CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 113/11
[2012] ZACC 22

In the matter between:

PRINT MEDIA SOUTH AFRICA	First Applicant
SOUTH AFRICAN NATIONAL EDITORS' FORUM	Second Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
FILM AND PUBLICATION BOARD	Second Respondent
and	
JUSTICE ALLIANCE OF SOUTH AFRICA	First Amicus Curiae
SECTION 16	Second Amicus Curiae

Heard on : 13 March 2012

Decided on : 28 September 2012

JUDGMENT

SKWEYIYA J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, Maya AJ and Zondo AJ concurring):

[1] Before us are proceedings for confirmation of an order of the South Gauteng High Court, Johannesburg (High Court), per Mathopo J.[1] The High Court held that certain provisions of the Films and Publications Act,[2] as amended by the Films and Publications Amendment Act,[3] (Act) were unconstitutional and invalid. It is only those sections that concern us.

The parties

[2] The first applicant, Print Media South Africa, is an incorporated association not for gain. Its members are the Newspaper Association of South Africa, the Magazine Publishers Association of South Africa and the Association of Independent Publishers. It represents a wide range of participants in the print media industry.

[1] Constitutional Court Rule 16(4) provides:

> "A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

Section 172(2)(d) of the Constitution provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[2] 65 of 1996.

[3] 3 of 2009.

[3] The second applicant, the South African National Editors' Forum, is a non-profit organisation, comprising various editors, senior journalists and journalism trainers from all sectors of South African media. It states that one of its objects is to campaign for the elimination of legislative restrictions on media freedom.

[4] The applicants had previously made submissions to Parliament on the intended amendments to the Act and the direct effect that those would have on their members and the industry at large. Their efforts to avert the enactment of the challenged statutory provisions were unsuccessful, and for that reason they have brought these proceedings.

[5] The first respondent is the Minister of Home Affairs, the Cabinet member responsible for the administration of the Act. The second respondent is the Film and Publication Board[4] (Board), whose functions are implicated in these proceedings. The order of the High Court was made against both the respondents.

[6] The Justice Alliance of South Africa (JASA) was admitted as the first amicus curiae. JASA is a non-profit association, whose key objective is to uphold and develop Judeo-Christian and constitutional values by means of litigation and involvement in legislative processes. It has previously made submissions to the Ministry of Home Affairs and the Board on draft legislation, relating to banning access to pornography on the internet and mobile telephones.

[4] Established under section 3 of the Act.

[7] Another non-profit association, known as Section 16, was admitted as the second amicus curiae. To avoid confusion with the relevant constitutional and statutory provisions in the discussion to follow, I refer to Section 16 simply as the second amicus. The second amicus describes its main objects to be the expression of opinions on the development of the law, to ensure individual liberty and to advocate for law reform in respect of freedom of expression and access to information. It based its application for admission as an amicus curiae on its previous litigation history in relation to its objects, as well as on its interest in the issues raised here.

Condonation

[8] Some of the parties to these proceedings failed to lodge papers within the time periods prescribed by the Rules of this Court and our directions, and have applied for condonation for their failure. It is convenient to consider these applications at this stage.

[9] The first application for condonation was made by the respondents for the late filing of their notice of appeal, which, according to Rule 16(2), was to be filed within 15 court days from the date of the High Court's order.[5] Their condonation application and accompanying notice of appeal, in fact, arrived more than three months after this date.

[5] Constitutional Court Rule 16(2) provides:

> "A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the court which

[10] In his supporting affidavit the instructing attorney for the respondents states that, following the delivery of the High Court's order, he had been instructed by his clients to note an appeal, but that he had inadvertently failed to do so. He goes on to explain that he mistook this Court's directions of 21 November 2011 to indicate that his clients were required to deliver only heads of argument and not, in fact, to note an appeal, as Rule 16(2) requires. He concludes that his misapprehensions were rectified by counsel as late as 1 February 2012, the day before his clients' application for condonation was delivered and for his error he is contrite.

[11] Condonation is entirely discretionary and turns on a consideration of various factors.[6] A three-month delay is not trivial in the least and has inconvenienced this Court and the applicants. The condonation application, however, is unopposed, and any prejudice caused is outweighed by the broad social impact of the issues and the need for finality in this matter. I am, therefore, minded to grant condonation.

---

made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

Section 172(2)(d) is quoted in above n 1.

[6] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 18-9; *Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 14; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (8) BCLR 827 (CC) at paras 6-8; *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 39; and *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4.

[12] The next application for condonation was made by the second amicus. Its application for admission as an amicus curiae was due to be delivered by 16 February 2012. It was, however, delivered on 27 February 2012. The instructing attorneys apparently became aware of this Court's directions, which established the timeframe, only after the due date of their client's application. Although this application arrived very close to the date of the hearing, the significance of the matter and the contribution sought to be made by the second amicus warrant condonation.

[13] Before turning to consider the constitutional complaints, I set out the terms of the challenged provisions and a brief discussion on the pertinent mechanics of the statutory scheme.

The impugned provisions

[14] The challenged provisions of the Act are sections 16(1), 16(2), 16(2)(a) and 24A(2)(a). By extension of some of the submissions made in this Court, other sections of the Act may also be implicated. I, however, focus squarely on the impugned provisions, which are reproduced below:

> "**16 Classification of publications**
>
> (1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.

(2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—

(a) contains sexual conduct which—

(i) violates or shows disrespect for the right to human dignity of any person;

(ii) degrades a person; or

(iii) constitutes incitement to cause harm;

(b) advocates propaganda for war;

(c) incites violence; or

(d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,

shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

. . .

24A Prohibitions, offences and penalties on distribution and exhibition of films, games and publications

. . .

(2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16(1) of this Act which has—

(a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16(1), not been classified by the Board;

. . .

shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."[7]

[7] Section 1 of the Act provides in relevant part:

"**'publication'** means—

(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;

The relevant workings of the Act

[15] What follows is a précis of the interplay of the relevant provisions under the scheme:

(a) Section 16(1) permits any person to request that a publication be classified. The request may be made either before or after distribution.

(b) Section 16(2) requires a publisher to submit certain publications for classification before public dissemination. Significantly, the breach of the

---

(b) any writing or typescript which has in any manner been duplicated;

(c) any drawing, picture, illustration or painting;

(d) any print, photograph, engraving or lithograph;

(e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;

(f) computer software which is not a film;

(g) the cover or packaging of a film;

(h) any figure, carving, statue or model; and

(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;

. . .

'sexual conduct' includes—

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

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

(iii) masturbation;

(iv) bestiality;

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

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

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

(viii) oral genital contact; or

(ix) oral anal contact".

obligation to submit for prior classification, irrespective of the publication's ultimate fate after having been classified, will attract criminal penalties of a fine or up to five years' imprisonment or both.[8]

(c) Once a publication has been submitted in terms of section 16(1) or 16(2), it falls to be classified under section 16(4).[9] In terms of section 16(4), read

[8] Section 24A(2)(a) of the Act. See also [83]-[88] below in relation to the objective of section 24A(2)(a) being to criminalise the failure to submit a publication for prior classification in terms of section 16(2) of the Act.

[9] Section 16(4) of the Act provides:

> "The classification committee shall, in the prescribed manner, examine a publication referred to it and shall—
>
> (a) classify that publication as a 'refused classification' if the publication contains—
>
> (i) child pornography, propaganda for war or incitement of imminent violence; or
>
> (ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;
>
> (b) classify the publication as 'XX' if it contains—
>
> (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
>
> (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
>
> (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
>
> (iv) explicit infliction of sexual or domestic violence; or
>
> (iv) explicit visual presentations of extreme violence,
>
> unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified 'X18' or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
>
> (c) classify the publication as X18 if it contains explicit sexual conduct, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the

together with the Guidelines for classification,[10] a publication may be: (i) banned; (ii) distributed subject to restrictions; or (iii) freely distributed.

(d) If a publication is classified as refused classification[11] (RC) or XX,[12] then it is banned.[13] If a publication is classified as X18,[14] then it may be distributed, but only through the business of adult-only premises and with a license for that purpose.[15] Contravening any of these provisions is an offence and will attract the penalty of a fine or imprisonment of up to five years or both.[16] Publications that have been allocated an age restriction[17] must display that age restriction prominently to be distributable. This requirement is also enforced through the imposition of criminal penalties for failure to comply.[18]

---

protection of children from exposure to disturbing, harmful and age-inappropriate materials; or

(d) if the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age-restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials."

[10] Guidelines to be Used in the Classification of Films, Interactive Computer Games and Certain Publications, GN 887, in *GG* 32542, 1 September 2009 (Guidelines).

[11] Section 16(4)(a) of the Act.

[12] Section 16(4)(b) of the Act.

[13] Section 24A(2)(b) and (c) of the Act.

[14] Section 16(4)(b) and (c) of the Act.

[15] Section 24 of the Act.

[16] Section 24A(2) and (3) of the Act.

[17] Section 16(4)(d) of the Act.

[18] Section 24A(5) of the Act. Distributing trailers or adverts of games or films with a higher age restriction on certain publications with a lower age restriction without the written consent of the Board is also an offence, in terms of section 24A(7) of the Act.

(e) The Act does, however, cater for exceptional categories. If a publication would ordinarily be subject to restricted distribution as X18-rated material,[19] but is a *bona fide* documentary, a publication of scientific, literary or artistic merit or on a matter of public interest, then it must be classified in terms of the Guidelines.[20] The Guidelines also categorise publications that are merely age-inappropriate,[21] and, importantly, the Guidelines contain a category of "No classification necessary", which permits the free distribution of a publication.[22]

(f) Lastly, there are provisions that make certain conduct involving children offences, in addition to, and independently of, the sections that criminalise the same conduct through the classification scheme. They pertain to child pornography[23] and the exposure of children to representations of explicit sexual conduct.[24] For the purposes of the discussion to follow, it is of some

---

[19] See above n 14.

[20] Section 16(4)(c) of the Act. The types of sexual conduct, sought to be regulated, would fall under the XX or X18 categories or would be classifiable under the Guidelines, with the exception of child pornography, which is strictly classifiable as RC.

For the sake of completeness, section 16(4)(a)(ii) of the Act exempts a publication from classification if it contains advocacy of hatred, based on any identifiable group characteristic and which constitutes incitement to cause harm, if it is also a *bona fide* documentary or is a publication of scientific, literary or artistic merit or on a matter of public interest. This exemption does not apply to child pornography.

[21] Section 16(4)(d) of the Act.

[22] Regulation 4.5 of the Guidelines.

[23] Section 24B of the Act, quoted in full below n 75.

[24] Section 24A(4)(b) of the Act, quoted in full below n 75. Section 1 of the Act defines "explicit sexual conduct" as—

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

See above n 7 for the definition of "sexual conduct".

moment that these prohibitive rules are self-standing obligations that run parallel to the classification system and are not founded on the latter.

[16] The classification scheme initiated by section 16(2) of the Act[25] is one of *administrative* prior classification. Under this model of prior classification, control is exercised before publication by an administrative body under the control of the executive branch of government.[26] In essence, the person seeking to publish is required to submit the material to the administrative body, which decides whether to grant or deny permission to publish. If the administrative body concludes that the material is prohibited, the prospective publisher is prevented from publishing it. This amounts to a form of prior restraint, which is an inhibition on expression before it is disseminated.[27]

Proceedings in the High Court

[17] The applicants' constitutional complaints in the High Court were threefold:

(i) The Act creates a system of prior classification in a manner that entails the submission of a large number of publications for classification prior to distribution, in terms of criteria that are vague and overbroad, and in circumstances where failing to comply attracts severe criminal sanctions. This unduly trammels upon the right to freedom of expression.

[25] We are concerned only with section 16(2)(a).

[26] See [15] above regarding the arrangement under the Act.

[27] Compare Barendt *Freedom of Speech* 2 ed (Oxford University Press, Oxford 2005) at 122.

(ii) There is no rational basis for the exemption from prior classification of newspapers, but not magazines, where there may be no substantial difference between their respective contents.

(iii) Patent drafting errors in certain provisions produce absurd results.

[18] On the basis of these constitutional complaints, the High Court was tasked with determining whether the rights to freedom of expression and equality had been unjustifiably limited and whether the principle of legality had been breached. The High Court held that all three had been violated and that those were not infringements that the Constitution countenanced.

[19] The High Court declared sections 16(1), 16(2), 16(2)(a) and 24A(2)(a) constitutionally invalid.[28] The remedies ordered are, in effect, as follows:

[28] The High Court's order provides:

"1. It is declared that:

1.1 Section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, is inconsistent with the Constitution and invalid.

1.2 In order to remedy the defect, section 16(2)(a) of the Films and Publications Act 65 of 1996, as amended, is to be read as though the word 'contains' is deleted and replaced with the words 'advocates or promotes'.

2. It is declared that:

2.1 Section 16(1), section 16(2) and section 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, are inconsistent with the Constitution and invalid to the extent that they exclude magazines from the protection afforded to newspapers.

2.2 In order to remedy the defect, sections 16(1), 16(2) and 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, are to be read as though the words 'or magazine' appear after the word 'newspaper' in each case.

3. It is declared that:

(a) In section 16(2)(a) the word "contains" is replaced with "advocates or promotes";

(b) In sections 16(1), 16(2) and 24A(2)(a), magazines are included in the exemption afforded to *bona fide* newspapers, by inserting the words "or magazine" after every reference to "newspaper"; and

(c) Section 24A(2) has been reformulated to read in relevant part as follows:

> "Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication, which has—
>
> (a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16(1), not been classified by the Board *provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act;*
>
> . . .

3.1 Section 24A(2)(a) of the Films and Publications Act 65 of 1996, as amended, is inconsistent with the Constitution and invalid to the extent that it applies to publications other than those referred to in section 16(2) of the Act.

3.2 In order to remedy the defect, section 24A(2) of the Films and Publications Act 65 of 1996 is to be read as though:

3.2.1 The words 'referred to in section 16(1) of this Act' in section 24A(2) have been deleted; and

3.2.2 The phrase 'provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act' appears in section 24A(2)(a) between the words 'Board' and the semi-colon.

4. The orders in paragraphs 1, 2 and 3 above are hereby referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

5. The first and second respondents are directed to pay the costs of the applicants jointly and severally, such costs to include the costs of two counsel."

> shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment." (Emphasis added.)

Applicants' submissions

[20] The applicants' primary concern arises from section 16(2)(a) of the Act, which creates a requirement to submit certain publications depicting certain kinds of sexual conduct, for administrative prior classification. Their complaint goes to the breadth of section 16(2)(a), caused by the expansive definition of "sexual conduct"[29] and the legislative choice not to use in its place the term "explicit sexual conduct", which is more narrowly defined.[30] The applicants are also concerned with the wide definition of "publication"[31] and the criterion that a publication need merely "contain" the sexual conduct instead of advocate or promote it.[32]

[21] The upshot of the overbroad and vague manner in which section 16(2)(a) is cast, the applicants contend, is that numerous mainstream publications fall to be submitted for classification before they may become publicly available, even if they are manifestly in the public interest. This will impose severe financial and practical burdens on publishers,

[29] See above n 7.

[30] See above n 24.

[31] See above n 7.

[32] That a publication can be capable of *containing* sexual conduct appears to be a semantic oversight. It seems rather that what is intended is for a *depiction* of sexual conduct to be contained in a publication.

especially since it is the entire publication, and not merely the impugned material, that must be submitted.[33]

[22] The applicants emphasise that freedom of expression is of considerable constitutional significance and lies at the heart of democracy. It is not the sole preserve of those who would express lofty, noble or merely inoffensive sentiments, but should enable individuals to convey and receive views on a wide range of matters.

[23] Coupled with the fact that failure to submit for administrative prior classification attracts harsh criminal sanctions, the vagueness and overbreadth of section 16(2)(a) and the indeterminate delay, occasioned by the classification process, may lead to self-censorship and exert a "chilling effect" on the right to freedom of expression. The limitation of the right, the applicants argue, cannot be justified in a democratic society based on human dignity, equality and freedom.

[24] The appropriate remedial measure, the applicants propose, is to alter the wording of section 16(2)(a), so that only material that advocates or promotes the objectionable

[33] In terms of Regulation 4 of the Films and Publications Regulations, GN R207, in *GG* 33026, 15 March 2010 (Regulations).

sexual conduct must be submitted.[34] As an alternative, two interpretive options are suggested as remedies to avoid an unconstitutional outcome.[35]

[25] The applicants' second concern pertains to the exclusion of magazines from the exemption afforded to newspapers under sections 16(1), 16(2) and 24A(2)(a). They contend that there is no regulatory difference that justifies the distinction, as numerous mainstream magazines, like *bona fide* newspapers, are also subject to the jurisdiction of the Press Council, and that there is little difference between the substantive content published in many magazines and newspapers. Magazines are thus equally worthy of the protection of freedom of the press. In the result, the differentiation is irrational and unconstitutional, in that it violates sections 1(c) and 9(1) of the Constitution.[36]

[26] The applicants' final concern is in relation to a matter on which all parties agree. They aver that section 24A(2)(a) of the Act, as it presently stands, has the effect of criminalising the distribution of unclassified publications. Quite clearly, the legislation was designed so that section 24A(2)(a) would mirror section 16(2), so that the distribution of a publication that was required to be submitted for prior classification, but

[34] See above n 28, which quotes the order of the High Court, sought to be confirmed by the applicants.

[35] First, to interpret "contains" to mean "advocates or promotes", alternatively, to interpret section 16(2)(a) as applying only to visual presentation, as contended for by the respondents. The applicants, however, do highlight the shortcomings of these interpretive alternatives in their submissions, and one need not say much more about them.

[36] Section 1(c) of the Constitution provides for the "[s]upremacy of the constitution and the rule of law."

Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

was not, amounts to an offence. That section 24A(2)(a) refers to section 16(1) instead, appears to be a drafting oversight.

Respondents' submissions

[27] The respondents accept that the requirement that publications depicting sexual conduct must be submitted for administrative prior classification is a limitation on the right to freedom of expression, but argue that it is one that is justifiable within the meaning of the limitations clause. In support, it was contended that the three stated purposes of the Act, namely, to inform consumer choice, to prevent the exposure of children to age-inappropriate material and to ban child pornography, were in themselves sufficient justification for the limitation. The term "contains" was accordingly not overbroad, and replacing it with "advocates or promotes" would undermine the objects of the Act. Furthermore, the provisions of section 16(2)(a) could be construed to apply only to visual images of sexual conduct, which restricts the scope of its limitation on the right to freedom of expression.[37]

[28] The respondents submit that *bona fide* newspapers are exempt from sections 16(1), 16(2) and 24A(2)(a), since they fall under the jurisdiction of the Press Ombudsman and

[37] This is in spite of the fact, as pointed out by the applicants, that section 16(2)(a) does not employ the term, "visual presentation", which is defined in section 1 of the Act as—

> "(a) a drawing, picture, illustration, painting, photograph or image; or
>
> (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout."

are subject to the Press Code, whose provisions are substantially similar to those envisaged in section 16(2) and 16(4) of the Act. Regulatory mechanisms to receive and settle complaints are also in place. These measures function as adequate safeguards against newspapers publishing objectionable material, which has been demonstrated to be the case over time.

[29] *Bona fide* magazines that comply with the Press Code, say the respondents, occupy no special position compared to magazines that do not. Acceptance of the argument that only those magazines, which do not comply with the Press Code, must be submitted for classification prior to distribution, would create an imbalance in the application of the Act. Accordingly, the express provision of the words "or magazine" after each reference to "*bona fide* newspaper" in these three sections is undesirable.

JASA's submissions

[30] Like the respondents, JASA contends that section 16(2)(a) of the Act limits the right to freedom of expression, but does so justifiably. JASA argues that since the expression of objectionable sexual conduct, contemplated in section 16(2)(a), cannot be said to lie at the heart of the right to freedom of expression and is not the kind of information, the value of which depreciates quickly, the infringement is neither severe nor particularly intrusive. Any initial uncertainty, it is averred, in relation to the submission requirements will be ameliorated as a body of precedent develops over time.

[31] JASA further submits that section 16(2), which generates the obligation to submit for administrative prior classification, exists in a "symbiotic" relationship with section 16(4), which provides for the classification of material, once submitted. Interfering with section 16(2)(a), as the High Court did, tampers with the statutory scheme and creates a fissure in it, so undermining the objects of the Act. Because section 16(4) is not challenged, and is thus presumptively valid, section 16(2) must be read together with it, to the effect that what is ultimately not classifiable *a fortiori* need not be submitted.

[32] Lastly, we were urged by JASA to accept that a publisher may yet avoid criminal liability through the exemption provisions, provided for in section 22 of the Act.[38] Moreover, a publisher may submit himself to administrative penalties to avoid criminal liability in terms of section 30(4)(a) of the Act.[39] Should we, however, not be persuaded

[38] Section 22 of the Act provides:

> "(1) The Board may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from section 24A, 24B or 24C if it has good reason to believe that *bona fide* purposes will be served by such an exemption.
>
> (2) Where the Board after due inquiry has good reason to believe that the conditions of an exemption are not complied with or that the *bona fide* purposes are no longer present, it may withdraw the exemption."

See [15] above for a brief description of the penalties referred to in section 24A and below n 75 where section 24B is set out.

[39] Section 30(4)(a) of the Act provides:

> "If any person who has contravened or failed to comply with section 24A(1), (2)(a), (5), (6), (7), 24C(2) or 27A(1)(a) agrees to abide by a decision of the Board and deposits with the Board such sum as the Board may determine but not exceeding the greater of two thousand rand or two times the prescribed classification costs, where applicable, on each such contravention or failure to comply, the Board may, after conducting an enquiry, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited."

that the limitation on the right to freedom of expression is justifiable, JASA suggests various remedial options.[40]

[33] The applicants, in response to JASA's submissions, proffer attractive contra-positions. Firstly, administrative bodies do not operate on a system of precedent. Secondly, section 16(2) and 16(4) deal with distinct concepts: submission and classification. This is clearly evinced by their plain language. Furthermore, suggesting that a publisher must don the classifier's hat, as it were, by reading the submission criteria subject to the classification criteria, begs the question. Finally, the exemption under section 22 and avoiding criminal liability under section 30(4) are no more than illusory defences, being subject entirely to the Board's discretion to grant or withdraw.

Second amicus' submissions

[34] The second amicus submits that section 16(2)(a) limits the right to freedom of expression, and the limitation fails the proportionality assessment in the limitation

[40] JASA suggested, as an alternative to its primary argument that the limitation on the right to freedom of expression caused by section 16(2)(a) is justifiable, the following remedial options:

(i) in section 16(2)(a), replace the word "publication" with "material intended for publication"; and

(ii) in section 16(2)(a), replace the words "contains sexual conduct which" with "contains a visual presentation of sexual conduct which, judged within context"; and

(iii) in section 16(4), read in after "shall" the words "as soon as practicable, but no later than five days after a request in terms of subsection (1) or a submission in terms of subsection (2)"; *further alternatively*

(iv) suspend the order of invalidity for a period of 18 months to allow Parliament to correct the defect(s) without any interim relief; else

(v) effect the alternative proposals as interim relief.

analysis, as the respondents have provided no evidence to suggest that the section achieves its purpose or that there are no less restrictive means available.

[35] The second amicus, like the applicants, submits that the broad scope of the definition of "publication", the legislative choice to employ the defined term "sexual conduct" and the shortcomings of the requirement of mere containment cause impermissible overbreadth and vagueness. It also argues that the further criteria that the content of a publication must "degrade" or "disrespect" contributes unwarranted uncertainty to these deficiencies.

[36] The point is trenchantly made by the second amicus that no justification has been tendered in particular for the Act's administrative prior classification system. In elaboration, it was submitted that the operation of this system amounts to a form of thought-control, has a "chilling effect" on the right to freedom of expression and is inimical to the Constitution.

[37] The second amicus submits that under the Press Code, newspapers are subject to a regulatory regime that employs a subsequent complaint and investigation process, absent criminal sanctions. In respect of the differentiation between newspapers and magazines, therefore, the second amicus contends that if that system is adequate for achieving the Act's objective as far as newspapers are concerned, as the respondents concede it is, then it ought also to be sufficient in relation to other publications. Furthermore, a separate

regime for newspapers, to achieve the same objectives through divergent standards, exposes a fundamental irrationality in the Act.

[38] Lastly, the second amicus argues that provisions in the Act requiring the prior classification of expression on the internet and distributed networks are plainly unworkable. It contends that this would cause serious prejudice to users of these media both by violating their right to freedom of expression and because of the financial burdens that would be imposed on them by having to comply with the prescribed manner of submission.[41]

Approach to the merits

[39] Central to this matter is the right to freedom of expression, to be considered in the light of the government's objective to regulate, through classification, publications that may constitute, among other things, indecent material.

[41] These concerns were:

(i) Given the Act's definition of "publication", which includes any message or communication, including a visual presentation, placed on any distributed network including, but not limited to, the internet, it would simply be impossible to seek to classify prior to publication expression on these media. The legal enforceability of section 16(2) in its entirety, therefore, is questionable.

(ii) The Regulations also create an absolute ban on the publication of material classified as X18 on distributed networks and the internet. By and large, most mainstream pornography contains explicit sexual conduct, which is classifiable as X18. Under the statutory scheme, therefore, mainstream pornography is banned from publication on distributed networks and the internet.

(iii) Our attention was drawn to the ease with which information may be uploaded onto distributed networks and the internet. Each upload constitutes a publication and undoubtedly there is no shortage of online content that meets with the section's criteria for submission. That it is practically and financially unfeasible to classify all offending online data beforehand is commonsense.

(iv) A publisher is required to pay a classification fee of R1000 for each publication submitted for prior classification.

[40] To assist the discussion to follow, I find it convenient to state my ultimate findings at this juncture. In my view, the High Court's declarations of constitutional invalidity of section 16(1), 16(2) and 16(2)(a) should be confirmed. The High Court's declaration of constitutional invalidity of section 24A(2)(a) only, however, should not be confirmed, but ought to be extended and replaced with an order declaring section 24A(2) constitutionally invalid.

[41] These findings are based on grounds that go beyond those considered by the High Court and those relied on by the applicants and respondents, as the compass of issues before us has been expanded appreciably by the amici curiae. For this reason, I propose to deal with the merits under three heads, namely the—

(i) constitutionality of section 16(2)(a);[42]

(ii) constitutionality of the exclusive exemption of *bona fide* newspapers in sections 16(1), 16(2) and 24A(2)(a);[43] and

(iii) constitutionality of section 24A(2).[44]

[42] See [42]-[78] below.

[43] See [79]-[82] below.

[44] See [83]-[88] below.

(i) Constitutionality of section 16(2)(a)

[42] The thrust of the applicants' complaint relates to the means rather than the ends of classification under the Act. Put differently, their protest lies against the administrative prior classification scheme created by the Act, and not against the concept of classification altogether. They focus on the ambit of the criteria for submission for administrative prior classification, and it is stridently advanced that their overbreadth and vagueness limit the right to freedom of expression unjustifiably.

[43] The implication of the applicants' principal argument is that clarification of the criteria for submission for administrative prior classification will cure the constitutional invalidity caused by their overbreadth and vagueness. Indeed, that is borne out by the primary remedy sought.[45] In my view, it is necessary first to ask whether administrative prior classification of material depicting sexual conduct is constitutionally acceptable in the circumstances of this case.

Are the impugned provisions consistent with the Constitution?

[44] In answering this question, regard must, of course, be had to our current jurisprudence on prior restraint, with a view to achieving an appropriate balancing of the scales in relation to this matter. In the context of court interdicts, the Supreme Court of Appeal has, correctly in my view, endorsed the following statement of Lord Scarman:

[45] See [24] above.

> "[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice".[46]

The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only.

[45] In foreign jurisdictions, one observes similar stances in relation to prior restraint. In the United Kingdom the rule against prior restraint was applied exclusively through the common law[47] and more recently through statute.[48] Deriving directly from the First Amendment, the rule is, perhaps, more strongly applied in the United States and permits of fewer exceptions.[49] The most recent pronouncement decrying prior restraint has come from the European Court of Human Rights.[50] Canadian jurisprudence considers prior

[46] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) (*Midi Television*) at para 15, quoting with approval the Court of Appeal of England and Wales in *Attorney-General v British Broadcasting Corporation* [1981] AC 303 (CA) at 362. See also the judgments of Lord Reid and Lord Morris of Borth-y-Gest in *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL), in the context of judicial prior restraint.

[47] *Attorney-General v British Broadcasting Corporation* [1981] AC 303 (CA) and *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL). Cf *Attorney-General v Guardian Newspapers Ltd* [1987] 3 All ER 316 (*Spycatcher*).

[48] Section 12(3) of the Human Rights Act 1998. See also *Greene v Associated Newspapers Ltd* [2005] QB 972 (CA).

[49] *New York Times Co. v United States* 403 US 713 (1971); *Freedman v Maryland* 380 US 51 (1965); and *Near v Minnesota* 283 US 697 (1931).

[50] *Mosley v United Kingdom* (2011) 53 EHRR 30, applying Article 10 of the European Convention on Human Rights, 1950 (ECHR), and *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, holding that the injunction confirmed by the House of Lords in *Spycatcher* above n 47 infringed Article 10 of the ECHR.

restraint to be an infringement of the right to freedom of expression, but regards it as a justifiable limitation in narrow instances.[51]

[46] In my view, the respondents have failed to demonstrate that the Act's administrative prior classification system is constitutionally defensible. Ultimately I hold that section 16(2)(a) unjustifiably limits the right to freedom of expression in establishing an administrative prior classification scheme, and, in the result, is constitutionally invalid, as will be more fully developed in the discussion to follow.

Freedom of expression

[47] I have indicated that freedom of expression is the kernel of this case.[52] It is necessary to enquire whether the expression of sexual conduct, which the Act seeks to qualify in section 16(2)(a), is protected under our Constitution. 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—

[51] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120, in relation to legislative prior restraints. See also Devenish "Prior judicial restraints and media freedom in South Africa – Some cause for concern" (2011) 74 *THRHR* 16-7 for a discussion on other Canadian cases, permitting prior restraints, and on judicial prior restraints generally.

[52] See [39] above.

(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."

[48] Section 16(2) provides an exclusionary list of the varieties of expression not protected by the right. Section 16(1), on the other hand, is merely illustrative of the kinds of protected expression and is non-exhaustive in character.[53] It necessarily follows that whatever expression does not fall under section 16(2) must do so under the purview of section 16(1).[54] Put differently, any expression, which is not excluded from protection under the Constitution, benefits from the preserve of the right.

[49] The question then is whether the expression of sexual conduct falls under one of the exceptional categories, delineated in section 16(2) of the Constitution. Textually, it does not. Furthermore, the non-protected categories under section 16(2) of the Constitution are, in fact, comprehensively reflected in section 16(2)(b), (c) and (d) of the Act. Consequently, the expression contemplated by section 16(2)(a) is protected by the right to freedom of expression.[55] Lastly, while there may in certain instances be overlaps between the expression of sexual conduct and non-protected expression, the very presence of the latter, in what would otherwise be constitutionally protected expression,

[53] *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at paras 31-4.

[54] Id at para 33 and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 47.

[55] See *Van den Berg en 'n Ander v Suid-Afrikaanse Spoorweë en Hawens* 1980 (1) SA 546 (T) at 558F and Du Plessis "Statute Law and Interpretation" 25(1) *LAWSA* 2011 at para 353.

would necessitate submission in terms of section 16(2)(b), (c) or (d) and not section 16(2)(a) of the Act.

[50] It is now possible to consider whether administrative prior classification, initiated through section 16(2)(a) of the Act, is constitutionally permissible.

[51] The Act creates a complex system requiring the submission of material that is sought to be published for evaluation and classification. Whether a publication is banned, restricted in its scope of dissemination or permitted to be distributed freely, the Act *regulates* expression and does so in varying degrees. To the extent that protected expression falls subject to the Act's prior classification scheme, the right to freedom of expression itself is regulated by the statute.[56] Because freedom of expression, unlike some other rights,[57] does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless. In the result, the prior classification requirement in section 16(1) and section 16(2)(a), read together, undoubtedly places a limitation on the right.

[56] *Islamic Unity* above n 53 at para 34.

[57] See *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) on the right to vote.

[52] As I see it, the free flow of constitutionally protected expression is the rule and administrative prior classification should be the exception. The right to freedom of expression, however, is not inviolable and is subject to justifiable limitation to the extent that section 36 of the Constitution permits.[58] With this said, I now turn to consider whether the limitation is constitutionally justifiable.

Limitation analysis

Nature of the right to freedom of expression

[53] Embraced by the right is the liberty to express and to receive information or ideas freely.[59] The right also encompasses the freedom to form one's own opinion about expression received,[60] and in this way both promotes and protects the moral agency of

[58] *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 17.

Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided for in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[59] Section 16(1)(b) of the Constitution. See also *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) (*Case*) at para 28.

[60] *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

individuals.[61] Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is owed.[62]

[54] In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society.[63] One might even consider the press to be a public sentinel,[64] and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.[65]

The importance of the purpose of the limitation

[55] It is settled in our law that it is insufficient to rely simply on the stated purposes of a statute in order to identify and evaluate the purposes of a specific, impugned provision within it. The focus must properly fall on the challenged law itself.[66] Here, the stated

[61] Id.

[62] *Holomisa v Khumalo and Others* 2002 (3) SA 38 (T) at 61.

[63] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 24 and *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 (2) SA 221 (T) at 227I-228A.

[64] *Government of the Republic of South Africa* id at 228A.

[65] *Midi Television* above n 46 at para 6.

[66] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as* Amicus Curiae*)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 33 and *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 23.

purposes of the Act are listed in section 2,[67] namely: (i) to provide consumer advice; (ii) to protect children from exposure to harmful or age-inappropriate material; and (iii) to ban child pornography. The means by which this is achieved is to disallow, as far as possible, the dissemination without prior classification of material that may ultimately be banned or, if not banned, that may be published subject to constraints.

[56] Indeed, aiming to curb generally the publication of proscribed materials and to control the manner in which some publications are made available are legitimate objects. As far as the stated purposes are concerned, little can be said to controvert the importance of the ban on child pornography and the protection of children from exposure to inappropriate materials.[68] Section 28(2) of the Constitution enjoins the state to protect children, whose rights deserve special and paramount consideration in all matters affecting them.[69] Though perhaps of somewhat lesser significance, providing an adult with more complete information on a publication's content can be seen to enhance his ability to make more informed choices about what he himself consumes or to what he might expose others, including children, through his own consumption.

---

[67] Section 2 of the Act provides:

> "The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to—
>
> (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;
>
> (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
>
> (c) make use of children in and the exposure of children to pornography punishable."

[68] See *De Reuck* above n 54 at para 63.

[69] Id.

[57] The ostensible purpose of section 16(2)(a) appears to me to align itself with the adage, 'prevention is better than cure'. It is surely an important purpose, but it is of vital import to determine whether the conventional approach of prevention through deterrence under threat of punishment, on the one hand, as opposed to prevention through the upfront restriction of free action, on the other, strikes the appropriate balance.

Nature and extent of the limitation

[58] In this case, administrative prior classification entails a transfer of control from the right-bearer, seeking to exercise the right to freedom of expression, to an administrative body. In other words, an administrative body has been made the appointed decision-maker, insofar as determining whether expression ought to be made public, and *not* the publisher, in whom the right properly inheres. By investing an administrative body with the exclusive power to grant permission to publish certain material, as well as the power to punish for denying it the opportunity to do so,[70] what is engendered is a scheme in which expression must be justified before, and as a necessary condition for, its release into the public realm. There is a shift in the locus of control to an administrative body from the right-bearer, whose liberty to exercise freely his right to freedom of expression is curtailed.

[70] See discussion on section 24A(2)(a) of the Act at [83]-[88] below and Emerson "The Doctrine of Prior Restraint" (1955) *Faculty Scholarship Series*, Paper 2804 at 655.

[59] According to academic commentators,[71] under a system of administrative prior restraint, the opportunity for public scrutiny and comment on a fresh publication is denied. An administrative body is more likely to restrict publications when it can classify upfront than when it must take punitive or restrictive action after publication. The greater propensity for prior restraint when controlled by an administrative body is explained by the nature of prior classification itself, where, by restraining upfront, the state is relieved of the greater burden on resources, personnel and time necessitated by policing and possibly prosecuting after material has been made public. Last but not least, an administrative body is mandated and incentivised to classify, which also increases the likelihood of restraint.

[60] Deepening the fracture in the right is the fact that throughout the classification process the fate of the publication remains uncertain.[72] In some instances, the very delay in bringing important information to the public's attention makes inroads into the right to freedom of the press and other media.[73] The contents of the publication may even be redundant by then, yet there would be no remedial action open to the publisher. Equally, if a publisher were not to submit material that, on the face of it, fell to be submitted, but would ultimately have emerged unrestrained, he could still be prosecuted for breaching the very duty to submit.

---

[71] For a robust discussion on the effects of prior classification, see Barendt above n 27 at 118-29; Emerson above n 70 at 655-60; and Bickel *The Morality of Consent* (Yale University Press, London 1975) at 61.

[72] Barendt above n 27 at 123 and Emerson above n 70 at 655-60.

[73] Section 16(1)(a) of the Constitution and *MEC for Health, Mpumalanga v M-Net and Another* 2002 (6) SA 714 (T) at para 29.

[61] The likeness between the theoretical descriptions of administrative prior classification models and the Act's administrative prior classification system is apparent. The Board and the appellate body under the Act are indeed administrative bodies and under ministerial control.[74] Quite remarkably, no timeframe is stipulated on the classification process. Moreover, an onus is placed on a publisher to justify the expression sought to be made.

The relation between the limitation and the purpose and less restrictive means

[62] Much store was placed by the respondents and JASA in the purposes of the Act as justifying the means employed to realise them.

[63] On analysis of the statutory scheme, there is little doubt that section 16(2)(a) is not the exclusive means through which the Act's purposes and its own purposes may be achieved. In fact, prohibiting the publication and creation of child pornography and the exposure of children to pornography are already governed by two other sections in the

[74] The classification committees are appointed by the Board (section 10(1)) and their decisions are deemed to be that of the Board (section 10(3)). The Council must make regular, quarterly reports about the Board's effectiveness to the Minister (section 4A(1)(f)). The Council determines the composition of the Board (section 9A(1)).

The Council's members are appointed by the Minister (section 6(1)), determine the classification policies and rules, in consultation with the Minister (section 4A(1)(a)), receive remuneration, allowances and other benefits, as determined by the Minister and the Minister of Finance (section 12), may be removed by the Minister, based on a finding of a tribunal appointed by the Minister (section 9) and may be reappointed by the Minister (section 8(2)).

In the same manner, the Appeal Tribunal members are also appointed, paid, may be removed from office and be reappointed by the Minister (sections 6(1), 12, 9 and 8(2), respectively).

Motala and Ramaphosa *Constitutional Law Analysis and Cases* (Oxford University Press, Cape Town 2002) at 366 say that if administrative prior restraints were in general sanctioned that "the press and the exercise of free speech would [become] beholden to the government."

Act, which are altogether independent of the classification system.[75] Consequently, section 16(2)(a) is not necessary to achieve the Act's purposes insofar as they pertain to children.

[75] Sections 24B of the Act provides:

> "(1) Any person who—
>
> (a) unlawfully possesses;
>
> (b) creates, produces or in any way contributes to, or assists in the creation or production of;
>
> (c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or
>
> (d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing,
>
> any film, game or publication, which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.
>
> (2) Any person who, having knowledge of the commission of any offence under subsection (1) or having reason to suspect that such an offence has been or is being committed and fails to—
>
> (a) report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; and
>
> (b) furnish, at the request of the South African Police Service, all particulars of such knowledge or suspicion,
>
> shall be guilty of an offence.
>
> (3) Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography, shall be guilty of an offence."

Section 24A(4) of the Act provides in relevant part:

> "Any person who knowingly distributes or exhibits any film, game or publication—
>
> . . .
>
> (b) which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a *bona fide* documentary or is of scientific, literary or artistic merit or is on a matter of public interest,
>
> to a person under the age of 18 years, shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment."

As the second amicus submitted, correctly in my view, most mainstream pornography would contain explicit sexual conduct.

[64] Section 16(2)(a) of the Act also creates the immediate and long-term effects of delaying the flow of expression, which in some instances may drastically impede the ability of the right-bearer from receiving information or ideas. The result is a reduction in, rather than an enhancement of, choice.

[65] 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. This is all the more indefensible when one has regard to the availability of less restrictive means, to which I now turn.

[66] One less restrictive alternative in our law to administrative prior restraint is a court interdict. To secure an interdict on a publication, our courts generally have called on applicants to meet a high standard of proof in regard to its requirements.[76] A court seized with an application for an interdict is required to balance carefully various factors and rights, relating to both the right-bearer and the party seeking the restraint. A central consideration is the impact on the right to freedom of expression.[77] In each case, the

[76] *Midi Television* above n 46.

[77] *Mandela v Falati* 1995 (1) SA 251 (W) at 257F-J.

particular circumstances are determinative of the appropriateness of, and the need for, the restraint.

[67] A prominent, distinguishing characteristic of a court interdict from its administrative counterpart is the allocation of the burden of proof on the party seeking to restrain the expression, rather than on the party seeking to vindicate the right. The right-bearer can exercise his right to freedom of expression, without constraint to the extent that the law permits, until a court makes a determination to the contrary. This is in diametric opposition to the arrangement under the Act's administrative prior restraint model, as I have already mentioned, where the burden of justifying the expression rests with the right-bearer.

[68] Notably, an enquiry into the merits of any prior restraint necessitates an adjudication of legal rights, a task that properly falls within the province of a court and not an administrative body. The provisions of section 16(2)(a) notwithstanding, a court interdict as an alternative remains open to any litigant, who can meet its requirements. In my view, it is an appropriate less restrictive means of enforcing a ban on child pornography and protecting children from exposure to harmful or age-inappropriate materials,[78] as well as preventing contravention of the law though an anticipatory mechanism.

[78] These are two of the Act's important stated purposes. See discussion at [56] above.

[69] As an interdict will be effective only where there is some prior knowledge of the material sought to be published, it is narrower in its range of application than its administrative equivalent. Be that as it may, however, an exclusive preference for court interdicts still facilitates anticipatory prevention of breach of the law and preserves the state's existing law enforcement duties to detect, investigate and prevent or prosecute the publication of unlawful material, as is the case with most other offences.

[70] Administrative prior restraint is also not the only way in which the state can promote lawful conduct on the part of publishers. Quite apart from court interdicts, permitting publishers to approach the classification authorities for an opinion on material sought to be published prior to distribution not only provides a means of obtaining legal certainty, but also restores to publishers the discretion to make informed choices about whether or not to publish. For that reason, it places them in a better position to regulate their conduct in accordance with the law. As the Act presently stands, it remains open to any publisher, who is uncertain about whether a publication that he wishes to distribute falls to be classified, to submit of his own accord that publication for classification in terms of section 16(1).[79]

[71] In my view, the mainstay of the law is to encourage lawful conduct rather than to seek to guarantee lawfulness by restricting conduct altogether. As Blackstone

[79] Section 16(1) of the Act, quoted in full at [14] above, notably empowers "[a]ny person" to request a classification of a publication. On its plain meaning, there is nothing to suggest that the publisher himself is precluded from utilising the provision for his own benefit prior to distribution of a particular publication.

suggested,[80] should a publisher choose not to pursue the avenues available to gain certainty about the lawfulness of intended publication, then he must bear the risks, attendant upon the decision to publish. Such is the cost of free expression.

Conclusion and remedy

[72] In my view, the central constitutional deficiency lies in the administrative and compulsory nature of the Act's prior classification scheme, in circumstances where there are less restrictive alternatives for achieving important legislative purposes. I agree with the concurring judgment of Van der Westhuizen J, to the extent that it also posits that attempting to remedy the submission criteria in this case would not save the section from constitutional invalidity. However, this to me renders the question of the criteria's constitutionality for being vague and overbroad peripheral to the main issue in this instance and unnecessary to decide, as it would not go to the heart of the matter.

[73] As the applicants correctly pointed out, the lamentable reality is that sexual offences, besetting our communities, are perpetrated with alarming frequency and cruelty. The need for redress is immediate and crucial. It is, however, difficult to conceive of how section 16(2)(a) might contribute to solving this problem.

[80] Blackstone *Commentaries on the Laws of England Book IV* (1795) at 151-2:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints on publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

[74] I would accordingly confirm the High Court's order of constitutional invalidity of section 16(2)(a) on the basis that it unjustifiably limits the right to freedom of expression.

[75] However, I would not confirm the High Court's accompanying order.[81] Replacing "contains" with "advocates or promotes" in section 16(2)(a) does not address the fundamental unconstitutionality of the administrative prior classification system itself. A complete excision is the only appropriate cure.

[76] The test to determine the suitability of severance was articulated in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*:[82]

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[83] (Footnote omitted.)

[77] Even without section 16(2)(a), all three of the Act's stated purposes are capable of satisfaction. The dissemination of child pornography and the exposure of children to

[81] See above n 28.

[82] [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[83] Id at para 16.

pornography remain offences under sections 24B and 24A(4)(b). Applying age-restrictions to publications remains possible under the Guidelines. Lastly, any publisher may request that his own publication be classified before distribution.

[78] At this juncture, I must pause to differ with the opinion of Van der Westhuizen J. According to my above findings and following the proposed striking out of section 16(2)(a), it is not the case that a court would be faced with having to apply vague or overbroad criteria in that section. It is, after all, only that provision, which is challenged in this case for bearing those defects.

(ii) Constitutionality of the exclusive exemption of bona fide *newspapers*

[79] Sections 16(1), 16(2)(b), (c) and (d) and 24A(2)(a) effectively exempt *bona fide* newspapers, which adhere to a code of conduct enforceable by the Press Ombudsman. The applicants and respondents are at one in submitting that Parliament considers this safeguard to be sufficient for the regulation of *bona fide* newspapers.

[80] The Act, however, excludes from this exemption magazines, which also adhere to a code of conduct enforceable by the Press Ombudsman. No evidence was submitted that there is any material, substantive difference between newspapers and magazines. In my view, the averments that magazines have a longer shelf-life, are less formal, more often contain offensive material than newspapers do and are not subject to short deadlines do not afford a substantive basis for differentiation.

[81] Not only is the differentiation unequal, but it is also irrational. It breaches, without justification, the principle of legality[84] and the right to equality before the law.[85] Consequently, the High Court's declaration of constitutional invalidity must be confirmed.

[82] To remedy the defect, I would also confirm the High Court's order of reading-in, which incorporates *bona fide* magazines into the exclusion, afforded to *bona fide* newspapers.[86]

(iii) Constitutionality of section 24A(2)

[83] Section 16(1) permits any person to request that a publication, which is to be distributed or is already being distributed, be submitted for classification. Section 16(2) provides for compulsory submission of publications which meet any of the criteria contained in paragraphs (b), (c) and (d), before being made publicly available.

[84] As the Act stands, section 24A(2)(a) criminalises the distribution of publications referred to in section 16(1) of the Act, which have not yet been classified by the Board.

---

[84] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85.

[85] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 56 and 59; *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54; and *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[86] See above n 28.

[85] The applicants argue that the section criminalises the publication of all non-classified material, save for *bona fide* newspapers. On this reading, reference to section 16(1) means that criminal sanctions will apply even to material that is not required to be submitted for classification before publication, where no request to this effect has been made in terms of that section. The applicants argue that this interpretation is plainly irrational, impermissibly vague and violates the right of freedom of expression. With them I agree.

[86] The only sensible reading is that section 24A(2)(a) is designed to penalise failure to submit a publication for prior classification in terms of section 16(2). I conclude that the reference to section 16(1) in section 24A(2)(a) of the Act is a drafting error, as expressly conceded by the respondents in oral argument in the High Court.

[87] In its remedy, however, the High Court also severed words from section 24A(2) without declaring that section unconstitutional and invalid, to the extent of its erroneous reference to section 16(1). It is axiomatic that constitutional remedies may not be applied to constitutionally valid laws or conduct. The High Court, therefore, erred in declaring only section 24A(2)(a) unconstitutional. Accordingly, I would declare section 24A(2) of the Act unconstitutional and invalid for the above reasons. I would, thereafter, confirm

the High Court's remedies of reading-in to section 24(2)(a) and severance from section 24A(2).[87]

[88] After the severance and reading-in have been effected, the provisions at issue will provide in relevant part as follows:

> "16(1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper or magazine that is published by a member of a body, recognized by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.
>
> (2) Any person, except the publisher of a newspaper or magazine contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—
>
> . . .
>
> (b) advocates propaganda for war;
>
> (c) incites violence; or
>
> (d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,
>
> shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition."

> "24A(2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication, which has—

[87] See above n 28.

> (a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper or magazine contemplated in section 16(1), not been classified by the Board provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act;
>
> . . .
>
> shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."

Costs

[89] The applicants have asked for costs, including the costs of two counsel. As successful litigants in this Court, I am satisfied that their prayer for costs should be granted.[88]

[88] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 43.

Order

[90] In the circumstances, the following order is made:

1. The respondents' application for condonation is granted.
2. The second amicus' application for condonation is granted.
3. Section 16(2)(a) of the Films and Publications Act 65 of 1996 is declared constitutionally invalid and is severed.
4. Sections 16(1), 16(2) and 24A(2)(a) of the Films and Publications Act 65 of 1996 are declared constitutionally invalid to the extent that they do not apply to magazines.
5. The words "or magazine" are read in after the word "newspaper" in sections 16(1), 16(2) and 24A(2)(a).
6. Section 24A(2) is declared constitutionally invalid to the extent that it is made applicable to section 16(1) of the Act.
7. Section 24A(2) of the Films and Publications Act 65 of 1996 is to be read as though—
    a. the words "referred to in section 16(1) of this Act" are severed; and
    b. the words "provided that this sub-section shall only apply to those publications referred to in section 16(2) of this Act" are read into section 24A(2)(a) between the word "Board" and the semi-colon.
8. The first and second respondents must jointly and severally pay the costs of the first and second applicants, including the costs of two counsel.

VAN DER WESTHUIZEN J (Yacoob ADCJ and Froneman J concurring):

[91] I have read the eloquently drafted judgment of my colleague, Skweyiya J (main judgment), and agree that the impugned provisions of the Films and Publications Act[89] (Act) are constitutionally invalid. However, I am unable to go along fully with the reasoning around section 16(2), which should be taken further, in my respectful view.

[92] I do not think that the central constitutional deficiency lies in the administrative nature of the Act's prior classification scheme, so much so that it is unnecessary to consider the possible vagueness and overbreadth of the criteria in section 16(2)(a).[90] The alleged vagueness of the criteria is not peripheral to the main issue. It was argued by the applicants and dealt with in the High Court's judgment. The constitutionality of prior restraint in this case cannot be properly considered without reference to the vagueness of the criteria, which are part and parcel of the scheme of the Act. Remedying the final details of the criteria may indeed not save the administrative prior restraint's constitutionality; but the converse is not necessarily true, namely that vague and overly broad criteria would pass constitutional muster under a censorship system of prior restraint which is not administrative, but rather judicial in nature. Judicial prior restraint based on unacceptably vague criteria would not be an acceptable less restrictive measure

[89] 65 of 1996, as amended.

[90] See [72] above. In my respectful view [78] above does not accurately reflect the position taken in this judgment.

to achieve the purpose of the legislation. The constitutional difficulty lies in the prior restraint scheme (whether administrative or judicial) linked to the vague and overbroad nature of the criteria in the Act. In this regard, it appears to me that there is a gap, or a link missing, in the reasoning of the main judgment.

[93] The important right to freedom of expression lies at the heart of democracy. The search for the truth, the ability to take democratic decisions and self-fulfillment have been put forward as reasons why freedom of expression must be protected.[91] It is closely linked to the right to human dignity and helps to realise several other rights and freedoms.[92] Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasised the importance of freedom of expression as the lifeblood of an open and democratic society.[93]

---

[91] See Milo et al "Freedom of Expression" in Woolman et al (eds) *Constitutional Law of South Africa* (2 ed) at 42—16 and Van der Westhuizen "Freedom of Expression" in Van Wyk et al (eds) *Rights and Constitutionalism: The New South African Legal Order* (Juta, Kenwyn 1994) 254 at 267-9.

[92] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 92. See also Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 9 of the African Charter on Human and Peoples' Rights; Article 10 of the European Convention on Human Rights; and Article 13 of the American Convention on Human Rights.

[93] *Dikoko* id. See also *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7:

> "[Freedom of expression] is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters." (Footnotes omitted.)

[94] Our history illustrates the crucial importance of free expression for democracy, even when its regulation and limitation deal with sexual conduct and related matters. Censorship was central in the legal system of the apartheid era. Not only were political activity, books, articles and even songs banned, but the apartheid state also imposed the narrow Calvinist and cultural notions of morality and good taste of the ruling minority on all. For example, the 1974 Publications Act[94] put in place an elaborate system of committees and a "Publications Appeal Board" to classify, prohibit and restrict. Books, magazines, articles and plays were banned or subjected to age and other restrictions. Globally celebrated films were banned, restricted to small venues, or subjected to the severe excising of language, nudity, sexual conduct and scenes depicting relations across the racial divide of that time.[95] Apart from providing for censorship of material deemed to be "prejudicial to the safety of the State", vague criteria like "indecent", "obscene", "offensive" and "harmful to public morals" were central to that Act.[96] The censorship system was a powerful tool to sustain political, cultural and religious dominance. And courts played along, for example, with the banning of books by well known authors on the basis that the description of sexual conduct in them was "indecent, obscene and objectionable."[97]

---

[94] 42 of 1974 (Publications Act).

[95] See Van Rooyen "Censorship in a future South Africa: A legal perspective" (1993) 2 *De Jure* 283 at 285-6 and 289.

[96] See section 47(2) of the Publications Act.

[97] In *Publications Control Board v William Heinemann, Ltd. and Others* 1965 (4) SA 137 (A) (*Heinemann*) the then Appellate Division of the Supreme Court sanctioned the banning of the book *When the Lion Feeds* by Wilbur Smith in terms of section 21(1)(f) of the Customs Act 55 of 1955 – read together with section 6(1)(a)-(d) of the Publications and Entertainment Act 26 of 1963 – which prohibited the publication of material that was deemed to be "indecent or obscene or on any ground whatsoever objectionable".

[95] However, free expression continued to play an important role in the struggle for political and moral liberation. Even in apartheid South Africa it was realised – also sometimes by courts – that freedom of expression was "a hard-won and precious asset, yet easily lost".[98]

[96] In democratic South Africa, section 16 of the Constitution recognises the right to freedom of expression. It includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity and academic freedom and freedom of scientific research.

[97] However, especially within the context of transformative constitutionalism,[99] our diverse society realises that free expression is not an absolute right. The opportunity to make choices is indeed central to the human dignity of individuals. But these choices are not the same as choosing products in a supposedly free market, as has often been argued. Power relations play a role. Language and visual images can be used not only to

[98] Rumpff JA in *Heinemann* id at 160E-F stated:

> "The freedom of speech – which includes the freedom to print – is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost."

[99] See Klare "Legal Culture and Transformative Constitutionalism" 1998 (14) *SAJHR* 146 and Langa "Transformative Constitutionalism" 2006 (3) *STELL LR* 351 at 354, where Langa CJ referred to transformative constitutionalism as a "permanent ideal".

communicate, but can also injure, intimidate and severely harm vulnerable groups and individuals. Freedom of expression thus has to be balanced against other rights and values, like human dignity,[100] equality,[101] privacy[102] and certainly the best interests of children.[103] In section 16 of the Constitution[104] propaganda for war, incitement of imminent violence and advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm, are all excluded from constitutional protection.[105]

[98] In order to balance freedom of expression against, for example, human dignity, equality of women and children's rights, it may have to be limited. This is what the Act, including section 16(2)(a), in this case does. The question is whether the limitation passes constitutional muster. Is it reasonable and justifiable in an open and democratic

[100] Section 10 of the Constitution.

[101] Section 9 of the Constitution.

[102] Section 14 of the Constitution.

[103] Section 28(2) of the Constitution.

[104] Section 16(2) of the Constitution.

[105] On some of the philosophical and ideological implications of the possible tension between freedom of expression and equality, see Meyerson "'No platform for racists': What should the view of those on the left be?" (1990) 6 *SAJHR* 394; Suttner "Freedom of Speech" (1990) 6 *SAJHR* 372; Greenawalt "Free speech in the United States and Canada" (1992) 55 *Law and Contemporary Problems* 5; and Mahoney "The Canadian constitutional approach to freedom of expression in hate propaganda and pornography" (1992) 55 *Law and Contemporary Problems* 77 at 103. Government intervention may be necessary to ensure a media environment that is characterised by pluralism, diversity and a citizen right to gain information and make his or her voice heard. See Puddephatt "The importance of self regulation of the media in upholding freedom of expression" UNESCO, CI Debates N.9 – February 2011; available at http://global-partners.co.uk/wp-content/uploads/Importance-of-slef-reg-English.pdf, accessed on 26 September 2012.

society based on human dignity, equality and freedom, taking into account all relevant factors, including those specifically mentioned in section 36 of the Constitution?[106]

[99] The two problematic aspects of section 16(2) of the Act are the system of prior restraint embodied in it and the vagueness and overbreadth of the criteria in subsection (a). I deal first with prior restraint.

[100] As indicated in the main judgment,[107] section 16(2) requires a publisher to submit certain publications for classification before dissemination. Once a publication has been submitted, it must be classified under section 16(4) and it may be banned, distributed subject to restrictions, or freely distributed. Conditions may include age restrictions and distribution only through the business of adult-only premises with a license.

[101] The severity of the limitation lies in the fact that the publication has to be submitted for classification before it is made available publicly, and before anyone has viewed or read it, or complained, or raised concerns about it. One possible outcome of the submission prior to publication is that it may be banned and thus never see the light of day. And its very publisher must submit it. In order to decide whether or not to submit, the publisher must apply the criteria in section 16(2).[108] If the publisher is of the opinion

[106] See above n 58 for the wording of section 36.

[107] [15] above.

[108] See [14] above for the wording of section 16(2)(a) of the Act.

that the material does not fall within those criteria and a criminal court later on decides that it does, the publisher may be convicted of a criminal offence and sentenced to up to five years' imprisonment.

[102] I am in full agreement with the main judgment's stance on the endorsement by the Supreme Court of Appeal of Lord Scarman's statement that prior restraint of a publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is substantial risk of grave injustice.[109] And I go along with much of the reasoning in the main judgment pointing out the perils of prior restraint.

[103] In my view the vagueness and overbreadth of the submission criteria are integral to the requirement to submit the publication before it is made publicly available to the criminal sanction that may follow a failure to submit, under the scheme of the Act. As pointed out above, it may indeed be the publisher's inability to interpret the criteria in the same way as the criminal court in which he or she may later be charged, that results in a conviction and imprisonment. I thus turn to the alleged vagueness of the criteria.

[104] The definition of "publication" in the Act is wide.[110] It includes newspapers, books, periodicals, pamphlets, posters, drawings, pictures, illustrations, paintings, prints,

[109] See [44] above and above n 46.

[110] See section 1 of the Act, quoted in above n 7.

photographs, engravings, lithographs, magnetic tapes and soundtracks. The first question a publisher of any of these must answer in deciding whether or not to submit is whether it "contains sexual conduct". "Sexual conduct" is defined in the Act[111] and includes bestiality and sexual intercourse, "whether real or simulated". But "contains" is not defined. It clearly means more than a portrayal or depiction of the conduct and could for example include a description or discussion of or reference to sexual intercourse or bestiality. Books, articles and reports on topics like rape, teenage pregnancy, sexual counseling and sex education would probably "contain sexual conduct", even if these explain, discourage or warn against the particular conduct.

[105] The next question would be whether the description, discussion, or reference in the publication "violates or shows disrespect for the right to human dignity of any person", or "degrades a person", or "constitutes incitement to cause harm".[112] The right to human dignity is of course recognised in the Constitution, but the "disrespect" criterion seems to be a much lower standard than the concept of the *violation* or *infringement* of rights generally used. It may be open to varied meanings. The notion of the 'degradation of a person' is also not defined and is by no means easily understandable.[113] It is unclear whether the provision is aimed at the degradation of human beings in an objective sense, or could include a specific person who may, objectively or in terms of subjective feelings,

[111] Id.

[112] See the wording of section 16(2) in [14] above.

[113] The definition of "degrade" was deleted by the Films and Publications Amendment Act 18 of 2004.

be degraded. A newspaper report on a bestiality case in a criminal court that identifies the accused may "contain sexual conduct" which "degrades a person". Furthermore, the kind of "harm" intended is not defined with any accuracy, nor is it clear whether harm to a specific person, a category of people, society, the country, or humankind is intended.

[106] It is not possible, wise, or necessary to delve too deeply into the possible meanings of the terminology used. Some of the criteria appear remarkably similar to those in the apartheid era statutes referred to above.[114] The question is whether they are vague and overbroad, not in the abstract, but within the context in which it is used, namely the prior restraint of publications. The answer is clearly yes. The prior restraint impacts on the relevance and seriousness of the vagueness and overbreadth of the criteria.

[107] The same applies the other way around. As stated by Lord Scarman and quoted by the Supreme Court of Appeal, prior restraint is a drastic interference with free speech, but it is not in itself always inimical to the recognition of free expression. It may "occasionally [be] necessary in serious cases . . . where there is a substantial risk of grave injustice."[115] Whether it is necessary, or otherwise acceptable, depends on the context. The fact that the Act links the prior restraint to vague and overbroad criteria shows that it is constitutionally unwarranted in this case. But it also serves to illustrate the dangers of

[114] See above n 94-8 and [94] and [95] above.

[115] See [44] above.

prior restraint to freedom of expression generally, in any situation where it is not implemented only to prevent grave injustice and within tightly formulated parameters.

[108] Can the vagueness and overbreadth of the criteria in section 16(2)(a) be remedied, for example, by reading-in a more accurate formulation? The answer is that it cannot; substantial redrafting is required. The High Court's order to replace the words "contains" with "advocates or promotes" clearly does not do the trick, because it would completely change the meaning and apparent objectives of the provision. This, again, impacts on the constitutionally suspect nature of prior restraint. It is up to the legislature to rethink the classification scheme.

[109] Would censorship based on vague and overly broad criteria be any more constitutionally acceptable if it does not appear in the context of *prior* restraint, or specifically *administrative* prior restraint? I do not think so.

[110] The main judgment relies on the advantages of judicial prior restraint as a less restrictive alternative for administrative prior restraint.[116] I fully understand and agree with an argument that the ordinary legal position regarding interdicts, as practised in our courts on a daily basis, would often suffice for the prevention of harm and would thus render an administrative censorship system providing for prior restraint unnecessary. Courts have over time developed requirements and guidelines for interim and final

[116] See [66]-[70] above.

interdicts sought on the basis of urgency or otherwise. But does this mean that judicial, instead of administrative, prior restraint would be an acceptable less restrictive measure than the scheme in the Act, even if the applicable criteria are as vague and broad as those in section 16(2)(a)? I am unable to accept that it would.

[111] Lord Scarman's above-quoted observation stresses the drastic interference that prior restraint constitutes for free speech. He made the statement in the context of court interdicts, not administrative restraint.[117] The main problem with prior restraint is that it is "prior". It can amount to the banning of a publication before it is seen, heard, or judged by its audience; it is killed before it is born. Even though courts can be presumed to be as fair as humanly possible, prior restraint remains to be limited to serious cases where there is a substantial risk of grave injustice. This we see, for example, when interdicts are sought to keep newspapers off the street, even before publication.

[112] In my view, a judicial officer would not necessarily be significantly better qualified than an administrative body to interpret criteria as vague as those before us in this case. Why would a Judge be more able to determine whether a publication "contains sexual conduct" that "degrades a person", or "disrespects" dignity, than an administrative body? If we find that the criteria in section 16(2)(a) are indeed clear, or capable of being given a constitutionally compliant meaning, then they are not vague, and the problem in this case will indeed be the prior restraint alone. But we do not. And the provision

[117] [44] above.

would not be constitutionally acceptable if the administrative prior restraint model is replaced by the legislature with judicial prior restraint, but the criteria remain as vague and wide open as they are.

[113] Therefore, in conclusion, section 16(2)(a) of the Act is constitutionally invalid, because it provides for prior restraint of publications based on vague and overly broad criteria.

[114] I generally agree with the main judgment's findings on section 24(A)(2) and the distinction between magazines and *bona fide* newspapers. I also agree with the remedy and the order. Paragraph 3 of the order indeed specifically targets the vague criteria in section 16(2)(a), which I find to be constitutionally invalid.

For the First and Second Applicants:	Advocate G Marcus SC and Advocate S Budlender instructed by Cliffe Dekker Hofmeyr Inc.
For the First and Second Respondents:	Advocate IAM Semenya SC and Advocate N Manaka instructed by the State Attorney.
For the First Amicus Curiae:	Advocate DJ Cooke instructed by A Batchelor & Associates.
For the Second Amicus Curiae:	Advocate S Stein and Advocate K Serafino-Dooley instructed by Webber Wentzel.