IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 3589/2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

27.6.2018 ....

In the matter between:

INDIGENOUS FILM DISTRIBUTION (PTY) LTD	1st Applicant
URUCU MEDIA (PTY) LTD	2nd Applicant
And	
FILM AND PUBLICATION APPEAL TRIBUNAL	1st Respondent
CHAIRPERSON OF THE FILM AND PUBLICATION APPEAL TRIBUNAL N.O.	2nd Respondent
FILM AND PUBLICATION BOARD	3rd Respondent
FILM AND PUBLICATION COUNCIL	4th Respondent
MAN AND BODY FOUNDATION	5th Respondent
CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA	6th Respondent
SOUTH AFRICAN HEALERS ASSOCIATION	7th Respondent
IBUTHOLESIZWE CULTURAL DEVELOPMENT	8th Respondent
IZINDUNA ZAMAKHOSI	9th Respondent
UBUHLE BENGCULE	10th Respondent

JUDGMENT

RAULINGA J,

Introduction

[1] At the heart of this urgent application is the issue of diversity, triggered by the publication and viewing of the film *Inxeba* ("the Wound") in cinemas. The Film and Publication Board ("the Board") had previously classified the film as 16LS. On appeal, the Film and Publication Tribunal ("the Tribunal") classified the film as X18 SLNVP. All this was done in terms of the Films and Publications Act, 65 of 1996 ("the Act").

[2] The term diversity may be categorised along the lines of race, religion and sexual orientation, and the list is not exhaustive. In the context of this application, diversity relates to culture and sexual orientation in the form of homosexual and heterosexual relationships.

[3] Part of the preamble to the South African Constitution[1], ("the Constitution"), reads as follows:

'*We, the people of South Africa, Recognise the injustice of our past, Honour those who suffered for Justice and Freedom in our land, Respect those who have worked to build and develop our country, and Believe that South Africa belongs to all who live in it, United in our diversity. . . .*'

This is just but one example that diversity is enshrined in our Constitution.

[4] In Chapter 1 of the Constitution, the Founding Provisions in section 1, among others, include human dignity, the achievement of equality and the advancement of human rights and freedoms. In the Bill of Rights in Chapter 2, equality, human dignity, life and freedom are listed in the Table of Non-

[1] Act 108 of 1996

Derogable Rights. Language and cultural rights are some of the protected rights which fall in this category.

[5] In essence, the matter involves inclusion and modernity pertaining to cultural rights and the right to expression. These issues require this Court to give a purposive interpretation to the relevant provisions of the Act, in order to find a balance between these diverse issues.

[6] The Indigenous Film Distribution (Pty) Ltd and Urucu Media (Pty) Ltd ("the applicants) instituted application proceedings, seeking to review and set aside the decision of the first respondent ("the Tribunal") taken on 13 February 2018 overruling the classification decision of the third respondent ("the Board") and classified the film, *Inxeba: The Wound* as X18SNLVP. The Board had previously classified it as 16LS.

[7] The Right2Know Campaign and the South African Screen Federation ("the *amici* respondents") apply in terms of Rule 16A of the Uniform Rules to be *amici curiae* in the application to review the decision of the Tribunal taken on 13 February 2018.

[8] The Tribunal and its chairperson (the second respondent), as well as the fifth and sixth respondents ("Man and Body Foundation and Congress of Traditional Leaders of South Africa") ("the appellants"), oppose both applications. The Board however does not oppose the application and seems to support the contention of the applicants.

Interim Order

[9] On 6 March 2018 Tuchten J made the following order which keeps the viewing of the film alive:

9.1 That in terms of Rule 6(12) of the Rules of this Court, the applicants' application be treated as an urgent application and the applicants' non-compliance with the forms and service provided in the Uniform Rules of Court be condoned.

9.2 Pending the final determination of the review relief sought in prayer 2 of the Notice of Motion, the film Inxeba: The Wound may be exhibited and distributed as though it has been classified 18SLNVP.

9.3 That the relief sought in prayer 2 of the Notice of Motion be postponed and dealt with as follows:

9.3.1 the first and second respondents and fifth and sixth respondents shall serve and file their answering affidavits by 12h00 on Tuesday 13 March 2018;

9.3.2 the applicants shall serve and file their replying affidavits by 12h00 on Monday 19 March 2018;

9.3.3 the parties shall exchange and file heads of argument by 12h00 on Thursday 22 March 2018; and

9.3.4 The review relief shall be heard as an urgent special allocation on Wednesday 28 March 2018.

9.4 Nothing in this order shall be understood to indicate that any party agrees that an 18 rating is lawful or appropriate save as an interim measure and all parties expressly reserve the right to contend in the

review proceedings for a more or less restrictive rating, as the case may be.

9.5 The costs incurred shall be costs in the cause in the review relief.

Misjoinder Application

[10] I start with the misjoinder application. When the hearing commenced, the Tribunal raised an objection in terms of a Rule 30 notice which was filed out of time. The notice pertained to the misjoinder of the Board, which the Tribunal argued that it should be considered as being part of the Tribunal and not a separate party. The filing of the notice was rejected and dismissed by the Court on the basis that it was filed way out of time and further that the contention on the misjoinder is misplaced.

***Amici* Application**

[11] The *amici* applicants seek to be admitted so that they can advance the following submissions in their founding affidavit in support of their application to be admitted.

11.1 The X18 rating is inconsistent with the Constitution, particularly with the requirements to apply international law as it pertains to the rights of free expression and cultural enjoyment;

11.2 The X18 rating and the manner in which it was conferred threatens the commercial viability of the South African Independent Film Industry;

11.3 The Tribunal's decision is inconsistent with the previous rulings in comparable cases and that fact endangers uncertainty and unpredictability in the film industry (prior Tribunal decisions).

[12] They wish to raise the above out of their concern that if the decision of the Tribunal is allowed to stand, it will have 'serious negative consequences for the South African Film Industry. It will reduce the amount of money people are willing to invest to make and distribute films, particularly if those films are in any way controversial'.

[13] The appellants opposed the amici's admission application on the basis that the submissions they intend to make will not add any value to the debate currently before this Court. Their intended submissions do not raise relevant matters of law or facts to which the attention of this Court has not been drawn to by the parties in the main review application. In their answering affidavit in the review application, the appellants make the point that the purpose of the Act (in limiting the freedom of expression) is that sometimes the commercial rights of investors have to yield to the bearers of human rights. This was done in response to an argument raised by the applicants in their founding affidavit regarding the very issue of commercial viability repeated by the amici applicants.

[14] The Tribunal and the Chairperson make common cause with the appellants in opposing the admission of the amici applicants in the proceedings, whereas, the applicants and the Board do not oppose the amici application.

[15] There is no need to detain myself too long in this issue. The principles and criteria on the admission of the amici curiae in proceedings are set out in Rule 16A of the Uniform Rules of Court. In, *In re: Certain Amicus Curiae Application:*

Minister of Health and others v Treatment Action Campaign and others[2], the Constitutional Court noted that:

"The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not be otherwise drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made out, must raise new contentions, and generally these contentions must be made on the data already before the Court. Ordinarily it is inappropriate for an amicus to try and introduce new contentions based on fresh evidence."

[16] In my view, the majority of the submissions intended to be made by the amici applicants are submissions that the parties in the review application have already advanced and are therefore already before this Court. The intended submissions on the prior rulings of the Tribunal were, for example, advanced by the applicants and the Board in their submissions. Further, there is no system of *stare decisis* in relation to administrative decisions, and none of the previous cases relied upon dealt with the need to balance free expression and cultural rights. The application of the amici must be dismissed on this ground.

[17] Section 39 of the Constitution enjoins the judiciary whilst interpreting the Bill of Rights:

'1(a) to promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

---

[2] 2002 (5) SA 719 (CC)

(b) Must consider international law; and

(c) May consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[18] On the proper application of section 39 of the Constitution, it simply means that the Court may mero muto consider all international instruments referred to by the amici applicants without resorting to their assistance.

[19] To the extent that the amici applicants might have raised new contentions, such contentions are not made on the data already before the Court. In the premises, the amici applicants' application to be admitted in the proceedings is dismissed on the basis that no exceptional circumstances exist for their admission.

Factual Matrix

[20] At the outset, I must mention that a day before the hearing of the application, the Court together with all the parties involved, viewed the film in order to familiarise themselves with the content thereof.

[21] On 6 July 2017, the Board classified the film *Inxeba* as 16LS. On or about January/ February 2018, the appellants approached the Board complaining

about the film. On 1 February 2018 the Board assisted the appellants to launch an appeal to the Tribunal.

[22] On 8 February 2018 the first applicant was informed of the appeal that was to be heard by the Tribunal. This notice was sent by an employee of the Board because they also act as the administrative personnel of the Tribunal.

[23] On 12 February 2018 the Tribunal responded to the notice. On the same day the first applicant was informed that its request had been sent to the Tribunal. The first applicant was also sent documents meant to assist it in dealing with the appeal.

[24] On 13 February 2018 the first applicant was informed that the appeal would go ahead as planned. On the same day the first applicant appeared before the Tribunal seeking a postponement, which was refused on the basis that it is an "indulgence" and that the matter would stand down for 2 ½ hours. Subsequently, the appeal was heard and on 23 February 2018 the Tribunal handed down its reasons for granting of the appeal, setting aside the decision of the Board and classifying the film as X18.

[25] It is instructive to note that the Tribunal afforded the Board and appellants opportunities to submit written heads of argument in advance of the hearing, but the applicants were not. The Tribunal also granted the appellants condonation for their late filing of appeals without providing the applicants with the application for condonation. The applicants' only option was to make oral representation without assistance from counsel. The applicants were expected overnight to consult and instruct counsel and prepare written representation.

Submissions by the Parties

[26] The applicants predicate their review application to set aside the decision of the Tribunal on both procedural grounds and merits. Insofar as procedural grounds are concerned, the applicants aver that the Tribunal had no power to consider the appeal and that the appellants to it had no locus standi (jurisdiction) to bring an appeal before it. Secondly, that the Tribunal followed an unfair and unlawful procedure. Insofar as the merits are concerned, the applicants submit that the classification does not fall within the provisions of the Act, in particular that the decision breached section 18 (3) (c) of the Act.

[27] The applicants further submit that the appellants were out of time, as they were almost six months late in bringing their appeal before the Tribunal.

[28] The Tribunal submits on its application of purposive interpretation, that it has the powers and the appellants had locus standi to bring the appeal to it. Further, it supports the decision it has taken.

[29] The Board has filed an affidavit supporting its decision but does not support the procedural unfairness attack on the decision by the applicants.

[30] The appellants argue that there is a distinction between appeal and review, and the two must not be conflated. They also aver that the appellants have the locus standi to approach or lodge an appeal to the Tribunal, which according to them has jurisdiction to hear the appeal. Further, that there is no breach of the *audi alteram partem* rule or procedural fairness as enshrined in PAJA. On the merits, they argue that no provision of the Act was breached in particular

section 18 (3) (c). In other words, that there is no error of law or alleged misinterpretation and misapplication of the provisions of the Act by the Tribunal.

Distinction between Review and Appeal Proceedings

[31] At the outset, one must remind oneself that the present proceedings are review proceedings and not appeal. As a result a decision of the Tribunal can only be set aside if it falls foul of the provisions of PAJA, which is a test for procedural breach in terms of section 6 (2) of PAJA[3].

[32] The most important and relevant issue is that unlike an appeal, an application for judicial review is not concerned about the correctness or otherwise of the decision but with the manner in which the decision was taken. Hoexter *Administrative Law in South Africa* 5 ed p288 explains the issue as follows:

"Any legal system that tries to uphold a distinction between appeal and review is bound to experience some controversy regarding review for an error of law (and, as we shall see, mistake of fact).

The rationale for the distinction is that it is not the Court's function to say whether an administrator's decision is right or wrong, but merely whether it was arrived at in an acceptable manner. This makes it difficult to explain why a court should be able to review the substantive correctness of an administrator's interpretation of legal (or indeed factual) questions."

[3] *Hamata and Another v Chairperson Peninsula Technikon* 2004 (4) SA 621 at 640 para 63

Balancing the Right to Freedom of Expression and Cultural Rights

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

[34] The doctrine of separation of powers dictates that the court must proceed with great caution and circumspection before interfering with the decisions of specialist tribunals which have been legislatively empowered to deal with matters which fall outside of the expertise of the courts. The courts cannot usurp the functions of such bodies. Theirs is merely to ensure that in reaching its conclusions, the rules were not broken. However, in exceptional circumstances the court may usurp the functions, such as when the administrator's exercise of power in pursuance of empowering provision is so unreasonable that no reasonable person would have so exercised the power or performed the function.[4]

[35] As already stated above in this judgment, this application concerns the balancing of two parallel equations, which are by all means not always equal – the right to cultural right and the right to freedom of expression – the need to balance the right to freedom of expression and cultural rights.

[36] As the factual matrix reveals, the film is set in rural Eastern Cape and more particularly in the Queenstown area, now known as Komani. The action is almost exclusively based on a Xhosa initiation school and the goings on

[4] Section 6 (2) (b) of PAJA

amongst the attendees of the school namely the initiates (*abakhwetha*) and their nurses or caregivers (*amakhakatha*). Inter alia, the film involves *amakhakatha*.

[37] The ritual of initiation or circumcision (*ulwaluko*) is central to the Xhosa people, to their very existence and identity. The practice of *ulwaluko* is a rite of passage to manhood and fatherhood. Measures such as the promulgation of the Traditional Circumcision Act[5] which prescribed the minimum age of 18 years for initiates were intended, *inter alia*, to preserve *ulwaluko* and to save lives.

[38] Initiation or circumcision is strongly believed to be sacred not only by the amaXhosa, but by the majority of African people in South Africa and elsewhere in other African countries. Sexual intercourse is a taboo subject in the context of *ulwaluko* which should not even be spoken about, let alone practiced. It contradicts the idea of ritual purity which is a cornerstone of circumcision. Any person associated with the initiates is strictly prohibited from engaging in sexual conduct, more especially the caregivers who have to handle the initiates and treat them to heal. I dare say that if any of the caregivers could be suspected or caught in a sexual act, they would be banished from the circumcision school and their families would be punished with a heavy fine in the form of cattle.

[39] There are also medical reasons for the above in that sexual stimulation or arousal can have devastating and even deadly consequences for the initiates. Breaking the rules is therefore likely to cause both physical and cultural harm. The prohibition on women at the initiation school or its vicinity is associated with the above cultural and medical rationale. Secrecy is sacrosanct and deeply

[5] Act 6 of 2001

entrenched. It is presently widely believed that any pre-exposure to children under 18 years would contribute to the gradual extinction of the practice.

[40] Publications are dealt with by section 16 of the Act. I agree with the applicants that there is no automatic requirement that a publication must be classified before being distributed. Instead, while certain types of publications are required to be classified before being distributed (s16 of the Act), other publications will only be classified when 'any person requests that this be done' (s16 (1) of the Act).

[41] Films are dealt with by section 18 of the Act. All films must be classified before being distributed. The duty to submit the film for classification rests on the person who distributes, broadcasts or exhibits the film – that is a request which may be granted or refused by the Board via its Classification Committee.

[42] Section 16 of the Constitution deals with the right to freedom of expression. It provides:

"(1) Everyone has the right to freedom of expression, which includes –

(a) Freedom of the press and other media;

(b) Freedom to receive or impart information or ideas;

(c) Freedom of artistic creativity; and

(d) Academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) Propaganda for war;

(b) Incitement of imminent violence;

(c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"

[43] It is indeed true that from its earliest judgment, the Constitutional Court has placed great emphasis on the fundamental importance of freedom of expression, particularly having regard to the apartheid past that preceded our democracy. As the Court explained in *S v Mamabolo (ETV intervening)*[6]:

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

[44] The applicants also contend that the mere fact that some people may be shocked, offended or disturbed by the film is irrelevant to whether the film receives constitutional protection. In support of their argument, they rely on the decision in *Islamic Unity Convention v Independent Broadcasting Authority and others*[7], in which Langa DCJ (as he then was) followed the approach of the European Court of Human Right to hold that freedom of expression must be

---

[6] 2004 (3) SA 409 (CC)
[7] 2002 (4) SA 294 (CC) at 27-28

generally interpreted in our democracy and that the right protects expression that is offensive, shocking or disturbing.[8]

[45] However, in *Phillips v Director of Public Prosecutions (Witwatersrand)* [9] the very same Constitutional Court held that the right to freedom of expression is not and should not be regarded as absolute and it may be limited by law of general application that complies with section 36 of the Constitution. The Court further held that the Constitution expressly allows the limitation of expression that is "repulsive, degrading, offensive or unacceptable" to the extent that the limitation is justifiable in an "open and democratic society based on human dignity, equality and freedom".

[46] In *S v Mamabolo (ETV, Business Day and Freedom of Expression Institute intervening)*[10] (supra) the Constitutional Court said:

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

---

[8] See also *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) para 49
[9] 2003 (4) BCLR 357 para 17
[10] 2001 (3) SA 409 (CC)

be stated is that freedom of expression does not enjoy superior status in our law."

[47] In *Dawood and another v Minister of Home Affairs and others*[11], the Constitutional Court reaffirmed the importance of the right to dignity and stated the following:

"The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution; it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

[11] 2000 (3) SA 936 (CC) para 35

[48] In its 2004 Report titled 'Cultural Liberty in today's diverse World' the United Nations Development Programme described cultural liberty in the following terms:

'Cultural liberty is an important part of human development because being able to choose one's identity – who one is – without losing the respect of others or being excluded from other choices is important in leading a full life. People want the freedom to practise their religion openly, to speak their language, to celebrate their ethnic or religious heritage without fear or ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings. It is a simple idea, but profoundly unsettling.'

[49] In casu, human dignity therefore informs constitutional adjudication and interpretation of cultural right and the right to freedom of expression. In this instance, in particular the right of choice to engage in homosexual activity. Homosexuality is as a given a protected right. The issue is about the engagement in sexual activity at an initiation school by two initiation nurses (*amakhakatha*). Whether it is homosexual or heterosexual relationship that is irrelevant. The two competing rights here are cultural right and right to freedom of expression.

[50] Whether the sexual conduct depicted in the film is "explicit" or "implicit", must of necessity be judged contextually and in relation to the fact that the arena for the conduct in question is a sacred space in which even to talk about sexual conduct is taboo and culturally forbidden. In the film, the caregiver is depicted as moving directly from performing the forbidden act to handling and

treating the initiate, who screams with pain. Two cultural taboos are committed in one fell swoop. The revelation of the secrets surrounding treatment and pain, which are traditionally kept away from children under 18 (as explained by Nkosi Holomisa and corroborated by Dr Bungane) and also breaching the prohibition on sexual conduct.

[51] The emphasis here is on the depiction of sexual conduct at the initiation school, which is in conflict with the secrecy observed at such occasions. Here secrecy is in its positive narrative – it is about being discreet in the observance of certain cultural values. The absence of secrecy is an attack on the custom of *ulwaluko*.

[52] There is no doubt that in the context of this case, right to freedom of expression has an effect on the rights of the Xhosa traditional group. The balancing exercise is to be found in the constitutional judgment of *Mamabolo* (supra) – the right to freedom of expression cannot be said automatically to trump the right to human dignity; therefore freedom of expression does not enjoy superior status in our law. It does not prevail over cultural rights.

[53] The appellants are correct in submitting that the present application must be judged against the uncontested rules, principles and underlying values and norms associated with the custom of *ulwaluko* from a traditional and medical point of view, respectfully and collectively. The undisputed evidence they allude to in respect of dignity, cultural preservation and even life and death, must be factored into the evaluation of the matter within applicable legislation. It can therefore be assumed that human dignity is universally ranked above all other rights, with exception to the right to life.

Were the Empowering Provisions Complied With?

[54] The applicants contend that the decision of the Tribunal is substantively invalid in that section 18(3) (c) does not empower it to classify the film as X18. It is also common cause that the Tribunal first had relied on section 18(3) (b) (ii) and have since changed tact and now submit that their reliance on section 18(3) (b) (ii) was an error, and they now rely on section 18(3) (c) for their decisions. The Tribunal and the appellants argue to the contrary, averring that "the Tribunal has found that the film should be classified as X18 in terms of section 18(3) (c)." But was the decision of the Tribunal materially influenced by an error of law or it contravenes the law and is not authorised by the empowering provision?

[55] Section 18(3) (c) provides that the Board or Appeal Tribunal shall:

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

[56] One must analyse section 18(3) (c), mindful of the fact that an X18 classification has extraordinary effects on the film concerned. It means that no person other than the holder of a licence for adult premises may ever broadcast, distribute, exhibit in public, sell or even advertise the film

concerned. A breach of this provision is a criminal offence, subject to imprisonment for up to five years.[12]

[57] Section 18(3) (c) makes clear that there are two jurisdictional facts that must be present before a film can be classified X18:

57.1 First the film must contain "explicit sexual conduct"; and

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

[58] Section 18(3) (c) does not permit the Tribunal to classify a film as X18 on the basis of factors other than these two jurisdictional facts, unless if judged in context it is found that it contains explicit sexual conduct.

[59] Sexual conduct is defined in the Act as including –

(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; . . . ."*

---

[12] Section 24A (B) of the Act

[60] Explicit sexual conduct is defined as:

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

[61] As already intimated above, the next enquiry is whether the film ".... Judged within the context ... is ... a bona fide documentary, or is of scientific, dramatic or artistic merit ..." If it is then it "... shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials. ..."

[62] The approach adopted in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[13] is helpful in interpreting the provisions of the Act. The Court held that:

'.... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results or undermines the

[13] 2012 (4) SA 593 (SCA) at para 18

apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. . . .

The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[63] There is no doubt that there is no ambiguity in the language used to distinguish "sexual conduct" from "implicit sexual conduct". However, adhering to the meaning suggested by the plain language may lead to glaring absurdity. This is so because cultural rights are subsumed under human dignity. Further, because section 18(3) (c) enjoins the Board, the Tribunal and similarly the Court to in the next enquiry, also judge the "explicit sexual conduct" within context. In selecting the proper meaning to the provision, it is necessary to consider the purpose of the provision and the context in which it occurs, in order to avoid impractical, unbusiness-like or oppressive consequences that will stultify the broader operation of the legislation. Put differently, the inevitable point of departure is the language of the provision itself, read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[64] In the present matter, the object of the Act as set out in section 2 thereof is to regulate the creation, production, possession and distribution of films, games in certain publications. The Act also aims at providing consumer and gaming

choices for themselves and for the children in their care. The Act also seeks to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

[65] It seems to me that when the Act was promulgated, the legislature had no cultural practices and rights in mind. The background to the preparation and production of the document excluded cultural rights from the context and purpose of the legislation.

[66] One is therefore faced with two or more possible meanings that are to a greater or lesser degree available on the language used. If cultural beliefs and practices are to be considered, the film is harmful and disturbing and exposes 16 year olds to the sexual conduct depicted in the film. The film included language which was degrading to Xhosa women and further exposes women to societal violence such as rape. It contains harmful scenes which could cause tensions within the Xhosa community and even within the broader African community. By implication it has an effect on the rights of the Xhosa traditional group. Therefore, in deciding to curtail the applicants' freedom of expression and artistic creativity the Tribunal took into account the competing rights of the affected communities more particularly their rights to human dignity, equality and cultural rights. Human dignity and life are ranked above all other rights, which the Constitutional Court stated that these two rights are "most important of all human rights."[14]

[14] *S v Makwanyane* 1995 (3) SA 391 (CC) para 144

[67] Section 39(3) of the Constitution states that:

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

See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[15]

[68] In so far as the ground laid down in section 6(2) (h), namely that the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function, the Constitutional Court in *Bato Star Fishing* (supra) said the following:

"*Section 6(2) (h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.*"

[69] Further, in so far as the ground relating to a material error of law is concerned, our Courts have held that, a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2) (d) of PAJA permits administrative action to be reviewed and set aside only where it is materially influenced by an error of law. An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law.[16]

---

[15] 2004 (4) SA 490 (CC)

[16] *Genesis Medical Aid Scheme v Registrar, Medical Schemes and another* 2017 (6) SA 1 (CC) para 101

[70] In the circumstances, a contextual and purposive laden interpretation is necessary to include certain of the sexual conduct in the category of explicit sexual conduct. Although one may find that the decision of the Tribunal is well-founded, it is not for this Court to make a pronouncement on the lawfulness thereof.

Were the Provisions of PAJA Complied With?

[71] The applicants also record a complaint that the decision of the Tribunal was unfair, because they were not afforded a proper opportunity to participate in the proceedings before the Tribunal – they were not provided with reasonable opportunity to make submissions for consideration. Put differently, the mandatory material procedure or condition prescribed by section 6(2) (b) of PAJA was not complied to.

[72] The factual nature of the proceedings in this regard is instructive. It is not disputed by the Tribunal that the times for preparation and hearing for the matter were truncated.

[73] A revisit of how the proceedings before the Tribunal were handled may be helpful. The first applicant was only formally notified of the details of the hearing on 8 February 2018. This only gave it two working days to prepare for the hearing. The notice that the Tribunal now relies on, did not give sufficient details of the appeal e.g. who lodged the appeal; what the grounds of appeal were. The second applicant was never formally notified of the hearing or its right to appear.

[74] The applicants were not provided with any papers in the appeal until the afternoon before the hearing was due to take place, which did not allow them adequate time to prepare or consult properly with and brief legal representatives. This was despite the fact that the appeal had been filed over ten days earlier, on 1 February 2018.

[75] The Board and the appellants were afforded opportunities to submit written heads of argument in advance of the hearing – the applicants were not. The Tribunal granted the appellants condonation for their late appeals without giving the applicants any right to make submissions on this and without even providing the applicants with the applications for condonation.

[76] When the applicants requested a postponement, the Tribunal refused this and as an "indulgence" indicated only that the matter would stand down for 2 ½ hours. This did not allow for adequate preparation. The record reveals that the application by appellants for condonation was granted simply because there was no opposition to it. The Chairperson said:

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

While the appellants were afforded a week to find legal representation and bring an application for condonation, the applicants were expected overnight to consult and instruct counsel and prepare written representation.

[77] Procedural fairness demands at least equal treatment of the parties involved – *Transnet Ltd v Goodman Brothers (Pty) Ltd.*[17]

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

'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy'[18]

[79] In the present case, the applicants were given no proper opportunity to participate in the decision and no proper opportunity to influence the outcome of the decision. It must be remembered that during the hearing, the Chairperson of the Tribunal said: '*we were not aware that you will be noticed and invited. In fact upon enquiry I am further advised that the invite and/ or email was not supposed to be an invite'*

In my view, the approach of the Chairperson signalled exactly the opposite of respect for the dignity and worth of the applicants. This was in flagrant disregard of the provisions of sections 6(2) (b), 6(2) (c) (v) and 6(2) (e) (vi) of PAJA.

---

[17] 2001 (1) SA 853 (SCA)
[18] *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC)

[80] The Tribunal therefore did not comply with a mandatory material procedure or condition prescribed by an empowering provision, and as such did not observe the *audi alteram partem* rule.

Jurisdiction and *Locus Standi*

[81] With regard to the jurisdiction or locus standi, the argument of the applicants seems to hold some water. Section 19 affords certain rights to a certain category of persons and contains a closed list of the persons who can appeal to the Tribunal.

[82] The applicants contend that the Tribunal had no jurisdiction to make the decision because none of the purported appellants before it had any standing to appeal. Second, the Tribunal followed an unfair and unlawful procedure. Third, the decision breached section 18 (3) (c) of the Act, in other words, neither of the statutory requirements for an X18 rating to be imposed were satisfied.

[83] Section 19 of the Act reads as follows:

'*The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for classification in terms of section 16, or the reclassification of a film, game or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interest could be detrimentally affected by a decision of the Board on such application, or with regard to an exemption or permit, the withdrawal of which is being considered,*

or who appeals to the Appeal Tribunal against a decision with regard to such application, shall have the right to appear before the Appeal Tribunal. . . .'

[84] Section 20 (1) of the Act provides:

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

[85] In deciding this issue to try and give a purposive and sensible interpretation within the context of sections 19 and 20 of the Act, I am guided by the decision of the SCA in *Natal Joint Municipal Pension Fund* (supra).

[86] It is indeed true, as the Tribunal submits that the object of the Act as set out in section 2 thereof is to regulate the creation, production, possession and distribution of films, games in certain publications. The Act also seeks to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

[87] However, the 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. Having said that, my understanding of section 19 of the Act is that it does not deal with the question of standing to appeal. Section 19 provides only that 'any person who .

. . appeals to the Appeal Tribunal against a decision with regard to such an application, shall have the right' to appear in person before the Tribunal and be heard by it. Section 19 therefore deals with the procedure to be followed when someone appeals. Standing to appeal is dealt with by section 20(1) and only a person with the requisite standing under section 20(1) can exercise the procedural rights under section 19.

[88] Turning to section 20(1) of the Act, it does not say that 'any person' may appeal nor even 'any . . . interested person'. Instead, as the applicants correctly submit, the section specifically itemises the persons who may appeal regarding film classification decisions, and does so cognisant of the way in which the Act deals with publications and films. Thus, because the Act allows a member of the public to complain about publications to trigger the classification process, a person who complained about a publication is entitled to appeal. By contrast, because all films have to be classified without needing any complain, there is no equivalent provision for appeals about films.

[89] A closer scrutiny of the reading of section 20(1) after the word "and" preceded by a punctuation mark, the following phrase follows: "any person who applied for the classification of a film or game, or the publisher or distributor of a publication which formed the subject of any complaint or application in terms of section 16, may within a period of 30 days from the date on which he or she was notified of the decision, in the prescribed manner appeal to the Appeal Tribunal." In as far as films are concerned; the section only refers to any person who applied for the classification of a film, and in this instance the first applicant. It does not refer to any person outside that category.

[90] I have scrutinised both sections 34 and 38 of the Constitution, on access to court and enforcement of rights. These two sections do not seem to come to the assistance of the Tribunal and the appellants.

[91] The appellants therefore had no standing to appeal to the Appeal Tribunal and the Tribunal consequently had no jurisdiction to determine the purported appeal. If they were dissatisfied with the decision of the Board, their remedy was to bring a judicial review of the Board's decision.

Conclusion

[92] In view of the fact that the Tribunal lacks jurisdiction in the hearing of the appeal, which also plagues the locus standi of the appellants, the decision must be reviewed and set aside.

[93] It is trite that the costs follow the result. In the event that each of the parties in the main application has partially succeeded, an appropriate order is that each party must pay its own costs.

[94] In the event, the following order is made:

94.1 The *amici* application is dismissed.

94.2 The review application is granted.

94.3 The decision of the Tribunal is reviewed and set aside.

94.4 Each party is to pay its own costs.

TJ RAULINGA
JUDGE OF THE GAUTENG HIGH COURT DIVISION

APPEARANCES

For Applicants:	Adv. S Budlender; Adv. M Lekoane
Instructed by:	Webber Wentzel
For 1st and 2nd Respondents:	Adv VS Notshe SC; Adv D Dube
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys
For 3rd Respondent:	Mr M Bill
Instructed by:	Motsoeneng Bill Inc
For 5th and 6th Respondents:	Adv DC Mpofu SC; Adv GD Ngcangisa SC; Adv M Moropa
Instructed by:	Dudula Incorporated