

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 300/2024
CCT CASE NO: 306/2024

In the matter between:

BLIND SA

Applicant

and

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

**CHAIRPERSON OF THE NATIONAL
COUNSEL OF PROVINCES**

Third Respondent

**MINISTER OF TRADE,
INDUSTRY AND COMPETITION**

Fourth Respondent

**MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fifth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

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Introduction

- 1 There are two matters before this Court – (i) a referral made by the President in terms of section 79(4)(b) of the Constitution; and (ii) an urgent application by Blind SA for supplementary relief.

- 2 The Minister of Trade, Industry, and Competition (the Minister) does not oppose either of the applications and abides the decision of the Court in both matters. As the Executive member responsible for oversight and implementation of the Copyrights Act 98 of 1978, and of the Copyright Amendment Bill 2024 (CAB) when it becomes law, the Minister has filed an explanatory affidavit and files these written submissions to assist the Court in its consideration of a just and equitable remedy.

- 3 The Minister aligns himself with the President's referral of the CAB to this Court for a determination on its constitutionality. In doing so, the Minister seeks to address this Court on three issues –
 - 3.1 First, the relevant factual background of the CAB.

 - 3.2 Second, the Minister's standpoint on the two matters before this Court;
and

 - 3.3 Third, what the appropriate remedy should be.

Background

- 4 The journey of the CAB began in 2008. In 2011, the Department of Trade and Industry (now the Department of Trade and Industry and Competition, or DTIC)

established the Copyright Review Commission (CRC). The CRC found that the existing copyright laws do not adequately provide for the visually impaired or those with other disabilities. It recommended that the Copyright Act be amended to include these necessary exceptions, aligning with the Berne Convention¹.

5 In 2013, the DTIC released a Draft Intellectual Property Policy for public comment. In 2014, Genesis Analytics, appointed by the DTIC to assess proposed changes, issued the Genesis Report² in which it highlighted the need to amend the Copyright Act following the adoption of the Marrakesh Treaty in 2013³.

6 The first Draft Copyright Amendment Bill (CAB) was introduced in 2015 and included provisions in section 19D to create exceptions for people with disabilities. After a series of public consultations and modifications, the Bill was formally presented to Parliament in 2017. In 2018, a technical team was appointed to ensure the Bill's compliance with the Constitution and international agreements. However, questions arose regarding the Bill's alignment with the Marrakesh Treaty, especially in defining "accessible format copy" and determining which entities could produce such copies. "Accessible format" includes braille, audio and large print.

¹ Berne Convention for the Protection of Literary and Artistic Works

² Minister's Explanatory Affidavit, annexure "DTIC1"

³ The Marrakesh Treaty is an international copyright treaty that aims to make works accessible to people who are blind, visually impaired, or otherwise print disabled

- 7 In 2019, the Bill was approved by the National Council of Provinces and sent to the President. However, the President referred the CAB back to Parliament in 2020, due to constitutional concerns, including potential conflicts with international treaties like the WIPO Copyright Treaty⁴ and the WIPO Performance and Phonograms Treaty⁵, as well as issues around property rights and legislative powers.
- 8 The President’s referral to this Court includes sections 6A, 7A, 8A, 12A to 12D, 19B, and 19C of the CAB in that they might retrospectively and arbitrarily deprive property rights. The President highlighted that sections could limit copyright owners’ property rights, potentially breaching the section 25(1) of the Constitution read with international treaties (including those to which South Africa has not yet acceded).
- 9 The second matter recounts Blind SA’s challenge of the Copyright Act’s constitutionality, that it failed to provide necessary exceptions for visually and print-disabled persons. This Court ruled in Blind SA’s favour, suspending the declaration of unconstitutionality for 24 months to allow Parliament to amend the Act. The 24-month suspension period lapsed on 21 September 2024.
- 10 Blind SA launched this application on 9 October 2024, seeking various reliefs, including certain declaratory relief. The application also seeks to extend the

⁴ Described as “a special agreement under the [Berne Convention](#) which deals with the protection of works and the rights of their authors in the digital environment.”

⁵ The Treaty deals with the rights of, particularly in the digital environment, (i) performers and (ii) producers of phonograms

provisions of Section 13A of the Copyright Act, in the light of the lapse of the suspension period, pending the enactment of the CAB.

The Minister's Position

- 11 The Minister supports the temporary inclusion of Section 13A of the CAB, which allows for the creation of accessible format copies of copyrighted works without prior authorization. This provision is essential to ensure continued access to educational and informational resources for visually impaired individuals and print-disabled persons, and upholds their constitutional rights to equality, dignity, and education (in terms of sections 9, 10, and 29 of the Constitution).

- 12 The Minister emphasizes the importance of aligning South Africa's copyright laws with international obligations, in terms of section 39(2) of the Constitution, such as the Marrakesh Treaty, which South Africa has ratified to facilitate access to works for individuals with visual impairments. However, the Minister stresses that the legislative process must be thorough, transparent, and inclusive of all stakeholders to create a legally sound framework.

- 13 The concerns incidental to the retrospective application of Sections 6A, 7A, and 8A, which entitle authors and performers to a fair share of royalties after assigning copyright, are no small issue, it is thus appropriate for this court to make a proper determination on whether these provisions will limit copyrights in existing agreements in a manner that is inconsistent with Section 36 of the Constitution and international obligations.

- 14 Similarly, the Minister underscores the importance of ensuring the exceptions introduced by the CAB, such as fair use, educational use, and use by libraries and archives, which seek to balance copyright holders' rights with the public interest, comply with international treaties like the Berne Convention and the TRIPS Agreement⁶.
- 15 The Minister acknowledges the need for further interrogation of the CAB despite the inclusive legislative process, recognizing that the divergent views among stakeholders, including copyright holders, educational institutions, and advocacy groups for individuals with disabilities are best settled prior the CAB's assertions into law. The aim is to balance these interests and create a fair and equitable copyright regime.

Alignment with the President's Case

- 16 The Minister supports the President's concerns regarding the constitutionality of the CAB, especially in relation to the retrospective application of Sections 6A, 7A, and 8A, and the new copyright exceptions (Sections 12A to 12D, 19B, and 19C) as legitimate.

Section 13A: Access for Visually Impaired Individuals

- 17 Section 13A is critical in ensuring that the visually impaired and print-disabled persons have access to copyrighted works. This provision, which allows for the creation of accessible format copies without the need for prior

⁶ A multilateral agreement on intellectual property

authorization, aligns with South Africa's obligations under the Marrakesh Treaty.

- 18 Section 13A is important in bridging the gap in access to educational and informational resources for the visually impaired and the print-disabled, as required by the Constitution (sections 9, 10, and 29).

Respect for Legislative Processes and Stakeholder Interests

- 19 The Minister has supported the legislative process and stakeholder interests throughout the development of the Copyright Amendment Bill (CAB), embodying the principles upheld in cases like *Doctors for Life International v Speaker of the National Assembly and Others*⁷, where this Court emphasized the duty of the legislature to facilitate public participation in law-making. Extensive and meaningful public consultations were conducted, with active stakeholders' participation in the shaping of the Bill.
- 20 Further, the appointment of a technical team in 2018 to scrutinize the Bill's alignment with constitutional requirements and international treaties underscores the commitment to due process and adherence to constitutional principles, as echoed in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*⁸ which reinforced the importance of legislative respect for procedural integrity and public input. It is therefore submitted that this careful approach, which integrates both legal obligations

⁷ [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC)

⁸ [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)

and stakeholder interests, not only safeguards the integrity of the legislative process but also reinforces trust in governance, demonstrating a balanced commitment to constitutional values and international obligations.

Appropriate Remedy

- 21 This Court, in *Ex parte Minister of Home Affairs*⁹ set out the relevant principles on just and equitable relief under section 172(1)(b) of the Constitution in a situation where an order suspending a declaration of constitutional invalidity has lapsed, as is presently the case.
- 22 We submit that the Court hearing the initial Blind SA challenge did not consider a situation, as is present, where the CAB would be referred to this Court for consideration. Be that as it may, the suspension order has lapsed and that in turn has caused a *lacuna* on the prevailing copyright laws. What is needed is a balanced approach that respects both property rights and access rights while ensuring compliance with the Constitution and international law.
- 23 The Court's power to grant just and equitable relief under section 172(1)(b) of the Constitution is broad and flexible, enabling it to address the real dispute and ensure compliance with constitutional standards.¹⁰

⁹ *Ex parte Minister of Home Affairs and Others* (CCT 38/16) [2023] ZACC 34

¹⁰ *Ibid* at par 39, citing *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) (*Economic Freedom Fighters II*) at para 211

24 The Minister supports the application of just and equitable remedies to ensure that visually impaired and print-disabled individuals continue to have access to copyrighted works while the legislative process is completed.

25 Importantly, this Court in *Ex Parte Minister of Home Affairs* set out the test as follows:¹¹

“The legal question is what, under the circumstances, would qualify as a just and equitable order? To determine this, we must adopt the approach set out in Ntuli, Zondi, Minister of Social Development and Cross-Border Roads Transport Agency, where this Court considered:

(a) the nature of the constitutional defects;

(b) the harm caused by the failure to pass remedial legislation; and

(c) the remedies proposed by the parties.”

26 The nature of the constitutional defects is as stated in Blind SA’s original challenge. This Court found that that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published

¹¹ Ibid at par 30.

literary works, and artistic works as may be included in such literary works, in accessible format copies¹².

- 27 The harm caused by the CAB not being promulgated within 24 months is that the suspension and interim reading-in orders have lapsed, thus creating a gap in the copyright laws, reverting to the same position as prior to this Court's order in Blind SA's original challenge. Thus, the infringement against the rights of persons with visual and print disabilities persists. This, however, must be balanced against the need to pass legislation that is constitutionally compliant and to the satisfaction of the President and Parliament.
- 28 In far as this Court has power to fashion an appropriate remedy, the retention of section 13A is the appropriate remedy in the circumstances. This stems from its objective to uphold access rights for visually impaired persons, a right enshrined under sections 9, 10, and 29 of the Constitution, which ensure equality, dignity, and education. Section 13A provides a temporary mechanism for creating accessible formats of copyrighted works without prior authorization.
- 29 This remedy allows the targeted persons to access necessary educational and informational resources, fulfilling an urgent need for inclusivity until the legislative process is completed and appropriate legislation enacted. the Department endorses a remedy that addresses immediate needs without permanently bypassing Parliament's legislative authority.

¹² at para [74]

30 We accordingly submit that the Court extend the application of section 13A.

Condonation

31 The Minister seeks condonation for the late delivery of his affidavit. The affidavit was delivered about 7 days late - the parties were provided with an unsigned version on 8 November and the signed version of the same on 11 November 2024.

32 In *Biologicals and Vaccines Institute of Southern Africa (Pty) Ltd v Guardrisk Insurance Company Limited*, Wilson J aptly described what is incumbent of a party seeking condonation for non-compliance.¹³ The Learned Judge stated *“Explanations for non-compliance need only be honest. They do not have to be impressive. As long as it is frank, and sufficiently detailed, an explanation for non-compliance need not present those in default as faultless heroes, thwarted by the vicissitudes of life. An explanation for non-compliance that involves ineptness, a degree of slovenliness, or even downright stupidity may nonetheless be acceptable so long as the degree of negligence involved does not suggest that the non-compliance was reckless, or that an absence of diligence was so gross as to border on malicious dereliction.”*

33 A court will consider the nature and degree of non-compliance with a rule, the explanation for that non-compliance, any prejudice caused by the non-compliance, and the applicant’s prospects of success in the main case. Each

¹³ *Biologicals and Vaccines Institute of Southern Africa (Pty) Ltd v Guardrisk Insurance Company Limited* (11323/2022) [2023] ZAGPJHC 729 (27 June 2023) at par [10].

of these considerations is weighed with the aim of promoting the interests of justice on the facts of each matter, which is a court's fundamental pre-occupation.¹⁴

34 Without trivialising the seriousness of non-compliance with Court Directives, especially in urgent matters, we submit that the delay is not excessive, with sufficient time for the affidavit to be considered before the hearing on November 28, 2024.

35 The delay was due to procedural, logistical, and communication issues affecting the Department of Trade, Industry, and Competition and the Office of the State Attorney. This is fully and frankly explained in the affidavit of Serongwane Joseph Melodi in support of condonation, with a detailed chronology of actions taken and reasons for the delay. The delay was not the result of disregard for the Directive of this Court. Neither was it a result of lack of diligence.

36 Moreover, the Minister does not oppose the relief sought by Blind SA or the President. To that extent, seeing as the Minister's affidavit only clarifies the Department's stance, it is submitted that the delay in filing the Explanatory Affidavit has caused no prejudice any party.

Conclusion

¹⁴ *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at par 22.

- 37 The Minister does not oppose the referral of the CAB and supports the President's view regarding the need for constitutional certainty and supports Blind SA in the relief for the extension of section 13A .
- 38 In the light of the above, we submit that section 13A is necessary to address the gap in the law and to ensure continued access to educational resources for visually impaired and print-disabled persons.
- 39 Whether or not the President is correct on the constitutionality of the contested provisions, it is crucial that substantive relief is obtained to protect the rights of visually impaired persons, and thus a just and equitable order is one that preserves the benefit of section 13A.
- 40 Further, we respectfully submit that there is good cause to condone the delay in the delivery of the Minister's Explanatory Affidavit.
- 41 On the issue of costs, the Minister is not opposing either the President's referral or Blind SA's urgent application. The Minister and the Department have acted as diligently as is reasonably possible given the urgency of the two matters and comes to this Court to fulfil its duties as State litigants.
- 42 Insofar as any party is successful, such a success should not warrant a cost order against the Minister.

Sesi Baloyi SC

Lerato Phasha

Counsel for the Fourth Respondent

13 November 2024