

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

First *Amicus Curiae*

MEDIA MONITORING AFRICA GROUP

Second *Amicus Curiae*

INTERNATIONAL COMMISSION OF JURISTS

Third *Amicus Curiae*

**FIRST AMICUS CURIAE'S RESPONSE TO THE SECOND AMICUS
CURIAE'S SUBMISSIONS**

INTRODUCTION

1 On 23 March 2022, the second *amicus curiae*, Media Monitoring Africa Group (“**MMA**”), filed written submissions supporting the reading-in of proposed section 19D into the Copyright Act. It contends, among others, that comparative foreign law supports such relief since “*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 print and visual disabilities*”. It then provides four illustrative examples – from Canada, the UK, Brazil and Uganda.¹

2 In doing so, MMA introduces new evidence before this Court.² If the Court is to have regard to such evidence, then the first *amicus curiae* wishes to make two submissions in response:

2.1 First, comparative jurisdictions that permit broad legislative exceptions routinely impose additional accompanying requirements. The Court must have regard to the nuance and

¹ Second Amicus Curiae’s submissions, para 27, page 13-14. Notably, the second *amicus curiae* points out that the UK’s exception was introduced by way of regulation.

² Foreign law is a question of fact that must be proved: *The Asphalt Venture Windrush Intercontinental SA and another v UACC Bergshav Tankers As* 2017 (3) SA 1 (SCA) para 31; See also *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C) at 874E-G; *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G

particularity of such foreign-law exceptions in assessing the appropriateness of reading-in proposed section 19D.

2.2 Second, the parameters, operation, and accompanying requirements of wider legislative exceptions ought to be determined by the legislature, and not by a court's reading-in of a provision that is contentious³ and is not self-executing.⁴ That is all the more true in a case which has been brought on a particular basis – namely, the violation of the rights of blind, visually impaired and print-disabled persons.

THE FOREIGN EXCEPTIONS ARE NUANCED AND PARTICULAR

3 Professor Dean makes the point that the broad terms of proposed section 19D go beyond what Blind SA's case justifies. Rather than providing accessible format reproductions of print and text material to blind and visually impaired people, proposed section 19D extends to people with any type of disability, and applies to a wide category of works.

³ First Respondent's written submissions, para 26 pages 13-14; first amicus curiae's written submissions paras 59-61 pages 24-25

⁴ First amicus curiae's written submissions paras 68-69 pages 29-30

4 MMA seeks to justify the breadth of proposed section 19D with reference to comparative jurisdictions. It points to research by the World Intellectual Property Organisation (“**WIPO**”) indicating that:

- 23 countries have copyright legislation which provides exceptions in relation to print/text works for persons with visual disabilities;
- 28 countries have copyright legislation which provides exceptions for all disabilities; and
- 72 countries have copyright legislation that provides exceptions for unspecified works, or works that go beyond print/text for persons with visual disabilities.⁵

5 In this regard, MMA relies on a March 2019 WIPO study, authored by Blake Reid and Caroline Ncube and titled “Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities” (“**the 2019 Reid/Ncube report**”).⁶ That study was preceded by a 2017 study, also by Reid and Ncube (“**the 2017 Reid/Ncube report**”).⁷ We submit that the two studies must be read together.

⁵ Second Amicus Curiae’s submissions, para 28-29, page 14-15

⁶ 2017 Reid/Ncube Report, Available at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_3-executive_summary1.pdf (last accessed 7 April 2022)

⁷ 2019 Reid, Ncube Report, available at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf (last accessed 7 April 2022)

- 6 The 2017 Reid/Ncube report makes clear that “*the majority of the states imposed various types of conditions other than specific acts, specific disabilities or categories of copyright works on the exercise of limitations and exceptions*”.
- 7 Those conditions varied significantly between countries and were highly specific. They included “*restrictions on commercial use.; a lack of commercial availability of the relevant works in accessible formats; remuneration to the copyright owner, either as a matter of course or upon request; consistency with the three-step test; copyright management information requirements; and non-impact on existing markets for the works*”.⁸
- 8 Pages 28 to 30 of the 2017 Reid/Ncube report list a range of additional requirements relating to access, in different surveyed countries. By way of only a few examples:
- 8.1 In Brazil, the exception can only relate to non-profit purposes and the “*format must be in some medium designed for the specific beneficiaries*”.
- 8.2 Sweden requires, among other things, that the work has been made public and that copies may not be made for commercial

⁸ 2017 Reid/Ncube Report, page 3-4

purposes. *“In some cases remuneration to the author is required”*.

8.3 In the United Kingdom, *“copying is only permitted if accessible formats are not commercially available”* and *“distributors of such copies have a duty to keep records and provide such records to the copyright owner”*.

9 The 2019 Reid/Ncube report similarly sets out the scope of the copyright exception in each member state, if any, in relation to persons with disabilities. It shows that every member state that provides exceptions has a range of conditions that attach to their exercise.

10 Once again, those conditions are nuanced and specific. Where the exception caters not only for blind, visually impaired and print-disabled persons but extends also to other disabled people, WIPO member countries may impose conditions that extend beyond the scope of any requirements under the proposed section 19D.

11 Merely by way of example:

11.1 Germany provides exceptions for *“persons whose access to the work, because of a disability, is not possible or is made considerably more difficult by the already available means of sensual perception”*. Its exceptions are limited by the conditions that they cannot be for profit; remuneration must be paid to the

original author if more than one copy is made or distributed; an accessible version of the work must be unavailable; and the source or publishing house, if known, must be indicated.⁹

11.2 In Singapore, where exceptions are made in respect of visual, intellectual and reading disabilities, those exceptions are subject to the conditions that use cannot be for profit; accessible format copy of the original work must be unavailable; and equitable remuneration must be paid upon request to the copyright owner.¹⁰

11.3 Spain has exceptions for people with visual, reading and physical disabilities. In addition to a non-profit requirement, those exceptions must be for the benefit of people with disabilities and “*be directly tailored to those disabilities*”.¹¹

11.4 In Thailand, exceptions are permitted for access for persons who are deaf, visually impaired, physically disabled, or cognitively or intellectually disabled. Those exceptions cannot be employed for profit and, in terms that echo the three-step test, “*shall not conflict with the normal exploitation of the copyright work by the copyright*

⁹ 2019 Reid/Ncube report, table of countries, page 52

¹⁰ 2019 Reid/Ncube report, table of countries, page 109

¹¹ 2019 Reid/Ncube report, table of countries, page 113

owner and shall not unreasonably prejudice the legitimate rights of the owner”.

- 12 Thus, while the 2019 Reid/Ncube report found that more than half of WIPO member states have “*some sort of exception for disabilities written into their copyright laws*” and that, of those members, a third provide exceptions that cover all disabilities,¹² those exceptions are nuanced and specific, and are subject to a range of limitations to ensure compliance with the three-step test and to provide adequate protection to the rights of copyright holders and authors. Proposed section 19D does not provide equivalent safeguards.

READING-IN SECTION 19D IS INAPPROPRIATE

- 13 It is common cause among all the parties to these proceedings that an exception to the copyright regime must be developed that facilitates access to copyright works by blind, visually impaired and otherwise print-disabled people, based on the framework in the Marrakesh Treaty. That is the beneficiary class on whose behalf this application was brought.
- 14 No case has been made out, on the papers, for broad copyright exceptions for people with other kinds of disabilities. If that case had

¹² 2019 Reid/Ncube report, page 10

been brought, evidence would have been ventilated about the nature of exceptions required to address different categories of disability, and how they could be crafted to comply with international law and the three-step test. Those issues have simply not been meaningfully canvassed in these proceedings.

- 15 Section 19D proposes to introduce exceptions beyond those envisaged and sanctioned by Marrakesh – but without a case having been made out for them and without including the limitations that ordinarily accompany such broad exceptions. The result is that provisions which deal with principles that are peculiar to Marrakesh (and the needs of blind and visually impaired people) – for instance, those pertaining to cross-border exchanges – are made applicable to the situation of all disabled persons, whoever they may be, when they are not necessarily germane to or needed by those broader categories of persons. In short, section 19D introduces a one-size-fits-all approach where nuance is required.
- 16 If exceptions that go beyond the scope of the Marrakesh Treaty (and beyond the scope of this application) are to be adopted, that must be done by the Legislature, in line with the three-step test. With respect, broad exceptions ought not be introduced by this Court in the present proceedings, and not under the rubric of proposed section 19D.

- 17 Reading-in proposed section 19D is inappropriate on this basis alone.
- 18 Such reading-in is made all the more inappropriate for three additional reasons already traversed in our main heads of argument:
 - 18.1 First, proposed section 19D uses a range of undefined terms and is thus uncertain. It is also inoperative without the adoption of regulations.
 - 18.2 Second, it has not been adopted in accordance with the three-step test and consequently does not adequately take account of the rights of property holders (protected under section 25 of the Constitution).
 - 18.3 Third, it purports to make the implementation of the moral right of paternity of the work's original author conditional upon it being practicable, in violation of the Berne Convention.
 - 18.4 Fourth, it is the subject of controversy and ongoing legislative debate.
- 19 In contrast, the promulgation of regulations on terms akin to those proposed by Professor Dean is uncontroversial, and wholly appropriate. That remedy reflects the meaning of the Marrakesh Treaty – which in turn is compliant with the Berne Convention and the three-step test – without seeking to broaden exceptions in the absence of the legislature.

20 Once that regime is in place, there is nothing to prevent the legislature adopting further exceptions, within the framework of the Constitution and international law, should it determine to go beyond the scope of the Marrakesh Treaty.

CONCLUSION

21 If the Court determines to consider the comparative foreign regimes introduced by MMA, it must have regard to the nuances of the exceptions that they have adopted. Comparative foreign law shows that broad copyright exceptions are invariably accompanied by conditions and limitations on their exercise, which proposed section 19D lacks.

22 Moreover, it is for the legislature to determine whether and how to introduce copyright exceptions that extend beyond the terms of the Marrakesh Treaty and assist other beneficiary classes. That is not an issue before this Court in these proceedings.

23 The first *amicus curiae* accordingly persists in contending that it is inappropriate to read-in proposed section 19D.

ISABEL GOODMAN
DANIEL LINDE
Chambers, Sandton
8 April 2022

First *Amicus Curiae*'s Additional Table of Authorities

Cases

The Asphalt Venture Windrush Intercontinental SA and another v UACC Bergshav Tankers As 2017 (3) SA 1 (SCA)

Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen 1986 (4) SA 865 (C)

Schlesinger v Commissioner for Inland Revenue 1964 (3) SA 389 (A) at 396G

Studies World Intellectual Property Organisation

Blake Reid and Caroline Ncube *Scoping Study on Access to Copyright Protected Works by Persons with Disabilities* 5 November 2017 (Standing Committee on Copyright and Related Rights)

Blake Reid and Caroline Ncube *Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities* 13 March 2019 (Standing Committee on Copyright and Related Rights)