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

INTRODUCTION

- 1 Our opinion 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 Section 79 of the Constitution, which sets out the President’s duties when assenting to bills passed by Parliament, provides:³

- “(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*

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 Our emphasis

(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.”*

3 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.*”

4 ReCreate seeks our opinion on one of the President's reservations, specifically his reservation about whether the CAB was correctly tagged as a section 75 Bill, or should have been tagged as a section 76 Bill (“the tagging reservation”). We are asked to consider –

4.1 the validity of the tagging reservation, with reference to the opinion we previously provided to ReCreate;

4.2 any unintended consequences that may emanate from Parliament accommodating the tagging reservation; and

- 4.3 Parliament's options should it elect not to accommodate the tagging reservation.

THE PRESIDENT'S RESERVATIONS AND THE VALIDITY OF THE TAGGING RESERVATION

- 5 In his letter to the Speaker, the President identified six concerns in relation to the CAB. But in referring the CAB back to the National Assembly, the President cited only three reasons underpinning his reservations about the CAB's constitutionality:⁴

- 5.1 first, the tagging reservation;
- 5.2 second, that the retrospective application of each of sections 6A, 7A and 8A may constitute an impermissible arbitrary deprivation of property; and
- 5.3 third, that the copyright exceptions in sections 12A, 12B, 12C, 12D, 19B and 19C are likely to –
 - 5.3.1 constitute an impermissible arbitrary deprivation of property; and
 - 5.3.2 be in breach of the *“Three-Step test [first established under Article 9(2) of the Berne Convention] binding South Africa under international law.”*

⁴ Para 22, read together with para 23

- 6 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 5 above. Parliament's duty now is to consider the President's reservations.
- 7 In our previous opinion, we considered each of these issues (and the President's further concerns), which had already been identified by parties opposed to the CAB's enactment, and considered by Parliament itself.
- 8 We stand by our opinion. Insofar as tagging 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 –
- 8.1 it is primarily concerned with matters that reside in the exclusive legislative competence of Parliament; and
- 8.2 it does not substantially affect any matter that resides within a provincial competence.
- 9 Regarding the first reason, we explained that *“copyright – like other forms of intellectual property – is a subject matter that ordinarily falls within the exclusive national legislative competence.”* For the reasons set out in that opinion, we took the view *“that a court would probably find that legislating for copyright recognition regimes is an exclusive national competence.”*⁶

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

⁶ At para 79

- 10 Insofar as the second reason is concerned, 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 same issues identified in the President's letter.
- 11 We found that the CAB does not substantially affect either trade or customs of traditional communities. To the extent that the CAB may have some implications for these functional areas, we caution against adopting an approach that – in effect – could result in any bill which spills over slightly into a functional area of legislative competence in Schedule 4 being tagged as a section 76 bill.
- 12 Our conclusions are fortified by a consideration of *Democratic Alliance v President of South Africa*,⁷ 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.*”
- 13 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.⁸

⁷ *Democratic Alliance v President of South Africa and Others* 2014 (4) SA 402 (WCC) at para 95

⁸ A “*knock on effects*” test would be concerned with whether the provisions of a Bill have knock on effects for matters within Schedule 4.

- 14 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.⁹

THE CONSEQUENCES OF ACCOMMODATING THE TAGGING RESERVATION

- 15 We would caution against accommodating the President's concern about tagging in light of broader constitutional principles, and because of the resultant delay in realising important constitutional rights that the CAB is intended to protect. Moreover, for the reasons set out below, we are of the view that it would be imprudent for Parliament to accommodate the concern if the motivation is to adopt a precautionary or 'failsafe' approach, and thereby seek to reduce the risk of constitutional challenge.

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:

⁹ See para 88 of our previous opinion.

- 17.1 As we explained in our opinion,¹⁰ 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.
- 17.2 In turn, Parliament's role at this juncture is limited to addressing the President's reservations on constitutionality. Parliament is not obliged to agree with the President, nor should it simply accept his reservations as meritorious. Parliament should only revise the CAB if it concludes that the President is correct.
- 18 The constitutional scheme of allocation of power between the national and provincial sphere of government also comes to the fore with the tagging reservation. If Parliament were to retag 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.
- 19 If Parliament merely accepts the President's reservation, this may have profound implications both for how Parliament understands the scope of its residual

¹⁰ Part C, paras 43 – 53, especially at 47.1

legislative power, and the role of the provinces in law-making on matters that lie within its exclusive domain.

Delay in realising constitutional rights

20 A second consideration is the potentially very significant delay in realising the objectives of the CAB, and securing the rights that it is intended to protect, that would result from retagging. Indeed, there is a real risk that the CAB may be destroyed in its entirety, either because its core protective measures may be removed via a process that may re-open debate on the Bill in its entirety, or because it may lapse.

20.1 Should the CAB be retagged as a section 76 bill, this would require the public participation process in the NCOP to be started afresh. Prior to that, in the National Assembly, only those provisions identified by the President in his letter to the Speaker would be open for debate.

20.2 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 reservation could effectively reopen debate on the entirety of the CAB.

21 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.”¹¹

“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.”

- 22 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.”¹²*

Retagging to avoid risk of challenge

- 23 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*:¹³

“[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

¹¹ At para 57 (emphasis added)

¹² Para 58

¹³ 2000(1) SA 732 (CC) at paras 25 to 27 (footnotes omitted; our emphasis)

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), 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 ”

- 24 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. Rather, the last sentence of paragraph 25 of *Liquor Bill* suggests that Parliament should be careful to follow the correct procedure.

- 25 There are at least two further reasons why 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.

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. Such clarity would probably be quickly obtained if the President were to refer the CAB to the Constitutional Court in terms of section 79(4)(b) of the Constitution, in circumstances where Parliament had elected not to retag it.

25.2 Second, while in this case the President himself has expressed his reservation on the matter, in other cases, the risk of litigation may 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 and the realisation of important constitutional rights.

- 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. If the National Assembly remains of the view that it originally adopted the correct process, as we believe it did, it should not retag the CAB.

PARLIAMENT'S OPTIONS SHOULD IT ELECT NOT TO RETAG THE CAB

- 27 If Parliament elects not to retag the CAB, it has two options at its disposal, each with its own consequences.

The first option: returning the CAB to the President unamended

- 28 First, as Parliament did when processing the Liquor Bill,¹⁴ it may decide to return the CAB to the President unamended. The President would then be in a position promptly to refer the CAB to the Constitutional Court for a decision on his reservations. Clarity on important and contested issues that have been carefully crafted by Parliament, would then be obtained with relative expedition.¹⁵
- 29 The history of the Liquor Bill is of comparative value. The 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. The case was argued on 31 August 1999, with judgment being handed down on 11 November 1999.¹⁶ It thus took less than ten months for these concerns to be placed before, and decided upon

¹⁴ [B 131B—1998]

¹⁵ 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.

¹⁶ In his judgment, Cameron AJ (as he then was) found that some – but not all – of the President's constitutional concerns had merit.

by, our highest court.

The second option: reconsidering substantive reservations

- 30 The second option is one that sees Parliament choosing not to re-tag the CAB, but reconsidering the CAB in light of one or both of the President's substantive reservations. While in our view, the risk of a successful constitutional challenge to the CAB in its current form is not high, this does not mean that there are not ways in which Parliament could remove, or reduce certain risks of, successful constitutional challenge.
- 31 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 such risk. In pursuing this course, Parliament could re-open the public participation process on these controversial issues.
- 32 Such an approach would prevent the delays likely to result from re-tagging, and would result in the NCOP in turn limiting itself to the substantive reservations identified by the President, rather than re-opening the CAB in its entirety.
- 33 The second approach would not, however, preclude the President from referring the CAB to the Constitutional Court, whether on the tagging reservation alone, or on other issues, should he be of the view 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.

- 34 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.
- 35 Another factor that Parliament may consider arises from the fact that, in view of the controversy surrounding the CAB, litigation seems likely irrespective of the option it chooses. But if the President were to refer the CAB to the Constitutional Court in circumstances where his concerns are not fully accommodated, clarity on important constitutional issues would still be obtained, including on how to tag bills on intellectual property .
- 36 Moreover, clarity would be obtained much sooner than if legal proceedings were to be initiated by aggrieved parties after the CAB had obtained the President's assent. Absent exceptional circumstances, proceedings by such persons would have to be initiated in the High Court. Should such proceedings 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 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).

CONCLUSION

- 37 We are of the view that the two options that become open to Parliament, should it elect not to accommodate the President's tagging reservation and retain the CAB's tagging as a section 75 Bill, are the options that are best suited to

respecting, protecting, promoting, and fulfilling a range of constitutional rights, and preserving constitutional principle.

38 We advise accordingly.

SUSANNAH COWEN SC

JONATHAN BERGER

MEHLULI NXUMALO

Chambers, Sandton

10 September 2020