

APPEAL TRIBUNAL FOR THE FILM AND PUBLICATION BOARD

(HELD AT MELROSE ARCH, JOHANNESBURG)

Case No: 1/2018

In the matter between:

CONTRALESA GAUTENG **APPELLANT**

SOAHA **APPELLANT**

MAN AND BOY FOUNDATION **APPELLANT**

IBUTHOLESIZWE CULTURAL DEVELOPMENT **APPELLANT**

INDUNA ZAMAKHOSI **APPELLANT**

UBUHLE BENGUCLE **APPELLANT**

And

The Film and Publication Board (FPB) **RESPONDENT**

AWARD: INXEBA (THE WOUND)

Christopher Mamathuntsha: Chairperson

BACKGROUND AND INTRODUCTION

In or around July 2016, the classification committee of the “FPB” which comprised of three members, decided unanimously to give the film Inxeba (The wound) an age classification of 16 LS. The committee based its decision on the nature and complex themes on cultural practices, manhood, homosexuality, initiation, jealousy, love and murder, with no real pro-social or resolution with story impact, fairly frequent language and moderate to occasional story impact, fairly frequent sexual related activity.

The appellant, Contralesa Gauteng and Man and Boy foundation then lodged an appeal on the 1st February 2018 as they contended that the classification assigned of 16LS to the movie should be re classified and that only persons of the age of 18 or over be entitled to watch the movie. In fact the appellants requested to the tribunal, as also reflected in their heads of argument that the movie be reclassified as being blasphemous. The hearing of the appeal of this matter was held on the 13th February 2018. Mr Nkululeko Nxesi and Mr Prince Manene Tabane appeared in person before the appeals tribunal on behalf of the appellants, whereas Ms Nokukhanya Bhengu, appeared for the Respondent. As the tribunal, we thank the parties for both the oral and written submissions made the in this matter.

We also note the work of the classification committee, which had to confront the difficult issues and as a result adopted a more cautious and considered approach applying all the elements they considered relevant.

The film has since its release caused media and community uproar due to certain aspects that it seeks to explore. This uproar cannot be ignored as we consider what an appropriate classification is, or whether the film was correctly classified and if not what the appropriate classification should be.

On the 6th February 2018, the appeals Tribunal, together with both the appellants and the Respondent attended a viewing of the film in preparation of the arguments to be presented at the hearing. The said hearing, scheduled for the same day, could not proceed as the appellants did not file a condonation application as well as a request for legal representation made by the appellants.

The hearing resumed on the 13th February 2018, and after considering oral and written arguments from both parties, the Tribunal arrived at the following ruling:

- 1) The movie Inxeba (The wound) is reclassified and given a classification of 18X (SLNV) in terms of Sec 36 (4) (1) of the classification guidelines.
- 2) The movie be removed from public circulation with immediate effect.

We communicated to the parties that the ruling was applicable immediately, having considered the public interest factor in the film.

We hereunder table our reasons for our ruling:

A brief description of the film Inxeba (the wound)

1. The Film is based on story of a young man who is gay by the name of Xolani Radebe. He is employed at a factory in Johannesburg and he will leave for the mountains during the period of the initiation school, where he will both take leave at work and return upon its completion.
 - 1.1. These initiation schools will be in the Eastern Cape and there he would assume a role of an "INKAKHATHA" a caregiver at the initiation school. It is important to note that this was a Xhosa initiation school. A secret which was not known to his family and members of the community is that Xolani is gay and also has a relationship with fellow caregiver, by the name of VIJA.
 - 1.2. Xolani and VIJA are the leading characters in the film. Xolani is approached by the father of one of there would be initiates to take care of his son, Kwanda during the two week process. Kwanda`s father is concerned that Kwanda is soft and perhaps the initiation process will make him a strong man. Kwanda turns to be a defiant initiate and keeps on asking Xolani why things are the way they were at initiation schools.

2. THE APPELLANT`S SUBMISSION.

- 2.1. The appellant submitted that the film is a misrepresentation of traditional initiation practice and that it must be edited before screening. They submitted further that there must be a disclaimer by traditional leaders that the movie is not a true reflection of what happens in the initiation schools. They demanded further that there must be an apology

by the National, Video and Film Foundation for having funded a movie of this nature and approved it. They argued that the movie contains vulgar language and is blasphemous, and that thereby a distortion of the Xhosa traditional practices.

- 2.2. They submitted that the movie shows explicit sexual activities and also shows sacred and sensitive practices.
 - 2.3. There are scenes of Violence, substance and alcohol abuse including the use of alcohol at initiation schools.
 - 2.4. They requested that the movie is reclassified to 18 and as Blasphemous.
 - 2.5. They argued that there is explicit nudity and there is visible and not implied sexual experiences.
 - 2.6. There is use of degrading language towards Xhosa women and girls.
 - 2.7. Vulgar language is used throughout the movie. It was also submitted that mostly those words used are often used when people are fighting "loosely".
 - 2.8. The appellants cited instances/scenes where there are encounters of sexual interactions. They indicated that the movie is set on a traditional circumcision area and that such a place prohibits any sexual conducted regardless of whether it is heterosexual or homosexual. Therefore arguing that the movie is a misrepresentation of the Xhosa Culture of initiation practice and an overall insult to the culture and traditions.
- 3.
- 3.1. They submitted further that when a 16 year old is watching and hearing those words used, it is inappropriate and that there are utterances are directed to Xhosa people and other black groups such as the Zulu King (Ilembe) as well as Jesus Christ.
 - 3.2. The appellants submitted further that in the movie there are instances where women are degraded and referred to as objects where manhood can be tested.
 - 3.3. It is also argued that Xhosa initiation is a passage to manhood and trainee initiates are to be better men who are caring and protectors of their families. Yet in the movie the opposite is portrayed as violence against women is encouraged, whilst this is inciting.
 - 3.4. In a country where attacks on women are on the rise, such inciting statements should be zero tolerated.
 - 3.5. They argued further that the Act (The Films and Publications Act) the FPB can only rate the movie differently.
 - 3.6. The appellants further submitted that in terms of the Xhosa Customary law, no men under the age of 18 are allowed to go to Initiation school. This law, Act 5 of 2016 of the Eastern Cape was put in place to regulate initiation practice safety, and minimise deaths that occur due to initiation practice.
 - 3.7. As part of their submission, they argued that the current classification allows 16yrs olds boys to watch what is normally reserved until the right age, thereby exposing them prematurely to adult experience of the passage to manhood.
 - 3.8. They further argue that the initiation practice has its own "coded language" which is spoken only by initiates at particular places (never in public). The movie has revealed

and uses the “code language” and that this is against the traditions and customs of the Xhosa tribe.

3.9. They argued that the increase to age 18 will not amount to any prejudice to anyone and that in fact the opposite will be applicable.

3.10. The appellants cited section 9, 10, 15 and 28 of the constitution of the Republic of South Africa. They argued that the spirit of the constitution is centred on equality and that all are equal before the law, whether you are a child or an adult.

3.11. Therefore, they argued that any opposition to the 18 age restriction will be insensitive to cultural, linguistic practices and that such will be condemning children to those practices.

2.13 In closing they submitted that the Directors of the movie are not from South Africa, the lead actor, VIJA is not from South Africa but from DRC.

2.14 It was the appellants submission that if one is not from a community which they seek to tell a story about, they are bound to misunderstand and misrepresent the practices of such a community and that they may not act in the best interest of that community.

This formed the appellants’ main argument.

THE RESPONDENTS ARGUMENT

RESPONDENTS SUBMISSION

Where FPB is concerned, objects and role of the FPB was tasked to classify the film accordingly. In considering the appeal, the Tribunal has to look at section 2 of the Act. Outlining of expose to harmful and disturbing material classification guideline. South Africa standards and norms, value and practices.

FPB classified it as 16 and violence. Proper analysis done

- Blasphemous
- Explicit sexuality
- Degrading women
- Coded Language

The Respondent submitted that they looked at the classification guidelines for the age 16, and that it provides that the film may contain moderate scenes.

The Respondent did not find the film to have blasphemy, no pronunciation about God. Kwanda explaining to X about Gays, e.g maybe Jesus and his disciples were gay, or maybe Shaka and his men were gay, they asked if this was offending.

Nudity is moderate- you see nakedness, but no genitals

1. At the abandoned house...
2. When the initiates removed their blankets
3. At the waterfall, when they were lying asleep.
4. Did not expose anything that a 16years old would not have seen
5. We have social network and social media aware of it will be wrong to conclude that we are exposing them.
 - According to stages of development 16year olds of today are more matured than imagined
 - Children of 16 know right or wrong
 - Fail to understand to code language
 - Common words – Inkakatha
 - Respondent did not set the language because the representative does not know it.
6. Eastern Cape customary law cannot be considered as it is a provincial law. The children Act states that children of 16 years may consent to go for circumcision.
7. Fifty shades of grey was used as a benchmark and it was rated LNS and that 16year olds have watched it.
8. Argues that the Appellants have not proven what harm will be caused to boys of 16.
9. If the movie was to be reclassified to 18, it will limit the rights of 16years olds competing interests.

Bill of rights and international law

The Respondents argued that the former high commissioner of the United Nations, Navya Pillay when discussing universal rights always trumped tradition and culture, themed around homosexuality.

The Respondent submitted further that:

- Film is about homosexuality and what they go through.
- Whether a 16year old will be able to understand a right from wrong.

ANALYSIS OF ARGUMENTS MADE BY BOTH PARTIES

It was clear from the arguments presented that both parties were far apart from each other in terms of the classification of the 16LS as awarded by the FPB

The appellants were represented by Mr Nxesi whose submission should be summarised as follows:

1. That the movie contains vulgar and blasphemous language and that it is a total distortion of the Xhosa initiation cultural practice.

2. That the movie shows explicit sexual activities and also shows sacred and sensitive traditional initiation practices.
3. That there are scenes of violence, substance and alcohol abuse not suitable for the age category of 16 years as classified by the Respondent.
4. That the sexual scenes involving two gay men are explicit and also harmful to any person under the age of 18 years
5. They lament the fact there are many scenes where there are sexual encounters in the movie.
6. Mr Nxesi, on behalf of the appellant emphasized that the reflection of traditional circumcision is conducted.
7. That this was an insult to culture and that there are insults throughout the movie. This, he corroborated by indicating that it is the strong words that are used to insult and that you don't find the words being used loosely in their language.
8. Mr Nxesi submitted emphatically that the utterances used are not appropriate for a 19 years old.
9. That the movie is degrading towards women in that there are utterances about their private parts and he asked what is the movie teaching to the 16 years olds
10. The appellants argued that "we are confronted with the issue of editing, especially on scenes that contain nudity
11. It was further submitted that the space was not appropriate for lovemaking and that the movie was not a true reflection of the Xhosa culture.

In conclusion, the appellants summarised its argument by submitting that any opposition to the 18 years age classification will be insensitive to cultural and linguistic practices.

In its closing arguments, the appellants urged the tribunal to look at section 3(2) of the guidelines and submitted that the classifiers have to look at this section in performing their duties.

They asked if the target market was the gay community, and who is being suppressed.

They argued that the theme of homosexuality is depicted in the film and that homosexuality is put in the initiation setting.

The Appellants argued further that there was no artistic and dramatic merit of the film, and the educational elements are non-existent. They argued that the film is disturbing and that is intentional because it is trying to bog down the issue of homosexuality. They argued again that a difference between provincial and traditional laws should be drawn, and requested that the classification of the film be moved to 18 (b) and that it must be pulled off until all editing concerns are addressed. They decried the misinterpretation of the Xhosa language on sub-titles and submitted that there were completely misleading.

This in summary summed up the appellants appeal. The tribunal made an order to receive closing arguments in writing from the parties and by the 19th February only the Respondent had furnished written arguments.

The Respondent represented by Ms Nokukhanya Bhengu

The Film and Publication Board (“FPB”) mandate is to classify based on watching the film and applying the guidelines. And that the guidelines are informed by **South African standards and norms**. This process involves extensive research and public consultations therefore, the Guidelines are formulated with due regard of the **South African norms and practices**.

They submit that the “FPB” classified the movie 16LS after proper analysis was done.

The Respondent contended that they looked at the classification guidelines for the age 16 and submit that the film may contain moderate scenes.

They argued that they did not find the film blasphemous.

They submitted that nudity was moderate in that viewers can **only see nakedness but not genitals**. Respondents submitted that 16year olds of today are exposed through social networks and social media and that it will be wrong to conclude that the movie Inxeba will be exposing them to material that will otherwise be meant for adults and that which they have not seen.

The Respondents submitted further that children of 16 years know what is right or wrong, and Piaget study of cognitive development was used as a reference.

The Respondent further submitted that the words used in the movie were common and that she (respondent representative) particularly did not see or recognise the “coded language” because she does not know it.

The Respondent submitted that the children’s Act allows 16year olds to consent to circumcision. It was further submitted that the Eastern Cape law referred to by the Appellants is a Provincial law and that the national legislation (Children’s Act) supersedes it.

They concluded their argument by indicating that the film is about homosexuality and what they go through in their daily experience and that the movie is awareness.

Written closing arguments by both the Appellants and the Respondent were also submitted to the tribunal.

In summary, the Respondent submitted that the mandate of the FPB is to classify based on watching the film and applying the guidelines.

These guidelines, they argue, are informed by South African norms and standards, which themselves are a result of research and extensive public consultations. Furthermore, the Respondent submits that when the FPB talks about the artistic merit of the film, it is about a **bona fide story** being told about the film.

The Respondent submit that the film is **fiction** and not a documentary and as a result, freedom of expression also means freedom of creative license. They submit that they strongly believe that with support and guidance from the guidelines, that this film was rated correctly, and is accordingly suitable for the age of 16 years and above. They closed their arguments by urging the tribunal to remember the mandate of the FPB and to apply the classification guidelines when reaching its decision.

The Respondent prayed that the rating of 16LVS be upheld. In responding to some of the questions posed by appeals tribunal members, the Respondent cited Generations and Rhythm City scenes involving same sex relationships and argued that 16year olds know what is wrong and right. They further conceded that the language used in the film is rude but 16years olds know it is not right. They argued that the nudity does not have adverse effects.

The Respondents further argued that classifiers have an understanding of how to classify and that 16years olds know about alcohol and drugs. They submitted that the sexual acts are implied and not expressed. Lastly that the movie has educational value.

They referred the tribunal to page 13 of the guidelines. In reply, the appellants submitted that nudity is nudity, that there is vulgar and blasphemy in the film. The appellants cited a scene in the movie where Kwanda arrives at the initiation and insults fellow initiates. The traditional nurses "The Nkakatha" are insulting throughout both women and initiates. The appellants argue that there aren't many scenes about circumcision.

The appellants argued further that the movie has generated interest amongst the public. They ask, which right must supersede the other, and submit that there are other rights too. They submitted that the movie has evoked a lot of emotions in society and cited the violence that took place in Port Elizabeth where the actors had to be taken to a place of safety, this because members of the public had vowed to kill them. The family of the lead actor also threatened to assault him. This in the main constituted the totality of submission made to the tribunal regarding the classification of the movie Inxeba (The wound)

THE REASONS OF THE TRIBUNAL

It is trite law that the appeals tribunal takes its decision after considering both submissions from the parties to the appeal, i.e the Appellant and the Respondent.

In making its decision/ruling, the tribunal does so guided by the fundamental principle that says all classification decisions must consider context, impact and the release format of the material to be precise sec 32 of the guidelines direct as follows: That when considering context, regard must be had to the following factors:

- a. The expectation of the public in general and the target market of the material.
- b. The theme of the material
- c. The manner in which the issue is presented
- d. The literary, artistic, dramatic or educational merit of the film.
- e. The apparent intention of the filmmaker as reflected in its effect.

The movie Inxeba (The Wound) is a local production in Isixhosa language set in a bush where the initiation of boys, teenagers takes place. One of the initiates turns out to be a homosexual. Two of the caregivers Xolani and Vija, the head actors are also seen to be practicing homosexuality. They keep their relationship secret and begin to be worried by Kwanda's interrogative posture towards Xolani, his caregiver. He accuses Xolani of not being a man as he does not accept his homosexuality by keeping it a secret. Kwanda protests during the final stages of the initiation and refuses to declare himself a man, which is a compulsory process before the school session is closed. He finally finds them naked next to the waterfall after an apparent act of sexual intercourse. In the film there are, in the collective view of the Tribunal, explicit sexual scenes Have a moderate impact,

therefore harmful, distressing and pre-exposing the 16 year old child (as classified by the respondent) to adult experiences.

The target market, which in our view is the 16years old is not reasonable familiar with the practises of initiation schools as described by the appellants. We are persuaded in that pre-exposure to such acts of sexual conduct is harmful and disturbing to this age group.

The following classifiable elements were agreed to by classification committee, i.e language which is frequent and moderate to story.

The violence is mild to moderate and fairly frequent. The nudity is low impact and infrequent. Sexual related activity inclusive of anal and oral sex were found to be mild to moderate impact and fairly frequent.

The substance abuse is mild impact and infrequent. This summarises the reasoning of the classification committee and are unanimous in that the themes are complex and nature.

The question is whether the classifiable elements are of low impact and if so whether the 16LS classification was appropriate in the circumstances.

The tribunal was unanimous in that the classifiable elements were moderate to strong. Thus if there is agreement on our part that the classifiable elements were of strong impact, it therefore follows that the tribunal has to consider in the circumstances what will be an appropriate classification. In doing so, the tribunal has to consider the submission made by the parties, grounds of appeal, the heads of argument, the oral submissions, closing arguments, as well as all applicable guidelines and the Act which the Tribunal derive its mandate from.

Having said that, we are of the view that the film is characterised by scenes of strong usage of strong language, insults, which include women and thereby degrading them in society. This further exposes women to societal violence such as rape as initiates are encouraged to go taste their manhood on girls as they head back home.

In our considered assessments of all the facts in this appeal, the various scenes can be accurately defined as inappropriate for minors in the age category of 16years. The key question is whether the child aged 16 would find the scenes tolerable, or whether this are capable of causing harm or distress. According to developmental theorists, the 16 year old has cognitive comprehension of the classifiable elements as well as understanding of what is right and wrong. However, this does not necessarily translate to moral behaviour; when repeatedly exposed to acts of low moral standards he may show the propensity to engage in morally unacceptable, antisocial behaviour through vicarious learning and imitative behaviour as reflected in the film. Developmentally, the 16 year old is in a very fragile and vulnerable adolescent stage predisposing him to negative imitative behaviour.

The actions in the film are real and the characters are real. In the Respondent Heads of argument, the film is regarded as fiction which in simple English means **imaginary, invented or untrue**. In another contradictory statement the Respondent states that When the FPB talks about the artistic merit of the film, it is about a **bona fide story being told through film**.

The Tribunal collectively did not find any scientific, educational and artistic value throughout the film.

The following scenes could have increased tensions in society:

- (i) Anal sex scene between Vija and Xolani who are initiation nurses and performs the act at the initiation school, including oral sex.
- (ii) The act of intercourse is performed by the same adults that the initiates are entrusted to by their parents and society at a venue regarded as sacred by the tradition.
- (iii) The use of a single tool to circumcise all the initiates by the caregivers undermines the work that the government has/is doing in the initiation space by regulating healthy practices.
- (iv) The deliberate omission of condom use by the caregivers during a heated intercourse has an adverse effect on the minor viewers. Children learn by imitating.

Considerations of the Tribunal

The movie creators' right to freedom of expression has an effect on the rights of the Xhosa Traditional group by implication

Films and Publication Board Act 65 of 1996 as amended, chapter 4 section 18(3)b(ii) states that the film can be classified XX if it depicts conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour.

Children of 16 year may know what is right and what is wrong yet that does not exonerate them from imitation. It is also the responsibility of the FPB to protect them still from exposure to adult experience prematurely.

The children's act defines a child as anyone under the age of 18, exposing them repeatedly to sex life, drug abuse and alcohol abuse perpetuates the degeneration of morality

Section 20 (3) of the films and Publications Act 65 of 1996, as amended, provides as follows " The appeal tribunal may refuse the appeal and confirm the decision in question, or allow the appeal, either or wholly or in part, and give such decision on the board should in its view have given, and amend the classification of the film, same or publication, specifying the section of this act upon which the classification is in term of its decision bas, and may impose other conditions in respect of the distribution or exhibition of the film same or publication.

Sec 36 4 (1) of the guidelines provides as follows:

It is the duty of this tribunal to consider and decide whether there are any competing rights in the film. The constitution of the Republic provides for the protection of cultural and linguistic rights. It further provides in terms of section 9, the right to equality. In applying these rights, the constitution recognises the right to artistic, and creative abilities as well as freedom of expression. What is critical to note is that Section 36 of the constitution provide for limitation of rights.

The cumulative impact of the themes in the film are too strong and the sexual related activities do not justify a rating of 16LS. The classification that has been given is clearly inconsistent with our finding that the film should be classified X18.

In the circumstances the following order is hereby made.

1. The film Inxeba is assigned a classification X18
2. The film is removed from public circulation with immediate effect.

With Consensus of the full Tribunal:

Professor AS Magwaza

Nonkoliso Sigcau

Manko Buffel

Lutendo Malada

Sizwe Snail Ka Mtuze

Adv Lihle Mapipa Ndlovu

Dated at Johannesburg on this ,.....day of February 2018