

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

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

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**APPLICANT'S HEADS OF ARGUMENT**

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**INTRODUCTION TO AND PURPOSE OF THIS APPLICATION**

1      This application, which concerns the constitutionality of the Copyright Act 98 of 1978, is brought in terms of section 172 of the Constitution. At its core, it concerns the failure of the Copyright Act to include universally-accepted provisions designed to ensure that persons with visual and print

disabilities can access works under copyright.<sup>1</sup> 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.<sup>2</sup>

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”). 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;<sup>3</sup> and

2.2 Parliament had passed the Copyright Amendment Bill [B 13B—2017] (“the CAB”), which recognises exceptions for people with disabilities through the proposed introduction to the Copyright Act of a new section 19D, on 28 March 2019.<sup>4</sup>

3 The proposed new section reads as follows:

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<sup>1</sup> 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. See founding affidavit, para 16, p 001-11

<sup>2</sup> Founding affidavit, para 15, p 001-11

<sup>3</sup> Founding affidavit, para 17, p 001-12

<sup>4</sup> Founding affidavit, para 52, p 001-23

- “(1) Any person as may be prescribed and that serves persons with disabilities may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with 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, if the following conditions are met:*
- (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;*
  - (b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and*
  - (c) the activity under this subsection must be undertaken on a non-profit basis.*
- (2) (a) A person with a disability, or a person that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work for personal use.*
- (b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.*
- (3) A person with a disability or a person that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.*
- (4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.”*

- 4 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 Assembly for reconsideration on 16 June 2020, more than a year after it had completed its passage through Parliament.<sup>5</sup> As matters stand, some 15 months later, the National Assembly's decision to pass the CAB on 5 December 2018 has been rescinded,<sup>6</sup> and the CAB has been retagged as a section 76 bill.<sup>7</sup>
- 5 What this means is that section 19D, which is neither controversial amongst stakeholders nor the subject of any reservation raised by the President, is effectively held hostage pending the outcome of what is likely to be a lengthy legislative process.<sup>8</sup> This has a particularly pernicious and discriminatory impact on persons with visual and print disabilities, whose rights to equality and dignity, amongst others, continue to be violated while the fight over other provisions in the CAB drags on.<sup>9</sup>
- 6 The main purpose of this application is therefore to ensure that people with visual and print disabilities are immediately able to access protected works 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.<sup>10</sup> The repeated delays to the CAB coming into

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<sup>5</sup> Founding affidavit, para 18, p 001-12

<sup>6</sup> Supplementary affidavit, para 34, p 006-10

<sup>7</sup> Further supplementary affidavit, para 8, p 008-3

<sup>8</sup> See, for example, supplementary affidavit, paras 39 – 40, p 006-11

<sup>9</sup> Founding affidavit, para 21, p 001-13

<sup>10</sup> Founding affidavit, para 24, p 001-14

force serve only to perpetuate an unconstitutional state of affairs for persons living with visual and print disabilities.

- 7 In what follows below, we deal with the following eight topics in turn:
  - 7.1 First, the applicant's standing to bring this application;
  - 7.2 Second, developments following the President's decision to refer the CAB back to Parliament;
  - 7.3 Third, the practical implications of the Marrakesh VIP Treaty for people with visual and print disabilities;
  - 7.4 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;
  - 7.5 Fifth, 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;
  - 7.6 Sixth, why the limitations of these rights cannot be justified in terms of section 36(1) of the Constitution;
  - 7.7 Seventh, appropriate relief; and

7.8 Finally, the issue of costs.

## STANDING

8 Section 38 of the Constitution provides:

*“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.”*

9 As a non-profit organisation dedicated to promoting the interests of blind people in South Africa,<sup>11</sup> Blind SA has standing to bring this application in the following three capacities:<sup>12</sup>

9.1 First, in the interest of the individual members of its member organisations;<sup>13</sup>

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<sup>11</sup> Founding affidavit, para 7, p 001-9

<sup>12</sup> Founding affidavit, para 8, p 001-9

<sup>13</sup> Section 38(e) of the Constitution

9.2 Second, in the interest of people in South Africa with visual and print disabilities, including but not limited to persons who are blind, who are not members of Blind SA's member organisation;<sup>14</sup> and

9.3 Third, in the public interest.<sup>15</sup>

## **DEVELOPMENTS FOLLOWING THE PRESIDENT'S DECISION**

10 In his letter to the Speaker dated 16 June 2020, the President identified a number of concerns relating to the constitutionality of the CAB.<sup>16</sup> At no point, however, did he make any mention of proposed new section 19D. In referring the CAB back to the National Assembly, he cited various reasons underpinning his reservations. None of these reasons implicates section 19D.<sup>17</sup>

11 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 the Office of Constitutional and Legal Services.<sup>18</sup> By 14 May 2021, the Portfolio Committee had adopted a report that made various recommendations to the National Assembly on the way forward.<sup>19</sup>

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<sup>14</sup> Section 38(c) of the Constitution

<sup>15</sup> Section 38(d) of the Constitution

<sup>16</sup> Founding affidavit, para 57, pp 001-24 to 001-25

<sup>17</sup> See founding affidavit, para 58, pp 001-25 to 001-26

<sup>18</sup> Supplementary affidavit, paras 26 – 27, pp 006-7 to 006-8

<sup>19</sup> Supplementary affidavit, paras 28 – 30, pp 006-8 to 006-9

- 12 On 1 June 2021, the Portfolio Committee’s report was debated in, and adopted by, the National Assembly.<sup>20</sup> On 4 June 2021, stakeholders and other interested parties were invited to make written submissions on particular clauses of the CAB.<sup>21</sup> Quite correctly, no input was sought on proposed new section 19D.<sup>22</sup> Written submissions were due by 9 July 2021, with public hearings being scheduled for 4 and 5 August 2021.<sup>23</sup>
- 13 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 processing of the CAB:<sup>24</sup>

*“The retagging of the CAB means that it will be subject to several additional parliamentary and provincial legislative processes, including a rigorous public participation process, before its finalisation. At the provincial level, it may even open up to debate provisions of the CAB in respect of which no concerns were raised by the President.”*

*“These processes will require a significant amount of time, and will delay the finalisation of the CAB by many months, if not longer, and further violate the rights of the marginalised blind and visually-impaired community our client represents. They could even result in significant amendments to the CAB, making the outcome of the process far from certain.”*

- 14 In short, the ongoing process in Parliament is far from over.

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<sup>20</sup> Supplementary affidavit, paras 33 – 34, pp 006-9 to 006-10

<sup>21</sup> These are proposed new sections 12A – D, 19B, and 19C.

<sup>22</sup> Supplementary affidavit, paras 35 – 36, p 006-10

<sup>23</sup> Supplementary affidavit, para 37, pp 006-10 to 006-11

<sup>24</sup> Further supplementary affidavit, paras 9 – 10, pp 008-3 to 008-4

## PRACTICAL IMPLICATIONS OF THE MARRAKESH VIP TREATY

15 The Marrakesh VIP Treaty was adopted with the express purpose of rectifying the deprivation of access to works under copyright experienced by 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.*”<sup>25</sup>

16 Article 3 of the treaty defines a beneficiary person as 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*

(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”.*

17 The treaty also enables contracting parties to facilitate the cross-border exchange of accessible format copies.<sup>26</sup>

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<sup>25</sup> Founding affidavit, para 61, p 001-27. See, in particular, Article 4(1)(a)

<sup>26</sup> Article 5(1)

- 18 The ground-breaking nature of the Marrakesh VIP Treaty was highlighted in the closing statement made on behalf of South Africa at the WIPO Diplomatic Conference in Marrakesh on 27 June 2013.<sup>27</sup>

*“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.*

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

*In conclusion, South Africa continues to attach great importance to a balanced approach between intellectual property right holders and public interest and it is within this context, that we reaffirm our support and commitment to this treaty.”*

- 19 To date, South Africa’s 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 Marrakesh VIP Treaty, it will not be ratified.<sup>28</sup> The key provision that is legislatively required to give effect to the Marrakesh VIP Treaty is the CAB’s proposed new section

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<sup>27</sup> Founding affidavit, para 64, pp 001-29 to 001-30

<sup>28</sup> Founding affidavit, para 66, p 001-30

19D.<sup>29</sup> Since section 19D is universally accepted, delaying its entry into force on account of concerns relating to other provisions in the CAB, unreasonably and unjustifiably delays South Africa's accession to the Marrakesh VIP Treaty.

## **THE ACT CURRENTLY IMPEDES ACCESS TO WORKS UNDER COPYRIGHT FOR PERSONS WITH VISUAL AND PRINT DISABILITIES**

20 Copyright is a state-sponsored guarantee of market exclusivity that places a restraint on the unencumbered use of published works, including literary and 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.<sup>30</sup>

21 Section 2 of the Copyright Act lists the types of original works eligible for copyright in South Africa, including literary works, artistic works, cinematograph films, sound recordings, and broadcasts. In respect of these works, copyright holders have near-exclusive control over their reproduction, publication, performance, broadcast, transmission, and/or

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<sup>29</sup> Founding affidavit, para 68, p 001-31. Without ratification, a provision such as proposed new section 19D(3) – which seeks to facilitate the cross-border exchange of accessible format copies – would not have any practical effect. This is because Article 5 of the Marrakesh VIP Treaty makes it plain that any such cross-border exchange can only take place between beneficiary persons and/or authorised entities in contracting parties. According to Article 19 of the Marrakesh VIP Treaty (read together with Article 18), an eligible party only becomes a contracting party once it has deposited its instrument of ratification or accession.

<sup>30</sup> Founding affidavit, para 72, p 001-32

adaptation. This control is subject to those exceptions and limitations provided in the Copyright Act and in its regulations.

- 22 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 the particular use of a work falls within the legislated exceptions to copyright, or is authorised by the copyright holder, any other use of such work is considered an infringement,<sup>31</sup> and subjects the user to potential criminal sanction.<sup>32</sup>
- 23 The vast majority of books in South Africa, and indeed internationally, are published in print and not in formats that are accessible to persons with visual (and print) disabilities.<sup>33</sup> The World Intellectual Property Organization (“WIPO”) 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.<sup>34</sup> This means that between 93 and 99 percent of books are published in inaccessible formats.
- 24 Accessible formats include Braille, audio versions, or copies of published works in large print. For electronic versions, they include digital formats

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<sup>31</sup> Section 23 of the Copyright Act

<sup>32</sup> Section 27 of the Copyright Act

<sup>33</sup> Founding affidavit, para 75, p 001-33

<sup>34</sup> Founding affidavit, para 75, p 001-33. 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 1.3% living with severe visual disabilities, and 9.3% living with mild visual disabilities. See founding affidavit, para 77, p 001-33.

that enable the use of screen readers. They also include adding audio descriptions to films and broadcasts, as well as subtitles.<sup>35</sup>

- 25 Given that the majority of published books are not published in accessible formats, the absence of a legislated provision enabling persons with visual and print disabilities to convert books into accessible formats renders these works entirely inaccessible.<sup>36</sup>
- 26 Since there is no legislated exception for accessible format shifting under the Copyright Act, the only available option for persons with visual and print disabilities is to contact every single author (or copyright holder) to secure authorisation to transform the works they desire into accessible formats.<sup>37</sup> As the founding affidavit makes clear, such a process is costly, time-consuming, and without any guarantee of success.
- 27 In practice, this effectively denies access to the vast majority of published works for persons with visual and print disabilities, solely on the basis of their disability. The onerous steps required of them to secure access, and the threat of criminal sanction, are not experienced by persons without visual and/or print disabilities.<sup>38</sup>
- 28 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

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<sup>35</sup> Founding affidavit, para 78, pp 001-33 to 001-34

<sup>36</sup> Founding affidavit, para 79, p 001-34

<sup>37</sup> Founding affidavit, para 80, pp 001-34 to 001-35

<sup>38</sup> Founding affidavit, paras 80 – 84, pp 001-34 to 001-36

works are locally available, in various accessible formats, for those to whom such works are entirely inaccessible right now. As it currently reads, the Copyright Act thus stands as an insurmountable barrier in the way of the availability of accessible format copies of works under copyright.<sup>39</sup>

29 As Langa CJ recognised in *MEC for Education: Kwazulu-Natal v Pillay*:<sup>40</sup>

*“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”.*

## THE ACT LIMITS CONSTITUTIONAL RIGHTS

30 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.

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

31.1 courts have recognised the interdependence and interrelatedness of all rights,<sup>41</sup> including in respect of equality and human dignity,

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<sup>39</sup> Founding affidavit, para 85, p 001-36

<sup>40</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 74

<sup>41</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 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

which in addition to being substantive rights, are also foundational constitutional values;<sup>42</sup>

31.2 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

31.3 section 39(1)(b) of the Constitution obliges a court to consider international law when interpreting the rights in the Bill of Rights, requiring a consideration of South Africa’s existing obligations arising from the ratification of various international conventions.

### **The right to equality**

32 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 proposed new section 19D has served to perpetuate this inequality of access. As the Constitutional Court has recognised, “*like justice, equality delayed is equality denied*”.<sup>43</sup>

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<sup>42</sup> *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 at paras 58 – 64

<sup>43</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 60

33 In relevant part, section 9 of the Constitution provides:

- “(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law;*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) ...
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.” (My emphasis)*

34 The constitutional conception of the right to equality favours substantive over formal equality.<sup>44</sup> 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;<sup>45</sup> not only must the state remove barriers to the enjoyment of rights, on an equal basis, by

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<sup>44</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at paras 26 – 27 and 31

<sup>45</sup> *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

people with disabilities, but it must also take measures designed to ensure that the opportunity to realise these rights equally is meaningful.

35 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 the starting point when interpreting what the right to equality means for people with disabilities is the Convention on the Rights of Persons with Disabilities (“the CRPD”), which South Africa ratified in 2007.<sup>46</sup>

36 In its preamble, 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”*.

37 The CRPD recognises that intellectual property may serve as a barrier for persons with disabilities accessing works under copyright. With this in mind, it imposes obligations on states parties to *“take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats”*.<sup>47</sup>

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<sup>46</sup> Founding affidavit, para 90, p 001-38

<sup>47</sup> Article 30(1)(a)

38 In particular, states parties are required 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”*.<sup>48</sup>

39 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.”*

40 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.”*<sup>49</sup>

41 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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<sup>48</sup> Article 30(3)

<sup>49</sup> Article 4(1)(b)

- 41.1 First, in Mr Low's affidavit,<sup>50</sup> in which he describes the "*book famine*" experienced by persons who are blind, visually impaired, or otherwise print disabled;
- 41.2 Second, in Justice Yacoob's affidavit,<sup>51</sup> in which he describes his extremely limited access to reading materials since he started reading as a young child, until he became a successful advocate who could afford to buy his own books in print, and arrange for them to be converted into braille; and
- 41.3 Third, in Mr Gama's affidavit,<sup>52</sup> in which the teacher at a school for the deaf and blind explains the direct impact of the Copyright Act on the ability of both learners and teachers to get hold of accessible format copies of textbooks and other materials every child needs for their education.
- 42 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.

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<sup>50</sup> Low supporting affidavit, paras 24 – 34, pp 002-13 to 002-19

<sup>51</sup> Yacoob supporting affidavit, paras 3 – 12, pp 002-2 to 002-4

<sup>52</sup> Gama supporting affidavit, paras 6 – 14, pp 002-33 to 002-36

- 43 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, is unfair. Put simply, 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.
- 44 What makes matters worse is that the state is constitutionally bound to take positive measures to address such discrimination, by ensuring reasonable accommodation for persons with disabilities.<sup>53</sup> The same obligation arises in terms of Article 5.3 of the CRPD, which provides:

*“In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”*

- 45 Put simply, any failure to ensure reasonable accommodation constitutes unfair discrimination. As the Supreme Court of Canada has explained:<sup>54</sup>

*“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*

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<sup>53</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* at para 73

<sup>54</sup> *Eaton v Brant* [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)

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**

- 46 Copyright holders may refuse to allow accessible format copies of works under copyright to be made,<sup>55</sup> even in circumstances where they have no intention of making copies themselves. As the founding affidavit explains, 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; we will block you because we can, regardless of the consequences.<sup>56</sup>
- 47 Our courts have recognised that a life without dignity is a life that is substantially diminished,<sup>57</sup> and that everyone is entitled – as of right – to be treated as worthy of respect and concern.<sup>58</sup> In entrenching a right to human dignity in section 10, in addition to dignity being recognised as a foundational value, our Constitution values the intrinsic worth of all human beings. The Copyright Act, as it currently reads, does not.
- 48 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,

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<sup>55</sup> Alternatively, they may not respond to requests for the use of works in this manner, or may not be publicly traceable.

<sup>56</sup> Founding affidavit, para 98, p 001-41

<sup>57</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 326

<sup>58</sup> *S v Makwanyane and Another* at paras 328 – 329

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.<sup>59</sup>

49 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 by the South African Library for the Blind, these were not works prescribed in terms of their curriculum. The indignity of not being able to read for oneself, and being so heavily reliant on others, doesn't go unnoticed.<sup>60</sup>

### **The right to education**

50 The right to education, entrenched in section 29 of the Constitution, operates at two levels: first, in respect of basic education;<sup>61</sup> and second, in respect of further education.<sup>62</sup> Both rights include the entitlement to educational materials at all levels;<sup>63</sup> it is only the extent of the obligation imposed on the state that differs.

51 Unlike all other socio-economic rights in the Constitution, including the right to further education, the right to basic education is unqualified; it is

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<sup>59</sup> Low supporting affidavit, para 31, p 002-15

<sup>60</sup> Yacoob supporting affidavit, para 6, p 002-3

<sup>61</sup> Section 29(1)(a), which guarantees everyone a right “to a basic education, including adult basic education”.

<sup>62</sup> Section 29(1)(b), which guarantees everyone a right “to further education, which the state, through reasonable measures, must make progressively available and accessible.”

<sup>63</sup> 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

neither subject to the availability of resources, nor to progressive realisation. Instead, it is an immediately realisable right; its realisation cannot be delayed.<sup>64</sup>

52 While the right to educational materials is not expressly mentioned in the text of the Constitution, 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 on the state to provide such a textbook.<sup>65</sup> As this Court has held:<sup>66</sup>

*“[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”.*

53 The courts have also held that the failure to provide adequately for learners with disabilities is a violation of their right to a basic education.<sup>67</sup> In so doing, they have recognised the interdependency and interrelatedness of all entrenched rights, in particular the interrelated nature of the rights to education and equality.<sup>68</sup>

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<sup>64</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37

<sup>65</sup> *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) at para 176; *Minister of Basic Education v Basic Education for All* at paras 47-49

<sup>66</sup> *Section 27 and Others v Minister of Education and Another* at para 25

<sup>67</sup> See *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC)

<sup>68</sup> *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 47

54 This approach to the right to education of persons with disabilities is well-recognised under international law. For example, the CRPD 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:*

- a. *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;*
- b. *The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*
- c. *Enabling persons with disabilities to participate effectively in a free society.”*

55 In order to realise this right, Article 24(2) requires states that are party to the convention to ensure, amongst other things, that *“[p]ersons with disabilities receive the support required, within the general education system, to facilitate their effective education”*.

56 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.*

57 *“To this end”, the article continues, “States Parties shall take appropriate measures”. Amongst other things, this includes “[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”.*

58 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”.*<sup>69</sup>

The inclusion of an accessible format shifting provision would go some way towards discharging this obligation.

59 South Africa also bears obligations under the International Covenant on Economic Social and Cultural Rights (“the ICESCR”) to realise the right to education, at all levels, in line with the principle of non-discrimination.<sup>70</sup> According to General Comment 13, which concerns Article 13 of the ICESCR, states parties are required to ensure that education is available, accessible, acceptable, and adaptable for all.<sup>71</sup>

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<sup>69</sup> Article 9

<sup>70</sup> The ICESCR was ratified by Parliament in 2015. See founding affidavit, para 110 , p 001-44

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 13, The Right to Education (art 13) (1999) E/C12/1999/10

60 General Comment 13 explains 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”.*

61 In his supporting affidavit, Mr Gama explains the challenges faced by learners (and teachers) at a school for the deaf and blind that – relative to many others – may appear to be well-resourced. And 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.<sup>72</sup> Mr Gama also explains how learners often face new challenges when they leave school and pursue further education.<sup>73</sup>

62 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.

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<sup>72</sup> Gama supporting affidavit, paras 9 – 15, pp 002-34 to 002-36

<sup>73</sup> Gama supporting affidavit, paras 16 – 17, p 002-37

63 Moreover, 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-realizable standard contemplated by section 29(1)(a) of the Constitution. It further fails to meet the lower threshold standard of reasonableness, contemplated by section 29(1)(b), by failing to provide for the needs of those who are most desperate.<sup>74</sup>

### **The right to freedom of expression**

64 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*”. By preventing persons with print and visual disabilities from accessing many works under copyright (and sharing accessible format copies that they have made), the Copyright Act directly limits these aspects of the right.

65 Justice Yacoob, Mr Low, and Mr Gama have all explained how the Copyright Act has directly interfered (and continues to interfere) with the ability to receive information and ideas – by limiting and/or blocking access to works under copyright, whether for professional, educational, or personal purposes. Mr Low has also shown how the legislation negatively affects his doctoral research (in a scientific field).<sup>75</sup>

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<sup>74</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 44

<sup>75</sup> Low supporting affidavit, paras 34.4 – 34.5, pp 002-17 to 002-18

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

66 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.<sup>76</sup> Since copyright extends to all forms of media, the right to cultural life is directly implicated.

67 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.*"<sup>77</sup> 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.<sup>78</sup>

### **THE LIMITATIONS OF RIGHTS CANNOT BE JUSTIFIED**

68 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*

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<sup>76</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment No 21 "Right of Everyone to Take Part in Cultural Life" E/C.12/GC/21 (2009)

<sup>77</sup> Low supporting affidavit, para 28, p 002-14

<sup>78</sup> Founding affidavit, para 117, p 001-46

*human dignity, equality and freedom, taking into account all relevant factors*". The Copyright Act is a law of general application.

69 In determining whether any particular limitation is reasonable and justifiable, the factors to be considered include the following:<sup>79</sup>

69.1 the nature of the right;

69.2 the importance of the purpose of the limitation;

69.3 the nature and extent of the limitation;

69.4 the relation between the limitation and its purpose; and

69.5 less restrictive means to achieve the purpose.

70 We submit that in conducting this analysis, a court would be mindful of the fact that we are dealing here with 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.

71 Given the global consensus reflected in the Marrakesh VIP Treaty, South Africa's expression of its intent to accede to the treaty shortly, the fact that

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<sup>79</sup> See *S v Manamela* (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) at paras 32 and 65 – 66

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.

72 What makes matters worse is that the limitation does not just 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.

73 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.<sup>80</sup> As this matter is unopposed, no-one is seeking to justify the limitations.

## **APPROPRIATE RELIEF**

74 When deciding any constitutional matter that is 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*

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<sup>80</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 (3) SA 280 (CC) at para 34

*of its inconsistency*". There is simply no discretion; if the law (or conduct) is unconstitutional, the court must declare it so.

75 For the reasons set out above, we submit that the Copyright Act ought to be declared inconsistent with the Constitution to the extent that it –

75.1 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/or

75.2 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.

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

77 We submit that this Court may, and indeed should, go further. In terms of section 172(2)(b) of the Constitution, “[a] court which makes an order of constitutional invalidity may grant .... temporary relief to a party ... pending

*a decision of the Constitutional Court on the validity of th[e] Act”.*<sup>81</sup> As section 172(2)(a) makes clear, *“an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”*

78 A court’s power to grant just and equitable relief is broad.<sup>82</sup> In appropriate circumstances, it may also include a *“reading-in”* remedy.<sup>83</sup> We submit that in the circumstances of this case, it would be just and equitable for this Court to read into the Copyright Act, with immediate effect, the legislative solution already crafted by Parliament: proposed new section 19D, as contemplated by clause 20 of the CAB.<sup>84</sup>

79 In prayer 2 of its notice of motion, Blind SA sought an order *“[s]uspending the operation of the declaration of unconstitutionality referred to in prayer 1 for a period of 12 months”*. Given the provisions of section 172(2)(a) of the Constitution, Blind SA does not persist in seeking any suspension order. As Zondo ACJ held in *Minister of Justice and Constitutional Development v Prince*:<sup>85</sup>

*“The High Court suspended the order of invalidity for a period of 24 months from 31 March 2017. It said that that was to allow Parliament to correct the constitutional defects in the Drugs Act and Medicines Act set out in the judgment. It is neither necessary nor competent for a High*

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<sup>81</sup> See, for example, *S v Ntsele* [1997] ZACC 14, 1997 (11) BCLR 1543 at para 11; and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 191C.

<sup>82</sup> *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* 2015 (10) BCLR 1129 (CC) at para 12

<sup>83</sup> *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 88

<sup>84</sup> Parliament would always be free to amend any such reading-in remedy.

<sup>85</sup> *Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393 (CC) at para 2 (our emphasis)

*Court to suspend an order of constitutional invalidity that relates to a statutory provision or an Act of Parliament when it grants such an order of constitutional invalidity. It is unnecessary because s 172(2) of the Constitution provides that ‘an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court’. That means that 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. Such a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event.”*

## **COSTS**

80 In prayer 5 of its notice of motion, 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 this application is unopposed, Blind SA only seeks an order directing the first respondent to pay its costs.

81 This is consistent with the approach to constitutional litigation adopted by the Constitutional Court. As Sachs J explained in *Biowatch*:<sup>86</sup>

*“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.”*

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<sup>86</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 22 (footnote omitted and emphasis added)

- 82 The government's obligation to pay a successful applicant's costs even applies in circumstances where the state has chosen not to oppose.<sup>87</sup>

*"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 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."*

- 83 In the circumstances, we submit that the first respondent, who was cited in his capacity as the Cabinet member responsible for the administration of the Copyright Act,<sup>88</sup> ought to be ordered to pay Blind SA's costs, including the costs of two counsel.

<sup>87</sup> *Biowatch* at para 23 (footnote omitted and emphasis added)

<sup>88</sup> Founding affidavit, para 9, p 001-9

**CONCLUSION**

84 In the result, we submit that this Court ought to grant the orders sought in prayers 1, 3 (excluding 3.1 and 3.2), and 5 of the notice of motion.

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14 September 2021