

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PRETORIA)**

Case No. 3589/18

In the matter between:

**INDIGENOUS FILM DISTRIBUTION (PTY) LIMITED
URUCU MEDIA (PTY) LIMITED**

First Applicant
Second Applicant

and

**FILM AND PUBLICATION APPEAL TRIBUNAL
CHAIPERSON OF THE FILM AND PUBLICATION
APPEAL TRIBUNAL NO**

First Respondent

FILM AND PUBLICATION BOARD

Second Respondent

FILM AND PUBLICATION COUNCIL

Third Respondent

MAN AND BOY FOUNDATION

Fourth Respondent

**CONGRESS OF TRADITIONAL LEADERS OF
SOUTH AFRICA**

Fifth Respondent

SOUTH AFRICAN HEALERS ASSOCIATION

Sixth Respondent

IBUTHO LESIZWE CULTURAL DEVELOPMENT

Seventh Respondent

IZINDUNA ZAMAKHOSI

Eight Respondent

UBUHLE BENCULE

Ninth Respondent

Tenth Respondent

THE THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. For reasons which I advance herein below, it is my submission that the First, Second, Fifth and Sixth Respondent insistence with the opposition of the

Second Respondent's award, is informed by a failure to appreciate the statutory constraints of classification decisions.

2. It is for that reason, that the Third Respondent found itself with a decision which simply is impossible to implement.
3. Against this background, the Third Respondent was of the view that it should assist the Court by submitting an answering affidavit.

STATUTORY CONSTRAINTS

4. Films are classified by the classification committee and the classification committee's decision, once taken, is **deemed** to be a decision of the Board.¹
5. The process of classification, to avoid subjective classifications, is required to be done in terms of the Constitution, the Film and Publications Act² ("Act") and the classification guidelines ("Guidelines")³.
6. Guidelines are themselves pursuant to a vigorous public consultative process with a view to arrive at guidelines that fairly reflect the norms and standards of the South African people.⁴

¹ Page 171, Paragraph 11 of the Third Respondent's answering affidavit.

² No 65 of 1996

³ Page 186, Paragraph 3 of the Boards Heads of Argument before the Appeal Tribunal

⁴ Page 186, Paragraph 4 of the Boards Heads of Argument before the Appeal Tribunal

7. It is significant to point out that the classification committee, in arriving at its decision, was guided, and indeed referenced the classification guidelines extensively, and applied them appropriately.

8. The Third Respondent exists to achieve three objectives, that is:
 - 8.1. Provide consumer advice to allow adults to make informed viewing decision for themselves and their children;
 - 8.2. Protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
 - 8.3. Make the use of children in and exposure of children to pornography punishable⁵.

9. Because of these constraints, the third Respondent whilst recognising the various constitutional principles set out in the First and Second Respondent's answering affidavit⁶, must remain mindful of and be guided its objects which in turn describe its powers.

10. The issues of culture therefore, can be entertained on a very limited basis by the Second Respondent since the powers of the Second Respondent are sourced from the empowering legislation.

⁵ Page 170, paragraph 8 of the Third Respondent's answering affidavit

⁶ Page 259, paragraph 5 to 12

11. The residual challenges based on culture, to the extent that there is any merit to them, could have been brought to the above honourable Court and not under the Act.
12. It is curiously that even the Respondents who argued on the basis of culture and religion, did not request that the film be distributed only in adult premises.

ISSUE TO BE CLARIFIED

13. The Second Respondent in its answering affidavit expressed difficulty in implementing the award on three grounds. Of those grounds, only one survives since: -
 - 13.1. The First and Second Respondent conceded the incorrect referencing was an error;⁷ and
 - 13.2. In light of the interim order by this Court, the film cannot, and I do not understand the Second Respondent to insist that the film be “removed from public circulation”.
14. The remaining difficulty therefore, is the fact that the Second Respondent in its award, **offered no reasons** why the film should be classified X18 in circumstances where the decision being overturned, referenced the

⁷ Page 268, paragraph 25 of the First and Second Respondent's answering affidavit

Guidelines, and set out in some detail, how each classifiable element was considered.⁸

15. The Guideline are clear on how the Act is to be applied during the classification process.⁹
16. To simply state that there is no artistic merit in the film is not sufficient and, in any event, even if one were to be excuse the failure to provide reasons, the decision is directly inconsistent with the Guidelines.
17. As found by the classification committee, the themes are:

“mature and complex and include homosexuality, cultural practices, hiding one’s sexual orientation, an initiation process, circumcision without anaesthetic, friendship, a sexual relationship, manhood, jealousy, love and murder, with no real pro-social or resolution...”¹⁰

18. It remains unexplained how it was found that there is no artistic merit when the film explores such complex social issues which are in the public interest.

CONCLUSION

⁸ Page 186, paragraph 5 to 8.

⁹ Page 177, paragraph 31 of the Third Respondent’s answering affidavit

¹⁰ Page 66, Annexure HK8

19. In conclusion, I submit that during the viewing of the film in preparation for this hearing, the viewer was compelled to consider serious social issues which are foreshadowed by the classification committee, principal among such issues is the role of men in our patriarchal society, the plight of homosexual persons particularly within a rural and traditional environment.
20. It is difficult argue the absence of artistic merit in such circumstances.
21. Finally, the classification on Inxeba is consistent with other films that have been classified by the Second Respondent. The fact that the sexual activities are between men and that they take place within the context of an initiation, should not and cannot make the film X18.
22. The Act and Guidelines does not treat sexual intercourse (simulated or not) of heterosexuals different from that of homosexuals.
23. For reasons set out above, the Second Respondent stands by its decision.

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