

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 320/2021

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

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION

- 1 This application concerns the rights of blind and visually impaired people as well as people with other print disabilities to access works under copyright. The relief sought in this matter takes place in the context of a protracted parliamentary process that will eventually result in the promulgation of the Copyright Amendment Bill of 2015 (“the CAB”). The Bill was referred back to Parliament in 2020 pursuant to reservations expressed by the President about the constitutionality of the CAB. Of relevance to the present application, clause 20 of the CAB will insert section 19D¹ into the Copyright Act, 98 of 1978 (“the Act or the Copyright Act”).

- 2 Section 19D is modelled on the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“the Marrakesh VIP Treaty or the Treaty”)², which creates exceptions to the fair use of copyright material in a manner that serves the needs of visually impaired persons, who fall within the definition of a ‘beneficiary ‘as contemplated in Article 3 of the Marrakesh VIP Treaty.³

¹ Volume 1 pgs 105 – 107

² Volume 1 pgs 59 – 69

³ Id at pg 62

- 3 Blind SA challenged the constitutionality of the Act in the High Court and sought a suspension of the order of invalidity for 12 months to allow Parliament to cure the defect. None of the Respondents opposed the relief sought. The High Court accordingly declared the Act invalid and unconstitutional to the extent that it fails to make provision for exceptions that would enable, through the conversion of works under copyright to suitable formats, access to such works by persons with visual and print disabilities.
- 4 The Court further suspended the declaration for a period of 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality and ordered an interim reading in of section 19D of the Copyright Amendment Bill (“the CAB”) into the Act during the period of suspension.
- 5 In this Court, Blind SA seeks an order:
 - 5.1 Confirming the declaration of invalidity to the extent that it limits and/or prevents persons with visual and print disabilities accessing works under copyrights that persons without such disabilities are able to access; and
 - 5.2 Does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty to

Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled.(“the Marrakesh Treaty”)⁴

- 6 In addition, Blind SA seeks relief that goes further than the High Court order in that it seeks an immediate reading in of section 19D of the CAB and no suspension of the declaration of invalidity to allow Parliament to cure the defect.
- 7 The First Respondent (“the Minister”) did not oppose the relief sought in the High Court. In this Court, the Minister files these submissions in an effort to assist the Court with determining the appropriate remedy and does not oppose the finding of invalidity made by the High Court. This is in keeping with what this Court has explained regarding the duties of a member of the executive who considers that a constitutional challenge ought to succeed.⁵ The Minister’s duty is to provide “*assistance*” to the Court regarding the decision to be made, the basis for the decision and the way the judgment may be expressed.⁶

⁴ This second aspect concerning the Marrakesh Treaty was not dealt with specifically by the High Court in its order.

⁵ *Phillips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 (CC) at para 11

⁶ *Phillips* at para 12

8 Given this role of the Minister and in order to avoid unduly burdening this Court, these submissions do not seek to repeat the arguments advanced by Blind SA on the merits, which the Minister broadly endorses.

9 Instead, these submissions deal only with the following issues:

9.1 Background; and

9.2 The Appropriate Remedy and why an order of suspension is necessary and appropriate.

BACKGROUND

10 On 27 June 2013 the Marrakesh Treaty was adopted⁷ and in July 2013 South Africa signed the treaty,⁸ and began the process of domestication when the CAB was passed on 27 July 2015.⁹ The CAB seeks to amend the Copyright Act by among others, proposing exceptions to copyright law that will facilitate access to works subjected to copyright by persons with visual and print disabilities. It is the intended vehicle to align domestic law with the Marrakesh VIP Treaty.

⁷ Volume 1 pg 69

⁸ The Genesis Report dated 31 July 2014 and titled Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for SA Volume 1 pg 95 at pg 100 para c

⁹ Id at pg 105

- 11 The genesis of the CAB commenced in 2008¹⁰. In 2011, the DTI established the Copyright Review Commission¹¹, which concluded that the South African copyright regime did not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability. The CRC recommended that the DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention.¹²
- 12 In 2013 DTI published its Draft Intellectual Property Policy for public comment¹³ and in 2014 commissioned Genesis Analytics to provide an assessment of the proposed changes to the Intellectual Property Policy Framework (“The Genesis Report”).¹⁴ The Genesis Report concluded that on the adoption of the Marrakesh Treaty in July 2013 the Copyright Act had to be amended to provide for the exceptions and limitations relating to accessible copies of works for VIPs.¹⁵
- 13 On 27 July 2015 the DTI, after holding public consultations, published a Draft Copyright Amendment Bill for public comment.¹⁶ Various limitations and exceptions were included in the Bill for among others, people with disabilities. The latter were catered for in section 19D. The Bill was

¹⁰ Extracts of the Presentation by DTI to the Select Committee on Trade and International Relations Volume 3 pg 295

¹¹ Report of the CRC Volume 1 pg 84

¹² Id

¹³ Id at para 31

¹⁴ Genesis Report supra Volume 1 pg 95

¹⁵ Id at pg 100 para c; Founding Affidavit Volume 1 pg 17 paras 32 – 33

¹⁶ Founding Affidavit pg 18 para 34

subjected to stakeholder comments and objections and revised during 2016 and 2017. Public hearings were held in Parliament in early August 2017. These were attended by stakeholders across the board. Additional information was invited by the Portfolio Committee on Trade and Industry pursuant to the hearings.

- 14 It was presented to the Portfolio Committee on Trade and Industry in Parliament, and in February 2018, the Portfolio Committee appointed a small technical team to help it align the CAB with the Constitution and relevant policies and international treaties. The report of the technical team raised certain concerns with aspects of the CAB, including the definition of “accessible format copy” which is a term used in particular in section 19D. Other advice obtained by the Portfolio Committee on the Revised Copyright Amendment Bill on 1 October 2018¹⁷, included that the CAB proposes a single exception, but its terms do not meet the three-step test or the Marrakesh Treaty.¹⁸ Specifically, concern was raised that:

“Section 19D does not include any of the content required by Article 4 of the Marrakesh VIP Treaty, since the right to make accessible format copies for persons with a disability is open to “any person or organisation serving the disabled”, whereas the treaty limits that act to “authorised entities” and “a primary caretaker or caregiver” acting on behalf of a beneficiary, in terms of Article 4. It therefore fails to meet the conditions for a

¹⁷ Advice to Portfolio Committee by Andre Myburgh Volume 2 Pg 186

¹⁸ Id at Pg 187

*copyright exception or limitation permitted by the Marrakesh VIP Treaty and, in the circumstances, will not meet compliance under the Three-Step Test either”.*¹⁹ Furthermore, the CAB permits export of accessible format copies and because South Africa is not a member of the Marrakesh Treaty it could result in the exporter and importer being held liable for infringement.²⁰ He proposes that the quickest solution is for the CAB to have a copyright exception for the benefit of visually impaired persons that complies with the Marrakesh Treaty or alternatively extend it to specific cases of disability that would meet the ‘special case’ step of the Three-Step test.²¹

- 15 In addition to the above, on 13 February 2019, the DTI did a presentation on the Bill to the Select Committee, and one of the issues raised in its report was that section 19D “*extends beyond matters pertaining to the blind and includes other disabilities such as learning disabilities, dyslexia etc*”.²²
- 16 A revised Bill was then submitted to the National Assembly when some minor amendments were made and further public submissions were called for.²³ On 28 March 2019, after further deliberations, the final version of the

¹⁹ Id at Pg 188 para 7.6; Presentation to Select Committee on Trade and International Relations pgs 189-190

²⁰ Id

²¹ Id at pg 188 para 7.7

²² Volume 2 pg 114

²³ A comprehensive chronology on the genesis and legislative path of the CAB is to be found in DTI’s presentation to the Select Committee on Trade and International Relations on the CAB dated 13 February 2019, V2 pgs 109 – 138

Bill was approved by the National Council of Provinces (NCoP) and sent to the President.

17 On 16 June 2020 the President referred the Bill back to the National Assembly raising six constitutional issues.²⁴ The President was concerned in the main about the international treaty implications of the amendments in the CAB. The President acknowledged the purpose of the CAB as being to align national legislation with international treaties, which have been reviewed and are in the process of being acceded to by South Africa.²⁵ and included their impact on international treaty implications.²⁶

18 Among the concerns raised was that the Marrakesh Treaty has a bearing on the rights contained in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. The WIPO Copyright Treaty is a special agreement under the Berne Convention that grants authors the right to authorise the distribution, rental and communication to the public of their work. South Africa has signed but not acceded to the WIPO Copyright Treaty.²⁷ The WIPO Performance and Phonograms Treaty grants performers economic rights in their performances, including the rights to reproduction, distribution and rental. The President also

²⁴ President's Letter referring the CAB to National Assembly Volume 1 pgs 70 – 80

²⁵ Id at pg 76

²⁶ Id at pg 76

²⁷ Id at pg 77

expressed concern as to whether the CAB appropriately considered the implications of these treaties.²⁸

19 Finally, the President echoed the concerns previously raised on the definition of those persons who could benefit under the Marrakesh Treaty.²⁹ Based on the above, he referred the CAB back to the National Assembly.

20 At its meeting on 5 May 2021³⁰ the Portfolio Committee discussed the President's reservations in respect of the CAB, including the question of compliance with international treaties.³¹ It was noted that the Committee could decide to reconsider the remitted Bill in respect of compliance concerns and make the necessary amendments.³²

21 The importance of public participation was also raised at the meeting of 5 May 2021³³. The remitted CAB was discussed against the Portfolio Committee meeting of 12 May 2021³⁴, where the DA member,

²⁸ Id

²⁹ Id

³⁰ Volume 4 pg 393

³¹ Id at pg 394

³² Id

³³ Id at pg 395

³⁴ Volume 4 pg 398

Macpherson, stated that the DA did not believe that the Bill complied with international treaties.³⁵

22 At the Portfolio Committee Meeting of 14 May 2021³⁶ it was noted that “[t]he copyright exceptions might constitute reasonable grounds for constitutional challenges”, and that “[t]he Bill might not comply with International Treaty Obligations specifically in relation to the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty...”³⁷

23 A further meeting took place on 19 May 2021.³⁸ The Portfolio Committee adopted the view that the President’s reservations regarding the CAB’s non-compliance with international treaty obligations be *“dealt with in conjunction with the call for public comments to be done on other reservations. In considering such inputs, the Committee may then appraise itself of whether the Bill do indeed comply with these treaties or not, and if necessary effect amendments to it”*.(sic)³⁹

24 At this meeting the Committee recommended that the National Assembly rescind its decision to pass the CAB as a section 75 Bill; that the CAB is

³⁵ Id at pg 400

³⁶ Volume 4 pgs 402 – 404

³⁷ Id at pg 403

³⁸ Volume 4 pgs 411 – 416

³⁹ Id at pg 415

referred back to the Portfolio Committee to address the procedural and substantive concerns.⁴⁰ On 19 July 2021 the Portfolio Committee issued a notice inviting written submissions from stakeholders on aligning, among others, the CAB with the obligations set out in international treaties, including the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty and the Marrakesh VIP Treaty.

25 Public hearings set to take place on 4 and 5 August 2021.⁴¹ As the applicant correctly indicates the CAB will now be submitted to the Joint Tagging Mechanism (“JTM”) for reconsideration, and the JTM will consider the Bill afresh to determine whether it should be reclassified, as this was one of the procedural reservations raised by the President.⁴² Once the Bill is tagged it will follow the process for promulgation in either section 76 or 75.

26 What is clear from the above sequence of events is the following:

26.1 While no particular concern has been raised about the constitutionality of section 19D, concerns have been raised about whether the section sufficiently and appropriately defines terms which go to the heart of facilitating access of print materials to

⁴⁰ Id at pg 416

⁴¹ Id at pg 417

⁴² Supplementary Affidavit Volume 4 pg 359 paras 38 – 39

those who require access. So it is not correct, as the Applicant contends, that section 19D is entirely without controversy.

26.2 The process of considering and approving the CAB is ongoing and Parliament has yet to finalise the Bill. The Bill raises concerns not only of balancing South Africa's competing international law obligations but also of balancing the rights and interests of South Africans who are affected by its terms.

26.3 The extensive delay in passing the CAB is not due to a wilful failure by Government to give effect to its legislative obligations – but is rather a reflection of the fact that concerns were expressed about the constitutionality of the Bill in light of the competing interests identified above.

27 In this context, any remedy crafted by this Court must, we submit, take the above into account and allow the Parliamentary process to run its course.

THE APPROPRIATE REMEDY

28 As is clear, the Minister does not oppose confirmation by this Court of the High Court's order of invalidity. However, the Minister contends that the relief sought by Blind SA in this Court, namely that of a final reading in without suspension of the finding of unconstitutionality, is inappropriate and runs counter to the clear line of cases setting out the circumstances in which reading in is an appropriate remedy.

Reading in as an Appropriate Remedy

29 This Court has held on many occasions that a careful balance must be struck between the need to provide appropriate relief and the need to respect the separation of powers. It has therefore used reading in as a remedy with some level of caution. To this end, the final reading in sought by the applicant in this matter goes too far. Instead, this Court ought to order an interim reading in pending the outcome of the pending legislative process to amend the Copyright Act with an suspension of that order for a period of 24 months.

30 Should the legislature fail to amend the statute during the period of suspension, the interim reading in would become final.

31 In NL,⁴³ this Court held:

“It seems to me that a proper balance can be struck by suspending a declaration of invalidity and ordering an interim reading-in. Suspension coupled with an interim reading-in is a remedy that does not intrude unduly into the domain of Parliament. It is a remedy that gives recognition to the need to respect the separation of powers and in particular the role of Parliament as the institution constitutionally entrusted with the task of enacting legislation. Such a remedy will prevent uncertainty by avoiding the piecemeal judicial amendment of legislation. It is a remedy that will allow Parliament to conduct

⁴³ NL v Estate of the Late Sidney Lewis Frankel [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at para 73

the thorough process of consideration and constitutionally required consultation to properly cure the constitutional defect. This is the remedy which in my view is just and equitable.”
(Footnotes omitted.)

32 In *Nandutu*, this Court held:

*“Suspending the order of constitutional invalidity and granting the interim reading-in provides immediate relief for the applicants, and those in similar positions, in that a constitutionally compliant regime will be implemented with immediate effect. It also gives appropriate regard to the separation of powers, in that the Legislature maintains the opportunity to cure the invalidity.”*⁴⁴

33 Moreover, the approach of the High Court is perfectly consistent with that of this Court in matters such as *Gaertner*.⁴⁵ There, this Court emphasised a preference for suspension coupled with interim reading-in, because of separation of powers concerns:

“Reading-in has been the object of some suspicion and courts must resort to it sparingly. The actual act of writing or editing legislation may constitute a possible encroachment by the judiciary on the terrain of the legislature and, therefore, a violation of the separation of powers.

In Johncom Media Investments Ltd Jafta J held that a temporary reading-in is permissible and is just and equitable. In the court stated:

⁴⁴ *Nandutu v Minister of Home Affairs and Others* 2019 BCLR 938 (CC) at para 92

⁴⁵ *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC)

'(T)he only feasible way forward is reading-in. This course will not unduly intrude into the domain of Parliament because Parliament can amend the statute at any time.'

Depending on its nature and extent, the remedy thus does not intrude unduly into the lawmaker's sphere. With interim reading-in, there is recognition of the legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the court recognises that there may be other legislative solutions. And those are best left to Parliament to contend with.

Thus during the period of suspension, there is a need for a reading-in....."⁴⁶

34 A suspension order coupled with an interim reading-in, causes no prejudice to the Applicant's members or to others in their position. Their rights would be protected and vindicated during the period of suspension. However, a final order as sought by the Applicant would run counter to the long established approach of this Court to reading in, as set out above. No good reason has been advanced by the Applicant for a final reading in and as the Applicant itself points out, Parliament would retain the authority to amend the Act as it sees fit.⁴⁷

35 The suggestion that a final reading in would "not place pressure" on Parliament to finalise the process as a whole⁴⁸ is neither accurate nor is it

⁴⁶ At paras 82 – 85 (emphasis added)

⁴⁷ Applicant's heads of argument para 109. C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC) at para 89.

⁴⁸ Applicant's heads of argument, para 110.3

an issue that should concern this Court. As is clear from what we set out above, the Parliamentary process is ongoing and should it not be completed in time, the interim reading in will become final. It is not correct that simply because section 19D was crafted as part of the parliamentary process, that it is without concern and that it may not be changed as a result of the process currently underway. As we point out above, Parliament is already considering whether the section requires more careful definition and language to meet the Marrakesh Treaty obligations while balancing the rights of visual and print disabled persons.

36 In the circumstances, it is not clear what benefit the Applicant seeks to obtain from a final reading in circumstances where such a remedy goes much further than this Court needs to on the facts of the present case.

37 We therefore submit that this Court ought to make an order as follows:

37.1 confirm the order of invalidity and suspend the order of unconstitutionality for a 24 month period to allow Parliament to cure the defect.

37.2 during the period of suspension, the Copyright Act is deemed to read as if contains the proposed new section 19D contemplated by clause 20 of the Copying Right Amendment Bill [B13B-2017].

37.3 In the event that Parliament does not remedy the constitutional defect within 24 months of the date of the order of this Court, the interim reading in shall become final.

COSTS

38 The Minister did not oppose the relief sought in the High Court. Nor does it do so in this Court. The High Court ordered that Minister pay the costs of the High Court application including the costs of two counsel, save in respect of ReCreate. However, this Court has recognised that it may be appropriate, in confirmation proceedings, for costs only to be paid where confirmation is opposed.

38.1 In *Tronox*, this Court held:

*“Tronox needed to approach this court in any event to have the High Court's order confirmed; the MEC did not bring Tronox to this court. However, the MEC must pay the costs incurred by Tronox as a result of the MEC's appeal and opposition to the confirmation application.”*⁴⁹

38.2 This Court therefore directed the MEC to pay the costs of opposition to the confirmation proceedings – rather than all the costs.

⁴⁹ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) at para 60

38.3 In *University of Stellenbosch*,⁵⁰ this Court directed that the “respondents who opposed confirmation of the order of constitutional invalidity made by the Western Cape Division of the High Court are ordered to pay the applicants’ costs”.

38.4 In *McBride*,⁵¹ this Court directed the Minister to pay the costs but did so because “he still opposed the matter until late in the proceedings. The Minister’s draft order was served and filed at the proverbial eleventh hour, after the parties had already finalised their preparation and incurred high costs.”

39 In the present case, the Minister has not opposed the confirmation proceedings at any stage or in any form. Accordingly, the appropriate order would be for all parties to pay their own costs in this Court.

CONCLUSION

40 In all of the above circumstances, the Minister does not oppose a confirmation of the declaration of invalidity but suggests that the order of invalidity should be suspended for a period of 24 months during which an interim reading in as described above will apply. Should Parliament not

⁵⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) at para 212 (9)

⁵¹ *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) at para 57

cure the defect within the period of suspension, the interim reading in will become final.

N RAJAB-BUDLENDER SC

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3 March 2022