

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

Case No: CCT 320/21

In the matter between:

BLIND SA

Applicant

and

MINISTER OF TRADE, INDUSTRY AND COMPETITION

First Respondent

**MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION**

Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

and

OWEN DEAN

First *Amicus Curiae*

MEDIA MONITORING AFRICA TRUST

Second *Amicus Curiae*

SECOND *AMICUS CURIAE*'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. Central to this matter is the question of equitable access to copyright works for persons with visual and print disabilities. Access is fundamentally tied to the right to freedom of expression, inclusive of the right to receive and impart information and ideas. Enabling the rights to freedom of expression and access to information for persons with visual and print disabilities is a constitutional obligation that must be performed diligently and without delay.¹
2. The Constitution and South Africa's international law commitments enjoin the state to take all appropriate measures to ensure that persons with visual and print disabilities can exercise their expressive rights, including the freedom to seek, receive, and impart information and ideas on an equal basis with others and through all forms of communication.²
3. This matter concerns the Copyright Act 98 of 1978 ("Copyright Act") which creates considerable barriers for persons with visual and print disabilities to exercise their rights to freedom of expression and access to information and ideas on an equal basis.³ However, these challenges — when considered in line with South Africa's domestic, regional, and international law obligations — can be overcome in a manner that ensures that the rights to freedom of expression

¹ Section 237 of the Constitution provides: "All constitutional obligations must be performed diligently and without delay."

² Convention on the Rights of Persons with Disabilities (2006) at article 21.

³ Similarly to the Applicants, MMA uses the phrase "persons with visual and print disabilities" to refer to all persons who fall within the scope of the definition of a "beneficiary person" in Article 3 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013) ("Marrakesh Treaty").

and access to information can be fostered, rather than restrained, by copyright laws.

4. There is some consensus among the Applicant, the First Respondent, and the First *Amicus Curiae* as to the utility of exceptions as a means to enable access. However, there is a divergence in the mechanism through which exceptions are enabled, and the speed at which exceptions should be implemented. In addressing these discrepancies, and in locating this matter through the lens of the right to freedom of expression, these submissions on behalf of the Media Monitoring Africa Trust (“MMA”) address the following:

- 4.1. First, the challenges to the realisation of the right to freedom of expression and access to information and ideas imposed by the Copyright Act violate the expressive rights of persons with visual and print disabilities.

- 4.2. Second, legislative exceptions — both for traditional and contemporary usable formats used in the digital era — are the accepted foreign and international law practice to advance freedom of expression and access to information for persons with visual and print disabilities.

- 4.3. Third, the remedy proposed by the Applicant, where the state has *not* diligently performed, without delay, its constitutional obligations to persons with visual and print disabilities in the context of access to

copyright works, is appropriate and necessary in the circumstances of this matter.

FREEDOM OF EXPRESSION AND COPYRIGHT

Nature of the right to freedom of expression

5. The right to freedom of expression, provided for in section 16 of the Constitution, is integral to the advancement of dignity and autonomy.⁴ It serves to enable an array of other human rights and constitutional values. The “freedom to receive or impart information or ideas”⁵ is an essential element of the right to freedom of expression, enabling the formulation and development of opinions and ideas, and the transfer of knowledge. It is a right for all people to enjoy, equally.

6. In *Print Media*, the Constitutional Court explained that freedom of expression embraces the right to “express and to receive information or ideas freely”, which also “encompasses the freedom to form one’s own opinion about expression received, and in this way both promotes and protects the moral agency of individuals.”⁶ The right to access information is similarly important, being “crucial to the right to freedom of expression”, and the freedom to receive or impart information or ideas.⁷

⁴ *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at para 21.

⁵ Section 16(1)(b) of the Constitution.

⁶ *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 53 (“*Print Media*”).

⁷ *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 63.

7. More recently, this Court confirmed that freedom of expression “is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm” because it “is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability”.⁸ (Own emphasis.)
8. In addition to the constitutional protection of the right to freedom of expression, and the primacy it is given by our courts, it is a right recognised by international and regional legal frameworks. As this Court directed in *Zuma*, “section 39(1)(b) does, after all, provide an interpretative injunction that requires this Court, and all South African courts, to consider international law when interpreting the Bill of Rights.”⁹
9. International human rights law establishes the right of everyone to freedom of expression. Article 19 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁰
10. Article 19 of the International Covenant on Civil and Political Rights — which South Africa has signed and ratified — similarly provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek,

⁸ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 at para 68, quoting *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 1.

⁹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28, 2021 (11) BCLR 1263 (CC) at para 114 (“*Zuma*”), on section 39(1)(b) which provides that Courts, when interpreting rights in the Bill of Rights, must consider international law.

¹⁰ Universal Declaration of Human Rights (1948).

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 [their] choice.”¹¹

11. The right to freedom of expression is further recognised in article 21 of the Convention on the Rights of Persons with Disabilities (“CRPD”). The CRPD, which South Africa has signed and ratified, requires states parties to—

“take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice”.¹²

12. Regionally, article 9 of the African Charter on Human and Peoples’ Rights, to which South Africa is a signatory, provides that “[e]very individual shall have the right to receive information”, and that “every individual shall have the right to express and disseminate [their] opinions within the law”.¹³

13. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (“Protocol on the Rights of Persons with Disabilities”), to which South Africa is also a signatory, provides that “[e]very person with a disability has the right to freedom of expression and opinion including the freedom to seek, receive and impart information and ideas through

¹¹ International Covenant on Civil and Political Rights (1976).

¹² Convention on the Rights of Persons with Disabilities (2006).

¹³ African Charter on Human and People’s Rights (1986).

all forms of communication of their choice”, and that states parties have an obligation to take policy, legislative, and other measures to ensure that these rights can be exercised on an equal basis with others.¹⁴

14. Further regional recognition has been provided by the recently adopted Declaration of the African Commission on Human and Peoples’ Rights on Freedom of Expression and Access to Information (“Declaration on Freedom of Expression”). The Declaration on Freedom of Expression provides that:

“Freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights are crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights.”¹⁵ (Own emphasis.)

15. The Declaration on Freedom of Expression further affirms that everyone, inclusive of persons with disabilities, shall have the right to exercise freedom of expression and access to information without distinction of any kind,¹⁶ requiring states to—

“take specific measures to address the needs of marginalised groups in a manner that guarantees the full enjoyment of their rights to freedom of

¹⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (2018) at article 23.

¹⁵ Declaration of the African Commission on Human and Peoples’ Rights on Freedom of Expression and Access to Information (2019) at principle 1.

¹⁶ Id at principle 3.

expression and access to information on an equal basis with others. Marginalised groups include women, children, persons with disabilities, older persons, refugees, internally displaced persons, other migrants, ethnic, religious, sexual or gender minorities.”¹⁷

16. The right to freedom of expression, inclusive of the right to receive and impart information, is a constitutionally and internationally protected right, applicable to all persons without discrimination, and it is a right that has corresponding state duties and obligations, particularly in relation to marginalised groups.

Challenges to freedom of expression occasioned by the copyright regime

17. The Copyright Act provides for, among others, restrictions on the reproduction or adaptation of original works. As a result, changing or adapting a copyrighted work may amount to a copyright infringement, which may constitute an offence.¹⁸
18. However, and as evident from the record in this matter, copyrighted works often need to be adapted or changed into “accessible formats” in order for them to be usable by persons with visual and print disabilities. These include “digital formats that enable the use of screen readers”, and may include “adding audio descriptions to films and broadcasts, as well as subtitles.”¹⁹ The Marrakesh

¹⁷ Id at principle 7.

¹⁸ See definitions contained in section 1(1), such as “adaptation”, “author” “copy”, “infringing copy” and “reproduction” read with sections 23 and 27 on infringements of copyright and penalties.

¹⁹ Founding Affidavit of Jayaseelan Gopal Nair (24 March 2021), Record of Application at para 78 and paras 83-4, p 33-6. See, also, Supporting Affidavit of Zakeria Mohammed Yacoob (15 March 2021), Record of Application, at para 10, p 309.

Treaty defines an accessible format “as a copy of a work in an alternative manner or form”.²⁰

19. It is self-evident that modifications and adjustments to original works are needed to ensure that persons with visual and print disabilities can enjoy and exercise — on an equal basis with all others — their expressive rights and freedoms. However, the limitations imposed on changing or adapting works pose significant challenges, which, in turn, substantially limits these expressive rights, which is contrary to the Constitution, and South Africa’s regional and international law obligations.

Striking an appropriate balance between competing rights and interests

20. While South Africa’s current copyright regime is at odds with freedom of expression and access to information, a balance may be struck between the rights of copyright and intellectual property owners and the rights of all people to access and impart knowledge and ideas.
21. When balancing rights and interests, regard must be had to the importance of a right in the overall constitutional scheme. This Court has provided that:

“A right that is of particular importance to the Constitution’s ambition to create an open and democratic society based on human dignity, freedom and

²⁰ Marrakesh Treaty above n 3 at article 2.

equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.”²¹

22. What is at issue in this matter is not the limitation of the rights of copyright and intellectual property owners but rather the balancing of competing rights between copyright owners and persons with visual and print disabilities. Construing legal frameworks through a constitutional lens in a “manner that does not unduly trample upon freedom of expression” is an accepted approach of this Court.²²
23. This balance can be found in the remedy proposed by the Applicant, namely that the Copyright Act is read to include the proposed new section 19D in the Copyright Amendment Bill, 2017 (“CAB”).²³

COPYRIGHT EXCEPTIONS PROMOTE FREEDOM OF EXPRESSION

24. In support of this approach, relevant international and foreign law, read in terms of section 39(1)(b) and (c) of the Constitution, is useful to this Court in illustrating that the rights to freedom of expression and access to information can be promoted, rather than restrained, by copyright laws through the introduction of exceptions for persons with visual and print disabilities.

²¹ *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37 at para 41, fn 40 citing Currie and De Waal, *The Bill of Rights Handbook* 6 ed (Juta & Co, Cape Town) at 164.

²² *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 18.

²³ Applicant’s Notice of Motion at para 3.

- 24.1. First, international and foreign comparative law illustrates that the exceptions in copyright regimes are well established and are an internationally recognised and practical, meaningful, inclusive, and simple solution to achieving a balance between copyright and expressive rights.
- 24.2. Second, and in order to properly achieve this balance, it is necessary to recognise the importance of contemporary usable formats for works for persons with visual and print disabilities and how these formats assist with realising the right to freedom of expression and the ability to share knowledge and ideas in the digital era.

Exceptions for persons with visual and print disabilities

25. The Marrakesh Treaty aims to improve the availability of certain works in accessible formats for persons who are blind, visually impaired, or otherwise print-disabled.²⁴ It promotes exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats.²⁵
26. Article 4(1)(a) expressly provides that:

“Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO

²⁴ Marrakesh Treaty above n 3 at article 2, read with article 4(1)(a) and 4(2)(a) and (b).

²⁵ Id at article 4.

Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.”

27. In line with this position, a substantial number of states have incorporated general and specific exception provisions into their domestic copyright regimes, including provisions that address exceptions for persons with visual and print disabilities. By way of examples:

27.1. The Canadian Copyright Act, 1997 provides for exemptions for persons with perceptual disabilities, specifying that it is not an infringement of copyright to reproduce copyright work, in a format specially designed for persons with a print disability.²⁶

27.2. The United Kingdom’s Copyright and Rights in Performances (Disability) Regulations, 2014 — which amend and insert into the Copyright, Designs and Patents Act, 1988 sections that expand the provision for the supply of copies of modified copyright works to disabled persons generally — provide that the making of an accessible copy of a copyrighted work does not infringe copyright if the copy is made by a person with a disability or by a person acting on behalf of the persons with a disability, the copy is made for that person’s personal use, and the

²⁶ Canadian Copyright Act of 1997 at section 32.01.

same kind of accessible copies of the work is not commercially available on reasonable terms by or with the authority of the copyright owner.²⁷

27.3. The Brazilian copyright regime provides that it is not a violation of copyright to reproduce works for the exclusive use of persons with visual disabilities, provided that the reproduction is done without gainful intent.²⁸

27.4. The Ugandan Copyrights and Neighbouring Rights Act, 2006 provides that the fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where any work is transcribed into Braille or sign language for the educational purpose of persons with disabilities.²⁹

28. Recent research conducted by World Intellectual Property Organization (“WIPO”) presents a summary of the prevalence of general and specific exceptions clauses in legislation across WIPO member states.³⁰ South Africa is correctly

²⁷ Copyright and Rights in Performances (Disability) Regulations 2014 at section 31A. See, also, the Copyright and Rights in Performances (Disability) Regulations 2014, ‘Explanatory Note’. More recently, the United Kingdom introduced the Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations, 2018, which further amend the Copyright, Designs and Patents Act, 1988 to make the exceptions to copyright for disabled people compatible with the Marrakesh Treaty. Notably, while these amendments were occasioned through regulation, the Copyright, Designs and Patents Act remains the source of the exception. (Own emphasis.)

²⁸ Law 9.610 of 1998 at article 46.

²⁹ Copyrights and Neighbouring Rights Act of 2006 at section 15.

³⁰ WIPO Standing Committee on Copyright and Related Rights, ‘Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities’ (2019) at 22 onwards.

listed among the countries that have no exceptions in its present copyright legislation.³¹

29. In terms of exception provisions detailed in the WIPO research, which are largely located in sections or articles:

29.1. 28 countries have copyright legislation that provides exceptions for all disabilities, not specifying the disability;³²

29.2. 24 countries have copyright legislation which includes exceptions for persons with visual disabilities only limited to print/text works;³³ and

29.3. 72 countries have copyright legislation that provides an exception for persons with visual disabilities beyond print/text works and/or works not specified.³⁴

³¹ Id.

³² Id at Table 1: Summary of finding. These countries include Austria, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Ecuador, Estonia, Gabon, Germany, Hungary, India, Israel, Italy, Liechtenstein, Malta, Mexico, Montenegro, Netherlands, Poland, Republic of Moldova, Romania, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Switzerland, Republic of Macedonia, and Turkey.

³³ Id at Table 1: Summary of finding. These countries include Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Cameroon, China, Democratic People's Republic of Korea, Georgia, Grenada, Indonesia, Kazakhstan, Lao People's Democratic Republic, Mauritius, Nicaragua, Panama, Paraguay, Peru, Philippines, Rwanda, Ukraine, Uruguay, and Vietnam.

³⁴ Id at Table 1. These countries include: Albania, Australia, Austria, Bahamas, Belize, Bosnia and Herzegovina, Cabo Verde, Canada, Chile, Colombia, Cook Islands, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Gabon, German, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kuwait, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Malta, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Nigeria, Niue, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Vincent and the Grenadines, Sao Tome and Principe, Serbia, Seychelles, Singapore, Slovakia, Spain, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Turkey, Uganda, United Kingdom, and the United States of America.

30. The substantial number of states which include exceptions in their domestic legislation, along with the international position adopted in the Marrakesh Treaty, article 21 of the CRPD, and the Declaration of Freedom of Expression, makes it plain that exceptions are increasingly the accepted international practice to advance freedom of expression and access to information for persons with disabilities. Notably, the study references the CAB as including a specific provision,³⁵ aligning it with current international practice.

Extending exceptions to the digital era

30. With the proliferation of new technologies, the manner in which we receive and impart ideas and information has evolved. The Marrakesh Treaty recognises “the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities”.³⁶ (Own emphasis.) The United Nation’s Human Rights Council has also affirmed: “that the same rights that apply offline apply online”.³⁷ As a result, copyright exceptions should apply to the digital environment.

31. The WIPO Copyright Treaty (“WCT”) — which South Africa has signed — is a special agreement under the Berne Convention,³⁸ that deals with the protection

³⁵ Id at 112.

³⁶ Marrakesh Treaty above n 3 at the preamble.

³⁷ United Nations Human Rights Council (“UNCHR”), ‘Resolution adopted by the Human Rights Council on 13 July 2021 47/16: The promotion, protection and enjoyment of human rights on the Internet’ (2021) *A/HRC/RES/47/16* at 2. See further UNCHR, The promotion, protection and enjoyment of human rights on the Internet (2012) *A/HCR/RES/20/8*; UNHRC, ‘The promotion, protection and enjoyment of human rights on the Internet’ (2016) *A/HRC/32/L.20*.

³⁸ Berne Convention (1887).

of works and the rights of their authors in the digital environment.³⁹ Article 10 of the WCT provides that copyright exceptions can be extended into the digital environment. To this end, contracting parties may, in their national legislation, provide for limitations or exceptions that are appropriate in the digital environment, provided that it does not unreasonably prejudice the legitimate interests of the author of the work.

32. Resultantly, in line with the prevailing position regarding the applicability of rights both on- and offline, and in accordance with international standards which extend the scope of exceptions to the digital environment, exceptions relating to persons with visual and print disabilities should be inclusive of works in the digital environment.

THE STATE'S OBLIGATIONS IN TERMS OF SECTION 237

33. The Applicant argues that this case arose because of the state's "inordinate delay" in the law reform processes relating to the CAB.⁴⁰ The Applicant further argues that the "stalled process" results in the "ongoing violations of the rights of persons and print disabilities".⁴¹ MMA shares these concerns.⁴²
34. The Constitution requires that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights.⁴³ Section 8(1) of the Constitution provides that the

³⁹ WIPO Copyright Treaty (1996).

⁴⁰ Applicant's Founding Affidavit in the Application for Confirmation deposited to by Demichelle Petherbridge (13 October 2021), Record of Application at para 4, p 439.

⁴¹ Id at para 8.

⁴² Application for admission by the Second *Amicus Curiae* (March 2022) at para 27.

⁴³ Section 7(2) of the Constitution.

Bill of Rights “binds the legislature, the executive, the judiciary and all organs of state”. The Constitution further requires that “all constitutional obligations must be performed diligently and without delay”. (Own emphasis.)

35. It follows that the state, when exercising the powers granted to it under the Constitution, either through the drafting or enactment of legislation, must give effect to the obligations section 7(2) imposes, as well as the requirement for the diligent and timeous fulfilment of their obligations in terms of section 237.⁴⁴
36. This Court has held that “[t]he Constitution demands of all those on whom it imposes obligations, to fulfil them diligently and without delay”.⁴⁵ Further, this Court has established that “[s]ection 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself.”⁴⁶

Section 237 and the separation of powers

37. In this matter, and with particular reference to the remedy, a tension *may* arise between the separation of powers and the need to ensure constitutional

⁴⁴ See *President of the RSA and Another v Women’s Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others*; and *Minister of Justice and Constitutional Development v Esau and Others* [2020] ZASCA 177; 2021 (2) SA 381 (SCA) at paras 26-8.

⁴⁵ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47, 2018 (2) SA 571 (CC), 2018 (3) BCLR 259 (CC) at para 215. See further, *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) at para 7.

⁴⁶ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49, 014 (5) SA 579 (CC), 2014 (3) BCLR 333 (CC) at para 46. See also *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC) at 112.

obligations are fulfilled, without delay. However, this Court has made it clear that courts are enjoined to intrude when mandated to do so by the Constitution.⁴⁷

38. In *Doctors for Life* this Court held that:

“Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution”.⁴⁸

39. The Court held further:

“But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligation.”⁴⁹
(Own emphasis.)

⁴⁷ See below n 50.

⁴⁸ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (“*Doctors for Life*”) at para 37.

⁴⁹ *Id* at para 38.

40. The Court went on to explain that:

“Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and in particular, out of respect for the principle of separation of powers. But at the same time they have claimed their right to intervene in order to prevent any violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand and the need to respect the other branches of government, on the other, courts have developed a settled practice or general rule of jurisdiction that governs judicial intervention in the legislative process...

The primary duty of the courts in this country is to uphold the Constitution and the law “which they must apply impartially and without fear, favour or prejudice”. And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the Rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.⁵⁰ (Own emphasis.)

⁵⁰ Id at paras 68-70.

41. Within the context of this matter, the state is obliged to prepare, initiate, introduce, and bring into operation legislation that enables persons with visual and print disabilities to realise their rights to among others, equality, dignity, freedom of expression, and basic and further education, and to participate in the cultural life of their choice. This obligation must be fulfilled expeditiously. That persons with visual and print disabilities are still unable to access copyright works on an equitable basis is indicative of the state failing to fulfil its obligation.
42. As a result, the relief sought by the Applicant enjoins this Court to consider the multiplicity of constitutional rights of persons with visual and print disabilities which are impacted by the substantial delay in enacting the CAB. To the extent that a tension does arise, this Court is well within its remit to remedy the constitutional defect in the Copyright Act, and ensure that the rights of persons with visual and print disabilities are respected, protected, and promoted by all branches of government.

CONCLUSION

43. This matter is about equitable access, equality, dignity, and the state's duty to fulfil its constitutional obligations. It presents an important opportunity for the rights of persons with disabilities to be meaningfully realised. For the reasons advanced above, this Court should grant the relief sought by the Applicant.⁵¹

⁵¹ Application for admission by the Second *Amicus Curiae* (March 2022) at para 27.

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23 March 2022

⁵² The significant contribution that Tina Power, the instructing attorney for the Second *Amicus Curiae*, made to these written submissions is duly acknowledged.

LIST OF AUTHORITIES

Domestic legislation

- Constitution of the Republic of South Africa, 1996
- Copyright Act 98 of 1978
- Copyright Amendment Bill [B13B—2017]

Domestic case law

- *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC)
- *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)
- *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC)
- *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47, 2018 (2) SA 571 (CC), 2018 (3) BCLR 259 (CC)
- *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC)
- *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC)
- *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49, 014 (5) SA 579 (CC), 2014 (3) BCLR 333 (CC)
- *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (CC)
- *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC)
- *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC)
- *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* [2020] ZASCA 177; 2021 (2) SA 381 (SCA)

- *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC)
- *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22
- *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37 2022 (1) BCLR 46 (CC)
- *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28, 2021 (11) BCLR 1263 (CC)

Comparative foreign law

- Canadian Copyright Act of 1997
- Copyright, Designs and Patents Act, 1988 (United Kingdom)
- Copyrights and Neighbouring Rights Act of 2006 (Uganda)
- Copyright and Rights in Performances (Disability) Regulations, 2014 (United Kingdom)
- Law 9.610 of 1998 (Brazil)

International and regional law instruments

- African Charter on Human and Peoples' Rights (1981)
- African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression and Access to Information in Africa" (2019)
- Berne Convention (1887)
- Convention on the Rights of Persons with Disabilities (2006)
- International Covenant on Civil and Political Rights (1976)
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018)

- United Nations Human Rights Council, 'Resolution adopted by the Human Rights Council on 13 July 2021 47/16: The promotion, protection and enjoyment of human rights on the Internet' A/HRC/RES/47/16 (2021)
- United Nations Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet A/HCR/RES/20/8 (2012)
- United Nations Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet' A/HRC/32/L.20 (2016)
- United Nations Human Rights Council, "General Comment No. 34 on article 19 of the ICCPR: Freedom of opinion and expression" (2011)
- United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' A/HRC/17/27 (2017)
- Universal Declaration of Human Rights (1948)
- WIPO Copyright Treaty (1996)

Studies World Intellectual Property Organization

- WIPO Standing Committee on Copyright and Related Rights, 'Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities' (2019)