



10 October 2024

Dear Registrar,

**NOTICE OF REFERRAL IN TERMS OF SECTIONS 79(4)(b) AND 84(2)(c) OF
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996:
COPYRIGHT AMENDMENT BILL [B13F - 2017] AND PERFORMERS'
PROTECTION AMENDMENT BILL [B24F - 2016]**

1. The Copyright Amendment Bill [B13B-2017] (the **Copyright Amendment Bill**) and the Performers' Protection Amendment Bill [B24-2016] (the **Performers' Protection Amendment Bill**) (collectively referred to as **the Amendment Bills/the Bills**) were passed by the National Assembly on 28 March 2019 and referred to me for assent and signing into law.
2. According to section 79(1) of the Constitution of the Republic of South Africa, 1996 (the **Constitution**), the President must either assent to and sign a Bill referred to him or her by the National Assembly or, if he or she has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
3. Having considered the two Amendment Bills, I had reservations on their constitutionality. On 16 June 2020, I decided to refer them back to the National Assembly for reconsideration in terms of section 79(1) of the Constitution. My letter to the National Assembly is attached herein, marked **(Annexure A)**.
4. Below, I summarise my constitutional reservations as fully outlined in my letter to the National Assembly:
 - 4.1 The Amendment Bills were incorrectly tagged as Bills in terms of Section 75 of the Constitution, which do not affect the provinces, instead of being tagged as Bills in terms of Section 76 of the Constitution, which affect the Provinces.

- 4.2 The restrictions on copyright, imposed by sections 6A, 7A and 8A of the Copyright Bill, might constitute retrospective and arbitrary deprivations of property in breach of section 25(1) of the Constitution.
- 4.3 Following public hearings in August 2017, substantial amendments were effected to various sections of the Amendment Bills, including section 12A of the Copyright Bill, which deals with the fair use of a work or performance of a work. The relevant provisions as amended were not put out for public comment before the final version of the Amendment Bills was published.
- 4.4 Sections 6A, 7A and 8A of the Copyright Amendment Bill confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority, and as such would be constitutionally invalid.
- 4.5 The Copyright Bill introduces copyright exceptions in sections 12A to 12D, 19B, and 19C, which may constitute reasonable grounds for constitutional challenges including alignment of both Amendment Bills with international obligations.
- 4.6 I had also raised reservations about whether the Amendment Bills comply with South Africa's International Law obligations.
5. Parliament reconsidered the Amendment Bills and on 29 February 2024, submitted them to me for assent (**ANNEXURE B**), with version changes as follows: the Copyright Amendment Bill [B13F-2017] and the Performers' Protection Amendment Bill [B24F- 2016].
6. After consideration of the reconsidered Amendment Bills and obtaining legal advice, I am of the view that some of my reservations expressed above have been accommodated by Parliament.
7. I am, however, of the view that my reservations in relation to sections 6A, 7A, 8A, 12A to 12D, 19B and 19C of the Copyright Amendment Bill were not fully accommodated by Parliament. The same can be said of the provisions of the Performers' Protection Amendment Bill insofar as it incorporates the foregoing provisions of the Copyright Amendment Bill.
8. Below I outline the provisions of the reconsidered Bills which I still have reservations on and the reasons for my reservations:

8.1 **Retrospective and arbitrary deprivations of property:**

- 8.1.1 Parliament sought to address my reservations on retrospective and arbitrary deprivations of property by deleting the new sections 6A(7),

7A(7) and 8A(5) introduced by the Copyright Bill. These were the provisions that expressly provided that sections 6A, 7A and 8A applied to works of which the copyright had been assigned before the enactment of those sections.

- 8.1.2 It is my view that Parliament assumed that the deletion of these provisions would address my concern.
- 8.1.3 However, my constitutional reservations remain. Section 6A(2) in the Copyright Amendment Bill now reads as follows:

“Notwithstanding —

(a) the assignment of copyright in a literary or musical work; or
(b) the authorisation by the author of a literary or musical work of the right to do any of the acts contemplated in section 6, the author shall, subject to any agreement to the contrary, be entitled to receive equitable remuneration, or a fair share of the royalty received, for the execution for any of the acts contemplated in section 6.”

- 8.1.4 The above provision entitles an author to share in the royalty notwithstanding the assignment of the copyright in the work. It applies to any work of which the copyright has been assigned, whenever it might have occurred. It is not confined to works of which the copyright is only assigned after the introduction of section 6A.
- 8.1.5 It therefore follows that, despite the deletion of section 6A(7), the new section 6A still applies to any work of which the copyright has been assigned, even if it occurred before the enactment of the new section 6A.
- 8.1.6 Section 25(1) of the Constitution provides that, *“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”* Intellectual property, such as copyright, constitutes property protected by section 25 of the Constitution.¹ Any substantial interference with the use, enjoyment or exploitation of property is a deprivation of that property.²

¹ *Laugh It Off Promotions v South African Breweries International* 2006 (1) SA 144 (CC).

² *First National Bank of SA v Commissioner, SARS* 2002 (4) SA 768 (CC) para 57; *Offit Enterprises v Coega Development Corporation* 2011 (1) SA 293 (CC) para 39.

8.1.7 In this case, it is my view that the new provisions interfere with the owner's copyright in that it deprives the owner of a share of the profit derived from the exploitation of the work and the interference is substantial in that it goes beyond the mere regulation of the exercise of the owner's copyright. It obliges the owner to shed part of the value derived from the right. It accordingly in my view constitutes a deprivation of property which is arbitrary in the sense that it applies, not only in cases where injustice was done, but across the board to all copyright assigned in the past. It bestows a windfall on authors who received fair value for their copyright and even those who were overpaid. It penalises owners who paid fair value or even overpaid for the copyright they acquired. It even penalises owners who acquired their copyright, not from the author, but from a hard-nosed intermediate owner. In my view, this indiscriminate operation of the new rule renders it arbitrary.

8.1.8 I am of the view that the new Amendment Bill does not fully accommodate my reservations.

8.2 International Treaties and Copyright Exceptions

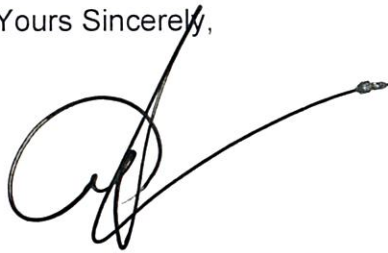
8.2.1 In paragraphs 15 to 20 of my referral letter to the National Assembly (**Annexure A**), I raised concerns about sections 12A to 12D, 19B and 19C of the Copyright Amendment Bill. These provisions introduced a range of new copyright exceptions, that is, limitations of the rights of copyright owners. Parliament made amendments to these provisions.

8.2.2 I have considered the amendments made by Parliament, I am however of the view that the reconsidered Bills do not fully accommodate my reservations in relation to sections 6A, 7A, 8A, 12A to 12D, 19B and 19C of the Copyright Amendment Bill.

8.2.3 My conclusion is that, in light of section 25(1) of the Constitution read with the international treaties to which South Africa has acceded, as well as those to which it has not yet acceded, the new copyright exceptions limit the property rights of copyright owners, which limitations are in breach of section 25(1) of the Constitution as they are contrary to the international treaties (including those to which South Africa has not yet acceded). Without evidence that the new exceptions are necessary to align the Bills with international law, there is insufficient reason for them.

9. In conclusion, the new Copyright Amendment Bill does not fully accommodate my reservations in relation to section 6A, 7A, 8A, 12A to 12D, 19B and 19C of the Copyright Amendment Bill.
10. The same can be said of the provisions of the new Performers' Protection Amendment Bill insofar as it incorporates the foregoing provisions of the Copyright Amendment Bill.
11. In terms of sections 79(4)(b) and 84(2)(c) of the Constitution read with Rule 14 of the Rules of the Constitutional Court, I hereby refer the Bills to the Constitutional Court for a decision on the constitutionality of the provisions as mentioned above.

Yours Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

Mr Matamela Cyril Ramaphosa
President of the Republic of South Africa

Mr Kgwadi Makgaka

Registrar

CONSTITUTIONAL COURT

BRAAMFONTEIN

Ms Thoko Didiza, MP

Speaker of the National Assembly

Parliament of the Republic of South Africa

CAPE TOWN

Ms Refilwe Mtshweni-Tsipane, MP

Chairperson of the National Council of Provinces

Parliament of the Republic of South Africa

CAPE TOWN