of 18 years for initiates were intended, *inter alia*, to preserve **ulwaluko** and to save lives.

24.4 **Ulwaluko** is strongly believed to be sacred by amaXhosa.

24.5 Sexual intercourse is a taboo subject in the context of **ulwaluko** which should not even be spoken about, let alone practiced. It contradicts the idea of ritual purity which is a cornerstone of **ulwaluko**.

24.6 Any person associated with the initiates is strictly prohibited from engaging in sexual conduct, more especially the caregivers who have to handle the initiates and treat them to heal.

24.7 There are also medical reasons for the above in that sexual stimulation or arousal can have devastating and even deadly consequences for the initiates. Breaking the rules is therefore likely to cause both physical and cultural <u>harm</u>.

24.8 The prohibition on women at the initiation school or its vicinity is associated with the above cultural and medical rationale.

24.9 Secrecy is sacrosanct and deeply entrenched. It is widely believed that any pre-exposure to children under 18 would contribute to the gradual extinction of the practice.

24.10 Some of the most harmful scenes of the film include the graphic display of sexual intercourse between Vija and Xolani, the use of a single tool (**umdlanga**) by **ingcibi** and the deliberate omission of condom use in the context of casual, extra marital sex. Generally speaking, the film is considered harmful in so far as it reveals practices and situations that are culturally intended to remain secret. The utterances which are degrading to women and which promote rape are also harmful to society. In the words of the applicants themselves, the film deals with a "*hidden gay romance set in the context of a secretive world of a traditional initiation school for Xhosa boys*".

25. In conclusion, it needs to be emphasized that none of the abovementioned cultural practices pose any threat to our constitutional order. On the contrary they contribute to the cultural diversity of South Africa which the Constitution seeks to affirm.

THE LAW

26. We now turn to the legal issues, starting with the crucial distinction between appeal and review in the context pf this application.

Appeal and review

27. Taking a leaf from the replying affidavit it has become essential to adopt the applicants' approach of stating upfront what the application is about and what it is not about.

28. This is not an appeal against the decision of the Appeal Tribunal to classify the film as X 18 but an application for the judicial review of the decision.

29. The applicants' failure to appreciate the distinction renders the entire application fatally flawed.

30. The distinction between an appeal and a review has been the subject of a longstanding debate in our courts. The most important and relevant issue is that unlike an appeal, an application for judicial review is not concerned about the correctness or otherwise of the decision but with the manner in which the decision was taken. Hoexter explains the issue as follows:

> "*Any legal system that tries to uphold a distinction between appeal and review is bound to experience some controversy regarding review for an error or law (and, as we shall see, mistake of fact). The rationale for the distinction is that it is not the court's function to say whether an administrator's decision is right or wrong, but merely whether it was arrived*

at in an acceptable manner. This makes it difficult to explain why a court should be able to review the substantive correctness of an administrator's interpretation of legal (or indeed factual) questions."[1]

31. More importantly, it has been correctly held that to undermine the distinction between appeals and reviews is to breach the important doctrine of separation of powers.

32. The doctrine of separation of powers dictate that the court must proceed with great caution and circumspection before interfering with the decisions of specialist tribunals which have been legislatively empowered to deal with matters which fall outside of the expertise of the courts. The courts cannot usurp the functions of such bodies. Theirs is merely to ensure that in reaching its conclusions, the rules were not broken.

33. Our Constitutional Court has repeatedly stated that the courts must generally stray away from "*circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers*".[2]

34. There are other additional reasons why administrative appeal bodies such as the Appeal Tribunal in this matter are the preferred decision makes in these circumstances over the courts. Hoexter explains.

"*Apart from considerations relating to the separation of powers, administrative appeals are thought to have two main advantages over*

[1] Hoexter: Administrative Law in South Africa (2nd Edition), Juta, page 288
[2] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at paragraph 141

judicial review. First, administrative authorities are very often the best judges of decisions made by other administrative agencies: they are more likely to have the necessary specialist expertise and to have a thorough grasp of the relevant policy decisions. Secondly, they are usually cheaper and speedier than courts of law, whose rolls are often overburdened"[3]

35. Hoexter cites the Appeal Tribunal established in terms of section 20 of the Films and Publication Act as an example of administrative bodies which "*often exhibit a degree of independence and begin to resemble a proper system of administrative courts*".[4]

THE PROCEDURAL GROUNDS OF REVIEW

36. Under this heading we proceed to discuss the first procedural ground of review dealing with:

36.1 jurisdiction (or *locus standi)*; and

36.2 *audi alteram partem rule* or procedural fairness .

Jurisdiction (or *locus standi* of the complainants)

37. The applicants' first attack on the decision of the Appeal Tribunal is based on its alleged lack of jurisdiction since the fifth and sixth respondents are allegedly not the categories of persons entitled in terms of section 20(1) of the

[3] Hoexter: Administrative Law of South Africa (2nd Edition), Juta p 66
[4] Hoexter p 67

Film and Publication Act ("the **Act**") to lodge an appeal in to the Appeal Tribunal. We submit that there is no merit in this attack and it must accordingly fail.

38. As persons who had lodged a complaint with the Board for the reclassification of the film, in terms of section 19 of the Act, the fifth and sixth respondents had a right to appear before the Board or the Appeal Tribunal to have their "*case and argument considered*." The interpretation accorded to section 19 of the Act by the applicants is misleading[5]. Section 19 of the Act provides thus:

> ***"****The Minister or any person who has lodged a complaint with the Board that <u>any publication</u> be referred to a classification committee for classification in terms of section 16, <u>or the reclassification of a film</u>, game or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interest could be detrimentally affected by a decision of the Board on such application, or with regard to an exemption or permit, the withdrawal of which is being considered, or who appeals to the Appeal Tribunal against a decision with regard to such an application, shall have the right to appear in person before the Appeals Tribunal …"*

39. Therefore, the section 19 makes plain that it confers on the Minister or any person who:

[5] At p 391, paras 106 to 106.4 of the replying affidavit the applicants contend that section 19 of the Act refers to persons who have lodged a complaint concerning a 'publication' and not a 'film'.

39.1 (1) has lodged a complaint with the board for a classification of a publication in terms of section 16;

39.2 (2) who has lodged a complaint for the reclassification of a film.

40. The 5th and 6th respondents fall under the second category. Section 20 is to the same effect.

41. The account given by the Board in its public media statement issued on 1 February 2018[6] clearly outlined the process followed by the relevant respondents, as complainants, which culminated in the appeal process and the impugned decision of the Appeal Tribunal.

42. We submit that there is no basis in law and in fact for this ground of review and the attack on the decision must accordingly fail. The interpretation of both sections 19 and 20 of the Act bear out the *locus standi* of the complainants and consequently the jurisdiction of the Appeal Tribunal.

Audi alteram partem

43. The applicants' third attack on the decision of the Appeal Tribunal is based on the alleged lack of fairness in the proceedings before the Appeal Tribunal[7]. They allege that they were not afforded a proper opportunity to participate in the proceedings before the Appeal Tribunal.

[6] Founding Affidavit, Annexures "HK15"; Paginated Papers p 104-105
[7] Para 109 Replying Affidavit

44. The principal grounds for this attack appear to be that the Appeal Tribunal failed to comply with section 19 of the Act, in that it failed to provide them with reasonable opportunity to make submissions for consideration;

45. We submit for the following reasons that there is no merit in these attacks in that:

45.1 Their reliance on section 19 contradicts the applicants' reliance only on section 20 in relation to the jurisdiction ground of review discussed above.

45.2 In any event, the applicants were notified of the appeal date of 13 February 2018 on 8 February 2018. They then requested the Appeal Tribunal to postpone the hearing of the appeal in order to afford them an opportunity to prepare for the hearing. On 12 February 2018, they were informed that their request would not be granted and that the hearing would proceed as scheduled.

45.3 On 13 February 2018 the applicants again applied for the hearing to be postponed in order to afford them an opportunity to prepare. The chairperson of the Appeal Tribunal then stood the hearing to 14h00 to allow the applicants to prepare the submission. When the hearing resumed at 14h00, the applicants were given an opportunity to make submissions, and they participated in the proceedings and made submissions before the Appeal Tribunal which were later considered by the Tribunal.

46. It is trite law that the granting of an application for a postponement is not a right, but an indulgence granted by the Appeal Tribunal in the exercise of its discretion. Therefore, when the applicants were informed of the appeal hearing on 8 February 2018, they ought to have engaged the services of a legal presentative then, or commence with the preparation of the appeal hearing and not sit idle in the hope that their request for postponement would be granted.

47. In any event the applicants failed to challenge the confirmation of the hearing in court or to follow other avenues available in law. By their own inaction, and their subsequent participation in the proceedings they waived their right to complain about the decision to proceed with the appeal hearing and acquiesced therein.

48. The same answer applies to the complaint about the decision of the Appeal Tribunal to grant condonation to the respondents. The applicants raised that complaint for the first time in the founding affidavit. There is no indication that they had wished to oppose the condonation application.

49. This ground of review also holds no water and must accordingly fail or that it would not have been granted in any event.

SECTION 18 OF THE ACT AND ERROR OF LAW

50. The central ground of review in this application is error of law or alleged misinterpretation and misapplication of the Act. As Hoexter puts it:-

"In the language of judicial review, a wrong or mistaken interpretation of a legislative provision is commonly referred to as an error of law".[8]

51. It is by now a well-established principle of our law that unlike appeals, in the case of judicial review it is not sufficient for the onus bearing party (in this case the applicants' merely to allege and prove an error of law or misinterpretation but it is incumbent on it to also allege and prove materiality i.e. that but for the error, the outcome would have been different. An outcomes-based analysis is prescribed. On this test the application must fail.

52. A proper analysis of the papers as they stand, and common cause facts read together with the applicable statutory provisions of the Act will clearly show that the outcome would remain unchanged even if the Appeal Tribunal had indeed misconstrued some of the applicable provisions, which is in any case denied.

53. The applicants have not even alleged, let alone proved materiality.

54. Bearing in mind that all the other grounds of review, save for the procedurally based grounds already discussed, are premised and anchored on the alleged misinterpretation on errors of law, then the entire application must fail.

55. We now proceed to deal with both legs of the test and before dealing with materiality we proceed to demonstrate that in any event, there is no error of law and that upon proper application of the relevant legal and constitutional

[8] Hoexter at page 22

principles, the decision of the Appeal Tribunal was not only correct but more importantly, it was taken in the correct manner and therefore cannot be set aside by way of a review application. We later assert and develop the obvious fact that, even if we are wrong in that conclusion and the decision was incorrect, it must still stand for want of materiality.

56. In the words of Jafta J recently in the Constitutional Court:[9]

> "*The erroneous interpretation of a statute would vitiate the decision taken only if on 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*" [Emphasis in the original judgment]

THE DECISION SUBSTANTIVELY CORRECT AND PROPERLY MADE

57. In this section we analyse the facts and the applicable law. In so doing, it is appropriate to start by sounding an early warning that the court is in no better position than the Appeal Tribunal to judge the suitability of the film. In fact the legislature has seen it fit that such a decision be taken by a panel of specialists who are better steeped in the relevant nuances that the court. While is it self-evident and trite that the court has the final say in the event of review grounds having been established, the court should only do so in the

[9] Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another 2017 (6) SA 1 (CC) at paragraph [100]

clearest of cases and as a last resort. In legal language we say the court should not behave as if the decision of the specialist tribunal is being appealed against.

58. Incidentally, it should be mentioned in the same vein that the Act previously made provision of the High Court being the forum of the last resort in appeals against decisions of the Appeal Tribunal. Section 21 of the Act used to read as follows:

> "*The Minister or any person who has lodged a complaint with the Board …. if the a publication or film has in terms of a decision referred to in terms of section 20 been classified as XX or X18, …. may …. appeal to the High Court against that decision*".

59. Section 21 of the Act was repealed in 2009. The implications thereof are self-evident, alternatively these will be further dealt with during oral argument.

60. With the above in mind, we turn to the key facts and the law which the Tribunal employed to justify the decision to classify the film as X18.

61. The natural starting point is the ruling or decision which is the subject matter of this review application. In the present application the decision of the Appeal Tribunal must be judged against the common cause facts and the uncontested rules, principles and underlying values and norms associated with the custom of **ulwaluko** as well as the unchallenged expert evidence of those who have dealt with **ulwaluko** from a traditional and medical point of view, respectively and collectively. The undisputed evidence they allude to in

respect of dignity, cultural preservation and even life and death, must be factored into the evaluation of the matter. These must then be weighed against the assertion by the applicants of their freedom of expression.

62. It is respectfully submitted that the most import and operative words which can be distilled from the reasons given by the Appeal Tribunal for its award[10] are: context and impact.[11] It went on to find, *inter alia*, that:-

62.1 The pre-exposure of 16 year olds to the sexual conduct depicted in the film was harmful and disturbing.

62.2 Sexual activity were found to be strong to moderate (but) fairly frequent. The classifiable elements were moderate to strong.

62.3 The film included language which was degrading to women and further exposes women to societal violence such as rape.

62.4 Various scenes can be accurately defined as inappropriate for minors in the age category of 16 years.

62.5 Contained a list of harmful scenes which could cause tensions in society.

62.6 The movie creators' right of freedom of expression has an effect on the rights of the Xhosa Traditional group by implication.

[10] Founding Affidavit, Annexure "HK10", Paginated Papers p 71-81
[11] 'context" and "impact" are both defined in the gazetted Guidelines, at pages 6 and 7 thereof respectively

62.7 Section 18 (3)(b) provides for an XX classification if a film depicts conduct or an act which constitutes incitement of encourages or promotes harmful behaviour.

62.8 It is the responsibility of the FPB to protect children of 16 years old from premature exposure to adult experience. The Children's' Act defines a child as anyone under the age of 18.

62.9 The Tribunal collectively, did not find any scientific, educational and artistic value in the film.

62.10 It is the duty of the tribunal to consider competing rights, with specific reference to the protection of cultural and linguistic rights, the right to equality (and dignity) as well as rights to artistic, creative abilities (and) freedom of expression.

62.11 "*What is critical to note is that a section 36 of the Constitution (provide) for (the) limitation of rights*".

62.12 The cumulative impact (does) not justify a rating of 16LS which is inconsistent with the finding of the Appeal Tribunal that the film should be classified as X18.

63. It is respectfully submitted that upon a proper analysis of the above grounds. the court would be hard pressed to make a finding that the impugned decision was accompanied by an error of law.

64. An analysis of the Act will show that:

64.1 One of its main object is to regulate the distribution of films by means of classification and the imposition of age restrictions. Classification is accordingly constitutionally permissible and does not amount to "*censorship*" or "*banning*" as falsely and sensationally claimed by the applicant.

64.2 The Act places a particular emphasis on the protection of children (i.e. persons under the age of 18 from "*exposure to disturbing and harmful materials and from premature exposure to adult experiences*" (section 2).

64.3 Provision is made for the establishment of a Board and the Appeal Tribunal, both of which shall be independent and function without any bias (section 3).

64.4 Notably, the members of the Tribunal shall collectively have experience in such a wide diverse of fields as community development, education, psychology, religion, law, drama, literature, communication science, photography, cinematography, gender matters, children rights and any other relevant field of experience as may be prescribed (section 6).

64.5 Any person my request that a publication be classified (section 16(1).

64.6 The classification committee (or relevant structure) shall examine the film and classify it as XX if it depicts, *inter alia*:

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

64.6.2 conduct or act which is degrading to human beings; or

64.6.3 conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour unless, judged within context it is a bona fide documentary or it is of scientific dramatic or artistic merit in which event it "*shall be classified as X18*" (section 18(b))

64.7 Further and alternative provision is made for the classification of a film as X18 if it is contains explicit sexual conduct unless, judged within context, it is a *bona fide* documentary or it is of scientific, dramatic or artistic merit, in which event it shall be otherwise classified with reference to the relevant guidelines to the protection of children from exposure to disturbing harmful or age inappropriate materials (section 18 (3)(c)).

64.8 Any person who had applied for a classification or reclassification of a film shall have the right to appear before the Board, a classification committee or the Appeal Tribunal and to have his case duly considered (section 19).

64.9 Any person who has lodged a complaint with the Board and who has applied for a decision and classification of a film may within 30 days, appeal to the Appeal Tribunal (section 20).

64.10 The Appeal Tribunal may refuse the appeal and confirm the decision or alter the appeal and give such decision as the Board should, in its view have given, and amend the classification of the film and may impose other conditions in respect of the distribution of the film (section 20 (3)).

65. Applying this legal regime to the common cause facts, it is respectfully submitted that the decision of the Appeal Tribunal is unassailable in this Honourable Court sitting as a court review. The decision can be defended on the basis of either:

65.1.1 section 18 (3) (c);

65.1.2 section 18 (3)(b); or

65.1.3 section 36 of the Constitution read with section 39 (3) thereof.

66. On either ground, the <u>outcome</u> would be the same, namely on X18 classification.

67. In respect of the section 18 of the Act, the two jurisdictional issues to which may require determination are whether the film:

67.1 depicts explicit sexual conduct; and/or

67.2 is of scientific, dramatic or artistic merit.

Explicit sexual conduct

68. The Act defines explicit sexual conduct as "*graphic and detailed visual presentations or descriptions of any conduct contemplated in the description of "sexual conduct*".

69. In turn "*sexual conduct*" is defined as to include:

    69.1 sexual intercourse, whether real or simulated, including anal sexual intercourse;

    69.2 the penetration of a vagina or anus with any object; or

    69.3 genital contact.

70. It is indisputable that the film depicts sexual conduct. The only remaining question is whether such conduct is, in the circumstances, explicit. In this regard it is worthy of note that the definition of sexual intercourse includes "*sexual intercourse, whether real or simulated, including, anal intercourse*".

71. It is in this respect that the 5th and 6th respondents appeal for a purposive and contextual interpretation of the definition. We also invoke the theory of relativity, which takes into account both context and impact as well as the common cause surrounding cultural setting and sensitivities.

72. In our respectful submission the repeated and detailed sexual conduct which is displayed in the film in a setting where even to talk about sex is taboo is, in the circumstances and context explicit. Given the physical and life-

threatening adverse consequences which may follow the display of <u>any</u> sexual conduct in that context, the Tribunal was fully entitled to declare the sexual conduct in this particular matter as "*explicit*". That adjective cannot be interpreted in a static manner more especially in respect of a piece of legislation, which elevates context and impact. These are, by definition, relative concepts which must necessarily be interpreted contextually and purposively.

73. This question can only be answered by giving meaning to the expression "graphic and detailed" visual presentation. The dictionary meanings of these terms support the conclusion of the Appeal Tribunal in this particular case.

74. In any event, the fact of the matter is that the Appeal Tribunal made a specific finding that the film contained explicit sexual conduct. This not being an appeal it matters not if that finding was incorrect or wrong. The only question is whether it is accompanied by an error or law or any misinterpretation of law and if so whether it was material to the outcome. We deal with materiality broadly further below.

<u>Scientific, dramatic and/or artistic merit</u>

75. The Appeal Tribunal has similarly found that the film lacks any scientific, educational and artistic value or merit. Again, it is not for this court to second guess the judgment of a specialist body in that regard, unless fraud, corruption or bias have been proven, which is not the case here.

76. Nor does the attainment of awards from bodies other than the Appeal Tribunal, whose opinion we are concerned with presently, take the issue any further. The opinions of those other organisations are irrelevant, in the legal sense of the word.

MATERIALITY

77. In any event and even if we are wrong and the court somehow finds that the film does have artistic merit, the outcome will be unaffected because the film will still be liable to be classified as X18 in terms of section 18 (3)(b)(iii) of the Act, read with the reasons and the common cause facts. The purported disavowal by the Appeal Tribunal of any reliance on section 18 (3)(b) does not take the matter any further. The Appeal Board is *functus officio* and it has not sought to review its stated reasons by which it is bound. In any event, its factual findings support the conclusion that the X18 rating conforms with the requirements of section 18 (3)(b)(iii). This would remain the case even if it had not mentioned that subsection if the facts supported that legal conclusion. It is accordingly unhelpful and too late for the applicants to lurch on opportunistically at the belated amendment of its reasons by the Appeal Tribunal.

78. Further alternatively, the outcome will remain unaffected upon a proper application of section 36 of the Constitution in relation to the competing constitutional rights at play in this matter, principally dignity, equality and cultural rights versus freedom of expression. Further argument in this regard will be advanced during oral agreement.

79. The applicants have therefore not only failed to discharge the onus to prove that the Tribunal misapplied section 18 (3)(c) of the Act but even if that was the case, such misapplication or error of law would, in the circumstances, be immaterial.

80. The applicants have notably even alleged materiality.[12]

81. The review application based on PAJA must accordingly fail.

LEGALITY

82. The applicants also purport to rely on the principle of legality, and not in the alternative but as an additional ground of review.

83. It is respectfully submitted that this is an impermissible and opportunistic invocation of the principle of legality in circumstances where the decision in question clearly amounts to administrative action which falls squarely under PAJA. There is no viable external basis for a review ground based on the rule of law outside of PAJA. Legality is clearly thrown in as part of a fishing expedition as characterised by the listing of subsections of section 6 of PAJA without any factual support for any reliance thereon or the pleading of the necessary elements which would sustain those sub-sections.

[12] See the decision of Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another 2017(6) SA 1 (CC), cited and quoted above.

84. In the event that the purported reliance on legality is seriously pursued, we reserve our rights to make oral submissions to demonstrate that such reliance will be ill-advised and fatally flawed. It must fail.

SECTION 36 OF THE CONSTITUTION

85. The Appeal Tribunal made it clear in the reasons for its decision that it had engaged in a process of balancing the contending constitutional rights at play, in terms of section 36 of the Constitution. This is a significant statement of the Tribunal and a very key issue in the determination of the present application alongside the other key issues of materiality and the appeal review distinction.

86. On the one hand the applicants assert their right to freedom of expression in general and more specifically the right to freedom of artistic creativity in terms of section 16 (1)(c) of the Constitution. On the other hand the respondents rely on the rights to human dignity, life, equality, language and culture, and cultural and linguistic belonging, among others.

87. In respect of section 16, it is worthy of note that the Act and its classification regime already constitute a constitutionally permissible restriction on freedom of expression and artistic creativity. In any event the constitutionality of the Act has not been attacked or even questioned in these proceedings.

88. Classification is not the same thing as censorship. Classification is done in order to protect society from, *inter alia*, behaviour which is harmful to the society. The weighing up of competing rights is an inherent and in-built feature of classification.

89. In deciding to curtail the applicants' freedom of expression and artistic creativity, the Appeal Tribunal self-evidently took into account the competing rights of the affected communities more particularly their rights to human dignity, equality and cultural rights. Human dignity and life are ranked above all other rights by the Constitutional Court[13] which authoritatively stated that these two rights are "*the most important of all human rights*".

90. Section 9 (3) of the Constitution outlaws discrimination, directly or indirectly on the basis of, *inter alia,* culture.

91. Given our history of colonialism and apartheid and the fact that ours is a transformative constitution indigenous cultures which were systematically undermined and suppressed deserve to be affirmed and given priority. Section 9 (2) of the Constitution provides that:

> "*To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken*".

92. In addition the evidence of Nkosi Holomisa and Dr Bungane indicating that the impact of Inxeba might threaten life itself, is unchallenged.

93. Section 18 of the Constitution provides that:

 93.1 A child's best interest are of paramount importance in every matter concerning the child; and

[13] S v Makwanyane 1995 (3) SA 391 (CC) at paragraph [144]

93.2 "*Child*" means a person under the age of 18 years.

94. The rights contained in sections 9, 10, 11 and 28 are non-derogable in terms of section 37 of the Constitution.

95. Section 39 (3) of the Constitution states that:

> "*The Bill of Rights does not deny the existence of any other rights or freedom that are recognised or conferred by common law, <u>customary law or legislation</u>, to the extent that they are consistent with the Bill*"

96. In terms of the applicable Eastern Cape legislation children under 18 may not attend initiation schools.

97. When expression rights are exercised in a manner that shows disrespect to the rights of others and is exercised in a manner that is degrading and offensive, they must curtailed. In **Phillips v Director of Public Prosecutions (Witwatersrand**)[14]the Constitutional Court held that the right to freedom of expression is not, and should not be regarded as absolute, and it may be limited by a law of general application that complies with section 36 of the Constitution. The Court further held that the Constitution expressly allows the limitation of expression such as the one contained in Inxeba, that is "repulsive, degrading, offensive or unacceptable" to the extent that the limitation is justifiable in an "*open and democratic society based on human dignity, equality and freedom*". It is noteworthy that in the Guidelines incitement to

[14] 2003 (4) BCLR 357 at para [17].

cause harm is regarded as synonymous to incitement of imminent violence, which is one of the exceptions listed in section 16 (2) of the Constitution.

98. The right to freedom of expression must especially be curtailed when it exercised in a manner that violates the right of others to dignity. Dignity is a founding value of our Constitution and is enshrined as one of the founding values of our Constitution in section 1. In **Dawood and Another v Minister of Home Affairs and another the Constitutional Court**[15] reaffirmed the importance of the right to dignity and stated the following:

> "*The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be*

[15] Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at para [35].

respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

99. The importance of the right to dignity was also reiterated in **Khumalo v Holomisa**[16]where the Constitutional Court held that in deciding whether a conduct constitute justifiable limitation to the right to freedom of expression, sight must not be lost of the constitutional values, in particular the value of human dignity.

100. In **Phillips v Director of Public Prosecutions (Witwatersrand**)[17]the Constitutional Court held that the right to freedom of expression is not, and should not be regarded as absolute, and it may be limited by a law of general application that complies with section 36 of the Constitution. The Court further held that the Constitution expressly allows the limitation of expression such as the one contained in Inxeba, that is "repulsive, degrading, offensive or unacceptable" to the extent that the limitation is justifiable in an "open and democratic society based on human dignity, equality and freedom".

101. The Appeal Tribunal considered the rights of the applicants to freedom of expression and correctly concluded their "right to freedom of expression has an effect on the rights of the Xhosa traditional group". This balancing exercise

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[16] 2002 (5) SA 401 at para [41]
[17] 2003 (4) BCLR 357 at para [17].

is in line with the Constitutional Court judgments. In **S v Mamabolo (E TV, Business Day and Freedom of Expression Institute Intervening**)[18] said:

> *"With us it [freedom of expression] is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."*

102. On these ground alone it must be clear that the conclusion reached by the Appeal Tribunal was, in all the circumstances, justified. It was therefore

[18] 2001 (3) SA 409 (CC) para [41].

unassailable whether from the point of view of PAJA or the rule of law and the demands of justice. Important as the freedom of expression is in a democracy, these competing rights, collectively viewed must necessarily take precedence.

COSTS

103. For the reasons outlined in the answering affidavit, and for which the applicants seemingly remain unrepentant, it will be strongly submitted that this is a case which warrants a punitive cost order.

104. On the facts of this case it was completely unnecessary to attack the integrity and independence of the members of the Tribunal. This may have a negative effect upon the execution of their duties.

105. The applicants are also guilty of deliberately misleading members of the public about the agreed interim order, for selfish financial gain.

106. To add insult to injury the applicants have more recently launched a new media campaign by placing full page colour advertisements of the film in the newspapers with the words "*NOW UNRESTRICTED*" to coax members of the public, including children to watch the film. The claim that the film is "*now unrestricted*" is false and calculated to mislead the public and to cause unsuspecting people part with their money.

CONCLUSION

107. To succinctly encapsulate the essence of this case, we can do no better than to quote O'Regan J in the famous death penalty case of S v Makwanyane(supra), at paragraph [329]

> "***Respect for the dignity of all human beings in particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. This recognition and protection of human dignity is the touchstone of the new political order and is fundamental as to the new Constitution***".

108. In the totality of the circumstances, it is respectfully prayed that it may please the above Honourable Court to dismiss the application and order the applicants to pay costs on the attorney-and-client scale, including the costs attendant upon the employment of three counsel.

DC MPOFU SC
GD NGCANGISA
M MOROPA
Counsel for the 5th and 6th Respondents

Sandton Chambers

23 May 2018