

SOUTH AFRICA / JUDGMENT

**Blind SA v Minister of Trade, Industry and
Competition and Others (CCT 320/21) [2022]
ZACC 33; 2023 (2) BCLR 117 (CC); 2022 BIP 518
(CC); [2022] HIPR 204 (CC) (21 September 2022)
[2022] ZACC 33**

COURT

Constitutional Court

BEFORE

Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla,
Mlambo, Theron, Tshiqi, Unterhalter

CASE / FILE NUMBER

CCT 320/21

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CONSTITUTIONAL
COURT OF SOUTH AFRICA

Case

CCT 320/21

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

OWEN

DEAN

First Amicus Curiae

MEDIA

MONITORING AFRICA TRUST

Second Amicus Curiae

INTERNATIONAL

COMMISSION OF JURISTS

Third Amicus Curiae

Neutral

citation: Blind

SA v Minister of Trade, Industry and Competition and Others

[2022] ZACC 33

Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Unterhalter AJ (unanimous) Heard
on:	12 May 2022 Decided
on:	21 September 2022
Summary:	Copyright Act 98 of 1978 — constitutionality of sections 6 and 7, read with section 23 — provisions are unconstitutional — infringement of the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution ORDER On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division,
Pretoria (Mbongwe J):	1. The order of the High Court of South Africa, Gauteng Division, Pretoria declaring the Copyright Act 98 of 1978 inconsistent with the Constitution is confirmed to the extent provided in paragraph 2. 2. It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible

format copies.

3.

A person with a visual and print disability described in paragraph 2 means 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 normally be acceptable for reading regardless of any other disabilities.

4.

The order of the High Court is otherwise set aside, save for its order as to costs.

5.

The declaration of unconstitutionality in paragraphs 1 and 2 takes effect from the date of this judgment and is suspended for a period of 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity.

6.

During the period of suspension referred to in paragraph 5, the Copyright Act shall be deemed to

include the following additional provisions:

“Section

13A Exceptions applicable to beneficiary persons

(1)

For the purposes of section 13A—

(a)

‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy must be used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and

of the accessibility needs of the beneficiary persons;

(b)

‘beneficiary person’ means a

person who—

(i)

is blind;

(ii)

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

(iii)

is otherwise unable, through physical

disability, to hold or manipulate a book or to focus or move the eyes

to the extent that would

normally be acceptable for reading

regardless of any other disabilities;

(c)

‘literary works’ means literary

works as defined in section 1 of this Act, and shall be taken to

include artistic works forming part of a literary work;

(d)

‘permitted entity’ means an

entity, including a government institution or non-profit

organisation, that provides education,

instructional training,

adaptive reading or information access to beneficiary persons on a

non profit basis, and has the provision

of such services as one

of its primary activities or institutional obligations.

(2)

A permitted entity may, without the

authorisation of the owner of copyright in a literary work, make an

accessible format copy of

the literary work; obtain from another

permitted entity, an accessible format copy, and supply those copies

to beneficiary

persons by any means, including non-commercial lending

or by electronic communication by wire or wireless means, and

undertake

any intermediate steps to achieve those objectives,

provided that all of the following conditions are met—

(a)

the permitted entity wishing to undertake

said activity has lawful access to that work or a copy of that work;

(b)

the work is converted to an accessible

format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(c)

such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(d)

the activity is undertaken on a non-profit basis.

(3)

A beneficiary person, or someone acting on their behalf, including a primary caretaker or caregiver, may make an accessible format

copy of a work for the personal use of the

beneficiary person or otherwise may assist the beneficiary person to make and use accessible

format copies where the beneficiary person

has lawful access to that work or a copy of that work.”

7.

The Minister of Trade, Industry and

Competition shall pay the applicant's costs in this Court, including costs of two counsel.

JUDGMENT

UNTERHALTER AJ (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for confirmation of an order granted by the High Court of South Africa, Gauteng Division, Pretoria

(High Court), declaring the Copyright Act[1] unconstitutional, to the extent that it: (a) 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 (b) 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.[2] The application was brought in terms of section 172(2)(d) of the Constitution, read with section 15(1)(b) of the Superior Courts

Act[3] and rule 16(4) of this Court's Rules.

Parties

[2] The applicant is Blind SA, a non-profit organisation established for the purpose of promoting the interests of blind people in South Africa. The first respondent is the Minister of Trade, Industry and Competition (Minister). The Minister is responsible for the administration of the Copyright Act and enjoys the power to make regulations under the Act. The Minister did not oppose the application before this Court but he did file written submissions. The second to fifth respondents are the Minister of International Relations and Cooperation, the Speaker of

the National Assembly, the Chairperson of the National Council of Provinces and the President of the Republic of South Africa. The second to fifth respondents were joined as respondents in the High Court proceedings but did not file any papers before the High Court, nor in this Court.

Amici curiae

[3] The first amicus curiae is Professor Owen Dean, an attorney who has long practiced copyright law. He is also a leading academic in the field. Additionally, Professor Dean is a Professor Emeritus and research fellow of the University of Stellenbosch, and the author of an important text, the Handbook of South African Copyright Law.[4] Professor Dean's application to intervene as amicus curiae was accompanied by an application to adduce further evidence in terms of rule 31 of this Court's Rules. He raises issues as to whether Blind SA's application is sound. The second amicus curiae is Media Monitoring Africa Trust (MMA), a non profit organisation that operates in the public interest to promote the development of a free, fair, ethical and critical media in South Africa. The third amicus is the International Commission of Jurists (ICJ), a non governmental organisation which has defended human rights and promoted the rule of law throughout the world, since 1952.

Background and the legislative process

- [4] The crux of this matter concerns Blind SA's contention that the Copyright Act limits the availability of works under copyright in formats accessible to persons with print and visual disabilities.[5] The Copyright Act requires the consent of the copyright owner to convert works into formats suitable for the use of persons with print and visual disabilities. As a result, such persons suffer limitations, often of a severe kind, in accessing works under copyright that persons without these disabilities do not encounter.
- [5] There is a legislative process under way to amend the Copyright Act. However, this process has endured since 2015 when the Minister published a draft Copyright Amendment Bill (CAB)[6] for public comment on 27 July 2015. The CAB proposed a new section 19D, under the heading "[g]eneral exceptions regarding protection of copyright work for persons with disability". On 16 May 2017, the CAB was introduced into the National Assembly as a section 75 Bill (ordinary bills not affecting provinces).

- [6] On 28 March 2019, Parliament passed the CAB. On 16 June 2020, the CAB was referred back to the National Assembly by the President in terms of section 79(1)[7] of the Constitution. The National Assembly's decision to pass the CAB has been rescinded and it has been reclassified as a section 76 Bill (ordinary bills affecting provinces).[8] As a result, section 19D has not been passed into law due to this lengthy legislative process.
- [7] The proposed section 19D[9] would allow for the conversion of copyright works into an accessible format copy, "but which does not introduce changes other than those needed to make the work accessible to a person with a disability".[10]

Litigation history

- [8] Aggrieved by the inordinate delay of the legislative process, Blind SA approached the High Court for an order declaring the Copyright Act unconstitutional to the extent that it unjustifiably limits the rights of persons with visual and print disabilities. On 7 December 2021, the High Court delivered a judgment in which it declared the Copyright Act to be unconstitutional to the extent that it fails to make provision for exceptions that would enable, through the conversion of works, access to such works by persons with visual and print disabilities.[11] The application was unopposed.
- [9] The High Court held that despite the alternative formats available for blind persons and those with visual and print disabilities, the Copyright Act was restrictive of the free conversion of works under copyright into alternative formats.[12] This meant that the consent of copyright owners was required to convert works under copyright into formats that enabled persons with print and visual disabilities to have equal access to information. The High Court found the statutory prohibition of the free conversion of works to be discriminatory and inconsistent with section 9 of the Constitution.[13]
- [10] Furthermore, the High Court held, that acting in accord with South Africa's intent to ratify the Marrakesh Treaty, Parliament adopted the CAB which proposes the insertion of section 19D to create exceptions to the Copyright Act.[14]
- [11] The High Court also considered the delay in adopting the CAB. It noted that section 19D was not the subject of controversy in Parliament. The Court found the delay to be unreasonable and contrary to section 36(1) of the Constitution as it unjustifiably perpetuates the violation of the rights of visually and print disabled persons.[15]
- [12] Three amici curiae made submissions before the High Court, namely the ICJ, MMA and Recreate Action. The amici supported the application before the High Court. The ICJ supported Blind SA's submission that the Copyright Act ought to be aligned with the Marrakesh Treaty to cure the inconsistency of the Copyright Act with the Constitution and acceptable international standards.[16] The MMA argued that the Copyright Act was inconsistent with domestic, regional and international obligations. It made submissions as to the importance of the recognition of the right to freedom of expression and the need freely to receive and share ideas in the digital era. [17] As to Recreate Africa, the High Court

did not find the arguments made by Recreate Africa to have been of assistance.[18]

[13] The High Court declared the Copyright Act unconstitutional and made the following order:

“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 [172(a)] of the Constitution Act, 1996.
 2. In terms of the provisions of section [172(2)(a)] 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 [giving] rise to the unconstitutionality.
 4. The Copyright Act is, from the date of this order, deemed to read as if it contains the new proposed 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.”

In this Court

[14] The submissions made by Blind SA, the Minister and amici covered a wide range of issues. These included the need to align the Copyright Act with the Marrakesh Treaty, as well as other International Agreements such as the Berne Convention,[19] TRIPS Agreement,[20] the Convention on the Rights of Persons with Disabilities[21] (CRPD) and the International Covenant on Economic, Social and Cultural Rights[22] (ICESCR). Submissions were also made regarding the possible importation and export of copyright works for purposes of making accessible format copies available to visually and print disabled persons.

Applicant's

submissions

The pleaded case

- [15] Blind SA seeks an order declaring the Copyright Act unconstitutional to the extent that it (a) 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; (b) 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.
- [16] In the founding affidavit, Blind SA submitted that section 2 of the Copyright Act lists types of original works eligible for copyright in South Africa. These works include literary works, artistic works, cinematographic films and a range of other works under copyright. However, having listed these works, Blind SA only explains how the Copyright Act impedes access to published literary works. The founding affidavit is also confined to securing the rights of persons with print and visual

disabilities.

Reproductions and adaptations, and section 13 and section 19D

- [17] Blind SA submits that copyright owners have near exclusive control over the reproduction, publication, performance, broadcast, transmission and adaptation of works under copyright. Unless it falls within a legislated exception, or is authorised by the copyright owner, any use of such work is an infringement of copyright and gives rise to civil and, potentially, criminal sanction. Therefore, the legislative framework must provide an express exception to permit the production of accessible format copies. The alternative is that persons with visual and print disabilities must contact every copyright owner to secure authorisation to produce accessible format copies. As a result, so Blind SA submits, the Copyright Act unfairly discriminates against persons with visual and print disabilities.
- [18] Blind SA observes that, read together with section 39(a), [23] section 13 [24] of the Copyright Act empowers the Minister to make regulations that contemplate further types of reproduction in respect of works under copyright. Blind SA submits that the Minister's power to prescribe general exceptions only applies to reproducing works. Section 13 may not be used to authorise acts beyond this.
- [19] Blind SA argues that this Court has drawn a clear distinction between the lawful delegation of authority to make subordinate legislation and the assignment of plenary legislative power to the Executive. Therefore, section 13 should be interpreted narrowly to avoid the unlawful assignment of plenary legislative power.

- [20] Additionally, Blind SA submits that leaving the realisation of the rights of a marginalised group of people to the whims of the Minister, in circumstances where he and his predecessors have failed to act for over two decades, is an affront to the dignity of persons with visual and print disabilities. Therefore, so Blind SA submits, sections 13 and 39(a) of the Copyright Act do not provide a statutory basis to afford access by print-disabled persons to accessible format copies.
- [21] If this Court finds that section 13 is indeed capable of a broad, constitutionally compliant interpretation, then section 13 is limited by its wording, which only applies to reproductions.
- [22] Blind SA submits that although an accessible format copy of a work requires reproduction, mere reproduction does not cover activities such as distribution and transmission to the requesting entity. Accordingly, even if reproduction under the Copyright Act were interpreted broadly, it would still fail to comply with Article 4(1)(a) of the Marrakesh Treaty which states that—

“[c]ontracting parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.” (Emphasis added.)

- [23] Thus, an exception granted solely in respect of reproduction would be inadequate.
- [24] Blind SA further contends that by impeding access to works, the Copyright Act limits a range of constitutionally-entrenched rights that persons with visual and print disabilities enjoy. These rights are the rights to equality, human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice. Blind SA says that the Copyright Act, as a law of general application, is not justifiable in terms of section 36(1) of the Constitution. Blind SA submits that the violation of so many intersecting rights is ordinarily very difficult to justify and that their limitation does not serve any legitimate purpose, as copyright owners do not stand to lose anything from the relief sought.
- [25] As to remedy, Blind SA argues that it would be just and equitable for this Court to exercise its broad remedial powers in terms of section 172(1)(b) of the Constitution,[25] and read in, with immediate effect, section 19D. Blind SA submits that a suspension of the order of invalidity is incompetent

because it purports to suspend the operation of an order that is not in operation in any event.

- [26] Blind SA also responds to the submissions made by the first amicus, Professor Dean. He opines that the text of section 19D cannot operate in the absence of two definitions that clauses 1(a) and (h) of the CAB seek to insert into section 1 of the Copyright Act: “accessible format copy”; and “person with a disability”. Blind SA responds that, to the extent that there may be any doubt as to what is meant by “accessible format copy” and “person with a disability”, regard may be had to the relevant definitions in the Marrakesh Treaty.

Additionally, Blind SA says that regard may be had to the treatment of unfair discrimination on the basis of disability in various decisions of our courts as also how disability is defined in other statutes.

- [27] Alternatively, Blind SA submits that this Court could, using its powers in terms of section 172(1)(b) of the Constitution, make a just and equitable order that the two phrases, when used in section 19D, bear particular meanings, either as defined in the CAB, or in the Marrakesh Treaty. Or in its order, this Court could also read in the new proposed statutory definitions of “accessible format copy” and “person with a disability”.
- [28] Blind SA contends that section 19D is not controversial, that the reading-in remedy is effective and operable and that the proposed remedy is not at odds with the Marrakesh Treaty and other international instruments. Blind SA says that the proposed reading-in remedy would be effective and operable, because multiple state parties to the Marrakesh Treaty do not define the scope of works to which accessible format shifting applies within their individual domestic copyright statutes. Therefore, section 19D is not an outlier. Furthermore, even in the absence of the definitions of “accessible format copy”, “persons with disabilities” and “a person who serves persons with disabilities”, the remedy is not vague because section 233 of the Constitution requires that, where reasonably possible, legislation must be interpreted in a manner consistent with binding international law.

First respondent’s submissions

- [29] The Minister does not oppose the confirmation of the declaration of invalidity. The Minister only makes submissions in favour of the suspension of the declaration of invalidity to assist this Court to determine the appropriate remedy. The Minister submitted that while it is true that no particular concern has been raised regarding the constitutionality of section 19D, concerns have been raised as to whether the section sufficiently and appropriately defines terms which go to the heart of facilitating access of print materials to those who require access. As a result, Parliament is already considering whether the section requires amendments to comply with the Marrakesh Treaty.
- [30] The Minister says also that the relief sought by Blind SA, namely a final reading in without suspension of the finding of unconstitutionality, is inappropriate. Rather, a suspension coupled with an interim reading in is a remedy that does not intrude unduly into the domain of Parliament.
- [31] During oral submissions, the Minister was referred to Professor Dean’s proposal that a regulation be promulgated under section 13 for purposes of allowing print and visually disabled persons access to copyrighted works. The proposed regulation is titled “[e]xception regarding protection of copyright work for persons with disability”.
- [32] When asked about this proposed regulation under section 13, the Minister argued that the purpose of section 19D is not only to align the Copyright Act with the Marrakesh Treaty and protect the rights of print and visually disabled persons. According to the Minister, section

19D encompasses a broader government policy to align the Copyright Act with various international obligations and protect the rights of all disabled persons. The Minister rejected this proposed regulation under section 13 on the basis that section 13 is too limited, that the Minister cannot be so directed, and that the proposed regulation under section 13 would amount to the Minister acting ultra vires.

First amicus curiae's submissions

[33] Professor Dean submits that the Copyright Act is not unconstitutional because section 13 permits the Minister to promulgate regulations which would allow for the reproduction of works under copyright in the manner contemplated by Blind SA. Professor Dean contends that the High Court's reading in of section 19D is inappropriate. He says this relief was granted on the erroneous assumption that this provision of the CAB was uncontroversial. He submits that the Minister and the Parliamentary Legal Adviser have delivered reports identifying problems with section 19D. Additionally, the Portfolio Committee published a redrafted version of section 19D for public comment.

[34] Professor Dean submits that section 19D is not consistent with the Marrakesh Treaty and creates various lacunae if the reading-in does not include other provisions

of the CAB. The various terms that have not been defined in section 19D such as “accessible format copy” and “persons with disability” mean that the provision is not self-executing. He submits that this Court cannot craft definitions of previously undefined terms because this Court would be assuming a legislative role and violating the separation of powers.

[35] Professor Dean contends that section 19D, in its current form, does not comply with the three-step test. In terms of the three-step test, articulated in Article 13 of the TRIPS Agreement[26] and Article 9(2) of the Berne Convention,[27] the exception must only cover certain special cases; must not conflict with the normal exploitation of the work; and must not unreasonably prejudice the legitimate interests of the owner of copyright. A provision that permits of blanket access to accessible

format copies of works under copyright must comply with the three-step test to be consistent with international law.

[36] Professor Dean proposes a regulation to be promulgated under section 13. The proposed regulation is titled “[e]xception regarding protection of copyright work for persons with disability”.

[37] Professor Dean further submits that an exception that permitted the reproduction of copyrighted works would be sufficient to enable the conversion of works into accessible use format because the definition of “reproduction”[28] is broad enough to incorporate the making of any derivative version where the reproducer does not add any contribution of their own, or change the ideological content of the work. Professor Dean says conversion to an accessible use format – for example, braille entails the reproduction of an existing work into a different format. There is no change to the content of the original work during this

process and it is, in essence, a mechanical process which seeks to present the exact original work in a new form.

- [38] By contrast, “adaptation” requires the person making the adaption to embroider on, or transform, the original work by making a contribution to the content of the work. It results in a version which is a new work, that enjoys its own copyright protection. Professor Dean provides a translation as an example, and says, in giving expression to a work in a different language and syntax, but retaining the essence of its ideological content, the translator changes or converts the work and creates a unique new work. The translation is an adaption, not a reproduction.
- [39] Professor Dean concludes that format shifting only entails reproduction and thus does not require a broader exception than that permitted by section 13. He submits further that Article 4(1)(a) of the Marrakesh Treaty expressly requires state parties to provide for an exception to the right of reproduction, but is silent on the right of adaptation. This, Professor Dean submits, is confirmation that reproduction (and not adaptation) is regarded as the relevant activity.

Second amicus curiae’s submissions

- [40] MMA submits that copyrighted works often need to be adapted into accessible format copies in order for them to be usable by persons with visual and print disabilities. These accessible format copies include “digital formats that enable the use of screen readers”, and may include “adding audio descriptions to films and broadcasts, as well as subtitles”. It emphasises that modifications and adjustments to original works are required to ensure that persons with visual and print disabilities can enjoy and exercise, on an equal basis with others, their expressive rights and freedoms.
- [41] MMA submits that South Africa’s current copyright regime is in conflict with the right to freedom of expression and access to information and that a balance must be struck between the rights of copyright and intellectual property owners and the rights of all people to access and impart knowledge and ideas. According to MMA, this balance can be found in the remedy proposed by Blind SA, that is, the reading-in of section 19D of the CAB.

Third amicus curiae’s submissions

- [42] The ICJ submits that the Copyright Act must, in addition to the relevant copyright regime, be interpreted in line with international human rights treaties such as the ICESCR and the CRPD. It submits that Professor Dean’s arguments fail to consider South Africa’s obligations in terms of international human rights law. It supports a reading-in of section 19D as proposed by Blind SA.

Analysis

[43] The application before this Court takes the form of confirmation proceedings. Section 167(5) of the Constitution stipulates that this Court—

“makes the final decision as to whether an Act of Parliament . . . is constitutional, and, must confirm any order of invalidity made by the Supreme Court of Appeal [or] High Court . . . before that order has any force.”

[44] Accordingly, this Court’s jurisdiction is necessarily engaged.

[45] In Phillips, [29] this Court held the following regarding confirmation proceedings that come before it:

“Section 172(2) confirmation proceedings are not routine, for it does not follow that High Court findings of constitutional invalidity will be confirmed as a matter of course. This Court is empowered to confirm the High Court order of constitutional invalidity only if it is satisfied that the provision is inconsistent with the Constitution. If not, there is no alternative but to decline to confirm the order. It follows that a finding of constitutional invalidity by a High Court does not relieve this Court of the duty to evaluate the provision of the provincial Act or Act of Parliament in the light of the Constitution. A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is

invalid.”[30] (Emphasis added.)

[46] Accordingly, this Court must conduct its own evaluation and satisfy itself as to the constitutional validity of the provisions of the Copyright Act that have been challenged.

[47] At the outset, it is important to identify the challenge that Blind SA makes to the constitutional validity of the Copyright Act. The pleaded case in the founding affidavit is this: the application is brought in the public interest and on behalf of persons with visual and print disabilities. This class of persons is taken to fall within the definition of “a beneficiary person” in Article 3 of the Marrakesh Treaty. A beneficiary person is there defined as follows:

“A beneficiary person is a person who:

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(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.” (Footnotes omitted.)

[48] While Blind SA’s submissions reference the works eligible for copyright listed in section 2 of the Copyright Act and, in general terms, the nature of copyright protection afforded these works under the Copyright Act, it is literary works that engage Blind SA’s concern. These works, published in print, include books, magazines, periodicals,

articles, textbooks and other educational materials. Blind SA observes that copyright in a literary work vests the exclusive right to do or to authorise the doing of acts set out in section 6 of the Copyright Act. Save for certain legislated exceptions, the use of literary works by recourse to acts which the copyright owner has the exclusive right to do or to authorise requires the consent of the copyright owner.

[49] Blind SA sets out the following evidence in its founding affidavit before the High Court:

“The vast majority of books are published in print, and not in formats that are accessible to persons with visual (and print) disabilities.

As the [World Intellectual Property Organization] Handbook on the Marrakesh VIP Treaty explains:

‘285 million people worldwide are blind or visually impaired. 90% of them live on low incomes in developing and least developed countries. Only 1-7% of books are published in a format they can read.’

...

According to a Statistics South Africa census conducted in 2011, 11% of South Africa’s population lives with visual disabilities – with 1.7% living with severe visual disabilities, and 9.3% living with mild visual disabilities.

Accessible formats include Braille, audio versions, or copies of published works in large print. For electronic versions, they include digital formats that enable the use of screen readers. They also include adding audio descriptions to films and broadcasts, as well as subtitles.”

[50] Given that the majority of published books are not published in accessible format copies, that is, formats accessible to persons with visual and print disabilities, such persons must secure authorisation to convert books into accessible format copies. This is difficult, often impossible, to do. Absent authorisation, the rendering of a literary work in which copyright subsists into accessible format copies would constitute an infringement of copyright under section 23, and an offence under section 27 of the Copyright Act.[31]

- [51] The result is that persons with visual and print disabilities are denied access to the vast majority of published literary works on the basis of their disability. The Copyright Act is an insurmountable barrier that prevents works being locally available in various accessible format copies.
- [52] In consequence, Blind SA contends that the Copyright Act limits the entrenched rights of persons with visual and print disabilities. The rights so limited are the rights to equality, human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice.[32] The supporting affidavits speak trenchantly of the deprivations wrought upon persons with visual and print disabilities by reason of the scarcity of books in accessible format copies. This, Blind SA contends, constitutes powerful evidence of the infringement of these rights.
- [53] Mr Low is blind. He edits Spotlight, a publication of public interest health journalism. He describes his own university education in which accessible format copies of books in the university library were often not available because authorisation from copyright owners could not be obtained. He describes the book famine experienced by persons with visual and print disabilities. Even where books are available in a format somewhat accessible to these persons, one such format may not be converted into another that is best suited to the user, without authorisation. This is of particular concern in respect of technical books. Mr Low also references the importance of an American non-profit library service, Bookshare, that has a local library, but cross border distribution requires permission from copyright owners.
- [54] To like effect, Mr Gama, a teacher at a school for the deaf and the blind, describes how many special schools across the country struggle to obtain sufficient textbooks in accessible format copies. Apart from textbooks, there are often few books available to many learners who are blind. This clearly disadvantages these learners and impairs their dignity. After learners leave school, their position is often worse still, lacking the assistance their schools were able to offer.
- [55] Finally, Justice Yacoob, a retired judge of this Court, blind since infancy, describes the plight of poor people with a visual disability who cannot afford to buy books. He says this:
- "My own experience tells me that it is impossible to express in words how urgent this is. The best I can do is say that every day that the present Copyright Act prevails in the form in which it is, literally thousands of blind and visually impaired people are deprived of reading material, and the prejudice to them is in fact irreparable, incalculable, and very difficult to put into words. I would suggest that even without it being put into words, the prejudice is obvious."*
- [56] Blind SA goes on to explain that the limitation of rights that the Copyright Act brings about cannot be justified in terms of section 36 of the Constitution. The deponent then sets out the relief that is sought. First, Blind SA contends that we should declare the Copyright Act inconsistent with the Constitution to the extent that: (a) it limits and/or prevents persons with visual and print disabilities accessing works under copyright that persons without such

disabilities are able to access; and/or (b) it 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. Second, suspending the operation of the declaration of unconstitutionality for a period of 12 months. Third, to order “a reading in remedy” that would deem the proposed section 19D, formulated in clause 20 of the CAB, presently before Parliament, to form part of the Copyright Act. That deeming would hold good for the 12-month period afforded to Parliament to remedy the constitutional defect, failing which, the incorporated section 19D would continue to apply. That relief was amended somewhat by the High Court, as I have indicated.

[57] Blind SA justifies this relief on the basis that those whose rights are infringed by the Copyright Act require an immediate remedy. They should not be required to wait for Parliament to pass into law the remedial provisions that would cure

the constitutional inconsistency of the Copyright Act identified by Blind SA. Nor should that remedial intervention have to await the broader reformation of the Copyright Act, so long delayed in Parliament. Rather, the proposed reading in of section 19D would serve the remedial purpose of giving immediate relief to persons with visual and print disabilities. Blind SA observes

that section 19D was not identified by the President, when he referred the CAB back to Parliament, as giving rise to constitutional concerns. This remedial regime would then permit Parliament to do its work to pass into law the CAB, and provide the basis for South Africa’s accession to the Marrakesh Treaty, but with immediate relief to those with visual and print disabilities.

[58] Having considered the submissions and the relief sought from this Court, the following issues require consideration:

- (a) What case was pleaded by Blind SA?
- (b) Is the reproduction of a literary work sufficient to convert the work into an accessible format copy for the use of persons with print or visual disabilities, or is an adaptation of the work also required?
- (c) Does section 13 of the Copyright Act cure the constitutional defects of the Act that Blind SA has raised, and if not, would a reading in of the proposed section 19D do so?
- (d) Is section 19D, if it were to be read-in, a remedy that extends beyond the pleaded case, and if so, what remedy should be granted?

[59] I have set out the challenge made by Blind SA and the relief that it seeks in some detail. I do so to draw attention to the issues that this case raises and those that it does not.

- [60] First, the case advanced concerns literary works. It does not traverse access to other works eligible for copyright. The complaint is the scarcity of published literary works in accessible format copies for the use of persons with visual and print disabilities. That scarcity is attributable to the difficulty in securing the required authorisation of the owners of copyright in literary works so as lawfully to render these works into accessible format copies.
- [61] Second, no case is made out as to the need for access to unpublished literary works. There is mention made by Mr Low of the need to comply with the Copyright Act so as to import books in accessible format copies from abroad, and in particular from Bookshare in the United States. But no case is made out as to precisely how the Copyright Act prevents or hampers the importation of books in accessible format copies into the country, nor, more generally, how distribution within the country is affected. The founding affidavit does not traverse section 23(2)(a) of the Copyright Act[33] which concerns infringement of copyright by any person who imports an article into the Republic for a purpose other than for his (the statutory language) private and domestic use. Nor does it do so in respect of section 23(2)(c) which concerns distribution in the country.[34] Both provisions have carve outs, the impact of which is unexamined in the founding affidavit. How the Copyright Act restricts imports and distribution and how such restrictions infringe upon the rights of persons with visual and print disabilities is so undeveloped in the founding affidavit that no case can be said to have been made out on this score.
- [62] Third, the failure by Parliament to pass into law the CAB, and, in particular, the failure to legislate so as to remedy the scarcity of literary works in accessible format copies is traversed by Blind SA to explain why it comes to the courts to seek relief, rather than awaiting the long delayed parliamentary process. But no relief is sought to bring under constitutional review Parliament's delay. Nor does Blind SA question the legality of the Government's approach to amend the Copyright Act to give effect to the Marrakesh Treaty, as a precursor to its ratification. Mr Low explains how the ratification of the Marrakesh Treaty would increase the number of books available to persons with visual and print disabilities. That may be so, but how the Marrakesh Treaty is best domesticated is a matter for Parliament and not for this Court.
- [63] The case before us is thus a challenge to the Copyright Act on the basis that the exclusive rights of copyright owners require the authorisation of these owners before original published literary works may be made into accessible format copies for the use of print and visually impaired persons. That requirement, it is contended, infringes the identified rights of these persons. If we should confirm that this is so, then we are bound to decide what remedy is required, and what remedy may be just and equitable, to cure this infringement of rights. Our remedial remit, however, does not go beyond the challenge that has been made.

Infringement and section 13 of the Copyright Act>

- [64] It was common ground between the parties that, apart from the dispute as to what section 13 of the Copyright Act permits or requires the Minister to do, the exclusive rights conferred upon owners of copyright that subsist in literary works has drastically restricted the availability of literary works in accessible format copies for the use of print and visually disabled persons. That is so because, on the undisputed evidence before us, the obligation to secure the authorisation of the owners of the copyright in literary works to make published literary works available in accessible format copies (the requirement of authorisation) has led to a scarcity of such works. Whether this comes about because authorisation is declined or on account of the difficulty and delay in identifying those from whom authorisation is required matters not. The effect is the same. Print and visually disabled persons struggle to access literary works in accessible format copies. Sometimes particular literary works are not available; sometimes the format is not optimal. More often, and particularly for poor persons in this class, the scarcity is absolute, and few works are available at all.
- [65] It takes little imagination to appreciate what that scarcity, relative or absolute, does for the life chances of those with print or visual disabilities. That some have nevertheless achieved substantial success is testament to their personal fortitude. It detracts not at all from the reality that those with print and visual disabilities suffer from a scarcity of access to literary works that persons without these impairments do not.
- [66] This scarcity goes to the heart of the constitutional challenge that Blind SA brings before this Court. The protection that the Copyright Act affords owners of copyright in literary works gives rise to a sharp disparity between those with print and visual disabilities, and those who do not suffer these impairments. Whatever limitations the exclusive rights conferred by the Copyright Act may cause to those without disabilities who would access literary works, they bear no comparison to the deprivations suffered by those with print and visual disabilities. The rights to incorporeal property that the Copyright Act protects may not become an instrument to disadvantage a class of persons who have the same need to have access to literary works that persons without impairments enjoy. The requirement of authorisation leads to the scarcity of literary works in accessible format copies. That is unfair discrimination on the grounds of disability that section 9(3) of the Constitution prohibits.
- [67] The same conclusion is reached in this way. Legislation that protects the rights of copyright owners must take account of the differential impacts of such protection upon different classes of persons. In this case, how the requirement of authorisation bears upon the access that persons with print and visual disabilities have to literary works in comparison to the access enjoyed by persons without these disabilities. Where those with print and visual disabilities suffer great and particular hardship by reason of the requirement of authorisation, the requirement cannot be applied as if all persons who need access to literary works are similarly situated, when they are not.

- [68] This reflects a broader principle of some import. Sometimes, for the state to avoid unfair discrimination, it must treat people in the same way or make available the same entitlements. But sometimes what is required of the state is to recognise the differences between persons and to provide different or more favourable treatment to some, so as to secure non-discriminatory outcomes for all. This may appear paradoxical, but it is not, and cases of persons with disabilities well illustrate this principle. Well known examples are these: a person in a wheelchair needs a ramp to access a public health clinic and a blind person needs a means by which they might know when it is safe to cross the road at a traffic light.
- [69] The same is true in the case before us. The requirement of authorisation protects the rights of owners of copyright in literary works. Parliament has decided that this protection is warranted. But this does not mean that the requirement of authorisation can be applied without regard to the impact of the requirement upon different classes of persons. To apply the requirement to all is to expose those with print and visual disabilities to the damaging scarcity of literary works. That constitutes unfair discrimination and hence the Copyright Act, to avoid this discrimination, must apply the requirement of authorisation with due regard to the differential effect of the requirement upon those with print and visual disabilities.
- [70] For these reasons, I find that the requirement of authorisation in the Copyright Act would constitute unfair discrimination on the grounds of disability, and thus infringes section 9(3) of the Constitution. The enactment fails to take account of the effect of the requirement of authorisation upon persons with print and visual disabilities.
- [71] For like reasons, the challenge made by Blind SA on the basis of the right to human dignity in terms of section 10 of the Constitution is well founded. Access to the vast universe of knowledge and imagination that is to be found in literary works is a condition for advancement. It also promotes an engagement with the world of ideas, and that is an important attribute of the well-being of persons. That those with print and visual disabilities should be so radically compromised in the access they enjoy to literary works by reason of the requirement of authorisation is to heap indignity upon the adversities these persons face. The requirement of authorisation thus infringes the right to dignity in section 10 of the Constitution.
- [72] So too, persons with print and visual impairments have their rights to freedom of expression, and in particular the freedom to receive and impart information in terms of section 16(1)(b), infringed by the requirement of authorisation. The evidence before us shows that the requirement of authorisation drastically limits access to literary works, impairs the freedom to receive information, and thus, in turn, to impart information. The requirement also limits the participation of persons with print and visual disabilities in the cultural life of their choice. Literary works are an important source of cultural life. When access to literary works is limited, so too are persons affected by this limitation compromised in their enjoyment of the right to participate in the cultural life of their

choice. Section 30 of the Constitution is thus also infringed by the requirement of authorisation.

- [73] Finally, the evidence marshalled by Blind SA establishes that those with print and visual disabilities struggle to secure books in accessible format copies that they require for their education. Children, and especially poor children, cannot secure the textbooks they require. Others who are admitted to university cannot access the articles and books they need, a substantial impairment to the benefits of a higher education. The right of persons with print and visual disabilities to basic education, as set out in section 29(1)(a) of the Constitution, is thus plainly infringed. That is also so in respect of the right to further education protected in terms of section 29(1)(b) of the Constitution. Although this right is to be made progressively available and accessible by the state through reasonable measures, there can be little doubt that the relaxation of the requirement of authorisation in favour of persons with print and visual disabilities is a reasonable measure that the state can and must take.
- [74] In sum, I find that, subject to what follows as to the powers of the Minister to permit the reproduction of literary works in terms of section 13 of the Copyright Act, the constitutional rights of persons with print and visual impairments in terms of sections 9(2), [35] 10, 16(1)(b), [36] 29(1)(a) and (b) [37] and 30 [38] have been infringed by the requirement of authorisation in the Copyright Act as it applies to make published literary works available to persons with print and visual disabilities in accessible format copies. No case was advanced by the Minister to show that the limitation of rights is justified. Indeed, the Minister did not oppose the application in the High Court, nor before us.
- [75] Professor Dean submits that section 13 of the Copyright Act saves the statute from constitutional invalidity. His argument is this: section 39 of the Copyright Act provides that the Minister may make regulations as to any matter required or permitted by the Act to be prescribed by regulations. One such matter is set out in section 13. As stated above, in terms of section 13, in addition to reproductions permitted by the Copyright Act, reproduction of a work shall also be permitted as prescribed by regulation. Reproduction pursuant to these regulations may not be in conflict with the normal exploitation of the work, nor unreasonably prejudicial to the legitimate interests of the owner of copyright. The Minister's power to regulate under section 13 is thus bounded by these strictures. Professor Dean contends that section 13 empowers and requires the Minister to promulgate regulations that would permit of the reproduction of literary works into accessible format copies for persons with print and visual disabilities.
- [76] Under the guidance of this Court's decisions in Hyundai [39] and Fraser, [40] we are urged by Professor Dean to interpret the Copyright Act, if such an interpretation is reasonably possible, to be in conformity with the Constitution, so as to give best effect to the rights at issue. Such an interpretation is possible, Professor Dean submits, for two reasons. First, the meaning of reproduction under the Copyright Act permits of sufficient amplitude to allow literary works to be rendered into accessible format copies for the use of persons with print and visual disabilities. Second, section 13, read with section 39, confers a power that the

Minister must exercise in the face of the plight of those with print and visual disabilities. But in any event, any doubt on this score may be cured by a mandatory order of this Court requiring the Minister to promulgate regulations.

- [77] Blind SA takes issue with the contentions of Professor Dean. It does so on two principal grounds. First, to render literary works into accessible format copies requires more than reproduction, it also requires adaptation. Second, to interpret section 13 as Professor Dean urges us to do, would amount to an impermissible delegation of an original legislative power. Blind SA also submits that the regulatory power conferred on the Minister does not extend to the import and export of accessible format copies, the distribution of these copies, nor the problem of unpublished works. These additional concerns, however, do not arise for our consideration because, as my analysis of the pleadings demonstrates, they formed no part of a properly formulated challenge to the Copyright Act by Blind SA.
- [78] I consider first the scope of the power conferred by section 13. That power must be understood within the scheme of the Copyright Act. Section 2 provides that literary works, if they are original, are eligible for copyright, subject to the provisions of the Copyright Act. A literary work is defined in section 1. It includes, irrespective of literary quality and in whatever mode or form expressed novels, dramatic works, textbooks and articles, lectures, dictionaries, tables and compilations, including compilations of data stored or embodied in a computer or a medium used in conjunction with a computer. A literary work does not however include a computer program. Section 6 specifies the nature of copyright in literary works. Copyright vests the exclusive right to do or to authorise the doing of the listed acts. Those acts include reproducing the work in any manner or form and making an adaptation of the work.
- [79] Of importance to the interpretation of section 13 is to distinguish reproduction and adaptation, and to determine what it means to reproduce a literary work. This is so because section 13 confers a power, by way of exception, to permit of the reproduction of a work. The power under section 13, as an exception, cannot permit what the Copyright Act does not otherwise prevent.
- [80] The Copyright Act does not provide a comprehensive definition of reproduction or adaptation. The definitions state what these concepts include. But what reproduction and adaptation mean and the distinction between these acts is not exhausted by their statutory definitions in section 1 of the Copyright Act. In *Media 24*,^[41] to “reproduce” within the meaning of the Copyright Act was held to mean “to copy”, and—

“in order for there to have been an infringement of the copyright in an original work it must be shown that (i) there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived.”

- [81] Professor Dean has emphasised the wording of section 6(a) which states “[r]eproducing the work in any manner or form”.^[42] As to an adaptation of a literary work, that, in part, is to be understood by reference in the definition of adaptation in section 1 to “a translation of the work”.
- [82] What then distinguishes the act of reproducing a literary work from making an adaptation of the work? Professor Dean submits that the distinction is this: reproducing a literary work is to take the work and make a transcription of it into another format, without changing its content. Making an adaptation of a literary work requires some creative or interpretative engagement with the text, the consequence of which changes the content of the work.
- [83] The exact boundary between the reproduction and adaptation of a literary work is hard to draw. We know that the translation of a literary work, by definition, is an adaptation. That assists us to understand what makes an adaptation distinctive. Language is not simply made up of words that signify identifiable and distinctive things in the world. We well know this as lawyers. The very exercise upon which I am engaged is an effort to arrive at the meaning of a concept. Within a language community, there are shades of meaning, and differences that arise as to what a text means. This is all the more so when we translate a text from one language into another. Observe, for example, the stark differences between modern translations of classical texts, and those that were rendered in earlier periods.
- [84] What this illustrates is that a content-based distinction between reproduction and adaptation will not always be definitive. When words are changed in a text, in an act of plagiarism, we might want to conclude that the text is nevertheless a copy because there remains sufficient objective similarity, and hence the work is a reproduction. However, its content has, in some measure, also been changed. An adaptation that is a translation is not merely a copy because there is an interpretative engagement with the text so as to render its meaning.
- [85] It will be apparent that these are fine grained distinctions, and they are more easily applied in concrete cases of infringement. Here we are asked to decide whether the power to make regulations to permit of the reproduction of literary works can save the Copyright Act from constitutional invalidity. In this endeavour we are greatly constrained. I grant that, as Professor Dean has submitted, the transcription of a literary work that is simply a copy of the text into another format would qualify as a reproduction. An example of this is a book in a hard copy edition that is converted into an electronic copy. But the issue before us is whether the rendering of literary works into accessible format copies for the use of persons with print and visual disabilities is also a process of copying a literary work into another format, and no more.
- [86] On the papers before us, this issue received little attention. This came about, so Blind SA pointed out, because Professor Dean made his intervention before this Court, and not in the High Court. That may be so, but neither Blind SA nor Professor Dean have placed much evidence before us as to the accessible format copies used by persons with print and visual

disabilities, the technology used to create these formats, and whether these formats more closely resemble translations or transcriptions that are in effect copies. Much was said in argument before us on this score. However, argument is not evidence.

[87] We were left at the oral hearing debating with counsel whether braille is a language and whether the transcription of a text into braille is akin to translation from one language into another. Other questions arose as to the rendering of a two dimensional work into three dimensions; how graphs, tables, histograms, and pie charts in textbooks and technical articles are rendered into accessible format copies, and whether this might require a textual description, and if so whether this amounts to an adaptation. Blind SA raised the issue as to whether a shift of format that required the written description of a photograph or a picture in a book was not an adaptation. So too, books (including e-books) may include a variety of multi-media presentations. While these may amount to artistic works within a literary work, the issue remains as to whether pictures, photographs, and other multi-media presentations

can be rendered in accessible format copies by merely reproducing them. This does not seem possible. The form in which such content

appears requires some translation, indeed transformation that requires interpretation and an effort to render the meaning in another accessible format. Additionally, what of the conversion of a written text into an audio format? Counsel for Blind SA and Professor

Dean were, unsurprisingly, not in agreement as to whether the use of these accessible format copies amounted to reproducing the original work or adapting it.

[88] These disagreements are not capable of definitive resolution on the evidence before us. But they illustrate a point of overarching significance for the use to which the regulatory power in section 13 can be put. It is common ground that the right of a copyright owner under the Copyright Act to authorise the reproduction or adaptation of a literary work should not prevent the access of literary works in accessible

format copies to print and visually disabled persons. That is the constitutional infirmity that must be cured. There are many varieties

of literary work, as the definition in section 1 of the Copyright Act makes plain. The layout of these works permits of numerous permutations. The graphical representations or multi media presentations that they may contain are many and varied. The technologies that are used to render literary works in accessible format copies are developing and provide different solutions for different impediments.

[89] What this means, as the final sentence of Article 4(1)(a) of the Marrakesh Treaty provides is that “[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format”. The exposition of the examples described above indicates that this cannot, with any measure of certainty, invariably take place by way of reproducing literary works (with their inclusion of artistic works), no matter how generously that term is reasonably interpreted. It may well be that some accessible

format copies reproduce the very content of the original work, and no more. But others require latitude to use adaptation to best render the work in an accessible format. There is no justification to reason that accessible format copies must be restricted to reproducing original literary works so as to permit section 13 to save the Copyright Act from constitutional invalidity. Quite the opposite is true. Those who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer. That requires, as a matter of probability, the freedom to make adaptations and not merely reproductions.

- [90] Once that is so, the power conferred upon the Minister in section 13 cannot adequately serve to cure the constitutional invalidity of the Copyright Act that I have identified. It follows that Professor Dean's defence of the constitutional validity of the Copyright Act cannot prevail. The statutory right conferred upon copyright owners to authorise the reproduction and adaptation of original literary works (and their inclusion of artistic works) gives rise to the scarcity of literary works in accessible format copies for those with print and visual disabilities, thereby infringing their constitutional rights. The remit of section 13 is confined to the reproduction of a work. That limitation does not secure the freedom that may be required to ensure that works are made accessible in the variety of formats that will best serve those with print and visual disabilities.

Remedy

- [91] Section 172(1)(a) of the Constitution requires us to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. I have found that provisions of the Copyright Act are inconsistent with the Constitution. The extent to which this is so, is the first issue to which I now turn.
- [92] The High Court, on this aspect of the matter, made the following order:
- "The Copyright Act 98 of 1978 is declared unconstitutional in terms of section 174(1) of the Constitution, 1996." (Emphasis added.)*
- [93] As Blind SA correctly observes, this order neither references the correct provision of the Constitution in terms of which an order of this kind is made, nor does it specify the extent of the inconsistency with the Constitution. Blind SA prays for an order to cure these defects in the following terms:

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

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

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

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

[94] The proposed order is too wide and, in some respects, imprecise. It is too wide for four principal reasons. First, it references all works under copyright. The case that Blind SA has made out concerns literary works, and, to an extent, artistic works that may form part of a literary work. Second, it would declare that the omissions of the Copyright Act fail to measure up to what the Marrakesh Treaty requires to enable persons with visual and print disabilities to have access to published works. The Marrakesh Treaty is not the standard against which inconsistency for the purposes of section 172(1)(a) is measured. Third, the proposed order stipulates for the declaration of invalidity of the Copyright Act, without identifying the provisions of the Copyright Act that are inconsistent with the Constitution. Fourth, it fails to specify that the order applies to published works. No case was made out for infringements in respect of unpublished works.

[95] As to the imprecision of the proposed order, it does not define what is meant by persons with visual and print disabilities; and it references what “access to works under copyright” means by invoking the Marrakesh Treaty. The Marrakesh Treaty is a detailed remedial regime and has much value, but access requires some definitional precision.

[96] To formulate an order that is responsive to the case that Blind SA has established before us, the following elements should feature in the order. The Copyright Act is inconsistent with the Constitution in that sections 6[43] and 7[44] confer on the copyright owner the right to do or authorise the doing of reproducing, in any manner or form, and the making of an adaptation of a literary work. This right limits persons with visual and print disabilities from accessing accessible format copies of published literary works and such artistic works as may be included in these literary works. It does so by rendering such persons liable for infringement of copyright under section 23, absent the authorisation of the copyright owner. Furthermore, Blind SA has used the phrase “persons with visual and print disabilities” to mean a “beneficiary person” as defined in Article 3 of the Marrakesh Treaty. The adoption of that definition is useful, but it should be reflected in the order for the sake of clarity.

[97] I have thus framed an order that covers this ground. This portion of the order will then read as follows:

“(2) It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.

- (3) A person with a visual and print disability described in paragraph 2 means a person who—
- (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 normally be acceptable for reading; regardless of any other disabilities.”

[98] As to this Court’s competence to make an order that is just and equitable in terms of section 172(1)(b) of the Constitution, there was considerable contestation before us. The High Court suspended the declaration of invalidity for a period of 24 months to afford Parliament an opportunity to correct the defect. However, the High Court’s declaration of invalidity had no force, pending confirmation by this Court, and consequently, there was nothing for the High Court to suspend. That error is uncontroversial. However, Blind SA sought to persuade us that this Court should not order a suspension of any declaration of invalidity that it might make, but should rather order that section 19D, presently before Parliament as clause 20 of the CAB, should be “read-in” to the Copyright Act, with immediate effect. Professor Dean marshalled reasons why we should not do so. He favoured regulations that the Minister should be required to promulgate. I do not consider that section 13 of the Copyright Act, for the reasons given, saves the Act from constitutional invalidity. Whether the draft regulations proposed by him have any residual remedial utility is a matter to which I shall return.

[99] This Court has had occasion to effect an interim reading-in remedy that enlarged the reach of a statutory offence so as to extend the protection of legislation that was otherwise constitutionally defective.[45] In *AmaBhungane*, [46] this Court went further still. It weighed the need for an effective interim remedy and the need to respect the separation of powers. It concluded that the egregious and intrusive violation of privacy rights required immediate redress and ordered that during the period of suspension, an additional and extensive provision would be deemed to be included in the Regulation of Interception of Communications and Provision of Communication – Related Information Act[47] (RICA).

[100] Blind SA urges us to follow suit, and to deem section 19D to form part of the Copyright Act. Blind SA makes the following submissions. First, section 19D is Parliament’s answer to the constitutional defect that we have confirmed. It remains so. Second, section 19D was not the subject of presidential concern that led the President to send the CAB back to Parliament. Finally, section 19D is Parliament’s effort to bring the Copyright Act in line with the Marrakesh Treaty. Neither the Speaker of the National Assembly, nor the Minister opposes the reading-in that is sought by Blind SA. To the extent that section 19D requires supplementation, this Court may do so, not least by recourse to the Marrakesh Treaty. Should Parliament in due course wish to amend section 19D in whatever legislation finally

emerges from the wider parliamentary endeavour to amend the Copyright Act, the order of this Court would not prevent Parliament from doing so.

- [101] Professor Dean points out some of the hazards that attach to the reading in of section 19D. First, section 19D is not uncontroversial, and this Court should exercise care, in effect, to legislate in such circumstances. More especially when the provision to be read in is not a narrow alteration of a statutory regime. Second, section 19D is incomplete and does not define terms of importance; these include “works”, “accessible format copy”, “person with disability” and a person who “serves persons with disabilities”. According to Professor Dean, borrowing from the Marrakesh Treaty will not cure the problem because it leads to legislative incoherence. Third, section 19D requires the Minister to prescribe by regulation who is a person that serves persons with disabilities. Therefore, section 19D requires subordinate legislation, and hence its adoption, without more, cannot take place. Finally, section 19D is at odds with the Marrakesh Treaty.
- [102] The starting point is this: persons with print and visual disabilities should not have to wait further to secure a remedy. The parliamentary process has already taken too long. The need to address the infringement of rights is pressing. There must be a remedy granted that provides immediate redress. Section 237 of the Constitution places a duty on organs of state that “constitutional obligations must be performed diligently and without delay”. However, Parliament must be afforded an opportunity to cure the constitutional defect we have found to exist. This is so because the remedy that is required fits into a larger legislative design as to how to domesticate the Marrakesh Treaty and harmonise the exceptions that are required with the project under consideration to revise the Copyright Act. This is a matter properly left to Parliament. A reading-in by this Court should not deter Parliament from its ultimate task to cure the constitutional defect we have found and integrate a remedy into the wider reformation of the Copyright Act. The declaration of invalidity should thus be suspended for a period of 24 months to permit Parliament to complete its work. During the period of suspension, interim relief must be afforded to persons with print and visual disabilities. A reading-in is thus warranted. The question is what should this reading-in contain?
- [103] A reading-in remedy must be carefully tailored to address the constitutional defect that has been established. To do more is to trespass upon the constitutional powers of Parliament. Courts are not elected. Their constitutional mandate is to provide an effective remedy that cures a specific defect. Remedial ambitions beyond this remit make of the courts Olympians, which they, assuredly, are not. Blind SA’s ambitious prayers for relief well illustrate how its justified concern for parliamentary delay translate into expansive remedial claims as to what this Court can and should do. Such claims are to be assessed with care, indeed caution.
- [104] I reiterate the case Blind SA brought to this Court. The challenge concerns published literary works, and, with some generous latitude, artistic works that may form part of a literary work. It focuses upon the rights of copyright owners to authorise the rendering of

such works into accessible format copies for the use of persons with print and visual disabilities. Blind SA does not make out a case in respect of unpublished works; nor as to the importation and export of literary works in accessible format copies; nor as to the domestic legal regime that would be required to ensure reciprocity under the Marrakesh Treaty to facilitate imports of such works; nor, more generally, as to how best to domesticate the Marrakesh Treaty so as to permit South Africa to ratify this treaty; nor as to how the distribution of these works should best be permitted for persons with print and visual disabilities. These matters were addressed, in part, in argument, and particularly in the contentions advanced as to remedy. But a case cannot be reverse engineered from remedy to rights. The remedy must cure the infringements of rights that have been established.

[105] Once the ambit of the case is properly demarcated, the wholesale adoption of section 19D cannot be ordered as interim relief. It covers grounds beyond the challenge established by Blind SA. It is legislation intended to permit South Africa to ratify the Marrakesh Treaty. Whether it does so adequately is beyond the bounds of the case before us. At best, we may permissibly look to the text of section 19D, the relevant provisions of the Marrakesh Treaty, and the proposed regulation that Professor Dean has framed to determine what relief will be effective, in the interim, to cure the scarcity of published literary works in accessible format copies available to persons with print and visual disabilities that is caused by the requirement of authorisation. That must be done in such a way so as to respect the rights of copyright owners that are not implicated in constitutional infringement, whilst providing an effective remedy to cure the identified infringement of rights.

[106] The interim relief must contain the following:

- (a) First, the subject of the exception is published literary works, and artistic works forming part of these works, that are the subject of copyright under the Copyright Act.
- (c) Third, it is necessary to define the scope of the exception, and, in particular, what it means to permit the making of an accessible format copy. The CAB's definition is somewhat truncated. Professor Dean's proposed regulation offers a definition that is limited to reproduction, which I have found to be too restrictive. Again, the Marrakesh Treaty provides a definition of "accessible format copy" that is sufficiently broad to take account of the variety of content and technologies that may be used to give beneficiary persons access that is feasible and comfortable. The definition also recognises the rights of the copyright owner to have the integrity of the original work respected.
- (d) Fourth, and further as to scope, the exception must be clear as to the right of the copyright owner from which a derogation is permitted. It is the right of the copyright owner to authorise the reproduction or adaptation of the relevant works.

[107] Several other aspects are uncontroversial. Those who would make an accessible format copy of a work must have lawful access to the work or a copy of it. The conversion of the work into an accessible format copy may include any means needed to navigate

information in the accessible format, but may not introduce changes other than those needed to make the work accessible to the beneficiary person. Accessible format copies are supplied exclusively to be used by beneficiary persons and such supply is undertaken on a non-profit basis. These are all requirements formulated to protect the rights of copyright owners and provide targeted relief.

- [108] There remains one important issue for consideration as to how best to formulate the interim relief. Plainly, persons with print and visual disabilities must be assisted by others to have accessible format copies of the relevant works made for them. Who should be authorised to do so? The Marrakesh Treaty, section 19D and Professor Dean's proposed regulation all rely on the concept of authorised entities, that is, entities authorised by government. This Court cannot frame an interim order that requires the Minister to undertake what amounts to subordinate law making. That is something only Parliament may require of the Minister.
- [109] The remedial answer may be somewhat imperfect, but it is one that endures only until Parliament has completed its work within the period of suspension. That answer permits not only persons who act as agents of beneficiary persons, but also entities and institutions that provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis to make accessible format copies. This formulation avoids the need for government authorisation. The entity or institution must serve beneficiary persons as one of its primary objects or institutional obligations, and may not do so for profit. That is adequate protection for copyright owners, at least in the interim, given the immediate imperative of ending the scarcity of books for persons with print and visual disabilities.
- [110] I have framed the interim order with these considerations in mind.
- [111] As to costs, Blind SA has had to come to the courts to secure relief for print and visually disabled persons. The Minister did not oppose the application but sought to assist this Court to frame appropriate relief. The Minister did not contest this application of the Biowatch principle that a successful applicant that comes to court to vindicate the rights of those who have suffered the consequences of an unconstitutional statute may look to the state to pay its costs, even if the state has not opposed the application. That principle is not of invariable application but, without well-founded opposition, it should be allowed in this case.
- [112] In the result, the following order is made:
1. The order of the High Court of South Africa, Gauteng Division, Pretoria declaring the Copyright Act 98 of 1978 inconsistent with the Constitution is confirmed to the extent provided in paragraph 2.
 5. The declaration of unconstitutionality in paragraphs 1 and 2 takes effect from the date of this judgment and is suspended for a period of 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity.

- (d) ‘permitted entity’ means an entity, including a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.

For the Applicant:

J Berger, F Veriyava and T Moosa instructed by SECTION 27

For the First Respondent:

N Rajab-Budlender SC and R Tulk instructed by State Attorney, Pretoria

For the First Amicus Curiae: I Goodman and D Linde instructed by Adams and Adams

For the Second Amicus Curiae: M Power instructed by Power Singh Incorporated

For the Third Amicus Curiae: M Z Suleman and S Mdletshe instructed by Equal Education Law Centre

[1] 98 of 1978.

[2] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, 27 June 2013.

[3] 10 of 2013.

[4] See Dean Handbook of South African Copyright Law (Juta & Co Ltd, Cape Town 1987).

[5] The term “persons with print and visual disabilities” also includes blind persons.

[6] [B 13B-2017].

[7] Section 79(1) states that “[t]he President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration”.

[8] Blind SA describes how the reclassification 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.”

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[9] The proposed section 19D reads as follows: “(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 [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 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.”

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- (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
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- (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 authorisation of the owner of the copyright work, reproduce the work for personal use.
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- (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.”

[10] Id.

[11] *Blind SA v Ministry of Trade, Industry and Competition* 2021 JOL 52197 (GP) (High Court judgment) at para 28.1.

[12] Id at paras 4-5.

[13] Id at para 6.

[14] Id at para 10.

[15] Id at para 11.

[16] Id at paras 18-9.

[17] Id at para 23.

[18] Id at para 26.

[19] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886. The Berne Convention has since been revised.

[20] The Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994.

[21] Convention on the Rights of Persons with Disabilities, 13 December 2006.

[22] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[23] Section 39(a) states that “[t]he Minister may make regulations as to any matter required or permitted by this Act to be prescribed by regulation”.

[24] In terms of section 13, “[i]n addition to reproductions permitted in terms of [the Copyright Act] reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.”

[25] Section 172(1) of the Constitution states: “When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

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 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[26] Article 13 of the TRIPS Agreement states that “[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

[27] Article 9(2) of the Berne Convention states that— “[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

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[28] Section 1(1) of the Copyright Act states that— “reproduction, in relation to— (a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film; (b) an artistic work, includes a version produced by converting the work into a three dimensional form or, if it is in three dimensions, by converting it into a two dimensional form; (c) any work, includes a reproduction made from a reproduction of that work.”

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[29] Phillips v Director of Public Prosecutions

[2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

[30] Id at para 8.

[31] These sections set out under which circumstances copyright will be infringed (section 23) and stipulate the penalties and proceedings in respect of dealings which infringe copyright (section 27).

[32] Sections 9, 10, 16, 29 and 30 of the Constitution.

[33] Section 23(2)(a) of the Copyright Act states that— “copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work: (a) imports an article into the Republic for a purpose other than for his private and domestic use.”

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[34] Section 23(2)(c) of the Copyright Act states that— “copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected.”

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- [35] Section 9(2) states: “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.”
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- [36] Section 16(1)(b) states that “[e]veryone has the right to freedom of expression, which includes freedom to receive or impart information or ideas”.
- [37] In terms of section 29(1)(a) and (b)— “[e]veryone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”
- [37] In terms of section 29(1)(a) and (b)—
- “[e]veryone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”*
- [38] Section 30 states that “[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.
- [39] Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 at para 23.
- [40] Fraser v Absa Bank Ltd [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 47.
- [41] Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd [2016] ZASCA 119; [2016] JOL 36649 (SCA) at para 12.
- [42] Emphasis added.
- [43] Section 6 provides a list of actions that a copyright owner is vested with the exclusive right to do or authorise in respect of literary and musical works.
- [44] Section 7 provides a list of actions that a copyright owner is vested with the exclusive right to do or authorise in respect of artistic works.
- [45] Centre for Child Law v Media 24 Ltd [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at paras 114-126.

[46] AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services [2021] ZACC 3; 2021

(3) SA 246 (CC); 2021

(4) BCLR 349 (CC) at paras 136-149.

[47] 70 of 2002.

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