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

CASE NO: 3589/18

In the application of:

RIGHT2KNOW CAMPAIGN	First Applicant
SOUTH AFRICAN SCREEN FEDERATION	Second Applicant

to be admitted as *amicus curiae* 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 BOY 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

HEADS OF ARGUMENT:
APPLICANTS FOR ADMISSION AS AMICI CURIAE

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I INTRODUCTION

1. The core issue in this Application is whether the decision by the First Respondent (**the Board**) to classify the film *Inxeba* as X18 was consistent with the Films and Publications Act 65 of 1996 (**FPB Act**). The decision followed an "appeal" by the Fifth to Tenth Respondents (**the Complainants**).[1]

2. The Applicants for Admission as *amici curiae* (**R2K and SASFED**) agree with the Applicants that it was not. But their reasons are different. While the Applicants, understandably, focus on compliance with the terms of the FPB Act in these particular circumstances, R2K's and SASFED's concern is broader.

3. Their concern is how the decision – if it is allowed to stand – will have serious negative consequences for the South African film industry. It will reduce the amount of money people are willing to invest to make and distribute films, particularly if those films are in any way controversial.

4. That is not only a constitutional violation of the rights of filmmakers that SASFED represents. It is a violation of the right of <u>all South Africans</u> to be able to see locally produced films, including films that may address sensitive topics, and contain scenes that some people may find offensive.

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[1] Only the Fifth and Sixth Respondents have opposed the application. Depending on the context, the term "Complainants" refers either to all those who lodged the "appeal" with the Tribunal, or only those who are participating in this application.

5. Accordingly, R2K and SASFED seek leave to be admitted as *amici curiae* in this Court to demonstrate that if the Tribunal's decision – and the manner in which it was taken – is held to be consistent with the FPB Act:

    5.1. South Africa will breach multiple international obligations that require it to protect free expression from precisely this form of censorship;

    5.2. The FPB Act itself will almost certainly be an unjustifiable limitation of the right to freedom of expression;

    5.3. It will undermine the simple process adopted by the FPB Act for the classification of films, by introducing the uncertainty of an appeal by any offended member of the public at any time; and

    5.4. It will make it impossible to rely on past Tribunal decisions to predict future classifications.

6. The practical result will be that South African filmmakers will struggle to obtain the necessary investment to make films that address controversial topics, and will shy away from including potentially offensive stories and scenes in their films. Fewer films like *Inxeba* will ever be made, and South Africans will never be able to determine for themselves whether they want to see them. That will be a severe limitation of the right to free expression.

7. These submissions are structured as follows:

    7.1. **Part II** summarises the relevant international law;

    7.2. **Part III** addresses the constitutional rights at stake;

    7.3. **Part IV** explains why the Tribunal had no jurisdiction to hear the appeal;

7.4. **Part V** details why it was impermissible for the Tribunal to issue a decision that was inconsistent with its previous decisions, without an explanation; and

7.5. **Part VI** deals with the opposition to R2K and SASFED's admission as *amici curiae*.

II THE OBLIGATION TO CONSIDER INTERNATIONAL LAW

8. This Part canvasses the relevant international law on freedom of expression, with particular reference to artistic expression. We address, first, those instruments that are binding on South Africa, and then briefly the position in Europe that provides useful comparative guidance.

9. International law is relevant for several reasons:

9.1. In terms of s 233 of the Constitution: "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"

9.2. Moreover, when interpreting the Bill of Rights, s 39(1)(b) of the Constitution mandates courts to consider international law. In *Glenister II*,[2] the Constitutional Court stressed the importance of international law in determining the content of the Bill of Rights, and particularly s 7(2). It held that an international obligation does not only exist on the

[2] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).

international plane: "*Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.*"[3] It continued:

> "*Section 39(1)(b) states that when interpreting the Bill of Rights a court "must consider international law". The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law.*"[4]

9.3. Courts must consider not only, the international treaties, but also the relevant commentary on those treaties, particularly those issued by the bodies established to interpret and apply the relevant treaty.[5]

9.4. Lastly, while the courts are not compelled to consider comparative law, they are permitted to do so when interpreting the Bill of Rights.[6]

Binding International Law

10. There are four treaties that are binding on South Africa and that directly impose an obligation not to censor films that are seen to be offensive. They are:

10.1. The International Covenant on Civil and Political Rights (**ICCPR**);

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[3] Ibid at para 189.

[4] Ibid at para 192.

[5] See, for example, *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 at paras 29-31; *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1; 2013 (3) BCLR 271 (CC); 2013 (2) SA 613 (CC) at fn 6; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at paras 95-6.

[6] Constitution s 39(1)(c).

10.2. The International Covenant on Economic, Social, and Cultural Rights (**ICESCR**);

10.3. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions; and

10.4. The African Charter on Human and Peoples' Rights.

<u>ICCPR</u>

11. Articles 19 of the ICCPR read:

> *"**Article 19***
>
> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> > *(a) For respect of the rights or reputations of others;*
> >
> > *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

12. The UN Human Rights Committee, in General Comment 24,[7] explains that in article 19(1) *"[a]ll forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature"*.[8]

13. It also explains that "expression" in article 19(2) "*includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse*".[9] Moreover, *"[t]he scope of paragraph 2 embraces even expression that may be regarded as* ***deeply offensive****, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3*".[10]

14. Article 19(3) sets out the requirements for limiting freedom of expression. The first requirement in article 19(3) is that any restrictions on expression are "provided by law". The committee explains that "*a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public*".[11] Moreover, the "*law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.*"[12]

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[7] UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34.

[8] Ibid at para 9.

[9] Ibid at para 11.

[10] Ibid at para 11.

[11] Ibid at para 25.

[12] Ibid.

15. As we expand on in **Part V** this is directly relevant to the *Inxeba* application. International law imposes a high standard of clarity on laws that limit expression. If the Appeal Tribunal is permitted to depart from the ordinary meaning of words (like “explicit sexual conduct” or “artistic merit”), acts inconsistently with its prior decisions and without explanation, and to add additional reasons for imposing an X18 classification that do not appear in the Act, then that breach the international law requirement for precise limitations on expression.

16. Second, article 19(3)(a) accepts that limiting expression for respect of the rights and reputations of others is a legitimate purpose. But the limitation must be *necessary* and *proportionate*.[13] The least intrusive means capable of achieving the purpose must be selected from available alternatives.[14]

17. An alternative to absolute prohibitions of publications are ratings to protect children and to limit viewing to adults.[15] The Appeal Tribunal had a range of alternatives available to it. This included rating the film 18 only (and not X18), so that the film could still be shown at cinemas (to adults only). Instead, however, it opted for what is in effect a ban on the film from all cinemas. It did not adopt the least restrictive, necessary limitation to expression. The decision thus breaches international law.

[13] Ibid at paras 33 and 34.

[14] Ibid at para 34.

[15] Report of the Special Rapporteur in the field of Cultural Rights *The Right to Freedom of Artistic Expression and Creativity* (14 March 2013) A/HRC/23/34 at paras 62-64.

18. Unfortunately, the Appeal Tribunal's decision accords with the recent observations made by the Special Rapporteur in the field of cultural rights. In 2013, she released a report on *The Right to Freedom of Artistic Expression and Creativity*.[16]

> *"[i]ssues relating to gender, sexuality and sexual orientation, in relation to religion and morals, continue to be highly debated in connection with artistic expressions and creations. Artworks that are concerned range from those addressing the issue of love and romance, or representing or exposing nudity, to those resorting to pornography or certain forms of pornography. References to, or descriptions of, homosexual relationships in literature, music and visual arts are criminalized in several countries, or face particular censorship in some others. The Special Rapporteur notes with concern that the motivation of protecting children from certain content may be used to and lead to prohibited access for adults. She further stresses that according to some information, "despite widely publicized claims that adverse effects [of sexual or violent content on children] have been proven, the studies are ambiguous, disparate and modest in their results"."*[17]

19. The Rapporteur stresses that the fact that some portions of the population may find art culturally offensive, is no basis to censor it. Indeed, art is central to internal contestation about meaning within culture:

> *"It must be recalled that, within any collective identity, there will always be differences and debates over meanings, definitions and concepts. To understand who speaks for which culture or community, and ensure that predominance is not accorded to one voice over the other, most often*

[16] Ibid.

[17] Ibid at para 50

> *out of prejudice, are particular challenges. The fear that some communities may protest should not be sufficient to lead to the conclusion that some artworks should not be displayed or performed; a certain level of contest and dispute is often inherent to contemporary art."*[18]

20. The UN Human Rights Committee has also noted with concern how expression is often censored when it questions prevailing religious or traditional views. In its General Comment 34, the Committee said:

> *"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."*[19]

21. While the statement focuses on religious beliefs, the same must hold true for cultural beliefs. Even sincerely and deeply-held objections to artwork on religious or cultural grounds cannot be a basis for censorship. Nor can any one culture be granted preferential treatment over other cultures.

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[18] Ibid at para 49.

[19] General Comment 34 (n 7) at para 48.

22. This is, in effect, the argument advanced by the Complainants. As the Applicants correctly note, it has no basis at all in the Act, and is contradicted by the Tribunal's own reasons. But it would also be inconsistent with international law to permit the state to limit expression to accommodate cultural objections.

ICESCR

23. Article 15 of the ICESCR reads:

> *"1. The States Parties to the present Covenant recognize the right of everyone:*
>
> *(a) To take part in cultural life;*
>
> *[…]*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
>
> *3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and <u>creative activity.</u>"*

24. In General Comment 21, the ICESCR Committee interprets and explains the right in art 15(1)(a).[20] The Committee notes that the right to take part in cultural life is also recognized in article 27(1) of the Universal Declaration of Human

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[20] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.

Rights, which affords everyone "*the right freely to participate in the cultural life of the community*".[21]

25. The Committee defines culture broadly. It is a concept that encompasses "*all manifestations of human existence*".[22] This includes "*the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with external forces affecting their lives*".[23]

26. Importantly, the Committee rejects the notion that culture is "*a series of isolated manifestations or hermetic compartments*".[24] Instead, culture is "*an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.*"[25]

27. For that reason, art 15 of the ICESCR guarantees everyone the right to "*freely choose their own cultural identity .. and have their choice respected*".[26] That includes the "*freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms <u>including art forms, regardless of frontiers of any kind</u>*".[27]

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[21] Ibid at para 3

[22] Ibid at para 11.

[23] Ibid at para 13.

[24] Ibid at para 12.

[25] Ibid.

[26] Ibid at para 49(a).

[27] Ibid at para 49(b).

Accordingly, South Africa is obliged to "*abolish censorship of cultural activities in the arts and other forms of expression*".[28]

28. The making of *Inxeba* is plainly itself a protected form of cultural expression. To prohibit *Inxeba* from being shown at cinemas thus limits the artists' right to participate in and contribute to their culture that are guaranteed in the ICESCR.

29. But it also limits' others rights to participate in cultural life. The right includes the elements of availability and accessibility. This means that if cultural goods are not available and accessible for everyone to enjoy and benefit from, like cinemas and art, the necessary conditions for the full realisation of the right are not present.[29] It also stresses that the right should not be limited unless it is necessary to do so to prevent the violation of other rights.[30]

30. The decision to rate *Inxeba* X18, because it is an effective prohibition, violates the right to participate in cultural life. It undermines the rights of the makers of the film, and it undermines the rights of all other South Africans who wish to participate in the cultural life of the community by watching the film.

31. More concerning is the impact that the decision will have in the future. It holds that films that fall well within the mainstream of artistic cinema may be relegated to sex shops because the members of the Tribunal found it offensive. That is plainly inconsistent with the ICESCR.

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[28] Ibid at para 49(c).

[29] Ibid at para 16(a).

[30] Ibid at para 19.

The Convention on Cultural Expression

32. The Convention on Cultural Expression was adopted in 2005. The preamble of the Convention records the following:

> *"Being aware that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures,*
>
> *Reaffirming that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies,*
>
> *Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values"*

33. The Convention begins with certain guiding principles. The first principle recognizes the centrality of free expression:

> *"1.* ***Principle of respect for human rights and fundamental freedoms***
>
> *Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof."*

34. Article 7 of Convention obliges states to

> *"create in their territory an environment which encourages individuals and social groups:*

> *(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;*
>
> *(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world".*

35. These provisions require South Africa to promote the distribution of cultural expression and ensure access to cultural expression. *Inxeba* is undoubtedly a form of cultural expression, not only because it is a film, but because it is one of the few feature films that is entirely in isiXhosa. Effectively banning the film is plainly inconsistent with South Africa's obligations under the Convention.

African Charter

36. Article 9(2) of the African Charter says that "*[e]very individual shall have the right to express and disseminate his opinions within the law*".

37. The African Commission on Human and People's Rights has held that freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness, and participation in the public affairs of a country.[31]

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[31] *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06 at para 246; *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* Communications 48/90-50/91-52/91-89/93 at para 54.

38. The expression "within the law" in art 9(2) must be interpreted in reference to international norms that provide grounds for limitations on freedom of expression.[32] This includes the UN Human Rights Committee's requirement, discussed above, that laws be precise and clear when limiting freedom of expression.[33]

39. The Commission has commented that *"[t]hough in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase "within the law", under Article 9 (2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation".*[34] In line with the position under the ICCPR, *"the reasons for possible limitations [of expression] must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained".*[35]

40. With reference to possible purposes for limiting expression, the Commission has held that "*the only legitimate reasons to limit these rights and freedoms are*

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[32] *Malawi African Association and Others v Mauritania Communication* 54/91-61/91-96/93-98/93-164/97_196/97-210/98- at para 106.

[33] *Lohé Issa Konaté v Burkina Faso* Communication 004/13 at para 128.

[34] *Kenneth Good v. The Republic of Botswana* Communication No. 313/05, para 188; 004/13 *Lohé Issa Konaté* (n 33) at para 129.

[35] *Media Rights Agenda, Constitutional Rights Project v. Nigeria* Communication No. 105/93-128/94-130/94-152/96 at para 69; *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* Communication 379/09 at para 114; 004/13 *Lohé Issa Konaté* (n 33) at para 150.

stipulated in Article 27(2), namely that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest".[36]

41. The purpose for the *Inxeba* decision does not fit into any of these categories. It is unclear how screening the movie at a privately-owned cinema, with an appropriate age limit, violates the rights of anyone.

42. The African Commission on Human and Peoples' Rights passed the Declaration of Principles on Freedom of Expression in Africa at its 32nd session in 2002. The Declaration elaborates on art 9, and is used by the Commission regularly to supplement the Charter.[37] Article 1(1) of the Declaration reads:

> *"Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy."*

43. Article 2(2) provides that "*any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society*". Article 3 then explains that

> *"Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things-:*

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[36] *Lohé Issa Konaté* (n 33) at para 134; *Media Rights Agenda* (n 35) at para 168.

[37] *Egyptian Initiative* (n 31) at para 245.

- *availability and promotion of a range of information and ideas to the public;*
- *pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;*
- *the promotion and protection of African voices, including through media in local languages; and*
- *the promotion of the use of local languages in public affairs, including in the courts."*

44. We highlight in particular the need to promote expression, including artistic expression, in local languages.

45. The Commission has urged member states to fulfil these obligations in two separate resolutions.[38] This is against a backdrop of violations of the right to freedom of expression across Africa.

46. Finally, the Commission has held that the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.[39]

[38] Resolutions 166 and 99.

[39] *Amnesty International* (n 31) at para 79.

47. The decision to effectively ban *Inxeba* would violate SA's obligation under the Charter. Instead of promoting a wide range of ideas and African voices and languages, the Appeals Tribunal has stifled valuable artistic diversity and contribution.

European Convention of Human Rights (ECHR)

48. Article 10 of the ECHR reads guarantees the right to freedom of expression.[40] The European Court of Human Rights has explained that art 10 protects all "*[t]hose who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions*".[41]

49. The Court has heard several cases concerning balancing the right to freedom of expression against countervailing religious or cultural interests.

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[40] The provision reads:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

[41] *Vereinigung Bildender Kunstler v Austria* [2007] ECHR 79 at para 26.

50. In the case of *Giniewski v France*,[42] the Court had to decide if France had violated Giniewski's freedom of speech for convicting him of defaming Christianity. Giniewski had written an article criticising the Pope for endorsing Christian values that could be perceived as anti-Semitic. The Court found that the conviction was contrary to the Convention because the limitation of free speech was not necessary in a democratic society:

50.1. The articles criticised the Pope or Archbishop only, and not Christianity as a whole.[43]

50.2. The article in *Giniewski* was "*a contribution, which by definition was open to discussion, to a wide-ranging and on-going debate, without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought*".[44] The Court held that the article contributed to an on-going debate about whether the manner in which the Jews are presented in the New Testament contributed to creating hostility against them.[45]

50.3. "*By considering the detrimental effects of a particular doctrine, the article in [Giniewski] contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society*".[46]

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[42] [2006] ECHR 82.

[43] Ibid para 49.

[44] Ibid at para 50

[45] Ibid at para 24.

[46] Para 51.

51. These reasons apply to *Inxeba*. The film can certainly be interpreted to raise the nature of masculinity in South African society generally, and Xhosa society in particular. In doing so, it is a contribution to an on-going, wide-spread debate on masculinity, homosexuality and existing social and cultural norms. It is not detached from the reality of contemporary thought. This is a question of "*indisputable public interest in a democratic society*". Finally, it does not interfere with the right of Xhosa people to practice their cultural rituals.

52. In *I.A. v Turkey*,[47] the European Court stressed that the right to freedom of religion does not immunise religious believers from criticism, or other hostile expression:

> *"Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."*[48]

53. The Court went on to say that comments that offend, shock or provoke others cannot be censored just because of how these comments make religious adherents feel.[49] This is entirely consistent with approach of the Constitutional

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[47] [2005] ECHR 590.

[48] Ibid at para 28, footnotes omitted.

[49] Ibid at para 29. It is worth noting that, the Court found that the speech at issue there did cross the line into abuse.

Court which has cited with approval the decision of the European Court in *Handyside v United Kingdom* that freedom of expression is applicable –

> *"… not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society."*[50]

54. Recently the Court has allowed artists to rely on precautions taken when showing or displaying their works to justify those displays. The Court has made clear that "*offence to one's beliefs that may result in a breach of the Convention cannot occur against individuals who have willingly submitted themselves to reading or visualizing an offensive work*". Therefore, a prohibition of an artwork should aim at protecting only those who do not want to expose themselves to the incriminated artistic creation or literature work.[51]

55. The artists behind *Inxeba* have taken a variety of precautions in displaying their work. The film was rated such that only those who are above the age of 16 can watch it. The film is not displayed in public, but in privately-owned cinemas. There is no danger that those who do not want to see the film will be forced to do so.

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[50] (1979-1980) 1 EHRR 737 at para 49, cited in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 28; *De Reuck v DPP, Witwatersrand* 2004 (1) SA 406 (CC) at para 49.

[51] Eleni Polymenopoulou 'Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights' (2016) 16 *Human Rights Law Review* 511 at 529.

III THE CONSTITUTION AND ARTISTIC CREATIVITY

56. Section 16(1) of the Constitution protects the right of everyone to freedom of expression. Section 16 of the Constitution states:

> *"(1) Everyone has the right to freedom of expression, which includes –*
>
> *(a) freedom of the press and other media;*
> *(b) freedom to receive or impart information or ideas;*
> *(c) freedom of artistic creativity; and*
> *(d) academic freedom and freedom of scientific research.*
>
> *(2) The right in subsection (1) does not extend to –*
> *(a) propaganda for war;*
> *(b) incitement to imminent violence; or*
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

57. All expression, even child pornography,[52] that is not listed in s 16(2) qualifies for constitutional protection.[53] Any limitation of such expression must be justified in terms of s 36(1) of the Constitution.

58. In this section, we make FIVE points about s 16(2):

58.1. The role and importance of free expression;

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[52] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC).

[53] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 27.

58.2. The relevance of inclusion of artistic creativity;

58.3. The history of censorship in South Africa;

58.4. The protection of offensive or unpopular speech; AND

58.5. The treatment of nudity and pornography.

59. First, the right to freedom of expression and its role in a democratic society has been frequently stressed. In *South African National Defence Union v Minister of Defence and Another*, the Constitutional Court held that

> *"freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."*[54]

60. Second, it is important to consider why the drafters of the Constitution chose to specifically include the protection of "*artistic creativity*". The obvious explanation is to make it plain that art "*lies at the core of the expressive right, not merely in the penumbra.*"[55] The express inclusion of artistic speech in the s 16(1)(c) suggests that our Constitution treats artistic speech as equally

[54] *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para 27; *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) para 8.

[55] D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2008) ch42-p53.

important to other forms of speech. The right to freedom of artistic creativity plainly includes the making of films.[56]

61. Third, the Constitutional Court has regularly referred back to our history of censorship and banning orders to caution against permitting any form of thought control.[57] There is a strong "never again" element to the Constitutional Court's jurisprudence on free expression. A large part of the history of censorship that informs the Court's approach is the banning of films and books.

62. Fourth, the freedom of artistic creativity is at its most important where it conveys sentiments that are threatened with suppression by the state or with marginalisation in civil society, because they are deemed dangerous, offensive, subversive, or irrelevant.[58] In the recent case of *Democratic Alliance v African National Congress*, the Court explained that freedom of expression – together with the other related rights – includes, in particular, the right to express "*controversial or unpopular views, or those that inconvenience the powerful.*"[59] The Court continued:

> "*The corollary is tolerance. We have to put up with views we don't like. That does not require approval. It means the public airing of*

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[56] Currie and De Waal *The Bill of Rights Handbook* 6ed p351.

[57] See *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37; *Phillips v Director of Public Prosecutions and Others* [2003] ZACC 1; 2003 (3) SA 345 (CC) at para 27; and *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC) at para 94.

[58] *Case and another v Minister of Safety and Security and others* 1996 (3) SA 617 (CC) at para 28 (Mokgoro J, concurring).

[59] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 125.

disagreements. And it means refusing to silence unpopular views. As Mogoeng CJ has recently explained:

> "Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen."[60]

63. Fifth, the Constitutional Court has expressly held that expression includes nudity. In *Phillips and Another v Director of Public Prosecutions and Others*, it was held that a prohibition of entertainment featuring indecency, obscenity or nudity at premises that serve liquor was an infringement of the right to artistic creativity. The prohibition hit dramatic performances including plays and concerts, irrespective of whether they represent serious works of art or the communication of thoughts and ideas essential for positive social development.[61] As Yacoob J explained: "*The core business of a theatre is to realise protected freedom of expression by presenting artistic creations that communicate thoughts and ideas.*"[62]

64. Thus, the following constitutional principles may be gleaned:

    64.1. The right to freedom of expression is is one of a web of mutually supporting rights in the Constitution.

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[60] Ibid at para 126, quoting *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 43.

[61] *Phillips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 (CC) para 15. See also, *Case* (n 58) where the concurring judgment of Mokgoro J would have overturned a censorship regime that prohibited certain forms of pornography. The majority agreed, but relied only on the right to privacy, not the right to free expression.

[62] Ibid at para 28.

64.2. The right to freedom of expression is central to the functioning of an open and democratic society and the ability of individuals to be able to hear, form and express opinions and views freely on a wide range of matters.

64.3. That the public interest in the open market-place of ideas is all the more important in this country because of our history.

64.4. The freedom of artistic creativity would be seriously undermined if it did not encompass the right of individuals to unhampered access to sources of artistic and intellectual inspiration.

64.5. Freedom of expression includes ideas that offend, shock and disturb.

IV THE RIGHT TO APPEAL

65. The Applicants have correctly argued that, under s 20 of the FPB Act, the Complainants had no right to bring an appeal before the Tribunal. R2K and SASFED have nothing to add to the textual argument advanced by the Applicants.

66. Instead, they argue that the position adopted in the statute facilitates and promotes the right to freedom of expression. It does so without improperly or unduly limiting the right of any person to approach a court to argue that a film should be restricted or even banned. But the internal appeal mechanism is not designed for them – it is designed to facilitate the production and distribution of films. This is entirely consistent with existing precedent on the availability of internal appeals.

67. The classification procedure is intended to be a quick, easy, cheap, and predictable system. That purpose would be undermined by providing for hearings by the distributors or exhibitors, let alone members of the public. It would be destroyed by permitting appeals against decisions by people who have no right to be involved in the initial decision.

68. R2K and SASFED have explained in their affidavits that allowing appeals by members of the public will create intolerable uncertainty in the film industry, and introduce significant additional costs. If a classification can, at any time, be challenged in front of the Tribunal and altered, then filmmakers cannot plan. They cannot choose to remove offending scenes in order to obtain a lower rating, and they cannot target their marketing and distribution scheme to fit with the classification.

69. That will reduce the number and quality of South African films that are produced. Fewer investors will risk less money if they have less of a guarantee that they will recover their investment. In simple terms, because of the massive cost of films, the certainty of prior classification <u>promotes</u> the production of films, and particularly controversial films. The same economic logic does not apply to other publications which have far lower production and distribution costs.

70. The commercial reality that an appropriate prior classification regime can, in the case of films , promote rather than hinder free expression has been recognised internationally

70.1. In 1972, the United Kingdom established a commission to investigate film censorship. One of the facts that emerged from the commission was that film producers and distributors favoured a system of prior classification because of the system's "*certainty, speed of decision, and cheapness*".[63]

70.2. A similar approach has been taken in the United States. The US Supreme Court is notoriously protective of speech rights. But even it recognises the benefit of a prior classification regime for films. In *Freedman v Maryland*[64] the Court struck down a state law that provided for prior licencing of films because it did not include adequate procedural safeguards. Part of the reasoning was a clear recognition of the reality of the business of motion pictures:

> "*It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission … recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date – far enough in advance so that the exhibitor could safely advertise the opening on a normal basis. Failing such a scheme or sufficiently early submission under such a scheme, the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute. Otherwise, litigation might be unduly expensive and protracted, or the victorious exhibitor might find the most propitious opportunity for exhibition past.*"[65]

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[63] E Barendt *Freedom of Speech* (2 ed, 2005) at 131.

[64] 380 US 51 (1965).

[65] Ibid at 61.

71. This is exactly the situation in which the Applicants have been placed. But the effect of allowing "appeals" by interested members of the public long after the Board has classified a film, and after the film has begun its run are not confined to the Applicants. The Tribunal's interpretation of ss 19 and 20 will have a serious negative impact on the South African film industry as a whole. It creates the risk that, even if a film is approved by the Board it could, at any time, be effectively banned. This will: (a) deter investment; and (b) discourage films that push traditional boundaries.

72. That is manifestly inconsistent with s 16(1)(c) of the Constitution, particularly when read with the state's obligation under s 7(2) to "*promote and fulfil*" the right to free expression.

73. There is nothing unusual about limiting internal appeals to those who were involved in the initial decision. The Respondents' argument misunderstands the nature of an internal appeal. It also confuses the classification of a film with its exhibition or distribution. These errors are best demonstrated by analogy to settled precedent.

74. In *Walele*,[66] the Constitutional Court held that neighbours who objected to the construction of a building had no right to be part of the initial approval of building

[66] *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC).

plans. Their rights were not affected, the Court held, by the granting of the approval, but by the construction of the building.[67]

75. In *Reader*[68] the issue was whether a dissatisfied neighbour was obliged, under s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**), to exhaust an internal appeal in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 before he could review the decision to approve building plans. Lewis JA held that he was not:

> *"Although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that his or her property rights are in some way diminished) may appeal, that cannot be. <u>How can a person not party to the application procedure itself appeal against the decision that results?</u>"*

76. That did not mean that the neighbour would lack standing to bring a review – only that the internal appeal process was not designed for them, but for the applicant.

77. This approach was confirmed by the SCA in *JDJ Properties.*[69] Again, the question was whether a neighbour had a right to appeal, this time in terms of s 9(1)(c) of the National Building Regulations And Building Standards Act 49 of

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[67] Ibid at paras 30-32.

[68] *Municipality of the City of Cape Town v Reader and Others* [2008] ZASCA 130; 2009 (1) SA 555 (SCA).

[69] *JDJ Properties CC and Another v Umngeni Local Municipality and Another* [2012] ZASCA 186; [2013] 1 All SA 306 (SCA); 2013 (2) SA 395 (SCA).

1995 which afforded the right to: "*Any person who … (c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law*". Despite the apparently wide wording, Plasket AJA applied the reasoning in *Reader* – a non-party to the original decision has no right of appeal:

> "*How can a person appeal against a decision taken in proceedings in which he or she was not a party? The essence of an appeal is a rehearing (whether wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision.*"[70]

78. Exactly the same is true here. No person has a right to participate in a classification decision by the Board. None of the Respondents suggest otherwise. Indeed, the entire system is built on a quick, simple and efficient classification process where not even the applicant has the right to make representations at the first level.

79. In fact, the case here is even stronger than it was in *Reader* and *JDJ Properties*. There the language was at least capable of the proposed interpretation. Section 62 of the Systems Act granted the internal appeal right to "*[a] person whose rights are affected by a decision*". Section 9(1) of the NBRA was

[70] Ibid at para 43.

similarly wide. Section 20 of the FPB Act is not. There is not even the textual support that was present in *Reader* and *JDJ Properties*.

80. Ironically, as *Reader* and *JDJ* make clear, a right to an internal appeal is a double-edged sword. If indeed the Complainants are correct, then any person aggrieved by a decision of the Board not only has a right to approach the Tribunal; in terms of s 7(2) of PAJA they have an obligation to do so before they can approach a court for relief. That cannot be what the legislature intended.

81. In conclusion, there is simply no right for dissatisfied members of the public to lodge an appeal with the Tribunal. This approach does not prevent members of the public who are aggrieved by a decision of the Board from asserting their right to judicial review, or through a separate action to prevent the exhibition of the offending film.

V CONSISTENCY AND THE RULE OF LAW

82. The Tribunal's decision is plainly inconsistent with its previous rulings.

    82.1. It is inconsistent with its refusal to grant X18 ratings to extremely explicit and violent films like *Ken Park* and *Baise Moi*.

    82.2. It is inconsistent with its refusal to permit cultural objections to justify ratings of the painting *The Spear*, or the website ulwaluko.co.za.

    82.3. And it is inconsistent with the Tribunal's prior rulings that "*serious film[s] that endeavour to encourage debate about a number of important and*

pressing issues on which we as a society need time to reflect more fully and urgently"[71] have artistic merit and cannot be rated XX or X18.

83. What is most startling about the Tribunal's decision, and its answering affidavit, is that they make no attempt at all to justify the departure from these clear precedents.

84. R2K and SASFED do not argue that the Tribunal is forever bound by earlier decisions. They do not argue, even, that the earlier decisions bind the Board in the way that judgments bind courts. But the failure to act consistently, combined with the failure to explain why it has departed from its earlier approach is plainly relevant.

85. This unexplained inconsistency supports the Applicants grounds of review, namely that the Tribunal acted irrationally, unlawfully, and was biased.

86. We develop that argument in three sections:

    86.1. We demonstrate the importance of consistency in administrative decision-making;

    86.2. We argue that consistency is particularly important in the context of film classifications; and

    86.3. We show that the Tribunal has not acted consistently.

[71] *Spier Films SA and Another v The Film and Publication Board* (2/2013), available at www.fpb.org.za/wp-content/uploads/2016/11/appeal-of-good-report-august-2013.pdf at 17.

Consistent Administrative Decision Making

87. It is trite that adherence to previous precedent is vital for court proceedings. Most recently, the Supreme Court of Appeal reiterated the value of respect for previous decisions in these words:

> *"The doctrine of stare decisis is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion,[72] to protect vested rights and legitimate expectations as well as to uphold the dignity of the court.[73] It serves to lend certainty to the law."*[74]

88. But the same principle also applies, in a modified fashion, to administrative tribunals. We first briefly outline how this principle has been developed in other jurisdictions, and then show that it is consistent with our own administrative law.

Comparative Law

89. In Canada, the Supreme Court has expressly relied on consistency in the context of labour arbitrations. The question was whether arbitrators had to act consistently with the decisions of other arbitral boards over time. The Supreme

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[72] *CIR v Estate Crewe* 1943 AD 656 at 680; Kahn 1955 SALJ 652. (Original footnote)

[73] *Ex parte Minister of Safety & Security: In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC) 646; 2002 7 BCLR 663 (CC) paras 53-61; *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) 38F–40F[2002] ZASCA 73; ; [2002] 4 All SA 125 (SCA); *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) para 28. (Original footnote).

[74] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19 at para 4.

Court held that they did.[75] As Rothstein and Moldaver JJ[76] held: "*no arbitral board is an island unto itself.*"[77] Accordingly, "*arbitral precedents in previous cases shape the contours of what qualifies as a reasonable decision in this case.*"[78]

90. The Justices expanded on the value of consistent decision-making in the following terms:

> "*Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. … ' … [T]he demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.*'"[79]

91. English Courts have taken the same position. In *North Wiltshire District Council v Secretary of State for the Environment*,[80] the Court of Appeal considered

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[75] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd* [2013] 2 SCR 458.

[76] The judgment is a dissent, however it is consistent with the finding of the majority on this issue, although the majority did not expand on the importance of consistent decision-making in any detail. Ibid at para 75.

[77] Ibid at para 77.

[78] Ibid at para 75 (emphasis in original).

[79] Ibid at para 78, quoting *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970) 21 LAC 332 (emphasis in original).

[80] (1993) 65 P&CR 137.

whether the earlier decisions of a planning appeal tribunal were relevant to assessing the legality of the decision before it. Mann LJ held that they were:

> *"It was disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases* <u>must</u> *be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.*"[81]

92. The Court went on to explain that the decision-maker must follow a two-stage process in assessing how to weigh previous decisions:

> "*To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? … Where there*

[81] Ibid at 145.

is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it."[82]

93. The same basic principle is also part of American law. One commentator has described the importance of consistent administrative decision-making in these terms:

> "*The requirement of consistency … meaning – that like cases be treated alike – is fundamental both for bureaucratic decisionmaking and for legal systems at large. It has strong intuitive appeal to our sense of justice, and is intertwined with the notion of fairness. … It is fundamental to the notions of prompt administrative order, rationality in administrative decisionmaking, and impartiality in adjudicative proceedings. Under the idea of the rule of law, administrative decisions are expected to be made with reference to a system of clearly stated, previously established, and publicly promulgated set of legal rules and principles-in a fashion that preserves the coherence and predictability of the process of decisionmaking. Inconsistency in administrative decisionmaking (that is, where agencies fail to treat similar cases alike) defies the values of the rule of law.*"[83]

94. Inconsistency without explanation can reveal a wide range of traditional review grounds. It "*may point to improper motives on behalf of the decisionmaker, discriminatory bias in favor or against some participants*".[84] And there can

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[82] Ibid. See also *R (Midcounties Co-operative Limited) v Forest of Dean District Council* [2013] EWHC 1908 (Admin) at para 16 ("*A decision is material unless it is distinguishable. A decision maker in a subsequent matter therefore should (a) decide whether the earlier decision is distinguishable; (b) if not distinguishable, then any disagreement must weigh the earlier decision and give reasons for departure from it.*")

[83] Y Dotan 'Making Consistency Consistent' (2005) 57 *Administrative Law Review* 995 at 1000.

[84] Ibid at 1001.

hardly be a "*more suitable reason to label the administrative process as 'arbitrary and capricious' than*" if the administrator treated similar cases differently.[85]

95. The key requirement is that inconsistency must be explained. In *Wichita Board of Trade*, the US Supreme Court accepted that an administrator can depart from prior decisions, as long as it proffers an explanation: "*Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.*"[86]

96. Similarly, in *Skidmore*, the Supreme Court held that prior decisions and interpretations by administrators, "*while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.*"[87] The weight of any administrative decision – in future administrative proceedings, or in judicial review – "*will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*"[88]

97. These are two mutually-supporting principles:

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[85] Ibid.

[86] *Atchison, Topeka & Santa Fe Railway v Wichita Board of Trade* 412 US 800, 808 (1973).

[87] *Skidmore v. Swift & Co.* 323 US 134, 140 (1944).

[88] Ibid.

97.1. Unexplained inconsistency is a red-flag for a reviewable irregularity; and

97.2. Consistent application by an administrative tribunal is relevant when a court seeks to interpret a statute.

98. The key principle to draw from all these jurisdictions is that unexplained inconsistency is relevant in assessing the validity of administrative acts.

The South African Position

99. South African courts have not yet directly considered this issue. Although, as we show below, the Tribunal has. But the available judgments clearly endorse the need for consistency in administrative decision-making. This appears, first, in the Constitutional Court's endorsement of policy as a means to ensure consistent and predictable decision-making

> "*Policy is not legislation but a general and future guideline for the exercise of public power by executive government. … The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case by case and fresh enquiry into every identical request or need for the exercise of public power.*"[89]

100. While the executive simply drafts policies, administrative appeal tribunals like the Appeal Tribunal and the Board develop it incrementally through their decisions. The accretion of decisions over time serve the same role – they

[89] *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37; 2015 (3) BCLR 243 (CC); 2015 (2) SA 584 (CC) at para 47.

provide predictability and consistency in decision-making. Like the common law, the body of decisions develops over time. But its guiding role is the same as executive policy. That is particularly so in the absence of any judicial interpretation of the relevant statutes.

101. Second, in *Derby-Lewis*[90] the Full Court considered an argument that a decision of an Amnesty Committee to refuse amnesty should be reviewed and set aside because a differently constituted committee had granted amnesty in comparable circumstances. The Court rightly rejected the argument. The decision of one committee could not bind another committee because they "*do not have a system of judicial precedent equivalent to stare decisis*".[91] An administrative committee certainly could not bind the High Court in the interpretation of the legislation.[92]

102. However, there are two reasons why *Derby-Lewis* is no obstacle to the argument made here:

102.1. The *Derby-Lewis* Court itself stressed the importance of consistency in the application of statutes:

> "*It is certainly to be hoped that Amnesty Committees have interpreted the Act uniformly, and have applied a common interpretation to the facts of each application in a consistent manner. Otherwise, disappointed applicants or objectors may*

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[90] *Derby-Lewis and Another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission, And Others* 2001 (3) SA 1033 (C).

[91] Ibid at 1056E.

[92] Ibid.

> *complain, as do the present applicants, that they have not been treated even-handedly.*"[93]

Our argument is not that the Tribunal is bound by its previous decisions, nor that the Applicants can enforce a legitimate expectation based on prior Tribunal decisions (they have not sought to do so). The argument is only that: (a) prior rulings are relevant in interpreting the FPB Act; and (b) unexplained inconsistency is relevant to assessing the grounds of review.

102.2. The amnesty committees at issue in *Derby-Lewis* are equivalent to the classification committees under the FPB Act, not to the Tribunal. The Tribunal is an appellate body that hears argument from both sides and delivers reasoned judgments that guide the classification committees. As the Tribunal itself has noted, that places it in a very different position.

<u>*Consistency in Tribunal Decisions*</u>

103. The particular importance of consistency in the context of the Board and the Tribunal was explained by the Tribunal itself in the appeal against the classification of the film *Of Good Report*.[94] Relying on *Derby-Lewis,* the Board made the startling submission that it was not bound by the Board's previous rulings. The Tribunal rejected this approach:

103.1. It pointed out that it was not in the same position as the amnesty committee at issue in *Derby-Lewis*. It stressed that the Tribunal was an

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[93] Ibid at 1056F.

[94] *Spier Films SA and Another v The Film and Publication Board* (2/2013), available at www.fpb.org.za/wp-content/uploads/2016/11/appeal-of-good-report-august-2013.pdf.

independent, administrative appeal tribunal. In its role as an appellate decision-maker, "*the Tribunal brings a different and reflective judgment to bear on the issues. Its appellate jurisdiction is akin to that of ordinary courts of appeal*".[95]

103.2. The Tribunal pointed that it has, "*since its inception, provided guidance to classification committees*" through its judgments.[96] Those judgments are made available to both the Board, and the public.

103.3. Allowing classification committees to simply disregard the Board's decisions "*would be contrary to the principles of the rule of law, which require certainty only gained through consistency in interpretation.*"[97] The purpose of the FPB Act, and particularly the creation of the Tribunal, is to allow" *for a legal framework to be erected in order to resolve classification disputes, provide certainty, and ultimately guide classifiers, who are the primary decision-makers under the Act.*"[98]

104. While the focus in *Of Good Report* was on the binding impact of the Tribunal's decisions on the classification committees of the Board, the Tribunal refers to its own previous decisions to guide its future decisions. For example, in *Of Good Report*, the Tribunal relied on its previous decision in *XXY* where it set out the proper approach to determining whether a film contained child pornography.[99]

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[95] Ibid at 5.

[96] Ibid at 6.

[97] Ibid.

[98] Ibid.

[99] *Out in Africa: South African Gay and Lesbian Film Festival v The Film and Publication Board* (1/2009), available at http://www.fpb.org.za/wp-content/uploads/2016/11/aa_XXY-200903-final.pdf

105. The need for consistency and predictability is particularly important in the context of a film classification board. What is at issue is the constitutional right to free expression. As was pointed out in the *Print Media* concurrence, and as international experience demonstrates, unpredictability in classification decisions will chill speech. It will do so in two ways:

105.1. It will deter investment for the reasons set out above; and

105.2. It will deter filmmakers from raising controversial or challenging issues because they will not know what types of scenes or images may result in the film being rated X18. Put simply, based on all the Tribunal's decisions prior to *Inxeba*, no filmmaker could possibly have predicted that *Inxeba* would receive an X18 rating. If the *Inxeba* decision is upheld, filmmakers will have no certainty at all about what types of films they can make that will be exhibited in ordinary cinemas. There will be strong commercial incentives for them not to follow their artistic vision, but to take the least risky option to ensure the film can be seen. That is a serious violation of artistic freedom of the filmmakers, and of the South African public.

<u>Inconsistent with Prior Decisions</u>

106. The relevant rulings of the Tribunal are set out in detail in the founding affidavit.[100] It is obvious that the decision on *Inxeba* is not consistent with those decisions. In these submissions, we highlight only the following points.

[100] Amicus FA at paras 72-111.

107. First, in a directly analogous situation, the Tribunal refused to censor ulwaluko.co.za for exactly the reasons advanced by the Tribunal and the Complainants. It held: "*The fact that some segments of our community may be offended by the criticism contained in the website cannot, in a constitutional democracy such as ours, justify the suppression of expression.*"[101] Similarly, in the award setting aside the Board's 16N rating for *The Spear*, the Tribunal made it clear that it is not permissible to impose a rating in order "*to assuage the sense of indignity and offence felt by some segments of society.*"[102] The remedy is not classification, but litigation.

108. Second, in assessing whether a film with explicit sex or violence has "*artistic merit*" within the meaning of s 18, the question is whether the offensive scenes "*convey the message of the director as opposed to being primarily designed to titillate and appeal to prurient interests.*"[103] Put differently, the question is whether the scenes are "*an excuse for pornography*". Even films with actual sex and extreme violence – like *Ken Park*, *Baise Moi*, and *In the Realm of the Senses* – should not receive X18 ratings if they meet this definition.

109. *Inxeba* does not contain explicit sex or extreme violence. But even if it did, the scenes are plainly intended to tell part of the story about the relationship between

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[101] *Community Development Foundation of South Africa (CODEFSA) v The Film and Publication Board* (1/2004), available at http://www.fpb.org.za/wp-content/uploads/2016/11/Award-1-of-2014-Codefsa-v-FPB-ULWALUKO.pdf.

[102] *Goodman Gallery v The Film and Publication Board* (8/2012), available at http://www.fpb.org.za/wp-content/uploads/2016/11/aa_the-spear-appeal-award.pdf.

[103] *Ken Park* (n 94) at 6.

Xolani and Vija. That story serves as part of the film's commentary on masculinity and the place of homosexuality in South African and Xhosa society.

110. Third, a further indicator that a film has artistic merit is if the acting and direction are "*of a high standard*".[104] This can be gleaned, in part, from whether the film has won awards. Whatever one's views of the message *Inxeba* seeks to convey, the acting, direction, cinematography, editing, sound and so on are all of an extremely high quality. That is why it has won multiple local and international awards. Treating a film of that standard – whatever its content – as lacking artistic merit is plainly inconsistent with the Tribunal's prior precedent.

111. Fourth, the Tribunal has repeatedly stressed that its role is to inform, not to censor. The Board's own motto is "*we inform, you choose*". In *Baise Moi*, it put it like this:

> "*freedom of expression, though not absolute, is an inalienable right and subject to the cardinal protection that whatever is allowed in the individual or group's right to express itself must not be harmful to children. Clearly then, as far as the conventional democratic values that our society would allow, the watching of any film that falls within the domain of adult viewing must be upheld by an enabling environment for such adults rather than a restrictive one."*

X18 and XX ratings must be reserved for only the most extremely harmful films. The X18 rating given to *Inxeba* is plainly inconsistent with this approach.

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[104] *The Review Board v Desso Trading 9 (Pty) Ltd* (4/2005), available at http://www.fpb.org.za/wp-content/uploads/2016/11/aa_in-the-realm-of-the-senses.pdf.

112. Fifth, "*a distinction needs to be made between the propagation of negative values such as violent conduct, prejudice, depraved sexual conduct and injury to animals, and the portraying of these*."[105] In rating *Inxeba* X18, the Tribunal appears to have conflated the depiction of harmful conduct with the promotion of that conduct. Yet its previous rulings make it plain that is inappropriate.

113. In sum, it is impossible to reconcile the Tribunal's decision in this matter with its previous decisions. It certainly made no attempt to do so. It made no attempt to explain why its earlier interpretations of the meaning of explicit sexual conduct and artistic merit were wrong. By contrast, the earlier judgments are careful and well-reasoned attempts to grapple with the meaning of the sometimes vague terms in the FPB Act.

114. This unexplained inconsistency supports the Applicants' argument that the decision is unreasonable, irrational, unlawful, and motivated by bias.

VI ADMISSION AS AMICI CURIAE

115. Only the Complainants have opposed R2K's and SASFED's admission as *amici curiae*. The opposition is solely on the basis that the submissions that R2K and SASFED seek to advance are either not novel, or not relevant.

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[105] *Holocaust 2 – Eaten Alive* (2/2002), available at www.fpb.org.za/wp-content/uploads/2016/11/Review_Eaten_alive.doc.

116. The opposition is ill-founded. It is necessary to frame the response to this opposition in light of the role of *amici curiae* as articulated by the Constitutional Court:

> "*Most, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.*"[106]

117. We now address the relevance and novelty each of the submissions sought to be advanced in turn.

118. First, the Complainants argue that the introduction of international law is not novel because international law is always relevant so it can be assumed that the other parties will deal with it. But none of the other parties have dealt with it. Only R2K and SASFED have referred to international law in their affidavits.

119. Second, with reference to the Constitution, the Complainants again submit that because it is relevant, it can be assumed that the parties will deal with it. But the Applicants do not base their argument on constitutional rights, but on compliance with the statute. While they briefly mention the right to freedom of expression, their challenge is primarily administrative. R2K and SASFED's

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[106] *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2010 (4) SA 327 (CC) at para 80.

approach is primarily constitutional. The fact that an argument is relevant does not mean that it will be advanced without the amici's participation.

120. Third, the Complainants correctly point out that the Applicants have raised how the decision and the manner in which it was taken negatively affects them financially. They therefore argue that R2K and SASFED's argument regarding the industry as a whole is not novel. This is mistaken. The Applicants, understandably, focus on the impact on them, primarily to justify the urgency of the matter. R2K and SASFED play out the impact of the decision for the industry as a whole, and explain how that is relevant to interpreting the FPB Act. That is a novel submission.

121. Fourth, the objection with regard to the unexplained inconsistency with previous Tribunal decisions is difficult to understand. The Complainants appear to argue that the prior decisions are irrelevant, and therefore R2K and SASFED's reliance on them is improper. For the reasons given above, that is wrong. Consistency with prior decisions is relevant to assessing the grounds of review advanced by the Applicants. The Complainants do not allege that any other party intends to make those submissions.

122. It is necessary to deal with four practical issues:

122.1. The Complainants accuse R2K and SASFED of intervening "*presumptuously, precipitately and certainly prematurely*".[107] That is false. R2K and SASFED responded to a s 16A notice that was issued

[107] Amicus AA at para 24.

by the Applicants. They complied with the timelines in that notice. There was nothing presumptuous or premature about their conduct.

122.2. The Complainants appear to be concerned that R2K and SASFED's participation may cause the hearing to run for another day. We accept that is not an option in the circumstances. Counsel will confine any oral submissions the Court permits it to make in order to ensure the matter can be completed in one day.

122.3. The Complainants claim that it is "*generally unheard for* amici *to be admitted in urgent court*". This is simply false. There are multiple examples where amici have been admitted in urgent matters both in this court and in other courts.[108]

122.4. As all the heads are to be filed simultaneously, it is impossible to know for sure what arguments all the parties will make. To the extent that any of the arguments advanced in these submissions are made by any of the parties, R2K and SASFED will not repeat them at the hearing of the matter.

123. Accordingly, R2K and SASFED have met the requirements for admission as *amici curiae*. It is in the interests of justice that they should be admitted.

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[108] See, for example, *Stransham-Ford v Minister of Justice and Correctional Services and Another* 2015 (4) SA 50 (GP); *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG); *Freedom Stationery (Pty) Ltd v Member of the Executive Council for Education, Eastern Cape* [2011] ZAECELLC 1.

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22 March 2018

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