

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 300/24

Case No: CCT 306/24

In the application to be admitted as amicus curiae of

RECREATE ACTION

Applicant for admission as
amicus curiae

In re: the matter between:

BLIND SA

First Applicant

And

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Third Respondent

**MINISTER OF TRADE INDUSTRY AND
COMPETITION**

Fourth Respondent

**MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION**

Fifth Respondent

And

In the *ex parte* application of:

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Applicant

In re: Constitutionality of the Copyright Amendment Bill and the Performers'
Protection Amendment Bill

FOUNDING AFFIDAVIT IN APPLICATION FOR ADMISSION AS AMICUS CURIAE

I, the undersigned:

HIMAL BHUSHAN DEVNARAIN

do hereby make oath and state that:

1. I am a member of the management committee of the applicant, ReCreate Action, which is a voluntary association with its place of business at 63 Craighall Road, Victory Park, Randburg.
2. I am duly authorized to depose to this affidavit and to institute this application on behalf of ReCreate Action.
3. ReCreate Action, in turn, brings this litigation on behalf of a number of the organizations that it is affiliated with. These organizations are described below.
4. The facts contained herein are, to the best of my knowledge, true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.

INTRODUCTION

5. This is an application for the admission of ReCreate Action as *amicus curiae* in the consolidated applications listed above. ReCreate Action seeks leave to make both written and oral argument, in accordance with rule 10 of the Rules of the Constitutional Court.
6. On 4 November 2024, ReCreate Action wrote to the parties in case numbers CCT 300/24 and CCT 306/24, requesting their consent for its admission as *amicus curiae*. Given the tight timelines set out in the Constitutional Court's

directions of 22 October 2024, ReCreate Action requested that the parties respond by close of business on 6 November 2024. A copy of this letter is attached hereto marked “BC1”. At the date of deposing to this affidavit, the following responses have been received:

- 6.1. Section 27, on behalf of the applicant (Blind SA) in the application numbered CCT 300/24, consented to the admission of ReCreate Action as *amicus curiae* on the terms requested. A copy of this letter is attached hereto marked “BC2”.
- 6.2. The State Attorney, Pretoria (on behalf of the President of RSA), stated that the President would abide by the Court’s decision in relation to ReCreate Action’s application for admission as an *amicus curiae*. A copy of this letter is attached hereto marked “BC3”.
- 6.3. The State Attorney, Cape Town (on behalf of the Speaker of the National Assembly) responded that “to the extent that it is within our client’s power, our client does not object” to ReCreate Action being admitted as an *amicus curiae*. A copy of this letter is attached hereto marked “BC4”.
7. Responses have not been received from the remaining respondents. As such, ReCreate Action makes this application for admission as *amicus curiae* by the Court (and directions as to the terms and conditions thereof) in accordance with Rule 10.

8. In what follows, I briefly describe ReCreate Action and its particular interest in this consolidated matter. Thereafter I describe the submissions that ReCreate Action will seek to advance if admitted and their relevance to the proceedings.

RECREATE ACTION'S INTEREST IN THIS MATTER

9. ReCreate Action is:
 - 9.1. a voluntary association with a membership consisting of organisations and individuals working as teachers, writers, actors and performers, film producers, film directors, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, producers of accessible format materials, researchers, librarians, and other South African creators and users of culture and knowledge; and
 - 9.2. a leading civil society movement in South Africa working with government and other stakeholders to support the broader copyright reform process, in the interest of South Africans.
10. A copy of the Constitution of ReCreate Action is annexed as "BC5".
11. To the best of my knowledge, ReCreate Action is the only organisation in South Africa (and Africa) that represents, and has as affiliates, groupings of both creators and users of copyrighted works. It represents the following organisations (with which ReCreate Action is affiliated) in this litigation:
 - 11.1. The South African Democratic Teachers Union ("**SADTU**"), which is the largest trade union in the basic education sector in South Africa, representing over 250 000 teachers and other education workers.

These are the people who educate the vast majority of South Africa's young people.

- 11.2. The South African Guild of Actors ("**SAGA**"), which is a registered Non-Profit Organisation and the only organisation representing actors in the film, television, live theatre, voice overs, commercials and corporate sectors in South Africa. SAGA is an advocacy group for, amongst other things, fair regulation of the creative sector.
- 11.3. The Directors Association Africa ("**IDAA**"), which implements policies and programs for (amongst other things) the economic and educational development and growth of film and TV directors, directors of photography and "below the line crew members" in South Africa and Africa.
- 11.4. Library and Information Association of South Africa ("**LIASA**"), which is a professional body representing 2000 librarians. It is committed to maintaining high standards in the library and information services ("**LIS**") sector, advocating for the interests of LIS practitioners across South Africa.
- 11.5. The Authors Alliance, which campaigns on behalf of its South African members to advance the interests of authors in academia and beyond, who want to serve the public good by sharing their creations broadly. Authors Alliance creates resources to help authors understand and enjoy their rights and promotes policies that make knowledge and culture available and discoverable.

- 11.6. The Committee for Higher Education Libraries of South Africa (“**CHELSA**”), which is a consortium of heads of libraries of the twenty-six (26) public higher education institutions in South Africa, two (2) research councils and the National Library of South Africa. CHELSA is a registered non-profit organisation (140-828-NPO) representing the interests of these libraries in the sector.
- 11.7. Creative Commons South Africa, a chapter of the Creative Commons Global Network, which provides tools and licences to copyright owners to legally allow others to reuse, share, and remix their material.
- 11.8. The National Professional Teachers' Organisation of South Africa (“**NAPTOSA**”), a teachers' union open to any education sector employee in the Republic of South Africa. NAPTOSA aims to promote, protect and maintain the rights, status and interests of teachers and to advance quality education in South Africa.
- 11.9. The Higher and Further Education Disability Services Association (“**HEDSA**”), which is registered as an NPO under the Department of Social Development. It does advocacy work, representing higher education institutions including 26 universities, 50 Technical Vocational Education and Training colleges (“**TVETs**”) and 12 Community Education and Training colleges (“**CETs**”), and assists in the development of disability projects and programmes.
- 11.10. Music Makers United (“**MMU**”), which is a collective of musicians and industry players interested in (i) the regulation of intermediaries that

collect royalties and (ii) the support of musicians through legislative reform and other interventions.

11.11. The South African Finishing Artists and Imaging Technicians Society (“**SAFAITS**”), which represents Digital Intermediate Colourists, Digital Imaging Technicians, Online Editors, VFX Artists, Compositors, Quality Control and Delivery Editors who play a crucial role in ensuring the visual quality of South African film, TV, and digital media.

11.12. The Southern African Regional Universities Association, which was established in 2005 as a membership-based association for the 66 public universities in the 15 countries of the Southern African Development Community (“**SADC**”). SARUA aims to assist in the general revitalization of higher education in Southern Africa.

11.13. Data Science for Social Impact (“**DSFSI**”), which is based at the University of Pretoria, and works to ensure Data Sciences serve our broader society and the public interest.

11.14. Wikimedia South Africa, which is the non-profit chapter for Wikipedia editors in South Africa. The chapter represents the over 500 volunteer Wikipedia editors, across all South African language versions of the free online encyclopedia and Wikipedia’s open-knowledge sister projects in the country.

11.15. The Wits Centre for Deaf Studies (“**SANDA**”) aims to develop globally competitive standards of excellence in the training of teachers of the Deaf, provide equitable learning, and research in the field of Deaf

Education. In addition to working with teachers of the Deaf, they aim to equip parents of Deaf children, and the greater Deaf community with the necessary knowledge and skills to foster equal opportunities for the South African Deaf Community.

11.16. The Association for Progressive Communications (“**APC**”) is a global network of 71 organisational members, founded in 1990. APC's mission is to strengthen collective organising towards building a transformative movement to ensure that the internet and digital technologies enable social, gender and environmental justice for all people.

11.17. The South African National Deaf Association (“SANDA”) is a leading independent not-for-profit public benefit, national advocacy and consumer organization founded 2004, managed by Deaf people with 25 affiliated local Deaf associations throughout the country representing 4 million Deaf and hard of hearing people.

12. Letters confirming that ReCreate Action is authorised to litigate on behalf of these affiliates are attached hereto marked “BC6”, “BC7”, “BC8”, “BC9”, “BC10”, “BC11”, “BC12”, “BC13”, “BC14”, “BC15”, “BC16”, “BC17”, “BC18”, “BC19”, “BC20”, “BC21”, “BC22”

13. Recreate Action's key objective is to promote the interests of South Africans and the public interest in South Africa, especially with regards to copyright legislation. It was established to advocate for a balance between copyright that protects modern creators' rights and users of copyrighted works.

14. To this end, ReCreate Action has been actively following and engaged in the copyright law reform process, and has advocated for the adoption of the Copyright Amendment Bill (“**the Bill**”), which is the subject matter of the consolidated application.
15. Therefore, the issues raised in the applications that have been consolidated before this Court fall squarely within the scope of Recreate Action’s expertise and areas of work. Recreate Action’s understanding of the meaning and impact of the current Act and the Bill, on (i) creators and (ii) access to copyrighted works for education and other purposes, will be of assistance to the Court in determining the Bill’s constitutionality.
16. ReCreate Action’s interest in these issues is underscored by the fact that it has been involved in earlier litigation on these issues. In 2021, Blind SA (the applicant under CCT 300/24), instituted an application to challenge the constitutionality of the Copyright Act and to seek an order enacting certain provisions of the Bill into law (to cure that unconstitutionality). Recreate Action applied to be admitted as an *amicus curiae* in the High Court and made submissions to that Court.

THE SUBMISSIONS THAT RECREATE ACTION SEEKS TO MAKE

17. If admitted, ReCreate Action will make submissions in relation to the constitutionality of the Bill and the need for the Bill to be finally signed into law. In particular, ReCreate Action will draw on domestic and international law to address the following issues that arise in the President’s *ex parte* application (CCT 306/24):

- 17.1. ReCreate Action will show that the specified provisions of the Bill (which the President has highlighted as being concerning) are constitutionally sound. Not only are they sound, but these provisions are necessary in order for the State to comply with its obligations to respect, protect, promote and fulfil a number of rights in the Bill of Rights, as well as its obligations under international law.
- 17.2. To the extent that any of the provisions highlighted by the President may limit the constitutional right to property (of any person owning copyright), ReCreate Action will show that such limitation is justified under section 36 of the Constitution. It is justified when the following is weighed and considered: the need for the exchange of information and ideas, the promotion of innovation, access to education, the choice of a trade or profession to generate a livelihood, and the underlying constitutional values of dignity and equality.
- 17.3. ReCreate Action will show that exceptions to exclusive rights in copyright have been integral to the field since its inception, that every copyright law has exceptions to meet a variety of public interest purposes, and that international law permits and requires such exceptions. ReCreate Action will specifically demonstrate the prevalence of exceptions worded similarly to those in sections 12A - 12D in other open and democratic societies, including the 19 countries that have or are considering open general exceptions in their copyright laws similar to section 12A. It will also show that courts in other

jurisdictions have found such exceptions necessary to meet fundamental rights obligations.

17.4. Importantly the Copyright Act of 1978, as it presently stands, suffers several constitutional deficiencies. It:

17.4.1. does not permit uses of works to the degree required for freedom of expression. This violates the right to receive and impart information (which is a component of the right to freedom of expression);

17.4.2. inhibits access to educational materials in the modern world, including through the digital environment. This violates the right to equal access to basic and further education for all, including in languages of the students' choice;

17.4.3. does not allow for materials to be translated into under-served languages, in violation of rights to use languages of one's choice and participate in cultural life;

17.4.4. does not give recognition to the rights of authors, performers, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work; and

17.4.5. does not allow libraries and museums to perform important tasks to support the rights to education and culture, including digitising collections (such as those relating to legal deposit

libraries, special and cultural heritage collections and priceless African treasures).

17.5. In light of the above, the Act does not balance the rights of creators and the users of copyright, but rather disregards the rights of both groups. As such, the rights of both groups are unjustifiably infringed.

17.6. These constitutional shortcomings are in addition to the current Act's unconstitutional discrimination against persons with visual and print disabilities, on which the Constitutional Court has already pronounced.

17.7. The President has expressed concerns with the new sections 6A, 7A, and 8A, as contemplated in the Bill. ReCreate Action will show that:

17.7.1. These provisions will provide appropriate safeguards for authors of copyright works. The ability of authors to retain royalties in works when they are no longer owners of such works is designed to incentivise creativity and innovation.

17.7.2. In addition, those provisions leave appropriate choices in the hands of authors, and include options for agreements providing for deviations from the default position. They also exclude from their ambit authorship within the scope of one's employment.

17.7.3. Accordingly, there is no deprivation of property, and certainly no arbitrary deprivation. Instead, the original author of the work is provided with a statutory power to retain an aspect of that work, in the form of a royalty right, which the author may opt out of.

17.7.4. In response to the President's concerns that the provisions are retroactive, Recreate will clarify that the provisions do not apply to income received prior to the effective date of the Act.

17.7.5. To the extent there is any limitation of a right in the Bill of Rights by the fair royalty provisions, Recreate will show that these provisions serve important public purposes and are similar to policies adopted in other open and democratic societies, including in recent policy changes in the European Union.

17.8. The President also expresses concerns about the proposed new sections 12A to 12D, which enact a variety of limitations and exceptions to exclusive copyright, with such exceptions and limitations being modelled on provisions in other countries.

17.8.1. Recreate will show that these are ordinary limitations and exceptions to exclusive rights that are common in other countries and indeed present in some form in every copyright law.

17.8.2. They are not only in line with international trends, but are necessary to promote a range of rights in the Bill of Rights, including the right to receive and impart information, and the right to basic education (an "immediately realisable" right which is intricately linked to the best interests of children principle).

17.9. Similarly, the new proposed sections 19B and 19C, with which the President is concerned, are not only justifiable but necessary.

17.9.1. The former is designed to ensure that South Africans can reverse engineer computer programmes to develop new applications and software compatible with those programmes. Absent this ability, copyright protections will largely bar South Africans from participating in the growing digital economy.

17.9.2. The latter is concerned with affording rights for libraries for education and non-commercial purposes.

18. ReCreate Action will also make submissions in relation to Blind SA's application under case number CCT 300/24. That application relates to the failure to cure the constitutional invalidity declared by the Constitutional Court in previous litigation (initiated by Blind SA). ReCreate Action participated in that litigation as an *amicus curiae* at the High Court stage.
19. In relation to Blind SA's application, ReCreate Action will underscore the necessity of all the limitations and exceptions in the Bill for all people, including people who are blind or visually impaired who, in addition to needing accessible format materials, also need rights to use educational materials, translated materials, materials from libraries, and other resources protected by the Bill's provisions.
20. In respect of the matter referred by the President under case number 306/24, ReCreate Action's view is that its role as an *amicus curiae* would be particularly apposite and of use to the Court. A referral application in terms of section 79 of the Constitution is a unique process, wherein there may not, as a matter of course, be a party or parties assisting the Court in submissions about the constitutionality of the provisions with which the President is

concerned. For that reason, and given the unique role and perspective of ReCreate Action, and the wide interest of its affiliates, ReCreate Action is well-placed to assist that Court in respect of the referral.

CONCLUSION

21. I respectfully submit that the submissions that ReCreate Action seeks to advance are:

21.1. Directly relevant to the issues arising in the consolidated applications and helpful to the Court in determining the matter; and

21.2. Distinctive, in that they will not repeat submissions which are contained in the other parties' heads of argument. In this regard, the application brought by Blind SA is primarily concerned with section 19D of the Bill. ReCreate Action's proposed submissions will go beyond this and address the additional provisions discussed above. ReCreate Action has a direct interest and expertise in relation to the subject matter of those provisions (which include provisions that benefit creators and users). ReCreate Action is best placed to make these submissions and assist the Court in relation to these issues.

22. In the circumstances, ReCreate Action prays for an order in terms of the Notice of Motion, admitting it as amicus curiae to advance written and oral legal argument in this matter.

DEPONENT

SIGNED and SWORN to BEFORE ME at _____ on this _____ day
of

_____ 2024, the deponent having acknowledged that they know and understand
the contents of this affidavit, that they have no objection to taking the prescribed oath
and that they consider the said oath to be binding on their conscience.

COMMISSIONER OF OATHS