



ReCreate ZA

Right to Own • Right to Earn • Right to Create

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SUMMARY OF OPINION

The opinion was prepared by advocates Susannah Cowen SC, Jonathan Berger, and Mehluli Nxumalo. Counsel were requested to consider whether there is any impediment to the President signing and assenting to the Bill, in light of various objections that have been raised by third parties. Counsel conclude that the objections that have been raised do not constitute any impediment to the President signing and assenting to the Bill, and unless there are other valid constitutional reservations, he is under a constitutional duty to sign and assent to the bill within a reasonable time.

The opinion commences with a consideration of the policy-making and legislative process, the Bill's purposes, and highlights some of the controversial provisions of the Bill, including the fair use provisions and the inalienable right to a fair royalty share.

Counsel then consider the nature of the President's obligations in terms of section 79 of the Constitution. This section provides that the President must either assent to and sign a Bill that has been passed by Parliament, or if he has reservations about its constitutionality, refer it back to the National Assembly for reconsideration. If his reservations remain thereafter, he may refer the Bill to the Constitutional Court.

The President's powers are exercised to uphold, defend, and respect the Constitution. The exercise of these powers is subject to the constitutional requirements of legality and rationality. This means that the President's reservations can only be about the constitutionality of the Bill. He does not enjoy a general veto, and he may not decline to assent to a bill because he disagrees with the policy underlying it, or has concerns about international obligations that are not independently a requirement of the Constitution.

The President's concerns may be substantive or procedural in nature. Where a reservation is marked, the President must clearly identify the constitutional issues to be addressed. A reservation may not be raised merely because a third party has raised a concern. Rather, the President must himself be satisfied that the Bill or a provision of the Bill is probably unconstitutional. If satisfied that a bill is probably constitutional, the President has a duty to sign and assent to it within a reasonable time.

In the second part of the opinion, counsel consider whether the Bill advances rights protected by the Constitution. When considering the constitutionality of a Bill, the President too must consider if a Bill advances and promotes the objects and requirements of the Constitution. Counsel are of the view that the Bill promotes the foundational values of the Constitution protected in section 1, and important rights protected in the Bill of Rights, including the right of access to education, freedom of expression, and the right to equality (including protection of persons with disabilities.) Furthermore, and importantly, copyright protection, without adequate limitations and exceptions such as those in the Bill, limits constitutional rights, including that of access to education, dignity, equality (including protection of disabled persons), and freedom of expression.

In the third part of the opinion, counsel turn to consider whether the Bill breaches the Constitution. In doing so, two procedural objections and three sets of substantive objections are considered.

The first procedural objection considered is that the Bill was incorrectly tagged as a section 75 Bill, because it has a substantial impact on Schedule 4 matters of custom, culture, and trade and industry. Counsel do not agree with these objections. Parliament is vested with plenary legislative powers, and regulating the incidents, nature and extent of copyright protection, in their view, falls within the exclusive national legislative competence. Where the provisions of a Bill fall within the exclusive national legislative competence, section 76 is required to be followed only where the provisions of the Bill substantially affect the provinces.

Counsel conclude that the provisions do not substantially affect trade as contemplated by Schedule 4, or custom and culture. Where the Intellectual Property Laws Amendment Act had a substantial impact on customary law, it does not follow that the Bill does. Rather, on analysis, the provisions of the Bill have a minimal or indirect impact on indigenous works. There is, also, no demonstrable impact on provincial policy. nor is there a need for provincial implementation. The referral of the Bill to the National House of Traditional Leaders appears to counsel to have been a cautious but unnecessary course.

The second objection considered is an argument that the Bill required extended public consultation, in view of amendments made by the Portfolio Committee. Counsel conclude that the example given, namely the amendments to the fair use provisions, does not provide a basis for such an objection. Parliament was mindful of its duty to re-open consultation where material amendments are made, and did so on four occasions. The amendments to the fair use provision were made, rather, in light of the consultation process that had, from the outset, focused on the issue of fair use and what its contours should be. In counsel's view, reasonable participants in the legislative process would have understood the issues complained about as live issues when the Bill was introduced.

The first substantive objection considered is whether the fair use provisions breach the right not to be deprived of property arbitrarily, as protected in section 25(1) of the Constitution. Counsel conclude that the fair use provisions do not breach section 25(1). For purposes of the opinion, counsel assume that copyright is constitutionally-protected property, and that the fair use provisions constitute a deprivation of vested rights in copyrighted works. Counsel focus rather on whether such deprivation is arbitrary, which is tested by whether there is sufficient purpose for the deprivation. Counsel conclude that the expanded exceptions and limitations in the Bill achieve legitimate public purposes in advancing the values and rights in the Bill of

Rights, specifically equality, access to knowledge for persons with disabilities, access to education, freedom of expression, and access to information and ideas.

Furthermore, the Bill balances copyright with the public interest in a manner which yields a proportionate relation between copyright holder and user, and avoiding undue commercial prejudice. Important considerations are the fact that the exceptions and limitations are constrained by the principle of *fair* use, and by the four-factor test. The courts will utilise well-recognised principles of statutory interpretation and, have regard to the Three-step Test in international law to give meaning to the scope of the exceptions and limitations.

Counsel conclude that the objections do not give cognisance to the leeway afforded by the Constitution to Parliament in selecting means to achieve legitimate purposes. Counsel note that there were studies conducted to assess the impact of the Bill, including the 2014 Genesis Analytics study, and the 2017 Socio-Economic Impact Assessment.

The second substantive objection considered is whether the fair use provisions breach section 22 of the Constitution, which protects the right to choose a trade, occupation, or profession freely. The objectors argue that the fair use provisions have a negative impact on choice, as they will render certain protected activities unprofitable and uncertain.

Counsel do not agree with this objection. On the face of it, the objection is insufficiently grounded as a matter of fact or logic. There is no research supplied indicating that the Bill will have so disastrous a net effect on the profitability of industries reliant on copyrighted work that the choice of trade, occupation, or profession would be harmed.

Also important is that creative efforts are promoted and new economic opportunities are created by the Bill. In addition, the Bill seeks to shift some profits to the originators of copyrighted works for their benefit, in light of historical exploitation. Furthermore, even if there is a limit on the right, cognisance must be given to section 36 of the Constitution and its limitations analysis. During the course of this analysis, a court would consider the effect of the Bill, and balance it with other rights that are advanced. In counsel's view, if there is a limitation, it is probably reasonable and justifiable.

The third substantive objection considered relates to provisions described by the objectors as retrospective. According to the Bill, authors of literary, musical, or visual works shall have an inalienable right to a fair royalty on the exploitation of their work. This applies not only to future exploitation, but also in respect of rights to royalties that have previously been assigned.

In counsel's views, these provisions are not properly regarded as operating retrospectively. Instead, they operate prospectively on future transactions to the benefit of creators. To the extent that these provisions might limit any constitutionally-protected freedom of contract or rights in property, counsel is of the view that the provisions are fair, reasonable, and justified, in light of the exploitative history of copyright-based industries, and the positive impact on creators' economic well-being.

It must also be kept in mind that it is a *fair* share of the royalty to which the creative talents are entitled, as negotiated, or ruled upon by the Copyright Tribunal. The result of these provisions is that the Bill should ensure that there will never be another case like that of Solomon Linda.

There is, further, no impermissible delegation arising from the Minister's power to make regulations dealing with procedural aspects of the above process. The Minister's role is limited to making subordinate legislation to give effect to these provisions – which is subject to the added safeguard of impact assessment and parliamentary approval.