

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

Case Number: 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 NATIONAL ASSEMBLY

Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

and

INTERNATIONAL COMMISSION OF JURISTS (ICJ)

Amicus Curiae

AMICUS CURIAE'S HEADS OF ARGUMENT

1. The incorporation of the proposed section 19D of the Copyright Amendment Bill¹ ("Amendment Bill") is not only permissible, but legally required, in terms of South

¹ B13B-2017. Clause 20, Section 19D, reads as follows:

"19D. (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.

Africa's international human rights law obligations. The Copyright Act,² in its current form, is both unconstitutional and in contravention of South Africa's international law obligations.

INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS IN SOUTH AFRICA

2. We submit that sources of international law, both binding and non-binding, fall to be considered by this Court.³

3. Courts hold a constitutional obligation to consider international human rights law and standards when interpreting constitutional rights and legislative provisions.⁴ When interpreting legislation, Courts must (a) do so in a manner that "promote[s] the spirit, purport and objects of the Bill of Rights"⁵ and (b) prefer any "reasonable" interpretation that is "consistent with international law" over any alternative interpretation that is "inconsistent" with such law.⁶

4. According to the jurisprudence of the Constitutional Court, such an interpretation requires the state to take "reasonable and effective" measures to respect, protect, promote and fulfill the Bill of Rights, and measures that fall short of international law standards, may well be considered unreasonable.⁷ These principles are implemented on binding and non-binding sources of law⁸ and are "helpful in plumbing the meaning" around the text on constitutional rights.

(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."

² No. 98 of 1978.

³ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 96.

⁴ Section 39(1)(b) of the Constitution of the Republic of South Africa. *Id* at 192.

⁵ Constitution, s 39(1)-(2).

⁶ Constitution, s 233.

⁷ *Glenister*, paras 189, 194. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 42.

⁸ *S v Makwanyane and Another* [1995] ZACC 3.

5. Where the text is in harmony with the context in which it is used in our Constitution, “there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.”⁹

VIENNA CONVENTION ON THE LAW OF TREATIES

6. Although South Africa is not party to the Vienna Convention on the Law of Treaties¹⁰ (“VCLT”), it is bound by its main provisions, having officially accepted that the main provisions of the VCLT as part of customary international law and generally following its prescriptions on international agreements.¹¹
7. We submit that Article 31(3)(c) of the VCLT also forms part of international customary law,¹² and is binding on South Africa as recognised law.¹³ Article 31(3)(c) of the VCLT requires “any relevant rules of international law applicable in the relations between the parties” to be taken into account when interpreting a particular treaty.¹⁴
8. Apparently conflicting treaty provisions should therefore be harmonized in light of their shared systemic objectives. This “systemic integration”¹⁵ aims at interpreting rules of

⁹ *Grootboom*, para 45.

¹⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

¹¹ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51, para 36-38. Specific to this case, the VCLT provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” and that a State “may not invoke the provisions of its internal law as a justification for a failure to perform a treaty” obligation. See VCLT, Articles 26-27. While the Constitutional Court deemed article 26 as a “main provision”, it seems indisputable that Article 27 is also such a “main provision” of VCLT as it resolves a fundamental conflict otherwise existing between the application of domestic and international human rights law.

¹² Report of the Study Group of the International Law Commission “Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law” A/CN.4/L.682 13 (April 2006): https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, para 168.

¹³ Section 232 reads in full:

“Customary international law.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

¹⁴ VCLT, Article 31(3)(c).

¹⁵ *Id*, para 410.

international law as part of single coherent system of law wherever possible.¹⁶

9. Such harmonisation further requires South Africa to therefore adopt exceptions within its copyright laws to ensure equal and easy access to reading materials for persons with disabilities.¹⁷ And since domestic law must be interpreted consistently with this principle, we submit South African law must adopt exceptions within its copyright laws to ensure equal access to reading materials for persons with disabilities.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (“CRPD”)

10. Of direct application for the present purpose, Article 30(3) of the CRPD¹⁸ provides that States Parties should take all appropriate steps 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”.¹⁹
11. States must take specific measures to ensure that persons with disabilities “learn life and social development skills to facilitate their full and equal participation in education and as members of the community”.²⁰ This requires, inter alia, “facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication” and ensuring that education “is delivered in the most appropriate languages and modes and means of communication for the individual, and in

¹⁶ Id Article 31(3). P Sands, 'Treaty, Custom and the Cross-Fertilisation of International Law' (1998) 1 Yale Human Rights and Development Law Journal 85, 95.

¹⁷ S Samtani “The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill” (2020) American University Washington College of Law PIJIP Research Paper No. 61:

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=research>, p 50 “almost all copyright laws in the world have educational exceptions and it is a well-established exemption from the reach of copyright's monopoly”.

¹⁸ Convention on the rights of Persons with Disabilities.

¹⁹ Id, Article 30(4).

²⁰ Id, Article 30(2).

environments which maximize academic and social development”.²¹

12. South Africa must therefore act to “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....”; “development by persons with disabilities of their personality, talents and creativity...”; and the “enabling persons with disabilities to participate effectively in a free society”.²²

13. In addition to and reinforcing South Africa’s obligations in terms of Articles 24 and 30 of the CRPD, Article 9 of the CRPD provides for a self-standing right of “accessibility” for persons with disabilities including access to “information and communications”

²¹ Id, Article 24(3)(a)-(c).

²² -Id, Article 24(1)(a)-(c). Article 24 reads in full:

- “1. 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.
2. In realizing this right, States Parties shall ensure that:
 - (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - (c) Reasonable accommodation of the individual’s requirements is provided;
 - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
3. States Parties shall 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. To this end, States Parties shall take appropriate measures, including:
 - (a) Facilitating 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;
 - (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
 - (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.
4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

and all “facilities and services open or provided to the public”.²³

14. To comply with these obligations, South Africa must ensure the general accessibility of education systems, in addition to providing reasonable accommodations of an individual’s own requirements and additional individualised support measures, where necessary.²⁴
15. To this end, the Constitutional Court took South Africa’s obligations in terms of the CRPD into account in the interpretation of the Constitution.²⁵ Pertinent to the present context and in similar fashion, the High Court considered the provisions of the CRPD relating to the right to education in determining the content of the State’s obligations towards children with disabilities.²⁶
16. In accepting that all the above rights are “inter-related and mutually supporting”,²⁷ we submit that South Africa carries a clear positive obligation to take proactive legislative measures to eliminate barriers to accessing²⁸ reading materials for persons with disabilities.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

17. In a similar fashion, the ICESCR provides for the realization of the rights to

²³ CRPD, Article 9.

²⁴ *Id.*, Article 24(2)(c)-(e). For a full explanation of the duties of South Africa in terms of Article 24 of CRPD see: Timothy Fish Hodgson “The right to inclusive education in South Africa: Recreating disability apartheid through failed inclusion policies” (2018) 135 SALJ 461, pp 474-489.

²⁵ *De Vos N.O and Others v Minister of Justice and Constitutional Development and Others* 2015 (2) SACR 217 (CC), paras 29-31.

²⁶ *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC), paras 23-25.

²⁷ *Grootboom*, para 23.

²⁸ Although access to textbooks in accessible formats is important and necessary, it is not sufficient for South Africa to comply with its CRPD obligations to provide reading materials to persons with disabilities for educational and other purposes.

education²⁹ and to take part in cultural life.³⁰ States Parties have an obligation to take steps towards achieving the full realization of these like any other Covenant rights.³¹ The scope of these protections are authoritatively interpreted by the CESCR including in its General Comments.³²

18. In terms of ICESCR, South Africa's immediate³³ and unqualified³⁴ obligations under Article 13 (the right to education)³⁵ are intrinsically linked to and must also be understood in light of its obligations under Article 15 (right to cultural life).³⁶ These include obligations in respect of the accessibility of education.

²⁹ Article 13 of ICESCR reads in full:

"1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

³⁰ Article 15 of ICESCR reads in full:

"1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."

³¹ ICESCR, Article 2(1)-(2).

³² UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 13 on the Right to Education and General Comment No. 21 on the Right to Take Part in Cultural Life.

³³ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13, para 37.

³⁴ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* (CCT 60/12) [2013] ZACC 10, para 38.

³⁵ CESCR, General Comment No. 5 on Persons with Disabilities; General Comment No. 13 on the Right to Education.

³⁶ ICESCR, Article 15(1)(a). CESCR, General comment No. 21 on the Right of everyone to take part in cultural life.

MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT

19. The Marrakesh Treaty³⁷ allows for the making of accessible copies of books without the permission of copyright holders.³⁸ It also permits such accessible books to be shared across national borders for the explicit benefit of persons with visual and other print disabilities.³⁹ The suggested vehicle by which this is to be achieved is measures taken by States Parties to provide for “limitations or exceptions in its national copyright law”.⁴⁰
20. Notably, the Marrakesh Treaty itself takes into account that states are likely to have similar obligations to those delineated in its text from “other international treaties. This acknowledges the approach to interpretation of international law as is required by Article 31(3)(c) of the VCLT, detailed above.
21. In keeping with the objectives of the Marrakesh Treaty, the contemplated section 19D of the Amendment Bill makes provision for exceptions in line with the Marrakesh Treaty.⁴¹ The enactment of a such provision is legally required, in terms of South Africa’s international human rights law obligations and accordingly permissible.
22. With this context in mind, the Marrakesh Treaty is of clear relevance in interpreting both international and domestic law in the present matter in at least the following ways:

³⁷ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

³⁸ Marrakesh Treaty, Article 2.

³⁹ Id, Article 3.

⁴⁰ Id, Article 4; 10 and 11.

⁴¹ Amendment Bill, section 19D.

- 22.1. As a persuasive source of international law in interpreting and informing the content of the CRPD and ICESCR.
- 22.2. As a source of general international human rights law that should be considered in interpreting the legislation and the rights in the Bill of Rights according to domestic law in South Africa.⁴²
- 22.3. The Marrakesh Treaty is a particularly forceful, if presently non-binding ,source in international law given South Africa’s clear commitment to, and agreement with, the content of the agreement which is reflected in the *travaux preparatoires* of the treaty.⁴³

23. We therefore submit that this Court should consider the provisions of the Marrakesh Treaty in its interpretive construction in four respects. First, the Treaty is relevant in interpreting the above applicable human rights treaties to which South Africa is a party.⁴⁴ Secondly, it is important in the interpretation of applicable domestic constitutional provisions and the State’s corresponding obligations.⁴⁵ Thirdly, it is of similar importance in interpreting the Copyright Act and its constitutionality. And lastly, it is relevant in the determination of an effective, just and equitable, remedy in compliance with international human rights law and section 172 of the Constitution.

⁴² *Makwanyane* at para 35; *S v Williams* 1995 (3) SA 632 (CC) at 639 in which the Court considered the jurisprudence of the United Nations Human Rights Committee, the European Commission and the European Court of Human Rights on the corresponding provisions in these treaties; *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at 1035-6 and 1085; *S v Rens* 1996 (1) SA 1218 (CC) at 1225 in which the Court relied on a decision of the European Court of Human Rights on fairness in appellate proceedings; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 660-3 in which the international human rights norms were used to uphold a constitutional challenge to imprisonment for judgment debts. *Glenister* at para 187.

⁴³ Government of South Africa “Draft South African Closing Statement Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities” (27 June 2013), available at: https://libguides.wits.ac.za/ld.php?content_id=5267475, which inter alia, reads:

“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.”

Reproduced in the record at Annexure FA 22.

⁴⁴ Including the CRPD (Articles 9, 24 and 30) and ICESCR (Articles 13 and 15).

⁴⁵ Including sections 7(2), 9, 10, 29 and 30 of the Constitution.

CONCLUSION

24. We submit that the Copyright Act places an impermissible barrier to non-discriminatory access to educational and cultural life.
25. When this Court considers sources of international law, both binding and non-binding, in a harmonized and systematically integrated manner, we submit that the Copyright Act, in its current form, is inconsistent with the Constitution.
26. South Africa has thus failed to take the legislative and other measures necessary to remove barriers to non-discriminatory access to reading materials for persons with disabilities and to prevent third parties from interfering in the exercise the rights of persons with disabilities. This includes the introduction or failure to repeal legislation.⁴⁶

Muhammad Zakaria Suleman
Sithandiwe Mdletshe

Chambers, Durban
17 September 2021

⁴⁶ CESCR, General Comment No. 20 on the Non-discrimination in economic, social and cultural rights.