



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

CASE NO: 14996/21

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<u>07/12/2021</u>	<u></u>
DATE	SIGNATURE

In the matter between:

BLIND SA

Applicant

and

MINISTER OF TRADE, INDUSTRY AND COMPETITION

First Respondent

MINISTER OF INTERNATIONAL RELATIONS AND

Second Respondent

COOPERATION

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF

Fourth Respondent

PROVINCES

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

JUDGMENT

MBONGWE J

INTRODUCTION

- [1] This unopposed application has been brought in terms of the provisions of section 38 of the Constitution of the Republic of South Africa Act : -- in the interests of the members the applicant who are blind, persons suffering from visual and print disabilities and generally in the public interest. In addition, the Applicant derives legal standing to institute these proceedings in terms of the provisions of section 38 of the Constitution which read thus:

“ 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.”*

- [2] These proceedings concern the unconstitutional marginalisation or limitation of the rights of persons with various visual and print disabilities from access to information. At the heart of these human rights infringements is the circumspect statutory protection of intellectual property rights. The absurdity of having to weigh the protected rights, which are invariably pecuniary in nature, against the infringement of human rights is unfathomable in a constitutional democracy with

a Bill of Rights. The marginalisation from accessing information that is available in works under copyright, by far the largest and primary sources of information, should have no place in any society.

- [3] Section 2 of the Copyright Act lists the types of original works eligible for copyright in South Africa. Amongst these are literary works, artistic works, cinematography films, sound recordings, and broadcasts. Notably, the Act clothes the authors of these work with almost absolute control over their works, production, publication, performance, broadcast and adaptation.

ALTERNATIVE AVAILABLE MEANS OF ACCESS TO INFORMATION

- [4] Alternative available formats suitable for the blind and persons with visual and print disabilities to access works under copyright include Brailles, audio versions, or copies of published works in large print. For electronic versions, they include digital formats that enable the use of screen readers, adding audio descriptions to films and broadcasts, as well as subtitles.
- [5] Despite the availability of the aforementioned alternative means, the provisions of the Copyright Act, in its current form, remain prohibitive of a free conversion of works under copyright to alternative formats. According to the World Intellectual Property Organisation (WIPO), no more than seven percent of published books are in formats that the blind or visually impaired, estimated at 285 million people worldwide, can read.
- [6] The consent of the authors of works under copy right, which is rarely readily granted, has to be sought for the conversion of the works into formats suitable for the visually and print disabled to have equal access to information. It is an act of criminality punishable by law to circumvent the control of an author of work under copyright. The statutory prohibition of free conversion of works under copyright is inherently discriminatory and renders the Copyright Act

inconsistent with the provisions of section 9 of the Constitution of the Republic of South Africa Act, 1996, inter alia. Section 9 espouses the eradication of all forms of discrimination in favour of the prevalence of equality, irrespective of race, gender, religion, disabilities and cultures. The Copyright Act, in its present form, discriminates against persons with visual and print disabilities and is consequently inconsistent with the constitution.

- [7] Courts have an obligation, when interpreting legislative provisions, to be alive to the spirit, purport and objectives of the Constitution and the Bill of Rights (section 39(1)(b) of the Constitution of South Africa). Sources of international human rights law may also be considered by the Court (see *Glenister v President of the Republic of South Africa and Others* 2011(3) SA 347 (CC)). The Copyright Act is incapable of an interpretation that aligns it with the fundamentals of section 39(1)(b) nor with the principle in the *Glenister* matter – an glaring indication of its unconstitutionality.

THE MARRAKESH TREATY

- [8] The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled advocates for the rights of persons who are blind and persons with visual and print disabilities. South Africa was among the countries represented at the *Diplomatic Conference to Conclude a treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* ('the Marrakesh treaty'). It is worth quoting some paragraphs in the closing statement that was made on behalf of South Africa expressing the appreciation of the purpose and value of the efforts and remedial actions proposed in the treaty;

"Mr President,

Our delegation would like to thank you for the leadership and the

guidance you have provided during this historic Diplomatic Conference.

We would like to express our gratitude to the Kingdom of Morocco and

the beautiful city of Marrakesh for the warm hospitality extended to us.

South Africa would like to thank the WIPO International Bureau for their hardwork as well as participating delegation for their flexibility and goodwill in producing this historic treaty”.

“At the outset, South Africa would like to align itself with the statement made by Algeria on behalf of the Africans.

Mr President,

The name Makkaresh will forever resonate with this landmark treaty that seeks to address the balance between private and public interests in line with the principles of the United Nations Convention on the Rights of

Persons with Disabilities and the Universal Declaration of Human Rights.

Persons with disabilities across the world in both developed and developing worlds have fought long and hard to have access to knowledge in accessible formats. This treaty creates an enabling legal framework to do so. It provides an impetus for a rights based approach and the full inclusion of disabled persons in society”.

- [9] A very poignant part in the speech was the acknowledgement of the purpose and values espoused by the Makkaresh Treaty and the positive impact the implementation of the remedial actions contained therein would have on the livelihood of the blind and visually impaired members of society was stated thus;

“The Marrakesh Treaty will forever be remembered as the first WIPO treaty that reaffirms exceptions and limitations in the copyright regime, but also the means to end the book famine that has long plagued people with visual impairment and print disabilities”.

COPYRIGHT AMENDMENT BILL

[10] In line with the declaration of intent to ratify the Treaty, the South African Parliament adopted the Copyright Amendment Bill [B 13B---2017] on 19 March 2018 which proposes the insertion in the provisions of the Act of section 19D to create exceptions to the Copyright Act for the benefit of the blind and people with visual and print disabilities. The proposed provisions of the Copyright Act Amendment Bill read thus:

- “(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 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 disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection*
- (1) may, without the authorisation 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”

THE INORDINATE DELAY

[11] Despite this positive step by Parliament, there has since been an inordinate delay in the actual amendment of the Copyright Act and, therefore, giving effect to these provisions. The delay pertains to an inchoate legislative process and engagements between the Presidency and the National Assembly. Notably, the provisions of the proposed Section 19D are neither a subject of contestation or controversy among stakeholders nor any reservation by the Presidency in the engagements concerned. The delay is, consequently, unreasonable and contrary to the provisions of section 36(1) of the Constitution as it unjustifiably perpetuates the violation of the rights of the blind, visually and print disabled persons.

[12] The endless delay has resulted in the Applicant instituting these proceedings and seeking the following orders:

1. Declaring the Copy Right Act 98 of 1978 ("the Copy Right Act") inconsistent with the Constitution of the Republic of South Africa, 1996 to the extent that it -

- 1.1 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

- 1.2 does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty to Facilitate Access to published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ("the Marrakesh VIP Treaty");

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

2. Suspending the operation of the declaration of unconstitutionality for a period of twelve months to afford –

- 2.1 Parliament –

- 2.1.1 An opportunity to remedy the defect giving rise to the unconstitutionality; and

- 2.1.2 sufficient time to approve the Marrakesh VIP Treaty, and

- 2.2 the Second Respondent sufficient time to deposit, with the World Intellectual Property Organisation, South Africa's instrument of accession to the Marrakesh VIP Treaty;

3. Deeming the Copyright Act to read as though it contains the proposed new section 19D contemplated by clause 20 of the Copyright Amendment Bill [B 13B---2017] –
 - 3.1 pending a decision of the Constitutional Court, in confirmation proceedings, on the validity of the Copyright Act; and
 - 3.2 pending Parliament's remedying the defect giving rise to the unconstitutionality, in the event that the Constitutional Court confirms the declaration of unconstitutionality and invalidity.
4. Directing that should Parliament not remedy the constitutional defect within twelve months of the order of the Constitutional Court, prayer 3 will continue to apply;
5. Directing that the costs of this application, including the costs of two counsel, are to be paid by the First Respondent and all other respondents who elect to oppose the relief sought by the Applicant.

SUMMARY OF APPLICANT'S ARGUMENT

- [13] It is apparent from the orders sought that the Applicant specifically challenges the inordinate delay by government to bring into operation the provisions of the Copyright Amendment Bill by amending the offending statutory provisions with the haste deserved. Courageously and, in view, appropriately so, the Applicant approached the Court seeking orders that are intended to expedite the process of bringing an immediate end to the violation of the rights of a section of persons in society; the blind, visually and print disabled persons.

AMICI CURIAE

- [14] In response to the Applicant's Notice IN TERMS OF RULE 16A of the Uniform Rules of The Courts, three amici curiae brought applications with the view to

obtaining admission to participate in the proceedings. Despite the objections by the First Respondent's representative, the magnitude of the relief sought rendered it imperative that the court hears as many views and contributions as possible and available in order to make an informed decision. In *Hoffman v South African Airways* [2000 SA 1 (CC); 2000 (11) BCLR 1211 at para 63] the Court said the following:

"An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."

- [15] Furthermore, in *In Re: Minister of Health v Treatment Action Campaign* [2002] ZACC at paragraph 5, the Court addressed the role of the *amicus curiae* as follows –

"is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court."

- [16] Conspicuous by their absence in the proceedings were authors of the works under copyright who undoubtedly have a direct interest in the subject matter.

INTERNATIONAL COMMUNITY OF JURISTS

- [17] The International Community of Jurists ("ICJ") describes itself as a non-governmental organisation that has since 1952 performed a unique and prominent role in defending and promoting the rule of law and the legal protection of human rights worldwide. This body had, prior to this hearing, brought an application to be admitted as a friend of the Court in these proceedings and was duly admitted on the 13 September 2021.
- [18] Arguing in favour of the Constitutional Court's view that the interpretation of constitutional and statutory provisions should consider international law and standards, ICJ expressed support for the Applicant's sought alignment of the provisions of the Copyright Act with the vision of the Marrakesh Treaty to cure the inconsistency of the Act with the South African Constitution and acceptable international standards.
- [19] The ICJ bolstered its argument by making reference, particularly, to the Convention on the Rights of Persons with Disabilities ('CRPD') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), both of which concern the protection of the rights to education and participation in cultural activities, emphasising the unconstitutional infringement of these rights by the Copyright Act. In *MEC for Education; KwaZulu – Natal & Others v Pillay* [2008 (1) SA 474 (CC)], Langa CJ described the plight of blind and visually and print person thus;

"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."

- [20] In my view, a developing country such as ours can ill - afford to not keep abreast with international standards more so on matters commonly affecting human rights and humanity worldwide. A coherent international approach that manifests in the laws of the individual States is the most practical mechanism to employ in such instances. The protection of intellectual property at the expense of human rights of access to information requires a coherent international approach to dislodge the beneficiaries of the protection of their controlling powers. There is no reason why a similar approach should not be adopted in respect of the limitation of access to the corona virus vaccines in light of the worldwide devastating effects the corona virus is causing.

MEDIA MONITORING AFRICA TRUST (“MMA”)

- [21] The Media Monitoring Africa Trust describes itself as a not-profit organisation that operates in the public interest to promote the development of freedom of expression and access to information in South Africa and the rest of the continent.
- [22] MMA argued that the challenges that persons with visual disabilities are subjected to by the provisions of the Copyright Act are inconsistent with South Africa’s domestic, regional and international law obligations. This body made submissions on the importance of the recognition of the right of freedom of expression and the need to freely receive and share ideas in the digital era.
- [23] Referencing to the provisions of section 16 (1) of the Constitution of the Republic of South Africa, 1996, the MMA made the submission that;
- “The right to freedom of expression is integral to the advancement of dignity and autonomy, and serves to enable an array of other human rights and constitutional values. The right to receive or impart information or ideas is an essential element of the right to freedom of expression,*

and the rights to freedom of expression and access to information are inherent to all persons and apply to all persons equally. In this regard, states are enjoined to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and access to information and ideas on an equal basis with others and through all forms of communication.” (Own emphasis).

- [24] MMA, in support of the relief sought by the Applicant, submitted that an appropriate balance can be struck that ensures that the right to freedom of expression can be fostered, rather than restrained, by copyright laws. MMA concluded with the submission that a balance can be struck through the remedy proposed by the Applicant: - the reading –in of section 19D in the Copyright Act, “which is a balance that finds application in international law and across multiple foreign jurisdictions”.

RECREATE ACTION

- [25] ReCreate defines itself as a non-profit organisation which is committed to advancing the interest of both copyright users and creators whose objectives are:

25.1 to protect and promote the right of access to education;

25.2 to protect and promote the right to freedom of expression;

25.3 to protect and promote the rights of creators of copyright material, and

25.4 to promote a balanced approach to copyright, which supports access to knowledge.

- [26] The bulk of the arguments presented by ReCreate would have been a notable novation and relevant had there been resistance or opposition by respondents

to the granting of the orders sought in these proceedings. This application is unopposed and in fact, the respondents have filed notices to abide and the authors of the impugned works have elected not to join as amici curiae to oppose the application either. I consequently cannot find that the arguments presented by ReCreate have brought any additional contribution to assist in the determination of this case.

JUSTICE AND THE BALANCE OF CONVENIENCE

- [27] It is impossible not to appreciate the exigency of the relief sought in this matter. There exists no substantive grounding for the delay in the implementation of the provisions of the Copyright Amendment Bill. In particular, a reading-in to the existing provisions of the impugned Copyright Act, will be an alleviation of whatever the burden causing the delay in the amendment of the Copyright Act. Of further importance is the absence of judicial overreach in the granting of the orders sought. Thus the due observance of the doctrine of separation of powers is barely undermined. A failure to grant the orders sought in these circumstances will mark a failure of the exercise of judicial function to ensure constitutional supremacy. In addition, there is no irreparable harm that the authors of works under copyright will suffer as a result of the granting of the orders sought.

CONCLUSION

- [28] For the reasons and findings in this judgment, and subject to confirmation by the Constitutional Court, I conclude that the Copyright Act 98 of 1978, as it stands;

28.1 ought to be declared unconstitutional in terms of section 174(1) of the Constitution Act, 1996 to the extent that it fails to make provision for exceptions that would enable, through the conversion of works under copyright to suitable formats that enable access to such works by persons with visual and print disabilities, and,

28.2 In terms of the provisions of section 174(2) of the Constitution Act, 1996, the provisions of the Copyright Amendment Bill [B 13B ----2017], ought to be read forthwith as if specifically incorporated in the provisions of the Copyright Act of 1978 in order to remove unconstitutionality in the current provisions of the Act.

[29] The amici curiae are in support of the Applicant's proposal and prayer for an order for a reading-in of the provisions of section 19D of the Copyright Amendment Bill in the provisions of the Copyright Act 98, 1978. I align myself with these sentiments.

COSTS

[30] With regard to costs I have already indicated that the arguments presented by both Media Monitoring Trust and ReCreate were similar in context. In light of the fact that ReCreate uploaded its papers very late and would have had sufficient time to read the papers of the Applicant and those of both ICJ and MMA, it is unlikely that ReCreate would not have noticed the similarities in the arguments they sought to advance on the subject matter of this case. I am of the view, therefore, that ReCreate ought not be awarded the costs. This view is in line with the principle enunciated in the *Treatment Action Campaign* case cited in paragraph 14, above.

ORDER

- [31] In the light of the findings in this judgment and subject to confirmation by the Constitutional Court the following order is made:
1. The Copyright Act 98 of 1978 is declared unconstitutional in terms of section 174(1) of the Constitution Act, 1996.
 2. In terms of the provisions of section 174(2) it is ordered that the

provisions of the Copyright Amendment Bill [B 13B ----2017], quoted in paragraph 9 of this Judgment, ought to forthwith be read as if specifically incorporated in the provisions of the Copyright Act of 1978 to remove the inconsistency of the Act with the Constitution.

3. The operation of the declaration of unconstitutionality referred to in order 1 is suspended for period of 24 months to afford Parliament an opportunity to remedy the defect given rise to the unconstitutionality.
4. The Copyright Act is, from the date of this order, deemed to read as if it contains the proposed new section 19D contemplated by clause 20 of the Copyright Amendment Bill [B 13B-2017].
 - 4.1 Pending a decision of the Constitutional Court, in confirmation proceedings, on the validity of the Copyright Act; and
 - 4.2 Pending Parliament's remedying of the defect giving rise to the unconstitutionality, in the event the Constitutional Court confirms the declaration of invalidity.
5. In the event Parliament does not remedy the constitutional defect within 24 months of the order of the Constitutional Court, the order in 2 above shall continue to apply.
6. Save in respect of ReCreate, the First Respondent is ordered to pay the costs of this application which costs shall include the costs consequent upon the employment of two Counsel, where applicable.



M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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