

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT320/21

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

Amicus Curiae

AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

- 1 This application is concerned with facilitating access to copyright-protected works by people who are blind, visually impaired or otherwise print disabled (we refer to them collectively as “**print-disabled**”), in accordance with the provisions of the Marrakesh Treaty to Facilitate Access to Published Work for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“**the Marrakesh Treaty**”). South Africa is not yet a signatory to that Treaty, although Government has indicated that it considers accession desirable.¹
- 2 The applicant (“**Blind SA**”), the Minister and the *amicus curiae*, Prof. Dean, all agree that there is a lacuna in the copyright regime that results in print-disabled people having inadequate access to copyrighted works. They disagree, however, on the source of this lacuna and how to remedy it.²
- 3 Blind SA contends that the Copyright Act 98 of 1978 is unconstitutional and invalid because it does not include provisions designed to ensure that print-disabled people are able to access copyrighted works in the manner contemplated by the Marrakesh Treaty.³ It asks that proposed section 19D of the Copyright Amendment Bill 13B of 2017 (“**the Bill**”) be permanently read into the Copyright Act, to remedy such defect.⁴

¹ Dean affidavit p 24 para 59.

² Dean affidavit p 47 para 130.

³ Blind SA proposed order: HOA p 50 para 2.2

⁴ Blind SA proposed order: HOA p 50 para 3.

- 4 The Minister agrees that the Copyright Act is unconstitutional and acquiesces in the reading-in of proposed section 19D – albeit subject to an order suspending the declaration of invalidity and affording Parliament an opportunity to remedy the defect.⁵
- 5 Prof. Dean, by contrast, submits that:
- 5.1 The lacuna does not arise from the terms of the Copyright Act and the statute is consequently not unconstitutional. The Copyright Act permits of exceptions that would enable print disabled people to access relevant copyrighted works. The current lack of access is a result of the Minister’s failure to enact appropriate regulations in this regard.⁶ The appropriate remedy is to compel him to do so.
- 5.2 Even if the Copyright Act is unconstitutional (which is denied), an order reading-in section 19D is not an appropriate remedy. Section 19D is not effective on its own and is not congruent with the terms of the Marrakesh Treaty. Its reading threatens to prevent – rather than to promote – accession to that Treaty.
- 6 We address each of these submissions below. First, however, we wish to highlight two aspects of the legislative regime that are germane to the proper determination of

⁵ Minister’s HOA pp 14-17 para 28-35.

⁶ Dean affidavit p 26 para 65.

this matter: the international dimension of the copyright regime, and the constitutional nature of the rights created by it.

THE LEGISLATIVE CONTEXT

Copyright has a domestic and an international dimension

7 Copyright operates as a world-wide system that is regulated through the terms of various international treaties, the most important of which are the Berne Convention for the Protection of Literary and Artistic Works (“**the Berne Convention**”), the Agreement on Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”)⁷ and, for the purposes of this case, the Marrakesh Treaty. South Africa has acceded to and ratified both the Berne Convention and to TRIPS.⁸

8 It is the international nature of the regime that ensures copyright protection attaches to works regardless of where they are created and dealt with. As the Supreme Court of Appeal has explained:⁹

“The Berne Convention for the Protection of Literary and Artistic Works . . . rests on three basic principles, namely national treatment, automatic protection and independence of protection. National treatment refers to the principle that works originating in one of the contracting states (that is, works the author of which is a national of such a state or works which were first published in such a state) must be given the same protection in each of the other contracting states as the latter grants to the works of its own nationals. Automatic protection means that copyright protection may not be conditional upon compliance with any formality. And independence of protection signifies that copyright protection is independent of the existence of protection in the country of origin of the

⁷ Dean affidavit p 20 para 44.

⁸ Dean affidavit p 40 para 20.

⁹ *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA); [2011] 1 All SA 449 (SCA) para 18. See also *Memory Institute SA CC t/a Memory Institute v Hansen* 2004 (2) SA 630 (SCA) para 6.

work. It should also be borne in mind that the convention does not form part of our law but merely places international obligations on governments that have acceded to it. This means that the convention is not directly justiciable in our courts.”

- 9 The copyright regime is governed domestically by the provisions of the Copyright Act, but its provisions derive, in large part, from the international treaties.

The relevant provisions of the international treaties

- 10 The Berne Convention and TRIPS both recognise and entrench the exclusive rights of copyright owners, and permit exceptions to them only if the exception complies with the three-step test – that is, that the exception:
- 10.1 covers only certain special cases;
 - 10.2 does not conflict with the normal exploitation of the work; and
 - 10.3 does not unreasonably prejudice the legitimate interests of the rights holder.¹⁰
- 11 A provision that permits blanket access to accessible format copies of copyrighted works by print disabled people must comply with the three-step test to be consistent with international law.

¹⁰ Dean affidavit p 21 para 47. See also article 9 of the Berne Convention which pertinently states:
*“(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
 (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
 (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.”*

And article 13 of TRIPS, which provides:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

12 The purpose of the Marrakesh Treaty is to to “*harmonise limitations and exceptions with a view to facilitating access to and use of works by person with visual impairments or with other print disabilities*”.¹¹ Its terms have been carefully designed to ensure the exceptions it introduces comply with the three-step test.¹² Adherence to the terms of the Marrakesh Treaty thus ensures that the exceptions introduced are consistent with international law.

The implications for this case

13 The international nature of copyright protection has two important implications for this case.

13.1 The first is legal. In terms of section 231(4) and (5) of the Constitution,¹³ the Berne Convention and TRIPS are law in South Africa and are binding on the State. In addition, the courts are obliged to prefer an interpretation of the Copyright Act that gives effect to international law (including the terms of the Marrakesh Treaty)¹⁴ over one that is inconsistent with international law.¹⁵

¹¹ Preamble, Marrakesh Treaty.

¹² Dean affidavit p 42 para 112.

¹³ Section 231 pertinently provides:

“(4) *Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*

(5) *The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*”

South Africa acceded the Berne Convention in 1971 and to TRIPS in 1995 – both before the final Constitution took effect.

¹⁴ The twenty instruments of ratification or accession needed for the Treaty’s entry into force was achieved on 30 June 2016, and it entered into force three months later, on 30 September 2016.

¹⁵ Section 233 of the Constitution.

- 13.2 The second is practical. South Africa only gains the benefits flowing from the international copyright regime by ensuring that its domestic system is congruent with it. That is because domestic courts only have jurisdiction over works and what transpires in relation to them in their own countries, and under their domestic laws.¹⁶ Dealings in works elsewhere are governed by the applicable foreign rules.
- 13.3 Inherently South African works are not protected under any foreign regime. A differential domestic copyright system thus applies. This would serve to disadvantage South African authors and copyrights owners, as their works would only enjoy copyright in South Africa. Treaty members' works, on the other hand, enjoy protection both domestically and throughout all member countries. Membership of the treaties thus enables South Africa to participate in the global mutual protection system. However, compliance of South African domestic law with the prescriptions of the treaties is a condition precedent to membership of the treaties.
- 13.4 In addition, one of the benefits of accession to the Marrakesh Treaty is that it permits the cross-border exchange of accessible format copies produced under its remit. Once South Africa has acceded the Treaty, it will be able to source and import accessible format copies from other Treaty countries.¹⁷ But that benefit will only become available if South Africa's domestic exception for

¹⁶ See *Gallo Africa* at paras 19-21, confirming that copyright are immovable tangibles over which the *forum rei sitae* has exclusive jurisdiction.

¹⁷ Dean affidavit p 38 para 99.

print-disabled people meets the requirements of the Marrakesh Treaty. Adherence will otherwise likely be declined by WIPO and no cross-border exchange will ensue.¹⁸

- 14 We submit that these considerations must be taken account when any change is introduced to the domestic copyright laws. They militate strongly against the introduction of piecemeal changes to the Copyright Act, which has been carefully drafted to conform to international law requirements.¹⁹

The constitutional protection of copyright rights

- 15 Copyright provides creators of works with the power to exercise control over their commercial exploitation. Its rationale is to place authors in a position to derive material benefits from the fruits of their labours in creating original works, thus providing them with a means of deriving income and incentivising them to create more and better works for the benefit of all. In practice, this is commonly achieved by enabling authors to charge royalties or fees for the commercial exploitation of their works for a limited term or period of protection. Upon the expiry of the term of copyright, the work falls into the public domain and can be freely copied or exploited by the public at large. The entry of the work into the public domain is the quid pro quo for the right granted to the author to exercise control over the use of the work.²⁰

¹⁸ Dean affidavit p 30 para 78.

¹⁹ Dean affidavit p 22 para 53.

²⁰ Dean affidavit p 18 paras 37-38. See also Dean, *Handbook of South African Copyright Law*' Revision Service 15 [30 September 2015], Juta, at 1-1.

- 16 Prof. Dean’s affidavit deals extensively with the rights afforded to authors and copyright owners,²¹ and we do not repeat his averments. We merely highlight that a copyright owner has a bundle of exclusive rights in their works, known as “*restricted acts*”,²² the most important of which is a restriction against the unauthorised reproduction of a work.²³ The author of a copyrighted work²⁴ also holds “moral rights” over the work, which attach to the author permanently.²⁵
- 17 This Court has repeatedly recognised that incorporeal rights – including intellectual property rights – qualify as property.²⁶ The rights of authors and copyright owners are therefore protected under section 25 of the Constitution.
- 18 Section 25 of the Constitution provides *inter alia* that the deprivation of property is prohibited, except in terms of a law of general application. No law may permit arbitrary deprivation of property.²⁷

²¹ Dean affidavit pp 19-22 para 39-51.

²² Dean’s Affidavit p 19 para 39.

²³ *ibid*

²⁴ Who may also be, but is not invariably, the copyright owner: see Dean affidavit p 19 para 40.

²⁵ Dean affidavit pp 19-20 para 42.

²⁶ See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) para 61 stating, with reference to *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); 2005 (8) BCLR 743 (CC) and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2006 (8) BCLR 883 (CC), that:

“Without discussing the specific point, this Court has also accepted a trade mark to be property, albeit incorporeal, deserving protection under section 25.”

See also *Moneyweb (Pty) Ltd v Media 24 Limited and another* 2016 (4) SA 591 (GJ) para 108, expressly holding that copyright is an intellectual property right which is “protected by section 25(1) of the Constitution”.

²⁷ Section 25(1) of the Constitution.

- 19 Any substantial interference with the use, enjoyment or exploitation of private property with a legally significant impact on the rights of the affected party constitutes a deprivation for the purposes of section 25(1).²⁸
- 20 The encroachment on the dominium of copyright owners – whether by a wholesale deprivation of their rights, or a mere restriction – thus amounts to a deprivation of property.²⁹ It must be for good cause, or constitute a justifiable limitation in terms of section 36 of the Constitution, to pass muster. (The three-step test, we submit, is an appropriate lens through which to assess the justifiability of an encroachment on the rights of a copyright owner.)
- 21 It means that the constitutional rights of authors and copyright owners are also at issue in these proceedings, and must be taken into account.
- 22 Blind SA’s submissions before this Court (and before the court *a quo*) focus on the rights of print-disabled people, without due regard for the constitutional protection that attaches to intellectual property rights. That is inappropriate. As Langa CJ, writing for a unanimous Court in *Phumelela Gaming v Gründlingh*, said:

*“It is not permissible for a litigant to simply carve out those provisions that are favourable to it in the application of section 39(2). The interests of other holders of rights must also be taken into account in the balancing exercise.”*³⁰

²⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 59; *South African Diamond Producers v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) para 48.

²⁹ See, in this regard, *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) paras 34-36, confirming that the impairment of an aspect of ownership may be sufficient to limit the section 25 right.

³⁰ *Phumelela* para 37

23 And as Sachs J explained in a separate concurring judgment in *Sidumo v Rustenburg*

Platinum Mines:

“Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other. Though, in particular factual situations, the interests secured by the rights might collide, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right through establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the constitutional interests involved.”³¹

24 The import is this: the Court must be cognisant of the protection that the Bill of Rights affords to copyright and factor it into the balancing exercise with which this Court must engage. That balancing exercise is germane at two stages: first, in determining the constitutionality of the Copyright Act and, second, in crafting an appropriate remedy.

25 Against that background, we turn to address the constitutionality of the Copyright Act.

THE CONSTITUTIONALITY OF THE COPYRIGHT ACT

The duty to avoid constitutional invalidity

26 It is well established that a court must, wherever possible, interpret legislation in a manner that avoids it being constitutionally invalid.³² In *Hyundai*, the Court put it as follows:

³¹ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) BCLR 158 (CC) para 148

³² *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) para 23; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

“[W]hen the constitutionality of legislation is in issue, [courts] are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

... judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.”³³ (our emphasis)

27 The Court expanded on the principle in *Fraser v Absa Bank* as follows:

“Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights.”³⁴

28 Put differently, the Court must adopt not just a constitutionally compliant interpretation of legislation; it must adopt the interpretation that best gives effect to the rights at issue.³⁵

29 These principles apply equally in the intellectual property sphere. In *Laugh it Off*, Moseneke J (as he then was) found that the SCA was correct to hold that section 34(1)(c) of the Trade Marks Act “*must be construed in the light of the Constitution and applied in a manner that does not unduly trample upon freedom of expression*”.³⁶ A constitutionally-informed approach must equally apply to the construction of the Copyright Act.³⁷

³³ *Hyundai* paras 22-23.

³⁴ *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) para 47.

³⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para 46.

³⁶ *Laugh it Off CC* para 18

³⁷ The South Gauteng High Court said as much, with reference to *Laugh it Off CC*, in *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ) para 96

The Copyright Act is constitutional

30 The nub of Blind SA’s case is that the Copyright Act fails “*to provide an exemption from its provisions for persons with print and visual disabilities*”,³⁸ and consequently violates their rights to dignity, equality, education, freedom of expression and to participate in the cultural life of one’s choice.³⁹

31 But, with respect, Blind SA is mistaken in this regard. The Copyright Act does include a mechanism for crafting such exemption. The fault lies with the executive, which has failed to invoke it.⁴⁰

32 Section 13 of the Copyright Act expressly empowers the Minister to craft exceptions in respect of the reproduction of works. It reads:

“In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.” (our emphasis)

33 It must be read with section 39(a), which says:

“The Minister may make regulations as to any matter required or permitted by this Act to be prescribed by regulation”. (our emphasis)

34 Read together, these provisions plainly entitle the Minister to enact regulations that would permit the reproduction of works into accessible format copies for use by print-disabled people. The fact that the Act does not enact an outright prohibition and

³⁸ See, for example, Blind SA HOA p 36 para 89.

³⁹ See Blind SA HOA pp 23-41 paras 52-102.

⁴⁰ Dean affidavit p 26 para 65.

wholly impede access to copyrighted works by print-disabled people is, we submit, sufficient to save it from constitutional invalidity.⁴¹

35 Indeed, properly interpreted, sections 13 and 39 of the Copyright Act oblige the Minister to promulgate regulations to provide access to print-disabled people, in accordance with the three-step test:

35.1 Although section 39 says the Minister “*may*” make regulations, it makes it clear that certain matters are “*required*” to be regulated under the Act. Section 13, in turn, envisages that additional reproductions “*shall*” be permitted, in regulated circumstances.

35.2 Our Courts have long held that statutory provisions framed in apparently discretionary language may impose a power coupled with a duty.⁴² In the frequently cited House of Lords decision in *Julius v The Lord Bishop of Oxford*, Earl Cairns LC explained that:

“There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom power is reposed

⁴¹ See, by analogy, *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC) at para 48 (per Kondile AJ for the majority) and paras 126-131 (per Sachs J concurring), finding that the availability of an exemption that permitted refugees to be registered as private security providers meant that it was not unconstitutional.

⁴² *Veriava and Others v President, SA Medical and Dental Council and Others* 1985 (2) SA 293 (T) at 310 -311; *Diepsloot Residents’ and Landowners’ Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) 348D-F; *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) paras 67-70.

to exercise that power when called upon to do so.⁴³ (our emphasis)

35.3 The upshot of this principle is that the word "may" in a statute can mean "must", in appropriate circumstances.

35.4 A court will invariably adopt such an interpretation where the conferral of a discretion (rather than the imposition of a duty) is constitutionally problematic.

So, for example:

35.4.1 In *S v Van Rooyen*⁴⁴ the Constitutional Court interpreted the word "may" in section 13(3)(aA) of the Magistrates Act. The Court addressed whether the Minister has a discretion to confirm a recommendation by the Magistrates' Commission that a magistrate be suspended. The Court held that interpreting "may" to confer a discretion on the Minister would not be consistent with the constitutional principle of judicial independence.⁴⁵

35.4.2 Similarly, in *Saidi v Minister of Home Affairs*,⁴⁶ this Court interpreted section 22(3) of the Refugees Act 130 of 1998 – which provided that a refugee reception officer "*may from time to time extend the period*" of an asylum seekers' permit to live and work in the country –

⁴³ *Julius v The Lord Bishop of Oxford* (1879-80) 5 AC 214 (HL) at p 222-223, cited in *Veriava* at 310; *Diepsloot Residents' and Landowners' Association* p 348.

⁴⁴ *S and others v Van Rooyen and others* (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC).

⁴⁵ *Van Rooyen* para 178.

⁴⁶ *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC).

imposed a mandatory duty on the officer to do so, rather than a discretion.⁴⁷

35.5 We submit that sections 13 and 39 must similarly be interpreted to impose a duty on the Minister to enact regulations that protect and promote the rights of print-disabled persons. Those rights, and the state's obligation to respect, protect, promote and fulfil them,⁴⁸ elevates the meaning of “*may*” to “*must*”, in the context of the exceptions that are “*required*” under the Act and which “*shall*” be prescribed under section 13.

36 In short, the Copyright Act permits of exceptions that would enable print-disabled people to access to accessible format copies of copyright works, and is not unconstitutional.

37 By way of an analogous example:

37.1 The regulations already promulgated under section 13 of the Copyright Act provide that multiple copies (not exceeding one copy per pupil) of a copyright work may be made for or by a teacher for class-room use or discussions.⁴⁹

37.2 In the absence of such regulation, our copyright regime would be wholly inadequate to give effect to the right to basic education (entrenched in section 29(1)(a) of the Constitution). That would not, however, render the Copyright

⁴⁷ *Saidi* para 18. (At paragraph 28 of the judgment, Madlanga J also emphasised that this interpretation was mandated by section 39(2) of the Constitution)

⁴⁸ Entrenched in section 7(2) of the Constitution.

⁴⁹ Regulation 7 of the Copyright Regulations, GN 2530 in GG 6252 of 22 December 1978, as amended.

Act unconstitutional. Instead, it would result in an imminent need for the Minister to comply with the obligation to prescribe the constitutionally-required exception.

38 The same is true of the current inadequacy of the copyright regime insofar as access to copyright works for print disabled persons is concerned.

An exception is not unconstitutional

39 Blind SA argues that an exception introduced in terms of section 13 would be unconstitutional because it would amount to an impermissible delegation to the Minister of an original legislative power.⁵⁰

40 But that is not so. The starting point is that Parliament can – and frequently does – delegate legislative-making functions. As this Court found in *Executive Council, Western Cape*:

“In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.”⁵¹

⁵⁰ See Blind SA HOA pp 18-20 para 41-44.

⁵¹ *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) para 51. The passage has repeatedly been quoted with approval: see, for example, *Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC) para 19; *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) para 53; *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) para 105; *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* (22311/2020) [2021] ZAGPPHC 168 (24 March 2021) para 35

- 41 There is consequently nothing impermissible in an executive functionary making binding rules to give effect to its legislative purpose, where s/he is authorised to do so by the relevant legislative.⁵² That is necessary to ensure responsive and effective law-making. Delegation of the law-making powers is particularly apposite “*where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them all in advance*”.⁵³
- 42 That said, the Constitution *does* preclude the legislature from assigning its plenary legislative power to another body and thereby abdicating its functions,⁵⁴ and from delegating its powers so broadly that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred.⁵⁵ Whether a delegation is permissible will depend, among others, on the nature and ambit of the delegation, the identity of the person to whom the delegation is made, and the subject matter delegated.⁵⁶
- 43 In this instance, the Copyright Act specifies a closed list of exceptions to restricted activities.⁵⁷ Through section 13, it then delegates the power to the Minister to create additional special exceptions by regulation, but requires that such exceptions comply with the three-step test. The delegation was enacted to cater for the possibility that

⁵² *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC); para 49.

⁵³ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 32-33.

⁵⁴ *Executive Council, Western Cape* paras 35, 137 and 141; *Smit v Minister of Justice and Correctional Services and Others* 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) paras 31-33.

⁵⁵ *Affordable Medicines* para 34.

⁵⁶ *Mpumalanga Bill* para 19; *Democratic Alliance* para 35.

⁵⁷ See sections 12 and 14 to 19B of the Copyright Act.

further unforeseen exemptions might become necessary, over time, to keep the Act in tune with modern requirements.⁵⁸

44 Section 13 thus delegates a narrow power with a specified ambit to an appropriate functionary for a particular, legitimate purpose. That is a lawful, constrained delegation. It does not entail the impermissible delegation of a plenary power, and is not unconstitutional.

45 Indeed, the Minister has used the section 13 power widely, to create exceptions for reproductions by libraries or archives,⁵⁹ multiple copying by libraries and archives,⁶⁰ multiple copies for classroom use,⁶¹ reproductions for teachers,⁶² and reproductions of building plans by local authorities.⁶³

46 None of these regulations has ever been challenged as the product of an impermissible delegation. There is no reason to believe that an exception to cater for print-disabled people would be.

The exception is adequate

47 Blind SA also submits that a section 13 exception would be inadequate because it only permits reproduction of a work whereas, according to it:

47.1 Accessible format shifting may require adaption;⁶⁴

⁵⁸ Dean affidavit p 23 para 55.

⁵⁹ Regulation 3 of the Copyright Regulations.

⁶⁰ Regulation 4.

⁶¹ Regulation 7.

⁶² Regulation 8.

⁶³ Regulation 9A.

⁶⁴ Blind SA HOA pp 20-21 para 35-36.

47.2 The import and export of accessible format copies would require distribution and, potentially, broadcasting and transmission;⁶⁵ and

47.3 There is no power to make regulations dealing with unpublished works.⁶⁶

48 Each of these complaints is misplaced.

49 First, an exception permitting (only) reproduction of copyrighted works would be sufficient to enable conversion of works to accessible use format.⁶⁷ That is because:

49.1 The provisions of the Copyright Act that deal with restricted acts consistently prohibit the unauthorised reproduction of works “*in any manner or form*”.⁶⁸

49.2 “*Reproduction*” is broadly defined to mean:

- “(a) *a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;*
- (b) *an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;*
- (c) *any work, includes a reproduction made from a reproduction of that work”.*

49.3 Reproduction incorporates the making of any derivative version where the reproducer does not add any contribution of their own, or change the ideological content of the work. It expressly includes a change of format or medium.

⁶⁵ Blind SA HOA p 21-22 para 47-50

⁶⁶ Blind SA HOA p 18 para 40.

⁶⁷ See, in this regard, Dean *Handbook of South African Copyright Law*’ Revision Service 15 [30 September 2015], Juta at 8.5.8, 8.4 and 3.3.

⁶⁸ See, for example, section 6(a) in respect of literary and musical works, and section 7(a) in respect of artistic works.

49.4 Conversion to an accessible use format – for example, braille – entails the reproduction of an existing work into a different format. There is no change to the ideological content of the original work in any way. It is, in essence, a mechanical process which seeks to present the exact original work in a new form.

49.5 By contrast, “*adaptation*”⁶⁹ requires the person making the adaption to embroider on, or transform, the original work by making their own ideological contribution. It results in a version which is a new work, but which is based substantially on an existing work. A translation provides a good example: in giving expression to a work in a different language and syntax but retaining the essence of its ideological content, the translator changes or converts the work and creates a unique new work. The translation is an adaption, not a reproduction.

50 Simply put, format shifting only entails reproduction and thus does not require a broader exception than that permitted by section 13. Tellingly, article 4(1)(a) of the Marrakesh Treaty expressly requires State parties to provide for an exception to the right of reproduction, but is silent on the right of adaptation.⁷⁰ This is confirmation that WIPO regards reproduction (and not adaptation) as the relevant activity.

⁶⁹ Section 1 of the Copyright Act defines “adaptation”, in relation to a literary works, to include:
 “(i) *in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;*
 (ii) *in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;*
 (iii) *a translation of the work; or*
 (iv) *a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical”*

⁷⁰ Article 4(1)(a) states:

51 Second, an exception permitting reproduction would also allow the parallel importation of accessible format copies.⁷¹

51.1 Section 23 of the Copyright Act deals with infringements. It states:

“(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize.”

(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work—

(a) imports an article into the Republic for a purpose other than for his private and domestic use;

(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;

(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or

(d) acquires an article relating to a computer program in the Republic,

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.” (our emphasis)

51.2 Section 23(2) makes clear that import and distribution only give rise to an infringement if they are undertaken in respect of an infringing copy. They are not self-standing violations of the Act.

“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 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.”

⁷¹ See, in this regard, Dean *Handbook of South African Copyright Law*’ Revision Service 15 [30 September 2015], Juta at 8.12 to 8.14.

51.3 To test whether work constitutes an infringing copy, the court must postulate that the actual (foreign) maker of the article hypothetically made the article in South Africa, and then assess whether it was lawfully permitted to do so.⁷² That boils down to an enquiry whether the foreign maker of the reproduction held a licence to make copies under the South African reproduction right. Whether or not an infringement arises will thus turn on whether reproduction of the copyright work was permitted, or not. If the reproduction was authorized, the article can be dealt with legitimately under the Copyright Act.

51.4 An exception that permits reproduction for the purposes of creating accessible use formats for print-disabled people would suffice to render those copies non-infringing, and thus to permit their import and distribution. The copy in question would not be an infringing copy in South Africa because it would be made by someone authorized by South African law to make it.

51.5 The only further requirement, to comply with article 5 of the Marrakesh Treaty, would be to restrict the parties to whom those copies can be restricted to “authorized entities”. The proposed regulation duly provides for that.

52 Third, there is nothing constitutionally problematic in withholding the right to publish and/or reproduce an unpublished work from a print-disabled person. It is for the author or copyright owner to decide whether, when and where her work should be published.

⁷² *Frank & Hirsch (Pty) Ltd v a Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A) at 285F-286E.

The Marrakesh Treaty makes no provision for first publication of unpublished works under its rubric.

53 We accordingly submit that an exception created in terms of section 13 is adequate to meet the needs of print-disabled people, and to comply with the requirements of the Marrakesh Treaty.

Summation

54 For all these reasons, we submit that:

54.1 The Copyright Act does not preclude access to accessible format copies by print-disabled people, and is not unconstitutional. Accordingly, a reading-in is unnecessary and inappropriate.⁷³

54.2 The lacuna arises instead from the Minister's failure to promulgate regulations in terms of section 13. The defect should be remedied by compelling the Minister to enact appropriate regulations.

55 For convenience, Prof. Dean has proposed wording for an appropriate regulation that would remedy that defect.⁷⁴ It cleaves as closely as possible to the language of the Marrakesh Treaty⁷⁵ – and its terms show the degree of complexity and nuance that is

⁷³ See *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) para 24, where Ackermann J said a reading in “*can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid*”

⁷⁴ See Proposed Regulation, annexure OHD1 pp 49-51.

⁷⁵ See Dean affidavit pp 43-46 para 115-127.

required to enact a compliant exception. We respectfully submit that it is more appropriately enacted by way of regulation than through a reading-in by this Court.

READING IN SECTION 19D IS INAPPROPRIATE

56 If this Court decides the Copyright Act is incapable of a constitutionally compliant interpretation (despite what is set out above), we submit that it would be inappropriate to read-in the proposed section 19D to remedy that defect. That is so for three reasons:

56.1 First, the provision is not uncontroversial;

56.2 Second, it is not effective and operable; and

56.3 Third, it is at odds with the Marrakesh Treaty and other international instruments.

57 We deal with each in turn.

Section 19D is not uncontroversial

58 As the Minister's heads of argument set out,⁷⁶ reading in entails an incursion by the Court into the legislative sphere, and may therefore violate the proper separation of powers. The Court "*should be slow to make those choices which are primarily choices suitable for the legislature*".⁷⁷ The Court will generally only read-in a provision where its terms are narrow and uncontroversial.

⁷⁶ Minister's HOA pp 15-17 paras 29-33.

⁷⁷ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 84

- 59 Blind SA asserts that section 19D is uncontroversial.⁷⁸ That is clearly not so. This Court granted the *amicus* leave to introduce three documents into evidence.⁷⁹ They are (i) an extract from a report by the Minister of Trade Industry and Competition, presented on 9 November 2021 to the Portfolio Committee, to which we have already made reference; (ii) an extract from a report of the Parliamentary Legal Advisory to the Portfolio Committee, dated 12 November 2021; and (iii) a draft rewording of the section 19D, published for comment by the Portfolio Committee on 3 December 2021.
- 60 The existence of these document demonstrates that section 19D is the subject of ongoing parliamentary debates, critiques and proposed edits. The Minister has also confirmed as much.⁸⁰
- 61 In the circumstances, reading the provision in would unduly encroach on the role of the legislature and violate the proper separation of powers.

Section 19D is vague and ineffective

- 62 Constitutional remedies must be effective.⁸¹ The rule of law requires that the reading in of words yields reasonable certainty as to what is required by those bound to a provision, so that they can regulate their conduct accordingly.⁸²
- 63 Section 19D does not meet these standards. If read in, it will be ineffective and vague.

That is so for two reasons:

⁷⁸ FA in confirmation application, vol 5 p 440 para 7.

⁷⁹ They are annexed to Dean's Affidavit as annexures OHD7, OHD8 and OHD9 respectively.

⁸⁰ Minister's HOA pp 13-14 para 26.

⁸¹ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 45

⁸² *Affordable Medicines* para 108

63.1 First, it uses broad and undefined terminology; and

63.2 Second, it is not self-executing. It requires further steps by the Minister to become operative.

The use of broad, undefined terms

64 The Marrakesh Treaty contains detailed definitions of its important terms.⁸³ Section 19D contains none.

64.1 Article 2(a) of the Marrakesh Treaty defines “works” as “*literary and artistic works within the meaning of Article 2(1) of the Berne Convention*”. Section 19D, however, contains no definition of “works”. As a result, if section 19D were read into the Copyright Act, the word “work” would bear the meaning assigned to it in section 2(1) of the Act.⁸⁴ That definition is far wider than the definition in the Marrakesh Treaty. In consequence, section 19D would, if read-in, create exceptions which go far beyond the reach of the Marrakesh Treaty.

⁸³ See articles 2-3, Marrakesh Treaty.

⁸⁴ Section 1 defines a “work” as “*a work contemplated in section 2*”. Section 2(1) states:
“*Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright—*
(a) *literary works;*
(b) *musical works;*
(c) *artistic works;*
(d) *cinematograph films;*
(e) *sound recordings;*
(f) *broadcasts;*
(g) *programme-carrying signals;*
(h) *published editions;*
(i) *computer programs.*”

64.2 Section 19D also uses the terms “*accessible format copy*”; “*person with disability*” and a person who “*serves persons with disabilities*”, without defining any of these terms. (The first is defined in section 1 of the Bill, but that definition is not to be read in to the Copyright Act.) With those terms undefined, section 19D makes little sense and is impermissibly vague.

65 Blind SA’s proposes two purported solutions to this problem.⁸⁵ It submits that the Court can either have regard “*to the relevant definitions in the Marrakesh VIP Treaty and the Convention on the Rights of Persons with Disabilities (“CRPD”)*” or it can itself provide particular meanings for those terms.

66 Implicit in its suggestions is an acknowledgement that the meanings of the words in section 19D are vague and uncertain. But neither provides an adequate solution:

66.1 The international treaties in question are not self-executing and their provisions accordingly cannot simply be incorporated and treated as law in South Africa.

66.2 In any event, the Treaty definitions are clearly inapposite under the rubric of section 19D:

66.2.1 The Marrakesh Treaty’s definition of “*accessible format copy*” is more limited than the definition in section 1 of the Bill. The Treaty’s definition specifies that the accessible format copy “*is used*

⁸⁵ Blind SA HOA pp 46-8 paras 115-119.

exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons". The Bill contains no such limitation.

66.2.2 The Marrakesh Treaty does not use or define the terms "*person with disability*" or a person "*serving a person with disabilities*". Rather, it contains an intricate definition of the terms "*beneficiary person*" and "*authorized entities*" (which are defined as entities authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis). Those terms are distinct from, and narrower than, the terms used in section 19D.

66.2.3 The CRPD defines "*persons with disabilities*" to include those who "*have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*".⁸⁶ That term has a far wider meaning than a beneficiary person under the Marrakesh Treaty. Utilising it in the context of section 19D

⁸⁶ Convention on the Rights of Persons with Disabilities, Article 1

would consequently extend its reach far beyond that of the Treaty and international copyright law.

66.3 Adopting the Marrakesh Treaty or CRPD definitions would not give effect to (what Blind SA claims is) the intention of the Legislature.⁸⁷

66.4 Nor can this Court, in the context of a reading-in, craft definitions for previously undefined terms. Doing so would clearly be to assume a legislative role, and violate the separation of powers.

67 Section 19D is thus unduly vague and unenforceable.

Section 19D is inoperative

68 Section 19D says that, provided listed conditions are met:

“Any person as may be prescribed and that serves persons with disabilities may, without authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives.”
(our emphasis)

69 No person that “serves persons with disabilities” is entitled to utilise the exemption until they have been designated as such by the Minister. As a result, section 19D, if

⁸⁷ The issue of section 19D’s overly broad and undefined terminology forms part of the recent and live controversy surrounding that provision of the Bill. On 9 November 2021 the Minister noted that the Bill requires amendments to bring it into compliance with the Marrakesh Treaty, and proposed that the definitions of “accessible format copy” and “authorised entity”, as encapsulated in the Treaty, be inserted into section 19D: see Portfolio Committee report, Portfolio Committee report, annexure OHD7 pp 76-82; see also Dean affidavit p 28 para 75.1.

read-in, will be ineffective unless and until the Minister issues a notice or adopts regulations governing designation. The provision is not self-executing.

70 Blind SA, in its submissions before this Court, expresses concern over delays arising from the need for Ministerial regulation.⁸⁸ We merely note that if regulations *are* required for the legislative lacuna to be remedied, it is far preferable for them to be enacted pursuant to section 13 of the Copyright Act, rather than proposed section 19D.

Section 19D is at odds with the Marrakesh Treaty and other treaties

71 We have already detailed some of the respects in which section 19D is substantially more permissive than the regime under the Marrakesh Treaty.⁸⁹ Among others:

- it creates a wider categories of beneficiaries (including all persons with disabilities, and not just blind, visually impaired and print disabled people);
- it applies to all works amenable to copyright, and not just literary and artistic works within the meaning of Article 2(1) of the Berne Convention;
- it does not require accessible format copies to be used exclusively by beneficiary persons and to maintain the integrity of the original work;
- it allows accessible format copies to be made available to a person “*serving a person with disabilities*”, and not just to authorised entities or agents.

⁸⁸ Blind SA HOA p 20 para 44.

⁸⁹ Further flaws are detailed in Dean affidavit p 31-41 paras 80-107.

72 In addition, section 19D does not provide for the import and export of accessible format copies on the terms permitted by the Marrakesh Treaty:

72.1 Article 5 the Marrakesh Treaty provides for authorised entities to make copies of an exempted work in one State party for the benefit of a beneficiary in another. The exporting authority must have reasonable grounds for believing that the exempted copies will only be used by beneficiary persons in the importing country. Article 6 in turn permits authorised entities and beneficiary persons in an importing country to make use of exempted copies in the same way as domestically made exempted copies.

72.2 Section 19D(3) attempts to capture these provisions. It says:

“A person with a disability or a person that serves persons with disabilities may without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.”

72.3 But the provisions are not in fact analogous.

72.3.1 First, section 19D(3) allows export by a person that serves a person with disabilities and by a person with disability. However, the Treaty only allows an “authorised entity to export”. This makes sense, because the Treaty seeks to provide beneficiary persons with personal use of accessible format copy, and not with the ability to export that copy.

72.3.2 Even assuming that we could infer that “person with disability” means “beneficiary person” and “person that serves a person with disabilities” means “authorised entity”, as those terms are defined in the Treaty, section 19D(3) still goes far beyond the Treaty’s provisions.

72.3.3 Second, section 19D(3) lacks the Treaty’s limiting requirement that the exporter must have reasonable grounds for believing that the exempted copies will only be used by beneficiary persons in the importing country. In recognition of this problem, this limitation has been introduced in a recent proposed amended draft section 19D, produced by the Portfolio Committee and which the *amicus* has introduced into evidence in this Court.⁹⁰

72.3.4 The equivalent limitation on use in the importing country is also lacking in section 19D(3).

73 In short, section 19D is not compliant with the terms of the Marrakesh Treaty, and will not promote South Africa’s accession to it. By Blind SA’s own account, that is one of the central objectives it seeks to achieve through these proceedings.⁹¹

74 More than that, the regime introduced by section 19D does not meet the requirements of the three-step test, and is consequently in breach of the Berne Convention and of

⁹⁰ Draft provision, annexure OHD9 p 96.

⁹¹ See, for example, Blind SA HOA p 12 para 22.

TRIPS. (In the *amicus*' submission, a violation of the three-step test would, in these circumstances, also constitute an unjustifiable limitation on the copyright owner's constitutional right to property.)

75 In addition, section 19D(4) purports to make the implementation of the moral right of paternity of the work's original author conditional upon it being practicable. That is a violation of the Berne Convention.⁹²

76 Section 19D is, in short, entirely at odds with the international copyright regime, and risks placing South Africa in breach of its treaty obligations.

Summation

77 We accordingly submit that reading section 19D into the Copyright Act – whether permanently or on an interim basis – is not a just and equitable remedy.

⁹² Berne Convention, Article 6*bis*

CONCLUSION

78 In sum, the *amicus* submits that:

78.1 A constitutionally sound interpretation of the Copyright Act requires the Minister to adopt regulations in terms of section 13, encapsulating the exception in the Marrakesh Treaty.

78.2 If the Court disagrees and finds that the Copyright Act is underinclusive and consequently unconstitutional, it should read in a temporary provision that is immediately operative and which, unlike section 19D, conforms to the Marrakesh Treaty.

79 In either case, Prof. Dean submits that a copyright regime which properly captures the noble goals of the Marrakesh Treaty, while protecting the constitutional rights of authors and copyright owners, and respecting international law, is readily available. It is encapsulated in the proposed regulation attached to his affidavit.⁹³

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11 March 2022**

⁹³ Proposed regulation, annexure OHD1 pp 49-51.

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