
OPINION FOR RECREATE ON THE PRESIDENT'S REFERRAL OF THE COPYRIGHT AMENDMENT BILL [B 13B—2017] TO THE NATIONAL ASSEMBLY

INTRODUCTION

- 1 Our advice is sought by ReCreate¹ in relation to the President's decision, taken in terms of section 79(1) of the Constitution, to refer the Copyright Amendment Bill [B 13B—2017] ("the CAB") back to the National Assembly for reconsideration. The CAB, which seeks to amend the Copyright Act 98 of 1978, completed its initial passage through Parliament on 29 March 2019.²
- 2 In a letter to the Speaker of the National Assembly dated 16 June 2020, the President expressed his reservations about the constitutionality of the CAB and the Performers' Protection Amendment Bill [B 24—2016]. He referred the Bills back to Parliament for them to be considered "*afresh so that their objectives can be realized speedily and without the risk of any constitutional challenge.*"
- 3 ReCreate seeks an opinion on the President's objections to the CAB, in which the following matters are considered:

¹ ReCreate is a non-profit organization established to advocate for a balanced Copyright Act that protects modern creators' rights. ReCreate is a coalition of writers, filmmakers, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, poets, producers of accessible format materials and other South African creators.

² On that day, the CAB was passed by the National Council of Provinces ('the NCOP').

- 3.1 The validity or otherwise of the President's constitutional objections, with reference to the opinion we previously provided to ReCreate;
- 3.2 Any unintended consequences that may emanate from Parliament accommodating the President's concerns, with particular attention to the issue of tagging, and the President's reliance on the property clause; and
- 3.3 Parliament's options going forward, having regard to –
 - 3.3.1 the CAB's objectives, including the need to respect, protect and promote fundamental human rights, and any consequence in delaying the CAB's promulgation; and
 - 3.3.2 whether Parliament should send the CAB back to the President, as it is, so that he may either assent to it, or refer it to the Constitutional Court, or whether Parliament should deal with it in any other way that may allow its objectives to be 'realised speedily' and with reduced risk of constitutional challenge.

4 In what follows below, we deal with each of these matters in turn.

THE PRESIDENT'S CONSTITUTIONAL OBJECTIONS

5 Section 79 of the Constitution, which sets out the President's duties when assenting to bills passed by Parliament, provides:³

³ Our emphasis

- “(1) *The 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.*
- (2) *The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.*
- (3) *The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if -*
 (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
 (b) section 74(1), (2) or (3) (b) or 76 was applicable in the passing of the Bill.
- (4) *If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either -*
 (a) assent to and sign the Bill; or
 (b) refer it to the Constitutional Court for a decision on its constitutionality.
- (5) *If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.”*

6 In his letter to the Speaker, the President identified various concerns in relation to the CAB. In particular, he noted that he had come to the conclusion that –

6.1 the CAB was incorrectly tagged as a section 75 bill;

6.2 sections 6A(7), 7A(7) and 8A(5) of the CAB may be unconstitutional in that –

6.2.1 they “*may constitute retrospective and arbitrary deprivations of property*”; and

- 6.2.2 each of subsections 6A(7)(b), 7A(7)(b) and 8A(5)(b) *“may well constitute an impermissible delegation of legislative authority”*;
- 6.3 the fair use provisions in section 12A were adopted pursuant to an unlawful process in that the final text of the section was not put out for public comment before the CAB was adopted;
- 6.4 the copyright exceptions contained in sections 12A to 12D, 19B and 19C (“the copyright exceptions”) *“may constitute arbitrary deprivation of property”*;
- 6.5 sections 12A and 12D *“may further run the risk of violating the right to freedom of trade, occupation and profession”*; and
- 6.6 some provisions may be in breach of the country’s obligations under various international treaties (“the international law concerns”).
- 7 But in referring the CAB back to the National Assembly, the President only cited three reasons underpinning his reservations about the CAB’s constitutionality:⁴
- 7.1 first, that the CAB was incorrectly tagged (“the tagging issue”);
- 7.2 second, that the retrospective application of each of sections 6A, 7A and 8A may constitute an impermissible arbitrary deprivation of property; and

⁴ Para 22, read together with para 23

7.3 third, that the copyright exceptions in sections 12A, 12B, 12C, 12D, 19B and 19C are likely to –

7.3.1 constitute an impermissible arbitrary deprivation of property; and

7.3.2 be in breach of the *“Three-Step test [first established under Article 9(2) of the Berne Convention] binding South Africa under international law.”*

8 Thus, despite the breadth of the concerns identified in the President’s letter, the only reservations that have been referred back to Parliament for reconsideration are those that are set out in paragraph 7 above. Parliament’s duty now is to consider the President’s reservations. Nevertheless, in what follows below, we consider all the concerns identified in paragraph 6 above.

9 In our previous opinion, we considered each of these concerns, which had already been identified by parties opposed to the CAB’s enactment.

9.1 Insofar as the tagging issue is concerned,⁵ we came to the conclusion that the CAB was correctly tagged as a section 75 bill (being an ordinary bill not affecting the provinces) because –

9.1.1 it is primarily concerned with matters that reside in the exclusive legislative competence of Parliament; and

⁵ We dealt with the tagging issue at paras 74 – 91 of the opinion.

9.1.2 it does not substantially affect any matter that resides within a provincial competence.

9.2 In coming to this conclusion, we considered objections that had previously been raised in respect of the CAB's implications for two functional areas of legislative competence referred to in Schedule 4 of the Constitution: trade, and customs of traditional communities. These are the very issues identified in the President's letter. We stand by our opinion.

9.3 Our conclusions are fortified by a consideration of *Democratic Alliance v President of South Africa*,⁶ which our opinion did not consider, in which Rogers J made it plain that the test for determining how to tag a bill “requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4.”

9.4 Rogers J rejected what he termed a “knock-on effects” test and adopted a “direct regulation test”, interpreting the cases on which we relied. On this test, “the direct regulation test”, the CAB was quite correctly tagged as a section 75 bill.⁷

⁶ *Democratic Alliance v President of South Africa and Others* 2014 (4) SA 402 (WCC) at para 95

⁷ A “knock on effects” test would be concerned with whether the provisions of a Bill have knock on effects for matters within Schedule 4.

9.5 Rogers J's decision also confirms our view that the Intellectual Property Laws Amendment Act 28 of 2013, which makes traditional works subject to copyright, should be treated on a different footing to the CAB.⁸

9.6 Insofar as the concern about retrospectivity (affecting sections 6A, 7A and 8A) is concerned, we came to two key conclusions that are relevant to the President's referral:

9.6.1 First, it is incorrect to describe these provisions as operating retrospectively. Rather, *"they operate prospectively in respect of two categories of works: those in respect of which the right to royalties has already been assigned; and those in respect of which the right to royalties has yet to be assigned."*⁹

9.6.2 Insofar as the second category of works is concerned, we noted that *"there can be no question whatsoever of retrospectivity."*¹⁰ Insofar as the first category is concerned, we explained:¹¹

"[W]e accept that the provisions have an impact on past transactions in that they impose new terms and obligations on the parties to any contract dealing with the assignment of royalties. In and of itself, this cannot raise any rule of law concerns. It is comparable to the introduction of a national minimum wage in certain sectors, which has a direct impact on the contractual relationships between employers and employees in such sectors."

⁸ See paragraph 88 of our opinion.

⁹ At para 134

¹⁰ At para 134

¹¹ At para 135

9.6.3 Second, to the extent that the vested rights to which sections 6A, 7A and 8A refer are property as contemplated by section 25 of the Constitution, *“any proven deprivation would be non-arbitrary, and accordingly, constitutionally valid.”*¹²

9.7 On the allegation that each of sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) constitutes an impermissible delegation of legislative authority, we were of the view that the CAB does no such thing.¹³

“The concern has been expressed in respect of sections 6A(7)(b), 7A(7)(b), and 8A(5)(b), each of which empowers the Minister to make draft regulations dealing with procedural aspects. At issue in each of the three sections is the right of the author of a copyrighted work to share in royalties in respect of literary or musical works, visual artistic works, and audiovisual works.”

“The right to share in royalties, in defined circumstances, is expressly guaranteed in the Bill; the Minister plays no role in determining who should succeed in obtaining their share. Instead, the Minister’s role is limited to four things: first, developing draft regulations setting out the process to give effect to the application of each section to eligible works; second, conducting an impact assessment of the proposed process; and third, tabling the draft regulations and impact assessment in the National Assembly; and fourth, making the regulations should the National Assembly provide its approval.”

“The delegation of power to make regulations about the process to give effect to each section is properly regarded as conferring the power to make subordinate legislation within the framework of the empowering

¹² At para 136. In this regard, we relied on our analysis of the property arguments advanced in dealing with the fair use provisions of the CAB.

¹³ At paras 138 – 140 (footnote omitted)

legislation and to give effect to it. This does not amount to a delegation of plenary legislative power.”

9.8 Insofar as the process in terms of which the fair use provisions were adopted is concerned, we were of the view that the procedural concern raised did not present a risk of successful constitutional challenge. More specifically, our previous opinion made it plain that there was no obligation on the Committee to invite further public comment once it had replaced the phrase “*for the following purposes*” in section 12A in the final version of the CAB with the phrase “*purposes such as the following*”.¹⁴

9.9 But in any event, objections to the changed wording were in fact entertained in the National Council of Provinces (“the NCOP”):¹⁵

“It is also material to note that the objectors who are raising the complaint were as a matter of fact specifically heard, and their objections specifically considered by the NCOP. While they were heard as a collective in the NCOP, some of the entities had previously elected to participate individually during the National Assembly process. The fact that Parliament disagreed with them does not mean that there was any procedural defect in the process.”

9.10 Our previous opinion dealt in some detail with the concern raised by some parties that the fair use provisions constitute arbitrary deprivations of property.¹⁶ Our opinion applies to all the copyright exceptions.

¹⁴ See, in particular, paras 95 – 101

¹⁵ Para 102

¹⁶ See paras 110 – 115

9.11 For purposes of the opinion, we assumed – without considering the complicated legal questions raised – that copyright is constitutionally-protected property, and that section 12A constitutes a deprivation of property. But even on this generous approach, we came to the conclusion that the fair use provisions do not fall foul of section 25(1) of the Constitution, because they cannot be considered as arbitrary, in the sense that the term has been interpreted by the Constitutional Court in the *FNB* case.¹⁷

9.12 We considered a number of factors in coming to this conclusion. We highlight three for present purposes.

9.12.1 The fair use provisions would serve crucial public purposes, which the state is obliged to enhance, relating as they do *“to equality, facilitating access to knowledge for persons with disabilities, access to education, freedom of expression and access to information and ideas”*.¹⁸

9.12.2 In nature, copyright is incorporeal and is enhanced, not depleted, through use.¹⁹

9.12.3 The CAB *“seeks to balance the nature and extent of a creator’s copyright protection (which in some respects is enhanced under the Bill) with exceptions and limitations in the public interest”*, and

¹⁷ *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002(4) SA 768 (CC) at paragraph 100.

¹⁸ Para 111.1

¹⁹ Para 111.3

*“does so carefully, and in a justifiable way”.*²⁰ The CAB achieves this balance by using the well-suited principle of *fairness* of use to mediate interests, sets out a four factor test and introduces the principle of proportionality, specifically protects against undue commercial prejudice, and clearly permits of an interpretation that is consistent with the Three-Step Test and comparative approaches.²¹

- 9.13 Insofar as the allegation that sections 12A and 12D violate the right to freedom of trade, occupation and profession (in section 22 of the Constitution) is concerned, our opinion sets out – again in some detail – why such concerns have no sound basis in either law or fact.
- 9.14 Our opinion focused on the second part of the right in section 22, which provides that the practice of a trade, occupation or profession may be regulated by law. The requirement of this provision may be met by satisfying the rationality test. As the test for rationality is weaker than the test for arbitrariness in section 25 of the Constitution, there was no need to consider that aspect of the right in section 22 any further.²²
- 9.15 The first part of section 22 of the Constitution relates to the right of citizens to choose a trade, occupation or profession. In this regard, opponents of the CAB claimed that although it imposes no formal

²⁰ Para 111.4

²¹ These latter points are detailed in subparagraphs 11.4.1 to 11.4.6.

²² Para 116

impediments, there is an *effective* impediment because any activity that relies on the commercial exploitation of copyright will be made uncertain, and therefore illusory, and potentially unprofitable.²³

- 9.16 After considering the case law on this aspect of the right, as well as the available evidence on the industries potentially affected by sections 12A and 12D, we came to the conclusion that section 22 of the Constitution would not be breached.²⁴

“Even if those opposed to the Bill, and some in some industries, may be able to establish that the profitability of their businesses will decrease, it is a different matter altogether to establish support for the further claim that the effect will be of such a degree so as to make their businesses so undesirable, difficult or unprofitable that the choice to enter that line of business will effectively be taken away.”

- 9.17 Finally, on the international law concerns, we noted that –

9.17.1 *“[t]he President may not decline to assent to a Bill solely because he may be concerned that a Bill, or a provision of a Bill, will result in South Africa not complying with international obligations”;*²⁵
and

9.17.2 the President *“may only do so if the international law obligation is either a requirement of the Constitution, or – when properly interpreted in light of that obligation – a constitutionally-*

²³ See para 118

²⁴ See para 123 in particular

²⁵ At para 47.2 (footnote omitted)

*entrenched right will be limited in an unreasonable and unjustifiable manner”.*²⁶

- 9.18 Because the international law concerns are not framed in a manner that forms any valid basis for objecting to the CAB’s assent, Parliament ought not revisit these issues. Importantly, however, the reservation that the exceptions may be in breach of the *“Three-Step test [first established under Article 9(2) of the Berne Convention] binding South Africa under international law”*, in our view, lacks foundation. As we explained in our opinion, the courts will interpret the exceptions having regard to and in light of international law.²⁷ There is nothing in the CAB that precludes the courts from doing so.
- 10 For the reasons set out in our previous opinion, which we have summarised here, we are of the view that there is no significant risk of a successful constitutional challenge to the CAB in its current form. Moreover, there is nothing in the President’s letter that explains why the conclusions reached in that opinion are incorrect. Rather, in the main, the President’s letter restates the conclusions reached by the CAB’s detractors, which Parliament has already considered, and which we have addressed in some detail.
- 11 Indeed, given the transformative purposes of the CAB and the contested nature of the underlying issues, it is not unlikely that whatever Parliament chooses to do, the CAB, when enacted, will attract constitutional challenge, either from its

²⁶ Ibid

²⁷ Para 111.4.5

current detractors, or from those whose constitutional rights would be protected by the CAB in its current form should their rights be unreasonably curtailed. The likelihood of an objective enquiry into the constitutionality of the CAB substantially reduces the danger of an unconstitutional outcome.

- 12 This does not mean, however, that there are not ways in which Parliament could remove or reduce certain risks of successful constitutional challenge. Parliament may thus prudently decide to make selected revisions to the CAB which both retain its core policy content, but simultaneously remove or significantly reduce any risk of successful challenge.
- 13 In our view, the provisions that could sensibly be so revised are those said to implicate 'retrospectivity', which would in turn also address the concern about delegation of legislative authority.²⁸ For example, amendments might be introduced to sections 6A and 7A that limit and clearly circumscribe the circumstances in which extant contracts may be revisited. But there are various possibilities.
- 14 For reasons we elaborate on below, we would caution against accommodating all of the President's concerns, especially the concern about tagging.

²⁸ In other words, those that we deal with in paragraphs 6.2, 9.6 and 9.7 above.

THE CONSEQUENCES OF ACCOMMODATING ALL OF THE PRESIDENT'S CONCERNS

- 15 In this section, we explain why we are of the view that the issue of tagging and the fair use provisions should not be revisited. We do so in light of implications for both process and substance, and broader constitutional principles.
- 16 In our view, it is vital that Parliament, in deciding how to proceed now, has full regard to broader constitutional principles at stake. We highlight two, the first concerning the separation of power between Parliament and the President, and the second concerning respect for the Constitution's allocation of power between Parliament and provincial legislatures.
- 17 On the separation of power between Parliament and the President:
- 17.1 First, as we explained in our opinion,²⁹ the President, when expressing constitutional reservations, does not exercise a veto power over legislation that Parliament enacts or its underlying policy choices. Constitutionally, legislating is obviously Parliament's preserve. The President's role in the legislative process in terms of section 79, while important to upholding the Constitution, is highly constrained. His role is limited to expressing constitutional reservations, of which there are only

²⁹ Part C, paras 43 – 53, especially at 47.1

three. The President may not decline to assent to a Bill based on mere concerns he may hold or the concerns of a third party.

- 17.2 Second, in turn, Parliament's role at this juncture is similarly limited to addressing the President's three reservations. The President's further concerns are not before Parliament. Parliament is furthermore not obliged to agree with the President, nor should it accept his reservations as meritorious without more. Parliament should only revise the CAB if it concludes that the President is correct. In this case, Parliament faces a difficulty in that the President has not explained his views with great particularity, and Parliament has already considered the constitutional issues that underlie the President's reservations and concluded differently to him.
- 18 The constitutional scheme of allocation of power between the national and provincial sphere of government comes to the fore with the tagging issue. If Parliament were to re-tag the CAB, it is most likely that any future bill that seeks to amend any legislation dealing with any form of intellectual property would – by default – be tagged as a section 76 bill. If Parliament merely accepts the President's reservation, this may have profound implications both for how Parliament understands the scope of its residual legislative power, and the role of the provinces in law-making on matters that lie within its exclusive domain.
- 19 One question that arises is whether Parliament can avoid the risk of constitutional challenge by following the more onerous section 76 procedure, even if it is of the view that the CAB was correctly tagged as a section 75 bill. In this regard,

Parliament may be mindful of the *obiter dictum* of Cameron AJ (as he then was) in *Ex Parte President of the RSA In re: Constitutionality of the Liquor Bill*:³⁰

“[25] There are three principle differences between the procedure stipulated in s 75 for ordinary Bills not affecting provinces and that in s 76. First, the latter gives more weight to the position of the National Council of Provinces. This occurs chiefly through the invocation of the Mediation Committee. If one House rejects a Bill passed by the other, or if one House refuses to accept a Bill as amended by the other, the legislation must be referred to the Mediation Committee, which consists of nine members of the National Assembly and one delegate from each provincial delegation in the NCOP. Second, if the NCOP raises objections to a version of the Bill approved by the Mediation Committee in circumstances where the Bill was introduced in the National Assembly, the Bill lapses unless the National Assembly passes it again with a two-thirds majority. Third, when the NCOP votes on a question under s 75, the provisions of 65 – in terms of which each province has a single vote in the NCOP ‘cast on behalf of the province by the head of its delegation’, and in terms of which questions before the NCOP are ‘agreed when at least five provinces vote in favour of the question’ – do not apply. Instead, in terms of s 75(2), each delegate in a provincial delegation has one vote and the question is decided by a majority of the votes cast (the presiding delegate having a casting vote), subject to a quorum of one-third of the delegates.

[26] It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute. The third is, however, of import, since whether a provincial delegation votes corporately through its head of delegation, as prescribed by section 65, or individually by each member casting a vote, as prescribed by section 75(2),

³⁰ 2000(1) SA 732 (CC) at paras 25 to 27 (footnotes omitted; our emphasis)

may in defined circumstances be determinative as to whether the NCOP passes a Bill.

[27] However, it is, in my view, unnecessary to decide this question ”

20 The Constitutional Court has thus not decided the question whether a section 75 Bill that is tagged and processed as a section 76 Bill would be constitutionally valid. On the contrary, the last sentence of paragraph 25 of *Liquor Bill* suggests that Parliament should be careful to follow the correct procedure.

21 A second consideration is the potentially very significant delay in realising the objectives of the Bill, and securing the rights that it is intended to protect, that would result from retagging. In this regard, there are various procedural implications for accepting the President's reservation on tagging.

21.1 Should the CAB be retagged as a section 76 bill, this would require the public participation process in the NCOP to be started afresh. We deal with this issue in more detail below. Prior to that, in the National Assembly, only those provisions identified by the President in his letter to the Speaker would be reopened for further debate.

21.2 But the limited role to be played by the National Assembly would not preclude the NCOP from making amendments to any other provisions of the CAB, or from rejecting the CAB as a whole. Thus, despite the limited ambit of the President's referral to Parliament, his raising of the tagging issue could effectively reopen debate on the entirety of the CAB.

21.2.1 Should the NCOP make any amendments, including in respect of provisions that did not raise any concerns with the President, then the amended CAB would have to be referred back to the National Assembly for reconsideration.

21.2.2 Should the NCOP reject the CAB as a whole, or should the National Assembly refuse to pass any amended CAB, the matter would then have to be referred to the Mediation Committee contemplated by section 78 of the Constitution.

21.3 The provisions of section 76 dealing with the Mediation Committee's role make it plain that the outcome of any such process could include a bill that differs from the CAB only in respect of the provisions identified by the President, a bill that differs on a much broader range of issues, or a lapsed bill.³¹ Put differently, retagging could completely destroy the CAB.

22 Moreover, the public participation process in the NCOP could take a significant amount of time, in large part because of the public consultation process required by the Mandating Procedures of Provinces Act 52 of 2008, read in light of sections 72(1)(a) and 118 of the Constitution. This Act *"provide[s] for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf, as required by section 65 (2) of the Constitution"*.

³¹ See *Democratic Alliance*, above n 6 at paras 9 – 11.

- 23 Each provincial legislature would have to decide on the negotiating mandate to give to its province's delegation to the NCOP,³² ordinarily after taking – at a bare minimum – the following steps:³³
- 23.1 scheduling and hosting a briefing by the relevant national department (in this case, the Department of Trade, Industry and Competition);
 - 23.2 notifying members of the public of their right to make submissions on the CAB at scheduled public hearings; and
 - 23.3 conducting the public hearings, and considering public comments, before deciding on the negotiating mandate (which may include consultations in rural communities in view of the President's understanding of how the CAB affects cultural matters).
- 24 Each provincial legislature's role does not end once there is a decision on the negotiating mandate. Once the relevant select committee of the NCOP has processed a section 76 bill, but before it is tabled at an NCOP plenary, each provincial legislature has to decide on its final mandate, which must *"indicate whether the provincial legislature votes in favour of or against, or abstains from voting on, the Bill"*.³⁴

³² Such a decision is taken by a committee of the provincial legislature.

³³ See *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) at paras 16 – 17

³⁴ The requirements in respect of final mandates are set out in section 3 of the Mandating Procedures of Provinces Act 52 of 2008.

25 It may not be wise for Parliament to retag the CAB as a section 76 Bill if the purpose of doing so is simply to mitigate any risk of litigation on the issue. We say so for at least two reasons.

25.1 First, insofar as the issue is debatable, Parliament would arguably benefit from clarity on the issue, especially given its implications for the handling of legislation on intellectual property.

25.2 Second, while in this case the President himself has expressed his reservation on the matter, in other cases, the risk will present itself through the threat of challenge by interest groups. The practical consequences for Parliament submitting to such pressure are significant, and can serve to derail or at least significantly delay the implementation of government policy.

26 In our view, Parliament should in each case cautiously make an assessment as to what the correct legal process is, not whether there is a risk that a case might be brought in due course.

27 Insofar as the President's reliance on the property clause is concerned, our previous opinion notes that there are three questions that any court would have to consider before finding that a statutory provision constitutes an arbitrary deprivation of property:

27.1 First, that copyright is property as contemplated by section 25 of the Constitution;

27.2 Second, that the statutory provision in question constitutes a deprivation of property; and

27.3 Third, that any such deprivation is arbitrary.

28 Our jurisprudence on section 25 of the Constitution makes it clear that reasonable people may disagree when attempting to answer these difficult questions, especially the third. We are of the view that the risk of a successful constitutional challenge to the CAB's provisions on the basis of section 25 is not significant.

29 However, if Parliament were to accommodate the President's concerns in relation to property, then these questions – insofar as they relate to the CAB – would remain unanswered. Instead, Parliament would have weakened the manner in which the CAB seeks to advance fundamental human rights, without having had the benefit of the Constitutional Court pronouncing on the constitutionality of its original and carefully considered provisions.³⁵ The constitutional rights at stake are important, including as they do the rights to equality, freedom of expression, education, and access to information, among others.

³⁵ If the President were to refer reservations to the Constitutional Court, the Court would be seized with each of the reservations so referred. The situation may be different if, in due course, an interested party were to challenge the new law on the basis of tagging, as happened in *Tongoane v Minister of Agriculture and Land Affairs* 2010(6) SA 214 (CC). In that case, the Constitutional Court declined to consider the remaining issues raised in a constitutional challenge to the Communal Land Rights Act in circumstances where the Court had concluded that the Act was invalid as it was incorrectly tagged. (See paras 114 to 128). The Constitutional Court performs a different function when adjudicating a referral under section 79; its duty then is to consider the President's reservations.

PARLIAMENT'S OPTIONS GOING FORWARD

30 Parliament has at least three options at its disposal, each with its own likely and potentially unanticipated consequences:

30.1 As Parliament did in processing the Liquor Bill,³⁶ it may decide to return the CAB to the President unamended. The Liquor Bill, which was referred to the National Assembly on 22 January 1999, was returned to then President Mandela on 3 March 1999. Five days later, he referred it to the Constitutional Court for a decision on its constitutionality.

30.2 The case was argued on 31 August 1999, with judgment being handed down on 11 November 1999. (In his judgment, Cameron AJ (as he then was) found that some – but not all – of the President's constitutional concerns had merit.) It thus took less than ten months for these concerns to be placed before and decided upon by our highest court.

30.3 Alternatively, the National Assembly could decide to give effect to all of the President's concerns, by retagging the CAB as a section 76 bill, and reconsidering the sections expressly identified by the President in his letter to the Speaker. Such an approach would require the Portfolio Committee to hold fresh public hearings on these sections of the CAB.

³⁶ [B 131B—1998]

- 30.4 But as already indicated above, once the CAB is before the NCOP, all of its provisions would be the subject of the various public consultation processes, including those convened by all nine provincial legislatures. This could result in a fundamentally different bill, or even result in the bill lapsing, and it would likely cause very significant delay.
- 30.5 A third option would be for the National Assembly to keep the CAB as a section 75 bill, and only reconsider one or both of the substantive reservations identified by the President in his letter to the Speaker. Such an approach would prevent any delays likely to result from retagging, and would result in the NCOP in turn limiting itself to the substantive reservations identified by the President.
- 30.6 Such an approach, however, would not necessarily prevent the President from referring the CAB to the Constitutional Court, whether on the tagging issue alone, or also on the basis that his substantive concerns had not been fully accommodated. And even if the President assented to the CAB, that would not stop any of its detractors from taking legal action.
- 31 In deciding which of these (or any other) options to take, Parliament ought to be mindful of the importance of the CAB's objectives, including the need to respect, protect and promote fundamental human rights. As our previous opinion explains, *"copyright protection without adequate limitations and exceptions should itself be regarded as limiting rights protected in the Bill of Rights."*³⁷

³⁷ At para 57 (emphasis added)

“This includes at least each of the rights that are, in our opinion, advanced by the Bill: access to education, dignity, equality, and freedom of expression. In the result, any legislative measure that confers copyright protection on a knowledge good must make provision for appropriate limitations and exceptions so as to be reasonable and justifiable in an open and democratic society, and thus meet the test set out in section 36 of the Constitution. Put differently, in our view, the inclusion of fair use provisions that protect these rights are necessary in order for the Bill, when enacted, to survive constitutionality scrutiny.”

- 32 Put differently, if the CAB were to be amended such that it no longer contains adequate exceptions and limitations, as we submit it currently does, it would be vulnerable to attack, albeit from a different side. We remain of the view that in its current form it *“respects, promotes, fulfils and protects multiple rights protected in the Bill of Rights.”*³⁸
- 33 Another factor that Parliament ought to take into consideration is the extent to which each option may result in delaying the CAB’s promulgation. Given that litigation seems likely regardless of the option exercised, Parliament should be aware that the length of delay would depend on whether the CAB was referred by the President to the Constitutional Court, or whether legal proceedings were initiated after the CAB had obtained the President’s assent.
- 34 Absent exceptional circumstances, such proceedings would have to be initiated in the High Court. Should they not result in any provision of the amended Act being declared unconstitutional, this could give rise to a lengthy appeal process involving the High Court, the Supreme Court of Appeal, and or the Constitutional

³⁸ Para 58

Court. Should there be any degree of success in the High Court, the matter would still have to be heard by the Constitutional Court (in confirmation proceedings).

35 Taking all of these considerations into account, we are of the view that there are two options best suited to respecting, protecting, promoting, and fulfilling the range of constitutional rights, as Parliament has sought to do.

35.1 The first is one that sees the CAB being returned to the President unamended.

35.2 The second is one that sees Parliament choosing not to retag the CAB, but reconsidering the CAB in light only of the President's substantive concern about 'retrospectivity' (and in turn legislative delegation).

36 Were either of these routes to be followed, the President should be expected – in the circumstances – to refer the bill to the Constitutional Court for a determination of its constitutionality.

SUSANNAH COWEN SC

JONATHAN BERGER

MEHLULI NXUMALO

Chambers, Sandton

20 August 2020