IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 3589/18

In the matter between:

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

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This review application concerns the film "*Inxeba: The Wound*".

2 The film was originally classified as 16 LS by the Film and Publication Board ("the Board") in terms of the Films and Publications Act ("the Act").[1] That meant it could be viewed in cinemas, but not by children under 16.

3 Seven months later, this decision was overturned by the Film and Publication Appeal Tribunal ("the Appeal Tribunal") and the film was classified as X18. It is that latter decision that is the subject of the present review application.

4 The effects of the decision to classify the film as X18 are unprecedented and extraordinary. It is effectively common cause on the papers that:

4.1 The decision means that the film can only be lawfully distributed or screened at "adult licensed premises".[2]

4.2 All or virtually all of these "adult premises" are what are colloquially known as "sex shops", such as Adult World, Luvland and Hustler.[3]

4.3 There are no or few such adult premises at which the film could be screened. Consequently, the practical effect of the decision is that even adults are prevented from seeing the film in cinemas.[4]

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1 Act 56 of 1996

2 FA, p 12, para 16.1. This factual allegation is not denied, see: Appeal Tribunal AA, p 271, para 37 and Contralesa AA, p 322-3, para 116

3 FA, p 13, para 16.2. This factual allegation is not denied, see: Appeal Tribunal AA, p 271, para 37 and Contralesa AA, p 322-3, para 116

4.4 There has never before been a non-pornographic film that has been given an X18 rating by the Board or Appeal Tribunal.[5]

5 We emphasise that, despite the length of the papers, the legal issues for determination are in truth very crisp. As we demonstrate, the Appeal Tribunal's decision violated well entrenched principles regarding its powers. Its decision falls to be reviewed and set aside on three separate grounds:

5.1 First, the Appeal Tribunal had no jurisdiction to make the decision because none of the purported appellants before it had any standing to appeal.

5.2 Second, the Appeal Tribunal followed an unfair and unlawful procedure.

5.3 Third, the decision breached section 18(3)(c) of the Act – neither of the statutory requirements for an X18 rating to be imposed were satisfied.

6 We deal with each of these in turn. Before doing so, we deal with the right to freedom of expression and how it affects the proper construction to be given to the Act.

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[4] FA, p 13, paras 16.3 – 16.4. These factual allegations are not denied, see: Appeal Tribunal AA, p 271, para 37 and Contralesa AA, p 322-3, para 116

[5] FA, p 13, para 17.3. This factual allegation is not denied, see: Appeal Tribunal AA, p 272-3, para 38 and Contralesa AA, p 322-3, para 116

THE RIGHT TO FREEDOM OF EXPRESSION AND ARTISTIC CREATIVITY

7 From its earliest judgments, the Constitutional Court has placed great emphasis on the fundamental importance of freedom of expression, particularly having regard to the apartheid past that preceded our democracy. As the Court explained in *S v Mamabolo*:[6]

> *"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed."*[7]

8 Section 16 of the Constitution deals with the right to freedom of expression. It provides:

> *"(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 of imminent violence; and*
>
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

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6 *S v Mamabolo (E TV Intervening)* 2001 (3) SA 409 (CC)

7 At para 37 (emphasis added)

9 It is thus clear that, unless the film falls within one of the three exceptions listed in section 16(2) of the Constitution, it is then protected expression under section 16(1) of the Constitution.

10 Notably, none of the respondents contends that the film presently at issue falls within the section 16(2) exceptions. Once that is so, the film constitutes protected expression in terms of section 16(1) of the Constitution.

11 Critically, the mere fact that some people may be shocked, offended or disturbed by the film is irrelevant to whether the film receives constitutional protection.

11.1 In the *Islamic Unity* case, Langa DCJ (as he then was) followed the approach of the European Court of Human Rights to hold that freedom of expression must be generously interpreted in our democracy and that the right protects expression that is offensive, shocking or disturbing:

> *"... we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'."*
>
> *South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. . . . In Handyside v The United Kingdom, the European Court of Human Rights pointed out that this approach to the right to 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 . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society'."*[8]

11.2 Subsequently, in *De Reuck,* Langa DCJ reiterated the principle 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."*[9]

12 In *Print Media South Africa*,[10] the Constitutional Court was called upon to deal with a challenge to the constitutionality of the very Act now under consideration – the Films and Publications Act. In upholding that challenge, Skweyiya J:

12.1 Held that whenever expression does not fall under one of the exceptions listed in section 16(2) of the Constitution, it was automatically protected by section 16(1) of the Constitution;[11]

12.2 Held that expression containing "sexual conduct" did not fall under one of the section 16(2) exceptions and was therefore protected by section 16(1) of the Constitution;[12] and

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[8] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras 27-28 (emphasis added)

[9] *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at para 49

[10] *Print Media SA v Minister of Home Affairs* 2012 (6) SA 443 (CC)

[11] At para 48

[12] At para 49

12.3 Emphasised the need for people to make their own choices as to the materials they viewed:

> *"Encumbering choice creates the danger that the autonomy of the individual to formulate and inform opinion on received expression, which might not otherwise have been restricted but for the administrative prior classification system, is eroded. In other words, hampering the individual's ability to choose freely those publications, to which exposure is not unlawful, whittles away at his capacity as a free moral agent…."*[13]

13 It is accordingly beyond question that the film at issue is protected by section 16(1) of the Constitution. This has two important implications.

14 First, it means that, absent a proper statutory basis for restricting the availability of the film, the applicants have a right to distribute and screen it and the public have a corresponding right to see it. This is because the right to freedom of expression may only be limited by a law of general application.[14]

15 Second, it affects the way in which the Films and Publications Act is to be interpreted.

15.1 It is moreover clear that the Film and Publications Act, by allowing for classification of films, involves the limitation of the right to freedom of expression.[15]

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[13] At para 65

[14] Section 36(1) of the Constitution.

[15] At para 51

15.2 Once this is so, this has profound implications for the statutory interpretation process, as Moseneke J (as he then was) explained in *Laugh It Off*:[16]

> *"It is so that the anti-dilution prohibition under s 34(1)(c)[17] seeks, in effect, to oust certain expressive conduct in relation to registered marks with repute. It thus limits the right to free expression embodied in at least s 16(1)(a) to (c) of the Constitution. We are, however, not seized with the adjudication of the constitutional validity of the section. We must assume without deciding that the limitation is reasonable and justifiable in an open and democratic society to which our Constitution is committed. That in turn impels us to a construction of s 34(1)(c) most compatible with the right to free expression. The anti-dilution provision must bear a meaning which is the least destructive of other entrenched rights and in this case free expression rights…"*

15.3 As we demonstrate in what follows, on a plain reading of section 18(3)(c) of the Act, there is no basis at all for the decision of the Appeal Tribunal. But even if there were any doubt as to the proper interpretation of the section, this Court would be required to adopt "*a construction … most compatible with the right to free expression".*

16 We now turn to the grounds of review.

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[16] *Laugh It Off Promotions CC v SAB Intl (Finance) BV t/a Sabmark Intl* 2006 (1) SA 144 (CC) at para 48 (emphasis added)

[17] Of the Trade Marks Act 194 of 1993

THE APPEAL TRIBUNAL HAD NO JURISDICTION TO HEAR THE APPEAL

17 The scheme of the Act is somewhat different for publications and films.

17.1 Publications are dealt with by section 16 of the Act. There is no automatic requirement that a publication must be classified before being distributed. Instead, while certain types of publications are required to be classified before being distributed,[18] other publications will only be classified when "any person" requests that this be done.[19]

17.2 Films are dealt with by section 18 of the Act. All films must be classified before being distributed. The duty to submit the film for classification rests on the person who distributes, broadcasts or exhibits the film[20] – that is the first applicant (the distributor) in this case.

18 The Act makes clear that the primary decision-maker for the classification of publications and films is the Board, via its Classification Committee.[21] As a matter of fact, in the overwhelming majority of classification decisions, there is no appeal against the decision of the Board, meaning that its decision is final.[22]

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[18] Section 16(2) of the Act

[19] Section 16(1) of the Act

[20] Section 18(1)(b) of the Act

[21] See sections 18(2)(and (3) of the Act

[22] SA, p 250, para 10 (not denied).

19 Section 20(1) of the Act then provides for appeals to the Appeal Tribunal. It deals with persons who are entitled to lodge an appeal and provides:

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

20 From the plain wording of section 20(1), it is clear that only the following people have the right to appeal against the classification decision of the Board regarding a film:

20.1 The Minister of Communications; and

20.2 The person who applied for the classification of a film – that is the first applicant in this case.[23]

21 It is therefore clear that, on the ordinary wording of the Act, the fifth to tenth respondents had no right to appeal to the Appeal Tribunal and the Appeal Tribunal therefore had no jurisdiction to pronounce on their purported appeals.

22 This is especially so as the Appeal Tribunal is a creature of statute.

22.1 It may only exercise the powers conferred upon it by statute and can accordingly not adjudicate matters which fall outside of its jurisdiction.

[23] FA, p 39, para 75.2 (not denied).

Simply put it may only issue orders which it is expressly authorised to do. If it exceeds its jurisdiction, its decision is unlawful.[24]

22.2 This is no technicality. It flows from a fundamental principle of constitutional law:

> *"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."*[25]

23 The Appeal Tribunal now concedes that section 20(1) of the Act does not "*expressly*" confer on it the jurisdiction to hear the purported appeals of the fifth to tenth respondents.[26] However, it contends that the section must be interpreted "*purposively*" to allow for this result. We submit that this contention is unfounded for the following reasons.

24 First, it is at odds with the proper principles of statutory interpretation.

24.1 Those principles are helpfully summarised by the SCA in *Natal Joint Pension Fund,* [27] as follows:

> *"… Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of*

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[24] *Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC) at para 16; *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* 2014 (2) SA 480 (CC) at para 38; *Simelane and Others NNO v Seven- Eleven Corporation SA (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) at para 12.

[25] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) at para 58.

[26] Appeal Tribunal AA, p 266, para 21

[27] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

> *the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation…The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*[28]

24.2 In the present case, the language of section 20(1) could hardly be more emphatic. The section does not say that "*any person*" may appeal nor even "*any interested person*".

24.3 Instead, the section specifically itemises the persons who may appeal regarding film classification decisions, and does so cognisant of the way in which the Act deals with publications and films.

24.4 Thus, because the Act allows a member of the public to complain about publications to trigger the classification process, a person who complained about a publication is entitled to appeal. By contrast, because all films have to be classified without needing any complaint, there is no equivalent provision for appeals about films.

[28] At para 18 (emphasis added)

25 Second, there is no merit in the contention that the Appeal Tribunal would be "*unable to carry out its functions*" [29] if the Act is interpreted to mean what it says.

25.1 Parliament chose to create an Appeal Tribunal with a limited jurisdiction – that choice must be respected.

25.2 On the contrary, it is the Appeal Tribunal's stance that imperils the workings of the Act. It would mean that whenever a film is distributed, every member of the public who was unhappy with the film's classification could, without more, appeal to the Appeal Tribunal. That is truly unworkable.

26 Third, it overlooks the fact that when Parliament wishes to grant broad standing rights to conduct internal appeals, it has done so expressly.

26.1 For example, section 64 of the Private Higher Education Institutions Act[30] provides that "*any interested person*" may appeal to the Minister against any decision of the registrar in terms of that Act.

26.2 Section 43 of the National Environmental Management Act[31] originally provided that "*any affected person*" could appeal to the Minister or the MEC against a decision taken under that Act and was then amended to provide that "*any person*" could do so.

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[29] Appeal Tribunal AA, p 266, para 21

[30] Act 101 of 1997

[31] Act 116 of 1998

26.3 Section 45D (1a) of the Financial Intelligence Centre Act[32] provides that "*any institution or person"* may appeal to the appeal board established in terms of that Act.

26.4 The contrast between these statutes and section 20(1) of the Films and Publications Act is palpable. Despite the fact that section 20(1) was enacted in 1996, amended in 1999 and amended again in 2009, Parliament has chosen never to include a standing provision which allows "*any person*" or "*any interested person*" to appeal. That is plainly a deliberate decision.

27 In an effort to avoid the difficulties regarding section 20(1), Contralesa[33] seeks to source the right of the fifth to tenth respondents to appeal in section 19 of the Act.[34] However, this is unsustainable.

27.1 Insofar as is presently relevant, section 19 provides only that "*any person 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 Appeal Tribunal and be heard by it.

27.2 But section 19 does not deal with the question of <u>standing</u> to appeal. It deals with the <u>procedure</u> to be followed when someone appeals. Standing to appeal is dealt with by section 20(1) and only a person with the requisite standing under section 20(1) can exercise the procedural rights under section 19.

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[32] Act 38 of 2001

[33] The fifth and sixth respondents are collectively referred to as "Contralesa".

[34] Contralesa AA, p 313, para 78

28 In the circumstances, the Act simply did not permit the fifth to tenth respondents to appeal to the Appeal Tribunal. If they were dissatisfied with the decision of the Board, their remedy was to bring a judicial review of the Board's decision. They failed to do so.

29 The fifth to tenth respondents therefore had no standing to appeal to the Appeal Tribunal and the Appeal Tribunal consequently had no jurisdiction to determine the purported appeal. The decision falls to be reviewed and set aside on this ground alone.

THE DECISION WAS PROCEDURALLY UNLAWFUL AND UNFAIR

30 If the Appeal Tribunal had jurisdiction to determine the appeal at all, the first and second applicants unquestionably had a right to be heard in the appeal proceedings.

30.1 They are responsible for making the film and their rights and interests would be (and have been) directly and immediately affected by any decision made by the Appeal Tribunal in this regard.

30.2 The right to be heard in this regard flows both from section 19 of the Act and from section 3 of PAJA.[35] Statutes that authorise administration decisions must now be read together with PAJA.[36]

[35] Promotion of Administrative Justice Act 3 of 2000.

[36] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 101

30.3 Indeed, both the Appeal Tribunal[37] and Contralesa[38] now expressly recognise the right of the applicants to be heard by the Appeal Tribunal.

31 However, once this is so then the procedure adopted by the Appeal Tribunal was patently unlawful and untenable.

32 This emerges from the following facts, none of which have been meaningfully disputed:

32.1 The first applicant was only formally notified of the details of the hearing, by the Board, not the Appeal Tribunal, on Thursday, 8 February 2018. This only gave it two working days to prepare for the hearing. Even then, it was only invited to attend the hearing as *"amicus curiae".*[39]

32.2 The "notice" that the Appeal Tribunal now relies on (which came from the Board) did not give sufficient details of the appeal e.g. who lodged the appeal, what the grounds of appeal were and so on.

32.3 The second applicant was never formally notified of the hearing or its right to appear.[40]

32.4 The applicants were not provided with any papers in the appeal until the afternoon before the hearing was due to take place, which did not

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[37] Appeal Tribunal AA, p 267, para 22

[38] Contralesa AA, p 331, para 151

[39] FA, p 40, para 81.1

[40] FA, p 44, para 81.2

allow them adequate time to prepare or consult properly with and brief legal representatives. This was despite the fact that the appeals had been filed over ten days earlier, on 1 February 2018. [41]

32.5 The Board and Contralesa were afforded opportunities to submitted written heads of argument in advance of the hearing – the applicants were not.[42]

32.6 The Appeal Tribunal granted the fifth to tenth respondents condonation for their extraordinarily late appeals without giving the first and second applicants any right to make submissions on this and without even providing the first and second applicants with the applications for condonation. [43]

32.7 When the applicants requested a postponement, the Appeal Tribunal refused this and as an "indulgence" indicated only that the matter would stand down for 2.5 hours. This self-evidently did not allow for adequate preparation.[44]

32.8 Section 19 guarantees the applicants the right to be represented or assisted by a legal practitioner <u>of their choice</u>. Yet, in addition to email requests prior to the hearing, the applicants (through Mr Phamodi) specifically requested an opportunity to brief counsel to represent them in the matter, but the Appeal Tribunal refused. The

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[41] FA, p 41, para 81.3

[42] FA, p 41, para 81.8

[43] FA, p 41, para 81.4

[44] FA, p 41, para 81.6

applicants' only option was therefore to make oral representation without assistance from counsel, which they wisely declined.

33 The extent of the unfairness and unlawfulness of the procedure is made especially glaring when it is contrasted with the manner in which the Appeal Tribunal deal with the fifth to tenth respondents.

33.1 The fifth to tenth respondents were six months late in lodging the appeals.

33.2 Contralesa arrived on the day of the initial hearing without any application for condonation having been placed before the Appeal Tribunal, and not even ready to move it on the day. Yet the Appeal Tribunal readily postponed it for a week.[45]

33.3 The record reveals that the application by the fifth to tenth respondents for condonation was granted simply because there was no opposition to it. The chairperson said:

> *"So, as we are sitting here the respondents are not opposing your application for condonation and this means the following. It means that we will have to proceed straight to the hearing as they applied last week."*[46]

33.4 By contrast, there was also no opposition to the applicants' request for a postponement. Yet, the application was refused.

33.5 While the fifth to tenth respondents were afforded a week to find legal representation and bring an application for condonation, the

[45] Transcript, Bundle p. 127, lines 5 – 10

[46] Transcript, Bundle p. 127, lines 5 – 10 (emphasis added)

applicants were expected overnight (after receiving the documents in the afternoon of the day preceding the hearing day) to consult and instruct counsel and prepare written representation.

33.6 Despite refusing the applicants a postponement of even a few days to prepare and make submissions to it, the Appeal Tribunal granted the Board and Contralesa the right to submit written closing argument after the hearing. In other words, the Appeal Tribunal was prepared to allow Contralesa (who had no right to appeal) until 19 February 2018 to submit written closing arguments but was not prepared to grant the applicants (who have a statutory right to be heard) any postponement or right to make submissions after 13 February 2018.

33.7 Procedural fairness demands at least equal treatment of the parties involved.[47] The present case, by contrast, involves entirely unequal and disparate treatment.

34 The Constitutional Court has endorsed Professor Hoexter's explanation of the value and purpose of procedural fairness:

> *"Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."*[48]

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[47] *Transnet Ltd. v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at para 42; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 24.

[48] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at para 41

35 In the present case, the applicants were given no proper opportunity to participate in the decision and no proper opportunity to influence the outcome of the decision. The approach of the Chairperson of the Appeal Tribunal signalled exactly the opposite of respect for the dignity and worth of the applicants. His attitude during the hearing was that "*we were not aware that you will be notified and invited. In fact upon enquiry I am further advised that the invite and/or email was not supposed to be an invite*".[49]

36 We therefore submit that the decision of the Tribunal falls to be reviewed and set aside as it was procedurally unlawful and unfair.

37 Indeed, the completely disparate treatment of the fifth to tenth respondents, on the one hand, and the applicants, on the other, gives rise to a reasonable perception of bias, an allegation pleaded squarely in the founding papers.[50] Despite the seriousness of the allegation, the Appeal Tribunal offers no meaningful response thereto.[51] The only conclusion that can be drawn is that the allegation of bias is well-founded. On this basis too, the decision falls to be reviewed and set aside.

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[49] FA, p 32, para 59.2

[50] FA, p 42, para 82.2

[51] AA, p 278 para 53 and AA, p 267, para 22

THE DECISION BREACHED SECTION 18(3)(c) OF THE ACT

38 Quite apart from the fact that it lacked jurisdiction and followed an unfair and unlawful procedure, the Appeal Tribunal's decision was also substantively invalid.

The relevant section

39 In its reasons, the Appeal Tribunal referred to section 18(3)(b)(ii) of the Act.[52] This created an impression that the Appeal Tribunal relied on section 18(3)(b) of the Act in making its decision.

40 However, in its answering affidavit, the Appeal Tribunal has now expressly disavowed section 18(3)(b) and relies only on section 18(3)(c).

40.1 The Appeal Tribunal justifies its decision to classify the film as X18 as follows:

> *"The film qualifies to be classified as such in terms of Section 18(3)(c) of the Act. The reference to section 18(3)(b)(ii) in our reasons for our decision is an error…"*[53]

40.1 This is reaffirmed elsewhere in the affidavit, for example were the Appeal Tribunal states:

> *"The First Respondent has found that the film should be classified as X18 in terms of Section 18(3)(c) and not Section 18(3)(b)(iii)."*[54]

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[52] Bundle, p 80, para 5

[53] Appeal Tribunal AA, p 268, para 25

[54] Appeal Tribunal Answering Affidavit pp 279 para 56.

41 It is therefore clear that, in relation to the substantive validity of the decision, the only section relied on by the Appeal Tribunal is section 18(3)(c) of the Act. If it cannot bring itself within the requirements of that section for an X18 rating, then its decision is invalid.

42 For this reason, we respectfully point out that much of Contralesa's affidavit is irrelevant.

42.1 That affidavit seeks to rely in large part on section 18(3)(b) of the Act to justify the decision. But that section can no longer be called in aid because the decision-maker itself – the Appeal Tribunal – has expressly disavowed reliance on it.

42.2 Moreover, while Contralesa spends much time trying to demonstrate that the film's portrayal of Ulwaluko is inaccurate or disrespectful, this is entirely beside the point. This is because section 18(3)(c) of the Act does not empower the Appeal Tribunal to classify a film as X18 on the basis that the film portrays cultural practices inaccurately or even in a manner considered to be disrespectful.

42.3 Therefore, in these heads of argument we do not deal with the contentions raised by Contralesa on these issues as such contentions are misguided in a series of critical respects both legally and factually. They are simply irrelevant to an enquiry as to whether the film could lawfully be classified as X18 in terms of section 18(3)(c) of the Act.

Understanding the section 18(3)(c) requirements

43 Section 18(3)(c) of the Act provides that the Board or Appeal Tribunal shall:

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

44 An X18 classification has extraordinary effects on the film concerned. It means:

44.1 No person, other than the holder of a license for adult premises, may ever broadcast, distribute, exhibit in public, sell or even advertise the film concerned.[55]

44.2 A breach of this provision is a criminal offence, subject to imprisonment for up to five years.[56]

45 No doubt mindful of these severely restrictive effects, section 18(3)(c) makes clear that there are two jurisdictional facts that must be present before a film can be classified as X18:

45.1 First, the film must contain "*explicit sexual conduct*"; and

45.2 Second, the film must not be of "*scientific, dramatic or artistic merit*".

[55] Section 24A(3) of the Act.

[56] Section 24A(3) of the Act

46 If even one of these jurisdictional facts is absent, an X18 classification decision will be unlawful.

47 Critically, section 18(3)(c) does not permit the Appeal Tribunal to classify a film as X18 on the basis of factors other than these two jurisdictional facts. It is these requirements alone that determine whether an X18 classification may be given.

48 In what follows, we explain that both of these requirements are not met in the present case.

49 Before doing so, however, it is necessary to deal with the proper approach to these issues.

49.1 The approach of the Appeal Tribunal, in particular, appears to suggest that it considers that it alone can judge whether these requirements are met and that there is no need for it to justify its decisions on this score before this Court. Thus, the Appeal Tribunal merely asserts that "*the film contains explicit sexual conduct*"[57] and that it "*judged*" that it is not of dramatic or artistic merit,[58] without justifying or explaining its conclusions.

49.2 This apparent attempt by the Appeal Tribunal to rely on its own *ipse dixit* is wrong as a matter of law.

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[57] Appeal Tribunal AA, p 268-9, paras 26-27

[58] Appeal Tribunal AA, p 270, paras 29

49.3 The Act confers on the Appeal Tribunal the power to examine the film and consider whether it meets these requirements. However, this does not mean that what is at issue is whether the Appeal Tribunal subjectively considered, in its opinion, that the requirements were met. Rather, it had to be the case that, objectively viewed, the requirements are met.

49.4 This is demonstrated by the Constitutional Court decision in *Walele.*[59]

49.4.1 There, the court was dealing with a statute[60] which provided that where the local authority "*is satisfied*" that an application complied with certain requirements, it could grant it.

49.4.2 But even there, with an expressly subjectively phrased requirement, the Court rejected the argument that all that mattered was the decision-maker's opinion:

> *"… If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds."*[61]

[59] *Walele v City of Cape Town* 2008 (6) SA 129 (CC)

[60] National Building Regulations and Building Standards Act 103 of 1977

[61] *Walele* above n 59 at para 60 (emphasis added)

49.5 Similarly, in *President of the RSA v M& G Media,*[62] the Constitutional Court held in relation to access to information:

> *"The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government."*

49.6 The present case is even stronger than these two cases. Section 18(3)(c) is phrased objectively – not subjectively – and says nothing about the intent of the Appeal Tribunal. Accordingly, to justify its decision, the Appeal Tribunal had to demonstrate that objectively the film indeed contains explicit sexual conduct and lacks dramatic and artistic merit.

49.7 As we demonstrate in what follows, it has squarely failed to do so.

No explicit sexual conduct

50 Section 1 (dd) defines "sexual conduct" as including:

> *"(i) Male genitals in a state of arousal or stimulation;*
>
> *(ii) The undue display of genitals or the anal region;*
>
> *(iii) Masturbation;*
>
> *(iv) Bestiality;*
>
> *(v) Sexual intercourse, whether real or simulated, including anal sexual intercourse;*

[62] *President of the RSA v M & G Media Ltd* 2012 (2) SA 50 (CC) at para 24

(vi) Sexual contact involving the direct or indirect fondling to touching of the intimate parts of a body, including the breasts, with or without any object;

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

(viii) Oral genital contact; or

(xi) Oral anal contact."

51 Section 1(o) of the Act defines "explicit sexual conduct" for purposes of sections 16 and 18 of the Act as:

> *"graphic and detailed visual presentations or descriptions on any conduct contemplated in the definition of "sexual conduct".*[63]

52 The distinction accorded by the Act between "*sexual conduct*" and *"explicit sexual conduct*" lies in the "*graphic and detailed*" nature of the conduct.

53 We submit that what the Act contemplates with this distinction is that a rating of X18 is plainly intended only for films of a pornographic nature.

53.1 It is for this reason that X18 films can only be viewed or purchased from licensed adult premises. Unsurprisingly, the respondents do not offer a single example of a licensed adult sex shop.[64] Nor do they suggest that there has ever before been a non-pornographic film that has been given an X18 rating by the Board or Appeal Tribunal.[65]

53.2 In this regard, the section must be understood in accordance with the distinction that the Constitutional Court has drawn between pornographic and non-pornographic films:

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[63] Emphasis added

[64] FA, p 46, para 87.1

[65] FA, p 13, para 17.3. This factual allegation is not denied, see: Appeal Tribunal AA, p 272-3, para 38 and Contralesa AA, p 322-3, para 116

> *"According to The New Shorter Oxford English Dictionary, "pornography" means:*
>
> > *"The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this."*
>
> *This is a useful guide. I would observe, however, that erotic and aesthetic feelings are not mutually exclusive. Some forms of pornography may contain an aesthetic element. Where, however, the aesthetic element is predominant, the image will not constitute pornography…."*[66]

54 The present film contains no "explicit sexual conduct". As the applicants explained in the founding affidavit in detail,[67] there are only three scenes of sexual conduct, which total less than 2 minutes and 30 seconds of the entire 90 minute film which are not explicit:

54.1 In the first scene, at approximately 00:13:54, two men are engaged in what appears to be anal penetration. They remain mostly clothed with the most visible parts of their body being their buttocks. No genitals are seen or shown. Most of the sexual activity in the scene is implied and the scene lasts no more than 30 seconds.

54.2 In the second scene, at approximately 00:32:44, there is a silhouette of two men engaged in what appears to be oral sex. This scene happens in the shadow of darkness and all of the sexual activity is implied. There are no genitals visible and there is no nudity.

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[66] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) at para 20

[67] FA, p 43-44, para 85

54.3 In the third scene, at approximately 01:09:10, two men are lying next to each other naked. The side frames of their naked bodies is seen. Once more, in this scene, sexual intercourse is implied given that in the preceding scene, the men were kissing and caressing each other's bodies. As with all the scenes in the film, there are no genitals shown nor is there any actual penetrated portrayed or seen.

55 Apart from a bare assertion, the Appeal Tribunal fails to deal with these detailed allegations at all. Both its reasons[68] and its answering affidavit[69] assert that the film contains scenes of explicit sexual conduct, but never explain which scenes those are. Still less do they explain <u>why</u> those scenes amount to explicit sexual conduct as defined.

56 The Appeal Tribunal thus appears to take the view that the applicants and this Court must simply accept its say-so that the film contains explicit sexual conduct. For the reasons given above, this is wrong as a matter of law.

57 Indeed, the reasons of the Appeal Tribunal are fatally confused on this issue. It concludes that the film contains explicit sexual conduct, yet finds that it has "moderate" impact.[70] This too is never explained.

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[68] FA, annexure **HK10** p 78, last para

[69] Appeals Tribunal AA, p 278, para 54

[70] FA, annexure **HK10** pp78 – 79

58 We submit that there is no basis for a conclusion that the film contains explicit sexual conduct. On this basis alone, the requirements of section 18(3)(c) are not met and the X18 decision is unlawful.

A film of dramatic and artistic merit

59 Even if the film did contain explicit sexual conduct as defined, this would still not render the X18 decision lawful. This is because section 18(3)(c), very sensibly, recognises that where dramatic and artistic works have explicit sexual conduct in them, they should not be banished to sex shops, away from the public eye.

60 Rather, section 18(3)(c) provides that, even where a film contains explicit sexual conduct, if the film is of dramatic or artistic merit it must instead "*be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials*". This would be a rating such as 16 or 18, depending on the nature of the content – but not X18.

61 The purpose of this provision is, again, to separate out pornographic from non-pornographic materials. It aims to distinguish between:

61.1 A genuine dramatic/artistic film which includes some explicit sexual conduct; and

61.2 A film which merely uses a storyline as a pretext for showing numerous scenes of explicit sexual conduct. As the Appeal Tribunal

explained in one of its previous rulings, "*a simplistic and predictable storyline [which] provides an excuse for a number of sexual encounters to be strung together and portrayed as a film*".[71]

62 In the present case, we respectfully do not understand on what basis it can be seriously suggested that the film is lacking in dramatic and artistic merit. This is demonstrated by a mere viewing of the film.

63 In any event, were there any doubt, it is resolved by the fact that:

63.1 The film was selected by the National Film and Video Foundation (an organ of state falling under the Department of Arts and Culture) as South Africa's nomination for the 2018 Oscars for Best Foreign Language Film; [72]

63.2 The film then made the short-list of nine films in the world for the 2018 Oscar for Best Foreign Language Film;[73]

63.3 The film has been nominated for awards in the South African Film and Television Awards by eight different juries, including Best Film, Best Director, Best Screenplay, Best Actor, Best Supporting Actor (two different actors), Best Costume Design and Best Editing;[74]

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[71] See: Appeal Tribunal decision on *Animal Instincts 1.* A copy will be provided at the hearing.

[72] FA, p 12, para 13

[73] FA, p 12, para 13

[74] FA, p 24-25, para 35 and RA, p 371, par 28.2

63.4 The film has won 20 awards of excellence within South Africa and around the world; [75] and

63.5 The film has received positive critical reviews within South Africa and around the world.[76]

64 Yet, in response, the Appeal Tribunal again offers no more than its *ipse dixit*.

64.1 In its reasons, it offers a single and unsubstantiated sentence: "*The Tribunal collectively did not find any scientific, educational and artistic value throughout the film*."[77]

64.2 In its answering affidavit, the Appeal Tribunal states only:

> *"We judged that the film does not have dramatic merit. The fact that it has been selected as a nomination for the 2018 Oscar and other short-listings does not mean that judgment of the First Respondent is invalid."*[78]

64.3 As we have demonstrated above, reliance by the Appeal Tribunal on its own *ipse dixit* is patently inadequate.

65 The film is thus certainly one of dramatic and artistic. On this basis alone, the requirements of section 18(3)(c) are not met and the X18 decision is unlawful.

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[75] FA, p 12, para 13

[76] FA, p 25, para 36

[77] FA pp 45 para 86

[78] Appeal Tribunal AA, p 271, para 35

Irrelevant considerations

66 In its answering affidavit, the Appeal Tribunal purports to itemise the reasons it relied on for its decision:[79]

> *"The First Respondent took the decision that the film: Inxeba: The Wound should be classified as X18 because it contains:*
>
> *24.1. distortions;*
>
> *24.2. the use of strong language which is vulgar and insulting and degrading to women;*
>
> *24.3. explicit sexual conduct which is contrary to the objects of the Act;*
>
> *24.4. is not a bona fide documentary, nor*
>
> *24.5. is of scientific, dramatic nor artistic merit."*

67 This merely confirms that the Appeal Tribunal's decision is unlawful.

68 The first two reasons ("*distortions*" and "*the use of strong language which is vulgar and insulting and degrading to women*") are simply irrelevant to the section 18(3)(c) enquiry and cannot provide a proper basis for classifying a film as X18.

69 This is quite apart from the fact that the Appeal Tribunal never explains what the "distortions" are. Indeed, the very notion of "distortions" in the context of a fictional film makes no sense, particularly when the Appeal Tribunal accepts – in its fourth reason – that the film is not a documentary.

[79] Appeal Tribunal AA, p 267-8, para 24

70 On this basis alone the Appeal Tribunal's decision falls to be set aside as it was taken for a reason not authorised by the empowering provision and because irrelevant considerations were taken into account.

REMEDY

71 For the reasons set out above, the Appeal Tribunal's decision must plainly be reviewed and set aside.

72 The only remaining question is whether:

72.1 The matter should be remitted to the Appeal Tribunal for a re-hearing; or

72.2 No remittal should be ordered, in which case the decision of the Board to give the film a 16 LS rating would be final.

73 We submit that, in accordance with the Notice of Motion, the latter course should be followed. Such an approach constitutes a just and equitable remedy[80] for four reasons.

74 First, as is explained above, the Appeal Tribunal had no jurisdiction to hear the matter and make the decision. Once that is so, any remittal would serve no purpose and would be impermissible.

[80] Section 8(1) of PAJA

75 Second, the applicants explained in their supplementary affidavit that they do not consider that they could now obtain a fair and proper hearing before the Appeal Tribunal.[81]

75.1 The facts make clear that the Appeal Tribunal is biased, or at least reasonably suspected of bias, against the applicants and the film.

75.2 This does not only arise from the patent procedural deficiencies and partial manner in which the Appeal Tribunal treated the applicants. It also arises from the Appeal Tribunal's extraordinary approach of making a decision first and then seeking submissions from the appellants and Board thereafter in an apparent attempt to find some reasons for its decision.[82]

75.3 The Appeal Tribunal has failed to explain this at all in its answering affidavit.[83] The only conclusion that can be drawn, as was alleged in the founding affidavit, that the Tribunal was intent, at all costs, on producing the result which it ultimately achieved - that "*the film is removed from public circulation with immediate effect*".[84]

75.4 In addition, in the supplementary affidavit, the applicants pointed out that:

> *"[H]aving already made a decision on the classification to be given to the film, it will be difficult and indeed impossible for the members of the Appeal Tribunal to now bring an independent assessment to bear on that very question. This is especially so*

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81 SA, p 249-250, para 8

82 FA, p 51-2, paras 94- 94.2; SA, p 249-250, para 8.

83 Appeal Tribunal AA, p 279, paras 56-57

84 FA, p 51-2, paras 94- 94.2

given that the decision of the Appeal Tribunal has been the subject of considerable public discussion and controversy, meaning that it is scarcely plausible that the Appeal Tribunal would be willing to reverse their X18 rating in what would be seen as a significant public reversal of their position."[85]

75.5 The Appeal Tribunal failed to deal with this meaningfully at all in its answering affidavit.[86]

75.6 We submit, therefore, that there is no basis for concluding that the applicants could obtain a fair hearing before the Appeal Tribunal in the event of a remittal.

76 Third, it is quite apparent that the decision of Board to give the film a 16LS rating is a well-reasoned and thoughtful one, given by experienced decision-makers, which properly applies the provisions of the Act.[87] It would thus be entirely appropriate, just and equitable for the Board's decision to stand as the final word and to govern the distribution of the film.

77 Fourth, there is nothing unusual a decision of the Board being the final word on the classification of a film, game or publication. On the contrary, and in accordance with the scheme of the Act, in the overwhelming majority of classification decisions, there is no appeal against the decision of the Board, meaning that its decision is final.[88] This is not denied by the respondents.

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[85] SA, p 250, para 8.3

[86] Appeal Tribunal AA, p 279, para 57

[87] SA, p 250, para 9 (not denied)

[88] SA, p 250, para 10 (not denied)

CONCLUSION

78 We therefore submit that the relief sought in prayer 2 of the Notice of Motion should be granted.

79 The Appeal Tribunal and Contralesa should be directed to pay the costs of this application, jointly and severally, including the costs of two counsel and including the costs reserved in the interim order made by this Court.[89]

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22 March 2018

[89] See: *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)