IN THE FILM AND PUBLICATION APPEAL TRIBUNAL

In the matter between:

GOODMAN GALLERY Appellant

and

FILM AND PUBLICATION BOARD First Respondent

CLASSIFICATION COMMITTEE Second Respondent

APPELLANT'S WRITTEN SUBMISSIONS

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INTRODUCTION AND OVERVIEW OF SUBMISSIONS

1 The appellant is the Goodman Gallery, an art gallery which exhibits and sells contemporary South African artworks to a local and international art-buying public. The Goodman Gallery ordinarily exhibits at locations in Johannesburg and Cape Town, as well as on its website.

2 This appeal concerns decisions taken by the Film and Publication Board ("the Board") and the Classification Committee in respect of an original artwork painted by Brett Murray, an artist of international reputation, entitled *The Spear* ("the portrait"). The portrait was produced as part of an exhibition entitled *Hail to the Thief* II, which ran for part of May and June 2012 at the Goodman Gallery's Johannesburg location.

3 This appeal is noted in terms of section 20(1) of the Films and Publications Act 65 of 1996 ("the Act") against the two inter-related decisions:

3.1 The Board's "written reasons for ruling on the points *in limine*", dated 31 May 2012 ("the FPB ruling"); and

3.2 The Classification Committee's "Recommendation for classification of a publication under section 16(1) of the Film and

Publication Act", also dated 31 May 2012 ("the classification decision").[1]

4 In these submissions we submit that this appeal should be upheld on one of three bases. Each of these is sufficient, by itself, to dispose of the appeal.

5 First, the Classification Committee lacked jurisdiction.

5.1 It had no jurisdiction to classify the portrait itself, which had been defaced and subsequently removed from public exhibition before the classification decision was made.

5.2 It had no jurisdiction to classify the online publication of the electronic image on the Goodman Gallery's website because there had been no complaint to it in this regard.

5.3 It had no jurisdiction to classify the image on the City Press website given that the City Press was subject to the *bona fide* newspaper exception.

6 Second, and alternatively, in the event that the Classification Committee had jurisdiction, it was required to afford a hearing in some form to other publishers of the image. Its failure to do so – despite this point being squarely raised and despite the details of many such publishers being

[1] In terms of section 10(3) of the Act, a decision of the Classification Committee is deemed to be a decision of the First Respondent.

provided – means that the decision falls to be set aside on this basis alone.

7 If this Tribunal upholds the appeal on either of these first two grounds, it will then not be necessary for it to reach the merits of the Classification Committee's decision.

8 If, however, the Tribunal does not uphold these first two grounds, we submit that the appeal must be upheld on the basis that the decision of the Classification Committee was incorrect on its merits. In this regard, we emphasise, by way of overview, the following considerations:

8.1 The image did not meet the requirements for classification under section 16(4)(d) of the Act, which was the section relied on by the Classification Committee;

8.2 The image did not meet the requirements for classification under the publications guidelines;

8.3 The reasoning of the Classification Committee was unsustainable in a series of respects, including that:

8.3.1 The Committee erred in its treatment of the evidence before it, including in relation to what it considered to be "common cause";

8.3.2 The Committee erred in repeatedly placing reliance on the concerns of “sensitive adults” when it had no jurisdiction to do so;

8.3.3 The Committee rested its decision largely on questions of the right to human dignity, which are not dealt with by section 16(4)(d);

8.3.4 The Committee erred in the manner in which it sought to characterise the relationship between human dignity and freedom of expression;

8.3.5 The Committee failed to recognise that the portrait does not in any event infringe on any person’s right to have his or her dignity respected;

8.3.6 The Committee erred in failing to understand the limits of its statutory powers and the fact that its classification would result in a complete ban on the portrait being shown; and

8.3.7 The Committee erred in failing to recognise the effect of its decision on a work which constituted both political speech and artistic expression.

JURISDICTION

9 The Board erred in concluding that notwithstanding the defacing of the portrait and its subsequent removal from the Goodman Gallery's exhibition, the Classification Committee still had the necessary jurisdiction to classify the publication.

No jurisdiction to classify an original artwork that has been defaced and removed from public exhibition

10 It is common cause that at the time the Classification Committee made its classification decision, the portrait had been defaced, removed from public exhibition and would soon thereafter be delivered to its owner (a private art collector based outside of South Africa). It has been publicly reported that the owner had indicated his intention not to restore the portrait to its original condition, but instead to retain it in its defaced condition.[2]

11 Yet in the FPB ruling, the Board held that the Classification Committee would "*proceed and classify the painting*"[3] because –

11.1 an image of the portrait was being exhibited on the Goodman Gallery's website;[4]

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[2] See: http://www.thenewage.co.za/mobi/Detail.aspx?NewsID=51804&CatID=1007 (26 May 2012)
[3] At paragraph 59
[4] At paragraph 48. This issue is addressed below.

11.2 "to argue that the painting will be taken to Germany does not rule out the possibility that another person may purchase it, and return it to South Africa";[5] and

11.3 there is a "possibility that the painting may be restored."[6]

12 The Board sought to explain:[7]

> *"It would thus be nonsensical to require the [Board] to deal with this matter, many years later when the painting finds its way back into the Republic, when the matter of the painting can be decided finally at this point in time."*

13 We deal with the question of online publication below. However, we submit that in relation to the portrait itself, the Board's reasoning was unsustainable for at least two reasons.

14 First, its hypothesis regarding the portrait's future whereabouts was pure speculation.

15 Second, section 16(1) of the Act – the very basis upon which the classification process was undertaken – expressly limits classification to a publication "which is to be or is being distributed in the Republic". In particular, section 16(1) provides as follows:

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[5] At paragraph 49
[6] At paragraph 50
[7] At paragraphs 51 to 56

> *"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".*[8]

16 At the time the Classification Committee made its classification decision, the Goodman Gallery was neither distributing the portrait in the Republic nor having any intention to do so. On this basis alone, any attempt to classify the original portrait was impermissible and beyond the powers of the Board.

No jurisdiction to classify the online publication of the portrait

17 It is plain that the Board's jurisdiction to classify in this matter had to derive from section 16(1) of the Act – that is a specific complaint/request for classification.

18 The Board received two complaints.

19 The complaint against the Goodman Gallery was received on 19 May 2012. That complaint related to the portrait hanging in the Goodman Gallery. That is confirmed by the fact that when the Classification

[8] Emphasis added

Committee inspected the portrait for purposes of classification, they did so at the gallery in Johannesburg itself – not via the internet.[9]

20 The second complaint was against the City Press. This was the only complaint received in respect of an online publication of an electronic image of the portrait. However, City Press is a *bona fide* newspaper that is recognised by the Press Ombudsman. The Committee therefore had no power to entertain this complaint, by virtue of the exemption in section 16(1) for all such newspapers, including their online versions.[10] The Board and Classification Committee appeared to accept this.

21 Nevertheless, the Board held that the Classification Committee had jurisdiction on the basis that the classification in question was "in respect of the painting by Mr. Brett Murray and all the *replicas*, or photographs, or duplications, wherever they may manifest themselves or appear."[11]

22 In respect of this finding, the definition of "publication" in section 1 of the Act is instructive:

> *'publication' means—*
>
> *(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;*
>
> *(b) any writing or typescript which has in any manner been duplicated;*
>
> *(c) any drawing, picture, illustration or painting;*

[9] Classification decision, paragraph 14
[10] See the definition of "newspaper" in section 1 of the Act.
[11] FPB ruling, paragraph 27

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

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

(f) computer software which is not a film;

(g) the cover or packaging of a film; and

(h) any figure, carving, statue or model."

23 Read together with section 16(1), the definition indicates that the process of classification that follows the lodging of a complaint is in relation to the specific form of the publication is respect of which the complaint has been lodged. This interpretation is supported by Regulation 2 and Clause 1.2 of the publications guidelines.

24 Regulation 2 requires the following details to be included in any request for classification of a publication contemplated in section 16(1):

"(a) (The publication or a copy thereof or, where it is not practical to submit the publication or a copy thereof, the full address of the place where that publication may either be obtained or examined by the Board;

(b) the full name and address, including a contact telephone or fax number and, if available, an email address, of the requester, unless the complainant wishes to remain anonymous;

(c) the title of the publication forming the subject matter of the request;

(d) the date and number of the edition or issue of the publication;

(e) the name and address of the publisher;

(f) the name and address of the distributor of that publication in the Republic; and

> *(g) a brief statement of the request, with reference to page numbers and specific paragraphs or lines of the publication."*

25 Clause 1.2 of the publications guidelines requires that *"[t]he content of a publication submitted for classification is examined within the context of the publication as a whole*".

26 Regulation 2, clause 1.2, the definition of "*publication*" in section 1 and section 16(1) collectively contemplate a classification process that considers the particular form a publication takes within the specific context within which it has been "*distributed*". Such an approach is underpinned by the recognition in section 3 of the Classification Guidelines dealing with classifiable elements and consumer information:

> *"In applying the Guidelines, classification committees will assess the impact of the classifiable elements within the context of the film, game or publication being examined. It is the intensity and frequency of a classifiable element that will determine the rating of the material examined: the more intense and frequent a classifiable element, the more likely that the material will be given a higher age rating. However, classification decisions are not based on individual classifiable elements only but on the cumulative impact of classifiable elements within the context of the theme or story-line of the material being examined."*

27 We submit that it is neither possible nor desirable to classify two different forms of a publication in a single process on the basis of a single complaint lodged in terms of section 16(1), and that the context-specific

approach mandated by the Act, the Regulations and the Classification Guidelines simply precludes such an approach.

28 It is thus clear that the only complaint that the Board could rule on was the complaint against the portrait itself, in the form hanging in the Goodman Gallery.

29 However, as already indicated, this portrait was no longer to be or being distributed in the Republic. The Classification Committee therefore lacked the jurisdiction to classify it.

30 We therefore submit that the ruling that ought to have been made is that the Board had no jurisdiction to pronounce on either of the two complaints. That would still have allowed for the Classification Committee to receive and pronounce on further complaints, if any.

PROCEDURAL FAIRNESS

31 In the alternative, and on the assumption that the Classification Committee had jurisdiction to classify any online publication of an image of the portrait (which we deny), we submit that it erred at the level of procedural fairness.

32 Apart from the Goodman Gallery and City Press, none of the persons and organisations that published the image were called upon to make any written and/or oral representations.

33 Section 19 of the Act expressly entitles –

> *"any person … who is the publisher of a publication which is the subject of an application for classification … to appear in person before the … classification committee … or to be represented or assisted by a legal practitioner or by any other person of his or her choice, to adduce oral or written evidence and, subject to a reasonable time-limit imposed by the chairperson concerned, to address that committee … in the language of his or her choice."*[12]

34 Although this issue was squarely raised by the Goodman Gallery, it was not addressed in the FPB ruling. Despite this, the ruling expressly notes that "the classification of the painting will have a result that, all the websites that were pointed out by [the Goodman Gallery and the City

[12] Section 19(a)

Press] as portraying the painting, will be required to comply with the findings of the classification committee."

35 It is common cause that only the Goodman Gallery and the City Press were afforded their procedural rights in terms of section 19 of the Act, and only because they sought to exercise them. There is no evidence to suggest that either of the respondents took any steps whatsoever to ensure that other domestic publishers of the online image were informed of and/or invited to participate in the public hearing.

36 We submit that the Board could not have it both ways.

36.1 If it was limited to the terms of the two complaints against the Goodman Gallery and City Press then only they needed to be heard, but the Board then lacked jurisdiction for the reasons set out in the previous section.

36.2 If, by contrast, it was entitled to consider all publications of the image in all forms, then section 19 required notice to be given to all such publishers.

37 The Board's decision thus did not comply with section 19 of the Act and the appeal falls to be upheld on this basis alone.

38 That this must be so is confirmed when the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") are taken into account. It is trite that all "*statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA*."[13]

39 Section 3(1) of PAJA requires procedural fairness in respect of "*[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*"

40 We submit that the classification decision falls squarely within the definition of "administrative action" in section 1 of PAJA, being a decision of an organ of state "exercising a public power or performing a public function in terms of any legislation", and that such decision adversely affects the right of domestic publishers of the online image to freedom of expression in terms of section 16 of the Constitution.

41 In particular, section 3(2)(b) of PAJA provides as follows:

> *"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—*
>
> *(i) adequate notice of the nature and purpose of the proposed administrative action;*
>
> *(ii) a reasonable opportunity to make representations;*
>
> *(iii) a clear statement of the administrative action;*

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

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

42 Subsection (4)(a) permits an administrator to depart from any of the requirements in subsection (2) if it is "*reasonable and justifiable in the circumstances*". Having considered the factors listed in subsection (4)(b), we submit that there was no lawful basis for the respondents' failure to provide to domestic publishers of the online image "*adequate notice of the nature and purpose of the proposed administrative action*" and "*a reasonable opportunity to make representations*".

43 On this basis too then the appeal falls to be upheld.

THE CLASSIFICATION WAS IMPERMISSIBLE AND UNSUSTAINABLE

44 Section 16(4) of the Act, which is to be read together with Regulation 4 and the publications guidelines, regulates the manner in which a classification committee is to examine a publication and take a decision on its classification. In short, a committee may –

44.1 Classify the publication as a "refused classification";[14]

44.2 Classify the publication as XX;[15]

44.3 Classify the publication as X18;[16]

44.4 Classify the 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", if it "contains material which may be disturbing or harmful or age-inappropriate for children";[17] or

44.5 Decide that no classification is necessary "[i]f the overall impact of a publication is not potentially disturbing, harmful or inappropriate on children".[18]

[14] Section 16(4)(a)
[15] Section 16(4)(b), read together with clause 4.1, publications guidelines
[16] Section 16(4)(c), read together with clause 4.2, publications guidelines
[17] Section 16(4)(d), read together with clauses 4.3 and 4.4, publications guidelines
[18] Section 16(4) as a whole, read together with clause 4.5, publications guidelines

45 In so doing, a committee is obliged by section 39(2) of the Constitution to "promote the spirit, purport and objects of the Bill of Rights" when interpreting – and giving effect to – the relevant provisions of the Act, its regulations and the publications guidelines. The starting point, therefore, is the relevant legislative framework, properly interpreted in accordance with the Constitution.

46 In this case, however, the Classification Committee first came to the conclusion that the right to freedom of expression should be limited,[19] whereafter it considered the relevant categories of classification. At paragraph 58 of the classification decision, for example, the Classification Committee held as follows:

> *"Having dealt with the legal issues and an examination of the artwork as set out above, and having found that the right to freedom of expression and artistic merit should be limited[,] it is now necessary to deal with the categories of classification which are pertinent."*

47 After dispensing with sections 16(4)(a), (b) and (c), the Classification Committee "*invoke[d] Section 16(4)(d) of the Act to classify [the] artwork*".[20] Without any further explanation, simply relying on the unproven and unreasoned assumption that the publication "*contain[ed] material which may be disturbing or harmful or age-inappropriate for*

[19] Paragraphs 57 and 58 of the classification decision
[20] At paragraph 62

children", it decided by a vote of three to two to apply the classification "16N".[21]

48 As is discussed in further detail below, this impermissible approach to classification is, in addition, not in compliance with the publications guidelines. Further, it is – in large part – based on and influenced by an ill-conceived and inappropriate consideration of the right to dignity.

No basis for classifying under section 16(4)(d) and clause 4.4 of the publications guidelines

49 The Classification Committee could only even begin to consider an appropriate classification if the painting contained "*material which may be disturbing or harmful or age-inappropriate for children*". That is the minimum threshold for the exercise of its powers under section 16(4)(d). This is then given further clarity by clause 4.4 of the publications guidelines which permits "*the imposition of appropriate conditions to [a publication's] distribution or exhibition*" if the publication contains "material that poses a reasonable risk of harm to children". In fact, the Classification Committee itself recognised that "[*t]he effects of the actual exhibition of genitalia and its impact on children and the public must be examined.*"[22]

[21] Paragraphs 63 and 64 of the classification decision
[22] Classification decision, paragraph 37

50 However, it is not at all clear how the Classification Committee could reach such a conclusion that there was a reasonable risk of harm to children.

51 In particular, in coming to the conclusion that the portrait should be classified in terms of clause 4.4, the Classification Committee erred in three ways:

51.1 First, it did not consider any expert evidence, applying an impermissible subjective standard;

51.2 Second, it relied on a number of untested and/or unproven assumptions; and

51.3 Third, few of the “facts” considered are relevant to the central question to be answered under section 16(4)(d) and clause 4.4.

52 For example, at paragraph 33, the Classification Committee says that it is "common cause" "*that the depiction of an African political leader with exposed genitalia is offensive to African people*", and "*that the painting has caused societal anger, outrage and hurt*". Neither of these issues was common cause at all.

53 In relation to the portrait’s potential impact on children, the Classification Committee made just two findings (again, without any evidential basis):

53.1 *"[T]he classification committee is of the view that the themes [exploring issues of power, sexuality, corruption and race][23] will require cognitive and mature thinking to decode their messages*";[24] and

53.2 "*Younger children and sensitive people may find the themes complex and troubling*."[25]

54 Neither of these findings supports a conclusion that the portrait contains "material that poses a reasonable risk of harm to children".

55 Further, we submit that there is nothing about the portrait that could have been said to pose a reasonable risk of harm to children. The portrait –

55.1 contained no form of sexual activity;

55.2 contained no form of violence;

55.3 contained no vulgar language; and

55.4 was displayed as part of a serious art exhibition.

[23] See classification decision, paragraph 39
[24] Classification decision, paragraph 40
[25] Classification decision, paragraph 41

56 The Classification Committee's finding that the portrait had to be classified means that were complaints to be lodged in terms of section 16(1) of the Act, it would have to reach the same conclusion regarding numerous works of art which contain genitals on display. This would include, for example:

56.1 The William Kentridge portrait on display at the Constitutional Court;

56.2 Posters or online images of Michelangelo's statute of David, the original of which is publicly on view at the Accademia di Belle Arti in Florence, Italy.

57 That could never have been the intention behind the Act.

58 To the contrary, the Act and publications guidelines expressly recognise that *bona fide* works of art are to be treated differently, repeatedly excluding them (as well as *bona fide* scientific, documentary and literary publications) from the ordinary processes – and therefore consequences – of classification.

59 We therefore submit that the Classification Committee simply did not have any basis for invoking sections 16(4)(d) of the Act or clause 4.4 of the publications guidelines. Instead, it should have concluded that clause 4.5 was applicable and that no classification was necessary.

60 In truth, nothing further need be said – this is sufficient for the appeal to be upheld. However, in what follows we proceed to deal with certain further claws in the Committee's decision.

Implications of a "16" classification for an original artwork hanging in an art gallery or published online

61 The classification decision merely refers to "16N", with nothing more. In the absence of anything else, it appears as if no advisory and/or conditional restrictions have been placed on the portrait's distribution and/or exhibition, as contemplated by clause 4.4 of the publications guidelines.

62 Assuming that a "16" classification may be applied to a publication (which is far from clear), a publication that is classified "16" must be restricted to persons 16 and older. But what does this mean in the present context?

63 Restriction in the context of films and games is easy to understand:

63.1 According to the films guidelines, a "16" classification means that a film is restricted to persons 16 years and older, it being "*an offence to allow any person under the age of 16 years to watch a film rated '16'*"; and

63.2 According to the games guidelines, "*[g]ames classified '16' are restricted to children aged 16 and older*", with no one under the age of 16 being allowed "*to buy or rent such a game, or play it in a public arcade*".

64 But restriction in the context of an original artwork hanging in a gallery or an electronic image of it published online, in the absence of any legislative guidance, is more difficult to understand:

64.1 In respect of an original artwork hanging in a gallery, would a restriction require the classified portrait to be exhibited in a separate space, or would only persons 16 years and older be entitled to view the exhibition at all?

64.2 In respect of an image of an original artwork published online, such as on a gallery's website, what steps – if any – could be taken to prevent those under 16 from accessing the image? If access to the website could not be prevented in this way, would the image have to be removed in order to comply with the age restriction?

65 The Classification Committee sought to downplay the extent of its classification decision by suggesting that *"[t]he artistic merit of the*

exhibition is not restricted entirely." It added: "Mature viewers are still able to interrogate the painting in context."[26]

66 However, for the reasons already given this is not so. The restriction appears to have a very severe practical effect on the display of the painting.

67 Leaving aside considerations of practicality, the Classification Committee's approach runs contrary to section 24A(4)(b) of the Act. Amongst other things, the provision expressly permits any person knowingly to distribute or exhibit to a person under 18 "*any publication … which contains depictions, descriptions or scenes of explicit sexual conduct*" if such publication "*is of … artistic merit*".

68 It is common cause that the portrait is of artistic merit and that it does not contain "*depictions, descriptions or scenes of explicit sexual conduct*". Thus on the Classification Committee's approach, a publication which is potentially more harmful to children may be distributed or exhibited to anyone under 18 in terms of section 24A(4)(b) of the Act, yet the portrait or an electronic image of it may not be distributed or exhibited at all to anyone under 16.

[26] Classification decision, paragraph 57

The right to dignity

69 The classification decision makes it plain that central to the Classification Committee's decision was the taking into account of the right to dignity:

> *"The outrage that the portrait has sparked in the community has not only focused on the dignity of the President but rather on the dignity of a male African elder whose genitals are exposed for all to see, which African people find insensitive as it goes against the norms and values of African culture".*[27]

70 In considering the right to dignity, the Classification Committee came to the conclusion that "[o]f all of the fundamental rights as enshrined in the Bill of Rights, dignity is that which enjoys the greatest protection."[28] Yet in the very same decision, only one paragraph earlier, the Classification Committee cited the following passage from *S v Mamabolo*:[29]

> *"The right to 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 be stated, is that freedom of expression does not enjoy superior status in our law".*[30]

71 In the same paragraph in *Mamabolo*, Kriegler J also held as follows:

> *"With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression."*

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[27] Classification decision, paragraph 55
[28] Classification decision, paragraph 52
[29] *S v Mamabolo* 2001 (3) SA 409 (CC). Note that the classification decision gives the incorrect citation.
[30] At paragraph 41 (footnote omitted)

72 We therefore submit that *Mamabolo* cannot be seen as authority for the proposition that dignity trumps all other rights.

73 Regardless of the manner in which the rights to dignity and freedom of expression are to be balanced in appropriate cases, such as certain actions brought under the *actio iniuriarum*, no such balancing is appropriate in respect of a classification in terms of section 16(4)(d) of the Act read together with clause 4.4 of the publications guidelines. This is made clear in section 2 of the Act, which deals with its objects and provides as follows:

> *"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".*[31]

74 Put differently, the Classification Committee went beyond its statutory mandate when it focused on the right to dignity in the manner that it did.

75 Assuming, however, that the Classification Committee was entitled to take the right to dignity into consideration, we submit that the only

[31] Emphasis added

person who may be notionally entitled to claim that the portrait infringes his dignity would be President Jacob Zuma. However, that was certainly not for the Classification Committee to decide. Mr Zuma was not before the committee and did not complain to it about the portrait. Moreover, he has a very well publicised application running before the courts on that very issue.

Political speech

76 The Classification Committee appears to have given no weight to the fact that a classification by it would amount to the restriction of political speech. This was a manifest error.

77 South African and foreign courts alike have insisted on the necessity of affording greater latitude to, and protection of, political speech. There are two main reasons for this:

77.1 Politicians and public office-bearers are reasonably expected to have a 'thicker skin' by virtue of their chosen profession. Politicians knowingly lay themselves open to close scrutiny and forthright criticism by both journalists and the public at large, and consequently ought to display a greater degree of tolerance.

77.2 Courts have recognised the importance of open discussion of political issues in democracies. Political discourse is essential to

keep members of society informed about what government does, and thus to enable public accountability by those who wield state power and control state resources.

78 As early as 1917, the Appellate Division in *Crawford v Albu* held:

> *"People who occupy a public position or for any other reason have been so unfortunate as to focus upon themselves the light of public opinion must expect to be criticised. And more particularly must those who, however righteous their motives, place themselves in determined opposition to society generally or to a section of society not be surprised if they find themselves assailed with some vehemence or even exaggeration. All this the law does not prohibit. Free speech and free thought are part of our common inheritance".* [32]

79 In 1946, in *Die Spoorbond and Another v South African Railways*, Watermeyer CJ held:

> *"[T]he Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals. … [I]t is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature."* [33]

80 Schreiner JA stated in a concurring judgment:

> *"[I]t seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action*

[32] *Crawford v Albu* 917 AD 102 at 105
[33] *Die Spoorbond and Another v South African Railways* 1946 AD 999 at 1009

> *and not litigation, and it would, I think, be unfortunate if that practice were altered.*"[34]

81 More recently, Lewis JA dealt extensively with the issue of political speech in *Mthembi-Mahanyele* and concluded:

> *"In my view, the reasons advanced … for recognising that the defamation of Government and members of Government might be justifiable in certain circumstances, and thus lawful, are compelling. They require that there be a special defence attaching to political information, such that the publication of defamatory matter in circumstances where it is justifiable (reasonable) is not actionable.*
>
> *Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does.*"[35]

82 In a concurring judgment in *Mthembi-Mahanyele*, Ponnan AJA observed that forthright political discussion "*assume[s] heightened significance in a fledgling democracy such as ours struggling to rid itself of its securocratic and censorious past*."[36]

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[34] At 1012-13

[35] *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at paragraphs 64-65. While Lewis JA's order in *Mthembi-Mahanyele* constituted that of the majority, her call for the recognition of a "special defence for political information" was supported by Howie P, but not endorsed by Ponnan AJA, Mpati DP or Mthiyane JA (on the basis that the reasonable publication defence was flexible enough to accommodate the special protection of political speech). Accordingly, no such special defence has been introduced in South African law. Instead, the courts have continued to afford political speech special latitude under the "reasonable publication defence".

[36] At paragraph 86

83 Most recently in *McBride*,[37] Cameron J (writing for the majority of the Constitutional Court) remarked on the healthy tradition of robust political speech in South Africa and reaffirmed its importance:

> *"Public debate in South Africa has always been robust. More than 50 years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, "[s]trong epithets are used and accusations come readily to the tongue". The court also found that allowance must be made "because the subject is a political one, which had aroused strong emotions and bitterness", of which readers were aware, and that they "would not be carried away by the violence of the language alone".*
>
> *These words are still apt today. Public discussion of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech. Another is the legitimate protection afforded to every person's dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs.*

Artistic expression

84 The Classification Committee similarly does not seem to have fully considered the fact that what is at issue here is artistic expression.

85 This is despite the fact that Parliament itself has repeatedly made clear that artistic expression stands on a different footing.

[37] *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* 2011 (4) SA 191 (CC) at paragraphs 99-100

85.1 The Act contains an express exception applicable to works "*of artistic merit*".[38]

85.2 Section 12(b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (which prohibits hate speech) explicitly makes an exception for a "*bona fide engagement in artistic creativity*".

86 As with political speech, artistic expression is deserving of special latitude and protection.

87 The concern to protect artistic expression is reflected in article 19(2) of the International Convention on Civil and Political Rights, 1966 (ICCPR). Article 19(2) states explicitly that the right to freedom of expression includes "*the right to seek, receive and impart information and ideas of all kinds … in the form of art.*[39]

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[38] In respect of publications, see sections 16(4)(a)(ii) and 16(4)(c).

[39] Article 19 of the ICCPR provides in full:

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

(Emphasis added) See also Article 13(1) of the American Convention on Human Rights, 1969 which reflects the provisions of the ICCPR.

88 Artistic expression is generally regarded as worthy of special protection for the following reasons:

88.1 It is a means of individual self-fulfilment and self-expression;

88.2 It generates ideas and information that contribute to the ascertainment of truth for the individual and society; and

88.3 It has a critical-moral capacity, in that it involves the presentation of new stimulus or insights that challenge the societal-moral status quo.[40]

89 Foreign courts have tended to emphasise the latter two socio-political functions of art. The European Court of Human Rights observed in *Muller v Switzerland*:

> *"Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression."*[41]

90 Similarly, the US Supreme Court emphasised the value of the visual arts as a medium of political and social commentary in *Hustler Magazine and Another v Falwell*:

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[40] P Kearns, "The Neglected Minority: The Penurious Human Rights of Artists", in R Banaker (ed), *Rights in Context: Law and Justice in Late Modern Society* (UK: Ashgate, 2010) 83 at 95. Kearns sums up the benefit to society of artistic expression in more emotive terms. He reminds us (at 95):

> *"It is to the benefit to society in general for art to be produced: creativity is a noble and commendable exercise at all levels, and the most highly-prized examples of art lift humanity to heights of awe and pleasure, and contribute to what is worthwhile and creditable about human civilization."*

[41] *Müller and Others v Switzerland* (1991) 13 EHRR 212 at paragraph 33

> *"[F]rom the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. … From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them".* [42]

91 And in *Laugh it Off Promotions*, Sachs J observed that "parodic illustrations in satirical columns, or editorial cartoons in newspapers or magazines, or a satirical programme on TV, are likely in any open society to enjoy a large measure of protection."[43]

92 In the present matter, the painting at issue serves precisely these social functions: it casts a moral spotlight on the socio-political *status quo*, and generates public debate and an exchange of ideas on the matter. It is a serious artwork of the sort widely recognised by courts and legislatures alike as being worthy of special protection.

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[42] *Hustler Magazine and Another v Falwell* 485 U.S. 46, 108 S.Ct. 876 at paragraph 16
[43] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at paragraph 87

CONCLUSION

93 We therefore submit that this Tribunal ought to allow the appeal in whole and set aside both the FPB ruling and the classification decision.

STEVEN BUDLENDER

JONATHAN BERGER

Chambers

Johannesburg

12 September 2012

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