IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case no.: CCT 320/21
HC case no. 14996/21

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

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 At its core, this application concerns the failure of the Copyright Act 98 of 1978 to include universally-accepted provisions designed to ensure that persons with visual and print disabilities can access works under copyright.[1] Without such provisions, access to works under copyright is extremely onerous for people with visual and print disabilities, and often near impossible. This is because of the monopoly granted by copyright to the creators of works over their use.[2]

2 In particular, this case concerns the state's failure, thus far, to legislate 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 VIP Treaty"), an international agreement that expressly recognises, and seeks to address, copyright barriers to access.[3] The irony is that the state has clearly stated its intention to legislate in this way.

2.1 South Africa has indicated its intention to be bound by the treaty;[4] and

2.2 On 28 March 2019, Parliament passed the Copyright Amendment Bill [B 13B—2017] ("the CAB"), which recognises exceptions for people

[1] The phrase *"persons with visual and print disabilities"* is used to refer to all persons who fall within the scope of the definition of a *"beneficiary person"* in Article 3 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ("the Marrakesh VIP Treaty"). See founding affidavit, para 16, p 11
[2] Founding affidavit, para 15, p 11
[3] Founding affidavit, annexure FA4, pp 59-69
[4] Founding affidavit, para 17, p 12

with disabilities through the proposed introduction to the Copyright Act of a new section 19D.[5]

3 As adopted, the proposed new section made provision for certain persons –

3.1 *"without the authorization of the copyright owner, [to] make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a 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"*, provided certain conditions were met;[6]

3.2 *"to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) ..., without the authorization of the owner of the copyright work, [to] reproduce the work for personal use"*;[7] and

3.3 *"without the authorization of the copyright owner [to] export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1)"*, subject to certain conditions.[8]

[5] Founding affidavit, para 52, p 23. The text of proposed new section 19D is quoted in full in the judgment *a quo* at para 10, pp 522-523.
[6] Proposed new section 19D(1)
[7] Proposed new section 19D(2)(a)
[8] Proposed new sections 19D(3) and (4)

4 Put simply, proposed new section 19D would allow for accessible format copies to be made, for copies of such adaptations to be made for personal use, and for the import and export of accessible format copies.

5 Clause 1(a) of the CAB seeks to define an accessible format copy as –

> *"a copy of a work in an alternative manner or form, which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without a disability".*

6 According to clause 1(h), a person with a disability is to be defined as –

> *"a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability".*

7 In terms of Article 2(b) of the Marrakesh VIP Treaty, on which the definition in the CAB is based, an accessible format copy is –

> *"a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability."*

8 The definition continues:

> *"The accessible format copy is used 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".*

9 What is a beneficiary person? Article 3 explains:[9]

> *"A beneficiary person is a person who:*
>
> *(a) is blind;*
>
> *(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or*[10]
>
> *(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;*
>
> *regardless of any other disabilities."*

10 What the CAB and the treaty therefore contemplate are exceptions to copyright law that would allow not only blind and visually impaired people, but also people with other disabilities that preclude them from reading works under copyright in their published forms, to access such works in formats that are appropriate for their particular disabilities. Such accessible format copies could be made locally and/or imported from where they are lawfully made.

11 The problem is that the legislative process is inchoate. Acting in terms of section 79(1) of the Constitution, the President referred the CAB back to the National

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[9] Footnote in original

[10] ***Agreed statement concerning Article 3(b):*** *Nothing in this language implies that "cannot be improved" requires the use of all possible medical diagnostic procedures and treatments.*

Assembly for reconsideration on 16 June 2020, more than a year after it had completed its passage through Parliament.[11] As matters stand, almost two years later, the National Assembly's decision to pass the CAB on 5 December 2018 has been rescinded,[12] and the CAB has been retagged as a section 76 bill.[13]

12 The result is that proposed new section 19D, which is neither controversial nor the subject of any particular reservation raised by the President, is effectively held hostage pending the outcome of an ongoing, lengthy legislative process.[14] This has a particularly pernicious and discriminatory impact on persons with visual and print disabilities, whose rights – including to equality and dignity – continue to be violated while the fight over other provisions in the CAB drags on.[15]

13 The main purpose of this application is therefore to ensure that people with visual and print disabilities are able to access works under copyright, in the manner contemplated by the proposed new section 19D, without having to await the final enactment (and subsequent coming into force) of the full set of amendments to the Copyright Act, in whatever form they may ultimately take.[16] The repeated delays to the CAB coming into force serve only to perpetuate an unconstitutional state of affairs for persons living with visual and print disabilities.

14 In what follows below, we deal with the following nine topics in turn:

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[11] Founding affidavit, para 18, p 12
[12] Supplementary affidavit, para 34, p 358
[13] Further supplementary affidavit, para 8, p 420
[14] See, for example, supplementary affidavit, paras 39 – 40, p 359
[15] Founding affidavit, para 21, p 13
[16] Founding affidavit, para 24, p 14

14.1 First, the applicant's standing to bring this application;

14.2 Second, developments following the President's decision to refer the CAB back to Parliament;

14.3 Third, the practical implications of the Marrakesh VIP Treaty for people with visual and print disabilities;

14.4 Fourth, an analysis of the Copyright Act as it currently reads, and how it impedes access to works under copyright for persons with visual and print disabilities;

14.5 Fifth, why section 13 of the Copyright Act, which makes provision for certain general exceptions to be prescribed by regulation, does not assist;

14.6 Sixth, the manner in, and the extent to which, the Copyright Act unfairly discriminates against persons with visual and print disabilities, and unjustifiably limits their rights;

14.7 Seventh, why the limitations of these rights cannot be justified in terms of section 36(1) of the Constitution;

14.8 Eighth, appropriate relief; and

14.9 Finally, the issue of costs.

STANDING

15 As a non-profit organisation dedicated to promoting the interests of blind people in South Africa,[17] Blind SA has standing to bring this application in the following three capacities:[18]

15.1 First, in the interest of individual members of its member organisations, in terms of section 38(e) of the Constitution;

15.2 Second, in the interest of people with visual and print disabilities, including but not limited to persons who are blind, who are not members of Blind SA's member organisations, in terms of section 38(c) of the Constitution; and

15.3 Third, in the public interest, in terms of section 38(d) of the Constitution.

DEVELOPMENTS FOLLOWING THE PRESIDENT'S DECISION

16 In his letter to the Speaker of the National Assembly dated 16 June 2020, the President identified a number of concerns relating to the constitutionality of the CAB.[19] At no point, however, did he make any mention of proposed new section

[17] Founding affidavit, para 7, p 9
[18] Founding affidavit, para 8, p 9
[19] Founding affidavit, para 57, pp 24-25

19D. In referring the CAB back to the National Assembly, he cited various reasons underpinning his reservations; none of these implicates section 19D.[20]

17 The public process to consider the President's reservations only began almost 11 months later, on 5 May 2021, when the Portfolio Committee on Trade and Industry ("the Portfolio Committee") was briefed by Parliament's Office of Constitutional and Legal Services.[21] By 14 May 2021, the Portfolio Committee had adopted a report that made various recommendations to the National Assembly on the way forward.[22]

18 On 1 June 2021, the Portfolio Committee's report was debated in, and adopted by, the National Assembly.[23] On 4 June 2021, stakeholders and other interested parties were invited to make written submissions on particular clauses of the CAB.[24] Quite correctly, no input was sought on proposed new section 19D.[25] Written submissions were due by 9 July 2021, with public hearings being scheduled for 4 and 5 August 2021.[26]

19 Parliament's Joint Tagging Mechanism has taken a decision to retag the CAB as a section 76 bill, effectively adopting the Portfolio Committee's recommendation in this regard. The papers explain what this means for the CAB's passage through Parliament, having originally been processed as a section 75 bill.[27] While there

[20] See founding affidavit, para 58, pp 25-26
[21] Supplementary affidavit, paras 26 – 27, pp 355-356
[22] Supplementary affidavit, paras 28 – 30, pp 356-367
[23] Supplementary affidavit, paras 33 – 34, pp 357-358
[24] These are proposed new sections 12A – D, 19B, and 19C.
[25] Supplementary affidavit, paras 35 – 36, p 358
[26] Supplementary affidavit, para 37, pp 358-359
[27] Further supplementary affidavit, paras 9 – 10, pp 420-421

remains uncertainty as to what exactly may unfold, what is abundantly clear is that the ongoing process in Parliament is far from over.

PRACTICAL IMPLICATIONS OF THE MARRAKESH VIP TREATY

20 The Marrakesh VIP Treaty was adopted with the express purpose of facilitating access to works under copyright for persons with visual and print disabilities. Amongst other things, it makes provision for contracting parties – in their national copyright laws – to *"facilitate the availability of [literary and artistic] works in accessible format copies for beneficiary persons."*[28] It also enables contracting parties to facilitate the cross-border exchange of accessible format copies.[29]

21 The ground-breaking nature of the treaty was highlighted in the closing statement made on South Africa's behalf at the World Intellectual Property Organization ("WIPO") Diplomatic Conference in Marrakesh on 27 June 2013.[30]

> *"This treaty will have a meaningful impact on the lives of millions of blind and visually impaired persons both in the developed and developing world. The treaty will unlock access to education, news, cultural materials and entertainment.*
>
> ...
>
> *The Marrakesh Treaty will forever be remembered as the first WIPO treaty that reaffirms exceptions and limitations in the copyright regime, but also as a means to end the book famine that has long plagued people with visual impairment and print disabilities.*

[28] Founding affidavit, para 61, p 27. See, in particular, Article 4(1)(a)
[29] Article 5(1)
[30] Founding affidavit, para 64, pp 29-30

South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded."

22 This approach to the ratification of the Marrakesh VIP Treaty has remained consistent: unless and until the Copyright Act has been amended to give legislative effect to the treaty, it will not be ratified.[31] The key provision that is legislatively required to give effect to the treaty is the CAB's proposed new section 19D.[32] Since section 19D is universally accepted, delaying its entry into force on account of concerns relating to other (disputed) provisions, unreasonably and unjustifiably delays South Africa's accession to the Marrakesh VIP Treaty.

23 An important aspect of the treaty is that it makes cross-border exchange of works with a large number of states a meaningful possibility. It does not leave such matters at the mercy of contractual arrangements at the industry level and/or individual copyright holders' willingness to contract with authorised entities. Instead, it empowers states parties to exempt authorised entities from requiring copyright holders' permission to convert works into accessible format copies and engage seamlessly in cross-border exchange. Accession is therefore key.

THE ACT IMPEDES ACCESS TO WORKS UNDER COPYRIGHT

24 Copyright is a state-sponsored guarantee of market exclusivity that places a restraint on the unencumbered use of published works, including literary and

[31] Founding affidavit, para 66, pp 30-31
[32] Founding affidavit, para 68, p 31

cultural materials. The system of copyright puts near-exclusive control over the use of these works in the hands of the author, or the party to whom the author sells or licences the copyright, subject only to certain legislated exceptions and limitations.[33]

25 Section 2 of the Copyright Act lists the types of original works eligible for copyright, including literary works, artistic works, cinematograph films, sound recordings, and broadcasts. In respect of such works, copyright holders have near-exclusive control over their reproduction, publication, performance, broadcast, transmission, and/or adaptation. This control is subject to those exceptions and limitations provided in the Copyright Act and its regulations.

26 Copyright extends to literary works published in print, which includes books, magazines, periodicals, and articles, amongst others. Significantly, textbooks and other educational materials are also largely in the nature of printed works. Unless it falls within a legislated exception, or is authorised by the copyright holder, any use of such a work is considered as copyright infringement,[34] and – in addition to giving rise to ordinary civil remedies in the hands of the copyright holder – subjects the user to potential criminal sanction.[35]

27 The vast majority of books, both in South Africa and abroad, are published in print; they are not accessible to persons with visual and print disabilities.[36] WIPO

[33] Founding affidavit, para 72, p 32
[34] Section 23 of the Copyright Act
[35] Section 27 of the Copyright Act
[36] Founding affidavit, para 75, p 33

estimates that only one to seven percent of books are published in a format that the 285 million persons who are blind or visually impaired worldwide can read.[37]

28 Accessible formats include Braille, audio versions, and copies of published works in large print. For electronic versions, they include digital formats that enable the use of screen readers. They also include adding audio descriptions to films and broadcasts.[38] But such formats are clearly the exception, given WIPO's estimates that between 93 and 99 percent of books are published in inaccessible formats.

29 Given that the majority of books are not published in accessible formats, either of two things must happen for persons with visual and print disabilities to make and/or obtain accessible format copies: the legislative framework must provide an express exception for accessible format shifting, or persons with visual and print disabilities must contact every single author (or copyright holder) to secure authorisation to transform the works they desire into accessible formats. Such a process is costly, time-consuming, and without any guarantee of success.[39]

30 As the Copyright Act and its regulations currently read, there is no provision along the lines contemplated by the proposed new section 19D and the Marrakesh VIP Treaty. We are aware of the submission advanced by Professor Dean, who seeks admission as *amicus curiae*, that the general exception in section 13 allows

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[37] Founding affidavit, para 75, p 33. WIPO estimates that *"90% of [the 285 million] live on low incomes in developing and least developed countries."* According to Statistics South Africa, 11% of South Africa's population lives with visual disabilities – with 1.7% living with severe visual disabilities, and 9.3% living with mild visual disabilities. See founding affidavit, para 77, p 33

[38] Founding affidavit, para 78, pp 33-34

[39] Founding affidavit, paras 80-83, pp 34-35

for the type of exception contemplated by the treaty to be prescribed by regulation. But as we explain further below, this submission has no merit.

31 In practice, the Copyright Act effectively denies access to the vast majority of published works for persons with visual and print disabilities, and it does so solely on the basis of their disability. The onerous steps required of them to secure access, which – even if taken – may not be successful, are not required of persons without such disabilities;[40] they are able to access works under copyright without the threat of criminal sanction that accompanies unauthorised use.

32 This is the exact type of barrier to access recognised by Langa CJ in *MEC for Education: Kwazulu-Natal v Pillay*:[41]

> *"Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society".*

33 Importantly, this is not about people wanting to circumvent the market, or access works for free. Rather, it is about filling a gap, by ensuring that works are locally available, in various accessible formats, for those to whom such works are largely or entirely inaccessible right now. As it currently reads, the Copyright Act thus ordinarily stands as an insurmountable barrier in the way of the availability of accessible format copies of works under copyright.[42]

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[40] Founding affidavit, paras 80 – 84, pp 34 -36
[41] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 74
[42] Founding affidavit, para 85, p 36

SECTION 13 OF THE COPYRIGHT ACT DOES NOT ASSIST

34 Before considering the text of section 13, it is important to place it in its statutory context, which includes an analysis of the structure of the Copyright Act. Starting with an introductory section on definitions,[43] the Act is then made up of five chapters. The first, second, and fifth of these, which are of direct relevance to the nature and scope of section 13, contain provisions dealing respectively with –

34.1 the nature of copyright in original works;

34.2 copyright infringement and remedies; and

34.3 the making of regulations (and other miscellaneous provisions).

35 Chapter 1, which covers sections 2 to 22, first identifies which works are eligible for copyright.[44] After dealing with a handful of issues that are not directly relevant for current purposes,[45] it focuses separately on the nature of copyright in each of the various types of works already identified.[46] For example, section 6 deals with the nature of copyright in literary or musical works. While there is some overlap, there are also differences that flow from the different types of protected works.[47]

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[43] Section 1
[44] Section 2
[45] Sections 3 to 5
[46] Sections 6 to 11, 11A, and 11B.
[47] For example, in terms of section 11A, *"[c]opyright in a published edition [only] vests the exclusive right to make or to authorize the making of a reproduction of the edition in any manner."*

36 The chapter then deals with exceptions, in three ways: first, by providing general exceptions to each type of work;[48] second, by providing a special exception in respect of records of musical works;[49] and finally, by allowing for the making of regulations that provide further general exceptions in respect of the reproduction of all works. It is this regulation-making power, in section 13, that Professor Dean submits saves the Copyright Act from unconstitutionality.[50]

37 Chapter 2, which covers sections 23 to 28, focuses on two things: first, identifying what constitutes copyright infringement;[51] and second, providing remedies in the event copyright is indeed infringed.[52] As we have already noted, such remedies are both civil and criminal in nature. Given the possible consequences that may flow from copyright infringement, one would expect to see any exceptions being set out primarily in the principal Act.

38 Chapter 5, which covers sections 39 to 47,[53] includes a regulation-making power. According to section 39, the Minister of Trade, Industry and Competition ("the Minister") may make various types of regulations. Of relevance to this matter are subsections (a) and (d), which contemplate the making of regulations –

38.1 *"as to any matter required or permitted by this Act to be prescribed by regulation"*; and

[48] This is done in separate sections. See sections 12, 15 to 19, 19A, and 19B
[49] Section 14
[50] Chapter 1 ends by dealing with three more topics: moral rights; ownership of copyright; and assignment and licences.
[51] Section 23
[52] See sections 24 to 28
[53] Section 42 was repealed in 1992

38.2 *"generally, as to any matter which [the Minister] considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved."*

39 Read together with section 39(a),[54] section 13 empowers the Minister to make regulations that – in addition to the type of work-specific reproductions permitted in terms of sections 12, 15 to 19, 19A, and 19B – contemplate further types of reproduction in respect of all works under copyright. It provides:[55]

> *"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."*

40 The Minister's power to prescribe general exceptions, in respect of all works under copyright, thus only applies to reproductions. Insofar as literary works are concerned, it therefore provides no power to make regulations dealing with the publication of unpublished works,[56] the transmission of works,[57] and/or the adaptation of works.[58] (We return to this issue further below.)

41 Section 13 may also not be used to authorise certain acts that are recognised by the Copyright Act to constitute infringement, *"if to ... [the] knowledge [of the person concerned] the making of that article constituted an infringement of that*

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[54] There is no suggestion by Professor Dean that section 39(d) is of any relevance in this matter.
[55] Our emphasis
[56] Section 6(b)
[57] Section 6(e)
[58] Section 6(f)

copyright or would have constituted such an infringement if the article had been made in the Republic."[59] Such acts include –

41.1 *"import[ing] an article into the Republic for a purpose other than ... private and domestic use"*;[60] or

41.2 *"distribut[ing] 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"*.[61]

42 The context within which the nature and scope of section 13 are to be determined is thus characterised by clearly defined exclusive rights in respect of works under copyright, carefully crafted exceptions carved out in respect of each category of works, and both criminal and civil sanctions as remedies for infringement. In such circumstances, the question to ask is whether the type of regulations required to permit the production, importation and/or use of accessible format copies *"are necessary to supplement the primary legislation"*.[62]

43 This Court has drawn a clear distinction between *"delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body"*.[63] Given the *"factors relevant to a consideration of whether the delegation of a law-*

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[59] Section 23(2)
[60] Section 23(2)(a)
[61] Section 23(2)(c)
[62] *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC) at para 19
[63] *Executive Council of the Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 51

making power is appropriate",[64] we submit that section 13 should be interpreted particularly narrowly;[65] to do anything else would be to treat section 13 as assigning plenary legislative power, which is constitutionally impermissible.

44 Moreover, given the state's obligation to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*,[66] and mindful that *"[a]ll constitutional obligations must be performed diligently and without delay"*,[67] the adoption of an exception needed to permit the production, distribution, importation and/or use of accessible format copies should not have to await any ministerial regulation-making process that may well amount to an impermissible *"complete delegation of original legislative power"*.[68]

45 But even if this Court were to find that section 13 is indeed capable of a broad, constitutionally-compliant interpretation, it would be limited by its own wording, which only contemplates reproductions. But accessible format shifting may also require adaptation. For example, for a printed book to be made accessible, the text would need to be transformed into Braille, or to a format for text-to-speech software to process. Although reproduction may be involved, mere reproduction of the text, without adaptation, is insufficient; accessible format *shifting* requires a change in the format of the work.

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[64] See *Mpumalanga Petitions Bill* at para 19
[65] See also, South *African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* [2016] 4 All SA 623 (GJ) at para 34, citing Professor Dean's *Handbook of South African Copyright Law* with approval, in support of the proposition that the Act is to be interpreted narrowly when considering which exceptions are permitted.
[66] Section 7(2) of the Constitution
[67] Section 237
[68] See also *Smit v Minister of Justice and Correctional Services and Others* 2021 (3) BCLR 219 (CC) at para 36, read with para 97

46 This much is strongly suggested by the open-ended definition of adaptation in section 1(1) of the Copyright Act, which provides:[69]

> *"'adaptation', in relation to –*
> *(a) a literary work, includes –*
> *(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;*
> *(b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;*
> *(c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable;*
> *(d) a computer program includes –*
> *(i) a version of the program in a programming language, code or notation different from that of the program; or*
> *(ii) a fixation of the program in or on a medium different from the medium of fixation of the program".*

47 Further, the importation and/or exportation of accessible format copies would require distribution, and potentially broadcasting and transmission. For instance, if a local entity were to receive a request for a copy of an accessibly formatted work from an entity outside of South Africa, it would have to distribute, broadcast and/or transmit the work (depending on its nature). Similarly, although a copy of an accessible work would require reproduction, mere reproduction does not cover activities such as distribution and transmission to the requesting entity.

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[69] Our emphasis

48 The right to distribution also plays a role domestically. According to the WIPO Copyright Treaty, *"[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership."*[70] And according to Article 4(1)(a) of the Marrakesh VIP Treaty –

> *"[c]ontracting 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."*[71]

49 The Article continues:

> *"The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format."*

50 Even if reproduction under the Copyright Act were to be interpreted as broadly as it may appear to be contemplated by the Marrakesh VIP Treaty, Article 4(1)(a) makes it clear that an exception granted solely in respect of reproduction would be insufficient "*to facilitate the availability of works in accessible format copies"*. Importantly, Article 4 is limited to exceptions regarding the making, distribution, and/or making available of accessible format copies; Article 5 deals with the cross-border exchange of such copies.

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[70] Article 6
[71] Emphasis added

51 In summary, we submit that even if section 13 were to be interpreted in a manner that permits the Minister to make regulations aimed at curing the Copyright Act's failure to speak directly to the needs of persons with visual and print disabilities, it would not empower the Minister to make regulations that are able to give full and meaningful effect to the Marrakesh VIP Treaty. That is something that can be done only by amending the Copyright Act.

THE ACT LIMITS CONSTITUTIONAL RIGHTS

52 By impeding access to works under copyright, in the manner and to the extent that it does, the Copyright Act limits a range of constitutionally-entrenched rights that persons with visual and print disabilities ought to be able to enjoy: equality, human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice.

53 In what follows, we consider each of these rights in turn, mindful that –

53.1 this Court has recognised the interdependence and interrelatedness of all rights,[72] including in respect of equality and human dignity, which in addition to being substantive rights, are foundational values;[73]

[72] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) at para 55, cited with approval in *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) at para 50

[73] *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) at paras 58 – 64

53.2 section 7(2) of the Constitution requires all organs of state to *"respect, protect, promote and fulfil"* the rights in the Bill of Rights, thus imposing both positive and negative obligations on all organs of state; and

53.3 section 39(1)(b) places an obligation on courts to consider international law when interpreting the rights in the Bill of Rights, which requires a consideration of our obligations under international law, including those arising from the ratification of international conventions.

The right to equality

54 Because of the additional barriers that the Copyright Act places in the way of those with visual and print disabilities who seek to access works under copyright, the right to equality is squarely implicated. The delay in the coming into force of the uncontroversial section 19D has served to perpetuate this inequality of access. As this Court has recognised, *"like justice, equality delayed is equality denied"*.[74]

55 The constitutional conception of the right to equality favours substantive over formal equality.[75] As this Court explained in *Qwelane v South African Human Rights Commission*:[76]

> *"Our jurisprudence is resolute that the type of equality underpinning our constitutional framework is not mere formal equality, but in order to give*

[74] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 60
[75] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at paras 26 – 27 and 31
[76] At para 58 (our emphasis). See also, *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) at para 97.

> *meaning to the right to dignity, also substantive equality. Substantive inequality 'is often more deeply rooted in social and economic cleavages between groups in society', and so it aims to tackle systemic patterns where the structures, context and impact underpinning the discrimination matters."*

56 When read with section 7(2), the prohibition on unfair discrimination in section 9(3) imposes both positive and negative obligations on the state to ensure an equality of outcomes:[77] not only must the state remove barriers to the equal enjoyment of all rights by people with disabilities, but it must also take measures designed to ensure meaningful opportunities to realise these rights equally.

57 As we have already noted, section 39(1)(b) of the Constitution obliges a court to consider international law when interpreting the rights in the Bill of Rights. In this regard, we submit that when interpreting what the right to equality means for people with disabilities, the Convention on the Rights of Persons with Disabilities ("the CRPD") – which South Africa ratified in 2007[78] – must be considered.

58 The CRPD recognises *"that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person"*, and that despite this, *"persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights"*.[79] It also recognises that intellectual property may serve as a barrier for persons with disabilities accessing works under copyright.

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[77] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at para 42, cited with approval in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 90
[78] Founding affidavit, para 90, p 38
[79] See preamble to the CRPD

59 With this in mind, the CRPD imposes obligations on states parties to *"take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats"*.[80] They must *"take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials"*.[81]

60 Article 2 defines *"discrimination on the basis of disability"* as –

> *"any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."*

61 Relying on this definition, the general obligations set out in Article 4 of the CRPD require states that are party to the convention, amongst other things, to *"take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities."*[82]

62 The manner in which the Copyright Act unfairly discriminates against persons living with print and visual disabilities is well-articulated in three affidavits filed in support of this application:

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[80] Article 30(1)(a)
[81] Article 30(3)
[82] Article 4(1)(b)

62.1 First, in Mr Low's affidavit,[83] in which he describes the *"book famine"* experienced by persons who are blind, visually impaired, or otherwise print disabled;

62.2 Second, in Justice Yacoob's affidavit,[84] in which he describes having extremely limited access to reading materials as a young child, later becoming a successful advocate who could afford to buy his own books in print, and arrange for them to be converted into braille; and

62.3 Third, in Mr Gama's affidavit,[85] in which the teacher at a school for the deaf and blind explains the direct impact of the Copyright Act on the ability of learners and teachers to get hold of accessible format copies of textbooks and other materials every child needs for their education.

63 In its current form, which excludes a provision such as the proposed new section 19D, the Copyright Act makes it significantly more difficult – if not at times impossible – for persons with visual and print disabilities to access works under copyright that persons without such disabilities are ordinarily able to access.

64 There can be no legitimate government purpose served by differentiating, in this way, on the basis of disability. On the contrary, the differentiation on the basis of disability, a prohibited ground of discrimination in section 9 of the Constitution,

[83] Low supporting affidavit, paras 24 – 34, pp 318- 324
[84] Yacoob supporting affidavit, paras 3 – 12, pp 307-309
[85] Gama supporting affidavit, paras 6 – 14, pp 333-336

is presumptively unfair. To the extent that the Copyright Act prevents works from being transformed into accessible formats, it unfairly discriminates against persons with visual and print disabilities.

65 Adding insult to injury is the state's failure to discharge its constitutional mandate to take positive measures to address such discrimination, such as by ensuring reasonable accommodation. The principle of reasonable accommodation, which gives rise to certain positive obligations, is firmly entrenched in our law.[86] The same obligation arises in terms of Article 5.3 of the CRPD, with Article 2 of that convention defining reasonable accommodation as –

> *"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."*

66 Put simply, *any* failure to ensure reasonable accommodation constitutes unfair discrimination. Not only has this principle been firmly entrenched in domestic policy and legislation,[87] but it has been widely accepted internationally. In *Çam v Turkey*,[88] for example, the European Court of Human Rights held that *"discrimination on grounds of disability also covers refusal to make reasonable accommodation."* And as the Supreme Court of Canada has explained:[89]

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[86] See *MEC for Education: Kwazulu-Natal and Others v Pillay* at para 73

[87] See, for example, section 7(2) of the Department of Basic Education's Policy on Screening, Identification, Assessment and Support, which provides: *"Every learner has the right to receive reasonable accommodation in an inclusive setting."* See also, section 12(4) of the South African Schools Act 84 of 1996, and section 9(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

[88] App no 51500/08, IHRL 3940 (ECHR 2016) at para 67

[89] *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at para 67, cited with authority in *MEC for Education: Kwazulu-Natal and Others v Pillay* at para 74 (emphasis added)

> *"Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."*

The right to human dignity

67 There is no obligation on copyright holders to permit accessible format shifting; they may refuse to allow accessible format copies of works under copyright to be made in all circumstances, even when they have no intention of making such copies themselves. The message sent to persons with print and visual disabilities is clear: we could not care less whether you are able to access the works under copyright; we will prevent you from making accessible format copies just because we can, regardless of the consequences.[90]

68 This Court has long recognised that a life without dignity is a life that is substantially diminished,[91] and that everyone is entitled – as of right – to be treated as worthy of respect and concern.[92] In entrenching a right to human dignity in section 10, as a self-standing right,[93] in addition to recognising dignity as a

[90] See founding affidavit, para 98, p 41
[91] See, for example, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 326
[92] *S v Makwanyane* at paras 328 – 329
[93] This Court has recognised that *"[w]hile equality and dignity are self-standing rights and values, axiomatically, equality is inextricably linked to dignity." Qwelane* at para 62 (footnote omitted)

foundational value, our Constitution values the intrinsic worth of all human beings;[94] the Copyright Act does not.

69 In considering the unequal provisioning for profoundly and severely intellectually disabled children, the High Court noted as follows in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*:[95]

> *"[T]he children's rights to dignity have been infringed, since they have been marginalised and ignored, and in effect stigmatised. The failure to provide the children with education places them at risk of neglect, for it means that they often have to be educated by parents who do not have the skills to do so, and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation."*

70 In his supporting affidavit, Mr Low describes the indignity – as a university student – of having been forced to choose between making accessible copies of certain prescribed books, in contravention of the Copyright Act, or accepting that he would not have had access to the books in question. The law told him that it considered him to be a criminal if he prioritised his right to an education.[96]

71 Justice Yacoob describes how he and his fellow learners were entirely reliant on teachers and other persons to read prescribed works to them. While a limited number of books had been made available to his school,[97] these were not works

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[94] See *Qwelane* at para 66
[95] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC) at para 46 (our emphasis)
[96] Low supporting affidavit, para 31, p 320
[97] By the South African Library for the Blind

prescribed in terms of their curriculum. The indignity of not being able to read for oneself, and being so heavily reliant on others, does not go unnoticed.[98]

72 Insofar as the Copyright Act prevents persons with visual and print disabilities from accessing works under copyright, by effectively placing an absolute bar on making, using and/or distributing accessible format copies of such works, it limits such persons' right to human dignity. This indignity is exacerbated by there being no commercial or other benefit, in such circumstances, to copyright holders.

The right to education

73 Education is transformative in nature, both for those being educated, and for society more broadly.[99] As Khampepe J explained in *Moko v Acting Principal of Malusi Secondary School*:[100]

> *"There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were only before ever dreamt of. I am not exaggerating when I say that education changes lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too."*

[98] Yacoob supporting affidavit, para 6, p 308
[99] See *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at n 1. See also, *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at paras 41-43; *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at para 1; and *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC) at paras 1-4.
[100] At para 1 (footnote omitted)

74 The right to education, entrenched in section 29 of the Constitution, operates at two levels: first, in respect of basic education;[101] and second, in respect of further education.[102] Both rights include the entitlement to educational materials at all levels;[103] it is only the extent of the obligation imposed on the state that differs.

75 Unlike all other socio-economic rights, including the right to further education, the right to basic education is unqualified; it is neither subject to the availability of resources, nor to progressive realisation. Instead, it is an immediately realisable right; its realisation cannot be delayed.[104]

76 This Court has held that *"access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."*[105] In so doing, it provided the foundation for other essential components of the right to be identified, resulting in the incremental recognition of a defined basket of entitlements that make up the right.

77 For example, while the right to educational materials is not expressly mentioned in the text of the Constitution, our courts have made it clear that every learner has a right to a textbook in every subject, and that the corollary to this right is the duty

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[101] Section 29(1)(a)
[102] Section 29(1)(b)
[103] See *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA). See also, *Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP) at paras 25 and 36
[104] *Juma Musjid* at para 37
[105] *Juma Musjid* at para 43

on the state to provide such a textbook.[106] In *Section 27 v Minister of Education*, a case dealing with the provision of text books to learners in public schools in Limpopo, Kollapen J held: [107]

> *"[T]he provision of learner support material in the form of text books, as may be prescribed[,] is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books".*

78 Our courts have also held that a failure to provide adequately for learners with disabilities is a violation of various rights, including – in particular – the right to a basic education.[108] In so doing, the courts have recognised the interdependency and interrelatedness of all entrenched rights, in particular the interrelated nature of the rights to education and equality.[109]

79 This approach to the right to education of persons with disabilities is well-recognised under international law. For example, the CRPD – which binds South Africa – seeks to ensure equality of opportunity and the removal of discriminatory barriers to education. In this regard, Article 24(1) of the CRPD provides:

> *"States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:*

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[106] See, for example, *Minister of Basic Education v Basic Education for All* at paras 47-49
[107] *Section 27 v Minister of Education* at para 25 (our emphasis)
[108] See *Western Cape Forum for Intellectual Disability*
[109] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 47

1.1 *The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*

1.2 *The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*

1.3 *Enabling persons with disabilities to participate effectively in a free society."*

80 In order to realise this right, Article 24(2) of the CRPD requires states parties to take steps to ensure, amongst other things, that *"[p]ersons with disabilities receive the support required, within the general education system, to facilitate their effective education"*.

81 Further detail is provided in Article 24(3), which deals with the taking of appropriate measures to *"enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.*

82 *"To this end"*, it continues, *"States Parties shall take appropriate measures"*. These include *"[f]acilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring"*.

83 For *"persons with disabilities to live independently and participate fully in all aspects of life"*, the CRPD requires states parties to *"take appropriate measures*

to ensure to persons with disabilities access, on an equal basis with others, ... to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas".[110] The inclusion of an accessible format shifting provision would go some way towards discharging this obligation.

84 In terms of its obligations under the International Covenant on Economic Social and Cultural Rights ("ICESCR"), South Africa is required to realise the right to education, at all levels, in line with the principle of non-discrimination.[111] General Comment 13, which seeks to interpret Article 13 of the ICESCR, recognises that states parties are required to ensure that education is available, accessible, acceptable, and adaptable for all.[112]

85 It also recognises that accessibility has *"three overlapping dimensions"*: non-discrimination; physical accessibility; and economic accessibility. On non-discrimination, General Comment 13 provides:

> *"Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds".*

86 In addition to the CRPD and the ICESCR, South Africa bears obligations under the Convention on the Rights of the Child ("CRC"), and the African Charter on the Rights and Welfare of the Child ("ACRWC"). Of relevance to this matter is

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[110] Article 9
[111] The ICESCR was ratified by Parliament in 2015. See founding affidavit, para 110 , p 44
[112] CESCR, General Comment No 13: The Right to Education, E/C.12/1999/10 (1999)

Article 23 of the CRC, dealing with children with disabilities, Article 11 of the ACRWC, dealing with the right to an education, and Article 13 of the ACRWC, dealing with the rights of children with disabilities.

87 In his affidavit, Mr Gama explains the challenges faced by learners (and teachers) at a school for the deaf and blind that – relative to others – may appear to be well-resourced. But even in that school, with specialist teachers and public funding, access to textbooks and other learning materials is severely limited – in large part – by the Copyright Act.[113] Mr Gama also explains how learners often face new challenges when they leave school to pursue further education.[114]

88 Where persons with visual and print disabilities – whether learners in schools or students in tertiary institutions – are unable to obtain textbooks and other learning materials in accessible formats, they are being denied their right to education. Thus to the extent that the Copyright Act prevents such textbooks and other learning materials from being transformed into accessible formats, it limits section 29(1) of the Constitution.

89 The failure of the Copyright Act to provide an exemption from its provisions for persons with print and visual disabilities falls far short of the immediately-realisable standard contemplated by section 29(1)(a) of the Constitution. It further fails to meet the lower threshold of reasonableness, contemplated by section 29(1)(b), by failing to provide for the needs of those who are most desperate.[115]

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[113] Gama supporting affidavit, paras 9 – 15, pp 334-336
[114] Gama supporting affidavit, paras 16 – 17, p 337
[115] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 44

The right to freedom of expression

90 Section 16(1) of the Constitution guarantees everyone the right to freedom of expression, which includes – amongst others – the "*freedom to receive or impart information or ideas"*, and *"freedom of scientific research"*. Not only does it *"lie at the heart of a democracy"*,[116] but it also plays a key role in ensuring that all people may develop into thinking, autonomous beings. As this Court explained in *Case v Minister of Safety and Security*: [117]

> *"The most commonly cited rationale [for the existence of the right to freedom of expression] is that the search for truth is best facilitated in a free 'marketplace of ideas'. That obviously presupposes that both the supply and the demand side of the market will be unfettered. But of more relevance here than this 'marketplace' conception of the role of free speech is the consideration that freedom of speech is a sine qua non for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development."*

91 Justice Yacoob, Mr Low, and Mr Gama have all explained how the Copyright Act has directly interfered (and continues to interfere) with their ability to receive information and ideas; it does so by limiting and/or blocking their access to

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[116] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 7. See also, *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 45.
[117] *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para 26 (our emphasis)

literary works under copyright, which are required for professional, educational, and/or personal purposes. Mr Low has also shown how the legislation negatively affects his doctoral research.[118]

92 By preventing them and all other persons with print and visual disabilities from accessing many works under copyright, and from sharing accessible format copies that they have obtained and/or made, the Copyright Act directly limits their right to freedom of expression.

The right to participate in the cultural life of one's choice

93 Section 30 of the Constitution recognises everyone's right *"to use the language and to participate in the cultural life of their choice"*, provided this is done in a manner consistent with the Bill of Rights. Unlike section 31, which refers to cultural, religious and linguistic communities, it applies more broadly, extending to the manner in which we create, express, and exchange ideas.[119] Since copyright extends to all forms of media, the right to cultural life is directly implicated.

94 South Africa is bound by the ICESCR to *"recognise the right of everyone to take part in cultural life"*,[120] which is to be realised in a manner that does not discriminate against anyone on any protected ground, such as disability.

[118] Low supporting affidavit, paras 34.4 – 34.5, pp 322-323
[119] See CESCR, General Comment No 21: Right of Everyone to Take Part in Cultural Life, E/C.12/GC/21 (2009)
[120] Article 15(1)(a)

95 The CRPD contains a similar obligation in Article 30(1)(a), which requires states parties such as South Africa to *"take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats"*. In so doing, it imposes an obligation to *"take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials."*[121]

96 Mr Low notes that *"a comparative lack of access to books has also had an impact on the extent to which [he] could participate in the cultural life of society."*[122] As bad as it is for someone like him, it is even worse for those whose mother tongue is not English, or any other language in which many titles are published; limited access to works under copyright severely curtails their ability to create, express, and exchange ideas.[123]

THE LIMITATIONS OF RIGHTS CANNOT BE JUSTIFIED

97 Section 36(1) of the Constitution makes provision for rights to *"be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors"*. The Copyright Act is a law of general application.

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[121] Article 30(3)
[122] Low supporting affidavit, para 28, p 319
[123] Founding affidavit, para 117, p 46

98 In determining whether any particular limitation is reasonable and justifiable, the factors to be considered include the following: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.[124]

99 We submit that in conducting this analysis, it is important to be mindful that this matter concerns a multiplicity of intersecting rights that are all implicated by the manner in and extent to which the Copyright Act limits and/or prevents persons with visual and print disabilities from accessing works under copyright. Put simply, multiple rights violations should ordinarily be very difficult to justify.

100 Given the global consensus reflected in the Marrakesh VIP Treaty, South Africa's intention to accede to the treaty shortly, the fact that no-one stands to benefit from the non-availability of accessible formats of works under copyright, and that no-one (including holders of copyright) stands to lose from their availability in the manner contemplated, the limitation cannot serve any legitimate purpose.

101 What makes matters worse is that the limitation does not only make it more difficult for persons with visual and print disabilities to obtain accessible format copies, but often makes it impossible for them to do so. In such circumstances, the limitation imposed by the Copyright Act is both an absolute and pernicious denial of access.

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[124] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at paras 32 and 65 – 66

102 For the reasons set out above, we submit that the limitations cannot be justified. That said, we are mindful that it is not for the applicant in a matter such as this to establish that any limitation of a right does not satisfy the test in section 36(1) of the Constitution. Instead, those seeking to justify any limitation must make out a case in this regard.[125] As matters stand, no-one is seeking to justify the limitations.

APPROPRIATE RELIEF

103 When deciding *"a constitutional matter within its power"*, a court is required by section 172(1)(a) of the Constitution to *"declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency"*. There is simply no discretion; if the law (or conduct) is unconstitutional, the court must declare it so. As this Court explained in *McBride v Minister of Police*:[126]

> *"[S]ection 172(1)(a) of the Constitution provides that when a court decides a constitutional issue within its powers, it must declare any law or conduct inconsistent with the Constitution invalid to the extent of such inconsistency. This section is couched in peremptory terms. It is therefore a constitutional imperative."*

104 Although the court *a quo* granted a declaration of constitutional invalidity,[127] its order neither specified the extent of the inconsistency with the Constitution, nor identified the correct provision in terms of which the declaration was made.

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[125] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) at para 34
[126] *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) at para 23 (our emphasis)
[127] Order at para 1, p 515

Instead of making that part of the order in terms of section 172(1)(a), the court *a quo* purported to act in terms of section 174(1). That was clearly an error.

105 But given the provisions of section 172(2)(a) of the Constitution, nothing turns on this error. Indeed, as this Court has made clear,[128] *"any order of constitutional invalidity of an Act of Parliament or a provision of an Act of Parliament made by a court other than this court does not take effect for as long as it has not been confirmed by this court."*

106 For the reasons set out in these heads of argument, we submit that this Court – in terms of section 172(1)(a) – ought to declare the Copyright Act inconsistent with the Constitution, and accordingly invalid, to the extent that it –

106.1 limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access; and

106.2 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 VIP Treaty.

107 In so doing, we submit, the copyright act unreasonably and unjustifiably limits the rights of persons with visual and print disabilities to equality, human dignity,

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[128] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* ("*Prince III*") 2018 (6) SA 393 (CC) at para 2

freedom of expression, and basic and further education, and to participate in the cultural life of their choice.

108 Purporting to act in terms of section 174(2),[129] the court *a quo* also read into the Copyright Act the provisions of the proposed new section 19D.[130] We submit that it would be just and equitable for this Court to exercise its broad remedial powers in terms of section 172(1)(b),[131] and read in, with immediate effect, the legislative solution already crafted by Parliament. (We return to this issue further below.)

109 In addition, the court *a quo* suspended the operation of its declaration of invalidity to afford Parliament an opportunity to remedy the constitutional defect,[132] and made it clear that should this not be done timeously, the reading-in remedy would become permanent.[133] (Of course, Parliament would always have the authority to amend what may be read in by a court.)[134]

110 We accept, as we must, that *"[s]uch a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event."*[135] And we submit, for the following three reasons, that there would be no need for this Court to suspend the declaration of invalidity sought in the event it is coupled with a reading-in remedy:

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[129] The court *a quo* could only have been acting in terms of section 172(2)(b).
[130] As contemplated by clause 20 of the CAB. See order at paras 2 and 4, pp 515-516
[131] See *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC) at para 12
[132] Order at para 3, p 516
[133] Order at para 5, p 516
[134] *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) at para 89
[135] *Prince III* at para 2

110.1 First, the declaration of invalidity sought concerns an omission in the Copyright Act. It therefore has no effect on its own, as would ordinarily be the case when a provision of a statute is declared invalid, and that declaration is not suspended.

110.2 Second, if the declaration of invalidity sought were to be coupled with the type of reading-in remedy sought, no purpose would ordinarily be served by putting Parliament on terms to amend what effectively would have already been amended by a legislative solution that had previously been crafted and adopted by Parliament itself.

110.3 Third, given the process underway in Parliament to finalise the CAB, it would not be appropriate effectively to place a deadline on that process in circumstances where this Court has only considered one small part of the puzzle. Any deadline in respect of proposed new section 19D would place pressure on Parliament to finalise the process as a whole.

111 This Court has recognised that it *"has broad remedial powers to fashion a remedy that is 'just and equitable' following a declaration of invalidity in terms of section 172(1) of the Constitution."*[136] One such remedy is reading in, which is ordinarily to *"be used sparingly so as not to encroach on the terrain of the Legislature."*[137]

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[136] *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others; Head of Department of Health, Gauteng and Another v Public Servants Association obo Olufunmilayi Itunu Ubogu* 2018 (2) SA 365 (CC) at para 73

[137] *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* 2022 (1) BCLR 46 (CC) at para 74

But much will depend on the circumstances of any particular case. As this Court held in *Gaertner v Minister of Finance*:[138]

> *"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."*

112 The facts of this case are somewhat unique. Not only has Parliament recognised the need for a provision such as section 19D, but it adopted the CAB that included the very provision that, but for the President's decision influenced by concerns unrelated to the section, would have become law. And in response to being cited as the third respondent in the court *a quo*, where the same reading-in remedy had originally been sought, the Speaker decided not to oppose. In such circumstances, there is simply no danger of encroaching on Parliament's terrain.

113 The need for a reading-in remedy is palpable. Not only have the executive and legislature recognised the need for an exemption that ensures the availability of accessible format copies of works under copyright, but so too has the international community. 2022 marks the ninth anniversary of the adoption of the Marrakesh VIP Treaty,[139] which paved the way for countries across the globe to make the necessary changes to their laws so that persons with visual and print disabilities have access to published works; they should not have to wait any longer.

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[138] *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) at para 84
[139] The treaty was adopted on 27 June 2013. See founding affidavit, para 61, p 27.

114 That leaves just one question: what exact form should the reading-in remedy take? We submit that it would be just and equitable for this Court, as the court *a quo* did, to read into the Copyright Act, with immediate effect, Parliament's original legislative solution, as contemplated by clause 20 of the CAB. As part of the current parliamentary process, that text will either be affirmed, or amended. But the starting process for Parliament will be the text as originally adopted. For that reason, we submit that the text to be read in should be the same.

115 We are aware of the submission advanced by Professor Dean that the text of the proposed new section 19D cannot operate in the absence of two definitions that clauses 1(a) and (h) of the CAB seek to insert into section 1 of the Copyright Act: *"accessible format copy"*; and *"person with a disability"*. Those definitions, which are set out in paragraphs 5 and 6 above, have been drawn directly from the definitions of *"accessible format copy"* and *"beneficiary person"*, which are set out in paragraphs 7 to 9 above.

116 The provisions of proposed new section 19D, which we seek to have read in, provide clear evidence of a legislative intent to bring the Copyright Act in line with the Marrakesh VIP Treaty. So too does the intention of the executive for South Africa to be bound by the treaty once the requisite amendments to the Copyright Act have been made.[140] Thus to the extent that there may be any doubt as to what is meant by *"accessible format copy"* and *"person with a disability"*, regard may be had to the relevant definitions in the Marrakesh VIP Treaty.[141]

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[140] See founding affidavit, para 17, p 12
[141] See section 39(2) of the Constitution, read with section 39(1)(b)

117 Insofar as the second definition is concerned, regard should be had to how the CRPD, which already binds South Africa, defines the term. This obligation to consider international treaties flows directly from the provisions of section 233 of the Constitution, dealing with the application of international law:[142]

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."*

118 Regard could also be had to various decisions of our superior courts dealing with unfair discrimination on the basis of disability,[143] and how disability may have been defined in other statutes.[144] Applying the principles of interpretation set out in *Endumeni*,[145] it should not be particularly difficult – should the need arise – for a court to provide guidance on what is meant by the phrase *"person with a disability"* when used in the Copyright Act.

119 Alternatively, this Court could do either of two things as part of its power in terms of section 192(1)(b) of the Constitution to make a just and equitable order:

119.1 in its judgment, this Court could make it clear that the two phrases, when used in section 19D, bear particular meanings, either as defined in the CAB, or in the Marrakesh VIP Treaty; or

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[142] Once South Africa has ratified the Marrakesh VIP Treaty, which it could do if the reading-in remedy were to be granted, the obligation imposed by section 233 would apply to the first definition.
[143] See generally, *MEC for Education: Kwazulu-Natal and Others v Pillay*
[144] See, for example, the definition of "people with disabilities" in section 1 of the Employment Equity Act 55 of 1998
[145] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17-26, recently cited with approval by this Court in *Van Zyl N.O. v Road Accident Fund* 2022 (2) BCLR 215 (CC) at para 130, n 152

119.2 in its order, this Court could also read in the proposed new statutory definitions of *"accessible format copy"* and *"person with a disability"*.

COSTS

120 In prayer 5 of the notice of motion in the court *a quo*, Blind SA sought an order *"[d]irecting that the costs of this application, including the costs of two counsel, are to be paid by the first respondent, alternatively jointly by the first respondent and all other respondents who elect to oppose the relief sought by the applicant."* As the application was unopposed, Blind SA only sought an order directing the first respondent to pay its costs. Such an order was indeed granted.

121 We submit that the same should apply in this Court, consistent with the approach to constitutional litigation recognised by this Court in *Biowatch*:[146]

> *"In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."*

122 The government's obligation to pay a successful applicant's costs even applies in circumstances where the state has chosen not to oppose.[147]

> *"The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to*

[146] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 22 (footnote omitted and emphasis added)
[147] *Biowatch* at para 23 (footnote omitted and emphasis added)

> *assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door."*

123 Accordingly, we submit that the first respondent, who was cited in his capacity as the Cabinet member responsible for the administration of the Copyright Act,[148] ought to be ordered to pay Blind SA's costs, including the costs of two counsel.

CONCLUSION

124 In the result, we submit that this Court ought to grant the following order:

1 Subject to paragraph 2, the declaration of invalidity issued by the High Court in respect of the Copyright Act 98 of 1978 is confirmed.

[148] Founding affidavit, para 9, p 9

2 The Copyright Act is inconsistent with the Constitution of the Republic of South Africa, 1996 to the extent that it –

2.1 limits and/or prevents persons with visual and print disabilities accessing works under copyright that persons without such disabilities are able to access; and

2.2 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;

and in so doing, unreasonably and unjustifiably limits the rights of persons with visual and print disabilities to equality, dignity, freedom of expression, and basic and further education, and to participate in the cultural life of their choice.

3 With immediate effect, the Copyright Act is deemed to read as if it contains the proposed new section 19D contemplated by clause 20 of the Copyright Amendment Bill [B 13B—2017].

4 The first respondent must pay the applicant's costs, including the costs of two counsel, both in this Court and the High Court.

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17 February 2022